INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE

The Criminal Tribunal for the Former Yugoslavia

Is International Justice Taking the Wrong Path?

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Adapted from the French by Corey E. Walker

The International Criminal Tribunal for the former Yugoslavia's (ICTY) weekly press conference is usually a routine exercise. But on June 19, 2013, the atmosphere was more electric than usual. Some days earlier, the *New York Times*[1] amplified the suspicions Danish Judge Frederik Harhoff aired against the president of the court, Theodor Meron, an American. Judge Harhoff accused Juge Meron of pressuring his colleagues for the acquittal of several of the accused. The article also reported anonymous comments from a "high representative of the Court," who confided that the tribunal's dysfunction had affected "nearly half of the judges." The journalists gathered for the press conference fielded questions that focused exclusively on the case and its aftermath:

"What do you think of the petition launched by victims' associations in favor of a UN inquiry into the tribunal's functioning and presidency?"
"Is Article 77 of Regulation (on the facts of contempt) applicable in this case?"
"What might the president or the chambers count on doing in order to restore the tribunal's credibility?"
" In the light of allegations by Judge Harhoff, will the prosecutor's office seek review of the judgments acquitting Gotovina and Markac Perisic?"
" Might we soon expect to see the election of another judge to the presidency?"

Magdalena Spalinska, the spokesperson of the Tribunal, and Aleksandar Kontic, the representative of the Prosecutor, responding to the journalists that they thoroughly oppose an end to inadmissibility. Spalinska clarified that the decision to refuse to elaborate on the subject is not hers but that of the institution: "no comment" then. A journalist from the Sense Agency described the officials 'strategy as similar to that of an ostrich.[2] Until the court raises its head, we will try to clarify provide answers to the questions that the court currently refuses to face.

1 Marlise Simons, "Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders", *The New York Times*, (June 14, 2013).
2 Sense Tribunal, "Tribunal's strategy : head in the sand", available at http://www.sense-agency.com/icty/tribunal%E2%80%99s-strategy-head-in-the-sand.29.html?news_id=15075#

Contrary to popular opinion, acquittals and dissenting opinions expressed by a minority of judges in a verdict may be evidence of a well-functioning justice system. Acquittals show that the accused is not convicted before a trial, that credible evidence must be presented by the prosecutor, and that the unjustly accused can be publicly rehabilitated. Dissenting opinions demonstrate the variety of possible interpretations of the facts and a rejection of an idealized, monolithic, and quasi-divine justice which designates "the" truth. So, what are the origins of the unease, and even revolt, concerning the tribunal's judgments in recent months?

Malaise at The Hague

In an article published in *Le Monde* in December 2012, Pierre Hazan, a renowned Swiss academic, said that the November 16th judgment acquitting the Croatian general Gotovina "is and will remain a stain for all those who believe in international justice and even more so to the victims." However, what is most striking in this case is not that the three judge majority's verdict is challenged by the dissenting opinions of two other judges - that is common enough- but that the dissenting arguments were so strongly worded - going so far as to say that "the judgment of the Court of Appeal contradicts any sense of justice."

This controversial verdict was only the first in a series of shocking acquittals that only reinforce the sense of the tribunal's increasing disorder. At the same time, this increasing sense of disorder, seriously challenges the fundamental reason for the tribunal: to judge those most responsible for mass crimes perpetrated in the Balkans in the 90s. The protests beyond the tribunal's chambers by victims' associations would be sufficient grounds to worry about this situation. After all, the tribunal's purpose was to address their grievances in the first place, even if it is not the same (and by definition does not have to be) in-line with their own interests or versions of events.

But, in addition to the scathing dissents concerning the tribunal's procedure, the most serious suspicions are directed toward the tribunal itself. These suspicions concern possible political pressure brought to bear upon the tribunal's direction, and from there, upon other judges and their decisions. Danish judge Frederik Harhoff confided his worries to about sixty colleagues in an e-mail that the Copenhagen daily *BT* was able to obtain and publish on the first page of its June 3, 2013 edition. Judges, victims associations, defenders of human rights, academics and the media gathered to re-examine the operation of a tribunal whose creation they had supported and in whose activities they were engaged participants. This is truly an unprecedented crisis.

