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**International Justice v. Local Peace?  
Case Study of the Impact of the  
International Criminal Tribunal for the Former Yugoslavia  
on the Reconciliation Process in the Balkans.  
The Reality of International Criminal Justice's  
Achievements with regard to Peace Building.**

In the last few years, increased attention has been paid to how countries recover from periods of war, conflict, and gross human rights violations, and an equivalently amplified emphasis has been put on the role played by international criminal justice in reconciliation and peace.<sup>1</sup>

However, although international criminal justice developed while promoting social objectives, its achievements with regard to reconciliation have rarely been empirically assessed. Yet, it is essential to review the impacts on those directly affected by this form of "*internationally administered justice*."<sup>2</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) is a particularly relevant actor to study as it provides a basis on which to perform an empirical assessment of this impact.<sup>3</sup> Although The Hague Tribunal officially claims to have social objectives, ongoing tensions in this region raised doubts on the ICTY's effective impact on the reconciliation process in the Balkans. As the legitimacy of international tribunals is a crucial factor to have an impact on peace and reconciliation processes, this research will particularly seek to examine whether the local population perceived the ICTY as having successfully fulfilled their need of justice.

To that end, the article is divided into three main parts. The first chapter approaches the existing general debate within international academia: May the justice brought by war crimes trials bring peace? Or is justice in post conflict situations an impediment to the local peace process? While this general examination of the debate *Peace v. Justice* is necessary to contextualize the case study, the second part will be fully devoted to the ICTY. The objective of this second development is to assess the tribunal's impact on reconciliation from the

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- 1 L.E. Fletcher and H. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24 Human Rights Quarterly 574.
  - 2 James Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia" (2005 ) 42 no 3 Journal of Peace Research 273.
  - 3 Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 no 7 American Journal of International Law 7.

perspective of its contribution to social processes. As a preliminary remark, justice alone may not build reconciliation. The ICTY shall not be considered as the only actor responsible for peace<sup>4</sup> nor will it alone solve all the problems of the Former Republic of Yugoslavia.<sup>5</sup> Reconciliation is a multi-faceted process that justice alone cannot achieve. However, justice may have a significant role in facilitating or impeding these social processes. After 14 years of existence and now at the edge of its disclosure, it is time to assess the Tribunal's contribution to reconciliation. This will be the objective of the second part.

The third and final part of this article will depart from lessons learned through the ICTY's practice to conclude on what reform of international criminal justice is needed to ensure that it can positively contribute to processes of reconciliation and social cohesion on the ground.

## CHAPTER ONE. THE THEORETICAL DEBATE: JUSTICE V. PEACE ?

For years, it has been argued that Justice and Peace may be two competing objectives. Following violent conflicts and societal trauma, the two concepts are often deemed to be difficult to conciliate, although both are necessary. This chapter will assess firstly the significance of the debate *Justice vs. Peace* and secondly its existence in the current state of International Law.

### I. The General Debate on Justice and Reconciliation in Post-Conflict Societies: Two Competitive or Complementary Interests?

Widespread academic debates are taking place on the alleged positive impact of justice on peace and reconciliation. While some argue that justice can effectively contribute to peace and reconciliation, others believe as a contrary that the first one is an impediment to the realization of the second.

#### A. Definition of Concepts

Before discussing the relationship between justice and reconciliation it is necessary to define and clarify the concepts in question, i.e. justice and accountability as well as peace and reconciliation.

##### 1. Justice and Accountability

Justice as a concept may be understood broadly.<sup>6</sup> However, the emphasis of this article will be drawn on the judicial approach to Justice, and the terms "justice"

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4 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

5 Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia?" (1998) 20 Human Rights Quarterly 784.

6 Arlene Audergon, *The War Hotel: Psychological Dynamics in Violent Conflicts* (Whurr Publishers Ltd, London 2005) 29.

and "accountability" will refer to the justice brought by Courts and Tribunals (either international or national) that brings accountability through prosecutions and sentencing of offenders. Therefore, throughout the text, notions as "*justice*" or "*accountability*" will be referred to in an inter-changeable way, keeping in mind the ideas of judicial justice and accountability through criminal trials. The potential of Justice with regard to reconciliation will be assessed with a special focus on the role of International Criminal Justice.

## 2. Peace and Reconciliation

Again, peace is an abstract term. Strictly speaking, it could be interpreted as the absence of war or absence of violence. This situation has been described as "*negative peace*."<sup>7</sup> However, this article aims at reaching a certain qualitative and sustainable peace. Beyond the sole absence of conflict, a positive peace may imply the establishment of a climate of trust, security and stability that involves cooperation among former hostile communities.

Thus, reconciliation is an integral part of the concept of positive peace. Only the achievement of a genuine societal peace through reconciliation "*will determine ultimately whether a nation slides back into violence or is able to repair the fissure that once tore it apart*."<sup>8</sup> While the decision to forgive is the private matter of every individual, the term reconciliation refers to a complex long-term psychological process that includes the post-conflict society as a whole.<sup>9</sup> It may be interpreted as a process of coming to terms with a painful past in a way that permits a qualitative reconstruction of the society.<sup>10</sup> Outcomes of reconciliation may involve the recognition of past mistakes, the agreement on a common truth and a process of re-humanization that implies "*the ability of one individual to regain empathy for another*"<sup>11</sup>, which leads eventually to the acceptance of the other and the willingness to live together. Finally, it can be considered as the sensation of belonging to a common community with a shared hope in the future.<sup>12</sup> Whereas to some, reconciliation is just a question of time and generations<sup>13</sup>, it is the underlying approach of this article that reconciliation requires initiatives to occur. Eminently idealistic, this approach to reconciliation – also reflected through

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7 Johan Galtung, "Editorial" (1964) 1 no 1 Journal of Peace Research 2.

8 For further information on the concept of societal peace, see: Meernik (2005) 272.

9 Interview with Florence Hartmann, journalist and author, who covered the Balkans in the 1990's for the french newspaper Le Monde, and became Carla Del Ponte's spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

10 Mitja Zagar, "Reconciliation and Its Impact on Peace in the Balkans: Success or Failure?" (Speech at the Conference of the European Center for Peace and Development in Milocer, Montenegro 2008) <<http://www.humiliationstudies.org/documents/ZagarMulticulturalism.pdf>> accessed 8 June 2010.

11 H.M Weinstein and J. Halpern, "Re-humanizing the Other: Empathy and Reconciliation" (2004) 26 no 3 Johns Hopkins University Press 567.

12 Audergon (2005) 38-51.

13 Interview with Alida Vracic, executive director of the think tank Popolari and former case manager at the Prosecutor Office of the War Crime Chamber in BiH (Sarajevo 13 April 2010).

the idea of transitional justice – is considered as one of the "sexiest projects"<sup>14</sup> of international law today.

Either referring to the terms "*reconciliation*", "*peace*" or "*societal peace*", this article will aim at the achievement of both: peace through reconciliation. The standpoint will be that there can't be any genuine peace without reconciliation and as a consequence, the two concepts are considered as inter-related and inter-dependant. Therefore, whether justice and accountability (understood as judicial justice and war crimes trials) can help to achieve peace and reconciliation in a post conflict society is a vast debate. The following paragraphs will consider the different arguments involved.

### ***B. The Competitive Vision: Justice v. Peace***

Facing difficulties to negotiate ceasefires when accountability is in prospect, diplomats often defend the idea that bringing justice and accountability in the direct aftermath of violence can lead to further destabilization of a fragile peace or might even prevent it at all.<sup>15</sup>

#### *1. Accountability and Prosecutions, a Threat for Peace talks?*

The prospect of prosecuting parties involved in the conflict may jeopardize fragile peace talks. Indeed, enforcing accountability and justice at the heat of a conflict may lead to an escalation of violence in a last attempt to shelter the criminal industry from prosecution. As emphasized an anonymous author: "*the quest for justice for yesterday's victims should not be pursued in such a manner that it makes today's living the dead of tomorrow.*"<sup>16</sup> Also, in the Sudanese conflict, a former United States special envoy Andrew Natsios noted: "*[the leaders of Sudan's National Congress Party] are prepared to kill anyone, suffer massive civilian casualties, and violate every international norm of human rights to stay in power,(...) because they worry (correctly) that if they are removed from power, they will face both retaliation at home and war crimes trials abroad.*"<sup>17</sup> Therefore, amnesty regimes have regularly been offered to warlords in order to incite them to lay down arms and sign an armistice, as it was for instance the case in Columbia with the FARCS. In particular in the case of the conflict in the Former Yugoslavia, Milosevic was perceived by many diplomats as being the most relevant actor to negotiate the peace. Thus, his ICTY indictment was perceived as a threat.<sup>18</sup> Under such a perspective, justice and accountability might delay ceasefires and prevent prospects of peace in the region.

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14 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

15 Human Rights Watch, "Selling Justice Short: Why Accountability Matters for Peace" (Report) (7 July 2009) ISBN 1-56432-508-3, 5.

16 Anonymous, "Human Rights in Peace Negotiations" (1996) 18 Human Rights Quarterly 258.

17 Human Rights Watch (2009) 6.

18 For further information, see: Florence Hartmann, *Paix et Châtiment: Les Guerres Secrètes de la Politique et de la Justice Internationales* (Flammarion, Mayenne 2007) 146.

## 2. The Risks of Jeopardizing a Fragile Peace

Another argument against judicial prosecutions in the aftermath of violence is the security outlook. In this regard, bringing offenders to trial in the aftermath of collective violence may endanger a fragile peace and the stability of the region. Indeed, former members of fighting groups may be tempted to set up a coup to destabilize the government in its attempt of prosecution. Moreover, opening trials against offenders may represent a great threat to the safety of victims and witnesses of past violence. In East Timor for instance, many witnesses were subject to attacks so that their testimonies before UN-backed criminal courts would be avoided.<sup>19</sup> Such a climate of tension and risk of reprisal may strike at the foundation of the new post-conflict regime; which justifies amnesty laws. As an example, following the civil war of the 1990's in Algeria, the stability argument justified laws of amnesty and the absence of prosecution. While the army maintained a predominant power, the legislation that implemented this strategy of impunity had "*peace and national reconciliation in the country*"<sup>20</sup> as a declared objective. Equally, in the direct aftermath of a destructive war in Bosnia, the population was mainly concerned with addressing issues of reconstruction, large-scale poverty and a 90% unemployment rate.<sup>21</sup> Therefore, economic development and political stability are often perceived as pre-conditions to justice and accountability.

## 3. The Limits of Victors' Justice

When talking about international criminal justice in particular, it has been accused throughout history of following the approach of "*victors' justice*". Either through the Versailles Treaty following WWI or the Nuremberg Trials following WWII, the losing powers were accused of the complete responsibility of the war, in the end being the only ones prosecuted. In the first case, this led to a national feeling of frustration in Germany, which helped Hitler rise to power in 1939.<sup>22</sup> In the second case, the one-sided justice of Nuremberg was often criticized by international scholars as a partial justice. Again today, the feeling of "*double standards*" felt by Serbs before the ICTY encourages a victimization of this community that is counter-productive to the regional reconciliation.<sup>23</sup> While selectiveness of prosecution is technically and politically unavoidable in the case of mass crimes<sup>24</sup>, feelings of double standards before international courts are the

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19 Erica Harper, "Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice" (2005) 10 no 2 Journal of Conflict and Security Law 163.

20 Farid Alilat, "La Main Tendue" *Jeune Afrique* (Paris 24 February 2009) <<http://www.jeuneafrique.com/Articles/Dossier/ARTJAJA2511p066-067.xml0/paix-justice-securite-terrorismela-main-tendue.html>> accessed 8 June 2010.

21 Akhavan (2001) 16.

22 Audergon (2005) 15.

23 Donna G. Arzt, "Views on the Ground: the Local Perception of the International Criminal Tribunals in the Former Yugoslavia and Sierra Leone" (2006) 603 *The Annals of the American Academy of Political and Social Science* 233.

24 Salvatore Zappala, "Between Justice and Politics: The Process of Selecting Cases of Prosecutions Before International Criminal Courts" (2009) 7 *Journal of International Criminal Justice* 111-112.

greatest weakness of international criminal justice, as it may raise a feeling of unfairness within the region where it operates, discredit the court's work and jeopardize its objectives of achieving peace and reconciliation throughout accountability.<sup>25</sup>

#### 4. *The Irrelevance of Law and Trial to Bring Reconciliation*

Legal rules are over-deterministic. Therefore, trials could be seen as "incapable of proceeding beyond the categorical abstractions imposed by the reductive nature of legal rules."<sup>26</sup> The rigorous approach of courts is inherently counter-productive to peace and reconciliation. Besides, objectives of reconciliation being particularly broad, international criminal prosecutions, while useful to bring individuals accountable, would not be enough to bring reconciliation.<sup>27</sup> Hence, tribunals would not be relevant actors to reach social objectives of peace and reconciliation.

This concept of justice and accountability v. peace and reconciliation is not shared by the majority of academia that generally favours the philosophy "No peace without justice".

### C. *The Complementary Vision: No Peace without Justice*

*"As painful and inconvenient as justice may be, (...) allowing accountability to fall by the wayside is worse"*<sup>28</sup>

Archbishop Desmond Tutu, 2009.

The impact of justice and accountability on long-lasting peace is often under-evaluated by diplomats or politicians when weighing objectives of short-term conflict resolution.<sup>29</sup> Greater emphasis must be put on the long-term benefits justice can bring for peace. Indeed, inputs of justice – whether provided at the national or international level – for peace building and reconciliation are abundant.

#### 1. *The Creation of a Culture of Accountability*

The establishment of War Crime Tribunals to prosecute former offenders is the official acknowledgement that the alleged crimes have indeed occurred. By

25 Andrew Clapham, "Double Standards in International Criminal Justice and the Risks of a Perception of Unfairness" (2009) 7 *Journal of International Criminal Justice* 101,104; Mirjan Damaska, "Selective Prosecutions in International Criminal Justice" (2009) 7 *Journal of International Criminal Justice* 104-106.

26 Ralf Henham, "International Sentencing in the Context of Collective Violence" (2007) 7 *International Criminal Law Review* 7.

27 Ruti Teitel, "Bringing the Messiah Through the Law", in Carla Hesse & Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (Zone, New York 1999) 181. See also: L.E. Fletcher and H. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24 *Human Rights Quarterly* 615.

28 Desmond Tutu, "Will Africa let Sudan off the hook?" *New York Times* (New York, 2 March 2009) <<http://www.nytimes.com/2009/03/03/opinion/03tutu.html>> accessed 7 July 2010.

29 Human Rights Watch (2009) 7.

sentencing the responsible, justice permits denouncing and condemning the violence committed. Such a symbol supports the creation of a culture of accountability at a local level, i.e. where the crimes have occurred, as well as internationally.

For instance, by holding accountable those who commit massive human rights violations, international justice is the recognition by the international community that crimes have occurred and that these crimes are not tolerated.<sup>30</sup> Besides, international indictment of a political leader for his responsibility in the commission of War Crimes may lead to his stigmatization and isolation from the political sphere, as "*the humiliation of pariah status in an interdependent world community*"<sup>31</sup> will jeopardize the leader's authority and influence in the region.

Also, international justice may have the impact at the local level of creating a dynamic of accountability. Efforts to prosecute offenders abroad may foster the establishment of War Crimes Courts at the local level in order to re-empower local justice to prosecute its own nationals. Such a dynamic was witnessed when the arrest of former dictator Augusto Pinochet in the United Kingdom and the litigations launched against him in Spain pressed the settlement of domestic courts in Chile in a quest for re-empowerment over the prosecution of their nationals.<sup>32</sup> Also, cooperation with international trials may symbolize a desire of the new government to "*confront with the past*"<sup>33</sup> and to walk towards accountability.

Similarly when prosecutions are held, in particular at the national level, the official denunciation of a culture of violence and impunity may strengthen the rule of law, preventing both the tolerance of violence and its recurrence in the future. While sanctions are "*essential for the credibility of law*"<sup>34</sup>, prosecuting war crimes will uphold the law that condemns their commission while creating a form of moral commitment of the prosecuting government that this violence will not be repeated.<sup>35</sup> "*Sanction of war criminals [by the successor regime] communicates publicly that the past horrors deserve societal condemnation.*"<sup>36</sup> Prosecutions of past crimes may raise expectations among public opinion; contribute to a better awareness of the population in identifying such criminal behaviour and to a faster condemnation of their occurrence in the future. On the contrary, the lack of justice in post-conflict situations has often encouraged the emergence of a culture of impunity, fuelling ongoing abuses locally.<sup>37</sup>

## 2. A Dissuasive Effect for the Commission of International Crimes

The absence of external constraints on barbaric regimes may be a factor for genocide to take place. Therefore, while the establishment of national war crimes

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30 Mohammed Ayat, "Justice Pénale Internationale pour la Paix et la Réconciliation" (2007) 7 *International Criminal Law Review* 417-418.

31 Akhavan (2001) 7.

32 Human Rights Watch (2009) 11.

33 Fletcher and Weinstein (2002) 595-596.

34 Akhavan (1998) 741.

35 Akhavan (2001) 29.

36 Fletcher and Weinstein (2002) 590.

37 Human Rights Watch (2009) 40-60.

trials still relies on the political will of national leaders, the development of international criminal justice and accountability for massive human rights violations can have dissuasive effects on potential offenders. Creating from above a pressure of accountability on heads of states, it could in the long run dissuade them from committing international crimes.<sup>38</sup> Thus, international justice plays a preventive role in avoiding the occurrence of violations.

Another aspect of dissuasion lies in the definition of international crimes enhanced through the development of international criminal jurisprudence. Additional to the academic interest in building a legal heritage that provides food-for-thought for international criminal lawyers and scholars, the work of international courts in defining concepts of international criminal law may add a brick in the wall of peace and prevention. Indeed, by defining the constitutive elements of genocide, war crimes and crimes against humanity, International Tribunals develop a progressive acknowledgement of what has to be considered as an international crime. In the long term, this achievement may lead to an increased awareness of combatants and results in behavioural changes in armies and rebel groups. Individuals aware of what constitutes an international crime would be more careful in times of conflict not to face future prosecutions.<sup>39</sup>

### 3. The Settlement of Historical Injustice

*"Peace without justice can not be sustainable.*

*It's a terrible mistake to believe that people will simply forget.*

*Even after a hundred years, sometimes even after several hundred years, unpunished crimes continue to represent huge stumbling blocks in establishing peaceful, normal relation between some states."<sup>40</sup>*

Carla Del Ponte, 2006.

In some cases, bringing justice and accountability through trying those responsible of mass violence can be received as the settlement of historical frustrations and injustice for a community. Indeed, the failure to address past crimes leaves open wounds and bitter memories that later on can manifest themselves as new conflicts. The need of justice that has been felt as missing is then an essential motor for violence; communities frustrated about unprosecuted past crimes may be easily encouraged to engage in a cycle of revenge *"in the name of Justice"*.<sup>41</sup> For instance, during the Balkans War in the 1990's, many references to a painful past were made by ultranationalist leaders, which fuelled

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38 Ayat (2007) 27; Akhavan (2001) 27-28.

39 Human Rights Watch (2009) 11.

40 Carla Del Ponte, "European Values and National Interests in the enlarging Europe" (Keynote Speech at the International Conference on Values and Interests in International Politics in Tallin 30 October 2006) <[http://www.riigikogu.ee/public/Riigikogu/Valissuhted/del\\_ponte301006.doc](http://www.riigikogu.ee/public/Riigikogu/Valissuhted/del_ponte301006.doc)> accessed 8 June 2010, 4.

41 Audergon (2005) 3-18.

hatred and facilitated public support. Serbian press often described Croats as "Ustasha", recalling the Croat Pro-Nazi regime that deported Serbs during WWII and whose crimes have never been prosecuted.<sup>42</sup>

Therefore, bringing justice after massive crimes appears to be necessary to avoid the repetition of such cycles of revenge while resolving historical conflicts through peaceful judicial means. Highly symbolic, a trial as "*a legitimate judicial process is the antithesis of violence.*"<sup>43</sup> Through the prosecution of offenders, communities will feel released from historical trauma without having to resort to violence. From this perspective, judicial justice can considerably contribute to a long term reconciliation.

