

## Not in our name! Visions of community in international criminal justice

Tripkovic, Milena

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## *Not in our name! Visions of community in international criminal justice*

ABSTRACT: This chapter explores how international criminal justice conceives of the relevant ‘communities’ as the authors and owners of criminal justice that is administered by international criminal courts. To do so, it contrasts the traits of relevant communities on the national and international levels. While there is *only one* relevant community on the national level – the domestic community – that oversees punishment, there are in fact *two* relevant communities at the international level – the ‘domestic’ community from which the perpetrators prosecuted before the international tribunals come, and the international community in whose name the perpetrators are punished before the international tribunals. This duality of communities at the supranational level creates tensions, because while the international community can be considered as both the creator and recipient of international justice, the ‘domestic’ community is merely its addressee, but hardly plays any other role. Thus, even if crimes over which international criminal courts have jurisdiction are universally condoned, the way in which international justice operates alienates and excludes the domestic community, while punishment at the international level does little to strengthen the domestic moral order. The chapter argues that it is this problem – more than issues of geographical distance or the lack of outreach – which accounts for why international trials fail to achieve beneficial effects and offers some insights into whether this problem could be resolved.

KEYWORDS: ICTY, community, punishment, reconciliation, international criminal tribunals

### **I Introduction**

Having delivered its final judgement in November 2017, the International Criminal Tribunal for the former Yugoslavia (in further text ICTY) ceased its work after nearly 25 years, which expectedly triggered attempts to give a closing verdict regarding its success in achieving various transitional goals. Although the main aim of the ICTY was to deliver justice by determining individual criminal responsibility, promoting peace in the former Yugoslavia also fared highly on the list of objectives that the Court set out to accomplish. The United Nations Resolution 827 by which the ICTY was founded in 1993, anticipated that the work of the *ad hoc* international criminal tribunal would, among other things, ‘contribute to the restoration and maintenance of peace’.<sup>1</sup> Writing its first annual report, the former President of the ICTY Antonio Cassese suggested that the Court is ‘a tool for promoting reconciliation and restoring true peace’.<sup>2</sup> Upon

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<sup>1</sup> United Nations Security Council, ‘Resolution 827’, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf) accessed on 24 June 2018

<sup>2</sup> ICTY, ‘Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991’ <[http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_1994\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf)> accessed 19 June 2018

its closure, a quarter of a century later, the Court seems convinced that it has achieved even more than it had hoped for:

Undoubtedly, the Tribunal's work has had a major impact on the states of the former Yugoslavia ... simply by removing some of the most senior and notorious criminals and holding them accountable the Tribunal has been able to lift the taint of violence, contribute to ending impunity and help pave the way for reconciliation.<sup>3</sup>

This self-assured view – that the Court's work on truth and justice paved the way towards reconciliation – is however shared by neither academic commentators nor many people who live in the former Yugoslavia. Most academics argue that the Court's proceedings have had little reconciliatory effects,<sup>4</sup> with some emphasizing that, if anything, the ICTY has actually contributed to a heightened sense of mistrust and hostility,<sup>5</sup> although many have recognized that reconciliation was an unattainable goal for a court whose main purpose is to establish criminal responsibility.<sup>6</sup> These views are hardly surprising: since its foundation, the ICTY was, across the former Yugoslavia, persistently accused of prejudice and bias: for this reason, for example, 71% of both Croatians and Serbs had a predominantly negative opinion of the Court, while 67% of

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<sup>3</sup> ICTY, 'About the ICTY' <<http://www.icty.org/en/about>> accessed on 19 June 2018

<sup>4</sup> Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security* 5; James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) 42 *Journal of Peace Research* 271; Isabelle Delpla, 'In the Midst of Injustice: The ICTY from the Perspective of Some Victim Associations' in Xavier Bougarel, Elissa Helms and Ger Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society* (Ashgate 2007); Johanna Mannegren Selimovic, 'Perpetrators and Victims: Local Responses to the International Criminal Tribunal for the former Yugoslavia' (2010) 57 *Focaal* 50; Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014); Madiha Inara Khan, 'Historical Record and the Legacy of the International Criminal Tribunal for the Former Yugoslavia' in James Gow, Rachel Keer and Zoran Pajic (eds), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014)

<sup>5</sup> Robert Hayden, 'What's Reconciliation Got to Do with it? The International Criminal Tribunal for the Former Yugoslavia (ICTY) as antiwar profiteer' (2011) 5 *Journal of Intervention and Statebuilding* 313-330