At the ICTY, acquittals and dissenting opinions are no longer the signs of a deliberative and well-functioning justice system but symptoms of dysfunction. But what is the true nature of the dysfunction? Are we assisting in the steady decline of a project of international justice? The sinking of an entire institution? Or the remediable mistakes of a few judges? To find out, it is necessary to avoid hasty and definitive pre-conclusions. The issue is too serious for observers to feel self-satisfied.

These concerns and observations require that we attempt to understand the acquittals pronounced by the court in several cases[3], starting with the earliest, that of Naser Oric, until the most recent, the case of Stanisic and Simatovic . From this analysis, we will show the different

3 To date, June 2013, the ICTY has condemned 68 accused and rendered 18 definitive acquittals. The acquittal, on May 30, 2013, of Jovica Stanisic and Franko Simatovic have been pronounced in the first instance and an appeal is still possible.

facets of the tribunal's current malaise. We will also articulate consequences and suggest ways to illuminate further points of inquiry.

Naser Oric and the indictments of Srebrenica's defenders: justice run amok?

Naser Oric was the Commander of the Joint Armed Forces of the sub-region of Srebrenica. In March 2003, Mr. Oric was accused of covering-up, in 1992 and 1993, ill-treatment of Serbian prisoners and the looting of Serbian villages and hamlets. The trial did not leave very much in doubt about its outcome due to a weak case and a lack of reliable witnesses presented. After the end of the adversarial phase, a partial discharge decision concerning the looting was already ordered by the judges. After the end of the presentation and defense arguments, the first trial sentenced Oric to two years in prison for "not having been sufficiently attentive to the plight of persons detained in Srebrenica."

On 3 July 2008, the Appeals Chamber fully acquitted Mr. Oric. That court reasoned that neither knowledge of abuse inflicted by unidentified individuals, nor his role as a superior authority towards these individuals, had been demonstrated. Further, the court took note that the Trial Chamber, even where it explicitly mentioned "the very limited liability of the accused and the extraordinary circumstances in which he acted," had impermissibly expanded the theory of command responsibility.

In Mr. Oric's case, the acquittal appears to be the denouement of a just procedure. However, what is alarming was the prosecutor's aggressive tactics and arguments that often conflicted with the elements he presented in other cases. He did not hesitate to re-litigate the 18 year penalty against accused and then took the initiative to inform the appeals chamber in order to challenge the original verdict. The decision to undertake a prosecution is itself difficult to understand. The prosecutor at the time, Carla Del Ponte, was known for his spirit and his will to systematically fight (which occasionally veered towards blindness) all the war lords who were parties to a conflict. Should we consider the procedures undertaken as those of a tenacious prosecutor? It is indeed the Attorney General's responsibility to open an investigation before drawing up an indictment that will then be validated by a court's judge.

Coincidentally, Del Ponte did not detail Naser Oric's case in his memoirs[4] . So we are unable to fully assess the case's shortcomings (such as technical incompetence of investigators, attempts to criminalize any fighter, agreements to engage in exchange of Mladic and Karadzic with the Serbian authorities) and remain undecided in the face of this terrible dilemma. The lawyer Rafaelle Maison, who wrote a book on the trial, referred to it as "tragedy" because, she notes, "the promise of international protection has been added to the persecution of the region's population and contributes to the stigma from the resistant community caused by the pursuit of one of its iconic figures."[5] But in the Oric case, if there were trial errors or abuses, it is not the fault of judges. On the contrary, the judges prevented "an international injustice."

4 Carla del Ponte, *La traque, les criminels de guerre et moi*, éditions Héloïse d'Ormesson, 2009.
5 Rafaëlle Maison, *Coupable de résistance ? Naser Oric, défenseur de Srebrenica devant la justice internationale*, Armand Colin, 2010.

Limaj/Haradinaj and security threats : trampled justice

The Limaj/Haradinaj lawsuit, also initiated under Carla Del Ponte's supervision, concerned members of the liberation movement of Kosovo (UCK). It, too, has been considered as a strategy for charges that encompassed the promoters of ethnic cleansing and those who fought community oppression. Two trials have been conducted before the ICTY. The principal accused was Fatmir Limaj, former mayor of Pristina, Kosovo's capital. Another accused party was Ramush Haradinaj, who served as prime minister at the time of his indictment. Fatmir Limaj, a regional KLA commander (and future member of the General Staff) and Musliu were found not guilty in the first instance, on November 30, 2005, and again on appeal on September 27, 2007.

