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The Forgotten Victim and the Scales of International Criminal Justice

An Analysis of the Treatment of Witnesses in the Trial Process of the International Criminal Tribunal for the Former Yugoslavia

Kamala Janakiram

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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Abstract

It has long been assumed that the successful prosecution of perpetrators is the appropriate response to conflicts involving gross human rights violations. This paper seeks to explore in what manner the International Criminal Tribunal for the Former Yugoslavia has contributed towards post-conflict needs and what place victims and their concerns are awarded within the international criminal process of the Tribunal.

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I. Introduction

The 20th century has witnessed a drastic increase in the use of civilians in modern warfare as a means to achieve military targets. While the majority of casualties during World War I were members of the armed forces, more than 90% of today's casualties are civilians.[1] Furthermore, since World War II, the character of war has shifted from inter- to intra-state conflicts. In recent internal conflicts, the destruction of homes and villages, civilian infrastructures, cultural property and monuments, and the systematic targeting of civilian populations of specific ethnic and/or religious groups, have been deliberate tactics used by politicians, whose objectives have been to create "ethnic homogeneity" as a means to secure territory and political power.[2] Internal conflicts have involved crimes of large scale murder; rape; torture; inhumane imprisonment; forced expulsions; and involved the perpetration of neighbour-on-neighbour violence organized, executed and sanctioned by the State. This type of violence has not only broken down societal structures but also resulted in an assault on the "networks of familial and intimate relationships that provide the foundation for a functioning community."[3] Consequently, social networks and other support mechanisms are attacked and weakened in their capacity to provide a traumatized population with the necessary support in the post-conflict phase.

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[1] Charlesworth, H. & Chinkin, C., *The Boundaries of International Law* (2000), p. 251
[2] Fletcher, L.E. & Weinstein, H. M., *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, Human Rights Quarterly 24, no 3 (August 2002), p. 575-576
[3] Ibid, p. 576

The trauma caused by massive organized violence has a profound impact on communities, families and individuals.[4] Unlike natural disasters where communities typically come together, organized ethnic violence has a political agenda, targets important symbols of the violated population, and is meant to destroy, inflict hurt and create terror in order to tear societies apart. The trauma resulting from organized mass violence jeopardizes the victim's "very fundamental view of the world as a predictable, just and meaningful place to live",[5] and entails high levels of deprivation, anger and aggression, mixed with fear, despair, hopelessness and loss of control, that may be aggravated by feelings of betrayal and burdened by suspicion and mistrust in the victim.[6] In the absence of the re-establishment of meaningful patterns of interactions in the community and the development of a social environment that is active, organized, supporting and above all safe, the consequences both for individuals and the community are long lasting, with the increased possibility of revenge and an increased likelihood of trans-generational transmission of violence within communities.[7] The aftermath of conflicts that involve gross human rights violations against civilian populations has not only exposed the extensive devastation these methods have had on the social fabric of multi-ethnic societies, but also revealed the overwhelming nature of the task of reconciling and reconstructing post-conflict societies after their destruction.

[4] Ajdukovic, D. & Adjukovic, M., *Systematic Approaches to Early Interventions in a Community Affected by Organized Violence*, in Orner, R. & Schnyder, U., Reconstructing Early Intervention After Trauma: Innovations in the Care of Survivors, Oxford University Press, 2003, p. 85
[5] Ibid, p. 82
[6] Ibid, p. 82
[7] Ibid, p. 82-83

In the last decade, the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court (ICC), has asserted international criminal trials as a significant response to mass communal violence.[8] It is the purpose of this paper to situate the international criminal justice system within the type of context it operates in, to indicate the limitations and advantages this context presents, to situate the position of victims within the international criminal process, and to recognize that certain shortcomings of the international criminal justice system can and need to be corrected in order to assist post-conflict reconstruction.

This paper begins by explaining that the international criminal justice process is derived from traditional criminal law and national criminal jurisdictions. Section III explains the position of victims within national criminal systems and the changes in the norms of their treatment within these systems. Section IV illustrates the constrained environment in which the International Criminal Tribunal for the Former Yugoslavia (ICTY) operates and the consequent importance of witnesses to international trials. Sections V and VI highlight the risks witnesses face in testifying for the ICTY and their motivations to testify, as well as the motivations of the international criminal justice system to prosecute perpetrators of war crimes. Section VII explains the ICTY's treatment of witnesses through an analysis of its Statute and its Rules of Procedure and Evidence, while section VIII describes witnesses' experience in the court room. Section IX explains the immediate and long-term post-trial effects on the witness and section X

[8] Supra 2, p. 577

looks at what the term "reconciliation" means to victims, seeking to analyze in how far the international legal process fulfills victims' needs.

II. The Conflicting Foundations of International Criminal Law

International criminal law and international criminal justice systems are modeled upon traditional Western criminal law and domestic criminal justice systems. International criminal law is unique in that it "simultaneously derives its origins from and continuously draws upon both human rights law and national criminal law".[9] However, the underlying philosophy of each strand of law presents a conflict. The primary focus of human rights law is the protection of the rights of the individual from state interference, through international treaties and conventions, as well as international bodies such as the European Court of Human Rights and the International Criminal Tribunals for the former Yugoslavia and Rwanda. The case law that these international bodies have produced has served to strengthen the importance of protecting human rights values, such as the right to life and the protection from torture, cruel inhuman or degrading treatment.[10] Furthermore, human rights law has reinforced the rights of suspects and accused with respect to their treatment by the criminal justice system in whose custody they are, as well as their right to a fair trial,[11] and awarded victims the

[9] Cassese, A., *International Criminal Law*, Oxford University Press (2003), p. 18
[10] See for example, Universal Declaration of Human Rights (UNDHR), 1948
[11] Ibid, Articles 10 & 11

right to effective remedy in the event of the violation of their fundamental human rights.[12]

The focus of criminal law, on the other hand, is to protect society through state mechanisms. Traditional Western criminal law perceives crime as an act that threatens the stability and well-being of society as a whole, and as a wrong primarily committed against society and secondarily towards the individual victim. Since the state has a duty to ensure order and the protection of its citizens, the responsibility of administering criminal justice to the offender is placed upon the state. This prevents the social instability that would ensue from individuals taking the law into their own hands, avoids placing the burden of bringing offenders to justice on the victims,[13] and ensures that the process remains as impartial as possible. Thus, the tension that arises in international criminal law results from the different positions human rights law and criminal law award victims. Further, the international criminal justice system is based on the common law adversarial process,[14] which perceives victims predominantly as potential witnesses and "conduits through which investigators and prosecutors can make their case".[15] This system contributes in sustaining victims of crime on the periphery of the criminal process. It also maintains their needs and rights secondary to the prerogatives of the state, in a national context, and the international community, in an international context. In addition, procedural aspects relevant in national justice

[12] Ibid, Article 7
[13] Ashworth, A., *Responsibilities, Rights and Restorative Justice,* British Journal Criminology 42 (2002) p. 579-580
[14] Arbour, L., *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, Hofstra Law & Policy Symposium, Vol. 3, (Nov. 1998), p. 510

systems operating in stable domestic settings have been grafted onto an international criminal justice system that functions alongside an unstable post-conflict environment. This has adverse impacts on witnesses, on whom the burden of post-conflict reconstruction lies, and impinges on international tribunals' effective contribution to post-conflict social reconstruction and "the restoration and maintenance of peace".[16]