<sup>6</sup> Janine Natalya Clark, 'From Negative to Positive Peace: The Case of Bosnia and Hercegovina' (2009) 8 *Journal of Human Rights* 360; Janine Natalya Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina' (2009) 7 *Journal of International Criminal Justice* 463; Janine Natalya Clark, 'Judging the ICTY: Has it Achieved its Objectives?' (2009) 9 *Southeast European and Black Sea Studies* 123; Rachel Kerr, 'Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia' (2007) 7 *Southeast European and Black Sea Studies* 373; Jelena Subotic, 'Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of *Gotovina, Haradinaj and Perišić*' (2014) 13 *Journal of Human Rights* 170; Jack Snyder and Leslie Vinjamuri 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security* 5; Patrick Robinson, 'Creating a Legacy that Supports Sustainable Rule of Law in the Region' in Richard Steinberg (ed.) *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publisher 2011); Diane Orentlicher, 'From Viability to Impact: Evolving Metrics for Assessing the International Criminal Tribunal for the Former Yugoslavia', (2013) 7 *The International Journal of Transitional Justice* 536

Croatians and 49% of Serbs were against their countries' cooperation with the ICTY.<sup>7</sup> It is then understandable that 54% of Croatians, 71% of Serbs – and perhaps most significantly having in mind its multi-ethnic composition – 50% of people in Bosnia and Herzegovina (in further text BiH), think that the Court's work has had no influence on reconciliation in the region.<sup>8</sup> Even though perceptions differ across ethnicities, 'exported'<sup>9</sup> or 'hijacked'<sup>10</sup> justice is seen unequivocally as a less than ideal solution.

This chapter is primarily motivated by a desire to explore some of the possible reasons for which the ICTY failed to achieve the task of reconciliation among the peoples of the former Yugoslavia. To do so, the chapter consciously moves away from standard interpretations of relevant factors which cite geographical distance and insufficient attention to outreach, both of which refer to the point that the ICTY was a foreign court whose work was *unfamiliar* to the population of the former Yugoslavia. While at first this seems like a reasonable explanation, the chapter contends that a more comprehensive understanding of the relevant factors ought to be employed, which concerns the relationship between punishment and the community and emphasizes the positive effects which the imposition of penal measures on wrongdoers can have for the wellbeing of the society. Stated simply, if prosecution and punishment by the ICTY did not have reconciliatory effects, then it must be the case that the positive effects which the punishment – as a theoretical possibility – may have on the community, were absent in this case. To understand what these are, we must seek to enlighten the deeper theoretical commitments which underlie this proposition.

The chapter develops in the following way. First, I expose the fundamental theoretical assumptions about the role of punishment in the community. This part of the chapter is not concerned with identifying the aims of punishment (its deontological or teleological

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<sup>7</sup> OSCE, 'Public Opinion Poll: Attitudes towards War Crimes Issues, ICTY and the National Judiciary', <<https://www.osce.org/serbia/90422>> accessed on 23 June 2018; Beogradski centar za ljudska prava, 'Javno mnenje u Hrvatskoj i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu', <<http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Hrvatskoj-i-stavovi-prema-Međunarodnom-krivičnom-tribunalu-za-bivšu-Jugoslaviju-u-Hagu-ICTY-2011-detajjne-tabele.pdf>> accessed on 23 June 2018

<sup>8</sup> OSCE (n 7); Beogradski centar za ljudska prava (n 7); and Beogradski centar za ljudska prava, 'Javno mnenje u BiH i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu', <<http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-BiH-i-stavovi-prema-Međunarodnom-krivičnom-tribunalu-za-bivšu-Jugoslaviju-u-Hagu-ICTY-2010-detajjne-tabele.pdf>> accessed on 23 June 2018

<sup>9</sup> Dan Saxon, 'Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia' (2005) 4 *Journal of Human Rights* 559

<sup>10</sup> Jelena Subotic, *Hijacked justice: dealing with the past in the Balkans* (Cornell University Press 2009)

foundations), but with the functions and role of punishment in the *community* to which the offender belongs. The second part of the chapter, drawing on the example of the ICTY's outreach program in the former Yugoslavia, elucidates the key differences between the assumptions about the functions of punishment *within* one community and the role of punishment *at the international level*. This part emphasizes the different way in which communities are conceived of on the domestic and international level by focusing on two key issues: the *authorship* and *ownership* of criminal punishment. Ultimately, it reaches a conclusion that international trials inherently suffer from the lack of appropriate moral bearing which is a precondition if punishment is to have a positive wide-scale effect on the society. Acknowledging the role that international criminal trials will increasingly assume in the future (particularly with regard to the International Criminal Court), the last part of the chapter concludes by seeking to reconcile the ever-growing need for international prosecutions with the problems which international courts innately experience.

