



## TRANSITIONAL JUSTICE IN PRACTICE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND BEYOND<sup>1</sup>

**Ioannis Armakolas<sup>2</sup>**

*Hellenic Centre for European Studies*

**Eleni Vossou<sup>3</sup>**

*European Commission*

### **Abstract:**

This paper reviews the critical debates of the transitional justice mechanisms employed in the former Yugoslavia. It summarizes the various positions, showing the present divergences and consensus. Given the fact that the ICTY is the dominant transitional justice mechanism in the former Yugoslavia, the paper gives particular emphasis in the literature on the Tribunal and places the ICTY in the much broader field of transitional justice and to some extent relates it to the rest of the instruments present in the region. In that context, the discussion focuses on some of the issues, problems, dilemmas and effects that the implementation of the ICTY presents.

**Keywords:** Transitional justice; ICTY; Yugoslavia.

### **Resumen:**

*Este artículo revisa los debates más importantes sobre los mecanismos de justicia transicional en la antigua Yugoslavia. Resume las diversas posturas, mostrando el consenso existente y reconociendo las divergencias que aún permanecen. Dado el hecho de que el ICTY es el mecanismo dominante para impartir justicia transicional en la antigua Yugoslavia, el artículo pone especial énfasis en la literatura sobre el Tribunal y sitúa el ICTY en un campo mucho más amplio de justicia transicional y en cierta medida lo relaciona con el resto de instrumentos presentes en la región. En tal contexto, la discusión se centra en algunos de los asuntos, problemas, dilemas y efectos que la ejecución del ICTY conlleva.*

**Palabras clave:** Justicia Transicional; ICTY; Yugoslavia.

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<sup>2</sup> Ioannis Armakolas (PhD, Cantab) is Research Fellow at the Hellenic Centre for European Studies, Athens, and Manager of its South East Europe Programme. *Address:* Kazantzaki 29, 163 42 Athens, Greece. *Email:* i.armakolas.99@cantab.net

<sup>3</sup> Eleni Vossou (MSc, LSE) is Intern at the European Commission – DG Enlargement. *Address:* Makedonias 11-13, 14561 Athens, Greece. *Email:* elenvossou@hotmail.co.uk



## 1. Introducing transitional justice

### 1.1. The purpose of the article

Karadzic's first appearance before the International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY) in July 2008 was in the West as a breakthrough event.<sup>4</sup> It was regarded to signal not only a possible turning point in the domestic political environment in Serbia but, for some optimists, also forged expectations for more positive prospects about reconciliation and social development for the whole region. Yet, it would not be self-evident for someone unaware of the Balkan developments why an indictment and prosecution in The Hague could signal so much for the socio-political progress in the other corner of the continent. Quite the opposite, those following the developments in Southeast Europe in the last two decades cannot stress enough the significance of this novel judicial institution.

After a troublesome decade for Southeast Europe the region may be at last stabilizing. Slovenia, Romania, and Bulgaria are already members of the European Union (hereafter EU). Croatia and Albania have recently joined NATO. Croatia is at the doorstep of the EU; it will before long make the first state involved in the bloodbath of the 1990s to join the European club. The remaining Balkan states are in various stages of the process of joining the Union. Even the long-expected Kosovo declaration of independence – hailed by the West as the last chapter in the breakup of Yugoslavia – has taken place without noteworthy essential violence and extreme incidents. And the ICTY, arguably the most important international body for the region in the last fifteen years is preparing its completion strategy. It is thus high time to assess the role of Tribunal in the context of the socio-political developments in the region. And also importantly, it is time to start considering the consequences of the centrality of this institution and the effects of the lack of other supplementary institutions.

The purpose of this article is to offer a review the critical debates of the transitional justice mechanisms employed in the former Yugoslavia; it will do so by summarizing the various positions, showing consensus and acknowledging the remaining divergences. Given the fact that the ICTY is the dominant transitional justice mechanism in the former Yugoslavia, this article will give particular emphasis in the literature on the Tribunal; at the same time, the article will attempt to place the ICTY in the much broader field of transitional justice and to some extent relate it to the rest of the instruments present in the region. More specifically, the purpose of the article is:

- a) To make a review of some key debates in the literature on ICTY
- b) To show some of the issues, problems, dilemmas and effects of the implementation of the ICTY as a tool, i.e. ICTY in practice
- c) To provide pointers as to the general transitional justice strategy situation in former Yugoslavia
- d) To briefly review the practice of two representative non-ICTY transitional justice tools and to relate them to the ICTY

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<sup>4</sup> E.g. Human Rights Watch: "Bosnia: Karadzic Arrest a blow Against Impunity", July 2008



- e) To offer some initial remarks as to the evaluation of the transitional justice tools in former Yugoslavia, and especially the ICTY

## 1.2. Peace building, transitional justice, and the post-Yugoslav states

### **1.2.1. From conflict to peace: peace building and transitional justice**

In the last few decades, and especially after the collapse of the communist bloc, we have witnessed a steady rise in the number of democratic and post-authoritarian regimes globally. Notwithstanding the, not infrequent but brief, setbacks democratization has been a constant of our globalizing world and tends to gradually incorporate a growing number of members of the international society.<sup>5</sup> This *third wave* democratization forces new governing elites to confront serious public policy dilemmas among which the key is how the transitional polities will deal with the legacy of the authoritarian past.<sup>6</sup>

While democratization was giving rise to public policies of dealing with the past, the proliferation in internal conflicts and a renewed interest in their resolution observed in the post-Cold War 1990s have also brought to the forefront similar policy concerns. As in the case of democratizing polities, the question of dealing with the crimes of the traumatic past in those post-conflict polities became imperative.<sup>7</sup> New ideas and perspectives in public policy emerged as a result. The key objective for scholars and policy makers in post-conflict situations is also societal reconciliation, or the "...process through which a society moves from a divided past to a shared future".<sup>8</sup> In the inherently difficult post-conflict peace building efforts the public policy jigsaw involves putting together the problems of the past and their current effects as well as a vision for a shared future. In other words, a key concern becomes how to deal with the past, especially with the legacy and actual deeds of past war crimes and violations of human rights, while at the same time laying the ground for reconciliation.

The concept that brings all these together in contemporary post-conflict and post-authoritarian regime policy making is *transitional justice*. The concept became popular in recent years as a general platform that may incorporate in varying degrees policy thinking and ideas, specific short and long term policy measures, public policy dilemmas and responses to transitional polities' policy concerns. Notwithstanding its popularity, the notion of transitional justice remains to a certain extent elusive in the sense that the definition of the concept allows for multiple and elastic interpretations regarding its objectives. What is broadly understood by the term is "...the full range of processes and mechanisms associated with a society's

<sup>5</sup> Fukuyama, Francis (1992): *The End of History and the Last Man*, London, Penguin

<sup>6</sup> Huntington, Samuel (1991): *The third wave. Democratization in the late twentieth century*, Norman, Oklahoma University Press.

<sup>7</sup> According to Christine Bell, dealing with the past comprises both 'undoing the past', i.e. undoing the effects of the conflict, and 'accounting for the past', i.e. dealing with the responsibility for crimes and offering explanations for the conflict. See Bell, Christine; Campbell, Colm and Ni Aolain, Fionnuala: "Justice Discourses in Transition", *Social and Legal Studies*, vol. 13(3), (2004), p. 314.

<sup>8</sup> Bloomfield, David, Barnes, Teresa and Huyse, Luc (2003): *Reconciliation after violent conflict. A Handbook*, Handbook Series, Stockholm, International Institute for Democracy and Electoral Assistance. Reconciliation was of course not new; but it was until recently dominated by theologians and philosophers. In recent years, social scientists studying conflicts and policy makers wishing to employ it for peace building purposes soon discovered that earlier thinking on reconciliation was not immediately useful "...as a policy objective applicable to situations of violent intra-state conflicts". Jakobsson Hatay, Ann-Sofi: "Peacebuilding and reconciliation in Bosnia and Herzegovina, Kosovo and Macedonia 1995-2004, Report (2005), Department of Peace and Conflict Research-Uppsala University.



attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all)...”<sup>9</sup>. The objectives of transitional justice range between the minimalist approach of truth recovery to the more maximalist aspirations of establishing accountability and imposing punishment for the perpetrators of past crimes, gratifying the needs of the victims, establishing a common truth, and re-establishing the rule of law.

It would not be implausible to characterize the 1990s as the decade of transitional justice.<sup>10</sup> The confluence of several international factors, from the end of the Cold War and the brief period of superpower consensus, to the proliferation of transitions to democracy, the renewed interest in the resolution of internal conflicts, and the consolidation of the international human rights regime, brought transitional justice concerns, discourses, and policies to the international vanguard. Importantly, the contemporary international political situation, with regards to the problems of internal conflicts, also further stimulates the search for transitional justice solutions. Bell, Campbell, and NiAolain (2004), in their examination of the changing transitional justice discourse and its role in formulating post-conflict social and political realities, point to four key global trends affecting this complex relationship:

- a) the sharp rise in the number of negotiated settlements of internal conflicts, which, due to their inbuilt compromises, underscore dilemmas about the role of law in transition,
- b) the increased significance of human rights law within and between states,
- c) the higher emphasis on accountability for past human rights violations as a result of the increased concerns about human rights and humanitarian law in the conduct of warring sides in internal conflict, and, in obvious contradiction to the above,
- d) the post-9/11 American unilateralism in international affairs that goes against the international trend of constraints posed to states by international law – but at the same time continues to use the language of ‘transition’ and ‘democratization’.

Evidently, all four trends, despite the fact that their logics are sometimes divergent, contribute to emphasizing the key role that transitional justice issues hold in the contemporary world.

### 1.2.2. Transitional justice mechanisms and tools

It is surely necessary here to qualify the term ‘justice’. This is of course not another scholarly term unfamiliar to the wider lay public. In fact, awarding justice is certainly the most sensitive of the post-conflict public policy concerns, especially for the vast majority of victims and their families. But justice as a lay term does not *necessarily* coincide with transitional

<sup>9</sup> United Nations Security Council, S/2004/616, “The rule of law and transitional Justice in conflict and post-conflict societies” (2004), p. 4.

<sup>10</sup> Vinjamury, Leslie and Snyder, Jack: “Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice”, *Annual Review of Political Science*, Vol. 7 (2004), pp. 345-362; Snyder, Jack and Vinjamury, Leslie: “Trials and Errors. Principle and Pragmatism in Strategies of International Justice”, *International Security*, vol. 28, n°. 3 (2003), pp. 5-44.



justice.<sup>11</sup> It may or it may not, depending on the context and the specific society at hand. According to Richard Goldstone, a prominent transitional justice figure internationally, all methods of dealing with a past of serious human rights violations except blanket immunity from prosecution or indemnity for past criminal acts have to be considered as forms of (transitional) justice.<sup>12</sup> Thus transitional justice may not include judicial methods, prosecutions and trials; it may constitute, for example, a Truth and Reconciliation Commission offering indemnities. Such solutions may still be forms of transitional justice opted by policy makers, while for victims for example they may equal non-justice.

Transitional justice mechanisms can be categorized according to various criteria, each approach being conducive to different and not uncommonly conflicting results: they can be legal or non-legal in nature, aiming at punishing the perpetrator or satisfying and rehabilitating the victim, directed towards the individuals or the collective, domestic or international. There are two key distinct models of transitional justice: the retributive and the restorative.<sup>13</sup> Retributive justice is punitive; it concentrates its efforts in punishing past crimes and sees dealing with the past and reconciliation as passing through the reinstatement of the rule of law and the moral order that were unbalanced by those crimes. Restorative justice claims to restore communal identities and relations broken by the conflict; it claims that because of this objective it is more effective than the short-term gains of punitive measures. There are several transitional justice tools associated with each model of transitional justice with retributive justice directed more towards judicial tools and especially prosecutions and trials, and restorative justice more towards truth commissions, reparations, education and others.<sup>14</sup>

Retributive justice is probably the most common type of transitional justice used in post conflict societies. Since it is also the type of transitional justice rendered by the ICTY it is important for this paper to outline some of the characteristics and strengths of retributive justice as they appear in the literature. The direct aim of retributive justice is to concentrate on holding individual perpetrators, making them accountable for their actions, and redress their wrongdoing by ascribing to them a punishment commensurate to the crime committed. Nevertheless, important indirect positive impacts of retributive justice are also crucial and conducive to long-term societal benefits. Through the operation of retributive justice post-conflict societies get educated in the rule of law and judicial procedures, which is a prerequisite for the good functioning of a democratic state. In addition, retributive justice in the form of an international tribunal like the ICTY has, according to its supporters, the advantage of not being prejudiced and not yielding to pressures for applying a ‘victor’s justice’. Furthermore, retributive justice is supposed to contribute to reconciliation by offering an objective base of undisputed facts about the past upon which a ‘master narrative’ unifying the society could be built.

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<sup>11</sup> The same is also the case for ‘reconciliation’, see Armakolas, Ioannis: “The International Criminal Tribunal for Former Yugoslavia and the question of Reconciliation in the former Yugoslavia”, paper presented at the International Conference: “The legal, political and historical consequences of the ICTY verdicts”, *Foundation Truth, Justice & Reconciliation* (October 2007).

<sup>12</sup> See Goldstone, Richard: “Justice as a tool for peace-making: Truth Commissions and International Criminal Tribunals”, *Journal of International Law & Politics*, vol. 28 (1995-1996), p. 492.

<sup>13</sup> Barton, Charles: “Empowerment and Retribution in Criminal and Restorative Justice”, *Journal of Professional Ethics*, vol. 7, n° 3&4 (1999), pp. 111 – 135; Cohen, Stanley: “State crimes of previous regimes: knowledge, accountability and the policing of the past”, *Law and social Inquiry*, vol. 20, n° 1 (1995), pp. 7-50.

<sup>14</sup> See more on transitional justice tools in the next section.



Most importantly for our discussion in this paper, retributive justice by individualising the guilt is supposed to prevent or reduce collective victimization; consequently it promotes reconciliation not only because it punishes the perpetrators, but also by doing so individually – most frequently targeting high level perpetrators - it removes the blame from the collective. Their subsequent stigmatization and removal from the public and political sphere contributes to the construction of a new social order<sup>15</sup>. Furthermore, retributive justice, according to its proponents, constitutes a method of deterrence for future perpetrators, satisfies the need for judicial resolution of grievances and hence prevents acts of revenge. Finally, the publicity that war crimes trials acquire assists in rendering widely known the abuses of human rights and their public prosecution enhances the legitimacy and the prospects of establishment of the rule of law. These are all advantages that retributive justice and consequently the ICTY are supposed to have over other methods of dealing with the past.<sup>16</sup> The operation of these in practice, however, is predictably a different story.<sup>17</sup>

Closing this section, we need to mention the different mechanisms and tools of transitional justice that, as we have seen in the previous paragraph, do not necessarily coincide with punitive measures. A United National Development Programme assessment report on Balkan transitional justice identifies four broad categories of mechanisms: a) prosecutions, i.e. domestic and international war crimes trials, b) lustration and vetting, c) truth-seeking initiatives, i.e. truth commissions, documentation efforts, initiatives for establishing the fate of missing persons, and media initiatives, and d) reparations, i.e. material reparations between states, material reparations within states, and symbolic reparations, such as public apologies and memorials.<sup>18</sup> Yet, other studies and reports expand further the list to include parliamentary debates on war crimes, unofficial and civil society initiatives for fact-finding, and institutional and judicial reform.<sup>19</sup>

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<sup>15</sup> United Nations Security Council, S/2004/616, *op. cit.*, p.13.

