

*THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* EDITED BY BERT SWART, ALEXANDER ZAHAR AND GÖRAN SLUITER (OXFORD, UK: OXFORD UNIVERSITY PRESS, 2011) 584 PAGES. PRICE AU\$181.95 (HARDBACK) ISBN 9780199573417.

‘A legacy is not something cast in stone for all times; rather it is an evolving intellectual relationship that we construct with an object receding in the past (to the point of it being strange to speak of legacy whilst the tribunal is still in activity), and that we are condemned to reinterpret on the basis of changing circumstances and assumptions’.

— Frédéric Mégret<sup>1</sup>

The word ‘legacy’ can be understood in at least two ways. It can be that which is left behind by a legator. It can also refer to the way in which the legator (whether a person or an institution) is remembered. It is this second sense of the term ‘legacy’ that is of interest here. At the first ‘Legacy Conference’ of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in December 2010, the President of the Tribunal, Judge Patrick Robinson, said that the Tribunal would not attempt to control its own legacy.<sup>2</sup> But the Tribunal is clearly quite preoccupied with its legacy.<sup>3</sup> In addition to hosting two ‘legacy conferences’, the ICTY is one of the first — if not *the* first — international institutions to appoint a legal officer to work solely on ‘legacy issues’.<sup>4</sup> At times, this preoccupation has smacked of self-congratulation. It is therefore appropriate that more critical academic studies are now appearing on the legacy of the ICTY.<sup>5</sup>

Mégret suggests that an approach which does not attempt to ‘foist’ a particular message on the reader is appropriate in the context of legacy — it shows sensitivity to the fact that legacy is often a matter of perception,<sup>6</sup> which depends on one’s own particular relationship to the Tribunal.

Does the book intend to paint a positive or a negative picture of the Tribunal’s legacy? Two of the editors (Zahar and Sluiter) state in the Introduction that this is not the right question for readers to ask. They point out that the final section of

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<sup>1</sup> Frédéric Mégret, ‘The Legacy of the ICTY as Seen through Some of Its Actors and Observers’ (2011) 3 *Goettingen Journal of International Law* 1011, 1014.

<sup>2</sup> Patrick Robinson, ‘Opening Remarks’ (Speech delivered at the Legacy Conference: ‘Assessing the Legacy of the ICTY’, The Hague, 23 February 2010) <<http://www.icty.org/sid/10294>>.

<sup>3</sup> In addition to organising conferences on the ‘legacy’ question, the ICTY has been working on its legacy through a compilation of its ‘best practices’: Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer* (Final Report, 2009).

<sup>4</sup> An Associate Legal Officer at the Tribunal, Dianne Brown, carries the title of ‘Legacy Officer’.

<sup>5</sup> Karnavas has commented that the Tribunal should have engaged in more self-criticism: see Michael Karnavas, ‘The ICTY Legacy: A Defence Counsel’s Perspective’ (2011) 3 *Goettingen Journal of International Law* 1053, 1091. See also Symposium, ‘The Legacy of the ICTY’ (2011) 3 *Goettingen Journal of International Law* 821.

<sup>6</sup> Mégret, above n 1, 1014.

the book is devoted to more sceptical chapters, which reveal the extent to which the ICTY has improvised in order to get the job done.<sup>7</sup>

The editors concede that the collection does not do justice to the ICTY's legacy as a whole.<sup>8</sup> They describe the book as 'but the first instalment in a larger project of understanding the legacy of the international criminal tribunals generally'.<sup>9</sup> Nevertheless, the book does well for such an ambitious undertaking, covering a broad spectrum of topics in considerable depth and detail. It also displays some originality<sup>10</sup> and novelty by including neglected topics such as a comparison between rights under the European Court of Human Rights and the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('ICTY Statute')<sup>11</sup> and the practice of writing individual opinions at the ICTY.