## **II The role of punishment in the community**

When considering the role of punishment, one of the key issues that arises concerns the justification(s) of punitive measures that are imposed on criminal offenders. This refers to a long-standing debate regarding deontological (retribution) and consequentialist (deterrence, rehabilitation or incapacitation) reasons for which punishment may be imposed. The focus of this discussion is hence mostly on the offenders, while the assumptions about the effects of punishment for the community are mostly drawn indirectly from whatever is thought that punishment of criminals could achieve: a sense of righteousness derived from the knowledge that those guilty of crimes will not go unpunished (retribution), a sense of hope stemming from the belief that potential lawbreakers will be discouraged (deterrence) while current lawbreakers will be rehabilitated (rehabilitation), and a sense of security that draws on the knowledge that criminals have been prevented from reoffending, usually by way of incarceration (incapacitation). But all these assumptions are limited in that they do not go far enough in explaining whether punishment could achieve comprehensive, and not merely fragmentary effects. To understand this, a sociological interpretation of the functions of punishment will be employed in this part of the chapter which examines the role of community in creating criminal laws (what I call the *authorship* dimension) and deriving the benefits from the application of punishment that is based on these norms (what I term the *ownership* dimension).

The sociological perspective on the role of punishment features perhaps most strongly in the work of Émile Durkheim, who developed a comprehensive account of the foundations and functions of punishment which (with some important caveats that will be mentioned below) figures strongly even today. In a well-rehearsed argument, Durkheim considered crime a ‘normal’ social fact which, even though it appears in diverse forms, is present across time and space.<sup>11</sup> For Durkheim, however, crime is not only ‘normal’ but is also not entirely negative: ‘to classify crime among the phenomena of normal sociology is not merely to declare that it is an inevitable though regrettable phenomenon arising from the incorrigible wickedness of men; it is to assert that it is a factor in public health, an integrative element in any healthy society’.<sup>12</sup>

To understand this unconventional claim, we need to go back to Durkheim’s examination of the foundations of criminal law. For him, crime is an action that ‘offends certain collective feelings which are especially strong and clear-cut’<sup>13</sup>. These collective feelings – which Durkheim calls ‘conscience collective’ and which spatially and temporally contingent – are molded into laws, which thus purportedly become accurate representations of the common morality. Punishment can therefore be said to represent ‘an index of society’s invisible moral bonds’<sup>14</sup> and it is in this sense that I suggest that the community has *authorship* over criminal laws. A strong link between morality and crime is therefore established, but the link assumes an opposite direction from the one usually assumed – in Durkheim’s words, we should not think that ‘an action shocks the conscience collective because it is criminal, but rather that it is criminal because it shocks the conscience collective .. we do not condemn it because it is a crime, but it is a crime because we condemn it’.<sup>15</sup>

However, the authorship role of the community in devising criminal laws is merely one dimension in Durkheim’s analysis of the social functions of crime and punishment. The truly beneficial effects derived from punishment emanate from the *ownership* of the process through which punishment is imposed on criminal offenders and – even more importantly – the ownership of *moral outcomes* of this process. Discussing this dimension of Durkheim’s work, David Garland notes how punishment represents ‘an occasion for the collective expression of shared moral passions, and this collective expression serves to strengthen these same passions

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<sup>11</sup> Émile Durkheim, *The Rules of Sociological Method* (Free Press 1964)

<sup>12</sup> Ibid. 98

<sup>13</sup> Ibid. 99

<sup>14</sup> David Garland, *Punishment and modern society* (Clarendon 1991) 2

<sup>15</sup> Émile Durkheim, *The division of Labor in Society* (Free press 1972) 123-124

through mutual reinforcement and reassurance'.<sup>16</sup> Therefore, a circular process is established whereby common morality provides the foundation for the definition of crimes whose punishment then works backwards to reaffirm that same morality and enhance social solidarity. Punishment then, rather than being merely expressive, has a functional effect as it 'is above all a moral process ... propelled by moral sentiments, its forms symbolize and express moral judgements, and its effects are primarily to reaffirm the moral order'.<sup>17</sup>

The most important conclusion emanating from the preceding discussion is that an intricate but robust link exists between *punishment* and *community* – the community not only creates criminal laws but more importantly, punishment does not exist and cannot be understood without reference to the community. Punishment is not an abstract, technical and instrumental response to crime that is separate from and bears no relevance to the social context within which it is imposed. While Durkheim's account has been criticized for assuming that 'conscience collective' is homogenous, but is more realistically a consequence of struggle thus becoming 'ruling' or 'dominant' morality,<sup>18</sup> this critique does not significantly undermine the importance of punishment for the society and social solidarity, however these may come about.