#### 4. A Relief for Victims

After a war, particularly in the context of civil wars, everyone is traumatised, either directly or through the suffering of members of their community. Yet, "*the recovery of the individual leads to the recovery of their community.*"<sup>44</sup> Consequently the treatment and attention victims receive before courts will impact their own community, and later on, the society as a whole. Official acknowledgement of the victims' status and suffering through justice can greatly help the victims to feel relieved from past trauma, to regain control over their lives and to renew a feeling of security and empowerment over their future. Additionally, fair trials and the symbol of sentencing can assist victims in restoring their dignity.<sup>45</sup> These achievements contribute positively to the reconstruction of destabilized communities and, in the long run, to the reconstruction of the society as a whole.<sup>46</sup> Thus, a justice inclusive of victims can play a particular role in assisting reconciliation.

#### 5. The Establishment of a Historical Record Necessary For a Common Truth

Often the absence of a common truth is a factor for tension and division among different conflicting communities. Following the war in the Balkans, a psychologist Arlene Audergon organised collective forums in Croatia to exchange on post-conflict traumatic experiences. She invited members of each community (Serbs, Croats, Bosniaks and people of other ethnicities) with the objective of sharing and discussing war experiences. She remembered that heated discussions would rise among the different participants when starting to talk about history: neither the events of 1990's, nor those of WW II, nor what happened in the 14<sup>th</sup> century could reach inter-community consensus. As she described: "*Either everyone is crazy or history is still not part of the past.*"<sup>47</sup> Yet, a minimum level

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42 Human Rights Watch (2009) 80.

43 Fletcher and Weinstein (2002) 596.

44 A.P. Jorge-Birol, "Victims Participation in the Criminal Justice System and its Impact on Peace Building" in W. Benedek, and others (eds), *Transnational Terrorism, Organized Crime and Peace-Building: Human Security in the Western Balkans* (Palgrave Macmillan, Basingstoke 2010) 379.

45 Human Rights Watch (2009) 10.

46 Ayat (2007) 404-407.

47 Audergon (2005) 9.

of common truth is necessary in a process of reconciliation. Therefore, another interest in pursuing justice following collective violence is that it may help to establish historical records on the events dividing communities. When justice is achieved based upon proven facts and documented evidence investigated impartially, it may contribute to build a collection of data and factual records that may be used to build a common and objective truth that will serve later on the reconciliation process.

The numerous advantages of justice to lasting peace and reconciliation have convinced scholars and judges to root the principle "*No Peace Without Justice*" into international law.

## **II. The International Legal Framework Regarding Justice, Accountability and the Prosecution of International Crimes**

Either through the settlement of International Courts and Tribunals or through their definition and interpretation of international crimes, the idea that no individual enjoys impunity when committing major violations of international law has progressively emerged.

### ***A. The Establishment of International Crimes and the Obligation to Prosecute***

Since the end of WWII, following large-scale human rights violations in Europe, the international community has progressively committed itself to the idea that accountability and justice shall follow phenomenon of collective violence.

#### *1. The Definition of International Crimes*

A regime of elements characterising international crimes has been established by international law. Crimes against humanity, war crimes and crime of genocide are the most prominent crimes forming part of this regime. Recognized by international law through conventions and treaties, these crimes were designed as a concern of humanity which occurrence shall not be left unpunished.

First, the International Convention on the Prevention and Punishment of Genocide (1948) affirms in Article 1 that "*Genocide, whether committed in time of peace or in time of war, is a crime under international law which [state parties] undertake to prevent and to punish.*" The principle of states' obligation to prosecute genocide is laid down in Article 5.<sup>48</sup> Later on, the obligation to penalize and prosecute war crimes committed in time of conflict was established in the Geneva Conventions (1949). In particular, the fourth Geneva Convention established the duty of states to provide effective penal sanctions against those

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48 Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948 UNGA Res 260 A(III) and entered into force 12 January 1951) (Genocide Convention) art 5: "*The Contracting Parties undertake to (...) provide effective penalties for persons guilty of genocide.*"

who committed crimes constituting a grave breach of its provisions.<sup>49</sup> Finally, the Rome Statute, which established the International Criminal Court, has brilliantly settled down this regime. While setting the list of International Crimes falling into its competence *ratione materiae*, it insists on "the duty of each state to exercise its criminal jurisdiction over those responsible for international crimes."<sup>50</sup> The acceptance of a duty to prosecute was also reflected at the regional level, such as in the *Aksoy v. Turkey* case before the European Court for Human Rights (1996)<sup>51</sup> or in the *Velásquez Rodríguez Case* before the Inter-American Court for Human Rights (1988).<sup>52</sup>

Therefore, alongside this development of a legal regime has emerged an obligation of international customary law to prosecute offenders responsible of serious international crimes.

### 2. Obligation to Prosecute: Who is Responsible?

The primary obligation to prosecute international crimes lies on those states having direct competence over the crime, either through the competence *ratione loci* when the crimes occurred on its territory, or through its competence *ratione personae*. The latter may take two forms: the active personality competence, when the offender has the nationality of the respective state; or the passive personality competence, when the victim has the nationality of the state.

However, if a responsible state is unable, due to political or financial restrictions, or unwilling to act, the *universal jurisdiction* principle empowers states without any form of either personal or territorial competence to launch arrest warrants and prosecutions against offenders of serious international crimes abroad. Yet, as illustrated by the 2003 amendment of the Belgian "Law on Universal Jurisdiction," which shifted the jurisdiction of Belgian Courts over international crimes from universal competence to a minimum requirement of passive personality competence,<sup>53</sup> in practice, the majority of states have not yet dared to use the principle of Universal Jurisdiction through an absolute competence.<sup>54</sup>

### 3. The (Quasi)Absence of Immunity for Official Agents

International crimes are considered as such grave breaches of international and human rights law principles that the official functions of its offender shall not

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49 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (adopted on 12 August 1949 and entered into force 21 October 1950) (Geneva IV) art 146: "[t]he High Contracting Parties undertake (...) to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."

50 Rome Statute of the International Criminal Court (adopted on 17 July 1998 and entered into force on 1 July 2002) U.N. Doc. A/CONF.183/9 (Rome Statute) preamble.

51 See *Aksoy v. Turkey* (Appl. no 21987/93) (1996) ECHR 1996-VI.

52 See *Velásquez Rodríguez Case* (Judgment) Inter-American Court for Human Rights Series C No. 4 (29 July 1988) [174].

53 Phillipe Couve, «La Belgique Rogne sa Loi de Compétence Universelle» *Radio France Internationale* (23 June 2003) <[http://www.rfi.fr/actufr/articles/042/article\\_26480.asp](http://www.rfi.fr/actufr/articles/042/article_26480.asp)> accessed 7 July 2010.

54 Human Rights Watch, "Universal Jurisdiction in Europe: the State of the Art" (Report) (27 June 2006) ISBN D1805, 39.

shelter the latter from prosecution. Thus, most of the conventions have a provision requiring that the commission of international crimes shall lead to prosecution regardless of the public functions of its author.<sup>55</sup> However, although immunities of public agents have been successfully ignored by international courts and tribunals, prosecutions at state level have not been able to go beyond the principle of state sovereignty. As confirmed by the International Court of Justice in the Yerodia Case (2002), no principle of international customary law has yet emerged that permits National Courts to disrespect the principle of immunity of state agents.<sup>56</sup> Thus, perpetrators of international crimes still holding official functions may not face criminal prosecutions before the National Court of another state.

Finally, this evolution – from the definition of international crimes to the obligation of states to prosecute them – proves the move of international law towards a law of accountability. The development of international justice has progressively set up justice for past crimes as a rule in international relations.

### **B. The Development of International Criminal Justice**

After 1918 but particularly since 1945, the principle of justice and accountability for the commission of international crimes developed in parallel with the settlement of international courts and tribunals.

#### *1. From Nuremberg to the International Criminal Court: the Institutionalization of International Criminal Justice*

Just as one may learn from mistakes, humankind learns from violence. Following major conflicts in recent European history, a dynamic has grown to set up criminal justice at the international level.

While international criminal justice was on its way starting from WW1<sup>57</sup>, a greater step was taken following WWII. In coherence with the objectives of the new UN Charter to achieve sustainable peace and to safeguard justice and human rights in the world,<sup>58</sup> the Allies decided to establish the International

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55 Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948 UNGA Res 260 A(III) and entered into force 12 January 1951) (Genocide Convention), art 4 : "*Persons committing genocide (...) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.*"

56 *Case concerning the Arrest Warrant of 11 April 2000 (Republic Democratic of Congo v Belgium)* (Judgement) (14 February 2002) ICJ [58].

57 In 1919, the Allies (Britain, France, Italy, USA and Japan) decided to set up a *Commission on the Responsibility of the Authors of the War* that would prosecute the German Emperor Wilhelm II. Yet, the latter's escape to the Netherlands led to the abortion of the project. For further information, see: William Schabas, *An Introduction to the International Criminal Court* (University Press, Cambridge 2001) 3.

58 United Nations Charter (adopted on 26 June 1945 and entered into force on 24 October 1945) (UN Charter) preamble [1]-[3]: "*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*", "*to reaffirm faith in fundamental human rights (...) and of nations large and small*" and "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.*"

Tribunals of Nuremberg and Tokyo. These tribunals were mandated to prosecute primarily high-ranking officers of the Nazi Regime and were particularly sensitive to command responsibilities. The Tribunals paved the way for an international criminal justice based on individual criminal responsibility of the perpetrator, irrespective of its status and function in state institutions.<sup>59</sup>

Although the Cold War froze ambitions to develop this field further, international criminal law in the 1990s experienced a revival. The large-scale ethnic violence in Yugoslavia and Rwanda incited the UN Security Council to become creative. Having missed the step to act in order to prevent violence, its intervention *a posteriori* was felt as politically necessary. Therefore, through an extensive interpretation of its mandate under Chapter VII<sup>60</sup>, the Security Council (SC) established two ad-hoc tribunals in order to prosecute those responsible for war crimes, crimes against humanity and genocide in the two regions: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.<sup>61</sup> Further ad-hoc Courts and mixed mechanisms of criminal justice were established by the Security Council later on, with among the most famous, a Special Court for Sierra Leone in 2002 and a Mixed Tribunal in Cambodia in 2003.<sup>62</sup>

Finally, the settlement of the International Criminal Court (ICC) through the adoption of the Rome Statute in 1998 was the realisation of an old dream of international criminal lawyers and human rights activists. According to its Statute, the Court is the first permanent institution that "*shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern (...) and shall be complementary to national criminal jurisdictions.*"<sup>63</sup> Accordingly, if the competent national state is party to the Rome Statute and is either unwilling or unable to prosecute a crime that was committed after the entry into force of the Rome statute, the court may be competent to handle the case. *Ratione temporis*, the Court's jurisdiction limits its competence over crimes committed after the entry into force of its statute in 2002.<sup>64</sup> *Ratione Materiae*, the ICC mandate covers crimes of genocide, crimes against humanity and war crimes.<sup>65</sup> The Court shall have a *ratione personae* competence over individuals "*without any distinction based on official capacity*".<sup>66</sup> Once again, this development of international criminal justice was assumed to be a major progress for

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59 See Statute of the Nuremberg International Military Tribunal (adopted on 8 August 1945 with the London Agreement) art 7: "*The official position of defendants (...) shall not be considered as freeing them from responsibility or mitigating punishment.*"

60 UN Charter (1945) art 39: "*The Security Council shall (...) decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security [in case of the existence of any threat to the peace, breach of the peace].*"

61 UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Resolution 955 (8 November 1994) UN Doc S/RES/955.

62 See: Global Policy Forum, "International Criminal Tribunals and Special Courts" (2005) <<http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html>> accessed 7 July 2010.

63 Rome Statute (1998) art 1.

64 Ibid art 11.

65 Ibid art 5.

66 Ibid art 27.

accountability and the fight against impunity, in addition to being a step in the direction of peace and reconciliation.

## 2. *The Ambition of International Criminal Justice: Accountability, Peace and Reconciliation.*

The fact that International Tribunals contribute to peace and reconciliation processes in the torn regions are *"among the declared objectives of the International Community"*.<sup>67</sup>

When setting up the two ad-hoc tribunals for Rwanda and the former Yugoslavia, the Security Council relied on the basis of Articles 39 and 41, Chapter VII of the UN Charter. Article 39 recognizes the competence of the Security Council *"to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken (...) to maintain or restore international peace and security."*<sup>68</sup> Therefore, the Security Council apparently regarded the conflicts in the Balkans and in Rwanda as *"threats to the peace"* and its decision to set up two International Tribunals under Article 39 UN Charter implies that such Tribunals would *"maintain or restore international peace and security"*. This method was particularly innovative, as it was not even described in the possible measures to be taken enumerated under Article 41.<sup>69</sup> Later on, in resolution 1534, the Security Council referred in clear terms to the great work of both Tribunals *"in contributing to lasting peace and security and national reconciliation."*<sup>70</sup>

At the establishment of the ICC, the Rome Statute remained surprisingly silent on the particular social inputs that international justice might have on peace and reconciliation processes.<sup>71</sup> Yet these social objectives of international justice were recalled in the Security Council Resolution 1688, backing up the arrest warrant issued by the Special Court of Sierra Leona against Liberia's Former President Charles Taylor. There, the SC recalled its determination *"to end impunity (...), promote respect for human rights and to restore and maintain international peace and security."*<sup>72</sup> In other words, arresting and prosecuting a former dictator involved in major violence may help to *"restore (...) international peace and security."* These social objectives, broader than dissuasion and prevention, are closely connected to objectives of peace and reconciliation.

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67 Ayat (2007) 394-395.

68 UN Charter (1945) art 39.

69 UN Charter (1945) art 41: *"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, (...). These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."*

70 UNSC Resolution 1534 (26 March 2004) UN Doc S/RES/1534 [5].

71 While State parties recognize that *«[international crimes] threaten the peace»* and that *«the most serious crimes of concern to the international community as a whole must not go unpunished»*, the fifth paragraph only refers to the dissuasion effect of international justice by stating that the Court was *«determined to put an end to impunity for the perpetrators of these crimes [...] to contribute to the prevention of such crimes.»*. For further information, see : Rome Statute (1998) preamble [3]-[5].

72 UNSC Resolution 1688 (16 June 2006) UN Doc S/RES/1688 [7].

Therefore, part of the declared objectives of the international community in developing international criminal justice is its potential contribution to peace and reconciliation. However, one may ask: What is the reality of this contribution? To what extent does International Criminal Tribunals effectively contribute to peace in the regions directly affected? While only "*few [International Courts] have empirically investigated their impact on those most directly affected*"<sup>73</sup>; there is a pressing need for the credibility of international criminal justice to assess the reality of its impact in the field. The objective of this second chapter will be to examine the particular contribution of the ICTY to the peace and reconciliation process in the Balkans.

## CHAPTER TWO. THE ICTY, A VEHICULE FOR RECONCILIATION?

*"The Balkans has gone through terrible cycles of violence and vengeance over the centuries. Our bet is that justice will help to put an end to these vicious circles."*<sup>74</sup>

Carla Del Ponte, 2006.

This declaration of Carla Del Ponte, former prosecutor at the ICTY raises various questions. Has the ICTY succeeded in its stated aim? What effect did the justice provided by the ICTY have on the degree of societal peace in the region? These are the questions this chapter will attempt to answer.

The methodology used to assess the tribunal achievements with regard to peace and reconciliation may be described in the following way: As it is the purpose of this paper to evaluate the adherence of the practice to the theory, the research efforts were largely empirical. Therefore, the ICTY's mandate and rules of procedure were used as the primary source of research and empirical results were later obtained through conducting approximately twenty interviews in Sarajevo, Graz and Kosovo. The main part of the field research was done in Bosnia in April 2010, where I had the opportunity to meet with a diversity of international and local actors. Most of the interviewees, even when working for international presence, were locals. Generally, though the opinions of my interviewees may reflect their professional experience; the views expressed are those of their authors and not necessarily of their organizations. Questions asked in the interviews focused on primarily the population's perception of "*justice*", their opinions concerning the pertinence of an international tribunal after the war and whether the Tribunal has fulfilled their expectations. Ultimately, at the final stage of the research, feedback from interviewees was received to guarantee the adherence of my text to their words in the passages where they were quoted. To complete these findings, relevant articles of scholars who conducted similar empirical researches and more representative studies were examined comprehensively.

Cultural and national biases of the information gathered when performing empirical research must be beared in mind. This applies especially in the Balkans

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73 Meernik (2005) 273; Fletcher and Weinstein (2002) 573.

74 Del Ponte (2006) 5.

where national identity tends to impact individual positions, particularly when discussing war issues.<sup>75</sup> Another problem arising when assessing the Tribunal's contribution to reconciliation is the complex inter-actions of its weaknesses. For instance, the Tribunal's weak outreach strategy exacerbates frustrations initiated by a lack of understanding in the procedure. Thus, when criticising the Tribunal one has to be aware of the mutual influences among the Tribunal's weaknesses. This empirical research is further constrained by the complexity of a reconciliation process. While accountability may be measured through objective criteria such as the length of trials, the number of indictments, or the seriousness of the crime prosecuted, effective reconciliation and qualitative peace is much more difficult to evaluate.<sup>76</sup> The input of the Hague Tribunal to contribute to reconciliation is a long term process and critiques developed in this article may be alleviated through the passage of time.

Throughout this Second Chapter, the appellation "*the Balkans*" will always encompass all member states of the Former Socialist Federal Republic of Yugoslavia (SFRY), which will also be referred to as "*former Yugoslavia*". As they were the first states involved in the secessionist conflict, a special emphasis will be put on Bosnia and Herzegovina, Croatia and Serbia, and on their ethnic groups: Serbs, Croats and Bosniaks.<sup>77</sup> Kosovo, Montenegro or Macedonia will be dealt with to a lesser extent throughout the paper.

The first part of this Chapter will describe briefly why and how the Tribunal was created and what its mandate encompasses; the second part will be dedicated to its achievements and failures with regard to reconciliation.

## I. The ICTY Creation

The ICTY is the product of the bloodshed of the secessionist conflicts in the Former Yugoslavia during the 1990s.

### **A. The Context of its Creation : Secession of the Former Socialist Federal Republic of Yugoslavia**

Describing the 1990s war in the former Yugoslavia is a difficult task, as even the qualification of the conflict is controversial.<sup>78</sup> Where the Croats and Bosniaks perceived the war as a result of Serbian aggression, the Serbs generally consider

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75 International Human Rights Law Clinic, "Justice, Accountability and Social Reconstruction: Interviews of Bosnian Judiciary Members" (Report) (Human Rights Centre of the University of California, Berkeley 2000) 2. Also available at : <[http://www.law.berkeley.edu/2978.htm#Bosnia\\_Judicial\\_Study](http://www.law.berkeley.edu/2978.htm#Bosnia_Judicial_Study)> accessed 8 June 2010.

76 Klaus Bachmann, "Die Rolle des Internationalen Jugoslawien Tribunal bei der Stabilisierung und Versöhnung in Ehemaligen Jugoslawien" in Michael Daxner (eds), *Bilanz Balkan* (Verlag für Geschichte und Politik, Vienna 2005) 228. See also: Refik Hodzic, "Impacting the non-existent: the contribution of ICTY to the process of Reconciliation in the Former Yugoslavia" (Unpublished speech at the Conference on Dealing with the Past and Reconciliation Processes in the Western Balkans in Vienna 2008).

77 Notion commonly used to describe Bosnian Muslims in the SFRY and in the outside world

78 International Human Rights Law Clinic (IHRLC) (2001) 24-44.

it as a civil war. While the Tadić Case qualified the conflict as an international armed conflict,<sup>79</sup> generally speaking the war shaking the whole Balkan Peninsula can be described as a secessionist conflict that was both ethnically and territorially motivated.<sup>80</sup>

In the late 1980s and early 1990s, a series of political and economical crises led to a violent outbreak of violence.<sup>81</sup> Fearing a threat to their autonomy and the safety of their own national groups, some former Republics of the SFRY started a process of secession. Slovenia was the first state to declare its independence from the Federation in 1991, briefly followed by secessions of Croatia and Bosnia and Herzegovina already being more brutal and violent since ethnic diversity in the two Republics was greater than in Slovenia. Violence further escalated in Kosovo and in Macedonia between 1998 and 2001.<sup>82</sup>

The slaughter left thousands of civilians dead and hundreds of thousands displaced. Reports denouncing civilian massacres, large-scale rapes, torture in detention camps, and city sieges were communicated to the United Nations already in late 1992. As a consequence, a UN Commission of Experts was sent on the ground to report on the violations of International Humanitarian Law (IHL). Their findings incited the Security Council to establish an International Criminal Tribunal for the Former Yugoslavia.<sup>83</sup>

### **B. The ICTY Establishment**

On 22 February 1993, UN SC Resolution 808 was adopted describing the situation at the Balkans as a "*threat to international peace and security*."<sup>84</sup> This qualification of the conflict gave the Security Council the competence to act under Chapter 7 of the UN Charter and to decide "*what measures shall be taken (...) to maintain or restore international peace and security*."<sup>85</sup> Three months later, in its resolution 827 adopted 25 May 1993, the Security Council formally established the ICTY.

