

and

Cox

**PRINCIPLES AND PRACTICE IN RECORDS
MANAGEMENT AND ARCHIVES**

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Community Archives

the shaping of memory

edited by
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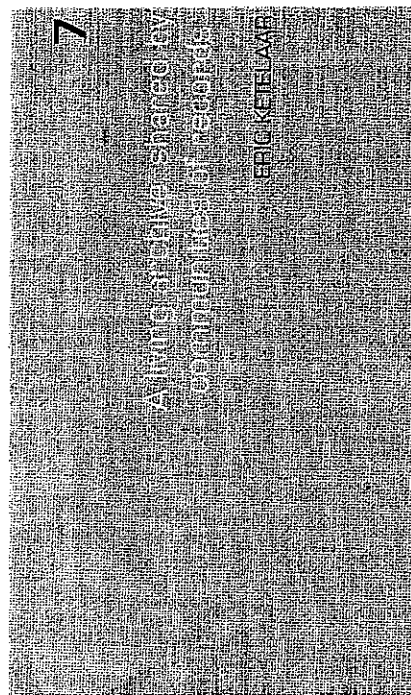
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Introduction

In 1993 the United Nations Security Council (UNSC) established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia' (UNSC, 1993; Bassiouni and Manikas, 1996; Scharf, 1997; Bass, 2000). The central purpose of the ICTY, as of any criminal court, is the deterrence of, and retribution for, serious wrongdoing (Osiel, 1997). But from the start, expectations of what the Tribunal could achieve went beyond the primary judicial goal of establishing the truth about and giving an historical record of what happened, contributing to healing individuals' and communities' traumas, and to reconciliation (Power, 2002). Connected with the diverse expectations of the outcomes of the Tribunal's work are expectations of the role the Tribunal's archives can play. Expectations are mounting as the ICTY's work is near completion and decisions about the legacy of the Tribunal are imminent.

In this essay, I explore the potential of the ICTY archives in establishing truth, engaging with history and practising memory – all of which may help communities in former Yugoslavia and elsewhere not only come to grips with their own past but also acknowledge a past shared with neighbouring ethnic and political communities.² I will argue that these expectations can

only be met by a living archive as a place of contestation, allowing for what Hayden White has called different kinds of discourse about 'what happened and what is to be done' – the archive not merely as a storage technique but primarily as a force for delegitimation of mythified and traditionalized memories (White, 2000, 55).

'Sarajevo joins race for ICTY archive' (*Dnevni avaz*, 2007)

'Discussion on the fate of ICTY archive' (*Nezavisne novine*, 2007)

'Fighting for the Hague documents' (*Nedeljni Telegram*, 2008)

'BiH, Serbia, Croatia all lobby to take over ICTY archives' (*Vecernji list*, 2008)

With headlines like these, the media in Bosnia and Herzegovina, Republika Srpska, Serbia and Croatia brought the archives of the ICTY into the limelight. The headlines also attest to contesting views on the fate of the archives, which vary by region in the former Yugoslavia.³ And even within one region there are competing views. The mayor of Sarajevo reportedly claimed that the ICTY archives contain 'the only established version of the truth, unlike the three versions that currently exist' in Bosnia and Herzegovina (Miller, 2006; Škuletić, 2008).

In the 15 years since its establishment, the Tribunal has indicted 161 persons. Proceedings against 116 have been concluded. Proceedings are ongoing with regard to 45 accused, and two (Mladić and Hadžić) are still at large.⁴ In 2003 the Security Council called on the ICTY to take all possible measures to complete the work. It is now estimated that all trials and appeals will be concluded in 2012. A key component of the ICTY completion strategy concerns the appropriate disposition of its archives.

In 2005 I submitted to the registrar of the ICTY a report called *The Legacy of the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY)*, based on research carried out between September 2004 and July 2005 (Ketelaar, 2005a).⁵ Concurrently, the US Institute of Peace and the National Peace Foundation sponsored Trudy Huskamp Peterson to undertake a comparative review of the temporary international tribunals and the records they create (Peterson, 2006; see also Peterson, 2005). While my report focuses on the measures to be taken with regard to the ICTY records in the framework of the Tribunal's completion strategy, Peterson's report offers a conceptual framework for creating a central international judicial archives under UN auspices and for standards to select, preserve and manage the records of temporary international criminal courts.