III. Witnesses and National Criminal Justice Systems

i. The "Forgotten Man"

It has been common to describe the witness as the "forgotten man" of the criminal process.[17] Only recently has research been conducted with respect to witnesses and their experience within national criminal justice systems, revealing a prevailing pattern of "witness-blindness".[18] Some of the earliest efforts to spearhead change resulted from the 1970s mobilization of feminists, who sought to focus attention on the apathetic treatment of rape victims by the criminal justice system. Increased awareness has prompted psychological studies indicating that victims and witnesses in domestic criminal courts have a strong desire to be respected and appreciated during the trial process. Further studies have established that exposure to insensitive treatment by the criminal justice system, trial delays, giving testimony in the presence of the accused and intimidation as a result of testifying in court are causes of high levels of stress in the

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[15] Mertus, J. *Truth in a Box: The Limits of Justice Through Judicial Mechanisms* in Amadiume, I. & An-Nai'im, A. (eds) , The Politics of Memory: Truth, Healing and Social Justice

[16] UN Resolution 808, establishing the International Criminal Tribunal for the former Yugoslavia states: ". . to put an end to such crimes [. . . widespread violations of international humanitarian law, . . . mass killings and the continuance of the practice of "ethnic cleansing", threat to international peace and security. .] and to take effective measures to bring to justice the persons who are responsible for them. . . that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would *contribute to the restoration and maintenance of peace*" (emphasis added)

[17] Ellison, L., *The Adversarial Process and the Vulnerable Witness*, Oxford University Press (2001), p. 1

[18] Ibid, p. 1

victim. This in turn has long-term physical and emotional effects on the victim and is detrimental to a witness' ability to fully and reliably recall events, thereby undermining the quality of a witness' testimony during trial.[19] This is particularly problematic for an adversarial legal process that awards a predominant position to oral evidence in criminal proceedings. Hence, the conclusions of studies examining the experiences of victims and witnesses have caused concerns, within the criminal justice system, that negative experiences of victims could lead to a decrease in the reporting of crimes, a diminished cooperation with the legal authorities and a reduced respect for the law.[20] Victim's rights groups have also been disturbed by the possible long-term consequences of witnesses' re-victimization by a criminal justice system meant to protect them. The result has been an increased demand for victims to be provided with support and assistance in their recovery,[21] for the creation of new social responses,[22] and for the initiation of changes within domestic criminal justice systems.

ii. Changes in the Norms of Victim Treatment: National Jurisdictions and Beyond

The recent re-evaluation of the victim's place within the criminal process has instigated policy changes to improve victim treatment by the criminal justice system. For the first time in 1990 the British Home Office published the Victim's Charter,[23] in which the appropriate practices required of the various agencies of the criminal justice system, in their relationship with the victim of crime, were defined. Sympathy, respect, minimal

[19] Ibid, p. 12
[20] Ibid, p. 4
[21] Ibid, p. 3
[22] Ibid, p. 16 The opening of rape clinics in the 1970s in the United States.

infliction of hardship upon the victims, the right to be kept informed and to receive support and protection, were amongst the practices expected of practitioners within the system.[24] Changes over the last ten years in the United States now also require prosecutors to inform the victim about the filing of charges, the acceptance of any plea agreement, the trial verdict and the release or detention status of the accused.[25] At a regional level, the Council of Europe published a recommendation focusing on key witness protection issues,[26] in which it maintained that "[t]he responsibility placed on the witnesses gives rise . . . to a corresponding duty on the part of the criminal justice system to protect their interests through the adoption, where necessary, of appropriate legislative and practical measures."[27] The principle was reinforced by a European Court of Human Rights ruling emphasizing the balance necessary between "the right of an anonymous witness to privacy and protection from intimidation against the right of the defendant to challenge contrary evidence".[28] At an international level, the United Nations published the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power accompanied by the Handbook on Justice for Victims, which recommended that measures be taken internationally, regionally and nationally, to improve victims' access to justice and fair treatment, restitution, compensation and assistance.[29]

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[23] Ibid, p. 4, Home Office, *Victim's Charter: A Statement of the Rights of Victims of Crime*, (1990), London HMSO
[24] Ibid, p. 4
[25] Ibid, p. 18
[26] Ibid, p. 1, Recommendation No. R (97) 13, *Intimidation of Witnesses and the Rights of the Defence*, Council of Europe (1997)
[27] Ibid, p. 1
[28] Ibid, p. 2, in reference to *Doorson v. The Netherlands*, (1996) 22 EHRR 330
[29] United Nations, *Handbook on Justice For Victims: On the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, (1999) United Nations, New York (ODCCP)

Simultaneous to the 1990s shift towards a greater awareness of victims' needs and an increased inclusion of victims' rights in Western domestic criminal justice systems, the world witnessed some of the most appalling violations of human rights in the former Yugoslavia and Rwanda. The international community has been widely criticized for its repeated inability to reach a consensus in forming a timely and effective action plan that would have halted the unfolding events on the ground. While an indecisive international community debated as to the course of action to be taken, a near million people died during the Rwandan genocide and an estimated 200,000 were killed in Bosnia, the large majority of whom were civilians. The establishment of the international criminal tribunals for the former Yugoslavia in 1993, and Rwanda in 1994, was, therefore, as much a political act as it was a humanitarian one and was aimed at showing the horrified world that the international community would take action even if governments refrained from using military means to stop the bloodshed. Indirectly, this also represented a landmark in the international recognition of victims' rights to redress.

IV. The ICTY and its Political Environment

International criminal tribunals, while modeled on national criminal justice systems, operate in environments quite different from Western domestic criminal jurisdictions. The latter function in an environment in which law enforcement establishments assist the criminal justice system and social institutions are present to support victims of violent crime. In contrast, the international criminal justice system functions without this support, alongside post-conflict societies where all such institutions and networks have been ravaged. Furthermore, contrary to national criminal justice systems in general, international criminal justice systems only investigate and prosecute crimes of gross human rights violations resulting from mass organized violence.

The International Criminal Tribunal for the former Yugoslavia, established in 1993, began its tenure while the war in Bosnia was still raging and crimes of war were still being committed. The restructuring of the former Yugoslavia under the Dayton Accords of 1995 left no clear winners or losers, which proved problematic because, unlike post-World War II Germany, there was no immediate dismantling of the warring regimes in the post-conflict period. On the contrary, the post-conflict governance of the region's countries was maintained in the hands of the political leaders who signed the Dayton Accords,[30] themselves targets of ICTY war crimes investigations.[31] Consequently, areas such as Serbia, Croatia and Republika Srpska in Bosnia-Herzegovina became practically inaccessible to ICTY investigators, who had limited access to crime scenes

[30] Glenny, M., *The Balkans: Nationalism, War, and the Great Powers, 1804-1999*, (1999), p. 652
[31] Slobodan Milosevic and Franjo Tudjman were under ICTY investigation.

and were unable to obtain critical documents necessary to ongoing investigations. In addition, access to witnesses was problematic because a large percentage of the population was either displaced, in refugee centers or missing.