The qualification of the conflict as a threat to international peace divided the international community. On the one hand many defenders of international criminal justice welcomed the Tribunal with open arms;<sup>86</sup> on the other hand critics argued that the SC was abusing its powers and that the international community's reactions were hypocritical.<sup>87</sup>

Opponents of the ICTY creation based their criticism on the perception that the events occurring in the region were internal matters of the SFRY rather than

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79 *Prosecutor v Tadić* (Appeal Case) ICTY-IT-94-1-A (15 July 1999) [87].

80 Arzt (2006) 228.

81 ICTY, "About the ICTY: Establishment" <[www.icty.org/sid/319](http://www.icty.org/sid/319)> accessed 7 July 2010.

82 Ibid.

83 Ibid.

84 See: UN SC Res 808 (22 February 1993) UN Doc S/RES/808

85 UN Charter (1945) Chapter VII, art 39.

86 See for example the work of: Hartmann (2007), Ayat (2007) and Akhavan (2001).

87 See for example: Christopher Black, "The International Criminal Tribunal for the Former Yugoslavia: Impartial?" (2000) 1 *Mediterranean Quarterly* 29-40.

a threat to international peace. Thus, "Yugoslavia was the first experiment in using a quasi judicial international body to attack the principle of sovereignty."<sup>88</sup> Furthermore, the establishment of the ICTY was considered as an abuse of powers by the Security Council, which under Chapter VII was never assigned judicial functions.<sup>89</sup> Nevertheless, in the Tadić case, the ICTY Trial Chamber recognised that "a broad discretion is given to the Security Council in the exercise of its Chapter VII authority".<sup>90</sup> It is the underlying assumption of this paper that the institution was legally established and its creation as such will not be questioned. A last critique was that the establishment of the ICTY was a hypocritical gesture from the international community unable to take real measures in order to prevent or stop the violence. Therefore, the ICTY was a symbol of Western strategy for "appeasing its troubled conscience" and "yearn[ing] for absolution from responsibility."<sup>91</sup>

Nevertheless, the ICTY was the first international tribunal to be set up after Nuremberg and Tokyo and the first to prosecute war criminals in the midst of an ongoing conflict.<sup>92</sup> Thus, its establishment was generally perceived as a great symbol of the development of international criminal law, promoting values of justice in a world where politics and power relationships prevail.<sup>93</sup>

### C. The ICTY Mandate

UN SC Resolution 827, which established the ICTY, also decided on its Statute determining the jurisdiction and functioning of the tribunal. In particular, its mandate aimed to be audaciously broad.

#### 1. The Tribunal's Competence

The tribunal's competence may be presented from four perspectives: competence *ratione materiae*, *personae*, *temporis* and *loci*.

*Ratione materiae*, the international tribunal shall have the power to prosecute persons "responsible for serious violations of international humanitarian law"<sup>94</sup> i.e. grave breaches of the Geneva Convention of 1949 (Article 2), violations of the laws and customs of war (Article 3), Genocide (Article 4) and crimes against Humanity (Article 5). Also, *ratione personae*, "the international tribunal shall have jurisdiction over natural persons."<sup>95</sup> In other words, collective responsibility, state responsibility or responsibility of organizations (e.g. NATO) is excluded. Furthermore, neither the official or commanding position of the accused person

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88 Ibid 32.

89 Ayat (2007) 399.

90 *Prosecutor v Tadić* (Decision on the Defence motion for Interlocutory Appeal on Jurisdiction) ICTY (2 October 1995) [7].

91 Akhavan (1998) 744; Hartmann (2007) 26.

92 Hodzic (2008) 1.

93 Hartmann (2007) 70-71.

94 ICTY Statute, <[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)> accessed on 10 January 2011, art 1.

95 Ibid art 6.

nor his/her subordinate role in executing orders shall relieve this person of his/her individual criminal responsibility.<sup>96</sup> The temporal jurisdiction of the tribunal shall cover events that occurred from 1 January 1991 until *"a date to be determined by the Security Council upon restoration of peace."*<sup>97</sup> At the time of writing, the completion strategy entails that all proceedings shall be completed by mid-2013, with the exception of Karadžić's appeal that may last until February 2014.<sup>98</sup> The ICTY's territorial competence shall extend to crimes committed on the territory of the former Socialist Federal Republic of Yugoslavia, *"including its land surface, airspace and territorial waters."*<sup>99</sup>

Also, the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons responsible for serious violations of international law.<sup>100</sup> However, the ICTY retains primacy over national courts. Thus, although a person tried before the ICTY may not be tried again for the same crime before a national court, the ICTY may re-open a case tried by a national court if it considers that *"the act was characterized as an ordinary crime, or the national court proceedings were not impartial or independent (...) or the case was not diligently prosecuted."*<sup>101</sup> This pre-emptive right of the Tribunal leaves the opportunity to the national judiciary to prosecute its own criminals while maintaining a scrutiny that safeguards fair trials.

## 2. The Tribunal's Work

The ICTY was finally established in The Hague, in the Netherlands. Although this position creates a geographical and psychological gap between its activities and the population concerned, it appeared impossible to settle such a Tribunal within the region in the midst of an ongoing conflict.<sup>102</sup>

The ICTY is composed of the following organs: first, the Chambers (three trial chambers and one chamber of appeal) which hear and decide the cases; second, the Prosecutor's Office, divided into the Prosecution Division, the Immediate Office and the Appeals division, which investigates the cases and prepares the indictments against suspects of violations; third, the Registry is composed of the Judicial Support Division, the Office of the Registrar and the Administration Division. Generally, the Registry provides administrative and legal support to the ICTY on diverse questions such as court management, state cooperation, translation of court activities, victims and witnesses support, supervision of detention, budget and human resources, etc.<sup>103</sup>

To date, the Tribunal has indicted 161 persons for serious violations of international humanitarian law. 36 accused are still on trial, in the process of 15 cases. 125 accused have been tried in the course of 89 cases whereas 12 were

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96 Ibid art 7.

97 See UN SC Res 827 (25 May 1993) UN Doc S/RES/827. Also: ICTY Statute, art 8.

98 ICTY, "Completion Strategy" <<http://www.icty.org/sid/10016>> accessed 12 June 2010.

99 ICTY Statute, art 8.

100 Ibid art 9.

101 Ibid art 10 [2].

102 Hodzic (2008) 3.

103 ICTY, "Organisational Charter" <[www.icty.org/sid/326](http://www.icty.org/sid/326)> accessed 7 July 2010.

acquitted, 64 were sentenced to imprisonment, 20 accused had their indictment withdrawn and 16 died (10 before their transfer to The Hague and 6 in the course of proceedings). Two accused remain at large: Goran Hadzić and Ratko Mladić.<sup>104</sup> Influenced by a staff largely coming from common law countries, the procedure before the ICTY is mainly adversarial.<sup>105</sup> Facing the time pressure of its completion objective, the Tribunal was asked by the Security Council (SC) to develop strategies in order to hasten trials.<sup>106</sup> In particular, it increasingly transferred some of its cases to national courts and started to accept plea-bargains.<sup>107</sup>

The Tribunal has produced thousands of witness testimonies, millions of pages of documentary evidence, thousands of hours of audio and video recordings and hundreds of adjudicated facts of the worst atrocities committed over the territory of the former Yugoslavia.<sup>108</sup> Interestingly, the future of these archives, i.e. where they will be stored once the ICTY is closed, was of great concern for the interviewees,<sup>109</sup> some of them suggesting that they shall be protected as a Common Heritage of Mankind by the UNESCO.<sup>110</sup>

### 3. The Tribunal's Objectives

*"Bringing war criminals to justice;  
Bringing justice to victims."*<sup>111</sup>

ICTY, 2010.

Echoing a general trend of international criminal justice, the SC Resolution 827 emphasizes that the establishment of an International Tribunal would not only *"contribute to ensuring that [violations of IHL] are halted and effectively redressed"*<sup>112</sup> but also *"contribute to the restoration and maintenance of*

104 ICTY, "Key Figures" <[www.icty.org/sections/TheCases/KeyFigures](http://www.icty.org/sections/TheCases/KeyFigures)> accessed 28 October 2010.

105 Hartmann (2007) 56-63 and 92.

106 UNSC Resolution 1800 requires the Tribunal *"to take all possible measures to complete all trial activities"* within the schedule set up for the completion strategy. See: UNSC Res 1800 (20 February 2008) UN Doc S/RES/1800.

107 Mark Harmon, "The Imperatives of the Completion Strategy and the Truncated Narrative of International Criminal Trials"(2009) 7 Journal of International Criminal Justice, 106-107. And: Bachmann (2005) 238-239.

108 Hodzic (2008) 3.

109 Marlise Simons, "Concluding Remarks" (2009) 7 Journal of International Criminal Justice 119. See also: Interview with Becir Macic, Pr. Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010); Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010). And: Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010)

110 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

111 ICTY, "Home Page" <[www.icty.org](http://www.icty.org)> accessed 2 June 2010.

112 UNSC Res 827 (25 May 1993) UN Doc S/RES/827 [7].

peace."<sup>113</sup> Accordingly, the tribunal has been conferred a triple mandate: first, it shall bring accountability for offenders. Second, it shall deter from further violence, end a culture of impunity and contribute to prevent humanitarian law violations. Finally, and most relevant to this paper, the Tribunal shall contribute to the restoration and maintenance of peace. While the two first objectives can be associated with accountability, the third objective of peace may later on be connected to social objectives of reconciliation.

This broad mandate was shaped by the predominant perception within the international community that there can be no peace without justice.<sup>114</sup> This view was endorsed by Bernard Kouchner who, as he was sent as the UN Special Representative in Kosovo in 2000, declared that *"there can be no peace and reconciliation in Kosovo until those indicted with human rights violations are brought to justice."*<sup>115</sup>

However, the various objectives of the ICTY may appear paradoxical and their common realisation a tricky challenge. Indeed, while accountability requires efficiency and fast sentencing, reconciliation requires fairness, victims' inclusion and large access to truth.<sup>116</sup>

Has the ICTY effectively managed to conciliate accountability and reconciliation? Have the social objectives mentioned been achieved? Has the Tribunal fulfilled the expectations triggered by its mandate? These questions will be dealt with in the following section.

## **II. The Impact of the ICTY on the Reconciliation Process in the Balkans: Achievements and Failures**

*"Far from being a vehicle for revenge, [the ICTY] is a tool for promoting reconciliation."*<sup>117</sup>

Antonio Cassese, 1994.

Today, the Balkans remains an unpredictable and potentially explosive region. The Republika Srpska threatens secession from Bosnia, Mitrovica remains a black hole in Kosovo, and limited economic cooperation and movement of people across the region are just a few indicators that reconciliation is a long way off. As societal peace can be valued by the degree of cohesion and interaction among former enemy groups, there are signs that this cohesion and interaction is still missing in the former Yugoslavia.<sup>118</sup>

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113 Ibid [6].

114 Akhavan (2001) 19; Hodzic (2008) 2. Refer also to Chapter One.

115 UNMIK Press Release, "Special Representative of the Secretary General Dr. Bernard Kouchner Hopes For A Special Envoy Soon" (2 May 2000) UNMIK/P/235 <[www.unmikonline.org/press/press/pr235.html](http://www.unmikonline.org/press/press/pr235.html)> accessed 7 July 2010.

116 Bachmann (2005) 235-237.

117 Antonio Cassese "First Annual Report of the ICTY President to the UN General Assembly and Security Council" (29 August 1994) UN Doc A/49/342 and S/1994/1007, 12.

118 Meernik (2005) 271.

First, no systemic or seriously intended efforts towards reconciliation have been undertaken by any state in the region.<sup>119</sup> Crucial fields for reconciliation were left aside from the political agenda: i.e. return of refugees, return of private property to pre-war owners and prosecution of war crimes at the national level.<sup>120</sup> Second, nationalistic leaders still largely exploit war traumas and inter-community fears to destroy reconciliation processes at the local level.<sup>121</sup> Third, any gesture made by political leaders toward peace is perceived by the population as biased or that it was made because of blackmailing by the international community.<sup>122</sup> Any cooperation with the ICTY is considered as the price to be paid for EU integration.<sup>123</sup> Finally, the ongoing division of ethnic groups on war crimes prosecution and the different perceptions with regard to the qualification of the war reflect a general lack of reconciliation in the region.<sup>124</sup> While each group keeps its own truth, the Balkans remains within a "*status quo*."<sup>125</sup>

Nevertheless, a process of reconciliation is necessary for the long term stability of the region.<sup>126</sup> As the ICTY was conferred social objectives, what have been its achievements with regard to reconciliation?

### **A. Positive Achievements of the ICTY with Regard to Reconciliation**

Throughout this research, two main positive achievements of the ICTY can be identified. First, the establishment of an international tribunal is regarded as an appropriate answer to face violations committed during the conflict. Second, through the legacy of its archives, the Tribunal provides the groundwork for future reconciliation.

#### *1. An International Tribunal Indispensable for the Emergence of a Culture of Accountability in the Former Yugoslavia*

The creation of an international tribunal as a post-conflict strategy in the Balkans was generally perceived positively; on the one hand because justice through trials suits the local belief in judicial justice, on the other hand because an international tribunal was necessary for justice to be done impartially at the time. Finally, the establishment of the ICTY has created a culture of accountability in the region that was missing throughout centuries.

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119 Zagar (2008) 3.

120 Nebojsa Bjelakovic, "Reconciliation, Truth and Justice in the Post Yugoslav states" (2002) 3 no 2-3 South East Europe Politics 164.

121 Hodzic (2008) 4.

122 IHRLC (2000) 40-43.

123 Arzt (2006) 232. Also: Interview with Melina Sadikovic, Bachelor degree in Psychology, Master degree in Euroculture, former involvement in projects of Reconciliation, researcher on Gender studies at the ERMA Program (Sarajevo 8 April 2010).

124 Bjelakovic (2002) 164-165.

125 Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of the Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010).

126 Meernik (2005) 271.

### 1.1. A Great Belief in Judicial Justice in the Balkans

*"In the Balkans, nothing less than trials would suit."<sup>127</sup>*

Stephanie A. Barbour, 2010.

Throughout this research it became clear that in the Balkans, all groups share a common belief in judicial justice. People highly support the principle of judicial accountability for those who commit war crimes.<sup>128</sup> Thus, *"it is safe to say that most citizens of Former Yugoslavia today recognize that war crimes shall be punished regardless of the rank of the perpetrator."*<sup>129</sup> Similarly, the study of the International Human Rights Law Clinic highlighted a general commitment of Bosnian legal practitioners to the Western legal tradition, reflected through the credibility of tribunals in their perception and a deep belief in the principle of rule of law.<sup>130</sup> This strong belief in judicial justice offered to the ICTY a *prima facie* legitimacy for its role in a process of accountability and reconciliation.<sup>131</sup>

### 1.2. The Need for an International Tribunal in the Midst of Violence

*"Without The Hague, there would be no justice."<sup>132</sup>*

A Bosnian Magazine Editor, 1999.

People in the Balkans generally admit that an international tribunal was necessary to prosecute war crimes. Indeed, without the ICTY, prosecutions at the national level in the direct aftermath of the war would have either not taken place or would have been ethnically biased<sup>133</sup> and used by communities as a tool

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127 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, Organization for Security and Cooperation in Europe (Sarajevo 6 April 2010).

128 Bjelakovic (2002) 165; IHRLC (2000) 1.

129 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

130 IHRLC (2000) 14.

131 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010). Also: Interview with Djana Mesic, Inhabitant of Sarajevo during the Siege (Sarajevo 12 April 2010). Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, Organization for Security and Cooperation in Europe (Sarajevo 6 April 2010).

132 IHRLC (2000) 4. Quoted as such in the text.

133 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010). Interview with Milan Mandic, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010). Interview with Melina Sadikovic, Bachelor degree in Psychology, Master degree in Euroculture, former involvement in projects of Reconciliation, researcher on Gender studies at the ERMA Program (Sarajevo 8 April 2010). Also: Interview with Djana Mesic, Inhabitant of Sarajevo during the Siege (Sarajevo 12 April 2010).

to fulfil their need for revenge.<sup>134</sup> Therefore, beyond ethnic lines, people usually recognize that the involvement of the international community was necessary to stop the violence, prosecute war criminals and ensure a basis of fairness and impartiality in judicial sentencing.<sup>135</sup>

### 1.3. The Establishment of a Precedent of Accountability in the Region

*"The ICTY was a clear message for the Balkans  
That justice will be given when war  
crimes are committed."<sup>136</sup>*

Alida Vracic, 2010.

Notwithstanding its strong message for aspiring tyrants overseas,<sup>137</sup> the ICTY had a considerable impact on the Balkans as it established a culture of accountability in a region with a long lasting tradition of impunity for war crimes.<sup>138</sup>

Indeed, before 1993, none of the serious crimes committed during or after the Second World War were ever seriously prosecuted. In the direct aftermath of the war, the ICTY helped to remove some of the most responsible leaders, as the stigma resulting from the pariah status conferred by Tribunal's indictments helped to decrease war lords' influence and weaken their support among the population.<sup>139</sup> Thus, it contributed to changing the political landscape in the region while providing an open space for more moderate leaders to replace the former ones.<sup>140</sup> Ultimately, the Tribunal created a dynamic of trials at the local level, which has contributed to the decline of the local culture of impunity.<sup>141</sup>

Thus, the ICTY has effectively contributed to bringing a notion of accountability for war crimes in the Balkans.<sup>142</sup> Another potential, if not essential, contribution of the ICTY to reconciliation lays in the Tribunal's archives.

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134 Interview with Murat Tahirovic, President, Union of Former Camp Inmates in Bosnia and Herzegovina (Sarajevo 9 April 2010). Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010). See also: Audergon (2005) 18; Human Rights Watch (2009) 80.

135 IHRLC (2000) 19.

136 Interview with Alida Vracic, Executive Director of the Think Tank Popolari, Former Case Manager at the Prosecutor Office, War Crime Chamber in Bosnia and Herzegovina (Sarajevo 13 April 2010).

137 Akhavan (1998) 742.

138 Interview with Alida Vracic, Executive Director of the Think Tank Popolari, Former Case Manager at the Prosecutor Office, War Crime Chamber in Bosnia and Herzegovina (Sarajevo 13 April 2010). Also: Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

139 Hartmann (2007) 47; Akhavan (2001) 9.

140 Akhavan (2001) 9.

141 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010). See also: Akhavan (2001) 30.

142 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

## 2. The Creation of a Legal Heritage and its Potential Impact on the Reconciliation Process

As mentioned earlier, the Tribunal played an important role in establishing a legal heritage of well-documented facts.<sup>143</sup> This heritage can be used to contradict vicious political propaganda and historical amnesia in the region and support the reconciliation process in the future.

### 2.1. The Establishment of a Well-Documented Truth Over the Events

Most of the interviewees recognized the formal qualities of ICTY proceedings, i.e. good prosecutors and competent judges, quality investigations and decisions based on reliable evidence.<sup>144</sup> Even though some Serbs perceive the Tribunal as too lenient when trying cases of non-Serb offenders, they generally admit the quality of proceedings when it comes to Serbian offenders.<sup>145</sup> In particular, the data and evidence collected by the ICTY have served to officially acknowledge the occurrence of massacres, such as the genocide of about 8000 Bosniak men in Srebrenica in July 1995,<sup>146</sup> or mass murders that occurred in Kosovo in 1999.<sup>147</sup> *"We Bosnian Muslims no longer have to prove we were victims."*<sup>148</sup> These well-documented facts helped to provide the victims with a certain moral credibility.<sup>149</sup>

Also, through this collection of evidence, the ICTY would be able to build up an *"optimal shared truth"*<sup>150</sup> indispensable to a process of reconciliation. While an *"un-adulterated"*<sup>151</sup> transfer of such a common truth to the local population is still missing in the Balkans,<sup>152</sup> the sum of these factual findings may become a precious tool for reconciliation as soon as there is a genuine political will to face the truth over the past and to address the traumas of war.<sup>153</sup> Hence, the ICTY's archive *"is a factual basis for the reckoning with the recent past."*<sup>154</sup>

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143 See Chapter Two Part I [C] 2.

