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The Genocide Convention

The Legacy of 60 Years

edited by

H.G. van der Wilt, J. Vervliet, G.K. Sluiter
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15. Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia¹

Eric Ketelaar

1. Introduction

In 1993, the United Nations (hereinafter UN) Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY) “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.”² The central purpose of the ICTY, as of any criminal court, is the deterrence of, and retribution for serious wrongdoing.³ But from the start, expectations of what the Tribunal could achieve went beyond the primary judicial goal of establishing the truth about and a historical record of what happened, contributing to healing individuals’ and communities’

1 This is a slightly different version of my paper, “Truths, Memories, and Histories in the Archives of the ICTR and the ICTY,” presented at the conference “60 Years Genocide Convention,” organized by the Amsterdam Center for Holocaust and Genocide Studies, the Amsterdam Center for International Law and the Peace Palace Library, The Hague, 8 December 2008. Another version was published as E. Ketelaar, “A living archive, shared by communities of records”, in *Community archives. The shaping of memory*, eds. J. A. Bastian and B. Alexander (London, Facet 2009) 109-132.

2 United Nations Security Council (1993) *Resolution 827*, http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf [accessed 22 June 2011]; M.C. Bassiouni, and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington N.Y, Transnational, 1996) 1-36 and 199-236; M.P. Scharf, *Balkan Justice: the story behind the first international war crimes trial since Nuremberg* (Durham N.C., Carolina Academic Press 1997); G.J. Bass, *Stay the Hand of Vengeance: the politics of war crimes tribunals* (Princeton and Oxford, Princeton University Press 2000).

3 M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, Transaction 1997).

traumas, and to reconciliation.⁴ Connected with the diverse expectations of the outcomes of the Tribunal's work are expectations of the role the Tribunal's archives can play. Anticipations are mounting as the ICTY's work is near completion and decisions about the legacy of the Tribunal are imminent.

In this essay, I explore the potentials of the ICTY archives in establishing truth, engaging with history and practicing memory – all of which may help communities in the former Yugoslavia and elsewhere to not only come grips with their own past but to also acknowledge a past shared with neighboring ethnic and political communities.⁵ I will argue that these expectations can only be met by a living archive as a place of contestation allowing for what Hayden White has called different kinds of discourse about “what happened and what is to be done”—the archive not merely as a storage technique but primarily as a force for delegitimizing mystified and traditionalised memories.⁶

Media in Bosnia and Herzegovina, Republika Srpska, Serbia, and Croatia brought the archives of the ICTY into the limelight with headlines like: “Sarajevo joins race for ICTY archive”;⁷ “Discussion on the fate of ICTY archive”⁸; “Fighting for the Hague documents”⁹; “BiH, Serbia, Croatia all lobby to take over ICTY archives”.¹⁰ The headlines also attest to contesting views on the fate of the archives, which vary by region in the former Yugoslavia.¹¹ Even within one region there are competing views. The mayor of Sarajevo reportedly claimed that the ICTY archives contain “the only established version of the truth, unlike the three versions that currently exist” in Bosnia and Herzegovina.¹²

4 S. Power, “Stopping Genocide and Securing ‘Justice’: learning by doing,” *Social Research*, 69 (2002) 1099–1106.

5 I refrain from dealing with “memoricide”: eradicating communities’ identities by destroying their archives. See J. Kolanovic, “Archives en temps de guerre: l’expérience de la Croatie,” *Archivum*, 42 (1996) 173–180; M. Kovacevic, “War Damage Suffered by the State Archives of Bosnia and Herzegovina,” *Archivum*, 42 (1996) 181–186; A.J. Riedlmayer, “Crimes of War, Crimes of Peace: destruction of libraries during and after the Balkan wars of the 1990s,” *Library Trends*, 56 (2007) 107–132.

6 H. White, “Catastrophe, Communal Memory and Mythic Discourse: the uses of myth in the reconstruction of society,” in *Myth and Memory in the Construction of Community: historical patterns in Europe and beyond*, ed. B. Stråth (Bruxelles and New York, P.I.E.-Peter Lang: 2000) 55.

7 “Sarajevo Joins Race For ICTY Archive,” *Dnevni avaz*, (20 November 2007).

8 “Discussion on the Fate Of ICTY Archive,” *Nezavisne novine*, (24 November 2007).

9 “Fighting for the Hague Documents,” *Nedeljni Telegraf*, (19 March 2008), 5.

10 “The archive material of the Tribunal is of crucial importance, our history will be written based on it,” *Vecernji list* (25 March 2008).

11 The territory of the former Yugoslavia comprises the states of Bosnia and Herzegovina (consisting of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska), Croatia, Kosovo, Republic of Macedonia, Montenegro, Serbia, and Slovenia.

12 S. Škuletić, “Sarajevo Major: The City of Sarajevo will Request the ICTY Archives On Its Own,” *Dnevni avaz Dnevni avaz*, 5 (2008); P.B. Miller, “Contested Memories: the

Since its establishment the Tribunal has indicted 161 persons. As of June 2011, proceedings against 125 have been concluded. Proceedings are on-going with regard to thirty-six accused, and one (Hadžić) is still at large.¹³ In 2003, the Security Council called on the ICTY to take all possible measures to complete the work. It is now estimated that all trials and appeals will be concluded in 2012. A key component of the ICTY completion strategy concerns the appropriate disposition of its archives.

In 2005, I submitted to the registrar of the ICTY a report called “The Legacy of the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY): Justice, Reconciliation, and Memory,” based on research carried out between September 2004 and July 2005.¹⁴ Concurrently, the United States Institute of Peace and the National Peace Foundation sponsored Trudy Huskamp Peterson to undertake a comparative review of the temporary international tribunals and the records they create.¹⁵ While my report focuses on the measures to be taken with regard to the ICTY records in the framework of the Tribunal's completion strategy, Peterson's report offers a conceptual framework for creating a central international judicial archive under UN auspices, with standards to select, preserve, and manage the records of temporary international criminal courts.

I reconnected with the ICTY archives when I was appointed as a member of the Advisory Committee on the Archives of the UN Tribunals for the former Yugoslavia and Rwanda (ACA), established by the registrars of the two Tribunals in October 2007.¹⁶ The ACA was mandated to provide an independent comparative analysis of

Bosnian genocide in Serb and Muslim minds,” *Journal of Genocide Research*, 8 (2006) 311–324.

13 www.icty.org (Accessed 22 June 2011).

14 E. Ketelaar, *The Legacy of the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY): justice, reconciliation, and memory* (Amsterdam, University of Amsterdam: 2005) (unpublished). I was assisted by postgraduate students enrolled in the Master of Archival Science program of the University of Amsterdam: Ernestine Baake, Esther Balkestein, Jelle Bosma, Marie-Christine Engels, Kees Fluyt, Wim Mastenbroek, and Natasja Pels. I presented some of the results of this research to the Second International Conference on the History of Records and Archives (ICHORA2) in Amsterdam, 1–3 September 2005.

