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SANDRA DAY O’CONNOR COLLEGE OF LAW
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EDITOR INTRODUCTION

The 2015 Law Journal for Social Justice Symposium, “Contemporary Discrimination” focused on current concerns regarding civil rights and civil liberty. Discussions ranged from the political legislative process, resistance in enforcement of civil rights judgments, and sexual orientation employment discrimination. Panelists included politicians, scholars from diverse backgrounds, practicing attorneys and community organizers.

Drawing on broader considerations, this issue features articles analyzing an array of concerns in the criminal, civil and international tribunals. The first article, *You Have Your Whole Life in Front of You...Behind Bars*, written by Rachel Forman, begins this issue by discussing a need to ban life without parole sentences for juvenile non-homicide offenders. Inalvis M. Zubiaur, in *Death Row: Mentally Impaired Inmates and the Appeal Process*, continues the focus on sentencing by engaging concerns regarding capital punishment. Next, in *Injection and the Right of Access*, Timothy F. Brown argues for increased access to lethal injection procedures to understand its constitutionality. Shifting consideration to the civil sphere, Victor D. Lopez & Eugene T. Maccarrone raise issues about privacy, due process, public policy and the basic fairness of traffic enforcement by camera, in *Traffic Enforcement by Camera*. Beginning the focus on international concerns, *Fictitious Labeling*, by Efe Ukala, discusses “recommendations that may help curb constitutional issues resulting from deportation.” Brittany Fink, in *Increase Quota, Invite Opportunities, Improve Economy*, proposes amendments to the DREAM Act that extend the path to citizenship.” Katharine Villalobos then focuses on the sociology of immigration in *The Crucible*, using historical examples to discuss the War on Terror. *Falling Through the Cracks* by Marissa N. Goldberg changes the focus to international law and unique considerations of women in the drug trade industry. Finally, *Seeking Truth in the Balkans* by Erin K. Lovall and June E. Vutrano concludes the issue by discussing the role of international law in seeking justice following the wars in the Balkans. Together these articles analyze issues that raise important questions about fairness and civil rights in the domestic and international contexts.

Special thanks to the entire staff of the Law Journal for Social Justice, who helped create this edition.

Kristyne Schaaf-Olson
2014-2015 Editor-in-Chief
The Law Journal for Social Justice

SEEKING TRUTH IN THE BALKANS: ANALYSIS OF WHETHER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA HAS CONTRIBUTED TO PEACE, RECONCILIATION, JUSTICE, OR TRUTH IN THE REGION AND THE TRIBUNAL'S OVERALL ENDURING LEGACY

By Erin Kathleen Lovall* and June Ellen Vutrano**

The authors dedicate this article and the companion documentary film to the people of the Balkans for inviting us into your hearts and sharing your experiences with us and to all who have worked at the ICTY to further justice in the world of international law.

The authors further dedicate this project to their professor and thesis advisor, Professor Jennifer Trahan, for her guidance and inspiration throughout our academic careers.

Introduction

Over the summer of 2013, we participated in a global field intensive with New York University international law and human rights Professors Jennifer Trahan and Belinda Cooper that focused on the war crimes prosecutions in the former Yugoslavia: “The Pitfalls and Promise of International Justice.” For this field intensive, we traveled to The Hague, Sarajevo and Belgrade and met with human rights activists, prosecutors, defense attorneys, victims groups, academics, and journalists. In our travels we discovered four completely different historical memories of the

* Erin K. Lovall, JD, Duke University School of Law; MS, New York University Center for Global Affairs. Formerly a corporate bankruptcy attorney in Dallas, Texas. Currently a documentary filmmaker/producer/director; research/writing consultant; and Managing Editor of the American Society of International Law's *Proceedings*. Film: “Seeking Truth in the Balkans,” which explores the legacy of the ICTY and the contribution to peace, truth, justice, and reconciliation in the region and beyond.

** June Ellen Vutrano, MS Global Affairs, New York University. Documentary filmmaker, producer, director. Film: “Seeking Truth in the Balkans,” which explores the legacy of the ICTY and the contribution to peace, truth, justice, and reconciliation in the region and beyond. Currently employed by Girl Scouts of the U.S.A. as a logistics coordinator for the K-5 customer engagement initiative in New York City. Also tours the U.S. to various universities doing film screenings and post-film discussion with international law experts.

events that transpired during the wars in the Balkans: *Istorija* (Serbian), *Historija* (Bosnian), *Povijest* (Croatian), and *Histori* (Albanian).

Without a shared historical narrative in the Balkans, there is no sense of justice. Without justice, there will be no real reconciliation—the future will be uncertain and further conflicts possible. There are many questions regarding the Tribunal and its impact upon the future of international justice and the people of the Balkans. It was this inspiration that led us to return to the ICTY and the region to find out what the legacy of this institution will be for future generations.

Surveys conducted by the Organization for Security and Cooperation in Europe (OSCE) indicate that the ICTY's outreach program has essentially failed in its mission to promote reconciliation, peace, and the furtherance of justice.¹ Proponents of the international legal system, international lawyers, and scholars believe the opposite. The ICTY is viewed as an historic precedent that has revived the world of international law by holding perpetrators of humanity's worst crimes accountable. However, this sentiment has not travelled to the Balkans region, leaving an aftermath of victimization, scattered blame, and a variety of histories. Truth in the Balkans has become subject to political and national alliances resulting in differing accounts and memories of past events.

The Tribunal in The Hague was organized early on during the regional conflict that grew into four wars, which burned throughout the entire 1990s, making the Balkans the scene of the worst bloodshed in Europe since two world wars. These wars in the former Yugoslavia left behind over 100,000 victims, the displacement of over five million people, and the tragic memory of unspeakable horrors and war crimes.² Horrendous methods of killing, maiming, and raping the enemy, who were neighbors for generations before the conflicts, are all being examined under the light of the Tribunal in The Hague. The ICTY has now sentenced 73 individuals for a total of 1,081 years and six life sentences.³

¹ ORG. FOR SEC. AND CO-OPERATION IN EUR. (OSCE), VIEWS ON WAR CRIMES, THE ICTY, AND THE NATIONAL WAR CRIMES JUDICIARY 2-121 (2009), *available at* <http://www.osce.org/serbia/40751?download=true>.

² There are only estimates of how many people were killed or displaced during the conflicts. Each side is politicizing their numbers of dead and refugees so that no exact number currently exists. The most accurate figures can be found at <http://www.hlc-rdc.org/>. This organization is still finding researching and documenting. Some bodies are still unaccounted for. These figures are modest estimates of the true number of victims and refugees. Today there remain 330,000 refugees from the siege of Sarajevo who are struggling for survival. Marie Dhumieres, *Suffering Goes on for 330,000 Refugees of the Yugoslav War*, INDEP. (Aug. 7, 2014), <http://www.independent.co.uk/news/world/europe/suffering-goes-on-for-330000-refugees-of-the-yugoslav-war-7622108.html>.

³ *Key Figures of the Cases*, UN ICTY, <http://www.icty.org/sections/TheCases/KeyFiguresoftheCases> (last updated Oct. 15, 2015).

After hearing over 4,650 witness testimonies and filling in over 2.5 millions of pages of transcripts, the Tribunal proudly displays that there are zero fugitives and only fourteen more individuals are involved in ongoing proceedings.⁴

May 25, 2014 marked 21 long years since the creation of the ICTY by the United Nations (UN). After failing to meet the mandate to complete the trials by 2012, the Tribunal is in the final phase of the completion strategy and is winding down. There currently remain four indictees on trial and four cases on appeal at the Tribunal before it can officially close its doors.⁵ Important questions need to be explored regarding the ICTY: Was it able to bring reconciliation and restore peace in the region? Was justice served after the two decades of the Tribunal's functioning? Finally, what will be the legacy of the ICTY?

The Tribunal at The Hague began with a shaky start, small staff, and limited funding; but today, it is functioning as a mid-sized organization that currently employs 760 people, costing the United Nations and its financiers nearly 2.5 billion dollars (almost \$200,000 million for this year).⁶ The Hague Tribunal will close in 2017, making this project well-timed and unprecedented in its scope. As David Tolbert, President of the International Center for Transitional Justice, so eloquently stated: "Genuine societal dialogue needs to occur in order to set clear goals for truth seeking, avoiding false expectations or the illusion of a 'magic wand' that produces automatic reconciliation."⁷

For this research we have conducted and recorded over 75 live interviews. We interviewed judges, victims, lawyers, academic experts, journalists, historians, and non-government organizations connected with the Tribunal. In the Balkans region, we interviewed journalists, legal experts, scholars, human rights advocates, victim groups, and those who experienced the conflicts firsthand. We conducted our interviews in (1) New York City, (2) Washington D.C., (3) London, United Kingdom, (4) The Hague, Netherlands, (5) Belgrade, Serbia, (6) Sarajevo, Bosnia Herzegovina, (7) Kozarac, Republika Srpska, (8) Zagreb, Croatia, and (9)

⁴ *Infographic: ICTY Facts & Figures*, UN ICTY, <http://www.icty.org/sid/11186> (last visited Oct. 19, 2015) (hereinafter "ICTY Facts & Figures").

⁵ The current cases still on trial at the ICTY are: (1) Hadžić; (2) Mladić; (3) Karadžić; and (4) Šešelj. The cases on appeal are: (1) Popović et al.; (2) Prlić et al.; (3) Stanišić & Simatović; and (4) Stanišić & Župljanin; *The Cases*, UN ICTY, <http://icty.org/action/cases/4> (last visited Oct. 19, 2015).

⁶ *The Cost of Justice*, UN ICTY, <http://www.icty.org/sid/325> (last visited Oct. 19, 2015) (hereinafter "ICTY: The Cost of Justice").

⁷ David Tolbert, *To Build Peace, Seek Truth About the Past*, INT. CTR. FOR TRANSITIONAL JUSTICE, (Nov. 19, 2013), <http://www.ictj.org/news/build-peace-seek-truth-about-past>.

Pristina, Kosovo. The article will record the living legacy of the ICTY at The Hague as well as the human legacy in the region.

I. THEMES OF THE ARTICLE

There will be three main overarching themes with regard to the ICTY explored throughout this article: international jurisprudence; the human context of international law as it affects peace, reconciliation, truth, and justice; and the living legacy.

A. History, Human Rights and Justice: The Lens of the Future Through the Prism of the Past

The ICTY was created by a United Nations Security Council resolution in 1993, during the ongoing war in the region. It was the first international tribunal to be created since the post-World War II tribunals in Nuremberg and Tokyo. Over 100 individuals have been tried by the ICTY and the final four trials are currently taking place. The ICTY predicts that its work will be completed in 2017. It is our view that this is the perfect time to assess the legacy, both from jurisprudential and human rights perspectives, as the ICTY winds down and nationalist sentiments have died down in the region. While many documentaries and research studies have been created regarding the war, the ICTY, and related topics, research regarding the overall legacy from these two perspectives does not yet exist. The depth and breadth of our research not only has not yet been done, but at its conclusion, it will contribute in a meaningful, lasting way to the understanding of international justice and human rights.

B. The Human Context in International Jurisprudence

Through a dialectical method that shares the most diverse sampling of views and opinions, we interviewed people from all sides of the Balkans conflict in the hope of realizing the true effect that the ICTY has had on the ground; not just in international law, but of the real human legacy, which will provide insight toward the future of the region along with international justice. This was accomplished by interviewing persons from each different region including Serbia, Croatia, Bosnia Herzegovina, Republika Srpska, and Kosovo, along with the legal experts at The Hague. The persons we selected for interview all have a different story to share on their thoughts and feelings regarding the ICTY and its mandate to instill peace, seek truth, foster reconciliation, and pursue justice.

C. The Legacy and Future

Various histories about the conflict have surfaced throughout the region, leaving no two similar stories about the wars in the Balkans. One of the obvious signs of such a deep disagreement about almost everything is an ongoing, low-intensity, war of statistics. The numbers of killed, raped, maimed, and misplaced varies hugely depending on the national side.⁸ Outreach efforts by the ICTY have failed to unify these contradictory memories. Truth, history, and memory are all important components toward the real legacy of this Tribunal. These three topics will be explored from the perspective of those living in the region.

This article explores the above topics, outlining the findings of our research by first giving a brief overview of the history of international law and the ICTY in Section II. Second it will summarize the findings of over 75 interviews regarding how peace, reconciliation, justice, and truth are perceived in the Balkans in Section III(A-D). Finally this article will conclude with the overall legacy and what the future holds for international justice and the region in Section III(E-F).

II. HISTORY OF INTERNATIONAL LAW POST WORLD WAR II AND THE ICTY

This section will consider the backdrop of war crimes, crimes against humanity, and crimes against the peace, which led up to a fully functioning Tribunal after a long pause in the international justice sphere.

A. Right to Privacy

After World War II, the International Military Tribunal (Nuremberg Tribunal) and the International Tribunal for the Far East (Tokyo Tribunal) were established to prosecute crimes against peace, war crimes, and crimes against humanity.⁹

⁸ *Bosnian War Casualties Still Disputed More Than a Decade On*, RT QUESTION MORE (Nov. 16, 2009, 07:31), <https://www.rt.com/news/bosnian-war-casualties-argument/>.

⁹ London Agreement of August 8th 1945 art. 1, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <http://avalon.law.yale.edu/imt/imtchart.asp>; Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 85 U.N.T.S. 251, available at <http://avalon.law.yale.edu/imt/imtconst.asp>; International Military Tribunal for the Far East Charter art. 5, Jan. 19, 1946, T.I.A.S. No. 1587, available at <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>; See also Jennifer Trahan & Erin K. Lovall, *The ICTY Appellate Chamber's Acquittal of Momčilo Perišić: The Specific Direction Element of Aiding and Abetting Should Be Rejected or Modified to*

Nuremberg essentially was the first attempt to deal with a major crime through law. It wasn't the absolute first time, but it was really the first organized and more or less successful attempt to use law rather than brute revenge, rather than killing a few of the leaders, and moving on. It was, in a way, a very American project, the idea of using law to deal with crimes on a mass scale The aim of Nuremberg, similarly to the current tribunals . . . , if you read what was said about it at the time, there was desire to educate the Germans on what they had done, to make sure they understood the magnitude of their crimes, the idea of assuring accountability, [and] making sure that leaders didn't escape unpunished. So it was also a very broad sense of what the tribunal could accomplish.¹⁰

The Nuremberg and Tokyo Tribunals were criticized for “shaky foundations in international law and victors’ justice.”¹¹

The criticisms of Nuremberg at the time were not the same as the criticisms now. The criticisms at the time were about retroactivity, about using laws that didn't exist to deal with crimes that had always been considered political actions and all of a sudden were now crimes pinned on individual leaders, and then there was the criticism of victors’ justice - the idea that it was the victors judging the losers, which . . . was really true. None of the crimes committed by the Soviet Union were considered, and of course the Allies committed crimes, although not on the same scale as Germany.¹²

However, after the Nuremberg and Tokyo Tribunals completed their work, another international criminal tribunal was not established for decades. Richard Goldstone, former Chairman of the “Goldstone Commission” in South Africa and the first sitting prosecutor for the ICTY and International Criminal Tribunal for Rwanda (ICTR) stated: “The hope 50 years ago of ‘Never Again’ has become the reality of ‘Again and Again.’ People in every country have to ask themselves and their leaders why this century has witnessed the death of 160 million people in wars - a

Explicitly Include a “Reasonable Person” Due Diligence Standard, 40 BROOK. J. INT’L L. 170, 174 (2014) (hereinafter “Perešić Article”).

¹⁰ Interview with Belinda Cooper, Adjunct Professor, New York University and Columbia University, in New York, New York (May 23, 2014).

¹¹ Robert L. Koenig, *Tyranny on Trial: Revisiting Nuremberg Modern Champions of International Justice Look to War-Crimes Tribunal for Guidance*, ST. LOUIS POST-DISPATCH, Sept. 26, 1995, at 13B.

¹² Interview with Belinda Cooper, *supra* note 10.

ghastly statistic. What went wrong?”¹³ One of the main reasons for this lull in the pursuit of international justice was the Cold War between the United States, the former Union of Soviet Socialist Republics, and their allies that permeated the second half of the twentieth century.