The prosecution failed to prove that either Limaj or Musliu had authority over the farming center that was later converted into a detention camp in the village of Lapusnik between May and July 1998, the period covered by the indictment. Only one guard, Bala, was sentenced to 13 years in prison for torture and murder of nine prisoners in the Berisha Mountains in July 1998. The chamber noted, however, that "Bala was only a single guard at the detention camp. He had no power or authority. In regards to the murders perpetrated in the Berisha Mountains, the Chamber notes that as a soldier he had obeyed the orders to liberate some prisoners and execute nine others . He did not act on its own initiative." Here the court's failure is obvious: it was created to try individuals who wielded principal responsibility, and not the conflict's small actors.

Ramush Haradinaj, another KLA regional commander, and his direct subordinate, Balaj, the "Black Eagles" special unit commander, have both also been acquitted. Among the accused, only one, Lahi Brahimaj was convicted, and only on two counts. Brahimaj was sentenced to six years before being acquitted in a new judgement on November 29, 2012. The prosecution's case had very few items of direct evidence to share between the three defense lawyers. All of this was a serious blow to the prosecutor.

Confronted as they were with the evidence actually presented by the prosecutor, the judges could not pronounce a verdict other than acquittal. But unlike in Mr. Oric's trial (Serb witnesses living in the shelter in the territory of the Serbian Republic of Bosnia), here, a climate of insecurity or intimidation suggests that had better protections been assured, several witnesses may not have retracted their testimony. This point is not a given. On the one hand, the Appeals Chamber has recognized that the prosecution was unable to obtain the testimony of two key witnesses. Noting that this difficulty was unprecedented, the Appeals Chamber ordered a new trial in part to hear them.

However, the first, Shefqet Kabashi, former KLA soldier,, continued to refuse to testify. He preferred to plead guilty to "contempt of court" and be sentenced to two months in prison. According to the judges, "reasons put forward by the Kabashi defense team to justify the refusal to answer questions were vague." The second, referred to under the pseudonym 80, was placed behind closed doors, and heard through video transmission. His testimony was released two months later by the court. On November 29, 2012, the judges once again upheld his acquittal.

If the dispute can not reasonably bear on the decision of the judges, which appears logical to examine the case, the context in which the trial was held is brought into question. Granting Ramush Haradinaj provisional release until the opening of his trial and the authorization, under certain conditions, to appear in public and take part in political activities, have been criticized as

contributing to a climate of witness intimidation. After the new trial, the Serbian Association for the Defense of Human Rights, the Humanitarian Law Center, which brought a valuable collaboration court has publicly regretted that "although the verdict is based on the evidence, it has not done justice to victims."[6]

And how could the victims feel satisfied by the years-long procedure's results? Though some of the crimes committed in the detention centers of the KLA were avowed, that an international judicial process would lead to the conviction of a small camp's guard seems incongruous. The procedures that began in Kosovo under the auspices of EULEX (a European Assistance Mission for the promotion of the rule of law), however slow and laborious, has done more to fight against impunity with fewer resources: in June 2013, the court in Pristina condemned three former KLA members for detainee torture in the Lapastica prison.

A few days before, the Pristina's appellate court ordered that the former mayor of Srbice and five other former KLA fighters, prosecuted for ill-treatment in the Likovac prison, be kept in detention in order to "avoid any risk of evidence manipulation. " Unlike the prosecution launched against Mr. Oric, the ICTY Prosecutor is not wrong to have opened investigations into the crimes committed by the KLA in Kosovo. The court's clearest failures are that it initiated its business without properly targeting the real culprits or gathering more physical evidence.

For Bosnian Serbs far too many procedures have failed to result in convictions or serious penalties. In the Celebici Camp Trials, if camp officials and a guard were sentenced to 9 years, 18 years and 15 years in prison, the commander of Muslim forces in the area was acquitted. Most lawsuits against Bosnian soldiers result in light sentences or acquittals. We do not deny *a priori* the soundness of these decisions. But it seems as if the court, in two decades, was only skimming the surface.

It is certainly not surprising - it is even desirable - that the asymmetry of the crimes committed on the ground by the better organized Serb attackers, is reflected in the asymmetry of the prosecution and punishment for accused ethnic Serb. But it is unfortunate that the strategy chosen by the court prosecutions, "strengthens Croats, Serbs, Albanians and Bosnians in their exclusive nationalism, even in negationism-- crimes committed by their own camps. And that the raison d'être of the Tribunal was to participate in the writing of an inclusive history of the terrible wars of the former Yugoslavia in order to move toward a reconciliation process," deplored Pierre Hazan.[7] On the Kosovo issue, it is not so much the lack of judicial integrity that we deplore but their relative inability to effectively deliver justice in certain situations.