While increased international political pressure and subsequent political transformations in the Balkan countries have resulted in greater cooperation with the ICTY's investigative teams, the final decisions with respect to the availability of documents and defendants still remain largely in the often unforthcoming hands of local governmental authorities.[32] The return of refugees and the normalization of the security situation have, however, facilitated the location and access of potential witnesses by the ICTY investigators. As a result, the ICTY's prosecution of war criminals has tended to rely more heavily upon witness testimonies, vital in establishing the occurrence of the crimes committed,[33] than if unrestricted access to documents and crime scenes had been granted. For example, the prosecutors of the Nuremberg Military Tribunal called thirty-three prosecution witnesses for the twenty-four defendants of the Nuremberg Military Tribunal, basing their case predominantly on documents from the German archives, to which the Allied Military Command had full access.[34] In comparison, in the trial against General Radislav Krstic, the single defendant in the Srebrenica genocide case, the ICTY prosecutors called one hundred and three witnesses.[35] As former ICTY Judge Patricia Wald states, victims and witnesses are "the lifeblood of ICTY trials".[36]

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[32] Supra 14, p. 502
[33] Taylor, T., *The Anatomy of the Nuremberg Trials*, (1992), p. 57
[34] Ibid, p. 574
[35] 8th ICTY Annual Report, (2001)
[36] Wald, P. M., *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, Yale Human Rights and Development Law Journal 5 (2002), p. 219

V. Witnesses and the Risks of Testifying

i. Safety Concerns of Witnesses Testifying for the ICTY

The large majority of ICTY witnesses are victims of war crimes. Some are refugees who have been unable or unwilling to return to their villages and towns, while others have returned to their homes and, sometimes, resettled alongside neighbours who participated directly or indirectly in the crimes committed during the conflict. In such an environment, victims often live in perpetual fear of retaliation if they speak about their experiences. Intimidation, anonymous phone calls, word-of-mouth threats relayed by third party intermediaries frequently occur when information is leaked that a victim is going to testify before the ICTY. In one instance, the children of a witness scheduled to testify for the Office of the Prosecutor were kidnapped on their way home from school. Held for a few hours, they were released with the message that next time the children would be returned dead to the witness, should he still choose to testify for the ICTY.[37] Consequently, the witness refused to testify for the trial. The Tribunal has no enforceable subpoena obliging witnesses to testify and can only issue summons and binding orders. These, however, are binding only in so far as the witnesses' country of residence chooses to cooperate with them. As a result of the prevailing atmosphere of fear and anxiety, witnesses often refuse to testify, or withdraw at the last minute. Many others simply want to get on with their lives and avoid stirring up the past, especially when a long time has elapsed between the end of the war and the start of the trial. Moreover, rape victims choosing to testify may experience the additional pressure of having to hide their experiences from family members and their community, out of

fear that revelations of sexual violence could result in negative reactions and their social stigmatization. As a result, when they come to testify, special care may have to be taken in concealing their trip to The Hague, where the ICTY is located. Since witness testimony is central to international criminal prosecutions, enlisting the cooperation of victims is beneficial to the ICTY.

ii. Victims and Witnesses Section

The large number of witnesses handled by the ICTY, the nature of the trauma, the risks faced by victims testifying, coupled with the absence of social institutions to support them through the trial process, have been motivating factors in establishing the Victims and Witnesses Section (VWS).[38] VWS, operating under the ICTY Registry,[39] provides logistical assistance, protection services, counseling and support to witnesses during the trial period, as per its mandate. Its staff is comprised of court and law enforcement personnel, psychologists and social workers, witness and language assistants, who assist witnesses with translation and other needs during their stay in The Hague, on a twenty-four hour basis. The ICTY, like many national systems, compensates witnesses for costs incurred as a result of testifying. Witnesses who testify before the Tribunal take time off their everyday lives in order to come to The Hague and are, therefore, hosted at the expense of the Tribunal and receive compensation for any lost wages and

[37] Information related to a witness on a case the author worked on.
[38] Article 22 of the ICTY Statute & Rule 34 of the ICTY Rules of Procedure and Evidence
[39] The ICTY Registry is responsible for providing the Tribunal's administrative and judicial support services, assisting both the Prosecution and the Defence.

expenses related to testifying.[40] Witnesses can also request that a family member or friend accompany them for support. VWS support officers assess the requirements and eligibility for assistance on an individual basis.

Most witness have expressed that their interaction with the VWS on a logistical level were satisfactory. One witness stated that the travel arrangements, obtaining visas and the support prior to testifying were "beautifully organized" and that care was taken with the smallest details.[41] Another witness explained: "Two people from the [VWS] met us at the airport. They really took good care of us; they were always asking if we were okay, if we needed anything, or if we were afraid."[42] While certain elements of witness treatment are based on national norms, the VWS, in its composition and role, is unique to the ICTY and fills the witness support void that is particular to an international tribunal that operates in an environment isolated from social institutions. In contrast to national criminal justice systems that work in conjunction with national social institutions providing the necessary support network to witnesses, VWS is an integral part of the ICTY, working from within the international criminal justice system rather than alongside it.

[40] Certain witnesses stated that they did not possess formal attire to appear in court and expressed that this was a source of embarrassment and discomfort for them. As a result, VWS awards witnesses an allowance for clothing for their court appearance.
[41] Stover, E., *The Witnesses: War Crimes and The Promise of Justice in The Hague*, Human Rights Center, University of California, Berkeley (May 2003), p. 84
[42] Ibid, p. 84

VI. Motivations and Benefits of War Crimes Trials

i. Witnesses' Motivations for Testifying

Despite the risks and difficulties that testifying poses for victims, many still choose to do so for a variety of reasons. 90% of the respondents interviewed in a study[43] stated that it was their "moral duty" to testify before the ICTY. As one witness stated: "It was my wish, my desire and my moral obligation to my family to testify".[44] Some witnesses testified to acknowledge the memory of the dead before an international court while others viewed their testimony as an opportunity to "tell the world the truth". Victim narratives can meet the needs of traumatized people to be heard and can also help make sense of traumatic events. Since facts and truths in instances of mass violence are not straightforward, victims of organized violence need to discover their own "truths" about what has occurred.[45] For those witnesses who had lived as neighbours with the accused, there existed a need to understand how and why the situation had developed as it did. One witness stated: "I wanted to see the [three] defendants and to ask them why they did it. Why did they kill all these people? Why did they destroy our village? We had such good relations. We were good neighbours. I just wanted one of them . . . to tell me why they did that".[46]

While witnesses who had been raped or tortured or watched their families murdered did harbor fantasies of revenge, most witnesses' desire to testify was motivated by a need to confront those who had caused them suffering. The perpetration of violence is based