After Nuremberg, and of course the Tokyo Tribunal, . . . we go into the Cold War and we really have no attempts of justice [of] that type. So it’s not coincidence that the Yugoslav and Rwanda Tribunals are created after the world emerges from the Cold War. . . . The Soviets and the U.S. were allies in creating Nuremberg and it takes reaching a point in time where Russia and the U.S. can join together in voting, along with other members on the Security Council, to create the Yugoslav and Rwanda Tribunals. We have a tremendous start at Nuremberg and Tokyo and then we don’t have follow-up for many, many years. And then we start to have the growth of the modern field of international justice resume at the Yugoslav and Rwanda Tribunals.¹⁴

Although the thawing of the Cold War allowed the international community to once again prosecute the worst crimes at an international level, the Nuremberg and Tokyo Tribunals were imperfect models upon which to base the ICTY and other international tribunals. The creators of the ICTY desired to avoid the stain of victors’ justice that colored the Nuremberg and Tokyo Tribunals. Furthermore, the crime of “genocide” was only created after World War II and remained an ill-defined area of law. Customary international law pertaining to war crimes and crimes against humanity had evolved in the almost fifty years between Nuremberg and Tokyo and the ICTY. Finally, the Nuremberg and Tokyo Tribunals had only a few clearly defined rules, regulations, procedures, or guidelines for the protection of the rights of defendants, victims, and witnesses. Thus, the creators of the ICTY essentially created the metes and bounds of the ICTY from scratch, with a nod to the Tribunal’s predecessors at Nuremberg and Tokyo, by focusing on a modern understanding of international justice as perceived by both civil and common law systems, and they did this as the war continued to escalate in the former Yugoslavia.

¹³ Koenig, *supra* note 11, at 13B.

¹⁴ Interview with Jennifer Trahan, Associate Clinical Professor, New York University, in New York, New York (May 23, 2014).

B. The History of the ICTY

In the 1990s, the former state of Yugoslavia devolved into chaos as various segments of the country declared independence while the government in Belgrade sought to maintain control of the region.¹⁵ Nationalist politicians inflamed ethnic tensions, resulting in horrific war crimes, ethnic cleansing, crimes against humanity, and the worst genocide to occur in Europe since the Second World War.¹⁶ As the conflict raged on, the UN Security Council unanimously voted on February 22, 1993 to establish an international tribunal to prosecute war crimes committed in the former Yugoslavia.¹⁷ After the vote, former U.S. Ambassador to the United Nations Madeleine K. Albright stated: “There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory.”¹⁸

On May 25, 1993, the Security Council passed Resolution 827 to establish “an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace,” thus establishing the first international war crimes tribunal since the Nuremberg and Tokyo Tribunals.¹⁹ The Updated Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY Charter) grants jurisdiction to the ICTY to adjudicate grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.²⁰ Thus, the ICTY was created before the Dayton Accords were signed, ending the war, but leaving the territory of Bosnia Herzegovina in a temporary constitutional setting that places limits on human rights, freedoms, and prevents progress. Additionally the lines separating the various states were random, not equally balanced, and reinforced the segregation of various ethnicities.

¹⁵ Perešić Article, *supra* note 9.

¹⁶ *Id.*

¹⁷ S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

¹⁸ Julia Preston, *U.N. Security Council Establishes Yugoslav War Crimes Tribunal; Judicial Panel Is First Such Body Since Nuremberg*, WASH. POST, February 23, 1993, at A01.

¹⁹ S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993); *see also* Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFFAIRS 122, 122 (Summer 1993); Perešić Article, *supra* note 9.

²⁰ S.C. Res. 1877, arts. 2-5, U.N. Doc. S/RES/1877 (July 7, 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (hereinafter “ICTY STATUTE”); *See also*, Perešić Article, *supra* note 9.

Since its creation, the ICTY has been the standard bearer for modern-day international tribunals. It has tried former heads of state, military leaders, and others in an effort to end the era of impunity that followed the conclusion of the Nuremberg and Tokyo Tribunals.

The ICTY issued its first indictments in 1994 and its last indictments in 2004, for a total of 161 indictments.²¹ Of those indicted, 74 were sentenced, 18 were acquitted, 13 were transferred to countries within the former Yugoslavia for trial, 36 were not processed because the indictment was withdrawn or the proceedings were terminated (generally due to the natural death of the indictee), and 20 are still in ongoing proceedings.²² The indictees whose cases have been completed and who were found guilty were sentenced to a total of 1,081 years, plus six life sentences, although convicted individuals generally do not serve out the full term of their sentences.²³ The final four individuals still in the trial phase of their criminal cases are: (1) Goran Hadžić, President of the self-proclaimed Serbian Autonomous District of Slavonia, Baranja, and Western Srem and later the President of the Republic of Serbian Krajina, charged with crimes against humanity and war crimes; (2) Radovan Karadžić, former President of Republika Srpska and Supreme Commander of its armed forces, charged with genocide, crimes against humanity, and war crimes; (3) Ratko Mladić, former Colonel General of the Bosnian Serb Army, charged with genocide, crimes against humanity, and war crimes; and (4) Vojislav Šešelj, founder of the Serbian Chetnik Movement and a former member of the Assembly of the Republic of Serbia, charged with crimes against humanity and war crimes.²⁴ To date, over 4,500 witnesses have testified, there have been over 7,500 days of trial, and over 1.6 million pages of trial testimony transcript have been generated.²⁵

The ICTY has been an expensive endeavor. As of November 2014, it employed 654 staff members and the cost of maintaining the Court, employees, court services, and related items has been more than was

²¹ *History*, UN ICTY, <http://www.icty.org/sid/95> (last visited Oct. 19, 2015); *Timeline*, UN ICTY, <http://www.icty.org/action/timeline/254> (last visited Feb. 14, 2015).

²² *Judgement List*, UN ICTY, <http://www.icty.org/sid/10095> (last visited Feb. 14, 2015) (hereinafter “*ICTY Judgement List*”).

²³ *Id.*; see also *ICTY Facts & Figures*, *supra* note 4.

²⁴ *Prosecutor v. Hadžić*, Case No. IT-04-75, First Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia July 22, 2011); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-I, Third Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2009); *Prosecutor v. Mladić*, Case No. IT-09-92, Fourth Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 16, 2011); *Prosecutor v. Šešelj*, Case No. IT-03-67, Third Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 7, 2007).

²⁵ *ICTY Facts & Figures*, *supra* note 4.

initially anticipated.²⁶ The budget for 2012-2013 was \$250,814,000.²⁷ By the time of its closure, the ICTY's total cost will likely run well over \$2 billion.²⁸

Our research was designed to determine what has been accomplished by the ICTY after 21 years. Has the ICTY contributed to peace, reconciliation, justice, and/or truth globally, and more specifically, in the former Yugoslavia? We interviewed and filmed over 75 individuals. Portions of these interviews are contained in our companion documentary, "Seeking Truth in the Balkans."²⁹ Our conclusions regarding the contributions of the ICTY, or the lack thereof, to peace, reconciliation, justice, and truth are set forth below.

III. FINDINGS REGARDING THE ICTY'S CONTRIBUTIONS TO PEACE, RECONCILIATION, JUSTICE, AND TRUTH

There are many divergent beliefs and opinions regarding what the ICTY has or has not contributed to peace, reconciliation, justice, and truth within the Balkans and globally. This section sets forth a cross-section of these opinions as developed through interviews with ICTY personnel (prosecutors, defense counsel, judges, and others), journalists, academics, human rights activists, NGO representatives, and others.

A. Peace

i. Will Peace Be Maintained in the Balkans

Throughout our interviews, we asked whether there is a belief that peace will be maintained in the Balkans or whether another war could erupt. Generally the view is that peace will be maintained.

In the Balkans, it's very hard to know what the benefit is, whether there has really been any resolution of internal divisions that can descend again into conflict, nobody knows. We are currently in the period of time when further war is unlikely to occur, it's only 20 years. Churchill

²⁶ ICTY *The Cost of Justice*, *supra* note 6.

²⁷ *Id.*

²⁸ Gordon N. Bardos, *Trials and Tribulations: Politics as Justice at the ICTY*, WORLD AFFAIRS (September/October 2013), <http://www.worldaffairsjournal.org/article/trials-and-tribulations-politics-justice-icty>.

²⁹ More information and a trailer for the film can be found at: <http://Seekingtruthinthebalkans.com>.

thought it was ten years between conflicts and recognized between the second and the first world wars that it was twenty years. But it's not a very long period of time between before a conflict can be reignited. So it could happen again . . . and there's simply no evidence at the moment as to whether the trial process and the verdicts returned will stop that happening. We just don't know. There are some, I suppose, encouraging signs that, in combination with other mechanisms, maybe political realities like the creation and expansion of Europe will, in combination with trial records, deter future conflict.³⁰

However, some interviewees expressed unease about remaining ethnic tensions and discrimination against a variety of groups, such as LGBT, Roma, and Jews, specifically in Bosnia Herzegovina.

You know that peace is absence of any kind of violence. We are facing here in Bosnia Herzegovina various kinds of violence - ethnic, cultural, and structural . . . When you have so many government authorities, when you have this joint government which is not functioning, when you have such numerous economic problems, then it's logical to have this type of violence because people here . . . speak of politics, the Tribunal in The Hague, [and] their government because they are not satisfied with the way it is working . . . because it is bureaucracy not democracy. This violence will break at some point and it will break over the backs of minorities, especially LGBT, Roma populations, and Jews in this town.³¹

ii. The Dayton Agreement

The Dayton Agreement was structured as a peace agreement formulated by an outside party to the conflict, the United States, to end the war in the Balkans in 1995; however, it remains to this day as the constitution of Bosnia Herzegovina and does not necessarily represent the real interests of the people of Bosnia Herzegovina.³² It codifies ethnic divisions in the country by requiring citizens to declare an ethnic group before, among other things, they can work for the public sector or run for

³⁰ Interview with Sir Geoffrey Nice, QC, Professor of Law, in The Hague, Netherlands (April 24, 2014).

³¹ Interview with Edvin Kanka Ćudić, Coordinator, UDIK, in Sarajevo, Bosnia Herzegovina (June 8, 2014).

³² U.N. GAOR, 50th Sess., annex 4, U.N. Doc. A/50/790 (Nov. 30, 1995).

office.³³ Some of our interviewees who are of mixed ethnicity found this requirement particularly vexing because they did not wish to be forced to choose and deny the background of one parent. Some refused to make the choice.

We are basically living in some sort of ethnopolis where your individual freedoms can be exercised only through a collective belongingness. If you do not declare yourself as Bosniak, Serb, or Croat, you cannot run for the presidency, for example. For you to be respected as a human being, you have to have some ethnic identity. And, for example, I do not declare myself as Bosniak, Serb, or Croat - I am a Bosnian. I am a citizen of this world. And I still know that I can very much contribute to this world, but here in this society, it is not appreciated.³⁴

Many of the people we spoke with feel that politicians use this political structure to inflame ethnic tensions that would not otherwise exist. Some politicians use these tactics to distract attention from their political shortcomings, failure to achieve political goals, or participation in corruption.

There is a feeling among the victims that if it was left to the people . . . there would be far greater reconciliation. The political elite in Republika Srpska has really nothing else to offer its people other than to try and stir up sectarian feelings and again try to revive this sense of victimhood. . . . The politicians play on that and try to generate fears among sub-populations that there will be retribution and so they drive the conflict and they drive this amnesia. And one thing that really struck me was what was missing in Republika Srpska was an essential factor that you would need to stop it happening again, and that's recognition of what happened and a shared narrative of what happened. I think to be sure that it doesn't happen again, you need that and that is missing in Republika Srpska. So I came away feeling there was nothing really stopping a repeat tomorrow.³⁵

³³ *Id.* at annex 3, arts. IV, V.

³⁴ Interview with Lejla Kusturica, Philanthropy Manager, Mozaik Foundation, in Sarajevo, Bosnia-Herzegovina (June 9, 2014).

³⁵ Interview with Julian Borger, Journalist and Diplomatic Editor, The Guardian, UK, in London, UK (Apr. 28, 2014).

iii. Opinions Regarding the ICTY's Contributions to Peace in the Balkans

UN Security Council Resolution 827 states that the Security Council was convinced that the establishment of the ICTY would “contribute to the restoration and maintenance of peace.”³⁶ We asked interviewees whether they believe that the ICTY has contributed to peace in the region. Some believe that it contributed directly to peace because there is no peace without justice.

I think sometimes too much pressure is placed today on the International Criminal Court . . . and on the tribunals [regarding] the effect on the whole scenario. That having been said, I think the trials that have been held, with reference to Srebrenica and . . . other atrocities committed during the course of the conflict, have played a very important role in bringing a sense of justice and bringing reconciliation and peace to the region, because I'm in the camp of no peace without justice. . . . I do think it's made an enormous difference in the region and in response to the genocide and other atrocities.³⁷

Others believe it contributed indirectly to peace by the ICTY's indictment of certain heads of state and military leaders, permitting new leaders to take their places and by contributing to the creation of regional courts to try war criminals.

It's always hard to assess the exact causative effect of peace, reconciliation, any of these concepts. What I think the Tribunal did achieve is by focusing on high-level leaders who were heavily implicated in large amounts of crimes and bringing them to The Hague and removing them from the political scene, it opened up space for younger, more progressive politicians to step into those roles and help those countries move forward from what had happened. In that respect, it may have had an impact in opening up the process.³⁸

Some believe that even though “peace” was part of the ICTY's original mandate, the ICTY's true focus and capability is justice, and that peace, reconciliation, and other aims are best sought at the local level.

³⁶ S.C. Res. 827, *supra* note 19, at 1.

³⁷ Interview with Judge Kimberly Prost, Ombudsperson, UN, in New York, NY (Apr. 7, 2014).

³⁸ Interview with Matthew Gillett, Deputy Prosecutor, ICTY, in The Hague, Netherlands (Apr. 24, 2014).

If you look at the statute itself, of course, the preambles of the Security Council resolutions talk about peace, reconciliation, and things like that. But if you look at the mandate in the statute of the court itself, it's to conduct criminal trials. . . . If you're sitting there looking at article 1, article 2, article 3, article 4, you aren't going to find too much about truth or peace or these kinds of overarching objectives there in the prefatory language of the resolutions.³⁹

The big mistake of the Tribunal in The Hague, in my opinion, is that in [the] last phase of its functioning, it took over something that was ours as a civil movement, as a peace movement here, that strives for peace and reconciliation for more than twenty years. So the Tribunal said suddenly that part of their mission is also reconciliation in the region. . . . It wasn't a part of their mission in the start and we know that. . . . It should have been and remained in our hands. [In] my opinion, for those last verdicts, Gotovina and Markač, Perišić, Simatović and Stanišić, it made . . . [irreparable] damage to [the] peace movement in the region because we could have done our part of the job with great difficulties, but with dedication we would [have achieved] it. But those kinds of verdicts destroyed many of our ideas, like one of those ideas I had, it was cooperation between communities of victims and after this verdict against Gotovina and Markač, we cannot do it anymore. Also, if this part of the job is not done, then people, local people, who no matter how they are ready or not ready to forget and move on, demand what is theirs and they think they have the right to see those people punished. In order to say one day, OK, we brought them to justice and now since they are behind the doors in the jail, we can speak as equals finally and can see what we can do for the future and the future generations. . . . I feel really, really disappointed and betrayed somehow because they took part of our mission. They put their own label on it. And the part for which we never strived, as it wasn't ours, like to deal

³⁹ Interview with David Tolbert, President, International Center for Transitional Justice, in New York, NY (Mar. 19, 2014).

with institutional justice because we are dealing with restorative justice, they also didn't do it properly.⁴⁰

iv. Conclusions Regarding Continued Peace and the ICTY's Contributions to Peace in the Region

Based upon information gathered in our interviews, it is unlikely that war will erupt in the Balkans again in the foreseeable future. The world is a different place than it was in the early 1990s. International justice has been firmly established globally due to the efforts of the ICTY, ICTR, International Criminal Court (ICC), Special Tribunal for Lebanon, Extraordinary Chambers in the Courts of Cambodia (ECCC), and other hybrid and regional courts around the world. While the existence of such courts may not provide a direct deterrent effect since (1) the ICC's jurisdiction is limited, (2) the creation of new *ad hoc* tribunals is complicated by a currently deadlocked UN Security Council P5, and (3) complaints abound regarding the costs associated with the creation and maintenance of *ad hoc* tribunals such as the ICTY and ICTR, heads of state and top military commanders are well aware that justice is not limited to lower-ranking individuals in the government and the military. Further, Serbia and Bosnia Herzegovina are both seeking to emulate Croatia and gain admission to the European Union. The dedication of certain countries in the Balkans to joining the EU was demonstrated by, among other things, their compliance with EU conditionality whereby Serbia, Croatia, and Bosnia Herzegovina were required to turn over indictees within their borders to the ICTY. Such conditionality was a major contributing factor resulting in the turn-over of all 161 ICTY indictees, including heads of state and military commanders.