Perisic/Simatovic and the joint criminal enterprise revisited: backtracking justice

Soon, the image of an "anti-Serb" court, and the successive acquittals of Gotovina and Haradinaj which fuels the Serbian nationalist propaganda, will be blurred by the following verdicts. This righteousness is not as "selective" as it seems. The court also "whitewashes" the most senior Serbian officers.

First, General Momcilo Perisic, Chief of Staff of the Yugoslav Army from 1993 to 1998. Despite the fact that he had been sentenced to 27 years imprisonment, a judgment of the Appeals Chamber yielded a simple acquittal in February 2013. Three months later, Jovica Stanisic,

6 Communiqué du 29 novembre 2012, available at http://www.hlc-rdc.org/?p=22034&lang=de
7 Pierre Hazan, *op. cit.*

former head of security for the state's Ministry of the Serbian Interior , and his subordinate Simatovic, responsible for "special operations" were also acquitted. But the three men were directly linked to the Serbian president Slobodan Milosevic; General Perisic in the military field and Misters Stanisic and Simatovic in the organization of the paramilitary network. Let us recall that the ICTY's Milosevic trial covered crimes committed by Serb forces in Croatia, Bosnia and Kosovo. It was interrupted by the death of the accused in March 2006. Therefore, no judgment was rendered to determine his culpability.

Perisic, Stanisic and Simatovic were therefore at the heart of Milosevic's "joint criminal enterprise" and as such mentioned in a large number of indictments. The concept of joint criminal enterprise, which can take three distinct forms,[8] attempts to capture the complex dialectic between individuals and groups and between ends and means in the context of a mass murder. It consists of a material element (the participation of business) and a moral element (the commission of a crime as a foreseeable consequence). This notion is evident in the prosecution strategy and became apparent in court rulings when the judges in the Dusko Tadic case stated that, although it was not included in the statutes of the court, it existed under customary international law and therefore could be used by the court.

Beginning in 1999, this jurisprudence became more robust and detailed through subsequent cases. This was still the case on April 3, 2007, during in the appeal case of Radoslav Brdanin.[9] If this principle was sometimes criticized by outside commentators, the court tried, over a decade, to develop a coherent jurisprudence. It is this effort that has been undermined. While the concept was intended to infer personal responsibility, or the responsibility of command, by exploring a company's involvement in the commission of a crime (and therefore the acquiescence of the accused in the commission of the crime, where general knowledge trumps detailed understanding), the new approach requires the court to prove direct intent to commit precisely the crimes listed in the indictment. Thereby, the practical effect of the judicial doctrine of joint criminal enterprise is undermined. Therefore, failure to acquire written orders for the commission of mass atrocities (evidence that is virtually nonexistent), despite overwhelming evidence supporting the prosecution's case, is almost an impossibility.. International justice has developed its jurisprudence toward determining culpability for the most senior leaders, despite their institutionalized protection and absence from sites of massacres. But here, that jurisprudence is rendered useless. The regression is spectacular.

The consequences on the region's history are considerable: in the light of recent acquittals and unfinished trials, a considerable number of the indictments issued by Tribunal appear erroneous. The court's work and decisions obscures more than it illuminates. If the convictions of Sainovic, Ojdanic, Pavkovic, and others, suggest that Milosevic would undoubtedly have been sentenced for ethnic cleansing operations conducted in Kosovo in 1999, acquitting Perisic and Stanisic seems like a posthumous acquittal for the former president and for his role in the wars in Croatia and Bosnia. Result: the history of the wars that ravaged the territories of the former Yugoslavia, especially Bosnia and Herzegovina, remain obscured.

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8 We will not enter into greater detail concerning this doctrine. For more detail on the subject *see* Olivier de Frouville (dir.), *Punir le crime de masse : entreprise criminelle commune ou co-action ?*, éditions Anthemis, collection Droit et justice, 2012.

9 Matteo Fiori, "Une nouvelle étape dans le développement de la doctrine de l'entreprise criminelle commune", *Journal judiciaire de La Haye*, vol.2, n°2, 2007.