<sup>16</sup> For elaborations of the advantages of retributive justice, see: Yacoubian, George: “Sanctioning Alternatives in International Criminal Law: Recommendations for the International Criminal Tribunals for Rwanda and Yugoslavia” *World Affairs*, vol. 161 (1998), p. 51; Heribert, Adam: “Divided Memories: Reckoning with a Criminal Regime” in Gabriel, Ricci (ed.) (2003): *Justice and Politics of Memory. Religion and Public Life*, London, Transaction Publishers, pp. 1-20; Albon, Mary: “Project on Justice in Times of Transition: Report of the Project’s Inaugural Meeting” in Kritz, Neil (ed.) (1995): *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. I), United States Institute of Peace, Washington D.C., pp.42-54; Kaminski M. Marek, Nalepa, Monica and O’Neill, Barry: “Normative and Strategic Aspects of Transitional Justice”, *Journal of Conflict Resolution*, vol. 50, n° 3 (2006) pp. 295-302; Llewellyn J. Jennifer: “Restorative Justice in Transitions and Beyond”, in Borer, Tristan Anne (ed.) (2006): *Telling the Truths: Truth-telling and Peace-Building in Post-conflict Societies*, Notre Dame, University of Notre Dame, pp. 85-100; Mani Rama, (2002): *Beyond Retribution. Seeking Justice in the Shadows of War*, Cambridge, Polity Press; Nino S. Carlos: “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina”, *The Yale Law Journal*, vol. 100, n° 8 (1991), pp. 2619-2640; Orentlicher, Diane: “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *The Yale Law Journal*, vol. 100, n° 8 (1991), pp. 2537- 2615; O’Donnell, Guillermo and Schmitter C. Phellippe (1995) “Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies”, in Kritz, Neil (ed.) (1995): *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (Vol. I), Washington D.C., United States Institute of Peace, pp.57-64.

<sup>17</sup> For an analysis of the ambivalent status of the purported advantages of retributive justice in Bosnia and Herzegovina, see Armakolas: “International Criminal Tribunal for Former Yugoslavia...” *op.cit.*

<sup>18</sup> Aucoin, Louis and Babbitt, Eileen: “Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia”, Report (June 2006), Belgrade, United Nations Development Program-UNDP

<sup>19</sup> See, among others, Cruvellier and Valinas (2006), HLC (2007), Mani (2005). In such an expansive list, arguably over-stretched, a whole range of post-conflict public policies from return of property and reconstruction, to media reform, to public administration and judicial reform would fall, one way or another, under transitional justice.



### 1.2.3. Choosing a strategy and mixing tools

In the question of seeking a strategy of transitional justice Snyder and Vinjamuri identify different approaches to the issue: the ‘logic of appropriateness’ and the ‘logic of consequences’.<sup>20</sup> The ‘logics’ of course correspond to different policy makers and scholars advocating different solutions. The ‘logic of appropriateness’ prioritises the judicial solutions and punitive measures for human rights violations. The solutions corresponding to this logic have to be the ‘appropriate’ with regards to the past deeds that need to be penalized. The opposite logic does not disregard the past deeds but incorporates political concerns and the consequences of transitional justice measures in the calculations for the preferred policy actions. A policy maker following the ‘logic of consequences’ will not rush into punitive measures if, for example, these risk destabilizing the transitory regime or the communal peace. According to Snyder and Vinjamuri, the proponents of the former position (‘appropriateness’) are usually legal scholars or policy makers of the idealist persuasion, while those of the latter position (‘consequences’) are political scientists or policy makers of the realist persuasion. The significance of the distinctions presented by the two ‘logics’ will become yet more evident in the next two sections, which will introduce two fundamental policy dilemmas in ICTY-type retributive justice.

A point regarding the selection of transitional justice methods and tools is due here. Although the, presented above, retributive and restorative justice are distinct models, they are not mutually exclusive. Although we need to be cautious about the compatibility of different tools,<sup>21</sup> in theory there are no advance prohibitions of efforts to combine transitional justice methods and tools for achieving better results. There are only a few but crucial features that have to be taken into account when designing a transitional justice strategy: a society and its leaders have to decide whether they actually want to deal with the past or simply desire to ‘forget the whole thing’; the designers have to have the specific local socio-political context keep in mind and not general theoretical schemes; they have to know in accordance to that context where ‘they wish to go’, what are the benchmarks of the transitional justice programme; there should not be presumptions about models and approaches that ‘must’ be adopted because they ‘worked’ elsewhere; and finally the full array of possibilities and available tools has to be kept in sight.

Last but not least, it’s important to make here a note of the implications of the choices made, especially in the field of justice. Only with retributive justice as the main strategic priority, justice is served in the commonly understood way. For restorative justice systems to function, the common understanding of justice has to transform in order to fit the objectives of this strategy. While reconciliation efforts and other transitional justice tools can be employed even if a judicial process is adopted, it is impossible for justice in its punitive form to survive if we remove from the picture retributive justice. In other words, justice as we commonly understand it cannot exist outside the courts. If punitive-judicial measures are *not* adopted a certain sense of justice may still remain. But this justice is transformed, changed to fit the needs of a post-conflict society; it’s not justice as we commonly know it. Therefore, if it is to be successful a change of mindset is necessary whereby victims will develop a new

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<sup>20</sup> The authors identify also a third logic, that of emotion, which will not concern us here. See Snyder and Vinjamuri, *Trials and Errors...*, *op. cit.*, pp. 5-44.

<sup>21</sup> See for example the views of the prominent transitional justice theorist Luc Huyse presented in Ilic, Dejan: “The Yugoslav truth and reconciliation commission. Overcoming cognitive blocks”, *Eurozine*, (24 April 2004), at <http://www.eurozine.com>



understanding of justice and perpetrators a deep sense of responsibility. None of this is straightforward in a sensitive post-conflict society.

#### 1.2.4. Transitional justice fundamentals I: Are peace and justice irreconcilable?

At the core of the debate on transitional justice is the tension between the pursuit of peace and the firm priority on justice, a debate that obviously resembles the two ‘logics’ of transitional justice presented above.<sup>22</sup> Should the prosecution of war criminals be a firm moral choice, a non-negotiable and strict priority of peace building, or, is there a hazard that prosecutions could complicate or delay the peace building activities, especially when the potential indicted individuals are indispensable negotiation partners of a peace deal?

There is an overall consensus by the international actors that human rights violations during an armed conflict necessitate to be addressed especially in instances of large scale and systematic violations of human rights and the laws of war. Yet, the beneficiary role of justice, especially in the form of international war tribunals is contested by many scholars, not to mention practitioners involved in peace brokering. Further dilemmas arise: are criminal prosecution and reconciliation compatible? Are law and politics compatible? To put it in other words, how much interference of politics is there in the judicial process, and what repercussions are there from this? Authors like Shinoda, Snyder and Vinjamuri, Fletcher and Weinstein, and Meernik provide us with comprehensive analyses of the two principal paradigms that seek to propose efficient strategies of conflict resolution and peace building in periods when human rights violations have ceased enjoying impunity<sup>23</sup>.

#### 1.2.5. Transitional justice fundamentals II: The paradigms of law and politics

The legal approach<sup>24</sup> supported by constructivist theorists highlights the normative power of the law and the judiciary: norms impose moral obligations influencing in this way actors’ behaviours. Institutionalized norms can be powerful enough as to shape the actors’ understanding of interest<sup>25</sup>, have an efficient enforcement and, subsequently, deterrence mechanism. According to the legal approach, the rule of law must be the leading principal in peace building thanks to its beneficial corollaries: individual accountability, truth exposure, acknowledgement of the victims’ suffering, revealing systematic patterns of violations.<sup>26</sup> Hence, the legal theory does not recognise any incompatibility between law and peace- it rather perceives the former as a precondition to the latter. Additionally, legalist adherents

<sup>22</sup> See previous section and footnote 13.

<sup>23</sup> Shinoda, Hideaki: “Peace-building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals”, *The International Journal of Peace Studies*, vol.7, n° 1 (2000); Snyder and Vinjamuri, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice Annual Reviews*, *op. cit.*, pp. 345- 362; Snyder and Vinjamuri, *Trials and Errors*, *op. cit.*, pp. 5- 44; Fletcher, Laurel E. and Weinstein, Harvey: “Violence and Social repair: Rethinking the Contribution of Justice to Reconciliation” *Human Rights Quarterly*, vol. 24 (2002), pp. 573- 639; Meernik, James: “Victor’s Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia”, *The Journal of Conflict Resolution*, vol. 47, n° 2 (April 2003), pp. 140- 162.

<sup>24</sup> Fletcher and Weinstein refer to the ‘legal and political paradigm’, See Fletcher and Weinstein, *Violence and Social repair...r*, *op. cit.*, p. 582; Meernik uses the terms ‘political and legal model’, See Meernik, *op. cit.*, p. 144 and 149; Snyder and Vinjamuri use the term ‘logic of appropriateness’, See Snyder and Vinjamuri, *Trials and Errors*, *op. cit.*, p. 8, see above section 1.2.3.

<sup>25</sup> See Snyder and Vinjamuri, *Trials and Errors*, *op. cit.*, p. 8.

<sup>26</sup> Richard Goldstone and Payam Akhavan quoted in Shinoda *op. cit.*, p. 46.





argue that legal variables are most predictive of judicial behaviour<sup>27</sup>; they thus tackle the issue of political interference in the workings of justice by stressing the principle of legal independence - principally guaranteed by international tribunals.

The political approach<sup>28</sup> claims to represent a more realist rationale, in which choices made by negotiators are unavoidably a product of a pragmatic bargaining, often obligating them to agree to compromises which can hardly be justified on ‘moral’ grounds or as just and equitable; rather, they need to correspond to the political reality and the existing power relations in order to become and remain viable and effective. As a consequence, prosecutions may cause further instability; they may jeopardize a peace agreement when that needs to be negotiated with local elite members-‘candidates’ for indictments, while there also the danger of further persecutions of civilians.<sup>29</sup> Realists do not refute the need for criminal justice altogether. They, nonetheless, demonstrate a partial and conditional acceptance of justice: most of them approve of the imposition of accountability but only after peace is consolidated; all at once, they may view amnesties as potentially necessary tools for peace. However, some supporters of this approach by accepting the political character of justice inevitably avow to the fact that war tribunals reflect in reality the underlying balance of power and subsequently can never be impartial.<sup>30</sup>

### 1.2.6. Transitional justice in the former Yugoslavia

Having sketched the field of transitional justice we now turn to the former Yugoslavia. The Yugoslav wars have been the paradigmatic conflicts of the post-Cold War period. Their features rendered content and meaning to the so-called ‘new wars’ paradigm.<sup>31</sup> And they have been the ones to attract unprecedented international attention of both the policy makers and the global public opinion.<sup>32</sup> Albeit being the quintessential 1990s conflicts, however, the Yugoslav wars have not attracted any elaborate consideration of the transitional justice mechanisms that could potentially be employed. The key concern of the 1990s post-conflict policy making – transitional justice – was missed in the former Yugoslavia. But what transitional justice was there in former the Yugoslavia?

The central transitional justice development was the creation of the ICTY already during the Bosnian war. Its formation had more to do with the enormity, unprecedented in recent times, of the crimes committed in former Yugoslavia than with an actual transitional justice strategy. The formation of the ICTY reflected the need of the international policy makers to supply a pressure valve to soothe and deflect the global outcry. In the views of most analysts, the Tribunal was a substitute for the military intervention to stop the carnage, an intervention that was not coming. And even so, as we will see below, it was set up in such a way that for some time after its creation the ICTY remained a void letter. Its officials had to

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<sup>27</sup> See Meernik, *op. cit.*, p. 149.

<sup>28</sup> Snyder and Vinjamuri, *Trials and Errors*, *op. cit.*, p.13, use the term ‘logic of consequences’; see above section 1.2.3.

<sup>29</sup> See Snyder and Vinjamuri, *Trials and Errors*, *op. cit.*, p. 15.

<sup>30</sup> See Meernik, *op. cit.*, p. 149.

<sup>31</sup> Kaldor, Mary (1999): *New and old wars. Organized violence in a global era*, Cambridge, Polity.

<sup>32</sup> Armakolas, Ioannis: “Identity and conflict in globalizing times: experiencing the global in areas raged by conflict and the case of the Bosnian Serbs”, in Catherine Danks and Paul Kennedy (eds.) (2001) *Globalization and national identities: crisis or opportunity?*, Basingstoke, Palgrave, pp. 46- 63.



struggle for its survival and for gaining the political support that later secured its undisrupted and effective operation.

It is not without significance for this analysis to note that the formation of the ICTY transcends the division between the ‘logic of appropriateness’ and the ‘logic of consequences’ presented above. The formation of the ICTY corresponds to the ‘logic of appropriateness’, and thus a more idealistic perspective of international relations. At the same time, though, the Tribunal did not enjoy the support necessary for implementing this idealist cause. Yet more perplexingly, through its formation the international community established a direct link between the awarding of justice and the reinstatement of peace. But in this way the ‘logic of consequences’ comes back in the picture in a peculiar way. How could peace be achieved through negotiations when the newly established international institution was laying the ground for the prosecution of those local leaders the international community was negotiating peace with?

We will address all these points in more detail in the following chapter which deals specifically with the debates surrounding the formation and operation of the ICTY. At this point, we can outline a key twin argument, which will be qualified and corroborated in the analysis that follows. The ICTY, as the principal transitional justice intervention in the region, was at once: a) in a difficult position as to its operation as a transitional justice tool, and later due to the high expectations nurtured for it, and b) left alone, without a complex programme of supplementary measures that would form a clear strategy of dealing with the past and reconciliation.

In closing this section, it suffices here to move one step back and raise again the issue of reconciliation and its relation to transitional justice measures. The following brief discussion can be seen as a first illustration of the confusions and problems that will be analysed at various levels in the rest of the article. Post-conflict reconciliation can be achieved through five different strategies: a) contact and interaction, b) cooperation, c) identity change, d) truth, and e) justice.<sup>33</sup> This is of course in theory because all too often transitional justice measures are taken without clear reference to a reconciliation strategy and without the policy makers having a well-thought off plan for the effects of their public policies when dealing with the past. In addition, elements of different strategies can be in operation concurrently. No post-Yugoslav country has had a planned and well executed reconciliation and transitional justice strategy. Not even in Bosnia and Herzegovina, which has been effectively co-run by international administrators, was there a defined strategy on the issue. In fact, different measures, not necessarily all of transitional justice nature, point to different priorities and ‘strategies’ when it comes to reconciliation.<sup>34</sup> Elements of both a ‘functionalism’ of the ‘contact and interaction’ strategy and the identity focus of the ‘identity change’ strategy could be found for example in the High Representative policies of removing obstacles to interaction.<sup>35</sup> Similarly, later projects, like the “jobs and justice”, also combined the logic of the justice strategy with other reconciliation strategies.<sup>36</sup>

<sup>33</sup> Jakobsson Hatay, *op. cit.*, pp. 63-71.

<sup>34</sup> For the characteristics of the policies by different High Representatives in Bosnia, see Sahovic, Dzenan: “Socio-cultural viability of international intervention in war-torn societies. A case study of Bosnia-Herzegovina”, *Report*, Department of Political Science-Umea University (2007).

<sup>35</sup> For the idea of the functionalist identity projects, see: Armakolas “Identity and conflict in globalizing times...” *op. cit.*

<sup>36</sup> Armakolas, “The International Criminal Tribunal for Former Yugoslavia...”, *op.cit.*



## **2. Transitional justice tools: the retributive justice of the ICTY**

### **2.1. Putting the ICTY under the microscope**

In this section, we will seek to summarize some key debates in the extensive literature on the ICTY and review the multiple, interlinked, and nuanced debates over its creation, design and efficiency.