Whether or not the ICTY contributed to peace in the region, as its original mandate envisioned, is a murkier issue. Grave war crimes, including the horrendous genocide that occurred in and around Srebrenica and the killing and displacement of civilians in Croatia during Operation Storm, occurred after the ICTY was established,⁴¹ thus calling into question whether the court initially had any deterrent effect. While it is true that bringing individuals such as Slobodan Milošević, Radovan

⁴⁰ Interview with Anonymous Activist, Women in Black, in Belgrade, Serbia (June 1, 2014).

⁴¹ Dan Bilefsky and Somini Sengupta, *Srebrenica Massacre, After 20 Years, Still Casts a Long Shadow in Bosnia*, N.Y. TIMES (Jul. 8, 2015), http://www.nytimes.com/2015/07/09/world/europe/srebrenica-genocide-massacre.html?_r=0; Daniel McLaughlin, *Croatia Marks 20 Years Since Operation Storm*, THE IRISH TIMES (Aug. 4, 2015, 1:00), <http://www.irishtimes.com/news/world/europe/croatia-marks-20-years-since-operation-storm-1.2305836>.

Karadžić, Ratko Mladić, Ante Gotovina, Momčilo Perešić, and others to The Hague (regardless of actual or anticipated trial results) opened space for individuals to take power in governmental and military structures who were not involved in the conflict or who are not motivated to utilize real or perceived ethnic tensions to achieve political goals, that has not always been the reality. For instance, the current Prime Minister of Serbia is Aleksandar Vučić. In 1993, Vučić joined the Serbian Radical Party, founded by Vojislav Šešelj, the former Deputy Prime Minister of Serbia who is currently on trial in front of the ICTY for war crimes and crimes against humanity.⁴² Before splitting from the party, Vučić publicly advocated for the protection of Ratko Mladić while he was still at-large in Serbia.⁴³ He is believed to be behind the alleged state-sponsored assassination of the journalist Slavko Curuvija during the time that Vučić was serving as Serbia's Minister of Information.⁴⁴ In his current position, he is widely derided for promoting heavy-handed censorship and stoking ethnic tensions.⁴⁵ Vučić is but one example of the many individuals involved in the Yugoslavian political machine in the 1990s maintaining political power and utilizing similar tactics today as those used in the past. Another example is Bakir Izetbegović, the current Chairman of the Presidency of Bosnia Herzegovina and also the son of Alija Izetbegović, who was the first Chairman of the Presidency of Bosnia Herzegovina and the first Bosniak member of the Presidency of Bosnia Herzegovina.⁴⁶ The Office of the Prosecutor of the ICTY stated that Alija Izetbegović died before an indictment accusing him of committing war crimes was issued.⁴⁷

Belief that the ICTY could have a direct effect upon peace in the region was perhaps overselling the abilities of a court located almost 1,000 miles from the Balkans. The main purpose of the court is to serve as a justice mechanism. Although the ICTY did establish an outreach program, it was not established until six years after the creation of the court, allowing politicians and others to spread propaganda about the ICTY and

⁴² *Serbia Profile - Leaders*, BBC NEWS (Aug. 5, 2015), <http://www.bbc.com/news/world-europe-17912584>.

⁴³ *Vucic: Serbian Nationalist Hawk Turned Pro-European*, EUBUSINESS (Mar. 16, 2014, 16:17 CET), <http://www.eubusiness.com/news-eu/serbia-vote.uf0/serbia-vote-vucic.ueb>.

⁴⁴ Interview with Izabela Kisić, Executive Director, Helsinki Committee for Human Rights, in Belgrade, Serbia (June 3, 2014).

⁴⁵ *Id.*

⁴⁶ Thomas Barrabi, *Who is Bakir Izetbegovic? National Candidates Lead Bosnian Elections For Three-Seat Presidency*, IBT (Oct. 13, 2014, 8:52 AM), <http://www.ibtimes.com/who-bakir-izetbegovic-nationalist-candidates-lead-bosnian-elections-three-seat-presidency-1703791>.

⁴⁷ *Bosnian Leader Was War Crimes Suspect*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/3203323.stm> (last updated Oct. 22, 2003, 4:45 GMT).

render the court's peace-building efforts much more difficult.⁴⁸ Therefore, while conditionality and the continued desire of states from the former Yugoslavia to join the EU has assisted in maintaining peace in the region, the impact of the ICTY upon achieving peace or contributing to enduring peace is perhaps limited at best.

B. Reconciliation

i. Opinions Regarding the ICTY's Contributions to Reconciliation in the Region

Reconciliation was a tall order for the proponents of the ICTY. When the Tribunal was created, reconciliation was the buzzword of the day. After twenty years, the majority of legal experts and human rights groups agree that reconciliation was not achieved by the Tribunal, nor was it possible to achieve through a legal mechanism. The use of the term reconciliation swiftly disappeared from the Tribunal's dialogue and was soon replaced by justice. Reconciliation was never mentioned in Resolution 827; however, the phrase "contribute to the restoration and maintenance of peace" would imply reconciliation or the repair and rebuilding of relationships and trust, a key component to achieving peace. Anthony Cassese, the first President of the Tribunal wrote in his annual report to the UN in 1994, and stated "[t]he role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace."⁴⁹ In a 1999 speech to the U.S. Supreme Court, Gabrielle Kirk McDonald, a former President of the Tribunal, also mentioned reconciliation as a goal of the ICTY: "[t]he ICTY was created to assist with efforts to bring peace, justice, and reconciliation to the Balkans."⁵⁰ But those living in the region and those working with the ICTY in recent years all agree that the court was not designed for reconciliation and that this was an overambitious mandate.

⁴⁸ Kristin Xueqin Wu, *Experiences That Count: A Comparative Study of The ICTY and SCSL in Shaping the Image of Justice*, 9 *UTRECHT L. REV.* 60, 63 (Jan. 31, 2013), <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.212/>.

⁴⁹ General Assembly Security Council, *Annual Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia*, ¶ 16, U.N. Doc. A/49/342, S/1994/1007 (Aug. 29, 1994), available at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf.

⁵⁰ Gabrielle Kirk McDonald, President of the ITCY, Remarks at the United States Supreme Court (Apr. 5, 1999) (transcript available at <http://emperors-clothes.com/docs/kirkback.htm>).

If you read the founding documents . . . at the ICTY . . . you will find quite a lot of references to reconciliation. I find that extremely surprising. Criminal trials have nothing to do with reconciliation. The trial of the rapist is not intended to reconcile the rapist or the victim. The trial of the burglar is not intended to reconcile the household to the burglar. Trials have entirely different purposes. Their principle is actually to separate people, not reconcile them, and to punish one side. If you look again at the documents after the foundation documents [of the ICTY] you will find that reconciliation disappears from the reporting to the UN, because a certain degree of reality crept in.⁵¹

Without truth, justice, and accountability, which a court can provide to some degree, the process of reconciliation would be impossible. This is especially true when each side has their own memory and narrative of the events that transpired and politicians use the Tribunal to further their nefarious causes to maintain power at the expense of truth. The facts established at the ICTY can enhance the dialogue in the region toward a shared historical narrative of events.

We are often asked if the Tribunal has played or is playing a positive role in reconciliation or if we are not playing a negative role by prosecuting a number of individuals. Coming, reminding all of the time the wrongdoings from the past and by doing so preventing societies from moving towards reconciliation. As much as I am convinced that prosecution alone will never lead to reconciliation. As much I am also convinced that without accountability, without prosecuting and punishing those who are responsible for the crimes committed, no reconciliation is possible.⁵²

Carla Del Ponte, in a speech to the NATO parliamentary assembly in 2007, mentioned reconciliation with regard to the Tribunal nine times:

The Tribunal was established as a measure to restore and maintain peace and promote reconciliation in the former Yugoslavia. Peace has been established. However, its maintenance depends on many factors. True peace will only be maintained if the need for justice is satisfied, if facts about the war are undisputed and if reconciliation is achieved. The Tribunal is one element of this process. It is

⁵¹ Interview with Sir Geoffrey Nice, *supra* note 30.

⁵² Interview with Serge Brammertz, ICTY Chief Prosecutor, in The Hague, Netherlands (June 16, 2014).

a significant and very important part of the process but it is not and should not be perceived as the sole or the principal factor of reconciliation.

The Tribunal's primary contribution to peace and security, to regional stability and reconciliation is in establishing the facts and individual criminal responsibility. Convicted political and military leaders have been removed from power and cannot return to their previous posts and exert the same influence. Important facts are established about the crimes committed. Victims are provided a measure of justice. However, though this is a great achievement, in and of itself it is not sufficient for the process of reconciliation. In order to succeed, this complex and sometimes painful process must be further supported by local and international actors. History books must be amended to include crucial facts established in the Tribunal's cases. Politicians must provide their constituents with accurate information about these facts. Important institutions such as the religious establishment must foster an objective understanding of what happened. People must be given an opportunity to understand what was done in their name. Only after this understanding is reached can there be any hope for reconciliation. This complex task requires new visionary leaders who can help reconstruct broken post war societies. Furthermore, reconciliation and learning to deal with the past can be achieved through recovery of the truth.⁵³

Although legal experts agree that the Tribunal was not meant to solve the issue of reconciliation, without the facts established at the Tribunal there would remain no basis for a true narrative of history.

ii. Delay in the ICTY's Outreach Efforts Damaged the Reconciliation Process

Most people we interviewed agreed that the delay of the outreach efforts by the ICTY to the region caused irreparable harm to the reconciliation process. The Tribunal began in 1993, but outreach efforts did not begin until 1999.

It's really unfortunate that the ICTY did not start outreach until 1999. In those intervening years a lot of damage was

⁵³ Carla Del Ponte, Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly in Belgrade: The ICTY and the Legacy of the Past (Oct. 26, 2007), available at <http://www.icty.org/sid/8829>.

done, a lot of opinions were formed and a lot of prejudices were created. That became very difficult to counteract. I think their outreach program has done a really good job since then. But that lost period of time, I feel like they are going to be constantly paying for that.⁵⁴

In particular when it comes to the work of the ICTY . . . , first of all the ICTY made this mistake by introducing the outreach far too late. In some terms I'm not really sure that it has been very smart to introduce it in 1999 at all. After actually missing the first six years of their work and giving the possibility to nationalistic parties on the ground [that] are still in armed conflict. [It gives] them the possibility to actually, . . . do a lot in terms of discrediting the court. The propaganda against the ICTY was very, very, very strong in particular in those six years. And then suddenly the outreach started.⁵⁵

The delay of the outreach efforts and the distance of the Tribunal from the region added to the hindrance of a shared historical narrative in the region. Outreach was not implemented until a number of years after the Tribunal was established and this was when most people had stopped paying attention. This outreach program was instated through the ICTY with a very limited budget and resources and only targeted small pockets of the various communities that were affected by the wars.⁵⁶ Today's outreach targets the youth of the region through visiting programs to local schools to engage the students about the past in the hopes of providing them with information that is not available in their history books.⁵⁷ Many of those we interviewed commented on the history that is taught in schools, ending at World War II and picking up after Dayton, skipping the conflicts entirely.

I think there is a perception that the ICTY really surrendered the field to nationalist, ultra-nationalist politicians in the early years. That is they had no message for the region. The judges acted as though their judgments would speak for themselves, but of course 2,000 kilometers away, nobody knew what their judgments were. It took a

⁵⁴ Interview with Param-Preet Singh, Senior Counsel for the Human Rights Watch International Justice Program, in New York, NY (Mar. 28, 2014).

⁵⁵ Interview with Aleksandra Letić, Program Director for Helsinki Committee for Human Rights, Republika Srpska, in Sarajevo, Bosnia-Herzegovina (June 9, 2014).

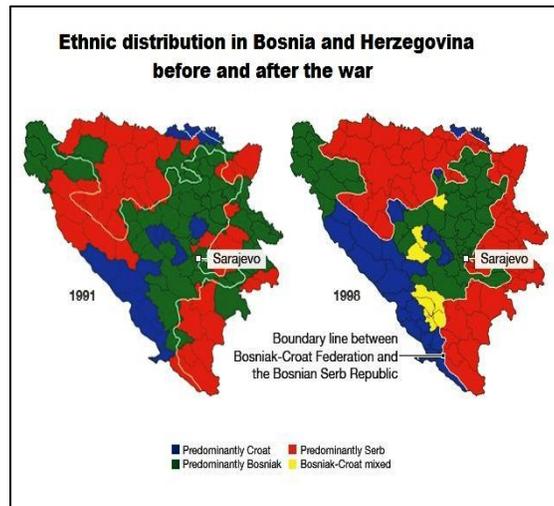
⁵⁶ Xueqin Wu, *supra* note 48.

⁵⁷ *Youth Outreach*, UN ICTY, <http://www.icty.org/en/outreach/youth-outreach> (last visited Dec. 19, 2015).

long time actually to have some judgments come out of their work and in the meantime politicians on the ground weren't nearly as reticent about expressing their views of the ICTY. They really framed a local narrative about what this ICTY is and was. As you know, the predominant narrative on the part of many Serb leaders was [that] this is an anti-Serb Tribunal - "It's organized to convict us." There was a bit of misinformation about the ICTY's record. A lot of people in the region didn't know that it had indicted people of all ethnic groups and not just Serbs. So there's cause for concern about the fact that the ICTY took a while to clarify the public record and understanding about what it was in fact doing.⁵⁸

iii. The Effects of Ethnic Cleansing and the Dayton Constitution

Additional damage to the reconciliation process and a shared historical narrative in the region was done by the success of ethnic cleansing during the conflicts. Various ethnic groups lived side by side until the wars divided them. Parts of the region that were thoroughly mixed with Croats, Bosniaks, Albanians, and Serbs became homogeneous after the wars.⁵⁹



⁵⁸ Interview with Diane Orentlicher, Professor of International Law, American University, in Washington D.C. (Apr. 11, 2014).

⁵⁹ *Ethnic Makeup of Bosnia and Herzegovina Before and After the War*, WIKIMEDIA.ORG, http://upload.wikimedia.org/wikipedia/commons/8/8f/Ethnic_makeup_of_Bosnia_and_Herzegovina_before_and_after_the_war.jpg. (last visited Oct. 21, 2015).

In November 1991 you had the slaughter of Croatian prisoners in Vukovar by Serbian forces. The biggest crimes in Bosnia happened not in 1995, it was the biggest crime itself at Srebrenica, but the largest number of victims were from 1992. You had . . . complete cities erased ethnically from Bosnian Muslims, especially this area of Eastern Bosnia: Foča, Višegrad, everything.⁶⁰

After the Dayton Agreement was signed in November of 1995, bringing peace to the Bosnia Herzegovina region, the various ethnic groups who had lived side by side were now not only separated by the conflict but permanently divided by Dayton, which was only intended to be a temporary constitution. It still remains today and is affecting human rights in the region as well as reconciliation efforts as the ethnic divisions are solidified under this constitution.