The acquittals of Stanisic and Simatovic was decided by the judges of the first instance. The prosecutor appealed. One may hope that this verdict is in turn reversed, as the penalties for Perisic and Gotovina had been by subsequent trials. But if a conviction on appeal restores the impression that, despite all, the court still seeks justice, a new dramatic reversal would only confirm the overwhelming sentiment that, between the two chambers, the fate of the accused is happenstance. Whatever the future verdict, it will not be enough to undue the grave crisis of confidence surrounding the ICTY.This time the responsibility clearly lies with the judges, or at least some of them.They have not managed to maintain consistency in the body of jurisprudence they have developed collectively. However, the judges' original sin lies elsewhere. In fact, it is rooted in the unlikely acquittal of General Ante Gotovina. The acquittal was so implausible that, beyond the serious doubts put forth by specialists', confidence in the impartiality of some judges was manifest.

General Gotovina, Judge Meron: innocent or guilty?

In this case, the doctrinal turmoil seems insufficient to explain the Croatian general's acquittal. It is not so much the strength of the evidence required that would be excessive and counter-productive as the inclusion by default of all elements presented at trial. The decision on appeal was based almost exclusively on the rejection of the lower chamber's use of a spatial criteria. The lower chamber determined that the bombing of the Croatian forces 200 m away was too distant for a military objective and was actually indiscriminate firing against civilian populations property. Everything else was practically removed from consideration: not the content of the meetings preparing for the attack on Knin and its surroundings, nor the intensity of the bombing of a pacified city , nor the impunity granted to the general looting and killings that followed the reconquest, nor measures to prevent the return of Serbian inhabitants. In his dissenting opinion, Judge Agius, who is also vice-president of the ICTY, wrote that the majority "ignore or do not take into account the evidence without providing adequate justification." The outright annulment of the first chamber's condemnation, based on what has been published by the judges, is incomprehensible and therefore not eligible.

A man is at the heart of this change: Judge Theodor Meron, an American. He presided over the Appeals Chamber. Recall that the appointment of judges is the result of a proposal by each judge's the State. The proposal is then either accepted or refused by the Security Council that then develops a short list it submits to the General Assembly of the United Nations. They then elect judges by an absolute majority. The President of the Tribunal shall be elected by a majority vote of the permanent judges of the ICTY for a period of two years, with the possibility of a single renewal. Judge Theodor Meron has held this position on two occasions: in 2003, 2005 and again on November 17, 2011. Mr. Meron's appointment is theoretically renewable in November 2013 because the the number of terms are not limited while the number of renewals are . As part of his functions, Meron chairs the plenary meetings of the Tribunal, coordinates the work of the chambers, oversees the Registry's activities, issues practical guidelines on particular aspects of court administration, and has political and diplomatic functions, some of which are before the Security Council. Above all, he chairs the Appeals Chamber judges and affects the Appeals Chamber and Trial Chambers. His authority is critical and extends to the presidency of the Mechanism for international Criminal Tribunals (MICT), the division responsible for ensuring the remaining administrative functions of the ICTY and ICTR when these two courts have completed their respective mandates.

As president or member of the Appeals Chamber, Judge Meron has taken part in almost all the procedures noted in this article (Limaj, Hartmann, Haradinaj, Gotovina, Perisic). It is only in the Stanisic and Simatovic judgments that his name does not appear directly because the acquittal has not yet been pronounced, to date, in the first instance. Yet in his email of June 6, Frederick Harhoff J. stated that "hallway murmurings" on the pressures Meron would have put on Judge Orie, who presided over the chamber in this case. Meron's mandate that Orie render the verdict in the following days (when, officially, there is no time-constraint of this nature for judgments), would have taken Orie unawares. With the Perisic jurisprudence still quite recent, it was naturally used as a guide in a similar case in many ways. The French judge who distinguished himself from his two colleagues had only four days to write a dissenting opinion: insufficient for it to be considered and discussed by the three judges' delay. "A rushed job. I would not have thought it possible from Orie "deplores Harhoff. But why this sudden rush?