At the core of the debate on the ICTY has from the beginning been the alleged political character of the ICTY and how this reflects on or should we say deflects from the judicial mission of the court. This debate has flowered into many deriving discussions. The first issue we will look into is therefore the interaction between law and politics: what are the implications of the political character of the tribunal on its judicial function? And if there is a tension between politics and justice, which one was given the priority in the case of the Balkans?

An answer to these questions may be sought in the institutional design of the ICTY. Was it adequately constructed and endowed to correspond to its mandate, judged by (obviously) its written charter but also by the expectations which beyond its explicit mandate have been placed in this new institution? At issue is not only the impact of this international legal institution in the particular region of its jurisdiction but also the positive effects which the tribunal has had in terms of a contribution to international humanitarian law and the position of human rights in international relations.

Looking at the impact on developments in the geographic area the issue of politics emerges a new, this time raising the issue of how the domestic politics there have influenced the substantive impact of the ICTY in the post conflict societies concerned. Obviously in addressing these questions we should have a clear mind of the criteria by which the ICTY should be judged. This would entail an objective evaluation not only of the correspondence to the tasks assigned but also of aspirations projected, and its institutional capacity.

As Stover and Weinstein point out, there is a gap between the international community's aspirations for justice and how this application was perceived by those most affected in the region<sup>37</sup>. An important consideration that should accompany every evaluation of the ICTY is a conscious understanding of the limits of international criminal justice. Thus every criticism about the failings of the ICTY should be examined under the lens of its real potential. For instance, when considering the contribution of the ICTY in the exercise of peace building we might consider the routes that the presence and functioning of a judicial institution opens up (for example as a means of legitimising the rule of law) instead of looking into whether the ICTY has helped bringing about lull in violence.

Finally, as we have seen already, much of the criticism developed in the transitional justice literature is the tension between peace and justice. The notions of peace and justice are, however, abstract terms, open to a vast range of interpretations. Consequently, a minimalist or maximalist understanding of either peace or justice will affect our judgement on how the ICTY has served them.

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<sup>37</sup> Stover and Weinstein quoted in Kerr, Rachel: "Peace through Justice? The International Criminal tribunal for the Former Yugoslavia" *Southeast Europe and Black Sea Studies*, vol. 7, n° 3, (2007), p. 379.



## 2.2. Formation, politics, and problems

### 2.2.1. The origins and statutory goals of the ICTY

On the 25<sup>th</sup> of May 1993, the Security Council of the United Nations (thereafter UNSC) passed Resolution 827 that brought the ICTY into existence. As proclaimed in the statute, the mandate of the Tribunal was the “punishment of war criminals and the restoration of peace and security”<sup>38</sup>. The Resolution was delivered under the chapter VII of the UN Charter as a threat to international peace and security. Therefore, importantly for what was to follow and our discussion here, the Tribunal was “...founded upon the recognition of a direct link between peace and justice.”<sup>39</sup> Furthermore, social reconstruction or national reconciliation even though not formulated to become a direct goal of the ICTY, were considered to be an indirect yet ‘natural’ and desirable effect of its prosecutorial activity<sup>40</sup>.

Consensus exists that the ICTY is a legal institution that has been created by a political resolution. But no consensus has been reached on whether the politicisation of the ICTY has compromised its work of rendering justice, either by affecting the principal of impartiality, or annulling the effectiveness of justice. Many authors believe that the rendering of justice was sacrificed on the altar of political convenience, compromise and opportunism. They are sceptical towards ad hoc international tribunals, as they perceive them as a mere “reflection of the underlying balance of power”<sup>41</sup> and argue that political considerations manipulate and influence the work of the tribunal. This debate is referred to in the literature as the “asymmetry of the powers of law and politics”<sup>42</sup>.

There is a group of authors who believe that the genesis of the ICTY as a subsidiary UNSC body already compromises its judiciary mission. As already mentioned, in creating the ICTY the Security Council responded to the widespread and grave violations of international humanitarian law in the territory of the former Yugoslavia. In its introductory considerations the Council stated that these violations constituted a threat to international peace and security. From there the UNSC concluded that an ad hoc international tribunal was necessary for the restoration and maintenance of peace and security and decided accordingly<sup>43</sup>.

Although the UNSC does have the legal power to create subsidiary bodies, a nexus between peace and justice constituted a legal requirement for the Council to apply Chapter VII (peace and security being the mandate of the UNSC). The decision of the UNSC to integrate the ICTY into its peacemaking strategy has not been without criticism; it is seen by many as arbitrarily and substantially enlarging the powers of the Security Council, hence casting additional doubts about the motives behind the creation of the Tribunal.<sup>44</sup>

<sup>38</sup> United Nations, S/RES/827, (1993) at <http://un.org/icty/legaldoc-e/index.htm>

<sup>39</sup> Goldstone, “Justice as a tool...”, *op. cit.*, p.486.

<sup>40</sup> Barrian, Lilian A.; Roper, Steven D.: “How effective are International Criminal Tribunals? An analysis of the ICTY and ICTR”, *International Journal of Human Rights*, vol. 9, n° 3 (September 2005), p. 357; Fletcher, Laurel and Weinstein, Harvey: “A world unto itself? The application of international Justice in the former Yugoslavia” in Eric Stover and Harvey Weinstein (eds.) (2004): *My neighbour, My enemy: Justice and Community in the Aftermath of Man Atrocity*, Cambridge, Cambridge University Press, pp. 36- 37.

<sup>41</sup> Meernik, *op. cit.*, p.145.

<sup>42</sup> Hazan, Pierre, (2004): *Justice in a time of war: the true story behind the International Criminal Tribunal for the former Yugoslavia*, Texas A & M University Press, p. 92.

<sup>43</sup> See S/RES/827, (1993).

<sup>44</sup> See Akhavan, Payam: “The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond”, *Human Rights Quarterly*, vol. 18, n° 2, (1996), p. 260. See also Zackling for further discussion over the UNSC competence to create legal institutions: Zacklin, Ralph: “Some Major Problems in the Drafting of the ICTY



In the same vein, authors like Johnson, D'Amato, Zacklin and Lombardi denounce the validity of the ICTY as a transitional justice mechanism in the Balkans, on the grounds of the irreconcilable tension between law and politics.<sup>45</sup> As we have already mentioned above, for many analysts the primary motives behind the creation of the ICTY were not to bring accountability and justice to the thousands of victims but more politically driven considerations such as: to find an excuse for not intervening militarily.<sup>46</sup> In their view at least, some of the proponents of the ICTY resolution were guided less by an effective peace and security strategy rather than by a responding 'domestically' to the sensitivities of their constituencies shocked by the findings of mass graves, the revelation of systematic racial persecution and ethnic cleansing. For many analysts the ICTY was installed to compensate for earlier negligence. Kerr, essentially a benevolent critic of the ICTY, agrees with Gow when he notes that the establishment of the ICTY must be viewed in the light of political 'instrumentalisation': instead of taking a pro-active and concerted stance the international community as a whole followed a course that was characterised by inconsistency and lack of will<sup>47</sup>.

In the literature there is rich and diverse argumentation about the corollaries of political origins of the ICTY. The fact that the creation of the ICTY was not solely aimed at holding accountable the perpetrators for the atrocities, but rather served to either compensate for earlier lack of will to intervene actively in the war or as a lever that would accommodate a peace agreement (a political goal), affected the work of the Tribunal in the long run. According to Lombardi, the tribunal's real purpose was never to function, but rather to stop the war; a consideration that automatically annuls the legitimacy of a judicial institution<sup>48</sup>. The politically tainted origin of the ICTY was seen to have resulted in a lack of institutional clarity. The Tribunal was overburdened by a double assignment to render justice and function as a peacemaking tool in order to compensate for the failure of the international community to take the political and military steps necessary to stop the war.<sup>49</sup> But this as we already mentioned earlier was a tall task. Rendering justice and peacemaking became increasingly difficult to coalesce. The international community brought itself in the position where it had to negotiate peace agreements with individuals who would consequently have to face an indictment in the framework of the very peace agreement which they were expected to sign up to.<sup>50</sup>

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Statute", *Journal of International Criminal Justice*, vol. 2, (2004b), p. 362. Zacklin notes, however, that the VII Chapter does not justify the discretion of legislation and that the latter constitutes an extension of UNSC competences.

<sup>45</sup> Johnson, Scott: "On the Road to Disaster: the Rights of the Accused and the International Criminal Tribunal for the former Yugoslavia", *International Legal Perspectives*, vol. 10, n° 1, (1998), pp. 111- 192; Lombardi, Gregory: "Legitimacy and the Expanding Power of the ICTY", *New England Law Review*, vol. 37, n° 4 (2003), pp. 887- 901; Zacklin, Ralph: "The failings of ad hoc International Tribunals", *Journal of International Criminal Justice* vol. 2 (2004), pp. 541-545; D' Amato, Anthony: "Peace vs. Accountability in Bosnia", *American Journal of International Law*, vol. 88, n° 3 (1994), pp. 500- 506.

<sup>46</sup> Bass, Gary; Beigbeder, Yves; Holbrook; Richard; Robertson; Geoffrey quoted in Meernik, *op. cit.*, p. 142.

<sup>47</sup> Gow, James: "Triumph of the Lack of Will: International Diplomacy and the Yugoslav War" (1997), Hurst, London; Kerr, Rachel: "International Judicial Intervention: The International Criminal Tribunal for the Former Yugoslavia", *International Relations 2000*, vol. 15, n° 17, (2000), p 18.

<sup>48</sup> See Lombardi, *op. cit.*, p. 900.

<sup>49</sup> Teitel, Ruti: "Bringing the Messiah through the law" in Hesse, Carla; Post, Robert (eds.) *Human Rights in political transition from Gettysburg to Bosnia* (1999), New York, Zone Books, p. 179.

<sup>50</sup> The polemic over the immunity that peace envoy Richard Holbrook allegedly had to offer to Radovan Karadzic is an obvious case in point here.



A general consensus wants it that the creation of the Tribunal constituted a ‘judicial intervention’ from the part of the United Nations which was not supported by the domestic political elites in the countries of the region. Consequently, the utilitarian nature and the instrumentalisation of the ICTY, as the court was perceived in the region, condemned the court to function in a “political vacuum”<sup>51</sup>. The umbilical cord that connected the ICTY with the Security Council i.e. the political interest of international actors had never been removed: the Tribunal’s existential and financial dependence from the UNSC rendered it impossible for the ICTY to establish legitimacy especially in the eyes of the polarised post-conflict societies.<sup>52</sup>

Nevertheless, in the transitional justice debates there is also a counter-argument: namely that international funding guarantees impartiality of the procedures; local sponsorship instead would have resulted in prejudiced operation and failure. This, however, does not seem to be the case in the former Yugoslavia, where the popularity of the ICTY is generally low in large parts of the local societies.<sup>53</sup>

### 2.2.2. Early deficiencies, their politics, and their effects

We have already alluded to some major problems that inhibited the work of the ICTY, at least in its early phase; we will now present these in more detail. During the first years of the tribunal’s function analysts and academics were seeking to analyse the impact of the political dependency of the ICTY on its workings. The strongest arguments advanced by those criticising the political dependence of the institutions had been the absolute absence of indictments. By this measure it was easy enough to claim that the ICTY was a void letter. Lawyers and judges admit that in the first two years the ICTY was mainly preoccupied with writing the rules of procedure. The incapability to issue indictments fuelled serious concerns especially when the budget started being jeopardised due to the lack of deliverability of the prosecution<sup>54</sup>. The court’s lack of efficiency is further corroborated by the testimonies of the ICTY personnel who had been recruited for the initial inception phase. The picture they paint of gives credence to their claim that “despite its desirability [...] the tribunal did not have the prospects of being very effective”<sup>55</sup>. They point to the fact that for a number of years, prosecutors and judges were not in a position to properly investigate and issue indictments. This created a psychology of defeatism in the gulfs of the tribunal<sup>56</sup>.

If the priority of the ICTY had indeed been to prosecute the primary responsible of human rights violations in the understanding that the legal response to the atrocities would eventually lead to a long-term peace, then the mechanisms of the ICTY have hardly been the adequate ones. Even authors like Hazan, who endorses the benefits and the necessity of international criminal justice, recognise that the ICTY’s “dependence on international politics put a limit on the workings of the tribunal”<sup>57</sup>. Hazan, though, urges us to judge the tribunal more in the long perspective and recognise its contribution on normative and substantive

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<sup>51</sup> *Ibid.*, p. 181.

<sup>52</sup> See Lombardi, *op. cit.*, p. 887.

<sup>53</sup> Klarin, Mirko: “The tribunal’s four battles”, *Journal of International Criminal Justice*, vol. 2, n° 2, (2004), pp. 553. See more on this issue below.

<sup>54</sup> Interview with Richard Goldstone in documentary: “Against all Odds” (2004), SENS Tribunal.

<sup>55</sup> Meron, Theodor, “The case for War Crimes Trials in Yugoslavia”, *Foreign Affairs*, vol. 72, n° 3, (Summer 1993), p. 132.

<sup>56</sup> Louise Arbour’s interview in documentary “Against all Odds”, (2003), SENS Tribunal.

<sup>57</sup> See Hazan, *op. cit.*, pp. 86- 89.



questions. Nonetheless the argumentation of these authors who welcome the creation of the ICTY shows that they are fully aware of the intricacies caused by the political character of the ICTY.

Authors like Meron or O' Brien, who studied the ICTY already in 1993 only a few months after the commencement of its work, foresaw quite clearly the difficulties to arise: lack of funding and personnel, absence of cooperation by relevant authorities in the territories of the former Yugoslavia, the lack of a system providing for incentives to co-operate or sanctions for non cooperation<sup>58</sup>. O' Brien emphasises the fact that the widespread atrocities in the former Yugoslavia politically obliged the Council to create the ICTY and lauds its statute and rules that provide a sound structure for determining individual responsibility. But he too eventually concludes that the Tribunal's success depended on the one hand on the states that had to provide the adequate resources for enforcement and on the other in creating a political climate in which the tribunal would have the chance to succeed.<sup>59</sup> Bringing these two issues together, Gow shows how the key development in awarding justice in the ICTY and in the shifting the political landscape in post-conflict Bosnia have been the war crimes enforcement by the international forces from 1997 onwards.<sup>60</sup>

The architects of the ICTY were very cautious in designing the powers and mechanism of this body. Their national demands were factors that did form eventually the institutional design of the ICTY. Hazan gives a detailed account of the national diplomatic considerations which mortgaged the structure of tribunal manifested to particular national interest: the English, for instance, were very persistent in erasing any reference to the obligation to cooperation. The French refused to authorise their military to testify in The Hague.<sup>61</sup>

Klarin states that only few, even among the founding fathers, believed that the tribunal would ever become a functional institution. According to Klarin, the effect of this general scepticism made those to whom threat was addressed to, perceive the tribunal- at best- as a mere instrument of political pressure, in the interest of achieving some kind of peace in the Balkans.<sup>62</sup>

### 2.2.3. Judicial independence<sup>63</sup>

The authors hitherto quoted have mostly based their analysis on the incompatibility between political underpinnings and the ambition to effectively render criminal justice; an equation in which the justice objective seemed the weaker one. At the same time authors like Meron<sup>64</sup> were commenting on the design deficiencies of the ICTY, which led to lack of deliverability

<sup>58</sup> Meron, *op. cit.* pp. 133- 134; O'Brien, James: "The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia", *American Journal of International Law*, vol. 87, n° 4, (1993), pp. 642.