I reconnected with the ICTY archives when I was appointed as a member of the Advisory Committee on the Archives of the UN Tribunals for the

former Yugoslavia and Rwanda (ACA), established by the registrars of the two tribunals in October 2007.⁶ The ACA was mandated to provide an independent comparative analysis of the potential locations for the archives of each of the tribunals and to examine related issues concerning those archives. The ACA submitted its report to the registrars in September 2008.⁷

ICTY archives

The ICTY archives comprise video and audio recordings, 2200 gigabytes of electronic material, artefacts and 1449 metres of paper records.⁸ Nearly 82% of the paper records exist in both paper and digital format. The bulk (70%) are the substantive records of the Office of the Prosecutor (OTP). These include records and material obtained in the course of investigations, such as witnesses' statements and other evidence. All over the former Yugoslavia, the OTP seized documents by the truckload, and from various sources tons of documents, photographs, intercepts of telecommunications, and videos were received (Hagan, 2003). They are from public and private provenances and include records of military and civil government agencies in and outside the former Yugoslavia, personal correspondence, audiovisual items, diaries and other similar material. In most cases, the originals have been returned to the owner or provider, leaving a copy in the archives of the Tribunal.

A second category are the judicial records comprising all court files and records obtained or generated by the Tribunal in support of and during the indictment phase, the pretrial, trial and appeal procedures, as well as procedures relating to the transfer of cases. These include English and French transcripts and the audiovisual recordings of the proceedings, evidence tendered in court, motions, decisions and all other documents and relevant correspondence created by the judges and the parties.

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

The administrative records include records concerning human resources, procurement, finance and other administrative support functions. Judges, the

prosecutor, the registrar and members of staff will have kept working papers. To the extent that they relate to the conduct of the Tribunal's activities, they have value as part of the ICTY's legacy (Sax, 1999). This applies equally to the records created and received by the defence counsel and not submitted to the Tribunal.

The ICTY's Judicial Database (JDB) provides electronic access to court records in most of the Tribunal's cases (Pimentel, 2004; Peterson, 2006). The JDB includes court filings, judgments, decisions, exhibits (but not 3D artefacts), transcripts and statistical information needed for registered users (usually from the OTP and the defence counsel) to conduct legal research. The database has to be separately accessed for public records, and confidential material may only be accessed with the appropriate security access. The JDB is a legal research tool and not designed to function as a database of archival records.

As early as 1994, the judges instructed the registrar to make and preserve 'a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings' (Mason, 2000; Haufek, 2006; Peterson, 2006; United Nations, 2006, rule 81). All courtroom sessions have been recorded on video (with audio track) and audio. The complete video contains all confidential material (for example testimonies by witnesses whose identity has to be kept secret), while a redacted version contains only public material. The audiovisual record of the proceedings is more comprehensive than the official transcripts. The transcripts exist in two versions, English and French, while the audiovisual record contains Bosnian, Croatian and Serbian as spoken by defendants and witnesses. Moreover, in the transcripts 'the entire visual content of the footage of atrocities committed throughout the region is in most instances reduced to two words: [videotape played]' (Lennon, 2005).

Legally, the records created and received by the Tribunal are the property of the UN. However, they do not belong to the Tribunal; they constitute a legacy, a 'joint heritage', shared by a number of 'communities of records' (Ketelaar, 2005b, 44-61). These communities consist of different stakeholders (to be identified in the following section), each with a *right to know* from the ICTY archives.

Stakeholders

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

The first category of stakeholders comprises those who now or in the near future have an interest in the primary legal business of the ICTY: to bring to justice persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This goal will not be reached on completion of the Tribunal's mandate in 2012. Part of the completion strategy is to transfer to competent national jurisdictions (inside and outside the former Yugoslavia) those cases involving the accused of intermediate and lower rank (Raab, 2005). For domestic courts, prosecutors and defence counsel, the ICTY records will continue to be *active* records.⁹

So far 15 states have agreed to enforce the Tribunal's sentences. The judicial authorities in these countries need to have access to the medical files and other records concerning convicts, which were created by the ICTY. The Tribunal retains certain supervisory responsibilities (Tolbert, 2004; Peterson, 2006), which (on completion of the Tribunal's mandate) have to be transferred to a successor agency. That successor agency will need access to the relevant records. Other stakeholders with an interest in ICTY's archives because they were involved in the core legal business of the Tribunal, are the UN, former ICTY staff and defence counsel, governments in the region, indicted and convicted persons, and witnesses.