Arguments which bear resemblance to Durkheim's position have been rehearsed more recently, within the debate on the best normative justification of punishment which emphasizes the citizenship dimension and pays attention to the community within which such punishment is imposed. Starting from the premise that crimes are public rather than private wrongs, Antony Duff holds that 'common law' – the law of the community – is 'a form in which citizens speak to one another' because it 'embodies values shared by the community [and] flows from the traditions and practices of the community'.<sup>19</sup> The purpose of punishment is to communicate reprobation to the offender, make her understand the harm that she has caused and allow her to be reconciled with the community. This view, much like Durkheim's, also focuses on two dimensions: it examines both what the punishment 'does' to the offender (in Duff's words, it aims at 'inclusion' through communication), but also how such inclusive punishment benefits the community. Similarly, Nicola Lacey considers that criminal laws play a social function in

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<sup>16</sup> Garland (n 14) 33

<sup>17</sup> Garland (n 14) 47

<sup>18</sup> Ibid. 52

<sup>19</sup> Antony Duff, *Punishment, communication and community* (OUP 2001) 59-60

upholding community values that are ‘perceived as necessary to the maintenance, stability and peaceful development of the community’.<sup>20</sup>

Finally, the idea of community’s focal role in punishment has found its practical application within the restorative justice paradigm. Offenders, victims and the community are key actors in the restorative process as they are all considered to have a ‘stake’ in the given offence.<sup>21</sup> Conceptualizing a crime as a conflict between the criminal and victim,<sup>22</sup> restorative justice nevertheless recognizes the central role which the community plays in expressing moral reprobation and condemnation, but equally importantly in taking positive steps towards reintegration of the offender which invariably strengthens social cohesion.<sup>23</sup>

While common criticism, as already mentioned, holds that the empirical reality is often far removed from the notions developed in this section, the normative value of ideas that underlie them is not consequently undermined. If punishment is to have any beneficial effects on the community – and there is no reason to desire anything less than that – then reaffirming solidarity, and reasserting common values and common morality seem like valuable goals. Making the community an author of punishment therefore becomes a crucial condition for claiming ownership over the beneficial consequences which come about through its imposition.

### **III The community and international criminal punishment**

The decision to put an international *ad hoc* tribunal, rather than any of the domestic courts which had actual jurisdiction over the matter, in charge of the prosecution of crimes perpetrated during Yugoslavia’s conflict, was essentially one of necessity. With the war still raging in 1993 when the ICTY was set up, there were no realistic prospects for prosecution other than to involve a geographically distant, and presumably impartial international court. According to Fausto Pocar, the ICTY’s former President, the primacy of the ICTY was nevertheless intended to be only temporary, and the Court’s ‘completion strategy’ which devised a plan for transferring the remaining cases to the countries in the region, was in reality a ‘continuation strategy’ aimed equally importantly to strengthening the rule of law and increasing judicial capacity in post-

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<sup>20</sup> Nicola Lacey, *State punishment* (Routledge 1993) 176

<sup>21</sup> Tony Marshall, ‘Restorative Justice: An Overview’ in Gerry Johnstone (ed.) *A Restorative Justice Reader: Texts, Sources, Context* (Willan 2003)

<sup>22</sup> Nils Christie, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1

<sup>23</sup> Heather Strang and John Braithwaite, *Restorative Justice and Civil Society*. (CUP 2001); Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2014); Francesca Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (Routledge 2015)



Yugoslav states.<sup>24</sup> Currently, a number of courts in the former Yugoslavia are facing the future prospect of conducting at least 3,000 trials for which the ICTY provided at least some evidence,<sup>25</sup> and while it remains to be seen how these processes will play out in reality, it is reasonable to suggest that the ICTY will remain the most important judicial body for the region, if for no other reason than because it succeeded in convicting a significant number of high-profile offenders for the most serious breaches of international humanitarian law.

Involving an international court into a domestic matter has, as is well known, led to numerous problems for the functioning of the Tribunal. Its fundamental deficiency was the lack of enforcement mechanisms to apprehend the suspects and secure evidence for prosecution, making the Court entirely dependent on the reluctant cooperation of the countries in the region.<sup>26</sup> The governments' unwillingness to cooperate was profoundly linked to (but also impacted) the negative way in which the people across the former Yugoslavia perceived the Tribunal's work.<sup>27</sup> The Tribunal was, from the start, seen to be not even an international, but essentially *a foreign court*, geographically removed from the region, alienated from the local population and the events that took place during the conflict. Even though the Tribunal at first enjoyed support within specific ethnic groups – such as Bosniaks and Kosovars – ICTY's subsequent indictments against (a small number of) members of these groups irreparably damaged its reputation.