<sup>59</sup> See O'Brien, *op. cit.*, pp. 658- 659.

<sup>60</sup> Gow, James, "The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine", *Ethnopolitics*, vol. 5, n° 1 (March 2006), pp. 49-65.

<sup>61</sup> See Hazan, *op. cit.*, p. 98- 103; See also Olofson, George: "Envisioning the ICTY" in Allcock, John (ed.) (2006): *The International Criminal Tribunal for the Former Yugoslavia*, The Scholars' Initiative – Research Team 10, p. 110.

<sup>62</sup> Klarin, *op. cit.*, p. 547.

<sup>63</sup> See Meernik, *op. cit.*, p. 149.

<sup>64</sup> See Meron, *op. cit.*, p. 133.



and inefficiency. These arguments could be used, as shown, to support the opinion that the architects of the ICTY created an institution that from the beginning had manifested weaknesses that were to be detrimental for its function. This rationale could be further used to highlight the tension between law and politics and cast doubt on the strategy of the international justice donors.

However, authors like O' Brien do not underestimate the important beneficial impact that it eventually had despite the deficiencies and unfavourable circumstances. In this view, the creation of the tribunal is considered as an unprecedented decision of tremendous significance in the treatment of human rights in international politics and endorsed its goal to bring justice to the thousands of victims. The eventual judicial intervention by a supra national body of the Security Council was considered to be necessary due to "the catastrophic failure of the national states to protect their citizens and the likelihood that those states would not prosecute the perpetrators through national trials"<sup>65</sup>. International tribunals are perceived by the United Nations to be tribunals of the last resort and their function is to deliver justice in the wake of the breakdown of national judicial systems. Most importantly their existence manifests a decisive shift within the international community away from impunity.

Authors like Humphrey, O'Brien and Hochkammer belong to the analysts who argue in favour of the UNSC rationale of creating stability in the former Yugoslavia through the enforcement of international humanitarian law.<sup>66</sup> Humphrey sees the ICTY as only one element of a complex and multifaceted institutionalised strategy which – alongside diplomatic cease-fire and peace negotiations - constituted a specific response to the atrocities<sup>67</sup>.

Earlier, we introduced the debate on the incompatibility of law and politics and so far we elaborated the rationale of the 'political model'<sup>68</sup>, which purports that in this relationship law is subordinate to politics. The counter-argument to this posture asserts that the judicial process cannot be conceived in isolation from politics. The advocates of this position do not only see no tension between the objectives of politics and justice but also perceive politics as the vital space that enables justice to function by ensuring both its legitimacy and effectiveness.<sup>69</sup> In their view, international criminal justice, effectuated not in its traditional national context of law but in the space in-between states, where the relationship between power and law is particularly evident, 'must be understood in the context of politics and not detached from it'.<sup>70</sup> As Kerr comments: "The ICTY was established by a political process [...] and the success or failure of the enterprise is ultimately determined by the political will because of the need for political support and action to underpin the legal process. However, while politics permeates every other aspect of the tribunal, it does not enter the courtroom and impinge on due process of law"<sup>71</sup>.

<sup>65</sup> Humphrey, Michael: "International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda", *Journal of Human Rights*, vol. 2, no. 4, (2003), p. 495.

<sup>66</sup> See Humphrey, *op. cit.* pp. 495- 505; O' Brien, *op. cit.* pp. 639- 644; Hochkammer, Karl: "The Yugoslav war Crimes Tribunal: the Compatibility of Peace, Politics and International Law", *Vanderbilt Journal of Transnational Law*, vol. 28, n° 119, (1995), p. 170.

<sup>67</sup> See Humphrey, *op. cit.*, p. 495.

<sup>68</sup> Term adopted from Meernik, *op. cit.*, p. 144.

<sup>69</sup> Allcock, John: "The political character of the ICTY", in Allcock, John (ed.), *op. cit.*, pp. 119-125 (Also at <http://www.salzburgseminar.org/ihjr/si/si/Report-10g.pdf>); Also see Kerr, (2000), *op. cit.*, p. 24.

<sup>70</sup> Bass, Gary quoted in Allcock, John (ed.), *op. cit.*, p. 92.

<sup>71</sup> See Kerr (2000) *op. cit.*, p. 24-25.





One of the greatest fears expressed during the initial phase of the tribunal was that its dependence on international politics would have a toll on the partiality of its indictments and decisions. Authors like Scharf commented in 1996 that although the ICTY proved a clear improvement of international justice since Nuremberg also in terms of the fairness of the trials, the scales of justice in the ICTY were tipping more in disadvantage of the Serbs since it was predominantly members of this group who had to sit on the dock.<sup>72</sup> This argument contradicts the declared by the transitional justice literature key advantage of the retributive paradigm, which we saw above; that is, that individual culpability removes of the collective guilt and stigmatisation.<sup>73</sup>

Meernik provides us with a host of arguments expressed about the concerns of partiality, concerns which remained unfounded. He examines in detail the arguments claiming that international criminal tribunals are ‘no more than instruments of victor’s justice in disguise’. In an elaborated system of fairness evaluation he concludes that although the ICTY started as a window dressing to veil the lack of international willpower, in its further course it did develop legitimacy. Furthermore, he states that it subsequently had positive impact on the international humanitarian law development, on the institutionalisation of the law in international politics. Importantly he confirms that no ethnic group has been singled out for unfair treatment and that as a long-term evaluation the ICTY has not been influenced by political actors and that the monitor mechanisms of the ICTY under the auspices of the UN are a sound guarantee of fairness.<sup>74</sup> Bass argues that war crimes tribunals have generally sought to apply, to the extent possible, legal criteria based on widely accepted international conventions.<sup>75</sup>

Similarly, Klarin argues that after 1997 the Tribunal acquired its own momentum accompanied by an impressive rise in the number of the indictments (having started even while Dayton was in full swing) and he registers them as encouraging signs of good collaboration from behalf of SFOR.<sup>76</sup> These achievements in the field were rewarded by ICTY–record budget for 1998.<sup>77</sup> He concludes that despite the seemingly insurmountable obstacles, on its tenth anniversary, the tribunal was precisely doing what it was created to do, namely prosecute the principal perpetrators and importantly converting the suffering of thousands of silent victims into an undeniable historical event.<sup>78</sup>

## **2.3. Evaluating the ICTY**

### **2.3.1. The evaluation of the ICTY according to its statutory objectives**

A more objective mode to assess the ICTY is to measure its achievements against its mandate. An analysis of the ICTY mandate leads to some important issues both fundamental to the assessment of the ICTY but also relevant to transitional justice tools in general.

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<sup>72</sup> Scharf, Michael: “A critique of the Yugoslavia War Crimes Tribunal”, *Denver Journal of International Law and Policy*, vol. 25, n° 2, (1996- 1997), pp. 310- 311.

<sup>73</sup> To this point we will return later in the paper.

<sup>74</sup> See Meernik, *op. cit.*, p. 156.

<sup>75</sup> Garry Bass quoted in Meernik, p.149.

<sup>76</sup> See Klarin, *op. cit.*, p. 551. Gow, “The ICTY, War Crimes Enforcement and Dayton...” *op. cit.*

<sup>77</sup> See Meernik, *op. cit.*, p. 552.

<sup>78</sup> *Ibid.*, p. 554.



As already mentioned the declared primary objectives of the ICTY were to punish the war criminals restore peace and guarantee security in the region. The statutory jurisdiction of the Tribunal was not directly aimed to reach beyond providing an immediate response to the humanitarian situation by promoting social reconstruction and long term reconciliation<sup>79</sup>. Although punishment and peace were both the primary statutory aims of the ICTY, different authors focus on one of the two goals baptizing it as the ‘major goal’. Those who consider the ICTY as principally a retributive justice tool (Cassese, Kerr, Klarin, Olofson)<sup>80</sup> are satisfied that in the long run justice has not been compromised in the pursuit of peace. Those who view the ICTY as a means to reach peace (Lombardi, Zackling)<sup>81</sup> believe that this very objective backfired on the effectiveness of the Tribunal not only weakening its role in ending the war, acquiring judicial legitimacy, and serving as a substantive tool of reconciliation.

General consensus exists on the fact that the ICTY did not fulfil its utmost mandate: the shocking incident of Srebrenica as well as the outbreak of the war in Kosovo seemed to illustrate that the ICTY had not been a successful deterrence factor. In this respect the literature is concerned with primarily one issue, namely how and why did the ICTY fail to have a greater impact as a tool of peace building?

Not infrequently commentators and authors draw the attention to the fact that the signatory states are accountable for the tribunal’s success; they should provide it with adequate resources, cooperation and create a climate in which the tribunal has a chance to succeed<sup>82</sup>. The question then to ask becomes whether the failure to achieve the goals set and the aspirations projected on this institution were a corollary of inevitable weaknesses (for instance due to lack of institutional experience or due to circumstances connected to the political realities) or whether they were indeed the outcome of political considerations. In other words was the ICTY intentionally designed to be a weak institution, so as not to be able to acquire too much of a judiciary momentum and impose obstacles in possible political settlements aiming at the restoration of peace and order? How much did politics affect the institutional design of the ICTY?

### **2.3.2. Endowed institutional weaknesses: a contradiction between aspirations and design?**

Many critics perceive incongruence between the imperatives of the ICTY mandate and its institutional design. A large part of the literature on the institutional failures of the ICTY criticizes the lack of enforcement<sup>83</sup> and its dependence on cooperation.<sup>84</sup> Although cooperation with the ICTY became provision of the Dayton Agreement, there was neither an effective mechanism of enforcing such cooperation nor a system of sanctions. The post-Yugoslav states have been exhibited extensive obstructionism in their cooperation with the

<sup>79</sup> Fletcher and Weinstein, “A world unto itself?...” *op. cit.*, p.36.

<sup>80</sup> Cassese, Antonio: “The ICTY: A Living and Vital Reality”, *Journal of International Criminal Justice*, Vol. 2, (2004), pp. 585- 597; Klarin, *op. cit.*, pp. 546- 557; Olofson, *op. cit.*, pp. 109- 118; Kerr, *op. cit.*

<sup>81</sup> See Lombardi, *op. cit.*, p. 887- 901; See Zackling, “The failings of ad hoc international tribunals”, *op. cit.*, p. 541- 545.

<sup>82</sup> See O’ Brien, *op. cit.*, 659.

<sup>83</sup> McDonald, Gabriele: “Problems, Obstacles and Achievements of the ICTY”, *Journal of International Justice*, vol. 2, (2004), pp. 559- 560; Askin, Kelly: “Reflections of the Most Significant Achievements of the ICTY”, *New England Law Review*, vol. 37, n° 4 , (2003), p. 903; Also see Klarin, *op. cit.*, p. 458.

<sup>84</sup> See MacDonald, *op. cit.*, pp. 559- 560.



ICTY, for instance by not making evidence available to the prosecution. Moreover, the ICTY relies on the signatory states to undertake arrests, as it does not have its own police force.

Judge Mc Donald commenting on the lack of cooperation that the tribunal confronted in particular during the first years of its existence said that not only did the resolutions of the Security Council fail to end the blatant non-compliance of Serbia and facilitate the tribunal access to Kosovo; the international community itself often ignored her own appeals to act as violence was escalating in Kosovo.<sup>85</sup> With no enforcement personnel of its own, often unwilling partners to get involved into arrests (criticism against NATO forces and the international forces who refused to assist in the arrests of the indicted)<sup>86</sup> and with the obstructionism posed by the state authorities of the indicted; the Tribunal quickly gained the characterization of an ineffective and slow functioning body.

Klarin said that even the impact of Dayton on the Tribunal was minimal. Although the peace accords were obliging the regimes to full cooperation there were no provisions enforcing sanctions in the failure of it.<sup>87</sup> However, the literature does not offer any alternative institutional options to the absence of enforcement mechanisms. It seems that at present there is no viable institutional concept for international criminal institutions to develop their own enforcement and sanctions systems.

This is corollary to the still initial phases of the development of international criminal justice and not a failure particular to the ICTY. The ICC, an institution, which to a large extent was built upon the ICTY and the ICTR precedents, although functioning under different rules (the ICC is not a UN body) and a permanent institution remains dependent upon the cooperation of the signatory states. As Cassese rightly points out, it is wrong to reach conclusions on the ICTY by comparing it with a national court, because an international ad hoc tribunal is not supported in its function by an entire state apparatus that underpins and complements its work.<sup>88</sup> Is this an inevitable reality of international justice? Pessimists would probably agree; Zacklin, for example, is arguing that it is impossible to envisage the establishment of a similar tribunal in new situations, considering that it is not only costly but also inefficient and ineffective.<sup>89</sup> Optimists on the other hand point out the contribution of the ICTY in the development of international humanitarian law. As Askin argued it is still very early to expect international justice systems to reach these levels of efficacy and institutional soundness that took hundreds of years to the domestic judicial systems to achieve.<sup>90</sup>

Being an unprecedented institution, the architects and practitioners of the ICTY acted often on a trial and error basis. On the one hand, some scholars suggest that the diversity of the personnel and the differing but co-existent procedures of civil and common law put an additional burden on the function. Incompatible disparities between legal traditions slowed down the procedures and cause confusion many times as to what would be a legal practice and what not.<sup>91</sup> Institutional insufficiencies, scarce legal procedural precedent, handicaps in

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<sup>85</sup> *Ibid.*, pp. 563- 564.

<sup>86</sup> See Hazan, *op. cit.*, pp. 94- 95 and Klarin, *op. cit.*, p. 550.

<sup>87</sup> See Klarin, *op. cit.*, p. 550. It has to be noted though here that although the provisions were not there, the international community in time did develop its own political tools for enforcing cooperation with the ICTY, not least by incorporating this element in the European Union conditionalities to the Western Balkan states.

<sup>88</sup> Cassese, *op. cit.*, p. 587.

<sup>89</sup> See Zacklin, "The failings of ad hoc tribunals", *op. cit.*, p. 545.

<sup>90</sup> See Askin, *op. cit.*, p. 914.

<sup>91</sup> Schrag, Mina: "Lessons Learned from ICTY Experience", *Journal of International Justice*, vol. 2, (2004), p. 432.



acquiring evidence and securing arrests coupled by scarce resources, both in personnel and in material marked the daily routine in the premises of the ICTY.<sup>92</sup> As a consequence, issuing an indictment was as a slow process as were the trial procedures themselves. This general inefficiency and hampered deliverability had a direct impact on its legitimacy<sup>93</sup>.

What was particularly seen to be inflicting upon the defendants' rights were the extraordinarily extended detention periods before their trial which was an unfortunate but expected result of the workload and the obstruction in the collection of evidence. The cumbersome beginning of the ICTY dictated to an extent its prosecution strategy, which initially had to be restrained on the low or mid levels instead of the high echelons of the command. The difficult and at times inhibited for the above reasons access to evidence rendered it impossible for Goldstone, chief prosecutor of the ICTY between 1994 and 1996, to indict the leadership- owners of functional responsibility. Instead his pyramid policy concentrated on the executors since evidence was by far and large more easily available thanks to the testimonies of victims. Yet this practice undermined the perception of fairness<sup>94</sup>, and became again the recipient of criticism. Some critics viewed the initial prosecution strategy that focused on the "example setters" (i.e. not those bearing functional responsibility, namely the leadership, but the execution organs)<sup>95</sup>, as an alienation of the tribunal's work from its declared purposes that stemmed in the alleged unwillingness to reach to the leadership.