Slightly more distant from the core legal business of the Tribunal, but nevertheless with an interest in the primary values of the Tribunal's records, are victims and their relatives, many of whom live outside the former Yugoslavia (Hutunen, 2005); victims' groups and other non-governmental organizations; the media; the International Criminal Tribunal for Rwanda; the International Criminal Court; and other criminal justice organizations (Adami and Hunt, 2005; Peterson, 2006). Scholarly researchers (in law, history, political science, and so on) intersect this first category of stakeholders as well as the second, which comprises all those who were not directly involved in the trials before the Tribunal but whose interest in the Tribunal's archives will develop over time.¹⁰ The ICTY archives have a significant secondary value for several reasons, analogous to the arguments recently proposed by Bruce Montgomery with regard to the archives of human rights organizations:

- The archival record is important for historical accountability, and will be 'used by researchers, prosecutors, and victims alike with the aim of analyzing and making known the dimensions of particular human rights violations'.
- The archival evidence 'is important for the memory of the thousands of victims and survivors of human rights abuses, their relatives, and others

who must individually confront the truth of what transpired. Retaining the memory of victims and survivors is also important to preserve at least some semblance of identity for those who suffered extreme depredations . . .

- Archival records of human rights abuses will likely assume new and critical importance as this evidence becomes pivotal in the adjudication of cases. Post-authoritarian governments can only be helped if they confront the crimes of the past and end impunity with the aim of building new democratic societies based on the rule of law (Montgomery, 2004, 23).

Truths, histories and memories

Truths

Tribunal's archive of truth.

Lazović, 2008

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

Four notions of truth were used by the South African Truth and Reconciliation Commission: factual or forensic truth; personal or narrative truth; social or 'dialogue' truth; and healing and restorative truth (Truth and Reconciliation Commission, 1998; Chapman and Ball, 2001). Richard Wilson (2001) proposes to categorize these into two truth paradigms: forensic truth and narrative truth. The former is 'the familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures' (Truth and Reconciliation Commission, 1998, 111). As an ICTY president wrote, establishing the truth in the courtroom of the ICTY means that the atrocities in former Yugoslavia will become 'facts established by law' (Jorda, 2004, 577). However, defendants, witnesses, prosecutors and judges tell, hear and record something that *counts as true* in a particular case, a particular trial, within the legal context (Edkins, 2003; Montgomery, 2004). The legal forum is not interested in anything but the forensic truth. It cannot 'move

beyond categorising through abstractions that are necessarily reductions in the scope of possible categorisations of persons and events' (Christodoulidis, 2000).

This 'legal myopia' continues to cause misunderstanding and frustration to victims who want to tell *their* truth, but for whom only a legal forum is accessible. They are 'tools in the prosecutors' case, confined in their testimony to only those fragments of their experience that meet the legal standard of relevant evidence' (Minow, 2000, 238; see also Dembour and Haslam, 2004; Booth, 2006; Hafner and King, 2007, 104). One can only guess what many of the thousands of witnesses before the ICTY may have endured (Klarin, 2004; Stover, 2004, 2005; Leydesdorff, 2008). One of the Tribunal's fundamental contributions to international humanitarian law is its jurisprudence on sexual slavery and rape (Wald, 2002, 2004; Niemann, 2004). However, as a former senior trial attorney regrettably remarked, 'the priority in the case seemed to be on legal theory rather than on the more immediate purpose of illustrating and showing how, and explaining why, sexual assault is used as a weapon of terror' (Schrug, 2004, 431). On the other hand, for many witnesses giving testimony gave 'a little bit of dignity' (Sachs, 2006, 12; see also Goldstone, 2000, 65–6). Also, several of ICTY's judgements contain a narrative explaining the origins and contexts of the conflict, thereby providing a broader picture of which the particular case forms only a part (Robertson, 2006). Still, the rules of the legal procedure generally prevent the ICTY (or any court) from providing an all-encompassing narrative framework, involving bystanders within and outside the region, and 'the complex interactions among ideologies, leaders, mass frustrations, historic and invented lines of hatred, and acts of brutality' (Minow, 2000, 238; see also Minow, 1998, 40; Balint, 2001, 136).