The Danish judge was unable to say so with certainty, but he believes that the court is influenced by the military or diplomats of some states: "Have the American and Israeli officials exerted pressure on the presiding judge for a change of direction? "he asks." We will probably never know. But rumors about the pressure he puts on his colleagues in the Gotovina and Perisic trials suggests he was determined to win an acquittal. And in particular he managed to convince an experienced Turkish judge to change his mind at the last minute. In both cases, the majority was three against two. "

The charge is particularly serious. Judge Meron is of American nationality, and more than others, he may be sensitive to delays of its military, deployed in the Middle East and in sensitive areas, or worries of the Israeli Army involved in regional tensions (with Lebanon in 2005 and now Iran). Confidential diplomatic cables divulged by WikiLeaks (and supported by other websites) reflect a very good relationship between Meron and the ambassador of the United States stationed in The Hague. The latter, in November 2003, highlighted the degree of agreement between the American ambassador responsible for war crimes, Pierre-Richard Prosper, appointed by President George W. Bush in May 2001, and the President of the ICTY. He described it as "the preeminent defender in the court of the government's efforts in the United States."[10] Worst still is that this is not the first time such suspicions were advanced by a prominent member of the court. The former spokeswoman for the prosecutor, Florence Hartmann, had already written a book and an article that earned her the wrath of the court where she worked between 2000 and 2006.[11]

The condemnation of Florence Hartmann: justice turned on its head

Ms. Hartman's book, entitled "The Secret Wars of Politics and International Justice" pointed out oversights that were more or less intentional in the constitution and analysis of information collected by the prosecution: "military analysts, organized under the Military Analyst Team (or

10 The commentary is as follows: "Ambassador Prosper's meetings, particularly with President Meron, provided an excellent opportunity to advance USG equities with respect to the completion strategy and to convey our support for the consistent efforts of the President and Registrar in this respect. Meron, the Tribunal's preeminent supporter of USG efforts, welcomed Prosper's articulation of U.S. policy with respect to the transfer of cases for local prosecution and benefited from a detailed understanding of the circumstances that prompted the USG's reaction to the unsealing of the recent indictments". Cité d'après le câble reproduit sur http://cables.mrkva.eu/cable.php?id=11982

11 Florence Hartmann, *Paix et châtiment. Les guerres secrètes de la politique et de la justice internationales*, Flammarion, 2007.

the MAT in the jargon of the Hague), were the gatekeepers through which any lawyer or investigator was obligated to pass (...) as the nerve center of the judicial machine, the great powers coveted MAT(...) Americans and British provided its highly qualified staff which allowed them to control penal strategies from a distance(...) the Anglo-Saxon military analysts systematically and deliberately concealed Mr. Milosevic's direct responsibility for the crimes in Bosnia, including Srebrenica "(pp.101-106).

In addition to this "internal sabotage", that the court has indeed long guarded confidential documents which are extremely compromising to Belgrade from the Supreme Defense Council is a evidence of the opacity in which the court sometimes operates. And finally, the chamber trying Milosevic undertook their procedures confidentially against the advice of counsel. The three judges endorsed the arguments proposed by Serbia and opposed an open process. An open process would not only interested the general public. It could also have led the International Court of Justice (ICJ) to consider certain arguments in the case between the State of Bosnia and Herzegovina against the state of Serbia. But Serbia's opposition to the disclosure can be summarized in three words: "vital national interest." According to Florence Hartmann, the prosecution attempted to obtain the annulment of the decision on several occasions. Those efforts were in vain. And even then, in September 2005, the Appeals Chamber acknowledged that the chamber trying Milosevic had committed an error of law and that the rationale invoked for confidentiality was not valid. Despite this prohibition, the Appeals Chamber did not overturn confidentiality measures. It argued that even though erroneous, the decision of the chamber's decision had, for Belgrade, "created a legitimate expectation... that all subsequent requests would be determined on the same basis."

So the court erred and, once the error was admitted, the error was preserved by recasting a veil of secrecy. Hartmann was prosecuted for contempt-- "insulting" the ICTY-- and sentenced to pay a fine of 7000 euros for recounting the standoff between judges and prosecutors. Such a penalty was normally reserved for people who deliberately obstructed the course of justice (for example by disclosing the identity of protected witnesses) and the proceedings against Hartmann were totally disproportionate. Not only because the disclosures made in Ms. Hartmann's book were already largely public knowledge (she was in no way in violation of "professional secrecy" or bound to her former position as spokesperson), but also because the confidential information disclosed did not expose protected documents' content (the transcript of the National Defense Council). Nevertheless, the judges deliberated on this point and kept their deliberations confidential!