15 T.H. Peterson, *Temporary Courts, Permanent Records* (Washington DC, United States Institute of Peace: 2006), <http://www.usip.org/files/resources/sr170.pdf> [accessed 22 June 2011]; see also T.H. Peterson, *Final Acts: a guide to preserving the records of truth commissions* (Woodrow Wilson Center Press and The Johns Hopkins University Press, Washington DC and Baltimore 2005) http://www.wilsoncenter.org/press/peterson_finalacts.pdf [accessed 22 June 2011].

16 The other members of ACA were Justice Richard Goldstone, former Chief Prosecutor of the ICTY and the ICTR (chair), Saliou Mbaye, former national archivist of Senegal, Judge Mohamed Othman, a member of the Tanzanian High Court, former Prosecutor at the East Timor UN Administration, and former Chief of Prosecutions at the ICTR, and Cecile Aptel, former staff member of both the ICTY and ICTR. I have benefited greatly from the insights and fellowship of the ACA. I also want to record my gratitude to Hans Holthuis, registrar of the ICTY and his staff for their invaluable assistance and

the potential locations for the archives of each of the Tribunals and to examine related issues concerning those archives. The ACA submitted its report to the registrars in September 2008.¹⁷

2. ICTY Archives

The ICTY archives comprise video and audio recordings, 2,200 gigabytes of electronic material, artifacts, and 1,449 meters of paper records.¹⁸ Nearly eighty-two percent of the paper records exist in both paper and digital format. The bulk (seventy percent) are the substantive records of the Office of the Prosecutor (OTP). These include records and material obtained in the course of investigations, such as witnesses' statements and other evidence. All over the former Yugoslavia, the OTP seized documents by the truckload, and from various sources tons of documents, photographs, intercepts of telecommunications, and videos were received.¹⁹ They are from public and private provenances and include records of military and civil government agencies in and outside the former Yugoslavia, personal correspondence, audiovisual items, diaries, and other similar material. In most cases, the originals have been returned to the owner or provider, leaving a copy in the archives of the Tribunal.

A second category are the judicial records comprising all court files and records obtained or generated by the Tribunal in support of and during the indictment phase, the pretrial, trial, and appeal procedures, as well as procedures relating to the

support to my research. The views expressed in the present paper are those of the author in his personal capacity and do not necessarily represent the views of the United Nations.

- 17 Unlike my 2005 study and the ACA report the present paper does not deal with the current management and the future location of the ICTY archives. Those and other issues are dealt with in the Report of the Secretary-General of the United Nations "on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals," 21 May 2009 http://icty.org/x/file/About/Reports%20and%20Publications/Completion-Strategy/090521_sg_report_residual_mechanism.pdf [accessed 22 June 2011] and in Resolution 1966 (2010) of the UN Security Council, 22 December 2010 http://www.icty.org/x/file/About/Reports%20and%20Publications/ResidualMechanism/101222_sc_res1966_residualmechanism_en.pdf [accessed 22 June 2011].
- 18 The term archives applies, according to the UN administrative instruction ST/AI/326 of 28 December 1984, "to those records to be permanently preserved for their administrative, legal, historical or informational value." Records are, following the definition in that instruction, "all documentary materials, regardless of physical type, received or originated" by the Tribunal: http://archives.un.org/unarms/doc/AI_326_UN_Archives_.pdf [accessed 22 June 2011]. I have updated some figures from Peterson, *Temporary Courts* on the basis of information provided by ICTY staff, as of November 2007/August 2008. See also the figures in the Report of the Secretary-General (2009), referred to in the preceding footnote.
- 19 J. Hagan, *Justice in the Balkans: prosecuting war crimes in the Hague tribunal* (Chicago, University of Chicago Press: 2003).

transfer of cases. These include English and French transcripts and the audio-visual recordings of the proceedings, evidence tendered in court, motions, decisions, and all other documents and relevant correspondence created by the judges and the parties.

Other types of records that relate to the judicial process, but are not part of the official case files, are records of meetings; general correspondence files; records concerning the privileges and immunities of the Tribunal; agreements with the host country, with other states, and with intergovernmental organizations; correspondence with individual states in order to help enforce sentences and the relocation of witnesses; press files; publications by the Tribunal; and, lastly, the Tribunal's website (www.icty.org), which is, among other things, an archive from which the public can download the public version of transcripts, etc. In 2008, the website recorded more than one million page hits each month for the English site and close to one million each month for the Bosnian/Croatian/Serbian site.

The administrative records include records concerning human resources, procurement, finance, and other administrative support functions. Judges, the prosecutor, the registrar, and members of staff will have kept working papers. To the extent that they relate to the conduct of the Tribunal's activities, they have value as part of the ICTY's legacy.²⁰ This applies equally to the records created and received by the defense counsel and not submitted to the Tribunal.

The ICTY's Judicial Database (JDB) provides electronic access to court records in most of the Tribunal's cases.²¹ The JDB includes court filings, judgments, decisions, exhibits (but not three dimensional artifacts), transcripts, and statistical information needed for registered users (usually from the OTP and the defense counsel) to conduct legal research. The database has to be separately accessed for public records, and confidential material may only be accessed with the appropriate security access. The JDB is a legal research tool and not designed to function as a database of archival records.

As early as 1994, the judges instructed the registrar to make and preserve "a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings".²² All courtroom sessions have been recorded on video (with audio track) and audio. The complete

- 20 J.L. Sax, *Playing Darts with a Rembrandt: public and private rights in cultural treasures* (Ann Arbor, University of Michigan Press: 1999).
- 21 D. Pimentel, "Technology in a War Crimes Tribunal: recent experiences at the ICTY," *William and Mary Bill of Rights Journal*, 12 (2004) 715-729; Peterson, *Temporary Courts, Permanent Records*.
- 22 United Nations International Criminal Tribunal for the former Yugoslavia (2006) *ICTY Rules of Procedure and Evidence*, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf [accessed 22 June 2011] rule 81; P. Mason, *Report on the Impact of Electronic Media Coverage of Court Proceedings at the International Criminal Tribunal for the former Yugoslavia* (The Hague and Southampton, Centre for Media and Justice at the Southampton Institute: 2000); Peterson, *Temporary Courts, Permanent Records*; S. Haufek, *Reconciliation and the Expansive Archive: cultural memory and the legacy of the International Criminal Tribunal for the former*

video contains all confidential material (for example testimonies by witnesses whose identity has to be kept secret), while a redacted version contains only public material. The audiovisual record of the proceedings is more comprehensive than the official transcripts. The transcripts exist in two versions, in English and French, while the audiovisual record contains Bosnian, Croatian, and Serbian as spoken by defendants and witnesses. Moreover, in the transcripts 'the entire visual content of the footage of atrocities committed throughout the region is in most instances reduced to two words: "videotape played".²³

Legally, the records created and received by the Tribunal are the property of the UN. However, they do not belong to the Tribunal; they constitute a legacy, a "joint heritage," shared by a number of "communities of records".²⁴ These communities consist of different stakeholders (to be identified in the following section), each with a right to know from the ICTY archives.