## **2.4. ICTY judged by results in the Balkans**

### **2.4.1. Expectations**

Some have argued that the validity of the ICTY should not be judged on whether it had an immediate deterrence effect or whether it contributed to an immediate ceasefire but rather on long-term substantial issues, such as contributing to sustainable peace. We have already by looking at its mandate established that the ICTY did not have as a statutory goal to become a medium of social transformation. However, transitional justice scholars ascribe to the criminal justice mechanisms a number of virtues that are according to the theorists conducive to the transformation of a post conflict society into a reconciled one in which democracy and the rule of law prevail. Yet, what are the preconditions that will allow an international body to have an impact on the dynamics of national politics and the domestic society what exactly is the role of law in the process of transition?

Several scholars who evaluate the effect of the ICTY on the region believe that in order for the Tribunal to become a factor in the processes of democratization and reconciliation it needs to become part of the political competition; in other words, it needs to become a political issue that would gain the support of those political forces that endorse democratization. Bell, Campbell and NiAolain point to the fact that "institutional reforms become intrinsically tied up with the ongoing experiment of political accommodation".<sup>96</sup>

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<sup>92</sup> See Askin, *op. cit.*, p. 903.

<sup>93</sup> See Schrag, *op. cit.*, p. 430.

<sup>94</sup> Schrag, Mina, *op. cit.*, p. 430.

<sup>95</sup> Del Ponte, Carla: "Prosecuting the Individuals bearing the Highest Level of Responsibility", *Journal of International Criminal Justice*, vol. 2, (2004), pp. 516- 519.

<sup>96</sup> See Bell et al, *op. cit.*, p. 313.



A number of other transitional justice authors believe in the *potential* pedagogical nature of international trials by contributing to collective memory and strengthening peoples' awareness. The task of the international courts is not constrained to the mere conduct of trials but also to the support of the development of parallel teaching and rehabilitative structures addressed to domestic audiences<sup>97</sup>. Furthermore, public pedagogy ought to take place also within the institutions whereby the international legal system should become a point of reference for the adequate development of the domestic one<sup>98</sup>. According to Bell, Campbell and NiAolain one needs to perceive the transitional process in terms of the reversal of the delegitimisation of domestic law and of legal institutions that occurred during the conflict; thus transition becomes a project of building the legitimacy of the law.<sup>99</sup>

Fletcher and Weinstein argue that through these educative virtues international criminal justice *might* contribute to achieving justice in the broader sense.<sup>100</sup> However, these authors discern the failure of the ICTY to do so. Equally Teitel, stresses that "...the ICTY symbolises the possibility of change in the region [...] from persecutory violence to the rule of law [...] and represents the rule of law in a transitional form, as an image of the possibility of liberal justice and a symbol of a potential change."<sup>101</sup> In the aftermath of a large scale conflict, where severe and systematic human rights violations took place, every notion of accountability, lawfulness and justice collapses and the value of the 'third power' needs to be re-established as the principle guarantee for the individual. The rule of law is the cornerstone of a democratic state and its necessity in the consolidation of peace in a diverse society is indispensable for coexistence after a conflict. Teitel, however, adds that the ICTY failed to have the expected impact on these respects. Along the same lines Tolbert had expressed the hope that the ICTY would have had a long- term impact on the systems of justice in the area of the conflict, yet recognising that the impact in this field had been minimal.<sup>102</sup>

#### 2.4.2. Why fail?

There are various arguments in the bibliography why international criminal tribunals cannot – at least when applied exclusively – have a strong impact on substantive reconciliation and social transformation. The question whether or not international criminal justice is beneficiary to social reconciliation also depends on the breadth one gives to the term. For Fletcher and Weinstein this broader sense of justice translates into the process of "social repair"<sup>103</sup>. Although they recognise the value of international trials as a response to atrocities, they argue that trials do not constitute a sufficient answer to a social reconstruction because this approach of transitional justice is responsive only to one dimension of the abuse of power and manifests limits in addressing the social and collective forces that lead to violence<sup>104</sup>. Their research has shown that criminal justice fails to redress the totality of the complex issue of social reconciliation. For instance bystanders and unindicted persons who directly or indirectly profited from violence remain untouched. Additionally trials only concentrate to perpetrators

<sup>97</sup> See Fletcher and Weinstein, *A world unto itself?...*, *op. cit.*, p. 43.

<sup>98</sup> *Ibid.*, p. 30.

<sup>99</sup> See Bell et al., *op. cit.*, p. 323.

<sup>100</sup> See Fletcher and Weinstein, *A world unto itself?...*, *op. cit.*, p. 43.

<sup>101</sup> See Teitel, *op.cit.*, pp. 188- 189.

<sup>102</sup> Tolbert, David: "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Forseeable Shortcomings", *Fletcher Forum World Affairs*, vol. 26, n° 2, (Summer/ Fall 2002), p. 8.

<sup>103</sup> Fletcher, Laurel and Weinstein, Harvey: "Violence and Social repair: Rethinking the Contribution of Justice to Reconciliation", *Human Rights Quarterly*, vol. 24, (2002), pp. 573- 639.

<sup>104</sup> *Ibid.*, p. 636.



leaving to broader initiatives the issues of democracy building, humanitarian assistance and economic development<sup>105</sup>.

### 2.4.3. Local trials

There is general consent in the literature that domestic courts in the former Yugoslavia suffer from low capacity and manifest low willingness to prosecute war criminals. According to a research in Bosnia and Herzegovina in 2004, the Bosnian judicial system “suffers from neglect, remains subject to influence by nationalist elements, political parties and the executive branch”.<sup>106</sup> The research concludes that this failure is to be attributed to the lack of a comprehensive vision in the area of transitional justice. Although the Dayton Agreement set out a broad framework for building the new state of Bosnia and Herzegovina, the overall transitional justice efforts have been ad hoc and incomplete. The conclusion of this research is one among many that support the argument that what was needed in the former Yugoslavia was a well aimed and targeted strategy of transitional justice within which the ICTY could have played a strategic role as one component of a holistic approach.

An equivalent but more recent research on war crimes tribunals in Serbia concludes that radical nationalists have frequently attacked the work of the war crimes tribunals, while moderate nationalists never publicly supported war crimes prosecutions<sup>107</sup>. Moreover, as in 2008 Serbia is lagging very much behind both Bosnia and Croatia in the number of indictments<sup>108</sup>. Regarding the issue of the institutional impact of the ICTY on the domestic courts, no use has been made of the ICTY jurisprudence conserving issues of substantive law by the domestic Chambers principally due to the lack of experience in international humanitarian law. Nonetheless, the same research confirms that the ICTY has contributed in many other ways to the functioning of war crimes chamber in Serbia, principally through training of judges and prosecutors in substantive international law.<sup>109</sup>

Zogling commenting in 2005 on Croatia’s status of domestic criminal justice system comments that “cases are marred with intimidation towards witnesses, politicization and double standards; [...] there is a general lack of ability and will to dispense justice”.<sup>110</sup> Although much of the ineffectiveness of domestic courts render justice is due to the weak institutional capacities, the dominant inhibiting factor appears to be the unwillingness of the governments to promote domestic trials, but also a general state of denial that prevails in the masses. Zogling’s argument then that holding up all or parts of some ICTY trials in the region would help in the acceptance of transitional criminal justice in the region<sup>111</sup> or the argument of other authors that the remoteness of the ICTY rendered it too distant as to have a substantial impact on the region do not hold water. The problem of acceptance of either international or domestic criminal justice it seems lies also more in the reconciliation and the acceptance of the past and not only in the legitimacy of the international tribunal.

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<sup>105</sup> *Ibid.*, p. 580.

<sup>106</sup> International Centre for Transitional Justice at “Bosnia and Herzegovina- Selected developments on Transitional Justice, (October 2004) at <http://www.ictj.org/images/content/1/1/113.pdf>

<sup>107</sup> International Centre for transitional Justice: “Against the Current: War Crimes Prosecutions in Serbia”, (2007), pp. 2-3.

<sup>108</sup> *Ibid.*, p. 5.

<sup>109</sup> *Ibid.*, pp. 35- 38.

<sup>110</sup> Zoglin, Katie: “The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?”, *Human Rights Quarterly*, vol. 27, (2005), pp. 55- 56.

<sup>111</sup> *Ibid.*, p. 75.



#### 2.4.4. The problem of the acceptance of the ICTY in the region

In any case, various researches affirm that the legitimacy and acceptance the ICTY enjoys in the region is considerably low. It is telling that the tribunal's popularity is inversely proportionate to the number of accused that come from the countries or entities and ethnic communities concerned, whereas in every country or entity it is the minority that has a positive view of the tribunal.<sup>112</sup>

The most common criticism about why the ICTY failed to have a strong and profound impact in the region was its dislocation from the actual domestic context. Some critics believed that it has been a mistake holding the trials in an outside place such as The Hague because this remoteness had as an effect the absence of a feeling of ownership. Zogling suggested that holding all or parts of some ICTY trials in the region would have advanced the goal of reaching one truth. It would have helped to involve to a greater extent the national judiciaries securing impartial trials and raise awareness in the populations.<sup>113</sup>

The physical remoteness becomes more of an issue if seen as a further element obstructing the proper communication of the tribunal. The architects of the ICTY have been criticised for failing to create the right mechanisms that would function as routes of communication between the international body and the region under its jurisdiction. Analysts but also ICTY professionals considered as neglect the fact that for the first six years the ICTY was not equipped with a kind of outreach mechanism that would undertake the awareness rising of the populations with regards to the work of the tribunal.<sup>114</sup> Other analysts still, question the extent to which a court ought to develop extensive awareness raising mechanisms and point to the evident failure of the international organisations active in Bosnia and Kosovo to make full use of the ICTY verdicts and available primary knowledge for informational purposes.<sup>115</sup>

The failure to address its constituencies affected substantially the attitude towards the tribunal in the countries of the region, which became a manipulated issue under the control of the local political power and the media.<sup>116</sup> As a consequence, according to the same critics, the failure to embed the ICTY into the local political and social context had a direct effect on the popularity the tribunal enjoyed in the local populations.<sup>117</sup>

#### 2.4.5. Politics

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<sup>112</sup> See Klarin, *op. cit.*, p. 553.

<sup>113</sup> See Zoglin, *op. cit.*, p. 76.

<sup>114</sup> Tolbert, *op. cit.*, p. 13. For interesting examples of awareness raising projects of the ICTY's Outreach Program, see Helsinki Committee for Human Rights in Republika Srpska: "Priblizavanje MKSJ-a lokalnim zajednicama u Bosni i Hercegovini", Conference series; and Open Society Fund Bosnia & Herzegovina: "Zlocin i Kazna. Procesuiranje ratnih zlocina pocinjenih u Bosni i Hercegovini pred Medjunarodnim Krivicnim Sudom za Bivsu Jugoslaviju", (2007), Sarajevo; George, Alexandra: "Justice Requires Outreach: A Vital Communication Tool in Rendering Justice", OSCE Mission in Bosnia-Herzegovina (April 2007), Report at <http://www.oscebih.org/public>. General information about the Outreach Program can be found at [http://www.un.org/icty/bhs/outreach/outreach\\_info.htm](http://www.un.org/icty/bhs/outreach/outreach_info.htm).

<sup>115</sup> Armakolas: "The International Criminal Tribunal for Former Yugoslavia..." *op. cit.*

<sup>116</sup> See Klarin, *op. cit.*, p. 553; Tolbert, *op. cit.*, p. 13.

<sup>117</sup> See Klarin, *op. cit.*, 553.



As elaborated in detail above, a number of scholars recognised that the ICTY as an externally imposed criminal justice institution functioned in a political vacuum. The assumed effect that the pursuit of the perpetrators would lead to their stigmatisation also in their domestic context and their removal from their activity domestic politics did not apparently materialize. Although arguably this is still an ongoing process, and without underestimating the progress achieved in recent years, it is true, as it is evident for example from the political situation in Bosnia and Herzegovina, that nationalism and ethnic politics are still a hard currency in the region. The Western Balkans were considered by analysts to have gone through a very disrupted and difficult political transition even before the beginning of the war owing to regressive local elite competition and the continuing strength of ethnic nationalism. In addition, the Balkan wars had ended without the total defeat of one of the parties which in that state could have provoked the people to hold their leaders responsible not only for the outcome, but also for aggressions and atrocities. Most leaders that played the role of ethnic entrepreneurs during the 1990s conflicts have remained in power even after peace agreements. Where they were removed, other politicians also viewing politics through ethnic nationalist lenses took over. Contrary to the expectations, the ICTY has only partially succeeded in excluding the criminals from the public discourse.

#### 2.4.6. Victims' expectations...

An important issue that has to be raised here concerns the extent to which the needs of the victims are met and their perspectives taken into account through the activity of the ICTY. Delpla makes some very interesting observations: firstly she concludes that the ICTY engages citizens of Bosnia mainly at the level of the arrests and sentences rather than the trials themselves; she has pinpointed that once arrests are completed trials attract less attention. In addition, she adds that the notion of justice includes financial and material aspects for the victims, a request definitely beyond the jurisdiction of the ICTY. Finally, the victims expect international criminal justice to offer them both individual and collective recognition. Yet trials in The Hague do not bring about a shared recognition or an improvement of the social or symbolic status of the victims.<sup>118</sup> It is fair to argue that the ICTY has not been able to totally satisfy the needs of the victims who on the one hand believe and support the role of the ICTY but on the other desire to see more justice being dispensed according to their own standards.

#### 2.4.7. ...and actual impact

In contrast to such a pessimistic view many scholars and practitioners of international law make us aware of the potentials of international criminal justice and how they were – even partially – advanced by the ICTY. The latter could not possibly tackle victims' aspirations for compensations, the dogma of restorative justice; the Tribunal nonetheless provided a historical record accredited by historians as a credible historical account.<sup>119</sup> According to Kerr, the historical record itself produced by the ICTY should be regarded as a means of restorative justice.<sup>120</sup> The extensive use of witness statements had multiple positive effects:

<sup>118</sup> Delpla, Isabelle: "In the Midst of Justice: The ICTY from the Perspective of some victim Associations", in Bougarel, Xavier, Helms, Elissa and Duijzings, Ger (eds.) (2007): *The New Mosaic: Identities, Memories and Moral Claims in a Post- War Society*, Ashgate, p. 231.

<sup>119</sup> Wilson, Richard Ashby: "Judging History: The Historical record of the International Criminal Tribunal for the Former Yugoslavia", *Human Rights Quarterly*, vol. 27, (2005), p. 908- 942.

<sup>120</sup> Kerr, Rachel, (2004): *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy*, Oxford University Press, p. 61.





apart from creating a historical account, their testimonies in an international tribunal made their voices heard, gave to their suffering global acknowledgement and recognition and acted as a purgatory mechanism that contributes to social healing. Moreover, the ICTY “has undertaken historical documentation without being lured into debates about national identity [...] and the ICTY judgements contain extensive historical interpretation of the causes of the conflict.”<sup>121</sup> Therefore, we can safely argue that the truth exposed before the tribunal has had a healing effect on the victims satisfying to a smaller or larger extent their aspirations of justice and preventing acts of revenge; it consequently has also a collective value.

As we have seen earlier in the paper, another strong argument projected by the legal school of thought in transitional justice is the notion of *individual* culpability. Holding individuals accountable for their acts prevents the *collective* stigmatization of groups. The virtue of this approach is that it breaks ‘old cycles of ethnic retribution’ and thus advances ‘ethnic reconciliation’<sup>122</sup>. In contrast to political interventions during conflict resolution, which focus on the peace between warring parties, the judicial intervention removes the focus away from the group onto the individual, eradicating the evil elements and perceptions from the group.<sup>123</sup> This constitutes one of the major advantages of the judicial intervention, as it is thought to be setting the foundations for a future restoration of the destroyed social bonds between the various sections of the society.