Aware of this damaging perception, seeking to reduce political obstruction,<sup>28</sup> and improve its reputation, the ICTY set up an outreach program in 1999. The program was essentially an information campaign, consisting of activities such as organizing workshops, preparing documentaries and prospects, and capacity building of the judiciary.<sup>29</sup> Its ultimate goal was to 'work with the communities in the region to reflect on the Tribunal's achievements and carry

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<sup>24</sup> Fausto Pocar, 'Completion or Continuation Strategy' (2008) 6 *Journal of International Criminal Justice* 655

<sup>25</sup> Balkan Insight, 'Suspects Evade Justice as Prosecutors Ignore UN War Files', <<http://www.balkaninsight.com/en/article/suspects-evade-justice-as-prosecutors-ignore-un-war-files-03-12-2018>> accessed on 13 June 2018

<sup>26</sup> Claude Jorda, 'The Major Hurdles and Accomplishments of the ICTY - What the ICC Can Learn from Them' (2004) 2 *Journal of International Criminal Justice* 572; Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (CUP 2008); Walter Scharp, 'International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?' (1996) 7 *Duke Journal of Comparative and International Law* 411

<sup>27</sup> OSCE (n 7); Beogradski centar za ljudska prava (n 7), Beogradski centar za ljudska prava (n 8)

<sup>28</sup> Kerr (n 5)

<sup>29</sup> See for details, ICTY, 'Outreach Programme', <<http://www.icty.org/en/outreach/outreach-programme>> accessed on 23 June 2018; see also Janine Natalya Clark, 'International War Crimes Tribunals and the Challenge of Outreach' (2009) 9 *International Criminal Law Review* 99

that legacy forward'.<sup>30</sup> The Court thus felt that it was necessary to secure conditions in which its work will be seen as legitimate and to achieve this, it relied on spreading *information* about what it was doing: outreach was a manner of implementing international law into the (multi)national setting.

Reflecting back, however, the idea that obtaining additional information about criminal proceedings would influence various national and ethnic groups to view the Court's work more positively which would subsequently allow these groups to assume a more objective stance towards their own role in the conflict, now seems rather naïve.<sup>31</sup> While the ICTY indisputably facilitated the uncovering of facts pertaining to the conflict which would have otherwise probably remained concealed,<sup>32</sup> the gap between knowledge and acknowledgement<sup>33</sup> was too wide and complex to be closed in such a simple way. Making the ICTY's work more visible in the region of the former Yugoslavia, therefore allowing the local population to 'participate' in its work, even if indirectly, was destined to achieve little in contemporary world in which the public is in any case majorly excluded from and mostly disinterested in the punishment rituals.<sup>34</sup> As David Garland astutely observes, 'so long as the existing sanctions appear to convey a punitive effect in a manner which is broadly in keeping with current sensibilities, there tends to be limited moral interest in the details of how punishments are actually carried out'.<sup>35</sup> The key issue here is that the public is less interested in *how* punishment is imposed and more interested in *who* imposes it and on the basis of *what*. Anecdotal testimony which corroborates this position may be seen in the way in which the Serbian public perceived the trial of Slobodan Milošević. Each of his appearances before the ICTY was televised and the Serbian public had ample opportunities to understand the details of the crimes that he was charged with and comprehend the seriousness of the allegations that were put forward by the prosecution. But instead of changing the perception about Milošević through revealing the facts about his alleged crimes, people across Serbia (even those openly critical of his regime) commended the skilled way in which he cross-examined the witnesses, reveling serious flaws in the prosecution's case and ridiculing the prosecutors who struggled to understand key actors and events, and even to pronounce words in

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<sup>30</sup> ICTY (n 29)

<sup>31</sup> Stanley Cohen similarly believes that a large gap exists between finding out the truth and coming to terms with atrocities perpetrated in one's name, see Stanley Cohen, *States of Denial* (Polity 2001)

<sup>32</sup> Jorda (n 26)

<sup>33</sup> Thomas Nagel, cited in Lawrence Weschler, 'Afterword', in Lawrence Weschler (ed.) *State Crimes: Punishment or Pardon* (Aspen Institute 1989)

<sup>34</sup> Michel Foucault, *Discipline and Punish: The Birth of Prison* (Penguin 1991)

<sup>35</sup> Garland (n 14) 33

the domestic language. Instead of coming to terms with the facts, the public seemingly became even more deeply enthralled into denial.

A response to this criticism was a suggestion that the way in which the ICTY's outreach program was created had too many flaws – a pertinent one being that it was set up six years after the Court started its work. It was thus thought that while in theory outreach could achieve its goals, this task was undermined by the flaws in concrete measures which the Court had implemented: the program was allegedly insufficiently thorough, understaffed and underfunded.<sup>36</sup> Resonating a general view that the ICTY is 'not our court', the Court's former spokesman Refik Hodžić held that it simply did too little:

Eager to stay out of 'politics' and to 'let judgments speak for themselves', the Tribunal's decision-makers never saw the need to properly report to their true constituents on critical questions being raised in Sarajevo, Zagreb, Belgrade: Why were certain people indicted and others not? What was the philosophy of Tribunal's so-called sentencing policy? How was it possible to quash 1,300-page trial judgments with several pages of an appeal judgment? Why were defendants allowed to get rich by splitting Tribunal-provided fees with their lawyers? The list of such unanswered questions (often posed even by 'friends of the Tribunal' in the Balkans) is inexcusably long.<sup>37</sup>

In other words, as this argument seems to propose, had the ICTY's work in this domain been more serious, thorough and persistent, the Court would have been able to improve its image, convince the domestic population that it had legitimacy to conduct the criminal proceedings over foreign suspects, and perhaps reduce hostilities among the countries in the region, thus paving the way towards peace and reconciliation.