What we have to reverse is what exactly happened in this country. People have systematically been divided in this country. Ethnic cleansing. So they don't get into contact. So they don't work on things together. The institutions have been divided in this way.⁶¹

We always say the Dayton Agreement did a lot to stop the war back in '95, so it did really stop the war and it was a good solution for a short term solution. However, the intention was never to draft up something for the longer term and in another sense, you sort of got to legitimize the nationalist parties by dividing people among Bosniaks, Croats, and Serbs. Which . . . before 1992 [was] incomprehensible. Because as you said before, we are so mixed, we are so diverse, that only a madman can divide us into three blocks of people. [Dayton] has served peace, we have seen peace for twenty years, we haven't heard a bullet shot or a gunshot. . . . However, you can look at the system at the moment, it's totally dysfunctional. It breeds and lives corruption, injustice. I mean the health care [system and the] education [system are] in total chaos. So the constitution needs chronic reform to provide Bosnia with some sort of future. So at least the people have some glimpse of a better future. Right now we are still living in December 1995 when the Agreement was signed. We

⁶⁰ Interview with Marijana Toma, Deputy Executive Director, Humanitarian Law Center, in Belgrade, Serbia (June 4, 2014).

⁶¹ Interview with Damir Karamehmedović and Igor Spaic, in Sarajevo, Bosnia-Herzegovina (June 7, 2014).

haven't moved one step forward. And a lot of people say we've even moved backwards because it's this perpetual subsidizing of the nationalist parties that we see.⁶²

I do believe deeply there are a few things [that] must happen in Bosnia Herzegovina before this country starts to go towards development and towards normal civil society. One among them, the most important one is changing the constitution, Dayton Constitution of Bosnia Herzegovina. Without changing this constitution, which provided the frozen situation in the last twenty years after the war, we will not move anywhere toward European Union integration, nor towards reconciliation, nor towards normal civil society. The precondition of any changes in Bosnia Herzegovina lays in changing the constitution. . . . I'm sure the international community can do it overnight. They have tools for doing this. But they're training democracy in impossible circumstances in Bosnia for over twenty years at the cost of millions of lives. Not in a literal way, but the millions of normal and decent lives of people who live in this country. And this is something of which I am very disappointed.⁶³

iv. Grassroots Efforts to Facilitate Reconciliation

Those in the region believe that reconciliation is best achieved as a grassroots movement. Local actors have taken up the mantle of reconciliation in the region, recognizing the Court's failure to provide this through just a legal mechanism.

You are familiar with the concept of RECOM,⁶⁴ that is the initiative to establish a regional commission to establish the facts on war crimes and other severe human rights breaches. Even in the name and in the concept of the commission both the word truth and reconciliation were not used. And that was the result of a long process of consultation in the region. I personally believe that if you are living in Serbia, coming from Serbia, you should not discuss reconciliation. It is almost not decent to say that

⁶² *Id.*

⁶³ Interview with Svetlana Broz, Founder, GARIWO, in Sarajevo, Bosnia-Herzegovina (June 9, 2014).

⁶⁴ Coalition for RECOM, RECOM.LINK, <http://www.recom.link/> (last visited Oct. 21, 2015).

word and to hope for that. Before we go through the very difficult process of accepting our own role, accepting our own responsibility, giving a real apology to the victims, then they could initiate the talks about reconciliation. This word, this concept has also a kind of religious layer which is not in the blood of the peoples here.⁶⁵

Many local actors use examples of civil courage to strengthen reconciliation efforts in the region. Civil or moral courage is to defy evil at great personal risk, such as hiding Jews from the Nazis. Stories of moral courage are collected and used as examples toward the process of reconciliation by local human rights advocates to inspire dialogue and understanding.

What we do is, we are taking kids outside of the schools, we are giving them a chance to interact between each other. And we are showing them the portraits of people from every ethnic side, where they can see how good people stood up against evil. We would also like to teach them how not to be a bystander. We are trying to explain to them that they can be ordinary heroes and they can [stand] up against evil in a daily life. That they can show the moral courage in their daily life if they see that someone is molested [and] that someone needs help on the street. So it's extremely complicated to work on reconciliation. You know you need to find those balanced models [that] you need It's not easy for a kid from Banja Luka to come to Sarajevo because usually we have a wrong approach of collective [guilt]. We have ICTY, and the legacy of [the] ICTY is extremely important. Then I think there will come a period when we will understand why [the] ICTY is such a crucial institution for [the] Balkans, especially in Bosnia. But unfortunately up until now, the ICTY didn't accomplish one of their missions which was reconciliation, also to establish some basis for reconciliation. So for a young person, for a kid from Mostar, or a kid from Banja Luka to come to Sarajevo or opposite a kid from Sarajevo to go to Banja Luka is not easy because usually they feel [the] burden for what someone from their ethnic group did. So what we would like to do also is put the blame on individuals, put [the] blame on [the] system, put the blame on political [and] military leaders and explain to those kids

⁶⁵ Interview with Natasa Govedarica, Program Manager, ForumZFD, in Belgrade, Serbia (June 2, 2014).

that they don't have a reason to blame [themselves]. And that they should find their own catharsis, their own way to manage and overcome [the] past because we all have to continue and build a better future.⁶⁶

Svetlana Broz, the granddaughter of the late Tito Broz, former President of Yugoslavia, wrote the book, "Good People in an Evil Time." During the war she collected the testimonies of those who were rescued by selfless acts of moral courage.⁶⁷ These examples of moral courage have inspired not only the people of the region but are universal lessons for all of humanity.

Well I was a cardiologist by training when the war started in Bosnia Herzegovina and I couldn't stay calm in my armchair watching the TV and following how only 100 kilometers far from my house my people were being murdered. How children were murdered and their houses were burned. That's why I decided to go to the war zone At the very first year of the war in 1992, trying to help maybe one human . . . being, who was in need at that time. While I have been told very often by my patients who belong to very different ethnic groups in Bosnia Herzegovina in these often improvised cardiology units, I never asked them about which experience they did have before I came to heal them. But, they . . . told me their testimonies. Answering my questions, "Yes, I have got a myocardial infection but it is not important. You know I would like to tell you my testimony, my story. I have been saved by somebody at that day, at that place by somebody who didn't belong to my own ethnic group. Somebody who crossed inter-ethnic, interfaith [lines], . . . risking his or her own life, who protected somebody." Do I have a moral right to ignore the will of those people, to spread their testimonies? It was clear for me, that they told me secrets just to spread them to others. Maybe they thought that I had a better chance to survive the war than they. . . . They could be murdered every day. I came from Belgrade So I can keep those testimonies. But why keep them, I should spread them to others.⁶⁸

⁶⁶ Interview with Velma Šarić, Founder and Executive Director, Post-Conflict Research Center, in Sarajevo, Bosnia-Herzegovina (June 9, 2014).

⁶⁷ SVETLANA BROZ AND LAURIE KAIN HART, GOOD PEOPLE IN AN EVIL TIME: PORTRAITS OF COMPLICITY AND RESISTANCE IN THE BOSNIAN WAR (2d ed. 2005).

⁶⁸ Interview with Svetlana Broz, *supra* note 63.

When the wars finally ended in the region, Svetlana Broz continued on her mission to teach and spread moral courage to others. She founded Gardens of the Righteous (GARIWO), a non-profit organization dedicated to the service of memory and education, to heighten awareness of people who have been selfless in the face of evil.

We are working on education in civil courage. We worked with over 100,000 young people in Bosnia Herzegovina and the rest of the Balkan region about this issue. And in the meantime we develop[ed] a program on the education of civil courage. In 2007 we did have a tragedy that Duško Kondor, teacher of democracy and human rights from Bijeljina, this is a city northeast of Bosnia, he had been assassinated in a political assassination. After that, I established [the] Duško Kondor Civil Courage Award. The very first year there were three laureates. The first was Lazar Manojlović, teacher from Bijeljina who saved children at [the] very beginning of the war in his place where perpetrators wanted to wipe out children who . . . belonged to [a] particular ethnic group and who saved some prisoners in [a] nearby concentration camp. He is still [a] fighter for [the] greater good, he's a fighter for truth about this period and somebody who is 80 but very active. The second was Dragan Andrić, he got his posthumously. He was [an] officer at the very beginning of the war of [the] Bosnian army, but he saved dozens of people who were lost in the woods and the mountains in [the] nearby place [of] Konjic, becoming refugees, and then they lost themselves so they were starving. And he and his soldiers were going to the enemy's territory to pick [them] up, being very quiet, to pick up these people and to bring them to the safe territories. So they saved the lives of many people. And the third was a young member of parliament of Bosnia Herzegovina, Denis Bećirović. He managed to persuade not very happy members of parliament to give [an] order to the government to separate money for building a monument to the 27 year old Srđan Aleksić from Trebinje place who sacrificed his life in 1993 when he saw that Serb soldiers were beating one Muslim citizen. So he interfere[d], being a Serb and a human being first of all. He interfere[d],

[saying] it's not fair to beat him, he is innocent. And then they were beating Srđan, who died after seven days.⁶⁹

Using stories of moral or civil courage to educate and spread reconciliation throughout the region is a major tool for local human rights advocates building bridges to understanding and inspiring dialogue. The Post-Conflict Research Center in Sarajevo has a roving display entitled "Ordinary Heroes" that they move from village to village throughout the region.⁷⁰ Svetlana Broz and GARIWO have a visible educational center and a museum to promote examples of righteous individuals for the purpose of reconciliation: "It will also be a traceable and recognizable token of civil courage amidst the chaos of lingering mistrust, fostering the sustainability of future of Bosnian society."⁷¹

v. Conclusions Regarding the ICTY's Contributions to Reconciliation in the Region

When the ICTY was first created, proponents believed that the Tribunal would play a significant role in reconciliation in the Balkans. As time went on, those hopes began to fade. The distance between The Hague and the Balkans, the horrendous effectiveness of ethnic cleansing, and the lack of an outreach mechanism for the first six years of the Court's existence made it easier for right-wing nationalists to distort the Court's achievements and to hinder reconciliation efforts. The vast majority of people we interviewed, both in The Hague and in the Balkans, feel that the Tribunal failed to directly facilitate reconciliation. Most interviewees also believe that including reconciliation as part of the Tribunal's original mandate was an unrealistic overreach by the United Nations.

However, the ICTY's work has created a pathway to reconciliation by ending impunity. Without criminal justice, the irrefutable facts the ICTY has presented to the world about what happened during the conflict, and the ICTY's commitment to accountability, both at The Hague and in local courts, denial would be much easier and true reconciliation would be more difficult, if not impossible. The ICTY's continued efforts, while imperfect, provide an opening that grassroots human rights groups have used and continue to use.

Countless grassroots organizations throughout the region are working tirelessly to help victim survivors and their families and to achieve

⁶⁹ *Id.*

⁷⁰ *Ordinary Heroes*, POST-CONFLICT RESEARCH CENTER, <http://p-crc.org/ordinary-heroes/> (last visited Dec. 19, 2015).

⁷¹ Gariwo Projects, GARIWO.ORG, <http://www.gariwo.org/en/program/projects> (last visited Oct. 21, 2015).

reconciliation. There is a coalition which is working to create a regional truth and reconciliation commission. Several organizations, such as the P-CRC and GARIWO, are using stories about moral courage to bring people together. Women in Black, Mothers of Srebrenica, UDIK, and others continue to hold demonstrations and vigils to educate and promote reconciliation. The Humanitarian Law Center, TRIAL, the Centre for Research, Documentation and Publication, and others continue to document what happened during the war and to advocate for victim survivors and their families. ICTY Outreach, the Helsinki Committee for Human Rights, the Mozaik Foundation, the Youth Initiative for Human Rights, and others work with the youth to educate them and to promote peace and harmony for the future. Those we interviewed are disappointed in the slow pace of reconciliation, but they remain optimistic for the future and believe that reconciliation can and will be achieved.

C. Justice

In UN Security Council Resolution 827, the Security Council expressed its “grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law” in the former Yugoslavia, including “reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing.’”⁷² The Security Council stated that it was “determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”⁷³ The ICTY was established for the “sole purpose of prosecuting persons responsible” for those violations.⁷⁴

There is no dispute that the ICTY was created to prosecute individuals believed to be responsible for committing genocide, war crimes, and crimes against humanity in the former Yugoslavia in 1991 and thereafter. However, whether or not criminal prosecutions generally, or in the way that the ICTY specifically carried out (and continues to carry out) such criminal prosecutions, achieves “justice” is hotly disputed because different people define justice in vastly different ways.

⁷² S.C. Res. 827, *supra* note 19, at 6.

⁷³ *Id.*

⁷⁴ *Id.* at 2.

i. The “Rule of Law” Versus “Justice”

There is an argument that the concepts of law and justice are not interchangeable. A criminal prosecution, even a conviction, may not be what a victim considers to be justice.

Law and justice are not the same thing. There is a really great statement by an East German dissident after the wall came down where she said, . . . “We were hoping for justice and what we got was the rule of law.” And I think that was one of the most brilliant statements of all times.⁷⁵

However, even though the “rule of law” and “justice” are not the same thing, the ICTY has striven to conduct trials that are fair to victims, defendants, and witnesses, governed by modern standards of due process, and open to outside observation. While justice as practiced by the ICTY is imperfect, it is important to maintain such high standards, even when difficult and even in the face of intense criticism.

I think these cases are inherently really hard and . . . it’s a challenge the law takes on in these cases and it’s appropriate. But it sometimes leaves the communities feeling like justice is letting them down. The reality, in my view, is that justice is functioning as it should. We are not stooping to the level of the criminality of the perpetrators. We are coming in and establishing a rule of law that requires this high standard.⁷⁶

What’s the sense of having a trial if it’s not done right? You need . . . not just substantive justice, but procedural justice. This whole thing about justice, . . . should be done but should also be perceived to be done - the perception part is extremely important, especially in these war crime cases, because usually they are politically charged and perceptions do matter. You want the public to have the perception that this was a fair trial.⁷⁷

ii. Perceptions of Justice Are Often Colored by Experience

How certain victim survivors view justice and their beliefs regarding how to achieve and maintain justice can be radically different from other

⁷⁵ Interview with Belinda Cooper, *supra* note 10.

⁷⁶ Interview with David Akerson, Law Professor, Sturm College of Law, in Washington, D.C. (Apr. 12, 2014).

⁷⁷ Interview with Michael Karnavas, Defense Attorney, ICTY, in The Hague Netherlands (June 18, 2014).

victim survivors. Oftentimes these views are based upon the type of crime they survived or that their loved ones suffered. The perception of justice also often depends upon whether the individual crime that a certain victim suffered is being prosecuted by the ICTY. With certain defendants in front of the ICTY, the crime base is so large, the prosecutors make the decision to only prosecute the largest crimes. Otherwise, trials would be unduly lengthy and, in their view, convictions and lengthy sentences can be achieved without indicting and prosecuting for every crime committed by that individual. However, this often leaves victims whose individual crimes are not prosecuted feeling as if their suffering is not important and that they will never see true individual justice, even if the perpetrator is found guilty.