Narrative truth includes the categories of personal, social, and healing (or restorative) truth, emphasizing narrative, subjective dimensions of truth. Narrative truth does not strive at factual truth, but attempts to explain why, according to the narrator, things happened and to give meaning to these events, both to the individual narrator and to society (Wiewiorka, 2006a). Currently, civil society groups in the former Yugoslavia and international actors are focusing on forensic truth, while there are few attempts to heal and reach reconciliation through story telling or involving communities on the local level (Zupan, 2006). While forensic truth can be shared, narrative truth will always be contested. As Michael Ignatieff argued in his renowned piece 'Articles of Faith',

[T]ruth is related to identity. What you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be

is mostly defined in terms of who you are not. To be a Serb is first and foremost not to be a Croat or a Muslim. Even people who fought to maintain a moral space between their personal and their national identities are now unable to conceive that one day Zagreb, Belgrade and Sarajevo might share a common version of the history of the conflict.

It is clear that the truth that victims claim as being their monopoly (Jelin, 1994) – as is the truth claimed by aggressors and bystanders – will be at odds with the forensic truth contained in the ICTY archives. Moreover, 'the idea of accessible court records that speak for themselves . . . is problematic' (Minow, 1998, p.125). Indeed, records do not speak for themselves; their 'tacit narratives' echo the user's interests, hopes and fears (Ketelaar, 2001). It is the autonomous responsibility of the user to determine what information he or she gets out of the archives (Menne-Haritz, 2001; Macpherson, 2002). This empowers the user to re-create in his or her own way what is found in the records that were created by the Tribunal in its way. That is why archives are never closed and never complete: every individual and every generation are allowed their own interpretation of the archive, to reinvent and to reconstruct its view on and narrative of the past.¹¹ That is to say (in Hanna Arendt's words), it has 'the right to write its own history. We admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don't admit the right to touch the factual matter itself' (Arendt, 1977, 238–9).¹² That factual matter is – if one has to choose between the four truths – ultimately *the* truth. The selectivity and the constructedness of the criminal trial may have frustrated survivors and their families, either present in the courtroom, or left behind where the atrocities were still fresh in the memories of the land and the people. However, once the selectivity and constructedness are frozen in the Tribunal's records, they are no longer an obstacle for telling your story, your truth, and storing your myth in what Hayden White calls the 'communal traditionalised memory' (White, 2000, 53).

A number of sociopsychological studies affirm that it takes a long time (20 to 30 years) before individuals and communities are ready to revisit and to reconstruct their past. Apparently, and for different reasons, they need some distance in time (Pennebaker, Paez and Rimé, 1997). As Jeffrey Olick contends, the only collectivity that can be healed and can learn the lessons of history and make something of them, is the next generation' (2007, 148). We should therefore not be surprised when society's immediate use of the Tribunal's archives turns out to be rather limited. Over time, both the current generation and their children will (re)discover the possibilities of the archives as sources of history.

Histories

The archive material of the Tribunal is of crucial importance, our history will be written based on it.
Veerinji listi, 2008

It is not only the victims and their families who have to come to grips with the past; their communities and society at large have to acknowledge it as well. What Elizabeth Jelin maintains for post-totalitarian Argentina is true for the former Yugoslavia too: 'Only when the incorporation of historical events becomes an active and dynamic process can it feed into the construction of a democratic culture and collective identity' (Jelin, 1994, 53). What function in this process would the ICTY archives have as a historical record?

The expectation that the ICTY would establish a historical record can be traced back (Allcock, n.d.) to the words of Robert Jackson, the chief prosecutor at the Nuremberg trial, who said that the prosecution had documented from German sources the aggressions, persecutions and atrocities 'with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people' (Harmon and Gaynor, 2004, 404). Jackson's words were echoed by the ICTY's first president, Antonio Cassese, who observed that the Tribunal 'has established a record of events that will go down in history and may not be impugned in future' (Cassese, 2004, 597).¹³ The ICTY cites in its Krstić judgement the words of Nuremberg prosecutor Telford Taylor who said that it is 'important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable' (ICTY, 2001, para. 95).¹⁴ The objective is not so much creating a record contributing to historiography, but to prevent denial. As Ruti Teitel wrote, 'The ICTY's responsibility should be to forge and disseminate a record that limits the possibility of historical denial' (2005; see also Orendlicher, 2008). However, she also argues that a court that tries to go beyond individual accountability to assess the historical reality at large risks 'sacrificing individual rights to the societal interest in establishing a historical record' (Teitel, 2000, 76; see also Zacklin, 2004).