144 Interview with Alida Vracic, Executive Director of the Think Tank Popolari, Former Case Manager at the Prosecutor Office, War Crime Chamber in Bosnia and Herzegovina (Sarajevo 13 April 2010). Also: Interview with Lejla Coulc, Lawyer, Legal Assistant in the Defence team for Naser Oric and Kasim Dezic, ICTY (Sarajevo 12 April 2010).

145 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

146 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

147 Bachmann (2005) 247.

148 Arzt (2006) 11-12.

149 Akhavan (2001) 7.

150 Akhavan (1998) 742.

151 Ibid 742.

152 Mirko Klarin, "The Impact of ICTY Trials on Public Opinion in the Former Yugoslavia" (2009) 7 Journal of International Criminal Justice 90. Also: Statement by Florence Hartmann (Personal email correspondence 17 May 2010).

153 Interview with Murat Tahirovic, President of the Union of Former Camp Inmates in Bosnia and Herzegovina (Sarajevo 9 April 2010).

154 Hodzic (2008) 9.

## 2.2. Its Potential Impact on the Reconciliation Process: Inciting Politicians and Public Opinion Towards Acknowledgement

A few examples already demonstrate the impact ICTY documented-evidence has had on the behaviour of politicians and on public opinion. First, the data collected helped raise awareness among the population of the wrongdoings their community leaders committed during the war. For instance, the first international indictment against Slobodan Milošević for crimes committed in Kosovo led, in May 2000, to a crowd in the streets of Belgrade shouting "*Milošević to the Hague!*"<sup>155</sup> Similarly, in the course of Milošević's trial, the Tribunal's findings of mass graves in Kosovo in 2001 and the video broadcast showing the Serbian paramilitary group *Scorpions* executing civilians from Srebrenica provoked a great reaction within the Serbian society.<sup>156</sup>

Furthermore, the ICTY's archives may have a long-term impact on political leaders to acknowledge history.<sup>157</sup> Therefore, as the videos of the *Scorpions* broadcast at the Milošević trial led the Serbian prime minister to announce on TV that those who committed the murders will be put on trial,<sup>158</sup> recent political gestures towards reconciliation could have been incited by ICTY case law. The March 2010 adoption by Serbian Parliament of a resolution recognizing the Srebrenica "*massacre*" illustrates a first step towards acknowledgment.<sup>159</sup> Thus, the long-term impact of the ICTY on the political sphere shall not be underestimated.<sup>160</sup>

### **B. Ongoing Failures of the ICTY with Regard to Reconciliation**

*"L'histoire du TPI est celle d'un judoka égaré  
sur un ring de box  
En plein championnat de poids lourds."*<sup>161</sup>

Florence Hartmann, 2007.

With this sentence, Florence Hartmann underlines the natural limits to the emerging international criminal justice in a world largely dominated by politics and secret diplomacy. By being the first international tribunal after Nuremberg,

155 Akhavan (2001) 16-17.

156 Hartmann (2007) 47; Akhavan (2001) 16. See also: Youtube, "Milosevitch on Trial" (2007) Produced by Team Production for TV 2 Denmark and posted by Spanonski <<http://www.youtube.com/watch?v=3zH2DzV8bHU>> accessed 3 April 2010.

157 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010). Also: Interview with Djana Mesic, Inhabitant of Sarajevo during the Siege (Sarajevo 12 April 2010). And : Interview with Goran Tinjic, Country Operations Officer, Country Office in Bosnia and Herzegovina, World Bank (Sarajevo 12 April 2010).

158 Youtube, "Milosevitch on Trial" (2007) Produced by Team Production for TV 2 Denmark and posted by Spanonski <<http://www.youtube.com/watch?v=3zH2DzV8bHU>> accessed 3 April 2010.

159 AFP, "Le Parlement Serbe Condamne le Massacre de Srebrenica" *Libération* ( Paris, 31 March 2010) <<http://www.liberation.fr/monde/0101627661-le-parlement-serbe-condamne-le-massacre-de-srebrenica>> accessed 7 July 2010.

160 Akhavan (1998) 809; Meernik (2005) 288.

161 Hartmann (2007) 31.

the ICTY played a pioneer role and had not much choice but to improvise, thus risking potential mistakes.<sup>162</sup> While the subsequent developments will highlight the failures of the Tribunal with regard to its contribution to reconciliation, any criticism shall be understood in a perspective of improvement. As the ICTY is at the edge of its completion, these comments may be fruitful to future developments of international criminal justice.

### 1. General Disillusion due to Great Expectations

*"As soon as the ICTY will become a true and fair court of justice, There will be no need of setting up any truth and reconciliation commission or whatever else."*<sup>163</sup>

Milan Mandic, 2010.

Shortly after its establishment, disillusion found their way into the Balkans as it soon became clear that the Tribunal could not meet the extremely high expectations of the population, and in particular of the part that was the most exposed to violence.<sup>164</sup> At the end of the war, there were plenty of victims, mountains of evidence and the common post-civil-war syndrome of "everyone knew".<sup>165</sup> The population expected the prosecution and conviction of all offenders, a short length of trials and long sentences reflecting the gravity of the crimes.<sup>166</sup> In particular, Serbians and Croats awaited fair trials with equal standards for each community.<sup>167</sup> Many assumed the tribunal to have more power, e.g. that it would be able to push local courts toward prosecutions or force states to extradite suspected offenders.<sup>168</sup> Others hoped that the ICTY would have issued its first judgement before November 1996 and would have focused directly on the "big fishes", i.e. on those persons holding command responsibility during the war.<sup>169</sup> However, an essential reason for the delay of

162 Interview with Lejla Mamut, Human Rights Coordinator, Advocacy Center Trial, Former researcher at the Research and Documentation Center (Sarajevo 12 April 2010).

163 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

164 IHRLC (2000) 23.

165 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010). The group think concept of "everyone knew" who committed the crimes is also described by Jessica Harper in her study of the UN Transitional Justice strategy in East Timor. See also: Harper (2005) 164-165.

166 Interview with Lejla Mamut, Human Rights Coordinator, Advocacy Center Trial, Former researcher at the Research and Documentation Center (Sarajevo 12 April 2010). Also: Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010). See also: IHRLC (2000) 34-37.

167 Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

168 Akhavan (1998) 795-797. Also: Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

169 Akhavan (2001) 19; Hartmann (2007) 89. Also: Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

initial prosecutions lays in the inherent technical constraints of launching the Tribunal's activities. In the face of inflexible technical constraints, many of the population's needs could have never been completely fulfilled.<sup>170</sup>

Aside from these unavoidable constraints, three main aspects of the tribunal's functioning have facilitated frustrations within the population and impeded the Tribunal's potential contribution to reconciliation: dissatisfactions due to misunderstandings of the Tribunal's functioning, lack of a genuine outreach strategy and, vicious side-effects emerging from the lack of attention to the collective context.

## 2. Frustrations due to the Tribunal's Functioning

Frustration of people mainly arose with regard to the Tribunal's functioning. Misunderstanding of its procedure, the peculiar controversy of plea agreements, feelings of double standards before the Tribunal and lack of victims' participation were the chief aspects of the population's disappointment.

### 2.1. Lack of Understanding over the Procedure

Frustrations due to the tribunal's procedure emerged at several levels. However, the main points of critique concerned the strictness of its rules of evidence and the potential abuse of rights it concedes to self-represented defenders.

#### a. The Strictness of its Rules of Evidence

*"At the ICTY, it had to be proved – in the case of even a single unlawful homicide – that a particular victim was murdered (...) and that the accused was individually criminally responsible for the death."*<sup>171</sup> This requirement makes the task of an investigator, proving the guilt of a suspected offender, particularly difficult. Individual criminal responsibility must be proven for each crime *"beyond reasonable doubt."*<sup>172</sup> Such strict requirements are hardly suitable in the context of collective violence where prosecutors must often investigate cases of thousands of murders and where those at the top of the criminal enterprise decided the plot without necessarily being present on the field at the time of the crime.<sup>173</sup>

While the Tribunal has set up concepts to face the difficulties of command responsibility that will be detailed later on, the strictness of its rules of evidence in a context of collective violence could be at the expense of justice itself. *"It*

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170 Interview with Lejla Coulc, Lawyer, Legal Assistant in the Defence team for Naser Oric and Kasim Dezic, ICTY (Sarajevo 12 April 2010). Also: Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

171 John R. Cencich, "International Criminal Investigations of Genocide and Crimes Against Humanity: A War Crimes Investigator's Perspective" (2009) 19 no 2 International Criminal Justice Review 176. See also: ICTY Rules of Procedures and Evidence (Revised on 8 December 2010) <[http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev45\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf)> accessed 10 January 2011, rule 47. And: ICTY Statute, art 7.

172 ICTY Rules of Procedure and Evidence, rule 87 [A].

173 Cencich (2009) 177.

may be difficult to obtain hardcore evidence of civilian killings, in the midst of the Sarajevo siege when the Tribunal requires the presence of the prosecutor, scientist experts, an anthropologist, police officers, etc."<sup>174</sup> In this context, witness testimonies remain the weakest evidence before the Tribunal.<sup>175</sup> While their probative value increased later on as the Tribunal took into account complaints of victims associations,<sup>176</sup> this general balance between the admissibility of evidence and the right of the accused to a fair trial is often difficult for victims to understand. This is particularly true in situations where potential offenders were granted early release or escaped their responsibility on the basis of "lack of evidence." For instance, a great resentment among the Serb community was felt when Ramush Haradinaj, former key leader of the Kosovo Liberation Army, was acquitted by the Tribunal for lack of evidence, although there existed strong presumptions of his individual criminal responsibility for crimes against Humanity against Serbs.<sup>177</sup> While the recent reopening of its case was largely welcomed by the Serbian community, victims generally tend not to accept seeing their offenders released for lack of evidence even though "everyone knows that they participated in killings."<sup>178</sup>

Although these frustrations deserve attention, the widespread post-conflict syndrome of "everyone knew" shall be tempered as these collective assumptions of a leader's responsibility may often be driven by emotions and trauma, thus putting justice at risk to miscarriages and false accusations when relied thereupon. On the contrary, the strict rules of evidence applied by the ICTY are a safeguard to secure the credibility of a sentence and the unquestionable reality of the facts established.<sup>179</sup>

#### b. The Room for Potential Abuse of Defenders' Rights in the Proceedings

*"ICTY trials are like a comedy show."*<sup>180</sup>

Munira Subasic, 2010.

To ensure sound control of the proceedings, ICTY procedure ensures that "*the Trial Chamber may order the removal of an accused from the courtroom (...) if the accused has persisted in disruptive conduct*" and shall ensure that the interrogation of witnesses is "*effective for the ascertainment of the truth and*

174 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010).

175 Ibid. Also: ICTY Rules of Procedure and Evidence, rule 89 [C]-[D].

176 Patricia, M. Wald, "Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal" (2002) 5 Yale Human Rights and Development Law Journal 166.

177 Interview with Momcilo Arlov, Programme Director, Centre for Civil Society Development in Kosovo Mitrovica (Mitrovica 18 January 2010). See also: Klarin (2009) 90; Human Rights Watch (2009) 83.

178 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010). Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010). Also: Harper (2005) 165.

179 Akhavan (1998) 770.

180 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

avoid needless consumption of time."<sup>181</sup> Yet, when watching ICTY trials, victims criticise the lack of the court's control over self-represented accused who abuse their procedural rights in order to delay or disrupt the trials. *"I cannot watch ICTY trials; it is just horrible to see how the defenders are acting."*<sup>182</sup> For instance, some referred to Milošević's cross-examination strategy of political digression and destabilization of witnesses;<sup>183</sup> Others referred to the right of Karadžić to postpone his trial and challenge evidence found by the Tribunal or the right of Vojislav Šešelj to insult the Tribunal's President.<sup>184</sup> Such behaviours in the face of justice have led some victims to wonder *"if any Court in Europe would have agreed to offer so much protection to war criminals as the one that is offered in The Hague."*<sup>185</sup>

This abuse of procedural rights by the accused often resulted in incredibly long procedures.<sup>186</sup> Ironically, if the Tribunal could be brought before the European Court of Human Rights, it would most likely be held responsible for violating Article 6 of the ECHR guaranteeing the right of an accused to be tried within a reasonable time.<sup>187</sup> As the maxim *"Justice delayed is justice denied"* is of paramount importance in post conflict societies, this situation raised particular frustration in the Balkans where the conception of a fair trial is generally associated with the speed and efficiency of the Court's process.<sup>188</sup> As emphasizes a victim, *"at Nuremberg, 4 years were enough."*<sup>189</sup> Thus, the disillusion of the population towards justice grows as the percentage of those who believed that it is important to face the truth through justice in the Balkans diminished from 37% to 29% between 2004 and 2009.<sup>190</sup> *"Because the time has passed, (...) the effectiveness of a sentence [is less]."*<sup>191</sup>

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181 ICTY Rules of Procedure and Evidence, rule 80 [A] and rule 90 [F].

182 Interview with Melina Sadikovic, Bachelor degree in Psychology, Master degree in Euroculture, former involvement in projects of Reconciliation, researcher on Gender studies at the ERMA Program (Sarajevo 8 April 2010).

183 Hartmann (2007) 142.

184 Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010). Interview with Melina Sadikovic, Bachelor degree in Psychology, Master degree in Euroculture, former involvement in projects of Reconciliation, researcher on Gender studies at the ERMA Program (Sarajevo 8 April 2010). Also: Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

185 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

186 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010). Interview with Lejla Coulc, Lawyer, Legal Assistant in the Defence team for Naser Oric and Kasim Dezic, ICTY (Sarajevo 12 April 2010). Also: Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010).

187 Bachmann (2005) 228-229. See also: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR) (1950) art 6.

188 IHRLC (2000) 35.

189 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

190 Klarin (2009) 93.

191 IHRLC (2000) 35.

Yet, to avoid the mistakes of an expedite justice at Nuremberg, guaranteeing the accused with all rights is essential to ensure the legitimacy of the Tribunal.<sup>192</sup> Nevertheless, there is similarly a legitimate need to grant victims and their society a genuine and effective justice. Thus, future international tribunals shall develop acceptable strategies that balance the defender's right to a fair trial and the victims' right to prompt justice.

## 2.2. The Controversies of Plea Bargaining

Facing the need to speed up the process because of the completion strategy, the Tribunal began accepting plea-bargains.<sup>193</sup> Originally a common law technique, plea-bargaining can be defined as an agreement between the prosecution and the defence whereby each party makes concessions in return for benefits.<sup>194</sup> Plea-bargaining may be done in three ways: through "sentence-bargaining" the accused may get a reduced sentence; more controversially, through "charge-bargaining" the accused may obtain the abandon or reduction of the heaviest charges against him. Finally, "facts-bargaining" involves the possibility of negotiating which facts can be brought to the court's attention.<sup>195</sup>

Advantages of plea-bargaining are multiple: first, it expedites the proceedings and makes efficient use of scarce judicial resources.<sup>196</sup> Once there is enough evidence proving the responsibility of the accused *prima facie*, a guilty plea releases the court from the burden of a trial.<sup>197</sup> Second, the promise of a lighter sentence through plea agreements has often encouraged the accused to cooperate with the Court, which often revealed to be particularly fruitful in obtaining information on other accused.<sup>198</sup> Also, plea agreements sometimes produced a snowball effect through which *"each agreement producing more evidence against others [lead] others to come forward as well."*<sup>199</sup> Finally, plea-bargaining can be a chance of catharsis for victims to see their accused recognizing his/her guilt and apologizing publicly. For instance, Pedrag Banović, former guard at the concentration camp of Keraterm in Prijedor, declared in his guilty plea: *"I feel sorry for all the victims and curse my own hands for having inflicted pain in any way on innocent people."*<sup>200</sup>

192 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

193 Arzt (2006) 229; Bachmann (2005) 242-245; Harmon (2009) 106-107. Also: Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

194 Refer to Chapter One III [A] 2.

195 OSCE Mission in Bosnia and Herzegovina, "Plea Agreements in Bosnia and Herzegovina: Practice before the Courts and their compliance with International Human Rights Standards" (Report) (9 February 2006) <<http://www.oscebih.org/public/default.asp?d=6&article=show&id=1708>> accessed 01 May 2010, 8.

196 Ibid 1.

197 In particular, no more need for witnesses or cross examination. See: Ibid 1.

198 Ibid 1. Also: Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

199 OSCE (2006) 20.

200 ICTY, "The cases: Banović" <[www.icty.org/x/cases/Banovic/cis/en/cis\\_Banovic\\_en.pdf](http://www.icty.org/x/cases/Banovic/cis/en/cis_Banovic_en.pdf)> accessed 7 July 2010, 3.

Yet, plea bargains before the ICTY have led to great frustrations in the Balkans. While the first criticism refers to the defendant's side, the second ones are widespread among victim communities.

#### a. Challenging the Right of the Accused to a Fair Trial

First, guilty pleas challenge the right of the accused to a fair trial, which includes the right to be presumed innocent unless proven guilty. Through plea-bargaining, the accused accepts culpability and therefore releases the prosecutor from his duty to prove his individual criminal responsibility. Also, by pleading guilty, the accused agrees to give up some basic rights: including his/her possibility to be acquitted, his/her right to public trial and his/her right to appeal.<sup>201</sup> Therefore, there have been large debates on the compatibility of plea-bargaining with the Right to a Fair Trial guaranteed under the Article 6 of the European Convention for Human Rights.<sup>202</sup>

Also, acceptance of guilty pleas before the ICTY led to large inconsistencies in the sentencing and raised great frustrations within the population.<sup>203</sup>

#### b. Questioning the Fair Administration of Justice through an Inconsistent Sentencing

*"In Bosnia, you kill a chicken,  
You get more than before the ICTY."*<sup>204</sup>

Enis Omerovic, 2010.

First, some sentences resulting from guilty pleas were perceived as inexplicably light,<sup>205</sup> which gave victims the impression that they were worth *"less than the offender or than any other victim in Europe."*<sup>206</sup> The judgement in the case of Biljana Plavšić is a prime example.<sup>207</sup> This former President of Republika Srpska was responsible for ethnic cleansing of non-Serbs in 32 communities in Bosnia.<sup>208</sup> After the war she cooperated with the international community and pleaded guilty for crimes against humanity before the ICTY.<sup>209</sup> Eventually, the charge for genocide was dropped from her indictment (charge-bargaining) and she was sentenced to 11 years imprisonment whereof she effectively spent 8 years in a comfortable Swedish prison. For many, the lightness of the sentence was

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201 OSCE (2006) 7-8.

202 Ibid 11-16.

203 Bachmann (2005) 243. Also: Henham (2007) 460-462.

204 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

205 Refik Hodzic, "Victims and the ICTY"(2010) 8 Journal of International Criminal Justice 128.

206 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

207 For further information on her case, see: ICTY, "The Cases: Biljana Plavsic" <[http://www.icty.org/x/cases/plavsic/cis/en/cis\\_plavsic\\_en.pdf](http://www.icty.org/x/cases/plavsic/cis/en/cis_plavsic_en.pdf)> accessed 8 July 2010.

208 Arzt (2006) 235.

209 Meernik (2005) 284.

unacceptable considering the seriousness of the crimes she was involved in and led some of the interviewees to believe that they would live more comfortably if they had been a war criminal.<sup>210</sup>

Second, some sentences resulting from plea-bargaining were perceived as unfair, as other offenders who did not plead guilty got harsher sentences for less serious crimes. An illustration can be drawn with the Banović case. This former concentration camp guard in Prijedor was charged for crimes against humanity as he participated in five murders and the beating of 25 prisoners. As he pleaded guilty, he was ultimately convicted to 8 years imprisonment.<sup>211</sup> Many people considered this mild sentence as scandalous since other guards lower in the command chain were sentenced to 20 years for less serious crimes and certainly too low with regard to the criminality of the accused.<sup>212</sup>

Also, the feeling of inconsistency in sentencing is reflected in the discrepancy between ICTY and national courts sentencing.<sup>213</sup> The cases of Damir Ivanković and Dražen Erdemović are an example of this inconsistency. Ivanković was a member of the Bosnian Serbian Police Force of Prijedor and charged with Crimes against Humanity for his joint participation in the commission of the forcible transfer of population and murders of hundreds of Croats and Bosniak men in the region of Prijedor.<sup>214</sup> Erdemović, another low-ranking soldier of the Serbian Army, was charged with crimes against humanity for personally shooting about 70 men at the Pilica farm near Srebrenica. While Damir Ivanković was sentenced to 14 years of imprisonment before the Court of Bosnia and Herzegovina, Dražen Erdemović pleaded guilty before the ICTY and received a five-year sentence.<sup>215</sup> Referring to his sentence, a Mother of Srebrenica deplored: *"The Hague Tribunal does not serve justice. Look at that war criminal, Erdemović, who received five years for killing over seventy people. It is unjust that he should receive such a light sentence."*<sup>216</sup>

It is true that when comparing sentences, one shall always keep in mind the potential mitigating or aggravating circumstances which surrounded the crime and influenced the judge in its decision (e.g. the qualification of the crime, the knowledge of the offender on his joint participation into the criminal enterprise,

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210 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010). Also: Interview with Djana Mesic, Inhabitant of Sarajevo during the Siege (Sarajevo 12 April 2010).