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<sup>36</sup> Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 *Journal of International Criminal Justice* 541; Aleksandar Fatić, *Reconciliation via the War Crimes Tribunal* (Ashgate 2001); Clark (n 29); Clark (n 6); Katie Zoglin, 'The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?' (2005) 27 *Human Rights Quarterly* 41; Laura Dickinson 'The promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295; Jaya Ramji-Nogales 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32 *Michigan Journal of International Law* 32

<sup>37</sup> Refik Hodžić, 'Accepting a Difficult Truth: ICTY is not Our Court', <<http://www.balkaninsight.com/en/article/accepting-a-difficult-truth-icty-is-not-our-court>> accessed on 23 June 2018

However, this position is essentially at odds with the theoretical notions regarding the role of punishment in the community that were developed in the previous section. While the Court's position seems to emphasise the beneficial effects which can be achieved if the domestic population *knows* what the ICTY is doing, the theoretical outlook holds that the beneficial effects can only take place if the community *feels* that the court 'belongs to them' and that the punishment imposed by such court is an authentic manifestation of communal sentiments.<sup>38</sup> These are two significantly different positions and the assumption that knowledge of how and why punishment is imposed will lead to a sense of ownership over this process<sup>39</sup> is rather tenuous, because it is debatable whether access to information can compensate for the lack of moral involvement.

It is at this point useful to go back to two concepts that were discussed in the previous section: the issues of authorship and ownership over criminal punishment, but the question now becomes how these concepts relate to the existence and functioning of international courts. While domestic communities are clearly the authors and owners (in other words beneficiaries) of punishment that is imposed by domestic courts, this is less obvious in the case in which punishment is imposed by a judicial body that is morally distant from the specific communal traits. Explaining Durkheim's position, Garland states:

Punishment may be a legal institution, administered by state functionaries, but it is necessarily grounded in wider patterns of knowing, feeling and acting, and it depends upon these social roots and supports for its continuing legitimacy and operation.<sup>40</sup>

To achieve beneficial effects, then, the imposition of punishment as a legal process must not be disconnected from the community of people who are expected to experience the beneficial effects that arise therefrom: those whose 'conscience collective' ought to be reaffirmed through punishment. But in the case of international criminal tribunals – and ICTY is a pertinent example of this – the imposition of punishment becomes a purely technical matter of proper administration of justice, which makes it profoundly disconnected from the moral sentiments of the domestic community, and, as it was argued above regarding the outreach program, makes the

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<sup>38</sup> Durkheim (n 11)

<sup>39</sup> Dan Saxon, 'Exporting justice: Perceptions of the ICTY among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia' (2005) 4 *Journal of Human Rights* 559-572

<sup>40</sup> Garland (n 14) 21

Court only superficially concerned with the impact of its judgements on the relevant community. While such punishment may be considered satisfactory from the standpoint of achieving the goal of justice,<sup>41</sup> punishment should not be expected to achieve other goals such as peace or reconciliation. The domestic population thus fails to see such punishment as morally relevant not because the Court is geographically removed and its work unfamiliar, but because it operates within an entirely alien moral framework. Suggestions on how best to ‘internalize’ justice achieved by international courts,<sup>42</sup> hence seem to utterly miss the point: they seem to invoke an essentially top-down process in which domestic communities are mere recipients and passive participants in the process of punishment, but not enough concern is paid to whether they actually feel such justice their own.

At the same time, it would be wrong to assume that the ICTY functioned in a moral vacuum: it is merely that its target moral community are not the countries of the former Yugoslavia, but the *international community*. Judging from the way in which it was founded, as a last resort of the international community to stop the bloodshed in former Yugoslavia, and having in mind the nature of the values endangered by the crimes in ICTY’s jurisdiction – universal values and the most severe attempts to undermine them – the authors and owners of such punishment are clearly located above and beyond the ex-Yugoslav community. Akhavan states this most succinctly when he observes how victims that appear before the international tribunals have the opportunity to ‘hear and see their stories told .. in an officially sanctioned forum before the *international community*’.<sup>43</sup> Similarly, proposing that punishment imposed by international tribunals has an ‘expressive function’, Sloane points out that such punishment contributes to the ‘world public order’,<sup>44</sup> which means that it only indirectly concerns national communities and – in his opinion and as a normative matter – there is no reason why national communities should be the main addressees of international justice. Nevertheless, even though international trials were externally imposed on countries of the former Yugoslavia,<sup>45</sup> punishment by the ICTY should still benefit the region – after all, former Yugoslav countries are part of the international community and subscribe to the same universal values. It is, however, obvious that beneficial effects are