In spite of the fact that the book has an appropriately critical tone for an academic study, it is clearly a tribute to the many achievements of the ICTY. But the book is also a tribute to Judge Bert Swart. Swart was Professor of European Criminal Law at the University of Amsterdam, *ad litem* judge of the ICTY and International Criminal Tribunal for Rwanda ('ICTR') and judge of the Special Tribunal for Lebanon.<sup>12</sup> He died in February 2011, a few months before the publication of the book. Fittingly, his coeditors have dedicated the book to him. In a sense, the book is also a tribute to the 'father of the Tribunal', Antonio Cassese, and his legacy as a judge and scholar. The legacy of the ICTY will be strongly influenced by these powerful personalities and groundbreakers.

What impact has the ICTY had on communities in the former Yugoslavia? This question has become increasingly interesting to ICTY observers and commentators.<sup>13</sup> The chapter by Kimi King and James Meernik attempts to balance international and local interests. They write:

If we are to evaluate the impact of the ICTY, we must understand the competing tensions and difficulties the Tribunal faces in advancing its mission given the diverse interests of these constituencies.<sup>14</sup>

The authors observe that something that has been noticeably absent from academic studies on the ICTY is a more explicit conceptualisation and

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<sup>7</sup> Alexander Zahar and Göran Sluiter, 'Introduction' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 1, 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> See, eg, Alexander Zahar, 'Civilizing Civil War: Writing Morality as Law at the ICTY' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 460.

<sup>11</sup> SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) art 9 ('ICTY Statute').

<sup>12</sup> See Göran Sluiter, 'In Memoriam, Bert Swart' (2011) 24 *Leiden Journal of International Law* 385.

<sup>13</sup> See, eg, Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7.

<sup>14</sup> Kimi L King and James D Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 7, 7-8.

methodology for assessing the Tribunal's impact. The authors attempt to develop a more systematic and 'theoretically driven' research agenda.<sup>15</sup>

The ICTY speaks to an international community with substantial professional interest in its work and to a national community with a substantial personal attachment to its work. These different kinds of interest have a significant effect on the way these two communities perceive the work of the ICTY. King and Meernik argue that when the interests of the national and international communities conflict, the Tribunal gives priority to the interest of its international stakeholders over local ones. They contend that the ICTY was not designed primarily to affect local stakeholders in Yugoslavia. The Tribunal's removal from the scene of the conflict substantially limited its visibility and relationship with stakeholders. Appeal Chamber decisions, for example, have been criticised as placing more emphasis on asserting and developing international law than on correcting errors made by the Trial Chamber. Since almost all ICTY cases reach the appeals stage, this is an important concern. In the authors' view, cases such as that of the 'Vukovar Three'<sup>16</sup> underscore the fact that public opinion regarding ICTY actions depend on ethnic identity.<sup>17</sup> In contrast to the views of the 'local constituencies', the ICTY managed to gain the respect of the international community.

In terms of the question of whether the ICTY has contributed to long-term reconciliation in the Balkans, Diane Orentlicher makes the sensible point that '[b]y its nature, the claim that ICTY prosecutions will serve the interests of long-term reconciliation cannot be tested now'.<sup>18</sup>

One of the reasons why the ICTY does not seem to speak to the 'local constituencies' is that it has failed to make compensation to victims or to be sufficiently victim-oriented. To what extent did the Tribunal meet the needs of the victims of the atrocities committed in the former Yugoslavia? In 2011, President Patrick Robinson made the proposal to create a Trust Fund for Victims.<sup>19</sup> Since the ICTY is wrapping up its work, it is quite late in the day for such a proposal. The questions of victims' rights and reparations to victims do not receive sufficient attention in the book. In the concluding chapter, Guido Acquaviva makes the point that inadequate attention has been paid to 'capacity-building' and outreach programmes after the judicial activities of the ICTY winds down.<sup>20</sup> There is also the question of what comes after outreach.

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<sup>15</sup> Ibid 8.