Still, the advantages of individual culpability are to a large extent lost in the former Yugoslavia. ICTY decisions in the post-Yugoslav counties are still interpreted through national lenses. For the Serbs, and to a lesser extent the Croats, the argument on the avoidance of collective stigmatisation is mostly missed. In fact, large parts of the Serbian public view the ICTY as specifically the institution that advances their collective stigmatisation. The point is missed in reverse also among Bosnjaks (Bosnian Muslims), especially the victims and their families. In their view, it is specifically the awarding of justice by the ICTY that confirms their victimhood and should corroborate their *collective* political demands.<sup>124</sup> Overall, the great advantage of retributive justice, the non-stigmatisation of the collectives, seems untenable in the former Yugoslavia.<sup>125</sup>

With regards, finally, to the impact on the political transition and the weakening of nationalist forces the picture appears in the literature to be mixed. On the one hand, surely there is some truth to the claims that the justice rendered in The Hague contributed to the delegitimation of the Milosevic regime, to Croatia’s steps towards EU integration and to some extent changing the civic landscape in Bosnia.<sup>126</sup> In the same line, the key development

<sup>121</sup> See Wilson, *op. cit.* p. 921- 922.

<sup>122</sup> See Teitel, *op. cit.*, p. 183.

<sup>123</sup> Shinoda, *op. cit.*, p. 52.

<sup>124</sup> Delpla, *op. cit.*

<sup>125</sup> For the perceptions of the ICTY in Serbia, see Gordy, Eric: “Public opinion on the ICTY and Reconciliation”, in Allcock (ed), *op. cit.*, OSCE Mission in Serbia & Beogradski centar za ljudska prava: “Javno mnjenje u Srbiji - Stavovi prema domacem pravosudju za ratne zlocine i Haskom tribunal” (December 2006); Strategic Marketing: “Stavovi prema ICTY” (July 2004), at [http://www.humanrights.gov.yu/files/doc/Stavovi\\_prema ICTY\\_Jul\\_2004.doc](http://www.humanrights.gov.yu/files/doc/Stavovi_prema ICTY_Jul_2004.doc); Logar, Svetlana and Bogosavljevic, Srdjan (2001): “Vidjenje istine u Srbiji”, quoted in Ilic, Dejan: “The Yugoslav truth and reconciliation commission. Overcoming cognitive blocks”, *Eurozine*, (24 April 2004), at <http://www.eurozine.com>. For the fate of the ‘individual culpability’ thesis in the former Yugoslavia see also the discussion in Armakolas (2007), *op. cit.*

<sup>126</sup> Akhavan, Payam: “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, vol. 95, n° 70, (2001), pp. 12- 13.



with regards to the ICTY role in the political processes came when the Tribunal became an issue of power struggle between opposing political forces.<sup>127</sup>

But on the other hand it is also true that many years after the end of war in Bosnia politics in the country are still divided along ethnic lines and a new generation of nationalist politicians, admittedly of more pragmatic postures, have replaced the old guard who were indicted by the ICTY. At the same time, the Tribunal continues to enjoy only limited legitimacy especially among Serbs and many Croats.

## **2.5. Beyond the Balkans - The universal impacts of the ICTY**

Considering the weaknesses of the ICTY and the inconsistencies of the international community in its strategy of judicial intervention in the Balkans there is a large consensus in the literature that the ICTY has been a success story. This has to be considered no small thing. The challenging and often unfavourable circumstances in which the ICTY had to function should not be neglected. Crimes within the jurisdiction of the ICTY involve complex factual, legal, and evidentiary issues, such as the exhumation of mass graves and the testimonies of victims who, when still alive, are traumatised or intimidated.<sup>128</sup> More intricate yet is the judicial process when trying the crime of genocide, in which investigation in support of the prosecution is particularly difficult, delicate, and complex. Even the analysis of propaganda or hate speech, as the prosecution tried to establish in its indictment against Vojislav Seselj, is a very elusive terrain for factual proof; it is yet necessarily for proving systematic discrimination and instigation to atrocities. As Akhavan points out with regards to some of the difficulties facing ICTY prosecution endeavours:

“An international organised crime investigation on such a grand scale is time consuming and resource intensive, and individual criminal accountability cannot be based on newspaper clippings and human rights reports [...] the ICTY initially could not grasp the complex legal and evidentiary contours of organised crimes at the highest echelons of state authority”.<sup>129</sup>

However, leaving aside the structural and circumstantial conditions that render the ICTY an overall successful endeavour, the Tribunal signifies an irrevocable alteration in the culture of impunity<sup>130</sup> and “the emergence of accountability as a significant element of international relations”.<sup>131</sup> Akhavan discerns a phenomenon which he denominates under the term ‘new realism’ or pragmatic idealism’.<sup>132</sup> His argument is that there is a broad realisation that impunity constitutes a source of continuous instability and threat to the international order; hence the pursuit or accountability reflects the notion of a ‘new realism’ and begins to constitute a substantial element of post-conflict peace building and reconciliation.<sup>133</sup> The value of the ICTY in this development has been instrumental not only as the pioneer and symbolic institution but also as a substantial point of reference. The ICTY has contributed in the clarification of many elements of international criminal law and has elaborated a set of

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<sup>127</sup> *Ibid*, p. 21.

<sup>128</sup> See Askin, *op. cit.*, p. 913.

<sup>129</sup> See Akhavan: “Beyond Impunity...”, *op. cit.*, p. 19.

<sup>130</sup> See Mc Donald, , *op. cit.*, 568.

<sup>131</sup> See Akhavan “Beyond Impunity...”, *op. cit.*, p. 7.

<sup>132</sup> *Ibid*, p. 30- 31.

<sup>133</sup> *Ibid*, p. 30- 31.



rules and procedures<sup>134</sup> that constitute a valuable legal heritage for other as hoc tribunals as well as for the permanent International Criminal Court (ICC). In adopting, refining and applying the rules of procedure and evidence there has been an immediate impact upon the international criminal law practice and procedure, which have taken a far more tangible and concrete form.<sup>135</sup> The enrichment of international criminal law is also established by the recognition of rape and other sexual assaults as crimes against humanity and by the joint criminal enterprise theory of responsibility.<sup>136</sup>

### **3. Transitional justice tools: supplementary retributive and restorative justice tools.**<sup>137</sup>

#### **3.1. Restorative justice responses: the initiatives for Truth and Reconciliation Commissions**

##### **3.1.1. The initiatives in practice**

Initiatives for uncovering the truth through truth commissions about past events have been particularly important in Latin America in the 1980s but it was the Truth and Reconciliation Commission (TRC) in South Africa<sup>138</sup> – set up in 1995 - which gave the tool its international attention.<sup>139</sup> Since the mid-1990s Truth Commissions are considered among the key transitional justice tools and among the most important public policy considerations in post-

<sup>134</sup> See Cassese *op. cit.*, p. 591.

<sup>135</sup> See Askin, *op. cit.*, p. 907.

<sup>136</sup> *Ibid*, p. 909.

<sup>137</sup> It would be impossible to analyse all transitional justice tools – utilized or not in the post-Yugoslav states – in the limited space of this article. The reader is urged to look into other studies and reports for information on those tools. See, among others, Alic, Anes: “Missing persons, ever-present divide”, *International Relations and Security Network*, 26 June 2008; Alic, Anes: “Missing persons politics”, *International Relations and Security Network*, 14 March 2007; Ahmetasevic, Nidzara: “Bosnia’s Book of the Dead”, *Balkan Investigative Reporting Network Justice Report*, 22 June 2007; Ahmetasevic, Nidzara; Mekic, Mirna: “Multiple Versions of the Truth”, *Balkan Investigative Reporting Network Justice Report*, 26 April 2006; Armakolas: “The International Criminal Tribunal for Former Yugoslavia...”, *op. cit.*; Aucoin and Babbitt, *op. cit.*; BBC Monitoring European: “Bosnian Federation TV pessimistic about work of Sarajevo Truth Commission” (January 2007), Report; Buljugic, Mirna: “No Progress for Sarajevo Truth Commission”, *Balkan Investigative Reporting Network Justice Report*, 23 February 2007; Cruvellier, Thierry and Valinas, Marta: “Croatia: selected developments in transitional justice”, Report (December 2006); Djordjevic, Djordje: “A Casualty of Politics: Overview of Acts and Projects of Reparation On the Territory of Former Yugoslavia”, Report (July 2002), International Centre For Transitional Justice; Freeman, Mark: “Bosnia and Herzegovina: selected developments in transitional justice”, Report (October 2004), International Centre for Transitional Justice; Humanitarian Law Centre (HLC): “Transitional justice in post-Yugoslav countries”, Report (2007); Humanitarian Law Centre (HLC): “Izvestaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999-2005.”, Report (2006); International Centre For Transitional Justice: “The former Yugoslavia. ICTJ activity”, Report (March 2008); International Centre For Transitional Justice: “Bosnia and Herzegovina. ICTJ activity”, Report (February 2006); International Centre For Transitional Justice: “Serbia and Montenegro (and Kosovo). ICTJ activity”, Report (February 2006); Jakobsson, *op. cit.*; Karup-Drusko, Dzenana: “Bosanska knjiga mrtvih”, *Nezavisne Novine*, 29 June 2007; Nettlefield, Lara: “Documenting the Victims of Conflict”, reproduced in *Bosnia Daily*, 7 July 2008; Rozajac, S.: “Amor Masovic nakon presude Suda pravde. Srbi ne ze le opstanak Komisije za Sarajevo”, *Oslobodjenje*, 14 March 2007; Skrbic, Mirna: “Counting the dead”, *Transitions Online*, 4 April 2006

<sup>138</sup> Wilson, Richard (2001): “The politics of truth and reconciliation in South Africa. Legitimizing the post-apartheid state”, Cambridge, Cambridge University Press.

<sup>139</sup> A 2005 updated list at the United States Institute for Peace digital archive lists twenty four Truth Commissions (<http://www.usip.org/library/truth.html#tc>, accessed 25/9/2008). The first Commissions were established in Latin American countries, while initiatives proliferated after the end of the Cold War.



conflict peace building settings.<sup>140</sup> TRCs are often perceived in opposition to classical justice tools, such as the prosecutions for past human rights abuses. In reality, they have to be considered as a different form of justice. According to Richard Goldstone, who has served in both the South African TRC and the ICTY:<sup>141</sup>

Criminal prosecution is the most common form of justice. Prosecution is, however, not the only form, nor necessarily the most appropriate form in every case. The public and official exposure of the truth is itself a form of justice, and it does not matter whether that exposure takes place in criminal or civil proceedings. The work of truth commissions or judicial inquiries share with criminal prosecutions the ability to bring significant satisfaction to victims. If that satisfaction is sufficiently widespread within a community, it can have a soothing effect upon a whole society.

In former Yugoslavia there have been initiatives for the formation and operation of Truth Commissions. At various stages of the initiatives local political elites, influential local and international NGOs, prominent think tanks, and the United National Development Programme were involved. But the attempts have not been systematic, suffered from design problems, encountered political obstacles and opposition, and have therefore not been successful thus far.<sup>142</sup>

The only TRC formed by a post-Yugoslav state was the result of the initiative of Vojislav Kostunica, then president of the Federal Republic of Yugoslavia (later Serbia-Montenegro), who formed such a Commission in March 2001.<sup>143</sup> The Commission failed to produce any report and its existence officially ended with the formation of the new state union of Serbia and Montenegro in February 2003. Civil society observers identified serious problems in the Commission's set up, mandate and methodology of work, including the non-involvement of civic-oriented civil society actors and minority groups, and the neglect for victims' perspectives.<sup>144</sup> The Commission never gained any legitimacy among non-nationalist civil society and neighbouring states; rather, its formation was seen as an attempt by members of the political elites, and president Kostunica in particular, to "secure an interpretation of history from the Serb point of view and as an attempt to convince the international community that, in the case of the Federal Republic of Yugoslavia, priority has to be given to

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<sup>140</sup> For the Truth and Reconciliation Commissions, see, among others, Avruch, Kevin and Vejarano, Beatriz: "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography", *Online Journal of Peace and Conflict Resolution*, vol. 4, n° 2 (2002), pp. 37-76; Feher, Michael: "Terms of Reconciliation". in Hesse, Carla, *op. cit.*, and Post, Robert (eds.) (1999) *Human Rights in Political Transitions: Gettysburg to Bosnia*, New York, Zone Books, pp. 325-338; Hayner, Priscilla: "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal", *Law and Contemporary Problems*, vol. 59, n° 4 (Autumn, 1996), pp. 173-180; Hayner, Priscilla (1996) 'Commissioning the Truth: Further Research Questions', *Third World Quarterly*, vol. 17 (1), pp. 19-22; Hayner B. Priscilla (1994) 'Fifteen Truth Commission – 1974 to 1994: A Comparative Study', *Human Rights Quarterly*, vol. 16 (4), pp. 597-655; Hayner, Priscilla (2002) 'Unspeakable Truths. Facing the Challenges of Truth Commissions', London, Routledge. See also critical perspectives in Dyzenhaus, David: "Justifying the Truth and Reconciliation Commission", *Journal of Political Philosophy*, vol. 8, n° 4 (2000), pp. 470-496; Mani, Rama: "Rebuilding an Inclusive Political Community After War", *Security Dialogue*, vol. 36, n° 4 (2005), pp. 511- 526; Petrovic, Maja: "The practices of Justice and Understanding the Truth", *Eurozine*, (December, 2003), at <http://www.eurozine.com>

<sup>141</sup> Goldstone, Richard J: "Ethnic Reconciliation Needs the Help of a Truth Commission", *International Herald Tribune*, 28 October 1998, p. 491.

<sup>142</sup> For evaluations and summaries of the initiatives see especially Cruvellier and Valinas *op. cit.*, Freeman *op. cit.*, HLC (2007), *op. cit.*; HLC (2006), *op. cit.*

<sup>143</sup> For the Yugoslav Truth Commission, see especially: Ilic, *op. cit.*

<sup>144</sup> HLC (2006), *op. cit.*, p.11; ICTJ (2008), *op. cit.* p. 2.



the...[TRC] and not the trials of the Hague Tribunal”<sup>145</sup>. This becomes clear when one looks into the Commission’s membership, its internal workings and conflicts, which resulted in the resigning of those members associated with civic and non-nationalist perspectives.<sup>146</sup> Evidently, the Yugoslav Truth Commission’s true objectives have been quite the reverse of the standard aim of TRCs to question the role of one’s own nation and the crimes committed in the name of the same.

Still, the bulk of activities in relation to a TRC were in Bosnia, in which paradoxically the Commission was never in fact formed. A TRC project was initiated at least three times, with the first already in the immediate post-war period.<sup>147</sup> The idea for a Bosnian TRC was aired again in 2000-1 by local and international activists.<sup>148</sup> Consultations took place, including ones in the form of a large international conference, and even a draft law was prepared but with no visible success. Later on, an initiative by the international NGO Dayton Project, in collaboration with the United States Institute for Peace (USIP), involved Bosnian parliamentarians of all three groups and resulted in the finalization of a state level draft law in early 2006.<sup>149</sup> Despite opinion polls suggesting that there is sufficient public approval for the formation of the Commission<sup>150</sup> the process was again halted and the draft law was never adopted. The draft law may have fallen victim to the general elections forthcoming at the time in Bosnia. But civil society and victims associations’ lukewarm attitude or opposition has also contributed to the stalemate.<sup>151</sup> Yet, the calls for a Bosnian TRC are still there and both local and international actors stress that such an initiative can provide a crucial missing building block in the picture of the misplaced reconciliation in the country. There are of course various debates surrounding the issue, including the questionable ‘maturity’ of the Bosnian society to undertake such a task and the problem of the right timing, which cannot be analysed here.<sup>152</sup>

Last but not least, there are the attempts by civil society actors in the region to advance the cause of a regional approach to the issue.<sup>153</sup> The process has culminated in the recent initiative by three prominent civic-oriented NGOs to revisit the establishment of a Truth Commission. The *Humanitarian Law Centre* in Belgrade, *Documenta* in Zagreb, and the *Research and Documentation Centre* in Sarajevo, all three NGOs with extensive involvement in the areas of transitional justice and issues of dealing with the past, reportedly having secured the backing of dozens of victims’ associations, joined forces in proposing a Truth Commission or a Commission for establishing the facts about war crimes with a regional,

<sup>145</sup> HLC (2006), *op. cit.*, p.11.