When it comes to victims, . . . it depends on the type of crimes they have survived. If you talk to victims of torture . . . or who survived camps, it's not that they don't care about truth, but they . . . want justice more. Because they are alive and they know the truth Yes, they would appreciate if somebody would acknowledge that truth, but for them, first justice and then we can talk about different things. On the other hand, when you talk to families of [the] disappeared, . . . then I would say that everything else is just forgotten when it comes to truth because they are still looking for their family members. . . . I have heard many of them say: "All I want to know is truth. I want to know what happened to my mother or my brother. I want to know where his body is. I want to bury him properly and that's it." It also depends on whether somebody addressed that crime, whether that was a court in The Hague or a court here. For some of them, for example, there are groups of victims which are discriminated against in Serbia because of our law on civilian victims. And for them, even though they know that there is someone in prison for what they did to their family members . . . the fact that they are not recognized under Serbian law as civilian victims just because their loved ones were killed by Serbian forces . . . for them the issue of reparation is the most important. It's not about the amount of money. It is about [the fact] that a court in Serbia or the government of Serbia recognizes them as victims. . . . It depends also on whether the crime was covered because the ICTY had to be very selective in crimes they are going to prosecute. For example, . . . there is the case of Milan Lukić. Milan Lukić was the leader of

the Serbian paramilitary group from Visegrad and . . . he is one of two persons who [were] actually sentenced to life in prison. His crimes were so vast, so big, that the prosecution decided not to include everything because it was pointless. They knew that they would nail him for two crimes. . . . But somehow, the victims of a couple of crimes that he committed that were not part of the indictment felt very neglected. They reasonably asked, “What do you mean? Does it mean that these crimes never happened? Who will address this?” Even though he’s in prison, even though he lost his appeal, even though justice was served by the ICTY, there are still those [who] think they didn’t experience it.⁷⁸

iii. Common Criticisms of the ICTY’s Contributions, or Lack Thereof, to Justice

When the ICTY was first created, it was widely believed that it would operate for a few years and then transition into its residual phase. However, delays in capturing fugitives, refusals by governments in the Balkans to assist the Court, lengthy trials, and other factors resulted in the Tribunal operating for over 20 years, with four trials still pending. When the Tribunal was first established, there were many high hopes associated with what the Tribunal could accomplish. Many of the interviewees we spoke with felt that the United Nations and the international community unfortunately created atmospheric expectations about the court by stating that it would be a critical factor in peace, reconciliation, justice, and truth in the region. As with all man-made institutions, the ICTY is imperfect and its efforts have disappointed many. While our interviewees expressed numerous criticisms of the court, the criticisms related to the ICTY’s contributions to justice we heard most frequently involved: (1) low sentences for perpetrators; (2) how the Milošević trial was conducted; and (3) the recent acquittals of high-level individuals, such as Gotovina and Perišić.

a. Sentencing

One criticism of the ICTY that was repeatedly asserted by our various interviewees was the low sentences issued by the ICTY. Since the ICTY is an institution created by the United Nations, the death penalty is not a

⁷⁸ Interview with Marijana Toma, *supra* note 60.

punishment option. The highest sentence that a defendant can receive is life imprisonment and, to date, only six defendants have received life sentences.⁷⁹ It is difficult for many to understand why many domestic systems would issue dramatically longer sentences to individuals convicted of one murder than the ICTY sentences perpetrators who have committed massacres, multiple tortures, and/or multiple violent rapes.

Survivors expect high sentences, which is absolutely their right and I couldn't agree more that for these kinds of crimes the sentences should be proportional to the severity of the crime that has been committed. . . . [T]hen they are disappointed, frustrated, [and] re-traumatized once the perpetrator is released after serving two-thirds or three-fourths of his sentence, that he's welcomed in his community as a hero, [and] that he can run for office [or] for some public position.⁸⁰

The European criminal justice model, which heavily influenced the structure of the ICTY, values rehabilitation in addition to retribution. Thus, most European countries allow for convicted perpetrators to serve less than their full sentence if they peaceably serve their sentences. The ICTY's sentencing and release model follows the European example.⁸¹ Further, since the longest sentence possible at the ICTY is life imprisonment, it appears that judges have attempted to scale the atrocities committed in the region. While it is difficult to compare one horrific set of crimes with another, the Court's sentencing regime seems to reflect an attempt to issue the longest sentences to the perpetrators who committed the most heinous crimes, relatively.

I think the sentences in general for the crimes that we deal with - war crimes, crimes against humanity, and genocide - are low and they're lower than could be expected in these circumstances. Where you get people involved in hundreds of thousands of expulsions, thousands of murders, and they're getting a sentence between 15 and 25 years imprisonment, I think almost any domestic system would find that surprising At the same time, sentencing

⁷⁹ *Judgment List*, UN ICTY, <http://www.icty.org/en/cases/judgement-list> (last visited Dec. 19, 2015).

⁸⁰ Interview with Lejla Mamut, former Human Rights Coordinator, TRIAL, in Sarajevo, Bosnia-Herzegovina. (June 7, 2014).

⁸¹ Oliver Windridge, *Guest Post: Two-Thirds of 45-Does Life Mean Life at the ICTY?*, OPINIO JURIS (July 5, 2015, 1:50 AM), <http://opiniojuris.org/2015/07/15/guest-post-two-thirds-of-45-does-life-mean-life-at-the-icty/> (the European model is focused more on rehabilitation and shorter prison terms, generally releasing prisoners before the expiration of their sentences).

comes down to the judges to decide and in general, there is an attitude that these sentences shouldn't be purely retributive, they should also have an aspect of rehabilitation for the offenders, which is another value of sentencing. They are balancing various factors in reaching them. Also, when you're dealing with hundreds of charges and various crimes, it's very difficult to make any kind of comparison from one accused to the next.⁸²

b. The Slobodan Milošević Trial

Historically, heads of state enjoyed complete immunity for all acts, whether committed in their private or public capacity.⁸³ The charters for the Nuremberg and Tokyo Tribunals made history by allowing for the prosecution of individuals for the laws of war, including heads of state.⁸⁴ However, both Adolf Hitler and Benito Mussolini died before the tribunal was established and although Japan's Emperor Hirohito survived the end of World War II, he was granted immunity and was not prosecuted by the Tokyo Tribunal.⁸⁵ In 1999, Slobodan Milošević became the first sitting head of state to be indicted for war crimes.⁸⁶ This indictment represented a

⁸² Interview with Matthew Gillett, *supra* note 38.

⁸³ Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 653-54 (2002-2003); *see also* Erin K. Lovall, *The Prosecution of Heads of State: An End to Impunity and a Call for an End to Accommodation 1* (Dec. 10, 2013) (unpublished manuscript) (hereinafter "Heads of State Paper") (on file with author).

⁸⁴ Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal arts. 6-7, Aug. 8, 1945, 85 U.N.T.S. 251, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>; International Military Tribunal for the Far East Charter arts. 5-6, Jan. 19, 1946, T.I.A.S. No. 158, *available at* <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>; *see also* Heads of State Paper, *supra* note 83, at 2.

⁸⁵ Mary Margaret Penrose, *The Emperor's Clothes: Evaluating Head of State Immunity Under International Law*, 7 SANTA CLARA J. INT'L L., 85, 104 (2010); HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 592-93 (2000); *see also* Heads of State Paper, *supra* note 83, at 2. Hideki Tōjō, the Japanese Prime Minister from 1941 to 1944 who ordered the Pearl Harbor attack, was tried and convicted by the Tokyo Tribunal, but he was not considered the Japanese head of state. Karl Dönitz was a German naval commander who was named Hitler's successor as head of state after Hitler's suicide. He was tried and convicted by the Nuremberg Tribunal for actions he took as a naval commander.

⁸⁶ *Milosevic Indictment Makes History*, CNN.COM (May 27, 1999), <http://www.cnn.com/WORLD/europe/9905/27/kosovo.Milosevic.04/>; *see also* Prosecutor v. Milošević, Case No. IT-02-54, Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999).

remarkable shift in international justice and, as this type of prosecution had no precedent at the time, the ICTY was in uncharted territory. After over two years of trial, Milošević died before all of the evidence was heard and the Trial Chamber issued a judgment.⁸⁷ Many in the international community and within the Balkans are critical of the Prosecution's long indictment and the lengthy trial. Many believe that because he was never convicted, he died "innocent."

I think that the prosecution case lasted over two years, that the presiding judge died, and then Milošević died, obviously wasn't the best way for the most important trial up until then held by the ICTY to have developed. I think that there was a great deal of concern amongst the victims that the person they saw as being primarily responsible for their victimhood had, as it were, escaped justice by dying. . . . The indictment was too long. As I recall, there were well over 60 charges brought against Milošević and that's one of the reasons the prosecutor's case lasted so long. It was exacerbated by the fact that Milošević insisted, as was his right, in defending himself and using the trial as a platform, a political platform, to talk to his own supporters back home in Serbia. . . . Subsequently, I think that prosecutors have learned the lesson and have shortened indictments. I've got no doubt that the correct approach is to go for the big charges, for the jugular. If you're going to lose on the big ones, there's no point in getting some solace by going for the small counts.⁸⁸

I think in [the Milošević] trial, my own view about it is that the prosecution charged Mr. Milošević with too many counts across too many theaters of conflict. He should have been charged in relation to all three theaters of conflict, in Croatia, Bosnia, and Kosovo, but 66 counts? I'm not convinced; I think it was way too much. The prosecution's case went on for two years and four months. 350 witnesses had been either called in person or their documentary evidence had been tendered. They had a list of nearly 1,000 witnesses that they would have liked to have called and the Trial Chamber said . . . this can't go on indefinitely. There

⁸⁷ Molly Moore and Daniel Williams, *Milosevic Found Dead in Prison*, THE WASHINGTON POST (Mar. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100525.html>.

⁸⁸ Interview with Richard Goldstone, first Chief Prosecutor, ICTY, in New York, NY (Mar. 13, 2014).

are lessons from that trial about the complexity of the case against the accused and I'd say at one extreme end of the spectrum is the Milošević trial and the other extreme end is the trial of Saddam Hussein, with a couple of counts in relation to one incident throughout nearly a 40 year dictatorship which was characterized by terrible atrocities. Those two extremes both . . . represent how not to try a former head of state. In between we've got to find some sort of balance.⁸⁹

Many believe that because Milošević was never convicted, he died "innocent." However, some combat this belief because so much evidence was presented in the prosecution's case to effectively prove his guilt and those facts are available for all to see. Thus, even though he was not officially convicted, he did not die innocent.

Crimes that Milošević was accused of in the ICTY do not change [anything] with the perception of most of the people in Serbia. In their view, he passed away as an innocent man because the trial was not completed. Even had the trial been completed, I doubt that many would regard him as a war criminal because they do not believe in the ICTY.⁹⁰

In hindsight, they would have had a more streamlined case against Milošević and we would have had a verdict, but nobody has hindsight. It is incredibly important the distinction between "not found guilty" versus "found innocent." I've heard people say "Gotovina was found innocent" and I've said "no, his conviction was overturned on appeal." That doesn't mean he was found innocent. It doesn't mean he was innocent. It means the legal process played out and that is our outcome. It's very important to draw the distinction between "found innocent" and having a conviction overturned. Milošević was found nothing, he was not found innocent and he was not convicted. We have neither finding. It's very important to not cause misperceptions about this.⁹¹

⁸⁹ Interview with Tim McCormack, Professor of Law, Melbourne Law School, in The Hague, Netherlands (June 16, 2014).

⁹⁰ Interview with Ivan Jovanović, former Head of War Crimes Unit, OSCE's Mission to Serbia, in Belgrade, Serbia (June 1, 2014).

⁹¹ Interview with Jennifer Trahan, *supra* note 14.

c. The Recent Acquittals in the Gotovina and Perišić Cases

In 2001, Ante Gotovina, former Commander of the Split Military District of the Croatian Army and commander of part of Krajina during Operation Storm, was indicted by the ICTY.⁹² A few years later, Ivan Čermak, former Croatian Assistant Minister of Defence and Commander of the Knin Garrison, and Mladen Markač, the former Croatian Commander of the Special Police and Assistant Minister of the Interior, were also indicted and joined into Gotovina's case.⁹³ The three men were widely viewed as being primarily responsible for horrific massacres and ethnic cleansing of Serbs during Operation Storm in the Krajina region of Croatia. All three were charged with: (1) persecutions on political, racial, and religious grounds, deportation, and inhumane acts; (2) plunder of public or private property and wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; (3) murder; (4) inhumane acts; and (5) cruel treatment.⁹⁴ At the trial level, Čermak was acquitted and Gotovina and Markač were convicted as members of a joint criminal enterprise for (1) persecution, deportation, murder, and inhumane acts (crimes against humanity) and (2) plunder of public and private property, wanton destruction, murder, and cruel treatment (war crimes) and both were sentenced to 24 years imprisonment.⁹⁵

In a shocking about-face in 2012, Gotovina and Markač were completely acquitted by the Appeals Chamber in a 3-2 vote, with Judges Agius and Pocar issuing unusually pointed dissents to the majority opinion.⁹⁶ "The decision of the appeals chamber was based on the following rationale: the existence of a [joint criminal enterprise] depended on whether the shelling of the towns was unlawful; the assessment of lawfulness, in turn, critically depended on the distance at which the

⁹² Prosecutor v. Gotovina, Case No. IT-01-45, Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2001) (hereinafter "Gotovina Indictment").

⁹³ Prosecutor v. Gotovina, et al., Case No. IT-06-90, Joinder Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2006) (hereinafter "Gotovina Joinder Indictment").

⁹⁴ Gotovina Indictment, *supra* note 92; Gotovina Joinder Indictment, *supra* note 93.

⁹⁵ Prosecutor v. Gotovina, et al., Case No. IT-06-90, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (hereinafter "Gotovina TC Judgment").

⁹⁶ Prosecutor v. Gotovina, et al., Case No. IT-06-90-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (hereinafter "Gotovina Appeals Judgment").

artillery projectiles fell in relation to legitimate targets.”⁹⁷ The Trial Chamber heard expert testimony regarding the shelling by Croatian military forces and accepted a 200-meter margin of error surrounding the target as “lawful” targeting.⁹⁸ Since many shells launched by Croatian forces ranged from 300-700 meters from the intended target, these were determined to be “unlawful” and provided evidence of a joint criminal enterprise to shell indiscriminately.⁹⁹ The Appeals Chamber rejected this standard as arbitrary and, since the standard was deemed flawed, the convictions were found to be in error and were overturned.¹⁰⁰

Momčilo Perišić, as Chief of the Yugoslav Army General Staff from 1993 to 1998, was the top military officer of the Yugoslav Army (VJ), headquartered in Belgrade, Serbia.¹⁰¹ According to the Second Amended Indictment, Perišić’s position gave him authority to: “(1) make and implement decisions for the VJ General Staff and all subordinate units; (2) issue orders, instructions, [and] directives [and to ensure their implementation]; and (3) transfer and second VJ personnel to Army of the Republika Srpska [(VRS)] and the Army of the Serbian Krajina [(the SVK)]....”¹⁰² The indictment alleged that in early 1995, Karadžić directed the VRS to “eliminate the Muslim enclaves of Srebrenica and Žepa” and that Perišić knew the attack was planned, and also knew that some VRS members would commit criminal acts including persecution, forcible transfers, and killings.¹⁰³ In July 1995, VRS forces executed over 7,000 Bosnian Muslim men and boys in the areas surrounding the town of Srebrenica, and forcibly transferred over 25,000 Bosnian Muslims.¹⁰⁴ The

⁹⁷ Bogdan Ivanisevic, *Hague Failed to Justify Gotovina Acquittal*, BALKAN INSIGHT (Nov. 19, 2012), <http://www.balkaninsight.com/en/article/hague-failed-to-justify-gotovina-acquittal>.

⁹⁸ Gotovina TC Judgment, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ Gotovina Appeals Judgment, *supra* note 96.

¹⁰¹ Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) (hereinafter “Perišić TC Judgment”); Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment Summary (Int’l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011); *see also* Perišić Article, *supra* note 9.

¹⁰² Prosecutor v. Perišić, Case No. IT-04-81, Second Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 5, 2008) (hereinafter “Perišić Indictment”); *see also* Perišić Article, *supra* note 9.

¹⁰³ *Id.*; *see also* Perišić Article, *supra* note 9.

¹⁰⁴ *Id.* A more accurate figure is over 8,000. Maja Zuvella, *Bosnia Reburies Srebrenica Dead 18 Years After Massacre*, REUTERS (July 11, 2013, 10:44 AM), <http://www.reuters.com/article/2013/07/11/us-bosnia-srebrenica-idUSBRE96A0HJ20130711>. Perišić was not the only person to be tried for criminal responsibility related to the Srebrenica massacre. *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-A, Appellate Judgment, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (wherein the ICTY Appeals Chamber unanimously found that “genocide was committed at Srebrenica in 1995” and

indictment charged Perišić with (1) aiding and abetting these unlawful killings, inhumane acts, and forcible transfers; (2) aiding and abetting the planning, preparation, or execution of shelling and sniping of civilian areas in Sarajevo; and (3) planning, instigating, ordering, committing, or otherwise aiding and abetting the shelling of civilian areas in the city of Zagreb by the SVK.¹⁰⁵

The ICTY Trial Chamber's judgment found Perišić guilty of (1) aiding and abetting murder in Sarajevo and Srebrenica, inhumane acts and attacks on civilians in Sarajevo, and inhumane acts and persecutions in Srebrenica and (2) superior criminal responsibility for murder, inhumane acts, attacks on civilians in Zagreb.¹⁰⁶ He was sentenced to 27 years imprisonment.¹⁰⁷ In another unexpected reversal, the ICTY Appeals Chamber found that the Trials Chamber failed to demonstrate there was evidence that Perišić's actions were specifically directed to aid and abet criminal activity.¹⁰⁸ Due to this failure, the Appeals Chamber overturned the Trial Chamber and completely acquitted Perišić of all charges.¹⁰⁹ The ICTY Trial Chamber in the case against Jovica Stanišić and Franko Simatović followed the legal logic of the Perišić Appeals Chamber and acquitted both defendants (although this case is now on appeal.)¹¹⁰ However, the Appeals Chamber in the Nikola Šainović case rejected the Perišić Appeals Chamber's decision that specific direction is an element of aiding and abetting and convicted Šainović and his three co-defendants, who had also appealed their convictions.¹¹¹

The reaction to the acquittals amongst the legal experts and human rights experts we spoke with regarding the legal reasoning and impact in the region was almost completely negative. Legal experts stated that the bases for the acquittals was weak and/or not based upon solid legal precedents and that even if the reasoning was absolutely correct, the cases should not have resulted in complete acquittals for these defendants. Human rights activists loudly condemned the impact the acquittals had

that Krstić was "guilty of aiding and abetting genocide"); *see also* Perešić Article, *supra* note 9.