<sup>16</sup> *Prosecutor v Mrkšić (Trial Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-13/1-T, 27 September 2007).

<sup>17</sup> King and Meernik, above n 14, 32.

<sup>18</sup> Diane F Orentlicher, *Shrinking the Space for Denial* (Open Society Justice Initiative, 2008) 41.

<sup>19</sup> International Criminal Tribunal for the Former Yugoslavia, 'President Robinson's Address before the United Nations General Assembly' (Press Release, VE/MOW/PR1460e, 11 November 2011) <<http://www.icty.org/sid/10850>>.

<sup>20</sup> Guido Acquaviva, "Best before Date Shown": Residual Mechanisms at the ICTY' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 507, 514–5.

In the context of the South African Truth and Reconciliation Commission and its influence on national reconciliation, Antjie Krog wrote:

By forcing a country to redefine itself through the testimonies of victims and perpetrators, the [Truth and Reconciliation Commission] has made a new relationship possible. But the cycle will have to be repeated many times for this relationship to be lasting. It has to be accompanied by changes to the lives of the poor to create a more equitable society, otherwise this fragile outreach will implode before our eyes.<sup>21</sup>

Would public opinion in the Balkans vis-a-vis the ICTY have been more positive if the ICTY had paid reparations, or allowed victims to participate in the same way victims are currently participating at courts such as the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court ('ICC')? Although it can be argued that the mandate of the ICTY did not include the making of reparations, and only so much can be expected of the first post-Nuremberg international criminal tribunal, a discussion of the failure to make reparations would have added to the book.

While the selection of topics for a collection such as this is always difficult and controversial, the editors could have taken a broader view of the Tribunal's work. The book focuses strongly on distinct criminal law subjects such as the way the ICTY treated crimes like persecution and complicity in genocide. This might be a reflection of the ongoing academic concern with whether the ICTY was rigorous enough in its application and interpretation of criminal law, and the extent to which the Tribunal respected the principle of legality. Taking a 'bird's eye view' is appropriate in a collection with the ambition of reflecting on the legacy of an institution. Choosing topics that are too specific or narrow can mean that one does not see the wood for the trees. Authors could also have paid more attention to how the different topics in the book relate to each other.

Another fundamental question which could have been addressed more explicitly is that of whether the Tribunal developed a theory or philosophy of its own. In light of the presence of judges of the stature of Antonio Cassese and Theodor Meron, it would also have been interesting to address what contributions individual judges made to the philosophy of the ICTY. Although books have already been dedicated to Cassese's contribution to international criminal law,<sup>22</sup> it would also have been appropriate to include a discussion in this collection. In his chapter 'Civilising Civil War: Writing Morality as Law', Alexander Zahar writes about Cassese's philosophical contribution to international criminal law. Zahar refers to Cassese's early work, in which he called for a shake-up of the law of non-international armed conflict in order to render 'the few existing norms live and operational and even emphasize the moral authority where the law is silent'.<sup>23</sup> Zahar writes that by making these

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<sup>21</sup> Antjie Krog, *Country of My Skull* (Random House, 1998) 292.

<sup>22</sup> See, eg, Lal Chand Vohrah and Antonio Cassese (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003).

<sup>23</sup> Tamàs Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (T M C Asser Press, 2010) 58, 58.

remarks, Cassese ‘forecasts that moral purpose [will] one day fill the gaps in the law’.<sup>24</sup>