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<sup>41</sup> Payam Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’, (1998) 20 Human Rights Quarterly 737

<sup>42</sup> Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 Vanderbilt Journal of Transnational Law 405

<sup>43</sup> Akhavan (n 41) 766 emphasis added

<sup>44</sup> Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 Stanford Journal of International Law 39

<sup>45</sup> Peskin (n 26)

undermined as the international community is the real author and owner of punishment imposed by international courts, whereas the domestic community is at best a passive recipient.

#### **IV Reconciliation through international courts: An untenable goal?**

Judging from public opinion surveys that have been conducted in the former Yugoslavia, an appropriate response to violations of international humanitarian law which occurred during the 1990's conflicts, would have been criminal prosecutions conducted by the courts in the region, not the ICTY. While in Serbia 45% of those surveyed believe that each country should put its own nationals on trial, 20% would additionally support trials in the country in which the crimes were committed (and these would presumably be courts in foreign countries – Croatia or Bosnia and Herzegovina – since few crimes were perpetrated on Serbian soil), and only 11% think that the ICTY should have been solely responsible for the trials.<sup>46</sup> In Croatia, the percentages pertaining to regional prosecutions are reversed – 15% support prosecution by the defendant's own state while 43% support trials in the country in which the crimes were committed (this should come as no surprise because it would in reality mean Croatia's jurisdiction as most crimes that are of interest for Croatians were perpetrated within the country); however, an equally small number – 17% - agree that the ICTY should have had sole jurisdiction.<sup>47</sup> This is an interesting finding – rather than the presumably impartial international court, those surveyed would have rather seen their co-nationals prosecuted by the courts of their former enemies. When asked why they would prefer such prosecutions over those conducted by an international court, the majority of respondents in Serbia (62%) suggest that regional courts – regardless whether domestic or foreign – would be more objective or fair.<sup>48</sup>

A notable level of distrust towards the objectivity and fairness of the ICTY can thus be observed in the surveys: regardless of differences between Croatia and Serbia, the Court clearly enjoyed less support than any of the courts in the region. This finding, along with the preceding discussion on the association between punishment and community, seems to paint a negative picture of the role that international criminal justice can play in the process of peace-building and reconciliation. Are international trials fundamentally ill-equipped to achieve anything more than (a necessarily partial) justice? Is the lack of moral authority to prosecute which is linked to the lack of authorship and ownership of domestic communities over international punishment an

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<sup>46</sup> OSCE (n 7)

<sup>47</sup> Beogradski centar za ljudska prava (n 7)

<sup>48</sup> OSCE (n 7); the question was not asked in the Croatian survey.

unsurmountable obstacle to the perceived legitimacy of international courts and their propensity to reaffirm the ‘conscience collective’ and restore solidarity at the domestic level? And, if so, what does all of this mean for the future impact of the International Criminal Court on domestic communities that are ‘unable’ or ‘unwilling’ to prosecute?

To answer these questions, an additional layer of analysis needs to be introduced, which concerns the *capacities* of domestic communities to acquire a sense of authorship and ownership over international trials. While I have argued throughout the chapter that it is inherently difficult for domestic communities to experience beneficial effects from international punishment, this is made all the less likely whenever a domestic community does not have desired moral traits and is *effectively not a community*, which is undoubtedly the case with former Yugoslavia that has undergone a process of complete dissolution into ethnically homogenous states (Bosnia and Herzegovina, although multicultural, is nevertheless internally divided). It bears to emphasize at this point that Emile Durkheim’s view of the potential benefits that may come about from punishment is conceived of within the framework of fully functional communities, which have a desired level of solidarity. But, as Durkheim seems to suggest, ‘punishment cannot by itself *create* moral authority: on the contrary, punishment implies that authority is already in place and has been breached’.<sup>49</sup> In other words, for punishment to be able to reaffirm conscience collective it needs to refer to a morally robust community, a condition which is certainly not present in the case of divided post-conflict communities such as the former Yugoslavia. For reasons similar to those that Snyder and Vinjamuri put forward when they describe why pursuing accountability for crimes in ethnically or religiously divided communities is inherently difficult,<sup>50</sup> the probability of recognizing and accepting the truth created by a foreign court will be additionally weakened – perhaps even made impossible – in circumstances in which bonds between citizens are not strong enough to create common moral sensitivities. The perceived legitimacy of an international court very much depends on *whom* the Court prosecutes – ‘indictments that conflict with the dominant internal narratives among the various groups will lead directly to lower perceptions of the court’s legitimacy’.<sup>51</sup> The impact of the Court’s work on the region is thus weakened not merely because the Court is perceived as irrelevant due to its weak moral links with the domestic community, but also because its judgements concern individuals that belong to multiple national or ethnic groups that are alienated from each other to the extent that they hardly make up a community. This furthermore causes many other problems which concern the outcomes of