Stakeholders

The stakeholders with a concern in the ICTY archives occupy different spatial and temporal positions, depending on the degree of their involvement in the core business of the Tribunal. The interests of stakeholders change over time. Some will not have an immediate interest; others' interests may gradually increase or decrease.

The first category of stakeholders comprises those who now or in the near future have an interest in the primary legal business of the ICTY, viz., to bring to justice persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This goal will not be reached upon completion of the Tribunal's mandate in 2012. Part of the completion strategy is to transfer to competent national jurisdictions (inside and outside the former Yugoslavia) those cases involving the accused of intermediate and lower rank.²⁵ For domestic courts, prosecutors, and defence counsel, the ICTY records will continue to be active records.²⁶

Yugoslavia. Master's thesis (unpublished) (Amsterdam, University of Amsterdam, Department of Media Studies: 2006).

23 H. Lennon, "A Witness to Atrocity: film as evidence in international war crimes tribunals," in *Holocaust and the Moving Image: representations in film and television since 1933*, eds. T. Gaggith, and J. Newman (London, Wallflower Press: 2005) 65-73.

24 E. Ketelaar, "Sharing: collected memories in communities of records," *Archives and Manuscripts*, 33 (2005) 44-61.

25 D. Raab, "Evaluating the ICTY and its Completion Strategy: efforts to achieve accountability for war crimes and their tribunals," *Journal of International Criminal Justice*, 3 (2005) 82-102.

26 According to Rule 11bis (D) of the ICTY Rules of Procedure and Evidence, when a case is referred to another court, "the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment": United Nations International Criminal Tribunal for the former Yugoslavia (2006) ICTY Rules of Procedure and Evidence, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf [accessed 22 June 2011].

Fifteen states have so far agreed to enforce the Tribunal's sentences. The judicial authorities in these countries need to have access to the medical files and other records concerning convicts, which were created by the ICTY. The Tribunal retains certain supervisory responsibilities,²⁷ which (upon completion of the Tribunal's mandate) have to be transferred to a successor agency. That successor agency will need access to the relevant records. Other stakeholders with an interest in ICTY's archives, because they were involved in the core legal business of the Tribunal, are the United Nations, former ICTY staff and defense counsel, governments in the region, indicted and convicted persons, and witnesses.

Slightly more distant from the core legal business of the Tribunal, but nevertheless with an interest in the primary values of the Tribunal's records are victims and their relatives, many of whom live outside the former Yugoslavia;²⁸ victims' groups and other nongovernmental organizations; the media; the International Criminal Tribunal for Rwanda; the International Criminal Court; and other criminal justice organizations.²⁹ Scholarly researchers (in law, history, political science, etc.) intersect this first category of stakeholders as well as the second, which comprises all those who were not directly involved in the trials before the Tribunal but whose interest in the Tribunal's archives will develop over time.³⁰ The ICTY archives have a significant secondary value for several reasons, analogous to the arguments recently proposed by Bruce Montgomery with regard to the archives of human rights organizations:

1. The archival record is important for historical accountability, which will be 'used by researchers, prosecutors, and victims alike with the aim of analyzing and making known the dimensions of particular human rights violations;'
2. The archival evidence 'is important for the memory of the thousands of victims and survivors of human rights abuses, their relatives, and others who must individually confront the truth of what transpired. Retaining the memory of victims and survivors is also important to preserve at least some semblance of identity for those who suffered extreme depredations...;'
3. Archival records of human rights abuses will likely assume new and critical importance as this evidence becomes pivotal in the adjudication of cases. Post-

27 D. Tolbert, "Reflections on the ICTY Registry," *Journal of International Criminal Justice*, 2 (2004) 480-485; Peterson, *Temporary Courts, Permanent Records*.

28 L. Huttunen, "'Home' and Ethnicity in the Context of War: hesitant diasporas of Bosnian refugees," *European Journal of Cultural Studies*, 8 (2005) 177-195.

29 Peterson, *Temporary Courts, Permanent Records*; T. A. Adami and M. Hunt, "Genocidal Archives: the African context – genocide in Rwanda," *Journal of the Society of Archivists*, 26 (2005) 105-121.

30 The archives of the International Military Tribunal and the US Nuremberg Military Tribunals are, some 60 years since their creation, used very rarely by lawyers and professional historians, but mostly by private individuals interested in a relative who testified or served in some capacity with the court, or people who are a relative of a victim of Nazi aggression etc. (T.K. Nenninger (US National Archives and Records Administration), personal communication to E. Balkestein, University of Amsterdam, March 15, 2005).

authoritarian governments can only be helped if they confront the crimes of the past and end impunity with the aim of building new democratic societies based on the rule of law.³¹

3. Truths

In February 2007, the Humanitarian Law Center in Belgrade, along with its partners the Research and Documentation Center in Sarajevo and Documenta Center for Dealing with the Past in Zagreb, jointly organized a forum called Establishing the Truth about War Crimes and Conflicts. The conference agreed that the ICTY archives will play a very significant role in truth-telling and truth-seeking. During the conference, however, representatives of victims' organizations expressed their disapproval of its title "claiming that victims are the only rightful owners of the truth".³² What did they mean by 'the truth'?

Four notions of truth were used by the South African Truth and Reconciliation Commission: factual or forensic truth; personal or narrative truth; social or 'dialogue' truth, and healing and restorative truth.³³ Richard Wilson proposes to categorize these into two truth paradigms: forensic truth and narrative truth.³⁴ The former is "the familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures".³⁵ As an ICTY president wrote, establishing the truth in the courtroom of the ICTY means that the atrocities in former Yugoslavia will become "facts established by law".³⁶ However, defendants, witnesses, prosecutors, and judges tell, hear, and record something that counts as true in a particular case, a particular trial, within the legal context.³⁷ The legal forum is not interested in anything but the fo-

- 31 B.P. Montgomery, "Fact-Finding by Human Rights Non-Governmental Organizations: challenges, strategies, and the shaping of archival evidence," *Archivaria*, 58 (2004) 23.
- 32 Documenta center for dealing with the past, *Conclusions from International Conference "Establishing the Truth about War Crimes and Conflicts," Second Regional Forum on Transitional Justice* (2007) <http://www.documenta.hr/eng/index.php?option=content&task=view&id=29&Itemid=> [accessed 4 July 2008].
- 33 Truth and Reconciliation Commission of South Africa, *Report*, vol. 1 (1998) <http://www.doj.gov.za/trc/report/> [accessed 22 June 2011]; A.R. Chapman and P. Ball, "The Truth of Truth Commissions: comparative lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly*, 23 (2001) 1-43.
- 34 R. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post apartheid State* (Cambridge, Cambridge University Press: 2001).
- 35 Truth and Reconciliation Commission of South Africa, *Report*, 111.
- 36 C. Jorda, "The Major Hurdles and Accomplishments of the ICTY: what the ICC can learn from them," *Journal of International Criminal Justice*, 2 (2004) 572-584, 577.
- 37 J. Edkins, *Trauma and the Memory of Politics* (Cambridge, Cambridge University Press: 2003); Montgomery, "Fact-Finding by Human Rights Non-Governmental Organizations."