While more chapters with a broad focus would have been fitting, the inclusion of certain topics that closely relate to the legacy question would have merited attention. One such question concerns archives and the management of ICTY records. Richard Steinberg’s edited collection of contributions made at the ICTY’s 2010 Legacy Conference, *Assessing the Legacy of the ICTY*,<sup>25</sup> devotes a considerable number of (short) chapters to this issue. The authors in the Steinberg volume agree on the importance of archives.<sup>26</sup> However, Swart, Sluiter and Zahar did not include it in their selection. In their book, most of the chapters are of quite a descriptive nature; the fate of the ICTY archives is only discussed briefly in the concluding chapter. It would have been interesting to include a theoretical chapter on the topic of archives and the preservation of memory. There is a rich and growing literature on this issue in the field of transitional justice.<sup>27</sup> By only including the topic of archives in a general chapter on ‘Residual Mechanisms at the ICTY’, alongside such subjects as witness protection, the book misses an opportunity to engage with the deeper question of what impact the ICTY has had on the way the events in the Balkans will be remembered. Since the concept of legacy is intimately linked to the way things will be remembered, it would have fitted perfectly.

Swaak-Goldman has noted that the ICTY’s significant shortcomings in satisfying a high standard of human rights for its accused are regarded by its critics as ‘a death-knell both for the broad acceptance of the ICTY’s jurisprudence as well as the prospects for a permanent international criminal court’.<sup>28</sup> The collection pays considerable attention to the crucial question of whether the ICTY has rigorously observed fair trial standards. The editors acknowledge that some of the areas on procedural law are heavily contested, and appropriately call this section of the book ‘Battlefields’. Issues such as complicity in genocide, justifications and excuse, as well as sentencing practice, are seen as legal battlefields.

The last section of the book is revealingly and provocatively titled ‘Improvisation and Discovery’. This is an acknowledgment of the fact that when the ICTY judges first began to apply the rudimentary rules of international

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<sup>24</sup> Zahar, above n 10, 490.

<sup>25</sup> Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011).

<sup>26</sup> See Navanethem Pillay, ‘Core Issues: Establishing Archives and the Residual Mechanisms’ in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011) 53; Konrad G Buehler, ‘The Role of the UN Security Council in Preserving the Legacy of the Tribunals: Establishment of a Residual Mechanism and Preservation of Archives’ in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011) 59; Elizabeth Emmerson, ‘How to Best Preserve the Records of the ICTY’ in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011) 69; Catherine Marchi-Uhel, ‘The Availability and Accessibility of ICTY Archives via Information Centers’ in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011) 75.

<sup>27</sup> See, eg, Wessel le Roux and Karin van Marle (eds), *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of the Republic of South Africa* (Pretoria University Law Press, 2007). See also A J Barnard-Naude, ‘Negotiating the Archive: Amnesty, Justice and Memory: Review Article of Antje du Bois-Pedain, *Transitional Amnesty in South Africa*’ (2009) 22 *South African Journal of Criminal Justice* 419.

<sup>28</sup> Olivia Swaak-Goldman, ‘The ICTY and the Right to a Fair Trial: A Critique of the Critics’ (1997) 10 *Leiden Journal of International Law* 215, 215.

criminal law, they embarked upon a process of discovery. The word ‘improvisation’, used in this context, is inherently controversial and critical. It has often been commented that the ICTY judges improvised instead of applying *lex lata*.<sup>29</sup>

One of the results of such improvisation — and one of the central criticisms of the ICTY’s track record with regard to fair trial standards — concerns the extent to which the ICTY departed from the principle of legality. In spite of the fact that the principle of legality is not included in the *ICTY Statute*, there can be no doubt that it applies to the practice of the Tribunals, inter alia, because of its inclusion in many human rights instruments.<sup>30</sup> Since the ICTY has been established as a subsidiary organ of the Security Council, it should not act contrary to the principles included in various United Nations instruments. In cases such as *Prosecutor v Vasiljević* (‘*Vasiljević*’), the ICTY has extensively discussed the principle of legality.<sup>31</sup> *Vasiljević* stressed the need for precision and the need for international criminal law to be grounded on principles of specificity. The Chamber emphasised that offences have to be defined with sufficient clarity to be foreseeable and accessible.<sup>32</sup> Commentators have argued that the open-ended crime definitions in the *ICTY Statute* violate the principle of legality.<sup>33</sup>