[43] Ibid, p. 66
[44] Ibid, p. 66-67
[45] Supra 4, p. 86

on the de-humanization of the victim, by the perpetrator's sub-human treatment of the victim. In contrast, through their dominant position and corresponding powers, the perpetrator is elevated to a superhuman position in the eyes of the victim. Facing the defendant in the physically secure environment of a court room can, for the victim, have the effect of restoring a certain sense of balance of power, lost as a result of the violence perpetrated. The empowerment of the survivor and the creation of new connections is especially important with respect to trauma recovery. As one male witness expressed: "It was not a question of revenge, I just wanted to meet the accused on the same level and to remind him of what he did to me and my family".[47] For many witnesses being in the court room with the accused helped restore their confidence in the order of things, allowing "power to flow back from the accused to [them]".[48]

Other witnesses wanted to find out what had happened to their family members and friends who were still missing. Anecdotal evidence and country-specific studies indicate that relatives have a need to find out what has happened to the missing in order to move past a state of "sustained shock" that is a result of the anguish and pain caused by the absence of a loved one.[49] The location and exhumation of bodies provide visual cues that allow families, caught in a limbo of "ambiguous loss", to pass through the states of mourning.[50] As one Bosnian Muslim addressed the accused, during his testimony, he

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[46] Supra 41, p. 68
[47] Supra 41, p. 67
[48] Supra 41, p. 110
[49] Stover, E. & Shigekane, R., *The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?*, IRRC December 2002, Vol. 84, No. 848, p. 859
[50] Ibid, p. 860

said: "I have nothing against you. I'm not going to charge you with anything. I just want to know where my son's body is".[51]

Verbalizing traumatic events in a safe environment has the effect of removing them from the confines of one's inner realm and placing them in an open environment where events and issues related to the victimization, such as guilt and anger, can be put into context and rationalized. When successful, telling their stories can enable survivors to reduce depressive symptoms that often accompany post-traumatic stress disorders. It can also help advance them on the path to recovery, to accept new responsibilities and regain satisfactory functioning in their new surroundings.[52]

ii. Motivations for Prosecuting War Crimes

The highly personal and subjective reasons that motivate victims to testify contrast starkly with the more clinical and political reasons that motivate an international tribunal to prosecute alleged war criminals. In order to contribute to the restoration and maintenance of peace and create an environment conducive to post-conflict social reconstruction, war crimes tribunals aim at fulfilling certain central functions which can, but do not necessarily, coincide with victims' needs. First, in the face of mass organized violence the focus of trials is to establish individual criminal responsibility, over the collective assignation of guilt.[53] By singling out perpetrators who were part of a broader group of individuals that organized and executed the violations, trials can serve to identify the accused with the old power structure, thereby underscoring the

[51] Supra 41, p. 68
[52] Weine, S. M., Kulenovic, A. D., Pavkovic, I., Geldons, R., *Testimony Psychotherapy in Bosnian Refugees: A Pilot Study*, American Journal of Psychiatry 151 (1998), p. 1723

discontinuity between the old and new regimes,[54] and promoting confidence that the new leadership can provide a stable and safe environment, essential to the recovery of the large numbers of trauma victims. For survivors of groups that have been accused, tribunals can help the population of bystanders to regain their own sense of identity through a disassociation from the crimes perpetrated and those accused of committing them. This can serve to reduce feelings of mistrust and suspicion between communities, thereby supporting the re-establishment of social networks. The success of this process is contingent, however, on factors that fall outside the functions of an international tribunal, such as civic reconstruction, in the form of democracy building and economic development, and on the extent to which members of the successor government are free of blame for past atrocities.

Second, the prosecution of perpetrators is seen as ending the culture of impunity that safeguarded leaders and organizers of mass violence during the course of the conflict. Hence, it is assumed that the existence and operation of international tribunals which hold state actors such as former President Slobodan Milosevic accountable, as well as the historical record that stems from these trials, will act as a deterrent to the future commissions of human rights violations. This is, however, an assumption that could be countered by pointing out that the Nuremberg Military Tribunal did not deter the 1994 genocide in Rwanda, that the establishment of the ICTY did not stop the continuation of the commission of violations in the former Yugoslavia during the conflict, and that the existence of the ICC is not serving as a deterrent to the genocide being committed at

[53] Supra 9, p. 6

present in Darfur, Sudan. This emphasizes the fact that a functioning international criminal justice system without an effective enforcement mechanism is incapable of influencing states' adherence to international law and, alone, is an insufficient deterrent. Nevertheless, the definition and prosecution of war crimes by international tribunals reinforces a globally recognized minimum standard of behaviour of parties engaged in armed conflict, as defined by international humanitarian law. Thus, while tribunals alone may be insufficient in acting as a deterrent, they still remain a necessary response to the aftermath of conflict and an important riposte to impunity.

[54] Supra 15

VII. Witnesses and ICTY Procedure

i. Witnesses in the ICTY Statute and Rules of Procedure and Evidence

The ICTY's Statute and its Rules of Procedure and Evidence[55] require, *inter alia*, that the safety of witnesses be balanced against the fair trial rights of the accused persons. The Rules provide witnesses with protective measures[56] and the possibility, if considered necessary, for their relocation.[57] The relocation of witnesses is a complicated and complex process in which the ICTY has to enlist the cooperation of either local authorities or a third country. The ICTY therefore arranges relocation only in cases where a witness faces serious danger as a result of testifying. Nonetheless, investigators are still required to inform all potential witnesses of the possibility of relocation. There have, however, been instances where investigators have either failed to do so[58] or failed to provide complete information to witnesses. A young witness explained that he felt ICTY investigators, eager that he testify, had failed to adequately clarify that relocation entailed minimal contact with family members and friends and limited support in the country of relocation.[59] The relocation of this particular witness led to a series of events that severely jeopardized his emotional well-being, which in turn had serious implications for his physical safety.[60] This example highlights several important problems of the international criminal justice system in general, and the ICTY in particular.

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[55] Hereafter ICTY Rules in main text
[56] Rule 75 of the ICTY Rules of Procedure and Evidence
[57] Article 22 of the ICTY Statute & Rule 34Ai of the ICTY Rules of Procedure and Evidence
[58] Supra 41, p. 68
[59] Information as related by the witness to the author.
[60] Information as related by the witness to the author.

First, while there is a code of professional conduct that delineates the appropriate behaviour expected of defence counsel appearing before the ICTY,[61] specifying the required conduct towards victims and witnesses,[62] no such code of conduct exists for the Office of the Prosecutor (OTP).[63] The only reference to the type of conduct demanded from the Prosecution is one that defines the conduct of the Chief Prosecutor as having to be "of high moral character".[64] An official guideline explicitly defining appropriate behaviour expected from all OTP staff members would be useful in establishing a uniform professional practice, especially in light of the fact that the ICTY is comprised of staff members from different cultures and divers legal systems.

Secondly and more importantly, the ICTY lacks a code of conduct that focuses specifically on the appropriate treatment of witnesses by the Tribunal, like the British Home Office's Victim's Charter for example. Witnesses interact with numerous individuals within the ICTY, including qualified VWS psychologists, but also investigators, prosecutors, defence counsels, judges, who have little or no background in psychology. Since most ICTY witnesses have had no interaction with the international criminal justice system prior to their contact with the Tribunal, it is important to ensure that practitioners within the legal system are aware of their needs and concerns.