rensic truth. It cannot "move beyond categorising through abstractions that are necessarily reductions in the scope of possible categorisations of persons and events."³⁸

This 'legal myopia' continues to cause misunderstanding and frustration to victims who want to tell their truth, but for whom only a legal forum is accessible. They are "tools in the prosecutors' case, confined in their testimony to only those fragments of their experience that meet the legal standard of relevant evidence".³⁹ One can only guess what many of the thousands of witnesses before the ICTY may have endured.⁴⁰ One of the Tribunal's fundamental contributions to international humanitarian law is its jurisprudence on sexual slavery and rape.⁴¹ However, as a former senior trial attorney regretfully remarked, "the priority in the case seemed to be on legal theory rather than on the more immediate purpose of illustrating and showing how, and explaining why, sexual assault is used as a weapon of terror".⁴² On the other hand, for many witnesses giving testimony gave "a little bit of dignity".⁴³ Also, several of ICTY's judgments contain a narrative explaining the origins and contexts of the conflict, thereby providing a broader picture of which the particular case forms only a part.⁴⁴ Still, the rules of the legal procedure generally prevent

- 38 E.A. Christodoulidis, "Truth and Reconciliation as Risks," *Social Legal Studies*, 9 (2000) 179-204.
- 39 M. Minow, "The Hope for Healing: what can truth commissions do?" in *Truth v. Justice*, eds. R. Rotberg and D. Thompson (Princeton and Oxford, Princeton University Press: 2000) 238; see also D.L. Hafner and E.B.L. King, "Beyond Traditional Notions of Transitional Justice: how trials, truth commissions, and other tools for accountability can and should work together," *Boston College International and Comparative Law Review*, 30, no. 1 (2007) 104; M. Dembour and E. Haslam, "Silencing Hearings? Victim-witnesses at war crimes trials," *European Journal of International Law*, 15, (2004) 151-177; W.J. Booth, "Communities of Memory: on identity, memory, and debt," *American Political Science Review*, 93 (1999) 249-263.
- 40 M. Klarin, "The Tribunal's Four Battles," *Journal of International Criminal Justice*, 2 (2004) 546-557; E. Stover, "Witnesses and the Promise of Justice in The Hague," in *My Neighbor, My Enemy: justice and community in the aftermath of mass atrocity*, eds. E. Stover and H.M. Weinstein (Cambridge, Cambridge University Press: 2004) 104-20; E. Stover, *The Witnesses: war crimes and the promise of justice in The Hague*, (Pittsburgh, University of Pennsylvania Press: 2005); S. Leydesdorff, *De leegte achter ons laten. Een geschiedenis van de vrouwen van Srebrenica* (Amsterdam, Bert Bakker: 2008).
- 41 G. Niemann, "The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000," *Journal of International Criminal Justice*, 2 (2004) 435-445; P.M. Wald, "Punishment of War Crimes by International Tribunals," *Social Research*, 69 (2002) 1119-1134; P.M. Wald, "ICTY Judicial Proceedings: an appraisal from within," *Journal of International Criminal Justice*, 2 (2004) 466-473.
- 42 M. Schrag, "Lessons Learned from ICTY Experience," *Journal of International Criminal Justice*, 2 (2004) 427-34, 431.
- 43 A. Sachs, "Archives, Truth, and Reconciliation," *Archivaria*, 62 (2006) 1-14, here 12; see also R.J. Goldstone, *For Humanity: reflections of a war crimes investigator* (New Haven Conn., Yale University Press: 2000) 65-66.
- 44 G. Robertson, *Crimes Against Humanity: the struggle for global justice*, 3rd ed, (New York and London, The New Press: 2006) 394-418.

the ICTY (or any court) from providing an all-encompassing narrative framework, involving bystanders within and outside the region, and “the complex interactions among ideologies, leaders, mass frustrations, historic and invented lines of hatred, and acts of brutality”.⁴⁵

Narrative truth includes the categories of personal, social, and healing (or restorative) truth, emphasizing narrative, subjective dimensions of truth. Narrative truth does not strive at factual truth, but attempts to explain why, according to the narrator, things happened and to give meaning to these events, both to the individual narrator and to society.⁴⁶ Currently, civil society groups in the former Yugoslavia and international actors are focusing on forensic truth, while there are few attempts to heal and reach reconciliation through story telling or involving communities on the local level.⁴⁷ While forensic truth can be shared, narrative truth will always be contested. As Michael Ignatieff argued in his renowned piece *Articles of Faith*:

Truth is related to identity. What you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not. To be a Serb is first and foremost not to be a Croat or a Muslim. Even people who fought to maintain a moral space between their personal and their national identities are now unable to conceive that one day Zagreb, Belgrade and Sarajevo might share a common version of the history of the conflict.⁴⁸

It is clear that the truth that victims claim as being their monopoly⁴⁹—as is the truth claimed by aggressors and bystanders—will be at odds with the forensic truth contained in the ICTY archives. Moreover, “the idea of accessible court records that speak for themselves...is problematic”.⁵⁰ Indeed, records do not speak for themselves; their ‘tacit narratives’ echo the user’s interests, hopes, and fears.⁵¹ It is the autonomous responsibility of the user to determine what information he or she gets out

45 Minow, “The Hope for Healing: what can truth commissions do?” 238; see also M. Minow, *Between Vengeance and Forgiveness: facing history after genocide and mass violence* (Boston, Beacon Press: 1998) 40; J. Balint, “Law’s Constitutive Possibilities: reconstruction and reconciliation in the wake of genocide and state crime”, in *Lethe’s Law: justice, law and ethics in reconciliation*, eds. E. Christodoulides and S. Veitch (Oxford and Portland, Hart Publishing: 2001) 136

46 A. Wieviorka, “The Witness in History,” *Poetics Today*, 27, no. 2 (2006) 385-396.

47 N. Zupan, “Facing the Past and Transitional Justice in Countries of Former Yugoslavia” in *Peacebuilding and Civil Society in Bosnia-Herzegovina: ten years after Dayton*, ed. M. Fischer (Berlin, Lit Verlag: 2006) 327-42.

48 M. Ignatieff, “Articles of Faith,” *Index on Censorship*, 5 (1996) 110-122, 114.

49 E. Jelin, “The Politics of Memory: the human rights movements and the construction of democracy in Argentina,” *Latin American Perspectives*, 21, no. 2 (1994) 38-58.