¹⁰⁵ Perišić Indictment, *supra* note 102; *see also* Perešić Article, *supra* note 9.

¹⁰⁶ Perešić TC Judgment, *supra* note 101; *see also* Perešić Article, *supra* note 9.

¹⁰⁷ *Id.*

¹⁰⁸ Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (hereinafter "Perišić Appeals Judgment"); *see also* Perešić Article, *supra* note 9.

¹⁰⁹ *Id.*

¹¹⁰ Prosecutor v. Stanišić & Simatović, Case No. IT-03-69, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013).

¹¹¹ Prosecutor v. Šainović, et al., Case No. IT-05-87-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

upon their work with victim survivors, their relationship with the ICTY, the legacy of the ICTY, and their ongoing work regarding reconciliation in the region.

In my 25 years of professional career, never have I been as frustrated professionally than after the acquittals of Gotovina and Markač on the one hand and Perišić on the other hand. Because in both cases, after more than two years trial, after having heard more than 150-200 witnesses, the judges in *Gotovina*, unanimously in the first instance, and in *Perišić*, with a majority of two judges, convicted in the first instance based on the evidence presented and after having listened to so many victim survivors and witnesses. Having seen those two [defendants], after very short appeals proceedings, acquitted, both with very small, not convincing appeals judgments, was not the most honorable day, from an [Office of the Prosecutor] perspective. If you look at the *Gotovina* decision, if you look at the dissenting opinions, I've never in my entire career seen such strong dissenting opinions from two very experienced judges, distancing themselves from the main decision.¹¹²

With the acquittal of Gotovina, and it's not important that Gotovina personally was acquitted, but there has been no conviction and there will be no conviction for crimes against Serbs in Operation Storm . . . in Krajina. Even the supporters of the Tribunal were embittered.¹¹³

As you can imagine, at the moment, we are deeply concerned about our own legacy. We are totally conscious and aware of the importance of the role played by this Tribunal in the past 20 years of its existence. The worst thing that could . . . happen is if we were not to leave a positive legacy. . . . I dissented [in the *Gotovina* case]. I couldn't agree with the opinion of the majority and I wrote what I felt. The majority wrote what they were convinced of and I wrote what I was convinced of. . . . Everywhere you hand down judgments, sometimes even if they are unanimous, they will not please [everyone]. That is the *real politik* of this Tribunal, of the Rwanda Tribunal, and

¹¹² Interview with Serge Brammertz, *supra* note 52.

¹¹³ Interview with Ivan Jovanović, *supra* note 90.

basically of any other tribunal or court, whether here or in the respective countries where we come from.¹¹⁴

It was in a way, a slap in our face. These verdicts were affecting mostly the people who were the greatest supporters of the ICTY and of course . . . we are not undermining the importance of the ICTY, but they did a lot to undermine the credibility of the court and the importance of the legacy, unfortunately in the year of their twentieth anniversary. . . . You cannot try to explain why these verdicts happened because I think that even the judges that participated in this appeals chamber were trying to overreach themselves It's difficult to explain it to the victims. It's difficult to comfort them.¹¹⁵

Interestingly, even though many ICTY indictees were welcomed back to their respective countries as heroes after they were released or acquitted, General Gotovina chose not to become the right-wing, nationalistic figurehead, that many in Croatia wanted or expected him to be. He chose not to run for office, adopted a more reconciliatory approach, and has been living in mostly quiet obscurity since his return.

It seems that General Gotovina, after his acquittal . . . and upon his arrival [back in Croatia] has not lived up to the expectations that part of the public and part of this marginalized, extreme, right-wing political parties had for him. After his return, he has had a very reconciliatory approach and [has made] statements . . . in public or in interviews that are more concerned with dealing with the past, with return of the Serb refugees, [turning] toward [the] future. When he first came to Zagreb and there was a big welcoming gathering on the main square . . . the first and only sentence he said was "The war is over, let's turn toward the future."¹¹⁶

¹¹⁴ Interview with Judge Carmel Agius, Judge and Vice-President, ICTY, in The Hague, Netherlands (June 17, 2014).

¹¹⁵ Interview with Maja Mičić, Director, Youth Initiative for Human Rights, in Belgrade, Serbia (June 1, 2014).

¹¹⁶ Interview with Marko Smokvina, Transitional Justice Program Coordinator and Historian, Youth Initiative for Human Rights, in Zagreb, Croatia (June 1, 2014).

iv. Common Areas of Praise Regarding the ICTY's Contributions to Justice

While the criticisms of the ICTY are plentiful, the ICTY's accolades are equally numerous. The ICTY was the first international criminal court to be created that was not a military tribunal and that arguably did not engage in rank victors' justice. Our interviewees had many areas of praise regarding the ICTY's contributions to justice, but the primary areas were: (1) but for the ICTY, there would have been impunity for the perpetrators of war crimes, genocide, and crimes against humanity committed in the Balkans in the 1990s; (2) the ICTY was a large factor in the creation and improvement of national war crimes chambers throughout the Balkans; and (3) the ICTY's case law has contributed greatly to international jurisprudence regarding war crimes, genocide, and crimes against humanity.

a. The Belief That There Would Have Been Impunity Without the ICTY

In all of the interviews we conducted, the interviewees expressed misgivings with or criticisms of the ICTY, some more than others. However, whenever we asked whether the world would have been better off without the ICTY, the answer was a resounding "no." People inside and outside the Balkans seem to universally believe that but for the ICTY, there would have been no criminal trials for those most responsible for atrocities committed in the Balkans (specifically governmental leaders, heads of governmental ministries, and military/paramilitary commanders), and possibly no criminal trials for direct perpetrators. The conclusion was that the ICTY, while imperfect, was directly responsible for the end of impunity for the worst crimes committed during the Yugoslav conflict and contributed to the end of impunity for lower-level perpetrators.

All justice systems have failings, but at the end of the day when they look back and see what happened, I think [the ICTY] did make a difference to the world. I think they did make a difference for sure.¹¹⁷

Everyone would say the ICTY has made mistakes, the ICC has made mistakes, but . . . how do you prove a negative? I think without some prospect of accountability for

¹¹⁷ Interview with Steven Kay, Defense Attorney, ICTY, in London, UK (Apr. 28, 2014).

perpetrators of the worst crimes, we would be much worse off than we are now.¹¹⁸

If there was no Tribunal [in The] Hague, or something like it, certainly nobody would ever be punished for what was done because there is a long history of impunity. It is also very important to emphasize that it is significant that those crimes happened on the territory of Europe because if it was not so, then certainly there would [not] be any tribunal for those crimes.¹¹⁹

Several interviewees noted that it was remarkable that all 161 of the ICTY's indictees were accounted for in some fashion, by being tried and convicted, tried and acquitted, having the charges against them dropped after further consideration, being transferred to a local court, or dying before indictments could be issued or before or during trial. Considering the fact that the ICTY does not have arrest powers and had to rely upon NATO and local police forces to capture and turn over indictees, many believed that this would never be achieved, particularly regarding Radovan Karadžić and Ratko Mladić, who evaded capture post-indictment for 13 years and 15 years, respectively.¹²⁰

All 161 indictees were accounted for, most of them [were] arrested and they faced some type of justice. Now if you talk to the victims, they will say . . . it was far too late, too little, and that's definitely true. But it's also true that if it hadn't happened, then it would be almost unbearable, the lack of justice, the lack of accountability. It's a small measure, but obviously better than the alternative of it not being done.¹²¹

Certain victim survivors, although critical of certain aspects of the ICTY, firmly believed that the ICTY was their one and only hope of receiving any sort of justice.

Each side has their own truth. The most important thing is, and I always quote one convicted war criminal . . . Blaškić, who was convicted for war crimes in Bosnia "If the tribunal was not created, we would still live with the belief that it is possible to commit mass crimes for which nobody

¹¹⁸ Interview with Param-Preet Singh, *supra* note 54.

¹¹⁹ Interview with Miloš Urošević, Activist, Women in Black, in Belgrade, Serbia (June 1, 2014).

¹²⁰ Dan Bilefsky and Doreen Carvajal, *Serbia Says Jailed Mladic Will Face War Crimes Trial*, N.Y. TIMES (May 26, 2011), http://www.nytimes.com/2011/05/27/world/europe/27ratko-mladic.html?pagewanted=all&_r=0; *Serbia Captures Fugitive Karadzic*, BBC NEWS (July 22, 2008), <http://news.bbc.co.uk/2/hi/europe/7518543.stm>.

¹²¹ Interview with Julian Borger, *supra* note 35.

will be punished.” Because we have been living with that belief for decades if not centuries. This is the first time that the principle of accountability has been established and implemented in that part of the world.¹²²

I distinctly remember . . . being in a meeting with a victim survivor group. They were women who experienced sexual violence during the conflict. It was at a time when there was a key . . . alleged perpetrator of sexual violence and the ICTY was trying to decide whether or not to send that case back to Bosnia because . . . the mandate of the Tribunal was winding down and they needed to transfer some of the cases to the local courts. I distinctly remember interviewing victim survivors and they were outraged, just outraged, at the possibility that this case could move from The Hague back to Bosnia because they didn’t have any faith in their institutions. For them, the need for justice was so profound and the ability, in their view, of justice institutions in Bosnia to deliver that much needed justice [was] simply not existent. I think they equated the Yugoslav Tribunal with their best hope of seeing some accountability. Which doesn’t mean that they were 100% happy with how justice was being delivered, but I think for them, it was the last best hope for accountability.¹²³

b. Creation and Improvement of National War Crimes Courts in the Balkans

In 2003, the Security Council adopted Resolution 1503 wherein the Security Council: (1) reaffirmed the 2002 statement of the then President of the Security Council that the ICTY should concentrate on prosecuting “the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions;” (2) called upon the international community to assist national jurisdictions in improving their capacity to try war crimes cases transferred from the ICTY; and (3) called upon the donor community to assist the High Representative to Bosnia Herzegovina to create a special chamber within the State Court of Bosnia Herzegovina to prosecute war

¹²² Interview with Mirko Klarin, Journalist, SENSE News, ICTY, in The Hague, Netherlands (Apr. 25, 2014).

¹²³ Interview with Param-Preet Singh, *supra* note 54.

crimes.¹²⁴ These goals and aims were emphasized and reaffirmed by the Security Council in 2004 through Resolution 1534.¹²⁵ War crimes chambers were established in Serbia, Croatia, and Bosnia Herzegovina and the ICTY has transferred numerous cases to these courts.¹²⁶ Further, these courts have indicted and prosecuted individuals accused of war crimes who were never indicted by the ICTY.

Generally, our interviewees felt that one of the ICTY's greatest legacies is its contributions to the creation and maintenance of local courts to try war crimes. While people acknowledge that these local courts are flawed, the general belief is that they would not have existed without the creation of the ICTY and the ICTY's support and cooperation with these courts and that each year, these national courts grow stronger and more established. While the ICTY's work will conclude in the near future, these courts will carry on and remain a very important part of the ICTY's enduring legacy and will carry on the work of ending impunity for atrocities committed during conflict.

There has been a lot of attention paid to this concept of legacy - what will be the legacy of the ICTY and ICTR. . . . I think some of the most important work that was done was sending cases back to the region and helping establish special and independent war crimes courts within the different republics that grew out of the fragmentation of the former Yugoslavia. Not the jurisprudence, not . . . the enormous judgments, but the fact that we helped promote and develop institutions which, hopefully over the long term, will serve to protect the fundamental rights of the citizens of the former Yugoslavia. I think if there's any real legacy of the ICTY, that's going to be a very important part.¹²⁷

As for the establishment of the Court of Bosnia Herzegovina and the contribution of the ICTY towards that, I can freely state it was extremely huge and immeasurable. I would like to point out two aspects of this support, one is . . . the creation of the legislative framework and the other is the creation of an organizational framework.¹²⁸

¹²⁴ S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

¹²⁵ S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

¹²⁶ *Completion Strategy*, U.N. ICTY, <http://www.icty.org/sid/10016> (last visited Oct. 26, 2015).

¹²⁷ Interview with Dan Saxon, Assistant Professor, Leiden University, in The Hague, Netherlands (June 18, 2014).

¹²⁸ Interview with Medina Džerahović, Legal Advisor Appellate Division, State Court of Bosnia Herzegovina, in Sarajevo, Bosnia-Herzegovina (June 6, 2014).

One of the big lessons learned and legacy projects where I think this Tribunal has been very active is organizing this interaction between the international level and the national level, making sure that the impunity gap is as small as possible because this is one of the big problems international tribunals have. What's the point, like in some cases of the International Criminal Court, to have 1, 2, or 3 people prosecuted in The Hague, [who] are the key responsible, and then having all of the mid- and lower-ranking perpetrators going free? You have a huge impunity gap . . . I think the future of international justice must be a very strong interaction with the international approach and the national approach to make sure that this impunity gap is relatively small.¹²⁹

Of course it's important to remember that the ICTY process . . . has spawned these other courts in the region, which are carrying on. People are being picked up every few weeks and facing trials. This process will roll on, it's not the end of the process.¹³⁰

Another important thing is that, thanks to this Tribunal and the so-called politics of conditionality of the international community, the United States, and the European Union, the local judiciary system has been reformed and started, with more or less enthusiasm, to hold war crimes trials for their own nationals.¹³¹

c. Jurisprudence Regarding International Humanitarian Law and Internal Criminal Law

All of the legal experts we interviewed agreed that the ICTY has provided an enormous contribution to the understanding of international humanitarian law and international criminal law. ICTY judgments have served to expand upon and clarify existing standards and have created new precedents in a variety of areas. Thus, the ICTY's case law has become the foundation of modern international law relied upon not only by the ICTY, but by other international, hybrid, and national courts.

Only one year after the Tribunal which dealt with us was already organized, we have a Tribunal in Arusha for the crimes in Rwanda. And thanks to [the ICTY] we also have

¹²⁹ Interview with Serge Brammertz, *supra* note 52.

¹³⁰ Interview with Julian Borger, *supra* note 35.

¹³¹ Interview with Mirko Klarin, *supra* note 122.

the Special Court for Sierra Leone, for Cambodia, for East Timor, and in 1998 . . . the Rome Statute for the International Criminal Court.¹³²

Some of the most important and groundbreaking ICTY decisions dealt with the understanding of what constitutes genocide and the prosecution of rape and sexual violence as war crimes, crimes against humanity, and genocide. In 2001, the ICTY Trial Chamber issued its first genocide conviction in the *Krstić* case, in which the Court determined that the massacre of over 8,000 Bosnian Muslim men and boys in and around Srebrenica was genocide.¹³³ This was a landmark case because the Nuremberg and Tokyo Tribunals did not prosecute individuals for genocide because genocide did not exist as a crime at that time. Thus, it was the first case of its kind also because prior to this case, it was very unclear exactly what qualified as genocide. The ICTY also issued several groundbreaking decisions regarding rape and sexual violence during conflicts, including: (1) *Tadić*, which was the first case to consider sexual violence against men during war;¹³⁴ (2) *Kunarac, et al.*, which considered the horrific events in Foča during the war, wherein Bosnian Serb forces committed murder, torture, rape, sexual enslavement, and other atrocities against the Bosnian Muslim inhabitants of the town, and determined, among other things, that sexual enslavement and rape qualify as crimes against humanity;¹³⁵ (3) the *Mucić, et al.* case, where the Court heard evidence of atrocities committed at the Čelebići Camp and found, among other things, that rape is torture;¹³⁶ and (4) *Krstić*, wherein the ICTY determined that there is a connection between rape, ethnic cleansing and genocide.¹³⁷ While certain other cases, such as the acquittals in *Perišić, Stanišić and Simatović*, and *Gotovina*, as discussed in more detail in Section C(3)(c) above, have been controversial and disappointing to many, the overall contribution of the ICTY to jurisprudence regarding international humanitarian law has been immense and of vast importance.