The case is a layered: this is the secret within a secret in the same way that Florence Hartmann's trial is a scandal within a scandal. So of course Ms. Hartmann's account does not mince words: "The five judges of the Appeals Chamber were voluntarily influenced by the authorities in Belgrade for the sole purpose of encouraging removal to another jurisdiction, the ICJ, were a miscarriage of justice would take place because of access to documents."[12] Today, in taking stock of the ICTY, what are the take-aways? General Perisic and Gotovina were acquitted while Florence Hartmann, a journalist and former spokesperson for the prosecutor, was sentenced. Everything is upside down! And what will happen to Judge Harhoff who expressed similar doubts about the integrity of the court's president? Will he, too, be punished in his turn? Will he be pushed toward resignation? Is it really up to him him to leave? Several victims' associations

12 Florence Hartmann, *op. cit*, p.121.

and dozens of lawyers have called for Judge Theodor Meron's resignation. How might the court escape such a terrible atmosphere?

The way forward? Further Questions and Lessons Learned

Let us return to the questions we had at the outset to have a better sense of the scope of the crisis. The idea of international justice is tarnished but is it entirely invalidated? No. To admit that the scope and scale, the international dimension of the trial does not protect from errors in its proceedings and judgments is nothing extraordinary. The examples are numerous and well known. The ICTR had, for example, already sadly illustrated proceedings were launched against Leonidas Rostra, one of the few Hutu military high-ranking to be publicly opposed to Colonel Bagosora and massacres during the genocide of Tutsi.[13] The international court is not the heroic figure speaking on behalf of humanity or a white knight universalism over selfishness and the justice of small national interests. The Rome Statute, developed in the late 90s, and the principle of complementarity on which rests the institutionalization of international justice through the International Criminal Court, has long been reduced to mere status of judge subsidiarity. The international court is the last resort to try the most serious international crimes when national courts are unable or unwilling to judge itself. This does not mean that national judges are better than international judges. Rather than if the latter have a particular duty to set an example, the first against a priori are better placed to do justice to their compatriots. But it is evident that the one and the other are equally fallible. That miscarriages of justice occur is never a reason for abandoning the idea of justice.

Furthermore, in terms of the doctrine, though the ICTY's new jurisprudence could be used to misused, damage should be limited. The International Criminal Court had not adopted the concept of joint criminal enterprise under which the ICTY continues to labor. The preliminary chambers I and III adopted the concept of "co-action."[14] The link between individual responsibility and mass crime remains a complex challenge to the criminal law, but it is by no means inaccessible.

Similarly the relationship between politics and justice, as complex and shifting as it is, is not condemned to to be as incompatible as "realpolitik" and the ideal of justice. Justice for crimes against humanity, crimes political in nature, is otherwise unable to provide a helpful link between the geopolitical and diplomatic environment in which it operates. We must also reject the *cliche* that politicians manipulate and control all judiciaries and abstain from caricaturing state approaches. History remains indebted to the United States that imposed upon its allies a project called the International Military Tribunal at Nuremberg in 1944-1945 ; the ICTY itself would have remained a "paper tiger" if the Americans had not given it minimal resources to operate. On the other hand, the Americans have always resisted, and sometimes in the most brutal manner, the idea that their own nationals may fall under the court's jurisdiction. Without evoking here the legal issue of cultural differences (between common law and civil law), it is not necessarily surprising to see American judges or lawyers working in The Hague without sharing the same vision of international justice than their colleagues (and a fortiori ours). Are they acting in bad faith? Not necessarily! The dividing line is not easy to draw between yielding to political pressure and adopting a maximalist or erroneous reading of the law. Concealment of

13 See chapter XIV, « La trahison des 'modérés' », dans Thierry Cruvellier, *Le tribunal des vaincus. Un Nuremberg pour le Rwanda ?*, Calmann-Lévy, 2006.
14 Olivier de Frouville, *op.cit.*

evidence or influence peddling are offenses but blindness or incompetence are not. In the first case, it is much more serious, but it may also be made up for since the judgment can possibly be canceled. As for the second case, it is less serious, though an undermined judgment is irrevocable. The reasons for pressures by major powers are not obvious to identify. Not that there are no possible motives. Indeed, there are many. But which of them are true?