50 Minow, *Between Vengeance and Forgiveness*, 125.

51 E. Ketelaar, “Tacit Narratives: the meanings of archives,” *Archival Science*, 1 (2001) 143-155.

of the archives.⁵² This empowers the user to re-create in his or her own way what is found in the records that were created by the Tribunal. That is why archives are never closed and never complete: every individual and every generation are allowed their own interpretation of the archive, to reinvent and to reconstruct its view on and narrative of the past.⁵³ That is to say (in Hanna Arendt’s words), it has

the right to write its own history. We admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don’t admit the right to touch the factual matter itself.⁵⁴

That factual matter is – if one has to choose between the four truths – ultimately the truth. The selectivity and the ‘constructedness’ of the criminal trial may have frustrated survivors and their families, either present in the courtroom, or left behind where the atrocities were still fresh in the memories of the land and of the people. However, once the selectivity and ‘constructedness’ are frozen in the Tribunal’s records, they are no longer an obstacle for telling your story, your truth, and storing your myth in what Hayden White calls the communal traditionalized memory.⁵⁵

A number of socio-psychological studies affirm that it takes a long time (twenty to thirty years) before individuals and communities are ready to revisit and to reconstruct their past. Apparently, and for different reasons, they need some distance in time.⁵⁶ As Jeffrey Olick contends, the only collectivity “that can be healed and can learn the lessons of history and make something of them, is the next generation.”⁵⁷ We should therefore not be surprised when society’s immediate use of the Tribunal’s archives turns out to be rather limited. Over time, both the current generation and their children will (re)discover the possibilities of the archives as sources of history.

52 A. Menne-Haritz, “Access - The Reformulation of an Archival Paradigm,” *Archival Science*, 1 (2001) 57-82; P. Macpherson, “Theory, Standards and Implicit Assumptions: public access to post-current government records,” *Archives and Manuscripts*, 30 (2002) 6-17.

53 This reasoning resembles James Booth’s argument that we have some measure of choice in determining how our understanding of the past will be shaped: W.J. Booth, *Communities of Memory: on witness, identity, and justice* (Ithaca and London: Cornell University Press: 2006) 182.

54 H. Arendt, “Truth and Politics,” in *Between Past and Future: eight exercises in political thought* (Hammondsworth, Penguin Books: 1977) 238-39; Wieviorka, “The Witness in History,” 396: “Each person has the right to fashion his or her own history, to put together what he or she remembers and what he or she forgets in his or her own way. [...] Each person has an absolute right to his or her memory, which is nothing other than his or her identity, his or her very being. But this right can come into conflict with an imperative of the historian’s profession, the imperative of an obstinate quest for the truth.”

55 White, “Catastrophe, Communal Memory and Mythic Discourse,” 53.

56 J.W. Pennebaker, D. Paez and B. Rimé, eds., *Collective Memory of Political Events: social psychological perspectives* (Mahwah NJ, Lawrence Erlbaum: 1997) 103-127.

57 J.K. Olick, *The Politics of Regret: on collective memory and historical responsibility* (New York, Routledge: 2007) 148.

4. Histories

It is not only the victims and their families who have to come to grips with the past; their communities and society at large have to acknowledge it as well. What Elizabeth Jelin maintains for post-totalitarian Argentina is true for the former Yugoslavia too: "Only when the incorporation of historical events becomes an active and dynamic process can it feed into the construction of a democratic culture and collective identity."⁵⁸ What function in this process would the ICTY archives have as a historical record?

The expectation that the ICTY would establish a historical record can be traced back⁵⁹ to the words of Robert Jackson, the chief prosecutor at the Nuremberg trial, who said that the prosecution had documented from German sources the aggressions, persecutions, and atrocities "with such authenticity and in such detail that here can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."⁶⁰ Jackson's words were echoed by the ICTY's first president, Antonio Cassese, who observed that the Tribunal "has established a record of events that will go down in history and may not be impugned in future."⁶¹ The ICTY cites in its Krstić judgment the words of Nuremberg prosecutor Telford Taylor who said that it is "important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable..."⁶² The objective is not so much creating a record contributing to historiography, but to prevent denial. As Ruti Teitel wrote, "The ICTY's responsibility should be to forge and disseminate a record that limits the possibility

of historical denial."⁶³ However, she also argues that a court that tries to go beyond individual accountability to assess the historical reality at large risks "sacrificing individual rights to the societal interest in establishing a historical record."⁶⁴

Indeed, the findings of any trial can be nothing more than a contribution to creating a larger historical record because the focus is on specific crimes and perpetrators, not on wider historical events.⁶⁵ A trial has to be selective, focusing on the indicted individual or individuals, on their accountability for crimes committed by them or because of them. As the Israeli court in the Eichmann case stated very clearly:

The desire was felt—readily understandable in itself—to give, within the limits of this trial, a comprehensive and exhaustive historical account of the events of the catastrophe... [But] the Court ... must not allow itself to be enticed to stray into provinces which are outside its sphere. The judicial process has ways of its own ... whatever the subject-matter of the trial The Court does not possess the facilities required for investigating general questions of the kind referred to above.⁶⁶

Can one expect from the ICTY that, within the limits of the judicial process, it investigates the historical, political, sociological, and economic causes that led to the conflict in former Yugoslavia?⁶⁷ The Tribunal, in its first judgment (in the Tadić case) devoted some forty-eight pages (out of 285) "to say something in a preliminary way about the relevant historical, geographic, administrative and military setting about

58 Jelin, "The Politics of Memory," 53.

59 J.B. Allcock, ed., *The International Criminal Tribunal for the Former Yugoslavia. Report by the Scholars' Initiative. Research Group 10*, <http://www.cla.purdue.edu/academic/history/facstaff/ingrao/si/scholars.htm> [accessed 22 June 2011].

60 M.B. Harmon and F. Gaynor, "Prosecuting Massive Crimes with Primitive Tools: three difficulties encountered by prosecutors in international criminal proceedings," *Journal of International Criminal Justice*, 2 (2004) 403-426, 404.

61 A. Cassese, "The ICTY: a Living and Vital Reality," *Journal of International Criminal Justice*, 2 (2004) 585-597, 597; M.P. Scharf, *Balkan Justice: the story behind the first international war crimes trial since Nuremberg* (Carolina Academic Press: 1997) 215: "While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process."

62 United Nations International Criminal Tribunal for the former Yugoslavia (2001) Judgment IT-98-33-T, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> [accessed 22 June 2011] para. 95; The ICTY continues in asserting that "It is therefore imperative to document these 'incredible events' in detail. However, the central issue in this case is the role that one man, General Krstić, played in the criminal acts and whether he is legally responsible for conduct that amounts to war crimes, crimes against humanity or genocide."

63 R.G. Teitel, Justice Seeks an Exit Strategy, *Taipei Times* (2005) <http://www.globalpolicy.org/intljustice/tribunals/yugo/2005/0107justiceexit.htm> [accessed 5 July 2008]; see also D.F. Orentlicher, *Shrinking the Space for Denial: the impact of the ICTY in Serbia* (New York, Open Society Institute: 2008) http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf [accessed 22 June 2011].