[The ICTY] took a very limited amount of case law, especially on procedural matters, and developed this whole amazing array of case law The principles, especially

¹³² Interview with Miloš Urošević, *supra* note 119.

¹³³ Prosecutor v. Krstić, Case No. IT-98-33, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (hereinafter "Krstić TC Judgment").

¹³⁴ Prosecutor v. Tadić, Case No. IT-94-1, Trial Chamber Judgment, ¶ 662 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

¹³⁵ Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

¹³⁶ Prosecutor v. Mucić, Case No. IT-96-21, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

¹³⁷ Krstić TC Judgment, *supra* note 133.

the head of state issue, . . . without the ICTY, we wouldn't be where we are on that issue.¹³⁸

We now have a huge amount of jurisprudence on the parameters of genocide, war crimes, and crimes against humanity - all of their different permutations and all the different forms of individual and command responsibility. . . . This is the first tribunal to create such a magnum opus of jurisprudence, which I think is a tremendous legacy for all kinds of trials going forward, whether they are national court trials or trials at the international level. If you look at some of the specific accomplishments, certainly prosecutions for crimes of sexual violence The prevalence of rape is a sad comment of what occurred during the war, but at least it is brought to the forefront of people's consciousness when we have these prosecutions of rape as a form of genocide, at the ICTR, and war crimes and crimes against humanity [at the ICTY]. The *Krstić* decision is also jurisprudentially significant. It's the first decision that Srebrenica is a case of genocide. . . . After Srebrenica, there was a lot of use of the term "ethnic cleansing," because one wasn't sure whether Srebrenica was a genocide or not, and that needed to be adjudicated that it was. I think that sets forth a very important benchmark.¹³⁹

One of the most important achievements of this Tribunal is that finally war rape became a crime against humanity for the first time in the history of civilization.¹⁴⁰

When we started our work, we realized that although the basics were there, international humanitarian law and international criminal law had not really been seriously dealt with by anyone except for the Nuremberg and Tokyo Military Tribunals. Over the years we have rendered a huge number of judgments which deal with several aspects of international criminal law which had not been dealt with before and which needed to be explored properly. I think our contribution in that area is perhaps one of the major aspects of the legacy. . . . When it comes to genocide, we have articulated very carefully the elements of specific intent in genocide, which is not required in any of the other

¹³⁸ Interview with Judge Kimberly Prost, *supra* note 37.

¹³⁹ Interview with Jennifer Trahan, *supra* note 14.

¹⁴⁰ Interview with Miloš Urošević, *supra* note 119.

crimes except persecution. We have dealt with several aspects of genocide including the numerical aspect of it and that applies also to the Rwanda Tribunal. We have dealt with persecution for the first time in international legal history. Persecution was not very well-defined before the ICTY started dealing with the cases. We have dealt with certain aspects when it comes to crimes against humanity, and with the aspect of persecution, we have dealt with the right to employment and violations that occurred in the [former] Yugoslavia against the right to employment, the right to proper medical attention, violations of the principle of the freedom of movement, those are but a few. For the first time, we have dealt with these issues. We have also dealt in great detail with torture and with sexual crimes and rape, in particular - making it clear that rape, for example, . . . in certain circumstances could equate to torture, apart from being a crime on a standalone basis. We have properly defined sexual offenses, which had not been defined before.¹⁴¹

v. Conclusions Regarding the ICTY's Contributions to Justice

In many ways, justice is in the eye of the beholder. Whether an individual believes that justice has been achieved often depends upon a person's role in a conflict, the harm suffered, who is in charge of creating and operating a given justice mechanism, and many other factors. However, most everyone can agree what constitutes the lack of justice, and that is impunity for those who have committed grave crimes.

While the ICTY is an imperfect institution, it has absolutely contributed to the end of impunity in the former Yugoslavia, through prosecutions at the ICTY itself and through the promotion of prosecutions at national courts. Further, the creation of the ICTY and its successes have contributed to the creation of numerous additional international, hybrid, regional, and national tribunals dealing with war crimes.

Criticisms of the Court regarding justice issues such as sentencing, the way the Milošević trial was conducted, and certain acquittals contain much validity. However, it cannot be forgotten what an extraordinary accomplishment it was to create such a tribunal, especially during the pendency of the war. Furthermore, the ICTY has no remaining fugitives -

¹⁴¹ Interview with Judge Carmel Agius, *supra* note 114.

it processed all 161 indictees, which is a remarkable feat considering the political push-back to the ICTY in the region.

The ICTY has created an enormous volume of case law regarding international humanitarian law and international criminal law. For the first time in history, a sitting head of state was indicted and prosecuted for crimes committed while acting as head of state. ICTY precedents have expanded our understanding of genocide, rape and sexual violence as tools of war, torture, command responsibility, and many other issues. To this day, the Court is considering what qualifies as aiding and abetting and joint criminal enterprise. While other international and local tribunals do not always choose to follow the legal standards set forth by the ICTY, they are set forth in lengthy, thoughtful judgments and are available for consideration by others.

The ICTY has demonstrated that it is possible to try heads of state, military commanders, and those in charge of governmental and military departments for crimes committed during war. It has shown the world that criminal justice can be achieved for victims and survivors. While the existence of this court and others may not act as a deterrent to atrocities, it does represent a reckoning and demonstrates that the global community is committed to ending impunity for genocide, crimes against humanity, and war crimes.

D. History, Truth, and Memory

There are varied opinions regarding how much the Tribunal has actually contributed to the regional dialogue. Many factors such as the distance of the Tribunal from the region, the delay of outreach efforts, and the difficulty of lay people to understand the complexity of legal decisions have all contributed to inhibiting a shared narrative of history. Decisions issued by the court can be manipulated to frame a false narrative. Some events that occurred during the wars have not been brought under the light of justice at the Tribunal. These details in the future may be disputed because they are not documented. But in the larger context, the Tribunal has contributed to establishing the facts regarding many events during the wars. Facts established at the Tribunal cannot be denied by future generations; these facts cannot be revised or changed with time. However, more time needs to pass before the political and cultural arenas are ready to face the past.

i. The “Truth” Regarding the War in the Former Yugoslavia in a Global Context

For 50 years after World War II, no one was held accountable for war crimes, crimes against humanity, or genocide by an international tribunal and no sitting head of state was criminally prosecuted, even though horrific atrocities occurred around the world. Thus, one of the struggles some people in the Balkans have with the “truth” of what happened during the Yugoslav conflict, and how historians will recount that truth, is that since an international criminal justice mechanism was used to try the Nazis, and not utilized again until the ICTY was established, inevitably there will be comparisons of people in the Balkans to the Nazis. This issue causes some people to deny the truth and/or block efforts to remember what occurred.

The Tribunal, . . . at least in 1993, was the only body established by international community to try for war crimes in the history of the mankind, except for the Nuremberg Tribunal. And then inevitably, you compare yourself against Hitler. You have legitimate arguments why nobody else in the world’s history or at least why nobody else between 1945 and 1993 had been put on trial for war crimes. Why only Serbs, Croats, and Bosniaks? . . . Acknowledging that the Tribunal was not established in vain or for no reason, it was simply established because at a given moment in a given set of political circumstances at the end of the Cold War, at the moment when globalization, especially globalization . . . of the media started to be omnipresent, when information and news about atrocities committed in the wars of the former Yugoslavia were quickly circulated all over the world.¹⁴²

There is also a problem placing the suffering of people in the Balkans in the global context - who has suffered the most since World War II? It appears that some people need what happened to be recognized as the worst of atrocities and that the people there suffered the most. Further, some in the former Yugoslavia believe that certain individuals or groups suffered more than others and thus the focus should be upon only those individuals or groups. There is anger that the atrocities that occurred in Srebrenica gets more attention than atrocities that occurred in Prijedor, Vukovar, the Republic of Serbian Krajina, or in countless other places.

¹⁴² Interview with Ivan Jovanović, *supra* note 90.

For me it's what I tell to my students, it's like something that I mentioned in the beginning like victims Olympics. What you have is Olympic games for victims. Who's the bigger victim? I was invited to speak at a conference about the experience of South Africa and their Truth and Reconciliation Commissions. So I started speaking about it. There was this guy from Bosnia who raised his hand and said, "What are you talking about, they only had apartheid." They only had apartheid? And, I was like, with all due respect, apartheid is a crime against humanity. He said, "Well, we had genocide." I said so did Rwanda. And he said, "Yeah, but that's Africa." . . . That is actually the opinion of the majority here. It took them years to stop using "the biggest crime after the Second World War" because somebody informed them that 800,000 people were slaughtered. Mainly not using heavy machines or concentration camps, not factory, not industry of death, but you know, machetes, in 100 days, which is a Srebrenica per day. This is the crime Olympics now. Who is equal to Hitler? . . . When I teach, when I give lectures to my students I always say there is no . . . little crime, the crime, and the biggest crime. Because crime is a crime. A person who lost one member of a family . . . will suffer the same loss as somebody who lost five members.¹⁴³

While these feelings and perceptions are certainly understandable, they stand in the way of establishing the truth of what happened by encouraging denial and distortions. Many hoped that the ICTY would be a neutral, unbiased arbiter that could collect evidence that would unassailably demonstrate the truth of what happened.

ii. The ICTY as Historian

Facts established at the ICTY and other tribunals contribute to the furtherance of peace for future generations by documenting how these atrocities came to pass. Tribunals act as a lesson for the future and may act as a deterrent to future war crimes, crimes against humanity, and genocide.

Better narratives of history, there is no truth of course, but better narratives of history are likely to be useful in deterring some of the most egregious misrepresentations of history in time to come when people wish to misuse history

¹⁴³ Interview with Marijana Toma, *supra* note 60.

in order to generate further conflict. Well if they want to do that and there's a record of evidence that is as extensive as it is in these cases that shows their narrative of history would be wrong, that's obviously very valuable. And these records shall also be valuable in explaining to the citizen or also the leaders how it is that mass atrocities come to be committed.¹⁴⁴

However, many legal experts believe that it is not the Tribunal's job to act as historian and that the facts established at the Tribunal are an incomplete record of events.

We're not good historians as prosecutors because we're only allowed to base our narrative on what we can get admitted into evidence. And that often is not a very common sense process. And things will be excluded that should be included in the narrative It's very clear when you look at Nuremberg, the narrative that was produced by the Nuremberg trials about the Nazi holocaust is very incomplete. And for me one of the lessons that we're still struggling with is how much of a historical component should be part of the criminal process.¹⁴⁵

The mandate of the Tribunal is not to create a historical record about the conflict in the former Yugoslavia. While we are saying this to our interlocutors, it is not a comprehensive analysis or recording of everything what happened in relation to the conflict. During the conflict and even years after that there is a denial of the crimes committed and we see today that there is in the Serbian part of Bosnia and Republika Srpska still very often denial of the Srebrenica genocide for example. And having those records, having those clear judgments on one hand but also the underlying evidence is a very strong record which can always be put in front of those who still think that they have to deny those crimes and who are refusing to accept that perhaps people from their own community have been involved in massive crimes.¹⁴⁶

And their role is not to write a history even though we would so much like because we don't have other channels here in the Balkans. We so much are focused on the Tribunal and we believe that they will write some things

¹⁴⁴ Interview with Sir Geoffrey Nice, *supra* note 30.

¹⁴⁵ Interview with David Akerson, *supra* note 76.

¹⁴⁶ Interview with Serge Brammertz, *supra* note 52.

that we will use . . . for our history books and it doesn't work that way. Especially as someone who had a chance to work in media outreach in that department of the Tribunal, to spend like seven months there. I absolutely understand that that institution is just a court.¹⁴⁷

Courts are not designed to uncover every detail of history and historians are not seated behind the benches recording volumes of truth. However, without a historical record to teach future generations, we have no starting point toward the prevention of atrocities. These trials serve as a lesson for the future. The human stories established during the course of these trials are recorded, shared, and studied for generations to come and may in fact contribute to the prevention of further mass atrocities.

We know we're all capable of doing it and it's the question of the coincidence of a number of factors that leads the otherwise well behaved citizen to commit atrocities. We've known that just since the Second World War, but well before that we've known how to do it. We've known how to create monsters out of our fellow citizens. So does this new account change that? Hopefully it does. Hopefully, if you keep making it more and more obvious how things happen then you'll make it more and more difficult for leaders to act in ways that lead to the commission of mass atrocities. And indeed I think, you can argue, and I certainly argue as a commentator, that it is simply no longer possible for any political leader anywhere in the world to pretend ignorance of how the words he carelessly states on a podium for political purposes will have the affect they have in the commission of crimes by those of his supporters who are inclined to follow his words. The connections between political leadership and mass atrocity crimes is better explained and understood with every well-articulated narrative of events that these trials generate.¹⁴⁸

iii. Truth and Denial

Even with the vast amount of testimony and witnesses to document the crimes that occurred, there remains today a very serious denial of some of the worst atrocities. This is especially prevalent in certain parts of the region. Failure to deal with or face the past and the altering or denial of

¹⁴⁷ Interview with Jazmina Lazović, Coordinator of Transitional Justice Program, YIHR, in Belgrade, Serbia (June 4, 2014).

¹⁴⁸ Interview with Sir Geoffrey Nice, *supra* note 30.

history permeates the current atmosphere. Even with the Tribunal, it seems to some as if none of these crimes ever occurred or it is best to forget the truth.

What is really striking about the Republika Srpska now is the degree of denial. I think there was a sort of opening up in the early 2000s where people and political leaders, and ordinary Bosnian Serbs were prepared to contemplate what had happened. What they as a people had done. And what I found more recently, there is a retreat from that to the sort of comfort of almost complete denial. You see this for example in the monuments in places where there were the greatest massacres, the worst camps you see monuments to the Serb fallen, Serb soldiers. And in the case of Trnopolje, a terrible camp in western Bosnia, in the actual grounds where the camp was, many people were tortured and killed, there is a concrete monument to the Serb soldiers and this inscription that is a bit of a poem dedicated to liberty, to freedom. And no memorial to the people who were killed. In Višegrad, . . . another scene of terrible atrocities, mass murders, they put up a monument in a Muslim cemetery which was dedicated to the women and children, and the old men who had been slaughtered as part of the genocide in Višegrad. And the municipal authorities who [are] now run by the same party, Karadžić's party who oversaw the ethnic cleansing of Bosnia, these municipal authorities have gone in and with an angle grinder removed the word genocide. Also in the same town in Višegrad there is a house where some 60 plus people were barricaded in, women and children, old men. The military-age men had already been rounded up or had escaped. These people were barricaded in and then the place was set on fire. And anyone trying to escape was shot down. A terrible atrocity. The families, the survivors were trying to rebuild it and they were planning on the room where this happened, a kind of basement, to put an interior shrine so that it would be a very private thing, but just somewhere to remember these people who were killed. These same municipal authorities, run by the SDS [Serbian Democratic Party], Karadžić's party, have come up with ways of changing the route of the road that goes past there and claiming that this was somehow in the way and had to be knocked down. . . . Again and again you come up against this. It is the

systematic way, erasing of history so that people won't have to face it, won't have to contemplate the implications of what they've done. And a real hatred towards survivors, especially those who speak up, who stand in the way of this amnesia.¹⁴⁹

The lack of and delay of outreach efforts in the region also contributed to conflicting versions of truth that still remain in the public opinion today.