<sup>146</sup> Ilic, *op. cit.*

<sup>147</sup> Jelacic, Nerma and Ahmetasevic, Nidzara: “Truth Commission Divides Bosnia”, *Balkaninsight Special Report* (March 2006), at <http://www.iwpr.net/index.php?>

<sup>148</sup> Freeman, *op. cit.*; Kritz, Neil and Finci, Jakob: “A Truth and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time has Come”, *International Law FORUM du Droit international*, vol. 3 (2001), pp. 50-58.

<sup>149</sup> HLC (2007), *op. cit.*, pp. 23-24.

<sup>150</sup> Data from the UNDP early warning system quoted in HLC (2007), *op. cit.*, p. 23.

<sup>151</sup> For the debate and criticisms see Finci, Jakob: “Ready for the truth?”, *Transitions Online*, 8 December 2008; Freeman *op. cit.*; Hadzovic, Eldin: “Truth Commission – concerting a story for \$20 million?”, Bosnian Institute (reproduced from *Dani*), 10 March 2006; Hodzic, Edin: “Truth and Reconciliation Commission (II): A forum to end myth-making”, *Pulsdemokratije*, 27 September 2006; Jelacic and Ahmetasevic, *op.cit.*; Peric 2001; Suljagic, Emir: “Komisija za istinu i pomirenje (I): Pomirenje kao krvavi cinizam”, *Pulsdemokratije*, 1 September 2006; Tokaca, Mirsad: “Truth and Reconciliation Commission (III): Truth as Admission and Compassion”, *Pulsdemokratije*, 19 November 2006.

<sup>152</sup> See, among others, the works in footnote 2 and the discussion in Armakolas 2007.

<sup>153</sup> HLC (2007), *op. cit.*, pp. 25-26.



rather than country specific, scope.<sup>154</sup> It is still too early to assess the merits of the initiative, although the three organizations are among the most professional NGOs in the region with many friends and supporters in the international community. Clearly, though, the initiative cannot take off and have deep impact without the active political support of official political institutions.<sup>155</sup> Similarly, the success of the Commission will require the active involvement of not only the victims' associations, but also of mass civil society actors that are not always in good terms with the non-nationalist and civic-oriented NGO scene.

### 3.1.2. Relationship to retributive justice tools (ICTY war crimes trials)

ICTY's first prosecutor Richard Goldstone, himself a South African, was among the very first officials associated to the Tribunal to have offered their backing to the formation of a TRC in Bosnia.<sup>156</sup> Still, the ICTY - TRC-to-be relationship has not been without troubles. ICTY officials had feared that the establishment of a TRC might undermine the work of the Tribunal. Concerns over duplication of efforts, political exploitation of the TRC platform by the ethnic political elites in an attempt to circumvent the Tribunal, gradual prioritization of amnesty solutions over the criminal responsibility tried in the Hague, and eventually impunity for war crimes executed were some only of the fears of the these officials.<sup>157</sup> The concerns were echoed also by many local NGO activists and victims' associations, who complained for not having being consulted and feared that war crimes perpetrators could go unpunished should the Truth Commission be allowed to undermine the work of the ICTY. In Bosnia, in particular, the draft law of the Truth Commission produced in 2006 added to the original concerns since, as critics argued, it did not adequately addressed the problem of the relationship between the Commission and the war crimes prosecution offices.<sup>158</sup>

Such fears have to be seen in the context of the Tribunal's struggle during the first years of its existence to secure funding, political support, the means to follow its mandate, and ultimately secure its survival and the capacity to pursue its objectives. These concerns, as we have seen above, were far from illegitimate since it took several years of hard work and aggressive lobbying to reach the reputation and political support that the ICTY enjoys today. A new body, which in other countries it has been associated with amnesties and non-punitive transitional justice, could not but alarm Tribunal officials and victims associations. ICTY's concerns seemed to have gradually soothed. In a speech at a conference on the establishment of a TRC in May 2001 in Sarajevo Claude Jorda, then ICTY's President, acknowledged the complementarity of a TRC with the work of ICTY. He viewed TRC's function as supplementing and, if necessary, reinforcing the ICTY in its mission of reconciliation.<sup>159</sup> He thus appeared to reassure those ICTY officials and backers of the Tribunal who remained skeptical of the Truth Commission. ICTY officials provided comments and suggested revisions to the draft TRC law. Jorda was convinced that if the necessary changes would be done to prevent overlaps in mandates and clarify the exclusivity

<sup>154</sup> ICTJ (2008), *op. cit.*; Gaffney, Conor; Alic, Aida: "First Regional Truth Commission Runs Into Doubts", *Balkaninsight* (August 2008), at [www.balkaninsight.com/en/main/analysis/12257/](http://www.balkaninsight.com/en/main/analysis/12257/); Roknic, Aleksandar: "NGOS call for War Crimes Commission", *Tribunal Update*, n° 556, 20 June 2008.

<sup>155</sup> Gaffney and Alic, *op. cit.*

<sup>156</sup> Goldstone, "Justice as a tool ...", *op. cit.*

<sup>157</sup> Freeman, *op. cit.*

<sup>158</sup> HLC (2007), *op. cit.*, p. 24; Freeman, *op. cit.*, p. 8. For other related criticisms, some of which questioning the very concepts of truth and reconciliation that a TRC strives to advance, see the works in footnote 2.

<sup>159</sup> Jorda, Claude: "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina", speech delivered on 12 May 2001, Sarajevo.



of the Tribunal's judicial powers the work of the TRC - in its complementary and distinct role - would prove important. Taking as given that the scope of the Tribunal's peacemaking is limited, Jorda goes as far as outlining four areas in which the work of a Bosnian TRC would best supplement the work of the Tribunal: dealing with the lower ranking executioners, reparations to victims, formulation of a historical narrative about the causes that led to the conflict, and the formulation of a collective, shared by all memory of the war.<sup>160</sup>

The change in moods must not have been unrelated to the exhibited by the international community and some local politicians in recent years full support to the work of the ICTY as well as the successful strategy of pressures employed by international, which resulted in the arrest and transfer to the Hague of most indicted, including top politicians. Other factors were probably also at play: the gradual physical or political demise of the wartime political leadership in all post-Yugoslav countries, the clarification of the complementary relationship between the trials and the truth commission tools, the gradual widening of support for the initiative among civil society actors.<sup>161</sup> In addition, the international community, after peaking its intervention and state-building drive in Bosnia, has gradually come to terms with the inconvenient truth that the divisions within the Bosnian society and political system are deeper than originally assumed. International factors have thus gradually and recently started realising that only a more comprehensive strategy for dealing with the recent Bosnian past can truly contribute to reconciliation in the country.<sup>162</sup>

### 3.1.3. General issues

It is obvious from the above brief presentation that the TRC in practice in former Yugoslavia proved a puzzling affair. Still, some key interrelated elements and issues can be identified.

*Should the Truth Commission be a top-down or bottom up initiative?* The above-described initiatives included all sorts of different paths: a government-formed and fully controlled Commission in Serbia, the initiative of grass root civil society actors for the regional Commission, and different degrees and combinations of activist initiative and political elite involvement in the various attempts to create a Commission in Bosnia. The practice has shown that in the case of the TRC political elites cannot work in isolation from the civil society activists and vice versa. The TRC in Serbia failed because it was a smokescreen for the continuing dominance of the elite-sponsored nationalist discourse; without desire for real change, and without the support of non-nationalist civil society, the minorities, and the victims associations the initiative was destined to fail. The regional initiative in contrast risks becoming a failure if it does not manage to involve the political class and the mass civil society organizations; in other words it will not take off as an effective Truth Commission if it does not move beyond the liberal and non-nationalist civil society circles to reach the wider public.

*What should be the level of involvement of political elites and official political institutions?* Early attempts in Bosnia might have been hopeless due to the fact that the political personnel still included key members of the nationalist elites that led the country to war. These politicians, several of whom ended up in The Hague, would have the incentive to

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<sup>160</sup> Jorda, *op. cit.*

<sup>161</sup> See Kritz and Finzi, *op. cit.*

<sup>162</sup> See Armakolas "The International Criminal Tribunal for Former Yugoslavia...", *op. cit.*; Mrkic, Jelena: "Miroslav Lajcak: Bosnia needs justice", *Justice Report*, 6 August 2007



manipulate the issue of the Commission in their effort to avoid ICTY indictments. Similarly, the TRC initiative in new Yugoslavia was marred by the same nationalist tendencies of the then President Vojislav Kostunica. Although the wartime political class has with very few exceptions disappeared from the political scene, it is far from certain that the current political leaderships, some of which exhibiting equal virulent nationalism, will not want to influence the TRC process. But it is equally inconceivable to think of an official TRC platform without the active commitment of political elites. It is fair to argue that, although the exact level of political leadership and official political institutions involvement will be negotiated by each society and political system depending on its socio-political circumstances, an effective TRC cannot but involve political leaders and institutions.

*What should the role of the civil society be and what civic actors have to be involved?* Past examples of Truth Commissions from Latin America to South Africa point to the key role played by the civil society in the process of the initial forming and actively supporting the platform. In contrast, in Rwanda, where civil society in the first years after the genocide was not sufficiently active, a top-down approach and mixed tools, such as *Gacaca*, were employed to make up for the missing civic engagement.<sup>163</sup> In the countries of former Yugoslavia the lack of civil society is a non-issue. In fact, the opposite problem would be more pertinent. It is more the case that there is a wide variety of different and often conflicting actors that such an initiative would have to make sure to have on-board. Non-nationalist and civic oriented organizations have been the champions of the international community and have played a key role in opening up the discourses in formerly bounded nationalist communities in the post-war years. The same organizations, many of which highly professional after several years of collaborating and being funded by the international community, are at the forefront of the efforts to deal with the past and beat the legacy of war crimes. It is, however, other civil society organisations, many of which with strong links to the nationalist parties and often advocates of exclusivism, which can claim large membership and appeal to the wider public, albeit of their own exclusive ethnic communities. To make the picture even more complex, the same often communitarian or nationalist organizations represent victims or their families, the very constituency that is of any Truth Commission. Clearly, a genuine and effective TRC cannot engage only the 'usual suspects' of the liberal and progressive civil society and will have to engage the above-described 'hard cases' of mass organizations of often regressive politics.<sup>164</sup>

*Last but not least, what should the truth function of the TRC be: to produce a new truth or to contribute to the acceptance of already established truth?* This is obviously the 'million dollar question' that cannot be answered with any certainty here. Will the involvement of victims associations and nationalist civil society actors have the effect of diluting responsibility and producing a resultant truth of competing influences and narratives? Clearly the risk is there. TRC will have to produce victim-centred narrative that may shake some of the solid foundations of our reading of the conflict. Still, to the extent that these will be results of genuine engagement with victims and their multiple versions of truth it will be a welcome development. For example, one of the standard observations of all local and international observers of the post-Yugoslav societies is that there is still, even several years after the war, largely no consensus about the fundamental facts of the Yugoslav wars, even those that are by now established beyond doubt through the work of the Hague Tribunal. And this is arguably reinforced by the exhibited limited interest of the public in the lengthy and

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<sup>163</sup> See Kritz and Finci, *op. cit.*, pp. 54-55.

<sup>164</sup> See Armakolas, *op. cit.*





strenuous trials in The Hague.<sup>165</sup> Still, given the predominance of the transitional justice tool of the ICTY and the delay in forming a TRC the post-Yugoslav countries will have to be quite creative so as to devise new instruments within a Truth Commission. Such instruments will, for example, make use of the facts established in The Hague, not as a political weapon or a higher level of truth but as auxiliaries to the normal operation of truth seeking. If a common narrative that would form the base for a new unified community is difficult to formulate, still a truth that would unify more than divide is imperative.

### 3.1.4. Assessment

All in all, TRC initiatives have been arguably delayed and their initiation has in practice, initially at least, suffered from the predominance of the ICTY as transitional justice tool. The example of the Yugoslav Truth Commission is illustrative of the dangers of badly conceived and implemented commission. Since, as experts admit, it is better to have no commission whatsoever than to have a badly designed and implemented one<sup>166</sup>, the failure to create a Bosnian TRC may prove a blessing. A well-designed and implemented TRC may prove a significant tool that can be used as part of a comprehensive strategy of dealing with the past in former Yugoslavia; such a strategy is after all one way or another sought after by officials and critics at different quarters.<sup>167</sup> Whether the regional initiative will prove more successful than earlier attempts will depend on solving the puzzle of the involvement of the official political and governmental institutions. Still, the marked delay in initiating a serious and professional TRC may allow for devising ways and functions that will make the initiative significantly more effective. Such functions can be to the direction of combining standard truth recovery sessions with disseminating the body of primary knowledge produced from other transitional justice operations, as for example the truth about events established in The Hague.<sup>168</sup> Similarly, a TRC can function better by collecting testimonies, not only of inconvenient truths, but also of positive examples of inter-group solidarity.<sup>169</sup> Finally, it has to be made clear that there are no ideal conditions for the creation of a TRC and the societies in the former Yugoslav countries cannot afford to 'sit and wait' for the social and communal-level 'maturity' in order to create the 'ideal TRC'. Such ideal institution is only the result of the negotiation of the problem by social and political actors and within the context and the constraints of the given environment. Instead, viewing the objective of reconciliation as a process rather than an end-product will illuminate the key significance of the formation and operation of such institutions even if not created in 'ideal' conditions.<sup>170</sup> Or to put in the words of two key advocates of a TRC in Bosnia, a Truth Commission "...is about a society beginning a soul-searching exploration of its own ills and defects..."<sup>171</sup>

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<sup>165</sup> Grego, Suzana: "Truth and Acknowledge in the Former Yugoslavia", Report (October 2007), International Center for Transitional Justice.

<sup>166</sup> Hayner, "Unspeakable Truths..." *op. cit.*

<sup>167</sup> Jorda, *op. cit.*; See Kritz and Finci, *op. cit.*; See Tokaca, *op. cit.*

<sup>168</sup> See Armakolas: "The International Criminal Tribunal for Former Yugoslavia...", *op. cit.*

<sup>169</sup> See Kritz and Finci, *op. cit.* Although admittedly a more mature and vibrant civil society would probably perform this task equally good, if not better than an official Commission.

<sup>170</sup> See Armakolas: "The International Criminal Tribunal for Former Yugoslavia...", *op. cit.*

<sup>171</sup> See Kritz and Finci, *op. cit.*, p. 54.