In a very critical discussion of the *Prosecutor v Tadić* (‘*Tadić*’) case,<sup>34</sup> Zahar writes that the *Tadić* judges departed from the principle of legality. He writes:

If the Security Council could criminalise a treaty provision ‘for the first time’ and apply it retrospectively to conduct in an earlier conflict without regard to whether a general acceptance of such a change in status predated the relevant events, what was to detain the Tribunal’s judges?<sup>35</sup>

Zahar paints the pre- and post-*Tadić* legal landscapes with regard to the discourse on the law of internal armed conflicts. Whereas Tamàs Hoffman explains that prior to *Tadić*, ‘none of the existing international criminal law textbooks made any reference to the possibility of war crimes committed in internal armed conflicts’,<sup>36</sup> the ICTY’s jurisprudence has evolved to a point

<sup>29</sup> See, eg, Diane F Orentlicher, ‘Foreword’ (1998) 13 *American University International Law Review* x.

<sup>30</sup> See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 11(2); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 7(1).

<sup>31</sup> *Prosecutor v Vasiljević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-98-32-T, 29 November 2002) [195].

<sup>32</sup> *Ibid* [198].

<sup>33</sup> See, eg, Roelof Haveman, ‘The Principle of Legality’ in Roelof Haveman, Olga Kavran, Julian Nicholls (eds), *Supranational Criminal Law: A System Sui Generis* (Intersentia, 2003) 39, 57–8.

<sup>34</sup> *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 2 October 1995).

<sup>35</sup> Zahar, above n 10, 492.

<sup>36</sup> Hoffmann, above n 23, 61.

where the ICTY prosecutor has succeeded in using Common Article 3 of the *Geneva Conventions*<sup>37</sup> as a foundation for a large proportion of the prosecution's criminal charges. Zahar writes that the ICTY has transformed Common Article 3 into a Swiss Army knife of humanitarian law.<sup>38</sup> In his view, these rapid legal developments show little sensitivity for the fact that international law should develop incrementally if it develops at all.<sup>39</sup>

The collection pays surprisingly little attention to that other jurisprudential hot potato: joint criminal enterprise. In her chapter 'Complicity in Genocide and the Duality of Responsibility', Nina Jørgensen discusses the way the ICTY has settled the law on aiding and abetting genocide. She devotes a few pages to a discussion on the relationship between complicity in genocide and joint criminal enterprise.<sup>40</sup> Jørgensen identifies the fact that international tribunals had rejected the notion that planners of genocide could be described as 'mere accomplices'. She discusses cases such as *Prosecutor v Brđanin*,<sup>41</sup> *Prosecutor v Rwamakuba*,<sup>42</sup> *Prosecutor v Krstić*,<sup>43</sup> *Prosecutor v Stakić*<sup>44</sup> and *Prosecutor v Karemera*,<sup>45</sup> in which the ICTY and the ICTR have considered whether joint criminal enterprise liability applies to genocide. Jørgensen concludes that '[t]he evolution of the jurisprudence [of the Tribunals] shows that a conviction under any of the three forms of joint criminal enterprise liability would be a conviction for genocide'.<sup>46</sup>

In the view of Mégret, the tribunal will be remembered as an 'intellectual, legal or political object of sorts'.<sup>47</sup> One can add that the Tribunal is also an historical and cultural object.<sup>48</sup> The term culture in this context can be understood in many ways. It can be understood in a 'cultural-juridical' sense. Or

<sup>37</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

<sup>38</sup> Zahar, above n 10, 492.

<sup>39</sup> *Ibid* 477–92.

<sup>40</sup> Nina H B Jørgensen, 'Complicity in Genocide and the Duality of Responsibility' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 247, 259–63.

<sup>41</sup> *Prosecutor v Brđanin (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004).

<sup>42</sup> *Rwamakuba v Prosecutor (Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-AR72.4, 22 October 2004).