64 R.G. Teitel, *Transitional Justice* (Oxford University Press: 2000) 76; see also R. Zacklin, "The Failings of Ad Hoc International Tribunals," *Journal of International Criminal Justice*, 2 (2004) 541-545.

65 B.N. Schiff, "Do Truth Commissions Promote Accountability or Impunity? The case of the South African Truth and Reconciliation Commission," in *Post-conflict Justice*, ed. M.C. Bassiouni (Ardsley N.Y., Transnational Publishers: 2002) 325-343.

66 Osiel, *Mass Atrocity, Collective Memory, and the Law*, 80-81; see also F. Bayard, ed., *Le génocide des Juifs entre procès et histoire 1943-2000* (Bruxelles, Complexe: 2000). Lawrence Douglas, while conceding that didactic trials as the Eichmann trial "are not well equipped to render history in its complexity", and not denying "that history and law are governed by differing epistemological and evidentiary conventions", warns against over-exaggerating the differences: L. Douglas, "History and Memory in the Courtroom: reflections on perpetrator trials," in *The Nuremberg Trials: international criminal law since 1945*, eds. H.R. Reginbogin, and C.J.M. Safferling (München, Saur: 2006) 95-104, 98, 101.

67 S. Basic, "Bosnian Society on the Path to Justice, Truth and Reconciliation," in *Peace-building and Civil Society in Bosnia-Herzegovina: ten years after Dayton*, ed. M. Fischer, 2nd ed (Berlin, Lit Verlag: 2007).

which evidence was received”.⁶⁸ In a later judgment (in the Krstić case), the judges were more negative about their role as history writers:

The Trial Chamber leaves it to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible, under the tenets of international law, for his participation in them. The Trial Chamber cannot permit itself the indulgence of expressing how it feels about what happened in Srebrenica, or even how individuals as well as national and international groups not the subject of this case contributed to the tragedy. This defendant, like all others, deserves individualised consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty.⁶⁹

Nevertheless, the ICTY has been praised because it was able to put its judgments in a broader historical context. Richard Wilson commends the ICTY judgments in the Tadić and Krstić cases for their extensive historical interpretation of the causes of the conflict, adding that their “approach to historical interpretation forces a reconsideration of the long-standing view that the pursuit of justice and the writing of history are inherently irreconcilable”.⁷⁰ However, as the ICTY itself elucidated in the Krstić case, in his final conclusion Wilson seems to leave the actual history writing to people outside the Tribunal who may use the ICTY records. The ICTY’s judgments, Wilson writes, “could become an indispensable part of the process of writing a common, credible history of political violence in the 1990s.”⁷¹ Prosecutor Carla Del Ponte said, “Governments, NGOs and historians should use the millions of pages presented in court to recount history as it really happened.”⁷² Robert Donia (who appeared before the Tribunal as an expert witness several times) testified that the ICTY had “produced histories that are not only credible and readable, but indispensable to understand the origins and course of the 1990s conflicts in the former

68 United Nations International Criminal Tribunal for the former Yugoslavia (1997) Judgment IT-94-1-T, <http://www.icty.org/case/tadic/4#tjug> [accessed 22 June 2011] para.53; The Tribunal stressed that this exposé was exclusively based upon the evidence presented in court. Scharf concludes that the record of the Tadić trial “provides an authoritative and impartial account to which future historians may turn for truth, and future leaders for warning” (Scharf, *Balkan Justice*, 215).

69 United Nations International Criminal Tribunal for the former Yugoslavia (2001) Judgment IT-98-33-T, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tjo10802e.pdf> [accessed 22 June 2011] para. 2, 95.

70 R.A. Wilson, “Judging History: the historical record of the international criminal tribunal for the former Yugoslavia,” *Human Rights Quarterly*, 27 (2005) 908-942, 922; see also Schiff, “Do Truth Commissions Promote Accountability or Impunity?”

71 . Wilson, “Judging History,” 942.

72 United Nations International Criminal Tribunal for the former Yugoslavia (2007) *ICTY and the Legacy of the Past*, <http://www.icty.org/sid/8829> [accessed 22 June 2011].

Yugoslavia,” and that it provided “a detailed, thoroughly investigated and comprehensive account of what happened at critical times in the battle for Bosnia from 1992 to 1995.”⁷³ Nevertheless, according to Donia, the judges’ ‘historical essentialism’ took only those elements into account that they felt were essential to comprehend the atrocities, and that they heard about from witnesses in each case.

The Tribunal’s time is in conflict with the time of history; the former emphasizes presence (justice here and now), the latter focuses on absence (justice in the past).⁷⁴ The law aspires to a degree of finality now and for the future. Therefore, a trial seeks closure through a full and final sentence. On the other hand, there “is no such expectation of relative fixity in the realm of historical understanding, or of the collective memory to which such understanding contributes.”⁷⁵ Subsequent events, new interpretations, new sources—they will inevitably change the view, and reopen the case. The court’s verdict is final, but its reading of the historical event is not. Court records have, therefore, not more value than other records.⁷⁶ Law’s closure has to be rejected in favor of history’s recurrence. History is never finished or final because with the passage of time historical interpretation undergoes change.⁷⁷ History is provisional and thereby allows a contrapuntal narrative doing justice to adversarial and contested stories.⁷⁸ Instead of asking for the truth or the history, one should show and teach that there are many truths and histories.

5. Memories

The psychologist Nico Frijda suggests that appropriating the past is an element in the construction of an individual’s identity. It does so in a double way, by “shaping or affirming the identity of one’s group, and by accepting or redefining membership within that group.”⁷⁹ This argument is shared by James Booth who puts forward that gathering in the past, appropriating it, “gives us identity and a moral narrative of

73 R.J. Donia, “Encountering the Past: history at the Yugoslav war crimes tribunal,” *Journal of the International Institute*, 11 (2004) 2-3, <http://hdl.handle.net/2027/spo.4750978.0011.201> [accessed 22 June 2011].

74 B. Bevernage, “Time, Presence, and Historical Injustice,” *History and Theory*, 47 (2008) 149-167. According to Booth, both the court and the historian depend on absence, on what is no longer present. However, justice, as Booth writes, seeks to act on the past by making it present: Booth, *Communities of Memory*, 113-115.

75 Osiel, *Mass Atrocity, Collective Memory, and the Law*, 217; see also Minow, *Between Vengeance and Forgiveness*.

76 Ketelaar, “Tacit Narratives: the meanings of archives.”

77 Teitel, *Transitional Justice*.

78 C.S. Maier, “Doing History, Doing Justice: the narrative of the historian and of the truth commission,” in *Truth v. Justice*, eds. R. Rotberg and D. Thompson (Princeton and Oxford: Princeton University Press: 2000) 261-278.