[61] *Code of Professional Conduct for Counsel Appearing Before the International Tribunal*, IT/125 Rev. 1, ICTY
[62] Ibid, Article 28
[63] The Office of the Prosecutor is comprised of the Prosecution Section and the Investigations Section.
[64] Article 16.4 of the ICTY Statute

Thirdly, the international criminal justice system does not provide for an independent international body where witnesses could lodge complaints and report misconduct of legal practitioners, and which would monitor and investigate Tribunal conduct with respect to witnesses. Such a body could, on the one hand, contribute to reinforcing the position of a witness within the criminal justice system, by providing recourse to redress in the event of a breach with respect to the procedure, and, on the other, provide the ICTY with an opportunity to take appropriate action and make necessary procedural changes to prevent future breaches.

Finally, the ICTY Statute and Rules, while speaking of the "rights of the accused",[65] do not formulate issues with respect to witnesses in the same distinct terms. The advantage of specifically defining issues in terms of rights is that it places a more stringent responsibility on the legal system to ensure their protection. Consequently, any non-compliance becomes a violation for which the violator could be penalized and allow the victim to claim redress. The definition of a witness' "entitlement" in the ICTY Rules is clearly less resolute in its language, when compared to the distinct use of the term "rights" with respect to the accused. This emphasizes that while there is a recognition of an accused's vulnerable position within the criminal justice system, the same consideration is not extended to the vulnerability of the witness.

[65] Article 21 of the ICTY Statute and Rules 3, 6, 55, 59 *bis,* 62, 67, 70, 75, 80, 82 of the ICTY Rules of Procedure and Evidence

ii. Witnesses and the Rules of Disclosure

The ICTY prosecution's disclosure obligations, for which sanctions can be imposed in the event of non-compliance,[66] are a source of conflict with respect to the protection of witnesses. In line with upholding the rights of the accused to a fair trial, the Prosecution is under obligation to disclose to the defence all statements of potential witnesses,[67] including any testimony that a witness may have given in other ICTY trials. This means that, even if witnesses were awarded a pseudonym in a previous trial, their identity and the type of protective measures they enjoyed can be disclosed to the defence in the pre-trial phase of new proceedings.[68] Even though witnesses are informed of this possibility before giving evidence,[69] such a procedure can pose subsequent threats to witnesses' safety for several reasons specific to the nature of the ICTY.

Since the immediate post-conflict governance of the Balkan countries was maintained in the hands of the warring political leaders, there has been neither a formal dismantling of the regimes nor a complete deconstruction of the nationalist policies that fueled the conflict. As a result, even though the warring leaders are no longer in power today, many nationalist members of the old regime have found new positions in the post-war governments of the region.[70] This situation is particularly problematic with respect to the counsel for the accused. According to the ICTY Rules, the accused may appoint counsel of his/her choice,[71] as long as the latter is qualified and "admitted to the practice

[66] Rule 68 *bis* of the ICTY Rules of Procedure and Evidence
[67] Rule 66 (A) (ii) of the ICTY Rules of Procedure and Evidence
[68] Rule 75 (F) (ii) of the ICTY Rules of Procedure and Evidence
[69] Rule 75 (C) of the ICTY Rules of Procedure and Evidence
[70] Supra 41, p. 119
[71] Rule 44 of the ICTY Rules of Procedure and Evidence

of law in a State, or . . a University professor of law, ... and a member of an association of counsel practising at the Tribunal recognised by the Registrar".[72] While fulfilling the criteria required for practising before the ICTY, however, certain defence lawyers from the former Yugoslavia are also affiliated to nationalist parties in their countries. While in theory political associations are not necessarily a determining factor of counsel's integrity, in practice, given the political nature of the 1990s Balkan conflict which led to the commission of the war crimes on trial at the ICTY, it remains a factor of particular concern with respect to the level of confidentiality exercised by defence counsel in relation to the identities of prosecution witnesses.[73]

As stated above, there have been instances where names of protected prosecution witnesses have been leaked to the public resulting in witness intimidation either before or after the trial.[74] While disciplinary action[75] can be taken against defence counsel whose conduct prejudices witnesses and the fairness of the proceedings, these issues are both difficult to investigate and to penalize for several reasons. First, witnesses may live in close proximity of the parties intimidating them. The ICTY has no practical means of protecting witnesses from harm and victims may thus refrain from lodging a complaint, choosing instead to withdraw from testifying. Second, investigations of any allegations may necessitate the assistance of local authorities, who may not necessarily be inclined to cooperate with the ICTY. Third, should allegations prove to be true, the

[72] Ibid
[73] Supra 41, p. 93, "Protected witnesses speculated that those most likely to have revealed their identities were the defendants and their lawyers."
[74] See also supra 41, p. 92-95
[75] Supra 64, Article 37

ICTY only has the power to impose a fine and suspend or ban counsel from practicing before the Tribunal.[76] This last rule could be effective if the international criminal justice system extended to include an international bar association, comparable to national bar associations in their authority over domestic legal practitioners. This organ could collaborate with national bar associations in disbarring lawyers from practising in both national and international jurisdictions in the event of professional misconduct. However, because at present no organ with such powers exists, the ICTY's capacity to adequately penalize legal malpractice is severely constrained.

Thus, in the time elapsed between a victim's first testimony and the pre-trial phase of any subsequent case they may be testifying in, the circumstances of a witness may have changed in ways that may jeopardize their safety. The ICTY's disclosure rules, as they are presently framed, protect the rights of the accused to a fair trial but do so at the expense of the witness and without taking into consideration the limited powers of the ICTY to effectively control and sanction any misconduct on the part of the defence.

[76] Supra 64, Article 47 (C)

VIII. Witnesses in the Court Room

i. Witnesses and the Adversarial Process

Live witness testimony is the foundation of the adversarial process and provides evidence on disputed questions of fact through first hand knowledge. Once oral evidence is presented, its reliability is tested by the adversary through a cross-examination of the witness, intended to expose a dishonest, mistaken or unreliable witness and reveal any inaccuracy and inconsistency in the presented facts.[77] The solemnity of the court room, the oath taken by the witness before testifying, the scrutiny of a public trial and the physical proximity of the accused are added elements that are assumed to foster an environment conducive to a truthful presentation of the facts by the witness. These formal and rigorous conditions, however, place additional strains on victims, already under severe pressure when testifying to crimes of gross human rights violations. Consequently, the ICTY has adapted certain procedures in order to accommodate the particular concerns of victims appearing before the Tribunal. Since ICTY trials are public, the ICTY Rules allow the court to order protection measures in the event that witnesses wish to retain their anonymity.[78] These measures include expunging names and other identifying information from the Tribunal's public records; the non-disclosure to the public of any records identifying the victim; the possibility of testifying through digital image and/or digital voice altering devices or closed circuit television; the assignment of a pseudonym. Closed court sessions that bar

[77] Supra 17, p. 11
[78] Rule 75 (B) of the ICTY Rules of Procedure and Evidence

the public from watching or listening to testimony can also be ordered by the court which must, however, publicly state the reasons for undertaking these measures.[79]

The above mentioned protective measures have, however, been criticized for infringing the public nature of trials.[80] Throughout the proceedings and in the final Judgement, witnesses are known by the pseudonym assigned to them. Further, where witness protection measures have been imposed, much of the material is restricted as to its dissemination and even redacted to avoid undue disclosure of witness identities. It has been remarked that these deviations from national procedures would not raise any questions as to whether the ICTY Statute's guarantee of a public trial[81] is being honoured, if they were limited to only a few witnesses per trial instead of fifty percent of the witnesses, as in some cases.[82] Furthermore, there is a concern that the historical utility of international trials to future war criminals is lost when witnesses stay hidden and are not identified in judgements.[83]

Cross-examination is an intrinsic part of the common law tradition and is a means by which the character and general credibility of the witness is scrutinized to expose any testimonial discrepancies. At the same time, cross-examination is widely considered to be the most traumatic aspect of testifying for most witnesses.[84] The intrusive nature of cross-examinations and the aggressive character of this process, particularly detrimental to victims of sexual violence, has been highlighted by non-governmental organizations.