What would hide or defend the Americans ? Are they the only ones who want to or have the means to infiltrate? Do they act in concert with their traditional allies, the English? Are they in competition or do they have the tacit support of other Western powers? Are the stakes related to the past and what are they precisely: is it to disguise the cowardice of their inaction in the face of massacres? Cover shadowy diplomatic and military maneuvers (including support for Croatian authorities to arm)? Not to mention what they knew of preparations underway for taking enclaves "protected" from Srebrenica and Zepa and the foreseeable nature of the killings? To conceal a secret green light to sacrifice a local population and then go on to a territorial compromise and general policy? To have made the choice of peace at the expense of the truth by bargaining concessions with Belgrade and Zagreb, two of the three signatories of the Dayton Accords? Or are they the issues instead (or also) to curb future advances in international law in the field of responsibilities attributable to general and heads of state in order to preserve future legal proceedings instituted on the basis of these achievements? Is there a link, and if so which, to controversies between the acquittals of the ICTY and the recent acquittals in Rwanda, by the International Criminal Tribunal for Rwanda and an appeals chamber also chaired by Meron? Can a single judge, as high up as he is in the hierarchy of the court, truly execute a reorientation of jurisprudence and decisions in which he wielded influence, and which were, at the same time, taken on by many others?

Would a commission and formation of an independent inquiry break the court's deadlock?

There is no ideal solution, but one could imagine that under the aegis of the UN, and possibly with the help of the office of the Registry of the ICTY, an independent investigation commission could determine whether there were actual attempts to pressure the judges or influence their work. If improper influence is discovered, how and by whom was it exercised? Does the impermissible influence originate from beyond the court? One might examine the nature and frequency of meetings between Judge Meron and the United States' Ambassador. Were these meetings official, integral to the political part of its mandate, linked to the permissible collaboration between a State and the court, or secret? In some instances, the judge's responsibility is limited. At the very least, inquiry may lead to the development of a code of ethics for international criminal tribunal judges (even beyond the ICTY) in order to avoid questionable conduct that is detrimental to the independence of justice but avoids preventing the necessary and useful exchanges between diplomats and politicians. Despite some foreseeable drawbacks, forming a commission with the tribunal's consent may restore some of the confidence the tribunal has lost, even if the commission's inquiry initially erodes confidence.

The court may also depend upon precedent. Indeed, it had already opened an investigation following allegations of pressures the prosecutor's office had exercised on witnesses in the trial of Vojislav Seselj's Serbian militia. The investigation invalidated the charges. Previously, the court had also diligently executed an independent investigation into the circumstances of the death of Slobodan Milosevic in the Scheveningen prison. The survey conducted by the

prosecutor of the Netherlands invalidated conspiracy theorists theories of Milosevic's poisoning and confirmed that the former Serbian president succumbed to a heart attack. Furthermore an audit of the detention center was conducted by the Swedish government. The investigation exposed security failures that allowed the smuggling of drugs and products into the prison (which is how Milosevic practiced dangerous self-medication). Finally, following the WikiLeaks revelations that the head of the ICTY's detention unit, Tim Mc Fadden, had informed the American ambassador of Mr. Milosevic's health, ICTY Judge Orie initiated an inquiry.

Judge Orie concluded that the case merited disciplinary sanctions rather than proceedings before the Court for contempt. These detailed reports highlighted the need for the court to be vigilant in regards to unflattering rumors against it. The current situation, however, is in some sense more serious. The suspicions articulated do not come from actors who have always been hostile to the court, but from a not insignificant number of actors who supported its creation. How can the tribunal credibly respond all of its critics? The ICTY can certainly minimize the crisis. Its mandate concludes in two years, and even if there are other controversial acquittals, it may hold on to the effective work which led to the convictions of Karadzic and Mladic.

In the short term, the election for the ICTY President will take place in the fall and could produce a new candidate elected from among the judges. But Meron's departure, voluntary or not, would be insufficient to truly close this chapter. It would be a mistake to believe that the storm is only transitory and that it only blemished the court's image. The ICTY must maintain its impartiality, its argument that it is beyond purchase or influence: that it, among others tribunals and bodies, contributes to the development of international law, particularly in regard to sexual violence, the definition and application of the Crime of Genocide, the qualification of crimes against humanity; that it inspires the International Criminal Court and other ad hoc courts such as the Special Court for Sierra Leone. That the ICTY ordered that a large significant number of criminals be apprehended to hear their valuable testimony. The ICTY assures a rapport between a mixed jurisdiction and a fully national jurisdiction (the special chamber for war crimes in Bosnia and Herzegovina that is installed in Sarajevo). The celebrations for the 20th anniversary of the ICTY's establishment, in May 2013, was an opportunity to highlight these achievements. They are not, however, enough to make us forget the crisis of internal and external confidence that has shaken court.

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