<sup>43</sup> *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001).

<sup>44</sup> *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003).

<sup>45</sup> *Prosecutor v Karemera (Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 18 May 2006).

<sup>46</sup> Jørgensen, above n 40, 263.

<sup>47</sup> Mégret, above n 1, 1015.

<sup>48</sup> *Ibid* 1021–2.

it can refer to the emerging human rights culture; in 2004, Ralph Zacklin wrote that ‘a new culture of human rights and human responsibility ... has gradually taken root’.<sup>49</sup> Mégret writes that one would expect a legacy of the ICTY to be a ‘certain culture of international prosecutions’, involving ‘a highly specific form of know-how about how to prosecute persons’.<sup>50</sup> In an interview with Mégret, Payam Akhavan referred to a ‘cultural transformation’ instead of an ‘immediate impact on the propensity of genocidal leaders across the globe to cease and desist from all further atrocities because of fear of punishment’.<sup>51</sup> For Akhavan, this evidenced a ‘culture of impunity gradually being transformed into a culture where there [are] ever greater degrees of accountability’.<sup>52</sup>

Thomas Franck wrote that every bench creates its own ‘cultural environment’.<sup>53</sup> In his chapter on ‘The Law and Practice on Individual Opinions at the ICTY’, Göran Sluiter discusses the under-analysed topic of the nature of judicial decision-making at the ICTY. He is of the view that individual opinions develop the law. He writes that the use of individual opinions should be based ‘on a common legal culture and understanding, mutual respect, and collegiality, and the exercise of restraint’.<sup>54</sup> A consideration of the culture created by the ICTY would have added to the book.

Many agree that beyond carrying out its formal mandate, the ICTY not only prosecuted perpetrators, but rendered justice. It significantly improved upon the Nuremberg model by prosecuting both sides of the conflict. Peter Robinson, Defence Counsel for Radovan Karadžić, has stated in an interview with Mégret:

I have to say that in most of the cases, when it comes to finding guilty people guilty and not guilty people not guilty, the Tribunal seems to have gotten it right in the end which is, after all, its main function.<sup>55</sup>

But not everyone agrees. Michael Karnavas writes that the selective method of prosecution has undermined the credibility of the ICTY as an impartial Tribunal and that this, in turn, has undermined the Tribunal’s objective of reconciliation.<sup>56</sup> The danger of selective prosecution is that ‘the narrative that has emerged from the ICTY as to what may have happened ... is unreliable and misleading’.<sup>57</sup> The ICTY has repeatedly emphasised that it considers building an archive as an important part of its ‘legacy work’. But does this archive tell the right story?

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<sup>49</sup> Ralph Zacklin, ‘The Failings of the Ad Hoc Criminal Tribunals’ (2004) 2 *Journal of International Criminal Justice* 541.

<sup>50</sup> Mégret, above n 1, 1021–2.

<sup>51</sup> *Ibid* (emphasis in original).

<sup>52</sup> *Ibid* 1022.

<sup>53</sup> T M Franck, ‘Judicial Fairness: The International Court of Justice’ (1993-III) 240 *Recueil des Cours* 302, 307.

<sup>54</sup> Göran Sluiter, ‘Unity and Division in Decision Making — The Law and Practice on Individual Opinions at the ICTY’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 191, 217.

<sup>55</sup> Mégret, above n 1, 1052.

<sup>56</sup> Karnavas, above n 5, 1089. See generally Sara Kendall, ‘Donor’s Justice’ (2011) 24 *Leiden Journal of International Law* 585.

<sup>57</sup> Karnavas, above n 5, 1089.