[79] Rule 79 of the ICTY Rules of Procedure and Evidence
[80] Supra 36, p. 223
[81] Article 21.2 of the ICTY Statute
[82] Supra 36, p. 224 in reference to *Prosecutor vs. Radislav Krstic*, IT-98-33-T
[83] Supra 36, p. 224
[84] Supra 17, p. 9

As a result the ICTY has adapted its rules with respect to testimony given by victims of rape and sexual assault. According to the ICTY Rules,[85] testimony of a rape victim requires no corroboration; consent is not a defence in the event of threat or duress; and a victim's prior sexual conduct cannot be admitted as evidence. The ICTY has taken into consideration that while certain issues may relevantly be questioned in cases of rape and sexual assault in domestic settings, the same acts committed in particular circumstances during armed conflict permit an inference with respect to the context in which the assault has occurred. Therefore, any adversarial cross-examination attacking a witness' character, suggesting the existence of an element of consent on the part of the victim, has been deemed unnecessary, irrelevant as well as inappropriate. ICTY Judges are furthermore awarded the power to, whenever necessary, "control the manner of questioning to avoid any harassment or intimidation",[86] of any witness during trial proceedings.

The measures that the ICTY has taken are significant because they take into consideration the psychological and physical impact of testifying on witnesses and adapt the trial process to balance victims' circumstances and needs with the rights of the accused, as well as with the principle of openness.

ii. Witnesses and their Narratives

Supporters of the international criminal justice system as a response to war crimes and gross human rights violations view trials as a necessary element to victims' recovery.

[85] Rule 96 of the ICTY Rules of Procedure and Evidence

The victim's needs for "the truth", acknowledgment of suffering, justice and healing are believed to be met by international criminal trials because these address the responsibility of perpetrators, thus transforming the victim's personal need for vengeance into public procedures of legal accountability. As stated above, many witnesses who come to testify before the ICTY are motivated to do so for a range of reasons that include a desire to honour the dead, to tell their story, to understand the reasons that provoked the crimes and to seek answers as to the whereabouts of the missing. However, the legal process is inherently counter-narrative because "it opens and closes, letting in only enough information to prove the issue at hand"[87] and is neither aimed at being therapeutic nor at answering questions individual victims may have. It is therefore difficult for witnesses to obtain what they seek from their courtroom experience. Maybe because they are aware of this, certain ICTY Judges give witnesses the opportunity to make personal declarations at the end of their testimony in court.[88] Often, victims in search of answers direct a heart-wrenching address to the accused, who remain stoic and silent.[89] As a result the process of testifying does not necessarily bring closure, neither does it necessarily contribute towards healing.[90]

A study of the impact on survivors' testimony before the South African Truth and Reconciliation Commission concluded that while certain individuals may have found

[86] Rule 75 (D) of the ICTY Rules of Procedure and Evidence
[87] Supra 15
[88] See transcripts of witness testimonies in *Prosecutor vs. Radislav Krstic*, IT-98-33-T, ICTY
[89] Information based on author's trial experience in the ICTY court room
[90] Supra 2, p. 594

testifying to be either distressing or relieving, the process of giving testimony[91] did not have a significant effect on a witness' psychiatric health.[92] The study further noted that the apparent lack of any significant impact on symptoms suggested that the process of testifying was qualitatively different from that of testimony therapy in the clinical setting.[93] Furthermore, cultural factors determine beliefs about the causes and meanings of catastrophic events and form the basis from which individuals and societies interpret the consequences and the aftermath of distressing events. The legal process is a part of the aftermath of events and, therefore, a witness' expectations of its purpose may be influenced by cultural factors specific to their background. It may therefore be overly ambitious to expect a witness to experience therapeutic benefits from testifying in proceedings because of the difference between a witness' expectations and the reality of what a legal process offers.

Prior to testifying before the ICTY most witnesses had no previous experience in a court room. Many had never told their stories publicly and did not know what emotional reaction would result from recounting painful memories before strangers, in the intimidating surroundings of a courtroom, with the accused present and under the scrutiny of defence counsel. The acclimatization of the witness to the court room and its procedures is significant both to the witness' experience of testifying as well as to the quality of witness testimony, particularly important to the case. Studies have

[91] Reference is made here purely to the effects of giving testimony, not to the effects on the victim of other aspects of the testimonial process, such as cross-examination.
[92] Kaminer, D., Stein D. J., Mbanga, I., Zungu Dirwayi, N., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses*, British Journal of Psychiatry 178 (2001), p. 375
[93] Ibid

concluded that the assistance of the prosecutor's office was the single most important factor to future witness cooperation.[94]

Although the experience of testifying may differ from individual to individual, most witnesses singled out their prosecutors and investigators as the one mitigating factor that made testifying less stressful.[95] Witnesses indicated that a supportive atmosphere that included prosecutors' attention to the needs of the witnesses resulted in a higher degree of satisfaction with the trial process as a whole. As one witness stated: "I cried almost constantly during my testimony. Well, afterwards [the prosecutor] came up to me and said how proud he was of my courage. He made me feel important, that my testimony was worthwhile."[96] Another witness said: "As soon as I left the courtroom, I burst into tears. It had been really difficult for me. But then my prosecutors came and told me, 'Come on, it's okay, you were great, everything's okay.' And that meant a lot to me."[97] Witnesses indicated a need to be actively engaged with their prosecutors, their primary links with the ICTY. They expressed approval for those prosecutors who familiarized them with the layout and procedures of the courtroom, coached them on what to expect from the defence and debriefed them in a substantive manner on the value and effects of their testimony on the case.[98] In a trial where prosecutors showed little or no interest in the witnesses after testifying, a witness stated: "The thing that bothered me was that I didn't know how important my testimony was for the

[94] Supra 41, p. 18
[95] Ibid, p. 83
[96] Ibid, p. 83
[97] Ibid, p.83
[98] Ibid, p. 84

prosecution's case. This, I think, is a failure on the part of the prosecution's office. They should pay more attention to the witnesses, even if it's only to give a little encouragement. Because basically, we have no idea what really went on in the court room."[99]

The varying experiences of witnesses testifying for different prosecutors indicates the absence of a uniform guideline with respect to prosecution witness preparation and support during the trial process. A guideline requiring prosecutors to explain to witnesses what to expect from the international criminal justice system would prepare victims for court room proceedings and give them a realistic expectation of what international criminal trials can achieve. At present, how far to accompany the witness through the trial process is left to the prosecutors' discretion and level of sensitivity.