79 N.H. Frijda, “Commemorating,” in *Collective Memory of Political Events: social psychological perspectives*, eds. J.W. Pennebaker, D. Paez and B. Rimé (Mahwah NJ, Lawrence Erlbaum: 1997) 103-127, 109.

pride, shame, and indebtedness, that ties us across time to our past and the burdens this past imposes simply by virtue of being ours.”⁸⁰ The common, often mythical, past, sustained through time into the present, is what gives continuity, cohesion and coherence to a community.⁸¹ Any community is therefore a community of memory, especially a community living after mass atrocities, where the past continues to torment because it is not past. They “are not living in a serial order of time, but in a simultaneous one, in which the past and present are a continuous, agglutinated mass of fantasies, distortions, myths and lies.”⁸² For victims and survivors of mass atrocities, the past stays on, as Frijda asserts, as “unfinished business”: they and their families keep on searching for meaning to understand how the humiliations, the cruelties, the systematic destruction were ever possible.⁸³ They may label their search for meaning, searching for the truth or the history, but it is in fact no more and no less than a meaning-making process to confirm and reconfirm identity,⁸⁴ constructing and reconstructing their community’s memories and narrative truths, engaging the community in rituals of commemoration. The ICTY cannot—or only minimally—live up to the expectations of a “secular ritual of commemoration.”⁸⁵ Such a ritual with its beneficial effects on individuals and communities has to be set up elsewhere, with the help of people and institutions engaged in memory-practice.⁸⁶ Among these institutions are, of course, memorial museums, including sites, that are established in “the global rush to commemorate atrocities,” as the title of Paul Williams’s recent book on memorial museums includes. Williams acknowledges that we only have a fuzzy awareness whether and how “concrete spaces like memorials and museums are effective social spaces for aiding reconciliation.”⁸⁷ But they provide space for rituals of commemoration, as for example the Srebrenica memorial and cemetery in Potočari (Bosnia), where annually on July 11 commemoration ceremonies are held.⁸⁸

Archives could also become such spaces of memory-practice, where people can try to put their trauma in context by accessing the documents, not primarily seeking

80 Booth, “Communities of Memory,” 254; Booth, *Communities of Memory*.

81 D. Morley and K. Robins, *Spaces of Identity: global media, electroniclandscapes, and cultural boundaries* (London and New York, Routledge: 1995); B. Stråth, ed., *Myth and Memory in the Construction of Community: historical patterns in Europe and beyond* (Bruxelles and New York, P.I.E.-Peter Lang: 2000).

82 Ignatieff, “Articles of Faith,” 119.

83 Frijda, “Commemorating.”

84 U. Fuhrer, *Cultivating Minds: identity as meaning making practice* (London: Routledge: 2004).

85 P. Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? a commentary on the United Nations war crimes tribunal,” *Human Rights Quarterly*, 20 (1998) 737–816, 784: Here Akhavan writes about “the sacral aspect of remembrance” and the “public ritual of atonement.”

86 Osiel, *Mass Atrocity, Collective Memory, and the Law*.

87 P. Williams, *Memorial Museums: the global rush to commemorate atrocities* (Oxford and New York, Berg: 2007) 170.

88 Ibid. 17–18.

the truth or searching the history, but transforming their experiences into meaning. Accessing the archives of the ICTY, and weaving them into private and public memories, may constitute a healing ritual. The archives become a space of shared custody and trust, where records are preserved through time—long enough perhaps to destroy the agony and heal the communities.⁸⁹

6. A Living Archive

Even after completion of the primary mission of the ICTY the archive will continue to be a living archive, used by prosecutors and judges within and outside the former Yugoslavia, by defence counsel, and by other stakeholders. At the same time—and stretching far beyond the time the documents have to serve judicial purposes—the archive will be a living archive for the causes of truths, histories, and memories. The archive will be a living archive because it will continue to be challenged, contested, and expanded. I will deal with these issues successively.

According to one of the UN Human Rights Commission’s principles, people are entitled to challenge the validity of the information in archives concerning them by exercising their right of reply.⁹⁰ The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. A comparable right of correction, enshrined in the data protection legislation of all European Union states, should be given to people involved in trials before the ICTY, especially because in some cases discrepancies between the witness’ evidence and the official record of it have been found.⁹¹

Any archive is a place of contestation (Harris, 2000, p. 80; Harris 2007). Like memorial museums, archives are spaces where battles about the politics of memory are fought. Like memory, an archive is not just an agency of storage, but a process, a mediated social and cultural practice.⁹² A living archive allows for what Hayden White calls

three different kinds of discourse about ‘what happened’ and ‘what is to be done.’ First, the disaster can be assimilated to communal memory by its mythification. Secondly, it can be assimilated to communal memory by the conventions of classification, cataloguing, and storage techniques of the rationalising sciences. And thirdly, the disaster can be

89 E. Ketelaar, “Archives as Spaces of Memory,” *Journal of the Society of Archivists*, 29 (2008) 9–27.

90 E. Ketelaar, “Access: the democratic imperative,” *Archives and Manuscripts*, 34 (2006a) 62–81.

91 Human Rights Watch. Justice at Risk: war crimes trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, 16, no. 7 (2004) <http://www.unhcr.org/refworld/docid/42c3bcf70.html> [accessed 22 June 2011].

92 E. Ketelaar, “Writing on Archiving Machines,” in *Sign Here! handwriting in the age of new media*, eds. S. Neef, J. van Dijck and E. Ketelaar (Amsterdam: Amsterdam University Press: 2006) 183–195.

assimilated to communal memory in such a way as to force a revision and delegitimation of traditionalised memory itself.⁹³

Different as these kinds of discourse may be about what happened and what is to be done, they have to be related. Myth and rationality are not entirely independent of collective memory; they are mutually constitutive.⁹⁴ The third component—revision and ‘delegitimation’—entails hospitality to contestation and renegotiation. As Michael Moss writes, the archive is

a place of ‘dreams’ of re-enactment for both the user and the archivist (curator), who together always are engaged either passively or actively in the process of refiguration that is never ending.⁹⁵

I believe that the archive is not merely (as White suggests) a rational storage technique but primarily a space to escape from a monolithic truth, history and memory, by allowing the questioning of myth and rationality—including the myth and rationality contained in the archive.

This is even more relevant in the former Yugoslavia, where the past is no common past. After the Second World War there was

never a discourse on how a multiethnic society whose population consisted of extremely divergent individual and collective memories could manage this complex legacy sufficiently to come to terms with its complex past.⁹⁶

And when the Yugoslav state disintegrated, the historical memory disintegrated too. The post-Yugoslav republics created “a new fragmented memory along not only ideological, but ethnic, borderlines.”⁹⁷ Different ethnic groups each claim their own memory of suffering, to be framed in a space only trusted by and accessible to members of their own group. This “ethnization of memory”⁹⁸ may lead to “ghettoization

93 Hayden White adds: “Programmes for recovery from the disaster (or the reconstruction of the afflicted society) can thus be sublimated into public debates about the relative merits of different ways of construing the *causes* of the disaster.” White, “Catastrophe, Communal Memory and Mythic Discourse,” p. 55.