211 Human Rights Watch, "Genocide, War Crimes and Crimes Against Humanity : A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia" (Report) (26 July 2006) ISBN 1-56432-339-0, 1.

212 *Prosecutor v Banovic* (Separate Opinion of Judge Patrick Robinson) ICTY IT-02-65/1-S (28 October 2003). See also: Interview with Djana Mesic, Inhabitant of Sarajevo during the Siege (Sarajevo 12 April 2010); Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010). And: Hodzic (2010) 121.

213 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

214 See: *Damir Ivanković* (First Instance Verdict) War Crime Section of the Court of Bosnia and Herzegovina, X-KR-08/549-1 (2 July 2009).

215 For further information on his case, refer to: ICTY, "The Cases: Drazen Erdemovic" <[http://www.icty.org/x/cases/erdemovic/cis/en/cis\\_erdemovic\\_en.pdf](http://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf)> accessed 7 July 2010.

216 IHRLC (2000) 4.

his/her particular situation and cooperation with the Tribunal, etc.).<sup>217</sup> However, *"dissimilar sentences in like cases and lenient penalties for serious violations (...) risk international justice's credibility."*<sup>218</sup> Indeed, for legal professionals, divergences between ICTY sentencing and local criminal law standards give rise to the assumption that the ICTY disrespects their legal tradition and perceives their legal system as *"substandard."*<sup>219</sup> For victims, *"the length of sentence is viewed (...) as a reflection of the gravity of crimes committed against them and thus as a mean of acknowledging their trauma and suffering."*<sup>220</sup> Therefore, the Tribunal shall be prudent of the outcomes of its sentencing as it *"could impair the very reconciliation process it seeks to advance if the rewards they hand out in appreciation for reconciliation become in itself an additional source of bitterness."*<sup>221</sup>

Thus, there is a general perception in the Balkans that the current sentencing practice of the ICTY – aggravated with the practice of plea agreements – does not permit legal certainty. As the cultural belief in the rule of law requires judges to apply the law strictly to the facts<sup>222</sup> and *"to stick to the legal solution"*<sup>223</sup>; local practitioners generally see with mistrust the *"limited and underdeveloped"*<sup>224</sup> sentencing criteria of the Tribunal. Thus, sentences rendered by the ICTY shall be more harmonious and more clearly defined by pre-determined standards.<sup>225</sup> Also, while duly acknowledging the particular circumstances of each individual, prosecutors should seek to ensure a more uniform approach by respecting more clear and established guidelines when negotiating sentences with the offender.<sup>226</sup> This will not only help to mitigate the growing frustrations towards the ICTY sentencing but also help the Tribunal to comply with rule of law principles.<sup>227</sup>

### c. Questioning the Access to Truth

A third aspect that is particularly controversial, considering the needs of post conflict societies, is that plea agreements impede the right of victims to uncover the complete truth. As *"some sentences imposed upon [individuals who pleaded guilty] (...) left unanswered questions as to the whereabouts of missing*

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217 Statement by Florence Hartmann (Personal email correspondence 25 June 2010).

218 Marisa R. Bassett, "Defending International Sentencing: Past Criticism to the Promise of the ICC" (Human Security Report Project, 22 May 2009) <<http://www.wcl.american.edu/hrbrief/16/2bassett.pdf?rd=1>> accessed 7 July 2010, 24.

219 IHRLC (2000) 42.

220 Hodzic (2010) 134.

221 Arzt (2006) 11.

222 IHRLC (2000) 12-14.

223 Ibid 14.

224 Bassett (2009) 23.

225 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010). Also: IHRLC (2000) 12-14.

226 OSCE (2006) 31.

227 For further information on Guilty Pleas, see the work of : Nancy A. Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press, California 2007).

persons,<sup>228</sup> guilty pleas "raise the important issue of whether such a procedural device (...) is best placed to determine 'truth.'"<sup>229</sup>

To some extent, plea-bargaining trades truth for faster punishments.<sup>230</sup> Indeed, as guilty pleas deny courts the possibility to prove evidence; they may also result in the joint determination of a charge between the defence and the prosecution that will not necessarily reflect the reality of the accused criminal responsibility.<sup>231</sup> This aspect is particularly controversial in the case of charge bargaining. This situation "effectively denies the court the opportunity to give full expression to the totality of that criminality through the imposition of a penal sanction which adequately reflects the seriousness of the crime(s) and the culpability of the offender."<sup>232</sup> In some cases, guilty pleas were the visible part of confidential negotiations to determine the extent to which truth shall be revealed.<sup>233</sup> Such a negotiation raised particular controversies in the case of Biljana Plavšić. In Plavšić case, the defendant and the prosecution negotiated reducing the charge of genocide to that of Crimes against Humanity; thereby avoiding the exhibition by the Tribunal that Republika Srpska was founded on a genocide plot.<sup>234</sup>

Accordingly, this practice may be counter-productive to the purpose of the ICTY's creation: revealing the truth through evidence, judging criminals proportionally to their crimes and bringing justice to victims. Instead, the practice of plea-bargaining creates a culture of speedy trial, the perception of a double standard of justice between those accused who pleaded guilty and those who pleaded non guilty, and finally a general distrust within victims communities.<sup>235</sup> Ultimately, allowing guilty pleas without genuine transparency and communication results in a loss of the Tribunal's legitimacy.<sup>236</sup>

### 2.3. Feelings of Double Standards

*"The perceived ethnic bias of the ICTY's actions may enflame rather than cool ethnic antagonisms."*<sup>237</sup>

James Meernik, 2005.

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228 Hodzic (2010) 128.

229 Ibid 11.

230 Interview with Lejla Mamut, Human Rights Coordinator, Advocacy Center Trial, Former researcher at the Research and Documentation Center (Sarajevo 12 April 2010). Also: Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

231 OSCE (2006) 31. On this topic, see also the movie: *Sturm* (The Storm), Dir. Hans-Christian Schmidt with Kerry Fox, Anamaria Marinca and Stephen Dillane, 23/5 Film Produktion (2009)

232 Henham (2007) 460.

233 Interview with Florence Hartmann, Former Journalist covering the Balkans for the French Newspaper Le Monde, Former Spokesperson of Carla Del Ponte from 2001 until 2006 (Sarajevo 12 April 2010).

234 Statement by Florence Hartmann (Personal email correspondence 25 June 2010).

235 Hodzic (2010) 128-131.

236 Henham (2007) 460-462; Arzt (2006) 235.

237 Meernik (2005) 277.

As a result of the oft-criticised victors' justice of the Nuremberg trials, the ICTY tried to ensure ethnic parity as a determinant aspect for its credibility.<sup>238</sup> Therefore, its statute is impartial and the ICTY aims at prosecuting all offenders irrespective of their nationality.<sup>239</sup> Nevertheless, as soon as investigations were launched, the ICTY became the target of critics questioning its impartiality. Croat and Serb communities in particular consider the ICTY as an ethnically biased and political institution. This criticism of double standards of the Tribunal is mainly mirrored by the selectivity of investigation, a *prima facie* unbalanced sentencing and the political perception of the Tribunal.

#### a. Double Standards in the Selectivity of Investigations

*"Selectivity is the greatest problem of international criminal justice."*<sup>240</sup>

Mirjan Damaska, 2009.

Serbs and Croats overwhelmingly distrust the ICTY and doubt its impartiality.<sup>241</sup> While the decision on which crimes shall be investigated lies in the hand of the prosecutor<sup>242</sup>, some interviewees denounce that *"even in the gathering of evidence, the investigations were biased."*<sup>243</sup>

In a survey published 2007 by the Belgrade Centre for Human Rights, 63% of the Serbian citizens polled believed that, in comparison with other ethnic groups, too many Serbs were indicted by the Tribunal.<sup>244</sup> The principle of fairness, i.e. the perception that two persons in a comparable situation have to be treated equally, is missing.<sup>245</sup> A prevailing perception among this community is that the ICTY Prosecutor Office invested more energy, resources and staff in investigating crimes committed *by* Serbs than it did for crimes committed *against* Serbs.<sup>246</sup> For instance, the unwillingness of the prosecutor office to do in-depth investigation on Haradinaj Case or of NATO bombings in Yugoslavia *"created at least a sense of dissatisfaction and bias, which nothing will ever dissipate."*<sup>247</sup>

This raises a tricky question: Shall there be ethnic parity in the investigations? The current dominance of investigations on violence committed by Serbs may be

238 Akhavan (1998) 781.

239 IHRLC (2000) 5. See also: ICTY Statute, art 1.

240 Damaska (2009) 104.

241 Arzt (2006) 233; IHRLC (2000) 42.

242 Clapham (2009) 101.

243 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010)

244 Klarin (2009) 92.

245 Clapham (2009) 101.

246 Diane Orentlicher, *Shrinking The Space for Denial: The Impact of the ICTY in Serbia* (Open Society Institute, New York 2008). Also available at: <<http://www.grotiuscentre.org/files/NWOpenSocietyImpactICTY.pdf>> accessed 8 June 2010, 85.

247 Zappala (2009) 112; Hartmann (2007) 69; Black (2000) 37, 40. Also: Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

justified by the fact that the ICTY's mandate limits its competence *ratione materiae* to the prosecution of "serious violations of international humanitarian law."<sup>248</sup> Thus, facing technical and financial constraints, the prosecutor must be strategic and prioritise the investigation of large-scale violations of international humanitarian law that provide an overall picture of the conflict, rather than isolated war crimes.<sup>249</sup> Yet, the gravest crimes were committed by the Serbian group. "There is simply no known equivalent to the July 1995 Serb massacre of more than 8,000 unarmed Muslim civilians at Srebrenica."<sup>250</sup> Therefore, a perfect ethnic balance in the investigations would risk distorting the truth. While it is neither possible nor hopeful to conduct investigations according to ethnic requirements, the prosecutor shall invest equal energies and efforts in all investigations of violence and alleged crimes that fall within the Tribunal's mandate, irrespectively of the nationality of the accused.

#### b. Double Standards in a prima facie Unbalanced Sentencing

Another point of critique related to double standards regards the Tribunal's sentencing. Croats and Serbs consider themselves as largely discriminated when receiving the heaviest charges and the hardest sentences by the ICTY. In 2008, *Politika*, one of the most respectable newspapers in Serbia, published a survey on the judgements of the ICTY in which the journal denounced the dramatic divergence in the weight of sentences vis-à-vis ethnicity.<sup>251</sup> According to this study, the Tribunal has sentenced in total 947 years of imprisonment, where 45 Serbs received 718 years, 12 Croats 167 years, 5 Muslims 42 years and 2 Kosovo Albanians 19 years.<sup>252</sup> Although the magazine ironically did not indicate the number of victims on each side, the survey became a symbol for Serbians that their group was the "scapegoat" of the ICTY.<sup>253</sup>

One of the interviewees condemned for instance the diverging judgements of a Serb and a Bosniak, Naser Oric and Dragomir Milošević, both having command responsibilities.<sup>254</sup> Naser Oric was the Senior Commander of the Bosnian Muslim Forces in Eastern BiH, including the Srebrenica enclave. He was charged based on his command responsibility for the destruction of a minimum of 50 Serbian villages by his troops and was sentenced to 2 years by the ICTY in 2006 and found not guilty by the appeal chamber in 2008.<sup>255</sup> Dragomir Milošević was the Serbian Commander of the Sarajevo Romanija Corps of the Bosnian Serb Army,

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248 See: ICTY Statute, art 1.

249 Akhavan (1998) 776.

250 Ibid 782.

251 Klarin (2009) 92. See also: S.R-A.P, "Srbima Hiljadu Godina Za Ratne Zločine" *Politika* (Belgrade, 8 July 2010) <<http://www.politika.rs/rubrike/tema-dana/Srbima-hiljadu-godina-zatvora-za-ratne-zlochine.sr.html>> accessed 7 July 2010.

252 Klarin (2009) 92.

253 Interview with Rados Vidakovic, Student in Sociology at the University of Belgrade, exchange student at the University of Graz (Graz 27 April 2010).

254 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

255 For further information on Naser Oric case, see: ICTY, "The Cases: Nacer Oric" <[http://www.icty.org/x/cases/oric/cis/en/cis\\_oric\\_en.pdf](http://www.icty.org/x/cases/oric/cis/en/cis_oric_en.pdf)> accessed 3 June 2010.

which was sniping and shelling over Sarajevo and its civil population. He was charged for crimes against humanity and war crimes, was convicted for terror, murder and inhuman acts and sentenced to 29 years imprisonment by the ICTY.<sup>256</sup> To the interviewee, this *prima facie* difference in the sentencing of two men holding equal command responsibility was everything but a fair and impartial justice.<sup>257</sup>

Yet, here again, considering the nature of the crime committed is necessary to understand the seriousness of a sentence. *"The fact that two persons hold equal command responsibilities does not amount to an equivalent criminality before the Tribunal and does not qualify the gravity of the crime."*<sup>258</sup> Thus, while this difference *prima facie* may seem unfair to the Serb interviewee, one shall always consider the specific circumstances of the case and the particular nature of the crime committed to be able to compare two divergent sentencing. Here, the desire of the interviewee to see two people who held equal command responsibility receive equal sentences reflects his difficulty to face the reality and an attempt towards victimization of his national group rather than a legitimate quest for justice.<sup>259</sup> This general attitude of negationism will be further detailed later on.

While the gravity and the nature of the crimes investigated may differ between two defenders holding equal command responsibility, the establishment of clear standards determining which crime receives which sentence can help to ensure the principle of *nulla poena sine lege*.<sup>260</sup> Here again, better legal certainty and foreseeability of the punishment would help reassure each community of the fairness of the sentences decided by the ICTY.

### c. Double Standards in Politicization of the Tribunal

Through its research, the IHRLC found that *"virtually all participants [in the Serbian and Croat groups] expressed concern that the ICTY was a political organization."*<sup>261</sup> For many Serbs, the ICTY is often considered as nothing more than an occidental creation, the result of an international conspiracy to diabolize their group<sup>262</sup> or *"designed to isolate and to destroy the integrity and sovereignty of a country."*<sup>263</sup> This politicization of the Tribunal could be reflected by the large financial support of the West, in particular of the USA,<sup>264</sup> and by the fact that the

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256 For further information on his case, refer to: ICTY, "The Cases: Dragomir Milosevic" <[http://www.icty.org/x/cases/dragomir\\_milosevic/cis/en/cis\\_milosevic\\_dragomir\\_en.pdf](http://www.icty.org/x/cases/dragomir_milosevic/cis/en/cis_milosevic_dragomir_en.pdf)> accessed 3 June 2010.

257 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

258 Statement by Florence Hartmann (Personal email correspondence 25 June 2010).

259 Statement by Florence Hartmann (Personal email correspondence 25 June 2010).

260 Clapham (2009) 101; IHRLC (2000) 9.

261 IHRLC (2000) 1.

262 Arzt (2006) 233; Klarin (2009) 92; Black (2000) 32. Also: Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

263 Black (2000) 40.

264 Black (2000) 35-39.

ICTY's staff mainly originates from common law countries.<sup>265</sup> Ongoing pressure from the 'Big Powers' on the Tribunal's activities and investigation choices are another sign of its politicization.<sup>266</sup>

The perception of the Tribunal's politicization and double standards was confirmed by the scandal around the trial of Ramush Haradinaj before the ICTY.<sup>267</sup> *"While the verdict drew strong protests in Serbia, the ICTY's treatment of Haradinaj before trial had already provoked deep resentment."*<sup>268</sup> In the end of the 1990s Ramush Haradinaj was the former Commander of the 'Kosovo Liberation Army' and became the Prime Minister of Kosovo. In 2005 he was indicted by the Tribunal for crimes against humanity and war crimes committed against the Serbian population in South Serbia and Kosovo during 1999.<sup>269</sup> First, Haradinaj was admitted a provisional release to prepare his defence from home and, more controversially, was authorized to continue his political activities despite the ICTY's traditional ban on suspects' political activities.<sup>270</sup> Later on, his release raised even more frustrations as his indictment strangely coincided with the "disappearance" of many witnesses willing to testify against him,<sup>271</sup> which ultimately deterred many other witnesses from testifying before the trial chamber. Haradinaj was eventually found not guilty for "lack of evidence". While *"the decision to allow Haradinaj to participate in Kosovo politics harmed the tribunal's attempts to establish a reputation for impartiality"*,<sup>272</sup> the dubious circumstances that surrounded his acquittal confirmed the Serbian perception of a partial and political ICTY.<sup>273</sup> Yet, the recent reopening of his case and the Trial Chamber's denial of Haradinaj motion for provisional release appear as positive measures that take into account the above critics.<sup>274</sup>

To some extent, the politicization of the ICTY is a reality.<sup>275</sup> As long as international criminal justice remains under the influence of international politics, and as long as a general reform of international governance – that would provide international tribunals with sufficient powers to be independent – is not carried

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265 Hartmann (2007) 58-65.

266 Ibid 32-34, 56-72.

267 Interview with Momcilo Arlov, Programme Director, Centre for Civil Society Development in Kosovo Mitrovica (Mitrovica 18 January 2010).

268 Orentlicher (2008) 83.

269 ICTY, "The Cases: Ramush Haradinaj and Others" <[http://www.icty.org/x/cases/haradinaj/cis/en/cis\\_haradinaj\\_al\\_en.pdf](http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf)> accessed 2 June 2010.

270 Orentlicher (2008) 83-84.

271 Interview with Momcilo Arlov, Programme Director, Centre for Civil Society Development in Kosovo Mitrovica (Mitrovica 18 January 2010). See also: Klarin (2009) 90 and Human Rights Watch (2009) 83.

272 Orentlicher (2008) 84.

273 Interview with Momcilo Arlov, Programme Director, Centre for Civil Society Development in Kosovo Mitrovica (Mitrovica 18 January 2010). Also: Interview with Rados Vidakovic, Student in Sociology at the University of Belgrade, exchange student at the University of Graz (Graz 27 April 2010).

274 *Prosecutor v Haradinaj* (Judgement of the Appeal Chamber) ICTY IT-04-84-A (19 July 2010); *Prosecutor v. Haradinaj* (Decision on Ramush Haradinaj's motion for provisional release) ICTY IT -04-84-Bis-PT (10 Septembre 2010).

275 Hartmann (2007) 32.

out, the politicization of international tribunals is unavoidable. The legitimacy of the Tribunal's sentencing will only be preserved if "*politics stop at the Court's doors*"<sup>276</sup>. Thus, the de-politicization of the Tribunal lays on the shoulders of its staff that, conscious of these external pressures, shall remain committed to do its work in a way that it guarantees the objectives of impartiality and fairness.

A last criticism with regard to the procedure before the ICTY concerns the lack of victims' participation.

#### 2.4. Lack of Victims' Participation Throughout the Proceedings

Victims' criticism encompasses mainly four aspects: first, victims have no right to reparation; second, those willing to testify against their perpetrator fear the absence of a genuine protection outside the courtroom; third, the adversarial system increases the difficulty for victims to testify; and fourth, victims feel a general lack of consideration before and after the proceedings.

##### a. International Legal Framework for Victims Protection

After WW II, the role of victims in criminal proceedings became a centre of interest for academics.<sup>277</sup> Victims' support became progressively institutionalized through NGOs and IGOs and their right to compensation became gradually rooted in international law. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power from 1985, although non-legally binding, lays down minimum standards for crime victims' compensation and reflects the general trend of international law to recognize a right of victims to redress.<sup>278</sup> More recently, the UN GA acknowledged through Resolution 60/147 "*the right of victims to equal and effective access to justice, including the provision of legal assistance, adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms.*"<sup>279</sup> This principle also reflects the spirit of Article 7 of the Universal Declaration of Human Rights that "*everyone has the right to an effective remedy*" in case of violations of his or her fundamental rights.<sup>280</sup> Lately, the Roma Statute establishing the International Criminal Court includes various provisions in favour of victims' participation in criminal proceedings, and notably a right to reparation in Article 75.<sup>281</sup> However, even though all those commitments were made at the international level, the proceedings of the ICTY generally lack victims' participation.