[99] Ibid, p. 83

IX. Life After "Justice"

i. Witnesses in the Post-Trial Phase

Neither the OTP nor the VWS are required by the ICTY Statute and Rules to maintain contact with the witnesses after they have testified before the Tribunal. The prevailing view at the ICTY is that the protection and needs of past witnesses fall under the responsibility of the local authorities where they reside. However, local authorities in the former Yugoslavia have insufficient funds to adequately support victims and, in any case, have expressed little or no interest in witness' security concerns and problems.[100] Witnesses concerned with their safety and that of their family felt abandoned by the ICTY. One witness explained: "You have to understand that in preparing for the trial we [witnesses] spent a lot of time with those investigators. We were with them for hours and sometimes whole days going over horrible things that happened to us. After we testified and came back, we were completely abandoned by the ICTY and our local authorities."[101] Furthermore, the Tribunal is not required to contact witnesses to inform them of verdicts or appellate rulings that have been rendered in cases they have testified in. Although it has been done in certain instances,[102] it is, again, left to the discretion of the prosecutors. Witnesses have expressed that it would have been helpful if the OTP had explained how verdicts and sentences had been reached in the cases they testified for.[103] One witness explained her reaction upon hearing the ICTY Appeals Chamber's decision to release the defendants Vlatko, Mirjan and Zoran Kupreskic,[104] against

[100] Ibid, p. 88 (Stover, E., *The Witnesses*)
[101] Ibid, p. 89 (Stover, E., *The Witnesses*)
[102] In *Prosecutor vs. Kunarac et al.*, IT-96-23-T, prosecutors contacted the witnesses who had testified to personally inform them of the verdict.
[103] Supra 41, p. 88 (Stover, E., *The Witnesses*)
[104] See Judgement in *Prosecutor vs. Kupreskic et al.*, IT-95-16-A, ICTY 23 October, 2001

whom she testified: "When I heard about the ruling,. . . I immediately took five valiums. No one called, no one came or even bothered to explain what had happened . . ."[105]

For witnesses, the relatively tense situation that still prevails in regions of the former Yugoslavia can lead to being dismissed from their jobs, daily harassment, death threats and eviction, should information that they testified for the Tribunal be leaked to the public[106]. These factors serve to inflict additional hardship on the victim and could be alleviated if the ICTY's field offices located in the region cooperated with local authorities to ensure that witnesses were effectively protected from harassment and threats. Furthermore, ICTY field offices could be assigned the responsibility of post-trial follow-up and informing witnesses when defendants have been released. At present, after receiving support from the ICTY before and during their testimony, witnesses experience a sense of "abandonment", resulting from the ICTY's inadequate follow-up (or absence thereof) in the post-trial phase.[107] As one witness states: "[What gets to me is] the fact that no one [at the ICTY] is interested. One day I was considered essential, a big witness for their case. And now I'm nobody." Asked if he would ever testify for the Tribunal again, he answered: "No, never. Even if they sent an army to take me there, I would never go."[108]

[105] Ibid, p. 103
[106] Ibid, p. 86-106
[107] Ibid, p. 88
[108] Ibid, p. 98

ii. The Impact of International Criminal Trials on Post-Conflict Societies

Despite the negative reactions of certain witnesses, a study of witnesses who testified before the ICTY revealed that the overwhelming majority of witnesses interviewed felt it was necessary to arrest and prosecute all suspected war criminals.[109] Witnesses said that the ICTY trials provided a forum where the suffering of victims could be heard and acknowledged, while also furthering the process of establishing the truth about events. They also felt that trials had a "chilling effect on the perpetrators" and had deterred or had the potential to deter war criminals.[110] One witness said: "Punishing war criminals has sent out a warning across Bosnia that if you commit a war crime there is a place where you will be punished. And it is called The Hague."[111] However, whether this is due to ICTY trials or to the fact that the three ethnic groups in the former Yugoslavia are still geographically separated from one another remains unclear. Another witness felt that the prosecution of war criminals served to strengthen international humanitarian law and to demonstrate to future military commanders the consequences of violating the Geneva Conventions. He hoped that the trials "would help educate the next generation of military officers in the region about the laws of war."[112]

Some witnesses have, however, criticized the Tribunal for failing to charge low-level perpetrators. What they wanted the most, they said, was to confront the actual people

[109] Ibid, p. 107
[110] Ibid, p. 107-108
[111] Ibid, p. 108
[112] Ibid, p. 108

who had abducted or killed their loved ones.[113] However, charging low level perpetrators has its own pitfalls, as was demonstrated in the *Kupreskic*[114] case, in which Croat soldiers were prosecuted for allegedly committing atrocities against the Muslim inhabitants of Ahmici. Prosecutions of high level perpetrators aim at establishing that those in command used subordinates to carry out their criminal plan. Proving the perpetrator's guilt is achieved by the establishment of their command responsibility over the troops that actually committed the atrocities. In contrast, cases involving low level perpetrators rely heavily on eyewitness accounts of defendants committing war crimes and on the corroboration of the events by fellow combatants. In the *Kupreskic* trial, the perpetrators' family succeeded in undermining the prosecution's case by intimidating potential witnesses. There was a significant witness drop-out rate making the case difficult to prove because of its heavy reliance on victim's eyewitness evidence and a lack of "insider" witness corroboration.[115] The defence managed to successfully question the accuracy with which victims were able to identify the perpetrators under the stressful circumstances of the massacre.[116] Eventually, of the six initial defendants, one defendant was released after the trial and three others were released after the appeal process. The defendants returned to live in Ahmici, amongst the victims and witnesses that testified against them. Although one of the defendants, Vlatko Kupreskic, publicly declared that co-existence was possible amongst the Croat

[113] The ICTY did initially indict a large number of low level perpetrators. This was principally because the prevalent political situation at the time made indicting higher level perpetrators difficult and because the ICTY was under pressure to commence proceedings in order to establish its legitimacy.
[114] *Prosecutor vs. Kupreskic et al.*, IT-95-16-T, ICTY
[115] The prosecution managed to secure one "insider" witness. See Trial Judgement *Prosecutor vs. Kupreskic et al.*, IT-95-16-T, ICTY
[116] See Trial Judgement *Prosecutor vs. Kupreskic et al.*, IT-95-16-T paras 366, 367, 424, 425, 427, 469.

and Bosnian population of Ahmici,[117] some of the witnesses have experienced harassment from the defendants they testified against.[118] Thus the verdict has had an adverse impact on the witnesses, with some now wanting to leave the village and others too afraid to return. One witness explained: "Four years after our return here, we still don't know the truth. My relative thinks his neighbour killed his father. This neighbour, knowing that he is suspected, is afraid and doesn't sleep at night. That's what we have here. It's not justice, but a balance of fear."[119]

iii. Local Courts and Complementarity

The ICTY is increasingly moving towards transferring cases against low level perpetrators to local courts in Sarajevo, which would be beneficial for several reasons. First, the ICTY has been widely criticized for failing to ensure the accused's rights to an expeditious trial.[120] Transferring cases to local courts would have the advantage of decreasing the ICTY's caseload, allowing cases remaining in The Hague, as well as those transferred to local courts, to be dealt with more quickly. Second, trials in local courts would bring the legal process closer to home and allow for an easier identification and prosecution of low level war criminals, presently living amidst the divided communities. This could potentially lower the ethnic tensions that exist in areas where they still exert power. However, as one witness states, in order to ensure a fair and impartial process and because "politics still has the power over justice in our countries", trials would need