### 3.2. Lustration and vetting<sup>172</sup>

#### 3.2.1. The initiatives in practice

Little has been done as far as lustration and vetting is concerned in any post-Yugoslav country other than Bosnia.<sup>173</sup> Serbia is the only post-Yugoslav state to have adopted a lustration law. The “law on the accountability for the violation of human rights” was adopted in 2003. It bars individuals who have violated the human rights stipulated in the law from public functions; or if they already hold such offices it foresees their resignation.<sup>174</sup> Still, although the law has been adopted it has not been implemented; this was mainly due to the hostility of the nationalist faction in the Serbian parliament, while even the pro-Western Democratic Party seems to believe that the momentum for lustration measures has been lost.<sup>175</sup> Other attempts for informal vetting process in the judiciary also failed. And civil society actors strongly, and at times successfully, opposed the appointment to public functions of individuals “...for whom there are credible allegations on accountability for violations of human rights”.<sup>176</sup> In Croatia draft lustration laws targeting officials who had had duties during the communist regime were twice rejected in the parliament. As a legacy of the nationalist politics of the 1990s the minorities in the judiciary are seriously under-represented. This so called ‘creeping lustration’, executed against individuals from the former regime and minorities, has been attacked by civil society organizations.<sup>177</sup> Generally, there has been no systematic attempt to undertake a vetting process in the judiciary, security forces, or the political system. And only an informal vetting process has taken place in the form of retirements, replacements, and re-assignments.<sup>178</sup>

Bosnia and Herzegovina is quite a different story due mainly to the presence of the international community. Miroslav Lajcak, the High Representative in Bosnia and Herzegovina, admitted last year that was already too late to consider a lustration programme.<sup>179</sup> The lack of formal lustration notwithstanding, the influence of the international community in the country has led to a series of extensive, and in part successful, vetting processes based on misconduct during the Bosnian war and other serious offenses. Between 1999 and 2002 24,000 police officers were vetted by the United Nations Mission in Bosnia and Herzegovina (hereafter UNMIBH), with 96% of them receiving certification and more than 500 failing to pass the process. The vetting of the judiciary took place, after an initial failed attempt, between 2002 and 2004. As many as 1,000 judges and prosecutors were vetted by the High Judicial and Prosecutorial Council created by the Office of the High Representative; the Council was created in an effort to reform and professionalize the judicial sector under the supervision of the internationally sponsored Independent Judicial Commission. Some 200 judges and prosecutors were not re-appointed as a result of the

<sup>172</sup> The two terms are used here interchangeably although in reality they are not the same. The type of processes observed in the post-Yugoslav countries is best described by the term vetting; lustration, instead, implies a programme that is wider than the screening of individual cases. Still, because of the fact that the term lustration is widely used in the region we will use it also here without, nevertheless, implying that the two terms actually coincide. See HLC (2007), *op. cit.*, p. 19.

<sup>173</sup> For a more detailed presentation of the lustration issues in the Balkans, see Hatschikjan, Magarditsch, Reljic, Dusan and Seber, Nenad (eds.) (2005): *Disclosing hidden history: Lustration in the Western Balkans. A project documentation*, Thessaloniki, Center for Democracy and Reconciliation in Southeast Europe.

<sup>174</sup> HLC (2006), *op. cit.*, pp. 35-36.

<sup>175</sup> ICTJ (2008), *op. cit.* p. 3.

<sup>176</sup> HLC (2007), *op. cit.*, p. 21.

<sup>177</sup> HLC (2007), *op. cit.*, p. 22.

<sup>178</sup> See Cruvellier and Valinas, *op. cit.*, p. 32-33.

<sup>179</sup> See Mrkic, *op. cit.*



vetting process of the judicial reform.<sup>180</sup> Under international pressure and guided by the international community agents the Bosnian Central Election Commission has also established and continues to successfully operate a screening process for any individual elected at the state-level parliament and government. Furthermore, the State Investigations and Protection Agency (SIPA) is involved in the verification of the wartime bio data provided by all members of the state-level government (Council of Ministers) and provides reports to the relevant committees of the Bosnian (state-level) parliament.<sup>181</sup> Importantly, both the Central Election Commission and SIPA have been formed under the aegis of the international community, are organized and operate at the state level, and are among the most professional and successful post-war Bosnian state institutions.

It is however unfortunate that the vetting process in Bosnia got associated to one of the most controversial cases of international interventions in the country, one that was deemed to illustrate the problem of non-accountability of the country's international administrators and the clash between human rights and the country's international obligations.<sup>182</sup> The case was the above-mentioned decertification of police officers. The certification process was executed by the UNMIBH, and more specifically by its International Police Task Force. After several failed efforts, the full execution of the process took place only in the final months of the UN's presence in the country and shortly before the European Union Police Mission took over. The results of the process met strong resistance from those police officers who were decertified. As many as 150 of them challenged the decisions in local courts and several continued with an appeal at the European Court of Human Rights. The case has attracted extensive local and international media coverage. The UN vetting procedure was challenged as violating the European Convention on Human Rights by the Venice Commission of the Council of Europe and the Commissioner for Human Rights of the same organization himself. After having also been attacked by the influential research and advocacy group *European Stability Initiative*<sup>183</sup>, the case against UN's vetting gained even more legitimacy when the High Representative of the time Christian Schwartz Schilling supported the local appeals for a revisiting of the process. Concerns over the effects of the problematical process had earlier been expressed also by previous High Representative Paddy Ashdown. The UN for some time resisted revisiting its decision and pressured the Bosnian government not to make any attempts towards cancelling the UN's fait accompli. In such a move the UN saw a dangerous precedent for other post-conflict countries wishing to dismantle the political legacy of internationally sponsored state-building. Still, later on, bowing no less to serious international and local pressure, the UN retracted from its earlier position and attempted a political compromise; it allowed the decertified policemen, not to review and challenge their

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<sup>180</sup> For details on the certification processes and an assessment of their merits, see Freeman, *op. cit.*, pp. 12-14, and, especially, Mayer-Rieckh, Alexander: "Vetting to prevent future abuses: reforming the police, courts, and prosecutor's office in Bosnia and Herzegovina", in Mayer-Rieckh and de Greiff, Pablo (eds.) (2008): *Justice as prevention: Vetting public employees in transitional societies*, New York, Columbia University Press, pp.181-220. The latter includes also statistics of the vetting processes. Mayer-Rieckh was the Chief of Human Rights Office of UNMIBH from 1999 to 2001 and oversaw the initial screening phase that preceded the police officers' certification process. Interesting information can also be found at the informational DVD of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (no date) and the website <http://www.hjpc.ba/>

<sup>181</sup> See details in HLC (2007), *op. cit.*, pp. 19-20.

<sup>182</sup> For the tension between human rights and international obligations, see Topic, Boris: "Decertified Police Officers: A State Caught Between Human Rights and International Obligations", *Pulsdemokratije*, 15 May 2007. For the general problem of the non-accountability of the international administrators, see Caplan, Richard: "Who guards the guardians? International accountability in Bosnia", *International Peacekeeping*, vol. 12, n° 3, (Autumn 2005), pp. 463-476.

<sup>183</sup> European Stability Initiative: "On Mount Olympus. How the UN violated human rights in Bosnia and Herzegovina, and why nothing has been done to correct it", Report (10 February 2007).



decertification process, but to re-apply for law enforcement jobs. The solution did not, however, satisfy the decertified policemen and human rights activists.<sup>184</sup>

A final point relates to a usually over-looked aspect of the vetting process in Bosnia. This is the dismissal of public officials and elected political office-holders based on the powers vested on the High Representative at the Bonn meeting of the Peace Implementation Council (the so called ‘Bonn powers’)<sup>185</sup>. This aspect does not appear in any transitional justice reports of international and non-governmental organizations; and understandably so. Such dismissals do not conform to the standard understanding vetting, not least because they are usually responses to contemporary political postures and not to wartime misconduct: formally the sacking of elected politicians takes place as a result of political actions that went against the peace agreements and their implementation. Still, it is important to mention these dismissals in the context of the practice of transitional justice. On the one hand because they are understood by locals as being a continuation of and in line with the other more formal vetting processes and on the other because they have had a more lasting effect on the relationship of the local communities and political elites to the international administrators. It was the sacking of politicians that set the tone of the international involvement in the country, demonstrated the determination to deal with obstructionists and their wartime power structures, and raised the stakes in the competition with local elites.<sup>186</sup>

In addition, it can be argued that the characteristics of vetting and dismissals of politicians in Bosnia have some resemblance to properties of classic lustration. The reasons behind vetting and dismissals cannot be clearly distinguished from past deeds and structural properties of a whole political class in the Bosnian polity. By dismissing a public official for obstructionism the international community was pointing to the very situation created during the war; the targeted official was simply protecting a system created by past deeds. Furthermore, it was not unusual for the international administrators to simply use the ‘Bonn powers’ not to punish certain acts obstructionism but rather to weaken power structures and dispose of key strongmen empowered during the war. To be sure, vetting and removals of politicians in Bosnia had several problems: it was done with questionable commitment to due process; it had problematic political motives; it often came with considerable delay, which had the effect of alienating victim organizations and those seeking more justice; and it was often done, not with providing the true reasons, but by deliberately misleading about the real issues, which had the effect of generating distrust. Above all, it was done in an ineffective way, since it proved counter-productive as far as the objective of winning over the electoral body and moderating the nationalist tendencies inherent in the political system is concerned. Perhaps, the most important problem was that, regardless of its unsystematic approach, it was perceived as an effective lustration programme and for that reason it reaped the fruits of the public’s dissatisfaction. The international community failed to aptly and timely get rid of politicians that had a catalytic imprint on the early post-war period; but still it did not eschew being perceived as an autocratic hegemon by the locals.

### 3.2.2. Assessment

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<sup>184</sup> For details on the issue, see Ahmetasevic, Nidzara: “Sacked Police Hope for Justice at Last in Bosnia”, *Balkan Investigative Reporting Network Justice Report*, 24 May 2007; European Stability Initiative, *op. cit.*; Freeman, *op. cit.*; Mayer-Rieckh, *op. cit.*; Topic, *op. cit.*

<sup>185</sup> See Sahovic, *op. cit.* p. 188-196.

<sup>186</sup> See Armakolas: “The International Criminal Tribunal for Former Yugoslavia...”, *op. cit.*



In sum, the vetting and sacking of individual officials in Bosnia produced few positive effects and more negative side effects. The IC missed the opportunity to pursue a comprehensive lustration programme in the early post-war or the even post-Bonn conference Bosnia. Had it attempted such a programme it would have removed a whole generation of nationalist wartime politicians who, unfit for peacetime statesmanship, had a particularly negative influence over the post-war political system and the justice efforts of the time. It is highly likely that more lasting effects on the political and social system and more extensive contribution to reconciliation would have been achieved.

## Conclusions

At the start of this article we set out to present the main dilemmas, problems, and obstacles that transitional justice in practice entailed in the former Yugoslavia through a review of the literature on ICTY and a series of other theses, arguments, and analyses. The objective was to reach some first conclusions about transitional justice in the region as well as to provide a rough assessment of the ICTY. The impetus for this study has been the relative relaxation of the political atmosphere of crisis in the region that enables us to start drawing some more general conclusions. More importantly, our ‘driver’ was a ‘puzzle’ evident in the condition of transitional justice in the region: the ICTY has been the dominant transitional justice tool in former Yugoslavia, but the evaluation about its impact and success are usually mixed. Why has this been the case if the ICTY tool was the absolute champion of the international community in the region?

The primacy of the ICTY per se was not a problem. It constituted a specific transitional justice path of the region. It is after all true that each post-conflict society selects its own path and adjusts the transitional justice tools to its needs. Instead, we argue that the above mentioned ‘puzzle’ is linked to four different but inter-connected elements: a) the specific conditions of the creation of the ICTY, b) the problems it encountered throughout its operation, and especially at its early phase, c) an ‘expectations gap’, i.e. the unrealistically raised expectations about its role, and perhaps most importantly d) the lack of a comprehensive dealing with the past and transitional justice strategy.

In this last chapter we will focus on the latter two, which, in our view, they have not enjoyed the appropriate attention in the literature. With regards to the ‘expectations gap’, the opinions of Richard Goldstone are instructive: “[we]...must not expect too much from justice, for justice is merely one aspect of a many-faceted approach needed to secure enduring peace in a transitional society”.<sup>187</sup> Given the nature of judicial tools, the novel institution that the ICTY was, and the problems at its initial phase, it would have probably been wise not to have high expectations of the Tribunal. Still, the ICTY became the ‘panacea for all evils’.<sup>188</sup> The expectations were raised unrealistically high from all sides: a) by the creators of the ICTY themselves when they directly connected it to the goal of stopping the violence in the Balkans, and at the same time they did not confer it with their full support, b) by the agents of the international community active in the former Yugoslavia when they failed to design a transitional strategy and the ICTY was left to do all the “dealing with the past” job; furthermore, the international community active in the field showed inability or unwillingness to connect its policies to the Tribunal’s work, other than that of putting pressure on local

<sup>187</sup> Goldstone: “Justice as a tool ...”, *op. cit.*, p.486.

<sup>188</sup> Delpla, *op. cit.*



politicians for the issue of the cooperation with the ICTY; for example, not much was done to promote the primary knowledge and truths established in The Hague, and c) by the victims and the local constituencies themselves, since they failed to comprehend the nature of the judicial tool, they exhibited unwillingness to engage with other transitional justice and reconciliation tools, and continued to ‘politicize’ at the one direction or the other the Tribunal verdicts.

Turning our attention to the transitional justice tools, we observe the following constants: a) there was not in the beginning, or even at a later stage, an elaborate reflection about what kind of transitional justice tools can be used and for what purpose; in other words, there was no conception of combining tools and mechanisms in a unified manner and for achieving an overall and well defined objective, b) the ICTY and its prosecutorial method was from the beginning the dominant tool, and for a long period of time the only tool, and c) there was an evident neglect for other supplementary tools. No matter the fact that the UN itself advises that in situations “...where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reforms, vetting or an appropriate conceived combination thereof”.<sup>189</sup> The elaborate thinking on these issues was and continued for long to be missing.

The effects of both the lack of transitional justice strategy and the lack of support to the ICTY were far reaching. When ideas about additional transitional justice tools that would contribute to reconciliation and peace building were suggested these were at first seen as a threat to the ICTY, which was still struggling to survive and pursue its objectives. With only few exceptions, which came with considerable delay, there were no efforts to link other tools to the work and the results produced by the ICTY. Initiatives for Truth and Reconciliation Commissions in the region were delayed, badly conceived, with no large support and pressure on behalf of the international community; moreover, they were for some time seen as a threat by the ICTY officials. Lustration and vetting initiatives were unsystematic, without far reaching strategy and direct linkage to the ICTY; the international community reaped the dissatisfaction of the local publics without gaining the full potential that was available from the usage of vetting. Other transitional justice tools, which we did not have the chance to present in this article, were also ineffective, politically ambivalent and with many resistances, with no effective pressure by the international community, and not fully linked to the ICTY; with few notable exceptions, such as the reports on the Srebrenica events, the other transitional justice tools did not become part of a strategy for change.

And what is then the assessment about the impact and success of the ICTY? Regardless of the many problems the creation and operation of the ICTY was a key development against immunity in the former Yugoslavia and internationally. Given the difficulties, the unrealistically raised expectations, and the lack of a comprehensive strategy, the ICTY managed to bring justice in the Balkans. In fact, the full assessment is only now, that the ICTY is nearing its closure, starting. There is a need for new and creative assessment tools and outlooks. There is also a need to evaluate the properties of the ‘expectations gap’ and its effects. And finally, the weaknesses and problems of the ICTY will soon have to be realistically considered and analysed further. All these will have to be done in the context of the complexity of transitional justice in practice in the region.

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<sup>189</sup> United Nations Security Council, S/2004/616, p. 7.