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276 Ibid 70.

277 Jorge-Birol (2010) 366.

278 UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34 (29 November 1985) art 5: "*Judicial and administrative mechanisms should be established (...) to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.*"

279 UN GA Resolution on Basic Principles and Guidelines on the right to a Remedy and Reparation for Victim of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 and UN Doc A/RES/60/147 (16 December 2005).

280 UDHR (1948) art 8.

281 Rome Statute (1998) art 68, 75.

## b. The Absence of a Right to Reparation Before the ICTY

*"I lost everything in the war: husband, son, brother...  
Now I can not even return where I used to live."*<sup>282</sup>

Mother of Srebrenica, 2010.

SC Resolution 827 recognized that *"the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek (...) compensation for damages incurred as a result of violations of IHL."*<sup>283</sup> Yet, such compensation cannot be claimed before the Tribunal itself.<sup>284</sup> Instead, victims shall pursue their claims before national courts.<sup>285</sup> Unfortunately, the chances for victims to be compensated adequately in national proceedings are still largely limited by a lack of financial capacities and of due consideration towards victims. For instance, the Bosnian law permitting victims to claim reparation directly in criminal proceedings has yet never been used as judges argue that the admissibility of such claims would deny the accused his right to a speedy trial.<sup>286</sup> Thus, victims are continuously redirected towards civil proceedings. The absence of a genuine access to reparations for victims impedes any positive perspective for their future, retaining them in the painful past.<sup>287</sup>

## c. The Absence of a Real Witness Protection Before the ICTY

*"I could have been killed a thousand of times on my way home from the Tribunal.  
(...) We are just used and then throw away."*<sup>288</sup>

Milan Mandić, 2010.

The lack of witness protection is another issue. Many of the people working with victims acknowledge the fear of those willing to testify before the ICTY to face retaliation at home.<sup>289</sup> Article 22 of the ICTY statute led to the establishment

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282 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

283 UNSC Res 827 (25 May 1993) UN Doc S/RES/827 [7].

284 Henham (2007) 455.

285 Jorge-Birol (2010) 376.

286 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

287 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010). See also the Bosnian movie: *Snijeg* (Snow), Dir. Aida Begic with Zana Marjanovic, Jasna Beri, Sadzida Setic and Vesna Macic, Rohfilm (2008).

288 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

289 Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010).

of the Victims and Witness Section.<sup>290</sup> This sub-office of the ICTY Registry has provided victims with *"logistical, psychological and protective measures necessary to make their experience testifying as safe and comfortable as possible."*<sup>291</sup> Whereas this unit has managed to offer protection, such as anonymity or re-allocation, to some precious witnesses; its general lack of resources has prevented the Office to guarantee a real feeling of security for witnesses across the region, thus dissuading witnesses to come and testify at the Tribunal.<sup>292</sup> The Ramush Haradinaj first trial is an illustration of the potential risk those willing to testify are facing.

The general fear of testifying at the ICTY is then aggravated by the lack of follow-up with witnesses after they testified at trial.<sup>293</sup> As emphasized by an interviewee, *"the support of the Tribunal to witnesses and victims is only lasting from the identification of the witness until the end of their participation. Before and after, nothing."*<sup>294</sup> Also, the insufficient follow up by the Tribunal can deter potential witnesses from testifying in the trials who would fear for their safety once they return home as they cannot rely on the Tribunal's backup. A constant communication between the ICTY and the witnesses would help to create a climate of trust and security that encourages witnesses to come and testify before the chamber.

#### d. The Difficulty of Testifying During Trials

When it is understandably *"very traumatic [for victims] to talk about what happened before the ICTY,"*<sup>295</sup> exponential difficulties rise with cross-examination, and particularly in the case of a self-represented accused.

The common law procedure of cross-examination authorizes the defence and the prosecution to question the witness so as to challenge the validity of his/her testimony at trial. As it requires the victim to face their perpetrators, cross-examination is a particularly tough experience when victims are challenged on what they lived and went through, especially in cases where the accused have opted for self-representation. In theory, it is the responsibility of the Trial Chamber to ensure the protection of the victim throughout the cross examination process.<sup>296</sup> However, judges often fail to facilitate this procedure for witnesses.<sup>297</sup>

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290 ICTY Statute, art 22: *"the International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses"*.

291 ICTY "Witnesses" <[www.icty.org/sid/158](http://www.icty.org/sid/158)> accessed 4 June 2010.

292 Wald (2002) 170.

293 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010). Also emphasized in the movie: *Sturm* (The Storm), Dir. Hans-Christian Schmidt with Kerry Fox, Anamaria Marinca and Stephen Dillane, 23/5 Film Produktion (2009).

294 Interview with Murat Tahirovic, President of the Union of Former Camp Inmates in Bosnia and Herzegovina (Sarajevo 9 April 2010).

295 Ibid.

296 ICTY Rules of Procedure and Evidence, rule 90 [ F].

Milošević's strategy, particularly in the context of Milan Babić's testimony, can be used as an example. Babić was the former President of the Serbian self-declared autonomous region in Croatia. He was indicted for crimes against humanity, and agreed in 2004 to testify against Milošević to mitigate his punishment. Thus, he became a key witness against Milošević. During his cross-examination, Milošević discredited Babić by asking him: "According to you, I was head of every Yugoslav citizen and if someone ran over a pedestrian, it was probably my responsibility?" further saying "This man is an idiot."<sup>298</sup>

Cross-examination also constrains witnesses to answer a set of yes or no questions, preventing them from telling their story in their own words.<sup>299</sup> In particular, it obliges the witness "to select carefully their words during testimonies as what they say may be used against them by the other party to discredit their statements."<sup>300</sup> Besides, victims do not have a right to a legal representative during criminal proceedings, making their testimony even more difficult as most of them have no experience with the common law judicial system.<sup>301</sup> For a while, the ICTY even required witnesses to come repeatedly to give their testimony on one and the same event but with the aim to prove the guilt of a different accused. This was changed recently, however, as the Tribunal took into account complaints from victims associations.<sup>302</sup> These general elements make the experience of cross-examination sometimes re-traumatizing for victims.<sup>303</sup>

#### e. A Lack of Consideration Throughout the Procedure

The last aspect of criticism refers to a general lack of consideration towards victims throughout the procedure. First, victims are generally disappointed by not having the opportunity to speak up before the Tribunal unless they are an expert or a witness of a particular crime.<sup>304</sup> The majority of them remain "frustrated observers on the sidelines, sporadically following trials through the media and word-of-mouth."<sup>305</sup> Also, those victims who were interviewed by the Prosecutor in the course of investigations, but were later on never called back to testify, experience intense frustrations towards the Tribunal's activities, as the

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297 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

298 Youtube, "Milosevitch on Trial" (2007) Produced by Team Production for TV 2 Denmark and posted by Spanonski <[http://www.youtube.com/watch?v=v\\_bU\\_y3fjsQ&feature=PlayList&p=3D94C2FA61AFAA38&playnext\\_from=PL&index=0&playnext=1](http://www.youtube.com/watch?v=v_bU_y3fjsQ&feature=PlayList&p=3D94C2FA61AFAA38&playnext_from=PL&index=0&playnext=1)> accessed 3 April 2010.

299 Jorge-Birol (2010) 372.

300 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

301 Jorge-Birol (2010) 375.

302 Interview with Murat Tahirovic, President of the Union of Former Camp Inmates in Bosnia and Herzegovina (Sarajevo 9 April 2010).

303 Jorge-Birol (2010) 381.

304 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010).

305 Hodzic (2010) 125.

feeling that their story was not "*good enough*" leaves them in a state of perpetual exclusion.<sup>306</sup> Also, while those victims who had the possibility of testifying at the Tribunal may experience a short-term relief, the lack of consideration of the Tribunal in the aftermath of their intervention may produce a great disenchantment, in particular when the verdict rendered is perceived as inadequate.<sup>307</sup>

Also those victims who testified at trial often feel used as an "*object*"<sup>308</sup> as the extent of their participation in the proceedings is limited to the extent that they can contribute to prove the accused guilt.<sup>309</sup> Furthermore, victims are frustrated with the lack of opportunity to express their opinion on the admission of a guilty plea.<sup>310</sup> Even though consultations were sometimes organised with prosecutors, judges who ultimately decide on the admission of a plea do not generally follow the victims' opinions.<sup>311</sup> In particular, victim communities felt deeply offended and humiliated by the disrespect shown by the Office of the Prosecutor which destroyed artefacts found in the mass graves that were considered as not useful any more for the ICTY proceedings. Watches, identity cards and other personal items of disappeared persons were destroyed without consulting the families.<sup>312</sup> Finally, no real communication strategy has ever been seriously applied by the ICTY to explain the procedure to victims, why trials take so long, why the defence has these rights, what are their rights in the process, etc.<sup>313</sup>

The lack of inclusion of victims in the trial proceedings needs to be reflected in a serious way. "*Victims, in post conflict contexts, are discriminated twice: First, when the offence is committed because they are part of this or that community; second, in the post conflict society because they are a victim.*"<sup>314</sup>

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306 Ibid 124.

307 Ibid 125.

308 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010).

309 Henham (2007) 459; Jorge-Birol (2010) 375. Also: Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

310 Jorge-Birol (2010) 375. See also the movie: *Sturm* (The Storm) Dir. Hans-Christian Schmidt with Kerry Fox, Anamaria Marinca and Stephen Dillane, 23/5 Film Produktion (2009).

311 Interview with Stephanie A. Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, Mission to Bosnia and Herzegovina, OSCE (Sarajevo 6 April 2010).

312 Interview with Munira Subasic, President of the Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010); Interview with Florence Hartmann, Former Journalist covering the Balkans for the French Newspaper Le Monde, Former Spokesperson of Carla Del Ponte from 2001 until 2006 (Sarajevo 12 April 2010).

313 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010). See also: Hodzic (2010) 124.

314 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

They feel excluded and abandoned by society,<sup>315</sup> and their exclusion from the judicial process aggravates this second victimization.<sup>316</sup> Large-scale *"narratives of victims are at the heart of future narratives for revenge; as victims are teaching to new generation who never experienced inter-ethnic harmony. (...) We are rising a new generation of soldiers."*<sup>317</sup> To avoid the transfer of victims' frustrations to the future youths of the Balkans, their voices need to be heard with all the respect and attention they deserve.

#### 2.5. Lack of Understanding in the Procedure: the inherent limit of a Common Law Procedure in a Civil Law Region?

In the precedent paragraphs, the limits underlined were due to the lack of understanding of the procedure: strict rules of evidence, potential abuse by the defenders of his procedural rights, controversy of plea-bargaining and its impact on the consistency of sentencing, a feeling of double standards among the different ethnic groups through the selectivity of the investigation and the gravity of the sentences, and finally, a lack of attention to victim communities throughout the proceedings. Many of these points of critique have their roots in a general misunderstanding of the particularities of a common law procedure: e.g. a limited space for victims, the weak position of the judge, cross examination or plea bargaining. *"The legal procedure before the ICTY is not following the traditional judicial procedure before the war."*<sup>318</sup>

Traditionally, the states of the former SFRY were civil law countries, following an inquisitorial procedure in criminal cases. Therefore, it used to be a judge-led system with a judge investigating the truth and proving the guilt of the offender with victims playing a greater role.<sup>319</sup> However, motivated by the desire to have a judge as neutral as possible, the ICTY was established following the adversarial procedure of common law tradition.<sup>320</sup>

This situation might create difficulties of empowerment by the local population over the Tribunal's work and increase the gap between the Tribunal and its constituents. For the people in the former Yugoslavia, the ICTY's rules of procedure are so complex to understand that *"even national lawyers in the countries are in struggle with them,"*<sup>321</sup> leaving its understanding in the hands of

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315 Interview with Murat Tahirovic, President of the Union of Former Camp Inmates in Bosnia and Herzegovina (Sarajevo 9 April 2010). Also: Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010).

316 Hodzic (2010) 134.

317 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

318 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

319 OSCE (2006) 5.

320 IHRLC (2000) 6.

321 Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010).

international lawyers originating from common law countries.<sup>322</sup> By interviewing Bosnian judges and prosecutors, the International Human Rights Law Clinic found that most of the interviewees lacked a clear understanding of the Tribunal rules of procedure and were generally disappointed that common law procedure is applied at the ICTY. Indeed, *"Bosnian judges and prosecutors perceive the choice of a hybrid set of procedures that embody primarily common law as a negative evaluation of the civil law system and a challenge to the precepts of Bosnian legal professionals."*<sup>323</sup> Participants generally regret international staff's disinterest in and/or lack of knowledge of their legal tradition, and perceived the international involvement as a pretentious and *"unwelcome intrusion into their country's legal system."*<sup>324</sup>

Although not all the difficulties raised by the Tribunal's procedure can be associated with the common law procedure, it can still be argued that a Tribunal based upon the local legal culture would have been better understood, thus better accepted by the population.<sup>325</sup> Little systematic research has ever assessed the impact the choice of procedural rules has on how an international tribunal is perceived by population.<sup>326</sup> An inquisitorial system could have better addressed the specific post-conflict situation in the Balkans by leaving more space to victims through less traumatic proceedings (spared from the cross examination practice) and granting greater access to an in-depth investigated truth that cannot be negotiated through plea-bargaining.<sup>327</sup> Thus, applying civil law rather than common law rules might have helped to bring a better narrative over the facts and a better visibility to trials.<sup>328</sup> Finally, the ICTY should have drawn a better balance between international human rights standards and the rules traditionally applied in the Balkans.<sup>329</sup> More systematic efforts to refer to the Balkans' legal traditions would have provided the decisions of the Tribunal with better legal certainty and could have reduced the incoherencies between ICTY and national sentencing, thus conferring the Tribunal a greater legitimacy on the field. Such a context-sensitive approach would greatly contribute *"to enhance cooperation with and decrease resistance to institutions of international criminal justice."*<sup>330</sup>

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322 Hartmann (2007) 61.

323 IHRLC (2000) 42.

324 Ibid 20.

325 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010). And: IHRLC (2000) 20; Harper (2005) 167

326 IHRLC (2000) 6.

327 Henham (2007) 455-456; Hartmann (2007) 127.

328 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

329 While the ICTY regularly tried to refer to the legal traditions in the Former Yugoslavia; it nevertheless does not consider itself as bound by local traditions. See: *Tadić v Prosecutor* (Trial Chamber) ICTY IT-94-1-T (14 July 1997) [9] : *"The practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person."*

330 IHRLC (2000) 38.

Another essential criticism with regard to the ICTY's achievements in the field of reconciliation lays in its lack of outreach strategy, which greatly aggravated frustrations described in the previous paragraphs.

### 3. The Lack of Outreach as an Aggravating Factor

*"Justice must not only be done.  
Justice must be seen to be done."*

Universal Axiom.

To some extent, the ICTY had a great potential to be successful. As seen through its achievements, the Tribunal generally provided a quality justice, with in-depth investigations, independent judges and competent prosecutors. It permitted the conviction of many offenders and built up a certain truth over the conflict. Yet, the wide range of its positive inputs could not be transferred to the region. By failing to ensure its own outreach, the Tribunal left space for nationalistic leaders to distort its message, hence, jeopardizing the potential contribution of its legacy to reconciliation.

#### 3.1. The Lack of a Genuine Outreach Strategy

As emphasized in the introduction, legitimacy of International Tribunals is necessary to contribute to the reconciliation process. However, *"to be seen as legitimate, legal justice must ultimately also be seen as local justice."*<sup>331</sup> Thus, an outreach strategy has to be established to bring the Tribunal closer to the people so that, aware of what is happening in the courtroom, they can feel connected to its work. Unfortunately, the ICTY's outreach has been relatively limited.

While the ICTY claims in its mandate promotes social objectives such as ensuring a lasting peace or restoring reconciliation in the region, in practice it has never set up a genuine outreach strategy in the Balkans<sup>332</sup> and generally lacked contact with its constituents, i.e. those for whom the Tribunal was originally conceived.<sup>333</sup> Instead, the Tribunal left to local actors the task of transferring its legacy to the region without paying attention to the emerging anti-Hague propaganda in the Balkans.<sup>334</sup>

The reasons for the Tribunal's initial absence of outreach in the region are manifold. First, the founders of the ICTY (i.e. SC members) did not believe that the tribunal would be effectively functioning.<sup>335</sup> Its establishment was rather considered as a tool to deter from further atrocities in the Balkans by the threat of prosecutions; offering the warlords an incentive to put down their arms in order to enter peace talks.<sup>336</sup> Thus, the social objectives enshrined in its mandate

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331 Jorge Birol (2009) 382.

332 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

333 IHRLC (2000) 43.

334 Klarin (2009) 90.

335 Hartmann (2007) 30-35.

336 Ibid 32.

amounted to a "*fouere-tout diplomatique*"<sup>337</sup> rather than to a genuine commitment to serve peace. Similarly, the fact that the Security Council never took any resolution outlining how the ICTY shall reach these social goals mirrors the little value that was given to these objectives.<sup>338</sup>

Also, the majority of ICTY's staff has never paid much attention to the achievement of these social objectives. Instead, it was taken for granted that the civil and political society will transfer the outcomes of the tribunal's work to the public.<sup>339</sup> For them, the Tribunal "*shall not engage in politics.*"<sup>340</sup> Thus, its staff generally failed to consider people from the Balkans as their original constituents.<sup>341</sup> The Tribunal restrained the assessment of its success to measurable figures, i.e. number of convicted persons, duration of trials, respect of the completion strategy, etc.<sup>342</sup> Efficiency of justice was assessed instead of the quality of its impact on reconciliation in the field.<sup>343</sup>

Consequently, social objectives were dropped out of the mandate by the practice.<sup>344</sup> The Tribunal has never conducted formal research to evaluate its impact nor has it devoted great energy to create a strong, systematic and well-defined outreach strategy. In practice, the failure to attribute enough attention to outreach has resulted in a lack of knowledge and disempowerment of the people in the former Yugoslavia, thus creating frustration that led to the instrumentalization of the Tribunal's work, jeopardizing its contribution to peace and reconciliation in the region.

### 3.2. The Impact of an Absence of Outreach in the Field

Today in the Balkans, public opinion is still hardly influenced by the actual work of the prosecution and the judges at the ICTY. Most of the information the population receives on the ICTY's work comes from politicians, academics and the cultural elite.<sup>345</sup>

Even though the raw material of the proceedings is published on the ICTY's website and while serious newspaper report objectively about the trials, these

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337 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

338 Bachmann (2005) 228.

339 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

340 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010). Also: Interview with Lejla Coulc, Lawyer, Legal Assistant in the Defence team for Naser Oric and Kasim Dezic, ICTY (Sarajevo 12 April 2010). And: Interview with Alida Vracic, Executive Director of the Think Tank Popolari, Former Case Manager at the Prosecutor Office, War Crime Chamber in Bosnia and Herzegovina (Sarajevo 13 April 2010).

341 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

342 Hodzic (2008) 3.

343 Bachmann (2005) 229.

344 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

345 Klarin (2009) 90.

sources are only accessible to a small part of the population. "Very little [objective information] is reported in the media in a way that is intelligible to ordinary citizens."<sup>346</sup> Equally, many members of the Bosnian judiciary complained that they lacked understanding of the ICTY's rules and activities. Furthermore, they perceived the only sporadic contact with the Tribunal as a sign of disrespect for their status and for their credibility in processing war crimes trials.<sup>347</sup> Most of the contact the ICTY had with the states of the former Yugoslavia was generally reproaches from the side of the Tribunal denouncing the lack of state cooperation. Yet, these repetitive negative remarks contributed to frustrations and the instrumentalization of the institution in the Balkans.<sup>348</sup> While cooperation of member states is necessary, as the tribunal doesn't dispose of police force on its own to orchestrate the transfer of indicted persons or the transmission of evidence, a better emphasis on States' positive demarches would have helped to improve the institution's perception in the region.