[117] Kebo, A., *Bosnia: Ahmici Three Homecoming*, Institute of War and Peace Reporting Update No. 242 (October 29-November 3 2001)
[118] Supra 41, p. 94
[119] Ibid, p. 106
[120] Rule 65 *ter* (B) the ICTY Rules of Procedure and Evidence

to be held under international supervision with the participation of foreign judges. Furthermore, the court would need to have effective and forceful protective measures for all witnesses.[121] Third, transferring cases to local courts would be more practical and cost effective since it would be easier for local investigators and prosecutors to obtain evidence and access witnesses. Finally, transferring trials to the region could be an incentive for the further development of national justice systems and contribute towards restoring confidence in local institutions, an essential component to the reconstruction of post-conflict societies.

[121] Supra 41, p. 112

X. Reconciliation

i. What Does Reconciliation Mean to Victims of Gross Human Rights Violations?

"Reconciliation", like "justice" or "forgiveness", is an ambiguous term in that it means different things to different people. Nevertheless, these are terms that are repeatedly used by those furthest from the process, proclaimed as necessary steps towards achieving a lasting peace after conflict. While victims, perpetrators and bystanders are the ones who have to reconcile within themselves and with each other, they are rarely asked to give their view on what these ideas mean to them. A recent study of victims of the conflict in the former Yugoslavia has allowed them, for the first time, to express what they consider important factors for their recovery and what significance they attach to an international tribunal prosecuting war criminals on their behalf.[122]

According to the respondents of the study, socio-economic factors are key components of justice. Factors such as victims' right to live where they want and to move freely without fear, the right to have bodies of loved ones returned for burial, the right to meaningful and secure jobs, and the right to receive adequate treatment for psychological trauma induced by wartime atrocities were seen as essential components to rebuilding their communities and lives.[123]

While retributive justice and the punishment of war criminals was considered central to post-conflict reconstruction, victims did not feel that testifying at the ICTY had altered their view of other national groups. Mistrust between communities is still prevalent as

a result of the wedge that the conflict created. Respondents felt that participation in killings and expulsions by certain neighbours of different national groups, as well as betrayal, hindered victims' ability to forgive and forget.[124] Furthermore, victims felt that their neighbours' inability and unwillingness to accept and acknowledge that they stood by as members of their national group committed crimes against the victims was one of the biggest obstructions to reconciliation.[125] Thus, according to the victims interviewed, reconciliation was seen as a personal process involving post-war encounters with past friends and colleagues from other national groups within their communities, rather than an abstract notion involving reconciliation in a collective sense.

ii. Reconciliation According to Victims: What Contribution has the ICTY Made?

While the ICTY may have ended the culture of impunity and thus contributed towards post-conflict social stability, it has not necessarily contributed towards victims' reconciliatory needs, stated above, for several reasons. First, victims have been targets of harassment as a result of testifying before the Tribunal and in some cases have been either relocated by the ICTY or have moved away on their own initiative. In certain cases, this could have been prevented if the ICTY had taken more effective measures in protecting the identities of witnesses testifying before the Tribunal. Second, while the ICTY has undertaken the exhumations of mass graves for evidentiary purposes, it has not always done so in a manner inclusive of the needs and rights of the families of the

[122] Supra 44
[123] Supra 41, p. 118
[124] Ibid, p. 123
[125] Ibid, p. 123-124

victims.[126] While ICTY forensic scientists have an obligation to the legal institution they serve, they should also have a responsibility towards the families of the missing. Third, while securing employment opportunities for victims falls outside the ICTY's function, the Tribunal must ensure that victims who hold a job do not lose it as a result of testifying in The Hague. Here again, this could be avoided if adequate measures were taken in protecting witness identities. Fourth, while the provision of psychological treatment to victims also falls outside the role of the ICTY, the Tribunal can nevertheless contribute towards witnesses' positive experience of the legal system. Finally, one of the foundations of international criminal prosecutions is individual accountability for acts of violence. The purpose is to alleviate collective guilt by differentiating between the perpetrators and innocent bystanders, with the aim of promoting reconciliation. However, when the focus on individual perpetrators is seen by victims as serving bystanders' claim to collective innocence, reconciliation is not achieved. One Croat victim who frequently sees her Serb pre-war classmates explains: "They try to approach me, but I just turn my head away. It's because they behave as if nothing had happened, like we were just away on vacation for a few years and had just come back. And when you confront them, they just shrug it off as if nobody did anything."[127]

[126] Supra 49
[127] Supra 41, p. 124

XI. Conclusion

It has long been assumed that the successful prosecution of perpetrators, in the aftermath of conflicts that involve gross human rights violations, is a clean solution to a messy problem. As Antonio Cassese former Judge and President of the ICTY states: "The merits of bringing culprits to justice lie in the focus of international criminal justice on establishing individual criminal responsibility over the assignation of collective guilt".[128] Cassese further contends that justice will dissipate the call for revenge by persons denied due process "because when the Court metes out to the perpetrator just deserts, then the victims' calls for retribution are met."[129] As a result, "victims will be prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for the crimes."[130] When Cassese speaks of "just deserts" being meted out to the perpetrator, he assumes that there exists an incontestable synthesis between a court's and victims' perception of justice and that there exists a single cross-cultural perception of justice, common amongst all victims. When he states that once justice rendered the victims' calls for retribution will be met, he unquestioningly presumes that all victims have a need for retribution and that criminal justice will fulfill that supposed urgency, consequently leading to a reconciliation between victims and perpetrators. He overlooks the fact that victims may indeed have needs other than retributive ones. The premise from which Cassese makes his sweeping statements is indicative of the limited knowledge possessed, with respect to the impact on individuals and communities of gross human rights violations, by certain key figures who mould

[128] Cassese, A., *Reflections on International Criminal Justice*, Modern Law Review, Volume 61 No. 1, (1998), p. 5-6
[129] Ibid, p. 6

and steer international criminal law and the international criminal justice system. This lack of knowledge contributes in keeping victims at the periphery of the criminal process and in doing so, works to the detriment of those it is supposed to give justice to. As a consequence, the international criminal justice system defeats its own aims by jeopardizing its success in prosecuting war criminals as well as its positive contribution towards post-conflict social reconstruction. It is therefore imperative to remember that while victims are "the lifeblood" of international trials, they are also "the lifeblood" and driving force of a society's post-conflict reconstruction. If international criminal trials are to be successful, both from a legal and a post-conflict social perspective, there will be a need to depart from particular aspects of traditional criminal law which contribute to maintaining victims in the background of the criminal process, and to move toward an international criminal process that is inclusive of victims and aware of the affected community's needs.

[130] Ibid, p. 6

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