It was just very striking that rather than produce a kind of commonly agreed version of the truth [the Tribunal] seemed to be producing or just confirming peoples' existing versions of the truth. That was the early stages, we have a change later on but that was obviously the time when most people were paying attention on a daily basis. And so it didn't have any instant or quick effect in terms of kind of producing a commonly agreed version of the truth that people could use as a basis for reconciliation.¹⁵⁰

Truth is also something that is based on a perception and a point of view or experience; thus, for each person who was affected by the events in the former Yugoslavia, a different truth emerges from their own personal experience.

We need to understand . . . [that] everybody has [their] own truth. Everybody has [their] own story. So every story should be respected and recognized and that is the way for me to deal with the past. Because we have a saying in Bosnia . . . we say that every mother is crying in the same way. So I believe [a] mom of a Serbian soldier is also crying for [her] own child [and] the mom of someone who is maybe an innocent civilian in a line for bread and water [is also crying]. So it's complicated, but we should keep going.¹⁵¹

One of the many organizations that have worked tirelessly to combat denial and record facts regarding atrocities committed during the war is the International Commission on Missing Persons (ICMP). The ICMP was established in 1996 to support the Dayton Agreement. Its "primary role is to ensure the cooperation of governments in locating and identifying those who have disappeared during armed conflict or as a result of human rights

¹⁴⁹ Interview with Julian Borger, *supra* note 35.

¹⁵⁰ Interview with Andrew Gray, Freelance Journalist, in London, UK (Apr. 28, 2014).

¹⁵¹ Interview with Velma Šarić, *supra* note 66.

violations.”¹⁵² The ICMP is uniquely situated because it is not a governmental organization and it is not associated with a certain country, region, or ethnicity. Its work is purely scientific and its mandate is to identify all 40,000 individuals who went missing during the conflict, regardless of who that individual is and who was allegedly responsible for their death.

ICMP is the first purpose-specific organization that was ever created to address missing persons cases from armed conflict and from human rights abuses. It was created in 1996 at the behest of President Clinton as a multilateral effort to deal with the 40,000 persons [who] went missing in the former Yugoslavia as a consequence of the conflicts that took place here. It’s the first time that the international community came together to build a structure like this, and that was in the late 1990s When the ICTY was created in 1993, it really began its investigations with a large-scale effort in 1996 to literally dig up evidence of crimes that were committed. As far as I know, there is no historical parallel with this. They went out and dug up mass graves, which contained not only the victims of atrocities, but also evidence regarding how they were killed or their execution. And this was a massive effort. Most of the people they were digging up . . . also come under the category of “missing persons,” as far as we’re concerned. As ICMP, we’re not just searching for casualties of war, we’re searching for those persons who are casualties of war [and] also whose bodies were deliberately hidden by perpetrators to hide crimes We estimate that today over 27,000 persons [of the 40,000 declared missing during the conflict] have been identified, which is huge. That’s over 70%; that’s never happened before. We know for a fact with DNA testing that over 17,000 persons have been accurately identified Of the 8,000 persons that were executed, killed, and hidden in mass grave sites [in and around Srebrenica], we’ve identified almost 90%.¹⁵³

¹⁵² *About Us*, ICMP, <http://www.ic-mp.org/about-us/> (last visited Oct. 26, 2015).

¹⁵³ Interview with Kathryn Bomberger, Director-General, International Commission on Missing Persons, in Sarajevo, Bosnia Herzegovina (June 9, 2014).

iv. Memorialization

Memorialization remains a serious problem for the region today, with human rights advocates, victims groups, and survivors fighting each day for remembrance against the backdrop of heated denial. One of the major themes for advocacy throughout the Balkans is memory and facing or dealing with the past. Many in the region believe that this is the only way to move forward, to find justice, and to live together in peace. Numerous individuals and groups in the Balkans have missions to, among other things, educate people in the region as to what really happened during the war and advocate for proper memorialization.

The Association for Social Research and Communication was established in 2013 in Sarajevo Since in Bosnia Herzegovina we do not cherish the culture of non-violence and peace culture, but we practice direct violence, either through the structure or culture, we decided to be the first organization orchestrated as a peace organization in Bosnia Herzegovina We are aware that in Bosnia Herzegovina, regarding facing the past and transitional justice, we have a situation where it is based ethnically. Like if a Bosnian is a victim or a relative of victims, he or she will weep only for theirs. We have decided to mark all the victims and all the crimes committed upon all the kinds of victims, meaning their ethnicity, nationality, religion, and so on. Everything was based on one slogan . . . and we take it to all of our vigils, and it says “Nationalism Kills.”¹⁵⁴

You cannot have, in Prijedor, ten, literally, of monuments to Serb soldiers who have died in the war - which is perfectly fine with me, I fully understand the need to memorialize that loss - while at the same time not to have a mention in any way of 3,500 citizens of Prijedor - civilians - who were killed in Prijedor, not like those soldiers elsewhere in Bosnia Our intervention is . . . going to the public square and saying [that] this has to be memorialized Last year we had a march in the city, despite the ban of the mayor and the police, to the main square to lay 103 roses for 103 children, with their names attached to these roses, in a circle to basically symbolically show that there could be a memorial there It was, as

¹⁵⁴ Interview with Edvin Kanka Ćudić, *supra* note 31.

you can imagine, quite emotional and we left these flowers and we said what we had to say and then disbanded, people went their way I expected that the flowers would have been picked up by the police or someone immediately after the crowds dispersed. I was stunned to see that they were still there intact six hours later People coming to the main square would immediately get drawn to see what it was and then they would start reading the names and going around the circle. It was quite powerful because they all did it with a great deal of empathy.¹⁵⁵

v. Conclusions Regarding the ICTY's Contributions to Truth, History, and Memory

Even with 21 years of trials, thousands of testimonies, and the passage of time, the region still suffers from the afflictions of scattered blame and victimization. The ICTY has failed to reconcile these factors that inhibit a shared history for those who live in the Balkans today. However, expectations that the Tribunal could create a complete history of the conflict and that this history would be accepted by everyone in the former Yugoslavia were simply unrealistic.

The ICTY is a justice mechanism that is charged with prosecuting certain types of perpetrators for certain types of crimes. This limited jurisdiction automatically determines that the ICTY could not possibly be the historian of the conflict because all of the perpetrators will not be adjudicated by the Tribunal, all of the actions taken during the conflict were not criminal, and lower-level crimes are not being considered by the Tribunal. Further, even in the cases before the Court, the goal of prosecutors is to indict those they believe committed the worst atrocities and obtain a conviction. Obtaining a conviction in an efficient and timely manner often means that an individual is not indicted for all of the crimes he or she allegedly committed. Thus, the full truth about the limited subset of individuals tried at the ICTY is not even complete.

However, the contribution the ICTY has made toward constructing a narrative of the worst atrocities committed in the former Yugoslavia cannot be overstated. While every crime and every perpetrator is not accounted for, the ICTY gathered hundreds of thousands of pages of documentary and testimonial evidence which irrefutably demonstrate that such crimes occurred. While certain people in the region may not currently be ready to accept that narrative, the hope is that as more time passes, that

¹⁵⁵ Interview with Refik Hodžić, Communications Director, International Center for Transitional Justice, in New York, NY (Mar. 19, 2014).

narrative will become widely accepted and that historians and others will build upon it to create a complete historical truth. The ICTY's efforts are a weapon against denial and revisionism and provide the facts needed by those in the region who are attempting to memorialize certain events. Therefore, even though the ICTY's contributions toward truth, history, and memory are neither perfect nor complete, they are of undeniable importance.

E. The Overall Legacy of the ICTY

After interviewing and recording the testimonies of 75 persons around the world discussing the legacy of the ICTY, it is clear that the narrative of the ICTY's enduring legacy is still in flux. However, as set forth above, certain themes regarding legacy are very clear. The ICTY's direct contributions to peace are minimal, but it may have assisted in opening the way for others to bring and maintain peace. Virtually everyone agrees that its contributions to reconciliation in the region are non-existent, but again, without its efforts regarding justice, the small gains toward reconciliation that have been achieved thus far - and the hopefully larger ones in the future - would have been much more difficult. The ICTY's contributions to justice seem clearer. The ICTY has contributed enormously to international criminal law and international humanitarian law and has brought a form of justice to people in the region. While there are many valid complaints about the form, speed, and cost of that justice, most agree that the ICTY has been generally successful in this endeavor and that its legacy of justice will be positive.

The ICTY promised in some cases, or the Presidents of the ICTY, or maybe . . . also the mandate promised something [that was] not really possible to fulfill. They said that they were going to be established in order to bring peace, justice, and reconciliation to the countries of the former Yugoslavia. Peace, was brought by somebody else. Justice, partly. So, criminal justice, yes. But criminal justice is not really giving enough space for the victims. It's very much focused on the perpetrators. It's not the fault of the ICTY, it's just the criminal justice system that works that way. But reconciliation, definitely not.¹⁵⁶

Regardless of the imperfections and the difficulties in seeking justice on an international level, overall it is unanimous that the world is better off

¹⁵⁶ Interview with Aleksandra Letić, *supra* note 55.

with the ICTY. Not one person in over 75 interviews felt that the Tribunal was a mistake or that it did more damage than good.

There's something cathartic about coming here and confronting the person or one of the people who's responsible for the terrible things that happened to you and your family and giving evidence about it. Having said that, the situation is still quite tense down in the region. I think we have fallen very short of the high hopes that people had that we would restore peace and foster reconciliation. I think the best we can do or the best we have done is to prove a limited number of cases, to provide evidence of what happened and the truth about what happened, and convict a number of people that are responsible.¹⁵⁷

When I speak to victims in Bosnia, the thing that strikes me most is that they typically have a really long litany of disappointments in the Tribunal. The trials last too long, they didn't indict enough people, the sentences are too low, and perpetrators get out on the streets too early, and victims encounter their torturers next door. And these are profound disappointments. There's a lot of anger toward the Tribunal. But when I ask some people, well in light of all of this, given what you've experienced, now that you've seen the reality, do you think it was a mistake to have created the Tribunal? Do you think it was just a misguided idea that this would do some good? And every single person I asked this question to said, "NO! You've completely misunderstood me. Are you crazy? How could you ask such a question?" And they would say that without the Tribunal we would not have had any justice and we couldn't have gotten through this if we didn't have justice. So I think their view was it's not good enough. They wanted more justice from the ICTY, but it would have been much worse if they had gotten no justice at all.¹⁵⁸

We can only learn from the history of this Tribunal and other Tribunals that have evolved since the end of the Cold War to move toward a system that seeks justice in the quest to prevent humans' worst sufferings. International justice is new on the scene of a globalized world and it may take decades to realize the fruits of its labor, but it is a beginning and a step toward justice for the sake of mankind.

¹⁵⁷ Interview with Dermot Groome, Senior Trial Attorney, ICTY Office of the Prosecutor, in The Hague, Netherlands (June 17, 2014).

¹⁵⁸ Interview with Diane Orentlicher, *supra* note 58.

If there was no Tribunal at The Hague, or something like that, then certainly nobody but nobody would ever be punished for what was done. Because there is a long history within the international regarding the impunity. It is also very important to emphasize that it is significant that those crimes have happened in the territory of Europe, because if it was not so than certainly there would be . . . any kind of Tribunal regarding those crimes.¹⁵⁹

What began in Nuremberg has been solidified with the ICTY and ICTR; we now have the ICC and other *ad hoc* Tribunals to seek justice and accountability for the most heinous crimes in our tumultuous human history. There will be more to come in the world of international justice and the ICTY is just a stepping stone toward that future.

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.¹⁶⁰

F. Youth and Optimism for the Future

Today many in the region and even those at the ICTY look toward the youth of the region for creating the change that is necessary to find a source of peace and move closer to reconciliation. Human rights groups and advocates tend to invest their energies in the future generations in the hopes that they will grow up learning a shared narrative of events. Many actors in the region use youth exchange programs to further the dialogue and understanding. The ICTY engages young professionals working in the local state courts, exchanging procedures and experience that can be taken back to the region and put into practice. The ICTY outreach program visits schools in the more ethnically divided, contested areas to share the work of the ICTY and the details of the trials.

I do hope and I do count [on] . . . the new generations . . .
[that were] not affected by the wars They did not

¹⁵⁹ Interview with Miloš Urošević, *supra* note 119.

¹⁶⁰ Opening Statement of Robert H. Jackson, The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring, et al., Nuremberg Trial Proceedings (1945) (Vol. 2), *available at* <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

suffer from the conflicts in the former Yugoslavia; [they] will have a more neutral and more open-minded perception of the work of the Tribunal.¹⁶¹

I think, and actually we believe at Helsinki Committee, that it's only possible to work with young people and to talk with them and to provide them with facts, . . . facts which they cannot obtain from media or from their families. To provide to them an alternative and to encourage them to think as open-minded [people] and . . . to think critically.¹⁶²

Our experience with the youth has been very positive and we believe that this is a generation that can really bring that revolution in a sense similar to the experience in post-Nazi Germany when the young generation really decided to face the past and to ask questions about the conflict and the events, [the] violation of human rights and humanitarian law. And in Bosnia Herzegovina [it] is pretty much the same situation. But additional differences related to Bosnia Herzegovina [are] the absence of any subject or course in their regular curriculum that teaches them about transitional justice or dealing with the past or similar topics. As [an] institution we still have the power to gain political support for our projects We've been engaged with the high school students for three years here in Bosnia Herzegovina and the feedback received from the students is overwhelmingly positive We believe that the students, they do have potential to just move forward this process of dealing with the past.¹⁶³

We now have interns, legal interns from the region working here [at the ICTY], and I guess I am most encouraged by them. If I go to a conference where people who are adults during the war are attending, I hear the same kind of speeches that we know happened before the war. I don't think we've changed their minds, I don't think we ever will. But, I do know that many of the young people that come here, whatever ethnicity they are, look to this institution for the truth about what happened. They read our

¹⁶¹ Interview with Ivan Jovanović, *supra* note 90.

¹⁶² Interview with Izabela Kisić, *supra* note 44.

¹⁶³ Interview with Almir Alić, Registry Liaison Officer, ICTY Outreach, in Sarajevo, Bosnia-Herzegovina (June 6, 2014).

judgments and I think that they recognize that some of the rhetoric of the past is just that, rhetoric.¹⁶⁴

Human rights groups and local advocates throughout the region work with youth to combat the false narratives that permeate the public sphere. These narratives get passed on from generation to generation, breeding longstanding contempt and hatred that carries forward. Public schools are not dealing with the past and history books omit the 1990s from their curriculum. Groups like Youth Initiative for Human Rights, the Helsinki Committee for Human Rights, GARIWO, the Post-Conflict Research Center, and others work tirelessly with the youth of the region to talk about the past and help the next generations face the future so that history or the violent history does not repeat itself again.

CONCLUSION

It is impossible to predict what the full legacy of the ICTY will come to be in the future. Since we cannot know what crimes have been prevented, we can only imagine what the greater legacy of the Tribunal will be. We hope that it has in fact contributed to the permanence of international law and that someday all countries will participate in a system that provides accountability for violations of human rights and humanitarian law. We hope that it has prevented future war crimes, crimes against humanity, genocide, and aggression through the lessons from the past. We also hope that it has contributed toward restoring peace and promoting reconciliation in the Balkans and beyond.

We do know that the Tribunal, even with its foibles and imperfections, has contributed immensely to international law and justice by holding those most responsible accountable for mass crimes and atrocities. The ICTY has greatly expanded the understanding of what qualifies as genocide, command responsibility, and rape, sexual violence, and sexual enslavement as crimes against humanity and war crimes. The ICTY also demonstrated that it is feasible to indict and prosecute a sitting head of state and that it is possible to conduct fair, non-military trials of those who give the orders to commit atrocities, not just those who carry out those orders. *Seeking Truth in the Balkans*, documents through extensive research what the legacy of the ICTY is after 20 years of existence. As the legacy is a living thing, it is anticipated that it will evolve over time, but that even with that evolution, the basic understanding of the ICTY's remarkable achievements and contributions to international justice and human rights will remain.

¹⁶⁴ Interview with Dermot Groome, *supra* note 157.