Also, as people lacking knowledge of the ICTY feel disempowered and frustrated, they become more sensitive to the discourse of the Tribunal's detractors.<sup>349</sup> Yet, in the direct aftermath of the war, most of the countries of the former SFRY were ruled by individuals formerly involved in war crimes. Therefore, they had no interest in promoting the Tribunal's activities and started to deteriorate its image.<sup>350</sup> Also, the inexperience of the region in an independent judiciary or the long-term brainwash of nationalistic propaganda made it unlikely for local actors to convey an impartial transfer of the ICTY's work locally.<sup>351</sup> Still today, the most accessible source of information for the majority of the population is largely slanted by the anti-Hague propaganda. The Tribunal is generally presented and perceived as a foreign body, with no geographic connection, using foreign languages and an alien legal procedure,<sup>352</sup> caricatured as a political organ, ethnically biased and holding only one version of the truth (particularly from the Croat and Serbian perspectives).<sup>353</sup>

In this context, the media plays an essential role.<sup>354</sup> The reputation of the ICTY and thus, its impact on reconciliation, is highly dependent on its media coverage since media is the essential intermediary in transferring the ICTY's message to the local population.<sup>355</sup> Yet in the Balkans, the media is still an

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346 Akhavan (1998) 794.

347 IHRLC (2000) 36.

348 Ibid 1, 36 .Also: Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010); Interview with Rados Vidakovic, Student in Sociology at the University of Graz, originally from Zrenjanin, Serbia (Graz 27 April 2010).

349 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010). Also: IHRLC (2000) 40.

350 Klarin (2009) 90.

351 Ibid 95.

352 Hodzic (2010) 9.

353 IHRLC (2000) 44-46.

354 Howard Morrison, "Neutral Reporting v Campaigning Journalism" (2009) 7 Journal of International Criminal Justice 108-109.

355 Antonio Cassese, "Selectivity, fairness, and Proper Ways for an International Tribunal to Interact with the Media" (2009) 7 Journal of International Criminal Justice 114.

instrument in the hands of politicians and therefore an essential motor for the anti-Hague propaganda.<sup>356</sup> Media partiality can be witnessed through the coverage of ICTY trials within each community where journalists tend to give more voice to their accused rather than to their victims.<sup>357</sup> The media coverage of the parallel trials of the Serbian radical leader Vojoslav Šešelj and of three Croat commanders, who directed Operation Storm, is a good example. Although the Croat operation was considered as the greatest ethnic cleansing against Serbs in History, the Serbian RTS Public Service TV preferred to broadcast the Šešelj trial every evening on Channel 2. Similarly, on the Croat side, no daily broadcast was done of Šešelj trial, whereas daily reports were done of the "Operation Storm" trial.<sup>358</sup> Perhaps only 10% of the message the Tribunal wants to convey to the region is transferred by local media.<sup>359</sup>

Yet, *"there is no point in holding trials unless they are fully and well reported."*<sup>360</sup> In particular with regard to reconciliation, the absence of an objective reporting on the ICTY's trials is counterproductive to the Tribunal's work and limits its positive impact on the field.<sup>361</sup> While the best outreach strategy cannot totally combat the heavy political propaganda going on in the Balkans,<sup>362</sup> it may decrease frustrations relating to the Tribunal's work by providing a direct and impartial source of information to the population. Also, the hermetic activity of the tribunal aggravates an impression of distance between The Hague and its constituencies in the Balkans leads to further frustrations.<sup>363</sup> These frustrations could have been partly avoided through a better outreach strategy. For instance, the lack of understanding of the rules of procedure due to the cultural shock of a common law system in a civil law region could have been mitigated with a genuine communication strategy of the Tribunal.<sup>364</sup> Criticisms that emerged on the field need to be better addressed if the ICTY wants to effectively contribute to reconciliation in the region.<sup>365</sup>

Thus, the ICTY shall generally be more transparent and communicate efficiently to local people on its aims, objectives, reasons for judicial selections, priorities of indictment, reasoning in the sentencing, rules of procedure, etc.<sup>366</sup> Also, outreach strategy may encompass enhanced cooperation with local media<sup>367</sup>

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356 Klarin (2009) 89; Akhavan (1998) 794.

357 Klarin (2009) 94.

358 Ibid 94-95.

359 Akhavan (1998) 741.

360 Morrison (2009) 109.

361 Akhavan (1998) 793.

362 Klarin (2009) 96. Also: Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

363 Hodzic (2010) 9.

364 Interview with Alida Vracic, Executive Director of the Think Tank Populari, Former Case Manager at the Prosecutor Office, War Crime Chamber in Bosnia and Herzegovina (Sarajevo 13 April 2010).

365 Hodzic (2010) 10.

366 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010).

367 Cassese (2009) 112.

or greater interaction with legal professionals.<sup>368</sup> The institutionalization of regular contacts between the ICTY and these actors may turn the latter into local supporters of the ICTY's inputs.

As the ICTY became aware of the need for better outreach in 1999, it developed some initiatives to address the situation.<sup>369</sup> For instance, it established "Outreach Offices" across the Former Yugoslavia, which developed local outreach strategies. For example, as the population near Prijedor was still denying the existence of the Omarska concentration camp (even though it was demonstrated in the Banović case<sup>370</sup>) the Outreach Office of the region organized conferences with political representatives, roundtables, and broadcasted documentaries, to ensure the transfer of the ICTY work on the field.<sup>371</sup> Today the local population in Prijedor may no longer hide its alleged absence of knowledge behind a lack of information. Seeing as these outreach initiatives set up after 2000 were rather "*disorganised and spontaneous*"<sup>372</sup> they could have been better organized, widespread and institutionalized in the Tribunal's functioning, so that the Tribunal's work could be effectively transferred to the population and so that the Tribunal would genuinely commit to its social objectives.

Once people are exposed to abundant information, the ongoing denial of local population is no longer a question of lack of awareness but illustrates "*a widespread phenomenon across the former Yugoslavia, where crimes committed against the members of 'the other side' are simply not accepted by the group from which perpetrators came despite abundant evidence to the contrary.*"<sup>373</sup> Beyond the lack of outreach, this ongoing phenomenon in the former SFRY reflects the limits of the ICTY focus on individual criminal responsibility to address aspects of collective violence.

#### *4. The Limits of Individual Criminal Responsibility to Address Collective Violence in the Balkans*

Although individual criminal trials are considered to be the most pertinent form of justice to achieve objectives of social repair, in the Balkans they witnessed developments on the field that jeopardize reconciliation. In the last few years, widespread denial of the population and collective victimization of each group became the general rhetoric. Although this situation was not the aim of war crimes trials, it might be a side effect of the concept of individual criminal responsibility which fails to address the reality of collective violence.

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368 IHRLC (2000) 47-50.

369 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010).

370 See for further information: ICTY, "The Cases: Banovic, Omarska and Keraterm Camps" <[www.icty.org/x/cases/banovic/cis/en/cis\\_banovic\\_en.pdf](http://www.icty.org/x/cases/banovic/cis/en/cis_banovic_en.pdf)> accessed 1 June 2010, 3.

371 Hodzic (2010) 6-7.

372 Ibid.

373 Ibid 131.

#### 4.1. The Reasons for Individual Criminal Responsibility

*"Individual criminal trials (...) have become the benchmark of accountability against which all other forms of reckoning [e.g. truth and reconciliation commissions] must be judged."*<sup>374</sup> The concept of individual criminal responsibility would help to alleviate collective guilt.<sup>375</sup> Based on the assumption that holding individuals accountable for their acts will help to deter leaders from abusing their powers under the umbrella of immunity,<sup>376</sup> individual accountability would also prevent that a whole nation or ethnic group is held accountable for the acts of a few<sup>377</sup> thus, avoiding the emergence of an historical trauma that might feed the group's desire for revenge.<sup>378</sup> To that end, the ICTY was established to focus on individual accountability and prevent the stigmatisation of a particular ethnic group. When no empirical studies have ever been seriously done to assess the consistency of this form of trials for reconciliation,<sup>379</sup> in the Balkans they witnessed the development of a destructive rhetoric of plural truths, denial and victimization. *"The rhetoric and symbolism of international sentencing discourse (...) seemed strangely disconnected from the reality (...) in the former Federal Republic of Yugoslavia."*<sup>380</sup>

#### 4.2. A General Trend in the Balkans: Plural Truths, Denial and Victimization.

Despite good intentions behind war crimes trials, another form of responsibility developed outside the courtroom that finally contradicts the initial purpose of individual criminal responsibility and is highly destructive to reconciliation.<sup>381</sup>

##### a. Existence of a Plural Truth

A truth telling catharsis is essential for the process of reconciliation.<sup>382</sup> Knowing what happened permits challenging existing negationism, denouncing the institutions behind ethnic cleansing, reflecting on the collective reality of violence and finally exposing the suffering of victims so that empathy for the members of another ethnic group can emerge.<sup>383</sup> Yet, in the Balkans, *"everyone has his own truth."*<sup>384</sup> *"What you believe to be true depends in some measure on*

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374 Fletcher and Weinstein (2002) 582.

375 Akhavan (1998) 794.

376 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

377 IHRLC (2000) 5, 26-32. See also: Fletcher and Weinstein (2002) 598; Audergon (2005) 31.

378 Audergon (2005) 3, 25.

379 Meernik (2005) 273.

380 Henham (2007) 325.

381 Statement by Florence Hartmann (Personal email correspondence 17 May 2010).

382 Audergon (2005) 37.

383 Akhavan (1998) 771.

384 Interview with Samira Krehic, Senior Program Manager, Western Balkans Political Unit, International Commission on Missing Persons (Sarajevo 8 April 2010). Opinion shared by all my interviewees. See also: Bjelakovic (2002) 160.

*who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not.*"<sup>385</sup>

As underlined in the IHRLC report, *"the theme of national identity, citizenship and allegiance was evident in the interviews.*"<sup>386</sup> Thus, as national identity largely influenced the participants' positions, controversies among ethnic groups would arise predominantly when discussions concerned the war.<sup>387</sup> Besides the disputes over the qualification of the conflict<sup>388</sup>, great divergences rise on the question of genocide.<sup>389</sup> For Bosniaks, genocide undoubtedly was committed against their community. Croats generally consider that genocide occurred on each side conflict, as everyone had to play *"the Serbian rules,"* where Serbs either doubt its occurrence or reject it totally. The perception of the ICTY also varies from one group to another. As a principle, support for the ICTY among national groups is inversely proportional to the percentage of accused belonging to the ethnic group.<sup>390</sup> This absence of a common truth with regard to the war is problematic as it impedes possible dialogues between the different ethnic groups, thus creating a situation obstructive to reconciliation.<sup>391</sup>

#### b. Ongoing denial

In the Balkans, each ethnic group continuously denies crimes committed against the other community. In particular, Serbs and Croats tend to deny their responsibility in the occurrence of international crimes, even though these two groups were considered as aggressors by the International Community. As a 2006 survey underlined, although 75% of Serbs interrogated had heard of the Srebrenica massacre, only 50% believed that it had happened and 43% considered it as a war crime. Also, 52% of the Serb interviewees were aware of the massacre of Croats by Serbs near Vukovar, of which 28% believed that it really occurred and only 21% believed it constituted a war crime. However, between 75 to 90% of the Serbs interviewed had heard of Croat violence against Serbian population during Operation Storm, of which 100% believed it happened and 100% qualified it as a war crime.<sup>392</sup> Similar findings exist within other communities. Also, the expulsion of the Muslim population in some regions of Bosnia is still considered by some members of the Serbian community as a voluntary departure: *"some of them were just gone when the war happened. Many abandoned these areas. Some citizens from this area left."*<sup>393</sup> When questioned about the occurrence of genocide, many Serbs answered: *"I am not*

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385 Akhavan (1998) 770.

386 IHRLC (2000) 21.

387 Ibid 44.

388 Ibid 24-33.

389 Ibid 44.

390 Klarin (2009) 92. See also: IHRLC (2000) 42.

391 Bjelakovic (2002) 166.

392 2006 survey on the knowledge of the Serbian population over ICTY findings. For further information, see: Klarin (2009) 93-94.

393 IHRLC (2000) 27.

aware of those facts" or "I do not have any evidence that it occurred."<sup>394</sup> Beyond a lack of knowledge, these figures clearly reflect the unwillingness of the population to admit violence committed by its own ethnic group.<sup>395</sup>

### c. Victimization and Rejection of Responsibility

The general denial of war crimes and crimes against humanity is complemented by a widespread rhetoric of victimization. *"None of the groups would want to start a state-building era with a heavy stigma of collective responsibility for war crimes or with the economical burden of paying for war reparation."*<sup>396</sup> Thus, by rejecting the responsibility of their groups and leaders for war crimes, each community victimises itself, affirming constantly its group's collective innocence.<sup>397</sup> ICTY's sentencing is exploited by communities as a tool to solidify a common understanding that their ethnic group was misunderstood or unacknowledged as a victim during the conflict.<sup>398</sup> *"Rather than a consensus about past atrocities, (...) trials are viewed primarily to confer legitimacy on the status of the respondent's national group as victims."*<sup>399</sup> Thus, despite the Tribunal's attempts not to collectivize the guilt through individual accountability, each prosecution is still perceived in the context of ethnic belonging.<sup>400</sup> For instance, dubious documentaries available on the internet claim that Slobodan Milošević was innocent. As the author described the video, *"the media demonized the Serbs and Milošević and said they were committing genocide. (...) No genocide was committed, there were no concentration camps (...) This documentary shows that Slobodan Milošević was falsely accused."*<sup>401</sup> Eventually, the constant victimization of each national group promoted by politicians and pedagogues in the region is a sign that there is yet no qualitative peace in the Balkans.<sup>402</sup> War criminals are hidden from the Tribunal and praised as national heroes, which feed tensions between the different communities.<sup>403</sup> Victims from the other community are

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394 IHRLC (2000) 27. Also : Rados Vidakovic, Student in Sociology at the University of Belgrade, exchange student at the University of Graz (Graz 27 April 2010).

395 Hodzic (2010) 130.

396 Bjelakovic (2002) 165.

397 IHRLC (2000) 28.

398 Fletcher and Weinstein (2002) 601.

399 Fletcher and Weinstein (2002) 589. Also: IHRLC (2000) 45.

400 Akhavan (1998) 169; Fletcher and Weinstein (2002) 589. Perspective also shared during the interviews by Gorana Mlinarevic and Melina Sadikovic, ERMA Program (Sarajevo 8 April 2010)

401 Youtube, "SHOCKING: Slobodan Milosevic was INNOCENT!"(2009) Tegenlicht production and posted by Romanianjustice <<http://www.youtube.com/watch?v=7FusfOqCtqc>> accessed 15 June 2010.

402 Interviews with Gorana Mlinarevic and Melina Sadikovic, ERMA Program (Sarajevo 8 April 2010). See also: Bjelakovic (2002) 165.

403 Interview with Milan Mandić, President of the Association of Missing Persons for Sarajevo Romania Region, Republika Srpska and Bosnia and Herzegovina (Sarajevo 12 April 2010à. Also: Interview with Pr. Macic Becir, Dr. in Political Science, Institute for the Researches of Crimes against Humanity and International Law, University of Sarajevo (Sarajevo 9 April 2010); Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

perceived as obstacles.<sup>404</sup> *"While the war was first economic, the ethnic war started in the post conflict context."*<sup>405</sup> This ongoing myth of collective innocence relentlessly drives away prospects of reconciliation in the region.<sup>406</sup>

As the ICTY witnessed the emergence of a plural truth, widespread negationism and community victimization, *"the widely-held belief that war crimes trials – which individualize accountability – contribute to social reconstruction may reflect more of an aspiration than a reality."*<sup>407</sup> Instead, these developments could be an involuntary side effect of the limits of individual criminal responsibility to address the reality of collective violence.<sup>408</sup>

#### 4.3. Side Effects of Individual Criminal Responsibility?

In a post conflict context, reflection over the *"collective nature of the legacy of mass violence"* is necessary for reconciliation to occur.<sup>409</sup> People have to be aware of the institutionalization behind the bloodshed and must reflect on their own responsibility in facilitating the violence.<sup>410</sup> Yet, while it has been the benchmark of international criminal justice development, the concept of individual criminal responsibility applied before the ICTY generally failed first to highlight the state and its administration's responsibility in the criminal enterprise, and second, to question the collective involvement of the population in the violence.

##### a. The Failure of Individual Criminal Responsibility to Condemn State's Institutionalization of Violence and the Ideology Behind

*«Il ne faut pas réhabiliter son passé, il faut mettre en échec l'idéologie qui a engendré les violences de masse. Ici, personne ne l'a remis en cause!»*<sup>411</sup>

Florence Hartmann, 2010.

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404 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

405 Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010).

406 Hodzic (2010) 135.

407 IHRLC (2000) 45.

408 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010). Also: Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

409 Fletcher and Weinstein (2002) 581; Akhavan (1998) 781-784.

410 Audergon (2005) 60.

411 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

It is the current strategy in the Balkans to create winners out of Warlords.<sup>412</sup> However, reconciliation requires confronting one's past and condemning those leaders who instigated abuses in one's name. To date, this is still missing in the former SFRY.

No pogrom occurs spontaneously. Bloodsheds, even in case of ethnic conflicts or civil wars, are the result of a systematic and carefully coordinated large-scale strategy of nationalistic political or military leaders.<sup>413</sup> The way for inter-ethnic hatred has to be paved through systematic indoctrination and disinformation in order to disconnect people from their moral values and lead them into committing crimes.<sup>414</sup> *"Perhaps 5% of those who participated in the violence during the outbreak of Yugoslavia were sadists or mentally disturbed. 95% were perfectly normal citizens."*<sup>415</sup> *"[W]hat has been done in BiH could not have been just committed by group of individuals going crazy. It needed to have state institutions behind it."*<sup>416</sup> In the case of the Former Yugoslavia, deliberate and calculated manipulation of historical fears and community trauma was used by political leaders to incite ethnic hatred at the local level.<sup>417</sup> Also, in Serbia, mobilization was particularly well organized and young people were forced to go fighting resulting in many leaving the country to escape being obliged to raise their arms against their neighbours.<sup>418</sup> Accordingly, the culpability of those national leaders who paved the way for the outbreak of violence must be clearly addressed.<sup>419</sup> Even though the Nuremberg trials were criticized for their biased and expeditious justice, they managed to condemn the highest rank officials of the Nazi regime, and to denounce the ideology, the system and the criminal plot behind it.<sup>420</sup>

The ICTY did exert some effort to take into account the responsibility of political institutions that incited violence and to denounce the ideological plan behind atrocities. Somehow, the use of the concepts of command responsibility and Joint Criminal Enterprise helped raise awareness of the political plot that preceded the violence. First, the concept of command responsibility permits to hold a commandant responsible for the acts committed by its subordinates.<sup>421</sup>

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412 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

413 Akhavan (2001) 10.

414 Akhavan (1998) 755.

415 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

416 Akhavan (1998) 796.

417 Akhavan (2001)10; Audergon (2005) 9.

418 Akhavan (1998) 757. Also: Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

419 Akhavan (1998) 796.

420 Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

421 ICTY Statute, art 7 [3]: *the fact that any of the acts (...) was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take*

Yet, to be held responsible under this provision, the commander first must have had a *de facto* superior authority over those committing the crimes. And, second, must have known or ought to have known that the crimes were about to be committed. Finally, Article 7 limits commanders to an obligation of means "*to take the necessary and reasonable measures*" to avoid or redress violations of international humanitarian law; not of results.