94 Olick, *The Politics of Regret*.

95 M. Moss, “Opening Pandora’s Box: What is an Archive in the Digital Environment?”, in *What are Archives? Cultural and Theoretical Perspectives: A Reader*, ed. L. Craven (Aldershot, Ashgate:2008) 71–87, 83.

96 W. Hoepken, “War, Memory, and Education in a Fragmented Society: the case of Yugoslavia,” *East European Politics and Societies*, 13 (1999) 190–227, 204.

97 Ibid. 226.

98 D. Corkalo et al., “Neighbors Again? Intercommunity relations after ethnic cleansing,” in *My Neighbor, My Enemy: justice and community in the aftermath of atrocity*, eds. E. Stover and H.M. Weinstein (Cambridge, Cambridge University Press: 2004) 143–161, 157.

of history.”⁹⁹ The archives of the ICTY, however, cannot be split up according to the ethnic provenance of perpetrators, victims, and witnesses. It is a joint, albeit a contentious, heritage that should be accessible from any of the places in former Yugoslavia (and from anywhere in the world) where people live who want to use the archives. The contentiousness of the archive might even prove beneficial because it can show “how people can live with continuing disagreements about what exactly happened in the past and why, and still respect each other as fellow citizens.”¹⁰⁰ Reconciliation, as Christodoulidis¹⁰¹ argues, has to take risks, and one of them is that memories and identities are not arbitrated, that constituencies for communities are not fixed. I believe that the risk of contentiousness of the archives should be taken too.

The living archive should be expanded, in the first place by linking the content to the holdings of the broad range of governmental and nongovernmental agencies within and outside the former Yugoslavia who continue to collect material about the conflict.¹⁰² Secondly, the archive should be expanded by gradually releasing the numerous classified documents, classified because of protection of witnesses, privacy, and state secrets. Most of the transcripts contain redacted passages, sometimes amounting to more than fifty percent, as in the case of Miletic et al, where 7,994 pages of the more than 16,000 pages of transcript contain redacted passages. And thirdly, by allowing people to enrich the ICTY record with their comments and stories. Witnesses, victims, as well as convicted and indicted people (and bystanders) should be allowed to tell their stories. Stories are not only vehicles for understanding, but they are also a means of remembrance.¹⁰³ Writing down and submitting their stories—co-creating and constituting the archive—allows people to articulate their own war histories and, in psychoanalytic terms, gives them an opportunity to express and thus begin to incorporate them into the present.¹⁰⁴ I propose permeating

99 Williams, *Memorial Museums*, 168.

100 A. Gutmann, and D. Thompson, “The Moral Foundations of Truth Commissions,” in *Truth v. Justice*, eds. R. Rotberg and D. Thompson (Princeton and Oxford, Princeton University Press: 2000) 22–44, 35.

101 Christodoulidis, “Truth and Reconciliation as Risks.”

102 D. Djordjevic, *Summary Report Regarding Local, Regional and International Documentation of War Crimes and Human Rights Violations in the former Yugoslavia* (New York, International Center for Transitional Justice: 2002) <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Documentation-Violations-2002-English.pdf> [accessed 22 June 2011].

103 B. Atwood and F. Magowan, eds., *Telling Stories: indigenous history and memory in Australia and New Zealand* (Sydney, Allen & Unwin: 2001).

104 C. Twomey, “‘Impossible History’: trauma and testimony among Australian civilians interned by the Japanese in World War II,” in *History on the Couch: essays in history and psychoanalysis*, eds. J. Damousi and R. Reynolds (Melbourne, Melbourne University Press: 2003) 155–165; D.B. Pillemer, “Can the Psychology of Memory Enrich Historical Analyses of Trauma?”, *History and Memory*, 16 (2004) 140–155; N. Adler, et al., *Memories of Mass Repression: narrating life stories in the aftermath of atrocity* (New Brunswick N.J., Transaction Publishers: 2009).

the boundaries between what Hayden White calls the communal ‘traditionalized memory’ and the communal ‘rationalized memory’; the first consisting of stories of the past, the second of “accounts of a community’s past, contained in its archives and catalogued and processed in the form of written or visualized ‘histories,’ so that it can be ‘accessed’ on demand.”¹⁰⁵

Of course archival institutions, as the rationalized receivers of story, should, in Verne Harris’s words,

Be ever vigilant. Cherish what story gives us, but always probe its telling, explore other tellings and other stories. Know that as compelling as it might seem, as seamless and satisfying and healing, it remains story not truth. We should never allow story to be more than a platform to our own search for meaning.¹⁰⁶

Archival institutions around the world are moving into new ways of capturing, storing, and using public and private documents, stories, images, and sound. Digital systems of distributed custody of the holdings of both public institutions and private individuals and communities are already in place. Web 2.0 applications stimulate social navigation, and uploading “evidence of me”¹⁰⁷ to an archival institution’s server thus creates and maintains a living archive out of private and public documents.¹⁰⁸ The ICTY archive presents “an unprecedented challenge to use new technology and innovative finding aids to assure access and usability to future generations.”¹⁰⁹

7. Conclusion

The ICTY archives, as any other archives, allow for contestation. But paradoxically that quality may help members of a community not only to come to grips with their own past but also to acknowledge that the past they share with neighboring ethnic and political communities is not a monolithic truth, history, or memory, but allows—even requires—questioning and contestation. For this, the archive provides a space. As South African judge Albie Sachs stated, archivists are caring for archives “not as we used to think, to guard certainty: they are doing it to protect uncertainty

¹⁰⁵ White, “Catastrophe, Communal Memory and Mythic Discourse,” 53.

¹⁰⁶ V. Harris, *Archives and Justice. A South African Perspective* (Chicago, Society of American Archivists: 2007) 415.

¹⁰⁷ S. McKemmish, “‘Evidence of me’”, *Archives and Manuscripts*, 24 (1996) 28–45, at rcrg.dstc.edu.au/publications/recordscontinuum/smckp1.html.

¹⁰⁸ E. Ketelaar, “Being Digital in People’s Archives,” *Archives and Manuscripts*, 31 (2003) 8–22; E. Ketelaar “Archives as Spaces of Memory”, *Journal of the Society of Archivists*, 29 (2008) 9–27; M. Šajkaš, *Transitional Justice and the Role of the Media in the Balkans*, International Center for Transitional Justice (2007) http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Media-Justice-2007-English_o.pdf [accessed 22 June 2011].

¹⁰⁹ Donia, “The New Masters of Memory,” 400; R.J. Donia, and E. Becirevic, *ICTY Archive Must Be Open To All* (2008) <http://iwpr.net/report-news/icty-archive-must-be-open-all> [accessed 26 June 2011].

because who knows how the future might use those documents.”¹¹⁰ Each community is a community of records, marking the limits to other groups and their members. The risk of ‘ethnization’ (or exclusiveness) of memories may be abated by giving each community in the former Yugoslavia not just a share in a joint heritage, but by making each community a co-custodian of the living ICTY archive, constantly challenged and challenging.

¹¹⁰ Sachs, “Archives, Truth, and Reconciliation,” 14.