There is a widespread feeling that the ad hoc Tribunals have been too expensive. In the year 2010–11 the ICTY budget exceeded US\$301 million.<sup>58</sup> The enormous cost of the Tribunal has raised many concerns.<sup>59</sup> In the context of the international courts, there were fears that ‘he who pays the piper calls the tune’.<sup>60</sup> It would have been interesting to explore the extent to which the interests of donors influence the independence of the ICTY. The influence of financial matters extends beyond the degree to which the ICTY’s dependence on funding has affected its decision-making. The controversy extends to the question of how money was allocated at the ICTY. One important example is the fact that in the early years of the Tribunal’s existence, the defence was not provided with sufficient resources.<sup>61</sup> This is a topic that deserves attention when considering factors that impact on the ICTY’s legacy.

In many ways it is premature to immerse oneself too deeply in the question of the legacy of the Tribunal. In this case it is appropriate to use the tired cliché ‘time will tell’. The legacy of the ICTY will depend more on the day-to-day work of the Tribunal than on the way outsiders attempt to scrutinise its work or its own attempts to (prematurely?) fashion its legacy.

If one takes into account the laconic *ICTY Statute*, the lack of precedent to draw from, and the early battles faced by those such as Goldstone and Cassese to get the Tribunal up and running,<sup>62</sup> the ICTY has made an enormous contribution. It has built not only a Tribunal but a legal discipline. Not many courts can claim to have done the same. It is because of the work and integrity of the ICTY, and the legitimacy it has achieved, that the ICC will receive the support it needs from the international community. It is because of the legal developments at the ICTY that international criminal law has become a rich discipline studied all over the world. The *Legacy of the International Criminal Tribunal for the Former Yugoslavia* captures the magnitude of this contribution successfully.

The ICTY cannot meet all expectations or achieve all goals.<sup>63</sup> At the time of the *Tadić* decision, Jose Alvarez expressed the ambition of the ICTY as a Tribunal with ‘foundational, political and epic goals’.<sup>64</sup> Any institution with such strong ambitions is bound to disappoint on some level. At the same time, it is

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<sup>58</sup> International Criminal Tribunal for the Former Yugoslavia, *The Cost of Justice* (26 January 2012) <<http://icty.org/sid/325>>.

<sup>59</sup> See, eg, David Wippman, ‘The Cost of International Justice’ (2006) 100 *American Journal of International Law* 861.

<sup>60</sup> See, eg, Kendall, above n 56.

<sup>61</sup> See, eg, John Hocking, ‘Legal Aid and Defence Support at the UN International Criminal Tribunal for the Former Yugoslavia’ (2010) 36 *Commonwealth Law Bulletin* 529; Sylvia de Bortodano, ‘What Price Defence? Resourcing the Defence at the ICTY’ (2004) 2 *Journal of International Criminal Justice* 503.

<sup>62</sup> See John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press, 2003) 62–78.

<sup>63</sup> Schrag sets out a list of goals including bringing sense of justice, re-establishing the rule of law, providing a foundation for peace, enforcing international law and ending impunity; Minna Schrag, ‘Lessons Learned from ICTY Experience’ (2004) 2 *Journal of International Criminal Justice* 427, 428, cited in Albin Eser, ‘Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 108, 110.

<sup>64</sup> Jose E Alvarez, ‘Nuremberg Revisited: The *Tadic* Case’ (1996) 7 *European Journal of International Law* 245, 246.

appropriate for an international Tribunal to have wide aims and to look beyond its official mandate. The fact that, in a historical sense, the ICTY is perceived to be the 'successor' of the Nuremberg Tribunal means that its work has attracted much attention, much scrutiny and much hope.

But it is too soon for nostalgia. The ICTY has proven to be like the cat with nine lives. It refuses to close down! With the trial of Ratko Mladić in full swing,<sup>65</sup> one can expect some drama and excitement before the Tribunal finally closes its doors. And when that happens it is more likely to be with a bang than a whimper.

MIA SWART\*

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<sup>65</sup> *Prosecutor v Mladić (Decision on Two Defence Requests for Adjournment of the Start of Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-09-92-PT, 3 May 2012).

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