Also, those whose influence inspired inter-ethnic violence but who did not directly or physically participate in the crime (e.g. media or political leaders) could hardly be held accountable under the concept of command responsibility.<sup>422</sup> To address this failure, the ICTY adopted in 2001 the concept of Joint Criminal Enterprise, which is comparable to the Conspiracy Doctrine at the Nuremberg trials. By acknowledging the role of political leaders in inciting and planning the crimes committed by others through an institutionalized criminal strategy,<sup>423</sup> the concept of JCE addressed the challenge of "*systemic crimes*"<sup>424</sup> and was "*indispensable to establish the link between the architects and the killing fields.*"<sup>425</sup> The JCE concept was used by the prosecution to charge Slobodan Milošević for the violations committed by Bosnian Serbs in Bosnia.<sup>426</sup> Thus, the Milošević case was a great opportunity to highlight the involvement of the Serbian administration behind the violence. Furthermore, it could have helped disclose and denounce the general ideology behind the killings.<sup>427</sup>

While a lack of will, due to time and political constraints, generally deterred members of the investigation team of the ICTY to investigate the responsibility of Milošević for exactions committed by Bosnian Serbs in BiH, particularly on the Sarajevo Siege and Srebrenica genocide<sup>428</sup>; the persistence of Carla Del Ponte led the Trial Chamber to confirm the indictment for genocide against Milošević in its 2004 preliminary judgment.<sup>429</sup> However, the death of the defender on the 11 March 2006 left the work of the tribunal unfinished. The absence of a judgment was a missed occasion to reveal a general truth over the conflict and to fight negationism in the Balkans.<sup>430</sup> Later on, the Tribunal's prosecution preferred to

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*the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*"

422 Cencich (2009) 183.

423 Ibid 182-188. Also: Statement by Florence Hartmann (Personal email correspondence 17 May 2010).

424 Statement by Florence Hartmann (Personal email correspondence 17 May 2010).

425 Statement by Florence Hartmann (Personal email correspondence 25 June 2010).

426 Hartmann (2007) 73-162.

427 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010); Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

428 Hartmann (2007) 84-112.

429 *Prosecutor v Milošević* (Decision on Motion for Judgment of Acquittal) ICTY IT-02-54-T (16 June 2004) [13] no 7: "*in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, (...) on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.*"

430 Hartmann (2007) 143; Interview with Gorana Mlinarevic, Master Degree on Gender Studies, Researcher on the experience of Women Victims before the ICTY, Centre for Interdisciplinary Postgraduate Studies of the University of Sarajevo (Sarajevo 8 April 2010) and interview with

emphasize the direct responsibility of Bosnian Serbs leaders rather than to condemn the role of Milošević's administration in the large-scale atrocities that torn the region. In 2007, Momčilo Perišić was tried before the ICTY. Former commander of the Serbian Army and Mladić's *de jure* superior; he was the right arm of Milošević.<sup>431</sup> The charge of "genocide" was dropped from his indictment despite well-established evidence that Perišić knew and facilitated genocide in Srebrenica.<sup>432</sup> The recent conviction of seven Bosnian Serb military and police officials for their involvement in a range of crimes in relation to the fall of Srebrenica and Žepa enclaves in 1995 is another example of this trend.<sup>433</sup>

Finally, the ICTY sporadically tried to highlight the broader context of the crimes.<sup>434</sup> For instance, in the Tadić case, the Court described in an exhaustive way the historical background of the conflict, starting from the Ottoman Occupation until the Dissolution of the Former Yugoslavia.<sup>435</sup> The Chamber took into consideration the fact that bitter memories of the Ottoman occupation and of WW II fed the Serbian desire of a Greater Serbia. When describing the war, the chamber also noted the endemic political propaganda and the state control of media that facilitated violence and contributed to the commission of crimes.<sup>436</sup> Yet, the lack of outreach of these decisions and their instrumentalization on the field limited the Tribunal's efforts to bring a broader picture of the context of violence.

By predominantly focusing on the individual accountability of the offender for this or that particular crime – and by searching the truth only to the extent of establishing the person's guilt – the ICTY generally failed to highlight the heavy institution of the war, and to condemn the leaders' ideology behind the crimes committed.<sup>437</sup> As a consequence, today in the Balkans, *"while people might condemn the means used during the war; they do not condemn the ideology itself and the motives that lead to the war."*<sup>438</sup> This unfortunately enhances the risk for future conflicts in the region. As long as individuals do not acknowledge their state's involvement in the criminal enterprise and the reality of the

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Munira Subasic, President, Association Mothers of Srebrenica and Zepa Enclaves (Sarajevo 13 April 2010).

431 See for further information on this case: ICTY, "The Cases: Momčilo Perišić" <[http://www.icty.org/x/cases/perisic/cis/en/cis\\_perisic\\_en.pdf](http://www.icty.org/x/cases/perisic/cis/en/cis_perisic_en.pdf)> accessed 7 July 2010

432 Hartmann (2007) 156-157.

433 ICTY Press Release "Seven Senior Bosnian Serb Officials Convicted of Srebrenica Crimes" (10 June 2010) <<http://www.icty.org/sid/10415>> accessed 7 July 2010.

434 Akhavan (1998) 785.

435 *Prosecutor v Tadić* (Judgement) ICTY IT 94-1-T (14 July 1997) [55]-[69].

436 Akhavan (1998) 788. Also: *Prosecutor v Tadić* (Judgement) ICTY IT 94-1-T (14 July 1997) [88]-[96].

437 Interview with Florence Hartmann, journalist and author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's spokesperson from 2001 until 2006 (Sarajevo 12 April 2010); Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

438 Interview with Florence Hartmann, journalist and author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's spokesperson from 2001 until 2006 (Sarajevo 12 April 2010).

institutionalized administration behind the atrocities committed, they will be more likely to follow the national myth set up by their national leaders.

Another dimension of collective violence that the Tribunal failed to address through its focus on individual criminal responsibility lays in the individual involvement in collective violence.

#### b. The Failure of Individual Criminal Responsibility to Reflect the Collective Dimension of Violence

*"We are all active players in violent conflicts."*<sup>439</sup> Indeed, forces of war may not operate outside of people, and individuals are generally swept into group violence without having a particular intent to assist genocide. Various social psychology and genocide studies reveal that group members behave in a way that is unique to groups, also known as groupthink.<sup>440</sup> As illustrated with the Kitty Genovese phenomenon, individuals acting in a group situation are less likely to have altruistic behaviours than if they were isolated.<sup>441</sup> Conversely, individuals are much more likely to breach normative behaviour in a crowd than when acting isolated. *"Whoever be the individual that compose it (...) the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think and act in a manner quite different from that in which each individual could think and act if in a state of isolation."*<sup>442</sup> Experimentation by Stanley Milgram particularly emphasizes how a diffusion of responsibility, the power of authority and the presence of allies may encourage normal individuals to act violently.<sup>443</sup> These various examples demonstrate how social settings and group processes influence individual's behaviours in the midst of collective violence.

Yet, by focusing on the individual accountability of actual perpetrators, the ICTY generally failed to address the communal engagement behind collective violence. Indeed, the concept individual criminal responsibility *"leaves no room for social processes that collectively influenced thinking and behaviour"*<sup>444</sup> during a conflict. Consequently, bystanders, who without taking direct part in hostilities, benefited from it or facilitated the violence through their passivity, are left aside.<sup>445</sup> *"The vast majority of those who participated in a less overly violent manner are able to reframe their action in ways that excuse their activity."*<sup>446</sup> While social settings may incite violence in individuals, the social context is often used as an excuse by individuals not to take personal responsibility for their action or omission in the time of violence.<sup>447</sup> Individual criminal trials leave a space for each community to create *"a myth of collective innocence."*<sup>448</sup>

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439 Audergon (2005) 46-50.

440 Fletcher and Weinstein (2002) 605.

441 Ibid 613.

442 Gustave Le Bon, *The Crowd: a Study of the Popular Mind* (Dover Publications, NY 1960) 23

443 Fletcher and Weinstein (2002) 608.

444 Ibid 614.

445 Ibid 625.

446 Ibid 605.

447 Ibid 614.

448 Ibid 580.

Yet, the acknowledgment of these collective dimensions of violence is a vital step for reconciliation.<sup>449</sup> In a post war context, everyone shall take moral responsibility for their own involvement and for the involvement of their own community.<sup>450</sup> As long as this is not achieved, individuals will continuously consider their own community as innocent while shifting the responsibility on others. Thus, the recognition of a state's responsibility in institutionalizing violence before a courtroom can encourage individuals to acknowledge their own responsibility outside of a court. *"As long as people do not perceive a sense of shared responsibility for the action of their government, they will take less personal responsibility for reconciliation."*<sup>451</sup> Once everyone recognizes the role of their own leaders in the suffering of the other, room is created for empathy to occur and for inter-community trust to grow. But *"if this acknowledgement does not occur, history may be rewritten."*<sup>452</sup>

As underlined throughout this second chapter, the mere settlement of the ICTY in the Balkans has not in itself guaranteed a positive impact on local peace and reconciliation. Where legitimacy of international criminal tribunals is an essential aspect to value their contribution to peace processes, the ICTY raised more frustration and negative developments than satisfaction among the local population. Its results highlights one idea: that the quality of the justice given is an essential factor to determine social achievements. What kind of international justice is needed to successfully achieve reconciliation? To ask this question is both legitimate and fundamental.<sup>453</sup> Indeed, international criminal justice shall not exist for the sole sake of its theoretical results, without valuing the quality and legitimacy of the justice it provides in practice. Learning from ICTY's mistakes, the following chapter will offer some guidelines on how international criminal justice may better achieve these social objectives locally.

### **CHAPTER THREE. LESSONS LEARNED FROM THE ICTY AND SUGGESTIONS FOR THE DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE**

While the current state of International Criminal Justice still reflects limits to successfully fulfil the needs of local populations in post-conflict societies, many authors such as Findlay, Henham or Tallgren, struggle for a reform of international criminal justice to better achieve the goals of peace and reconciliation in former torn communities. If international criminal can and shall pursue social objectives;

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449 Audergon (2005) 46; Fletcher and Weinstein (2002) 605-607; Interview with Florence Hartmann, Journalist and Author, who covered the Balkans in the 1990's for the French Newspaper Le Monde, and became Carla Del Ponte's Spokesperson from 2001 until 2006 (Sarajevo 12 April 2010). Also: Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

450 Audergon (2005) 50.

451 Fletcher and Weinstein (2002) 603.

452 Ibid 612.

453 Ayat (2007) 394.

it must undergo fundamental changes in order to meet the expectations of local populations in post-conflict societies.<sup>454</sup>

### I. The Need for a Justice Culturally Adapted.

Justice as provided by the ICC or by International Tribunals so far is essentially based on a retributive approach. As underlined earlier, this form of justice aims primarily at prosecuting and punishing, and has its emphasis on the individual responsibility of the perpetrator. While individual criminal trials appeared as the best opportunity to inspire deterrence and simultaneously achieve objectives of reconciliation; sentences appeared as the most suitable *"imposed normative system of social control."*<sup>455</sup> The occurrence of intolerable large-scale violence has led the international community to settle international criminal trials as an answer self-evident.

Yet, in practice, law and justice are culturally relative. *"The value given to punishment may vary and depends on the view that the society has of the criminal justice system."*<sup>456</sup> Whereas judicial accountability and retributive justice are taken for granted in the Western European legal culture, these concepts may not fit the social reality of crimes elsewhere. Therefore, the cultural relativity of law and punishment *"renders the concept of universal justice problematic."*<sup>457</sup> Unfortunately, international criminal justice has theorised the effect of international sentencing without confronting it to the practice.<sup>458</sup> The myth of retributive justice's inputs *"developed (...) with no empirical data to substantiate the purported benefits of international trials."*<sup>459</sup> When setting up international war trials, little attention was given to legal anthropological studies that would have helped to assess the role of law in the different cultures.<sup>460</sup> Therefore, local expectations for post-conflict reconstruction were barely taken into account. Eventually, there is a great gap between the international level establishing International Courts or Tribunals and the local level directly receiving the punishments.<sup>461</sup>

Accordingly, transitional justice strategies decided by the United Nations shall be aware of legal cultural disparity of the place where it intervenes and not try to impose foreign values.<sup>462</sup> *"Working towards reconciliation and peace through International Criminal Justice (...) can only begin once there exists more profound contextual knowledge about the relativity of justice."*<sup>463</sup> As for the conclusions on

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454 Henham (2007) 461.

455 Ibid 452.

456 Jorge-Birol (2010) 369.

457 Henham (2007) 452.

458 Ibid. Also: Immi Tallgren "The Sensibility and Sense of International Criminal Law" (2002) 13 European Journal of International Law 562-564.

459 Fletcher and Weinstein (2002) 584.

460 Ibid.

461 Henham (2007) 452.

462 Harper (2005) 167.

463 Henham (2007) 464-465.

the ICTY<sup>464</sup>, achievements of peace and reconciliation might be better reached through a model and procedure that fits the legal traditions of the place concerned.

## II. The Need of a Justice more Inclusive of Victims

Also, another critique of international criminal justice in its current appearance is therefore the lack of victim's participation. The emphasis put on the offender through the retributive system does not leave much space for victim communities to be heard in criminal proceedings.

Yet, as emphasized in the first and second chapter, victims are essential actors and post conflict reconciliation "*may only be achieved once victims are acknowledged.*"<sup>465</sup> Their needs in proceedings are acknowledgement and support, the establishment of control over their lives, the opportunity to tell their story in their own way and the need of a limited exposure of their trauma. Yet, these needs often conflict with the Court's needs in a retributive system based on an adversarial approach: i.e. to publicly challenge victims' credibility through cross-examination, to impose on them a complex set of rules and procedures, and to require responses to a set of yes or no questions that breaks down any personal construction of their story. Finally, the court may require victims to directly confront their former perpetrator, which might revive their trauma without providing them with the appropriate support needed. This current logic of International Courts may lead, instead of bringing relief of victims, to their re-traumatization and eventually "*postpones or even jeopardizes a perspective of restorative justice*"<sup>466</sup> that is essential to reconciliation and societal peace. Therefore, international criminal justice developments shall always bear in mind the importance of a greater inclusion of victims in their proceedings.

## III. Outreach as a Priority

When establishing international justice, "*the international community has never chosen to invest any significant resources*" to contradict states' propaganda.<sup>467</sup> However, it is cost ineffective to establish international institutions as a mean for peace if later on the media locally jeopardizes their message.<sup>468</sup> "*Indoctrination and misinformation are vital ingredients of incitement to ethnic tensions and violence;*"<sup>469</sup> Thus, leaving a space that permits such indoctrination jeopardizes peace and reconciliation. Outreach is therefore necessary to fill the gap that permits international tribunal's instrumentalization. Also, the legitimacy of the

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464 Refer to Chapter Two, Part II [B] 2 no 2.5.

465 Jorge-Birol (2010) 379.

466 Ibid 381.

467 Akhavan (2001) 795.

468 Ibid.

469 Akhavan (1998) 795.

Tribunal rests on its ability to demonstrate to the local population that it acted on their behalf. As the local population's empowerment over an International Tribunal's work is essential to the legitimacy of international sentencing, outreach is a necessary step to ensure the effective contribution of International Criminal Justice to reconciliation.<sup>470</sup> Therefore, more empirical studies shall be done to assess the impact of international tribunals in the field and the constant empowerment of local people shall be the leitmotif of those chairing at trials.

#### IV. The Need of a Justice Comprehensive to the Collective Context

A last aspect that has been allegedly missing in international criminal proceedings is the attention to the general context. As showed with the ICTY, International Trials have generally ignored the complexity and the scale of multiple responsibilities in a context of collective violence.<sup>471</sup> The adversarial procedure, focusing on the offender's guilt, has by and large failed to properly deal with the general context of the criminal political plans that led to violence.<sup>472</sup>

Yet, as insisted earlier, the establishment of a truth over the facts and the achievement of a general understanding of the context of violence are of paramount importance for achieving a sustainable peace and reconciliation in post conflict societies.<sup>473</sup> An understanding of the background ideology backing up the violence is necessary to bring the truth over the conflict, prevent negationism within communities, and discuss issues of collective guilt. As seen in the Balkans, ongoing denial, victimization and diverging truths were side effects of the principle of individual criminal responsibility and ultimately jeopardized the reconciliation process.

While a deeper contextual understanding of the nature of collective violence is necessary to pave the way towards reconciliation, it might be necessary to reflect on ways that may redress this situation. Until now, the debate on the accountability for war crimes has traditionally been limited to a choice between two extremes, i.e. impunity or individual accountability.<sup>474</sup> While individual criminal trials failed to sufficiently address the challenges of collective violence,<sup>475</sup> one may wonder if a solution for this failure can be found either in the reform of individual criminal justice -as suggest the authors Findlay or Henham- in a way that it can tackle the particular challenges of post conflict societies.<sup>476</sup> Another hypothesis would be to develop a concept of collective responsibility harmonized with objectives of reconciliation.<sup>477</sup> In particular with regard to State violence,

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470 IHRLC (2000) 40; Hodzic (2010) 9-10.

471 Henham (2007) 456.

472 Michel Feher, "Terms of Reconciliation" in Carla Hesse & Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (Zone, New York 1999) 337-338.

473 Audergon (2005) 38-39.

474 IHRLC (2000) 47.

475 Interview with Refik Hodzic, ICTY Outreach Liaison Officer in Bosnia and Herzegovina (Sarajevo 13 April 2010). Also: Henham (2007) 457-459; Fletcher and Weinstein (2002) 604-617.

476 Henham (2007) 450-459.

477 Interview with Sabina Subasic, Documentary Director on Victim's Rights, PhD on the status of Rape under International Criminal Justice (Sarajevo 12 April 2010).

institutions such as the International Court of Justice may there play a role in painting a broader picture of the institutions behind violence.

With regard to the individual involvement in collective violence, some authors believe that war crimes trials are inherently insufficient to address this perspective of social repair.<sup>478</sup> Other actors would be necessary to bring about results of reconciliation. Therefore, the reflection on the individuals' moral responsibility in the violence shall be addressed outside the courtroom, in spaces such as Truth and Reconciliation commissions or Community Forums. Similarly, *"leaders can have an enormous impact on the mysterious process by which individuals come to terms with the pain of their society past."*<sup>479</sup> Indeed, any symbolic gesture of politicians to acknowledge past crimes creates an atmosphere *"in which a thousand acts of private repentance and apology become possible."*<sup>480</sup>

## CONCLUSION

The objective of this article was to assess empirically a widespread belief of today's international relations that "there can be no peace without justice". This principle was progressively enrooted in international criminal law through the emergence of a duty to prosecute offenders of international crimes, and institutionalized through the mushrooming of ad-hoc Criminal Tribunals set up following outbreaks of violence. Throughout these developments, the Security Council announced as a declared objective of International Criminal Justice its contribution to peace and, therefore reconciliation.

While International Criminal Justice's inputs were largely theorized, the aim of this research has been to test the contribution of international criminal justice to the peace and reconciliation process of a particularly complex region: the former Yugoslavia. While the International Criminal Tribunal for the Former Yugoslavia was the first ad-hoc tribunal to be established in the midst of a bloody conflict and to prosecute a head of state still in exercise, its mandate was conferred with social objectives: i.e. *"to bring offender to justice and to bring justice to victims,"*<sup>481</sup> which would contribute to future reconciliation in the region.<sup>482</sup>

Has the ICTY brought about these social results on the field? Did the ICTY effectively contributed to the process of reconciliation in the former Yugoslavia? The conclusion reached through this thesis is that the Tribunal generally failed to realize these social objectives on the field. Although to some extent the Tribunal managed to build a precedent of accountability for War Crimes in the region, and formally established a heritage of facts that can be used in an effort of reconciliation, its practice witnessed large criticism. Although this article underlined

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478 Fletcher and Weinstein (2002) 580.

479 Akhavan (1998) 774.

480 Akhavan (1998) 773.

481 ICTY, "Home Page" <[www.icty.org](http://www.icty.org)> accessed 7 July 2010).

482 NSC Res 827 (25 May 1993) UN Doc S/RES/827 [6]; UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534 [5].

that the ICTY was not the only actor to build reconciliation, one may wonder how the Tribunal could have improved its impact.

First, it appeared throughout the research that the tribunal could have maximized its impact and diminished resistance if its procedure had better reflected the legal traditions of the place: i.e. continental law. An inquisitorial procedure would have been better understood by the population and might have provided a broader picture of the violence, a better inclusiveness of victims, and a larger role of the judge. Also, a greater application of local legal standards would have alleviated discrepancies in the sentencing and increased foreseeability of verdicts.

Second, an effective communication strategy and a systematic contact between the Tribunal and the local population would have generally enhanced its chances for a positive impact.

Finally, while a reform of international criminal justice in the future may be positive to adapt to the specific needs of collective violence; a greater willingness of the prosecution team in investigating the responsibility of those who planned and incited the violence from above –without the possibility of negotiating the charge – would have helped to better establish the truth on the realities and dynamics of violence and contributed to processes of acknowledgement and empathy at the individual level.

As a conclusion, my general finding is that International Criminal Justice has and shall maintain social objectives within its declared objectives. However, it shall commit itself to their effective realization in the field. While aiming at addressing the specific needs of collective violence, international actors shall be more aware of the local legal culture and perception of justice before deciding the model of international criminal justice that is to be applied. Also, they shall secure the greatest inclusiveness of victim communities in criminal proceedings and generally maintain a permanent contact with the population on the field. So that International Criminal Justice can be perceived as legitimate. Such a reform is essential if one wants the theorized axiom "*No Peace Without Justice*" to become a reality.

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