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<sup>49</sup> Garland (n 14) 42

<sup>50</sup> Snyder and Vinjamuri (n 4) 37

<sup>51</sup> Ford (n 42) 405

criminal punishment for the offenders and victims, and which do not usually appear in morally bounded communities. Divided communities are atypical to the extent that they tend to have sharply different perceptions regarding the causes and dynamics of conflict, and it is oftentimes the case that victims and offenders cannot easily be told apart as each ‘can drift from one category to the other over the duration of the conflict’<sup>52</sup> and – perhaps more importantly – due to a wider inability of social groups to acknowledge criminal responsibility of their co-nationals. While this is problematic enough, additional interference of an international court in such a setting and its inherent propensity to establish what is (or who was) right or wrong through its judgements, leads to problems in the appropriate social reactions towards offenders and victims, whose roles are conflated and viewed differently from the standpoint of various national and ethnic groups.

These realizations ultimately force us to reconsider the claims regarding the capabilities of international courts to achieve various transitional justice goals. On the one hand, having in mind the difficulties of making international courts morally relevant – especially when their judgments pertain to divided post-conflict communities – it would be sensible to reduce our expectations as to what they can achieve to merely determining criminal responsibility in individual (and necessarily small number of) cases. This is surely a worthwhile goal and if we additionally opt to pursue achievable aims of punishment – such as retribution or incapacitation – leaving those with dubious propensities to be achieved – such as deterrence or rehabilitation – aside, then punishment by international courts would serve its purpose of ending impunity for grave violations of international humanitarian law, regardless of the absence of the positive impact on the community.

However, aiming to achieve anything more than punishment of guilty offenders seems debatable from the theoretical point of view that was espoused in this chapter. Any attempt to do so could be doomed to failure simply because of the described moral irrelevance of international courts for the communities from which the offenders come. However, if any efforts are undertaken to bring international judgements closer to the community, these need to be cognizant of the domestic context and require skillful coordination of transitional justice mechanisms, which is something that international courts are themselves not equipped to do. Aiming to make international judgements relevant so that they can achieve desired beneficial outcomes would

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<sup>52</sup> Kerry Clamp, ‘Restorative Justice as a Contested Response to Conflict and the Challenge of the Transitional Context’, in Kerry Clamp (ed.) *Restorative Justice in Transitional Settings* (Routledge 2016) 3



require that some positive steps are taken towards reforming and reestablishing the moral framework of a significantly disrupted community, so as to make it receptive to ‘exported’ justice. In other words, to even attempt reconciliation through punishment (however impossible this may seem based on the account developed in this chapter), some level of reconciliation at the domestic level must already exist which could be a paradox difficult to resolve (though not entirely impossible if we acknowledge that reconciliation is a term that can be understood in various ways).<sup>53</sup> Even if this kind of punishment cannot be a morally satisfactory substitute for punishment by domestic courts, acknowledging transitional realities in the domestic community would arguably at least reduce the danger of the court’s judgements having a negative impact on the divided community.

## V Conclusion

The central argument of this chapter can be summed up succinctly through the words of a Srebrenica resident who, having been asked to comment on the impact of the ICTY on reconciliation, said: ‘no reconciliation can come from a court than has so little relevance to our daily lives’.<sup>54</sup> The chapter has put forward an original claim which ascribes the inability of the ICTY to achieve reconciliation to its moral irrelevance to the ex-Yugoslav community, which is itself a consequence of the fact that the Court’s proceedings are neither a sublimation of communal morality nor do its judgements have the capacity to reaffirm common morality in the region of the former Yugoslavia. Rather than focusing on the perceived fallibilities of the outreach program as an explanation for the lack of reconciliation through a failure to distribute *information* about the Court’s work, I have instead focused on the lack of *shared perception and consciousness* that the ICTY acts in the name and for the sake of the ex-Yugoslav community. The conclusion that I have subsequently proposed emphasizes that international prosecutions can be a substitute for domestic processes only if the aim is to achieve (necessarily) partial justice, but they cannot be expected to reaffirm common morality and social solidarity, especially if they pertain to internally divided communities such as the former Yugoslavia.

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<sup>53</sup> For various ways in which reconciliation can be defined and understood, see David Crocker, ‘Reckoning with Past Wrongs: A Normative Framework’ (1999) 13 *Ethics and International Affairs* 43

<sup>54</sup> Quoted in Clark (n 6)