Indeed, the findings of any trial can be nothing more than a contribution to creating a larger historical record because the focus is on specific crimes and perpetrators, not on wider historical events (Schiff, 2002). A trial has to be selective, focusing on the indicted individual or individuals, on their accountability for crimes committed by them or because of them. As the Israeli court in the Eichmann case stated very clearly:

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

Osiel, 1997, 80–1; see also Bayard, 2000¹⁵

Can one expect from the ICTY that, within the limits of the judicial process, it investigates the historical, political, sociological and economic causes that led to the conflict in former Yugoslavia (Basic, 2007)? The Tribunal in its first judgement (in the Tadić case) devoted some 48 pages (out of 285) 'to say something in a preliminary way about the relevant historical, geographic, administrative and military setting about which evidence was received' (ICTY, 1997, para. 53).¹⁶ In a later judgement (in the Krstić case), the judges were more negative about their role as history writers:

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

ICTY, 2001, para. 2

Nevertheless, the ICTY has been praised because it was able to put its judgements in a broader historical context. Richard Wilson commends the ICTY judgements in the Tadić and Krstić cases for their extensive historical interpretation of the causes of the conflict, adding that their 'approach to historical interpretation forces a reconsideration of the long-standing view that the pursuit of justice and the writing of history are inherently irreconcilable' (Wilson, 2005, 922; see also Schiff, 2002). However, in his final conclusion Wilson seems to leave the actual history writing, as the ICTY itself elucidated in the Krstić case, to people outside the Tribunal who may use the ICTY records. The ICTY's judgements, Wilson writes, 'could become an indispensable part of the process of writing a common, credible

history of political violence in the 1990s' (Wilson, 2005, 942). Prosecutor Carla Del Ponte said, 'Governments, NGOs and historians should use the millions of pages presented in court to recount history as it really happened' (ICTY, 2007). Robert Donia (who appeared before the Tribunal as an expert witness several times) testifies that the ICTY has 'produced histories that are not only credible and readable, but *indispensable* to understand the origins and course of the 1990s conflicts in the former Yugoslavia', and that it provided 'a detailed, thoroughly investigated and comprehensive account of what happened at critical times in the battle for Bosnia from 1992 to 1995' (Donia, 2004). Nevertheless, according to Donia, the judges' 'historical essentialism' took only those elements into account that they felt were essential to comprehend the atrocities, and that they heard about from witnesses in each case.

The Tribunal's time is in conflict with the time of history; the former emphasizes presence (justice here and now), the latter focuses on absence (justice in the past) (Bevernage, 2008).¹⁷ The law aspires to a degree of finality now and for the future. Therefore, a trial seeks closure through a full and final sentence. On the other hand, there 'is no such expectation of relative fixity in the realm of historical understanding, or of the collective memory to which such understanding contributes' (Osiel, 1997, 217; see also Minow, 1998). Subsequent events, new interpretations, new sources – they will inevitably change the view, and reopen the case. The court's verdict is final, but its reading of the historical event is not. Court records have, therefore, not more value than other records (Ketelaar, 2001). Law's closure has to be rejected in favour of history's recurrence. History is never finished or final because with the passage of time historical interpretation undergoes change (Teitel, 2000). History is provisional and thereby allows a contrapuntal narrative doing justice to adversarial and contested stories (Maier, 2000). Instead of asking for *the* truth or *the* history, one should show and teach that there are many truths and histories.

Memories

The ICTY has already become an institution of great importance for social memory in the region.

Donia, 2006, 400

The psychologist Nico Frijda suggests that appropriating the past is an element in the construction of an individual's identity. It does so in a double way, by 'shaping or affirming the identity of one's group, and by accepting or redefining membership within that group' (Frijda, 1997, 109). This argument is shared by James Booth who puts forward that gathering in the past,

appropriating it, 'gives us identity and a moral narrative of pride, shame, and indebtedness, that ties us across time to *our* past and the burdens this past imposes simply by virtue of being ours' (Booth, 1999, 254; Booth, 2006). The common, often mythical, past, sustained through time into the present, is what gives continuity, cohesion and coherence to a community (Morley and Robins, 1995; Str  th, 2000). Any community is therefore a community of memory, especially a community living after mass atrocities, where the past continues to torment because it is not past. They 'are not living in a serial order of time, but in a simultaneous one, in which the past and present are a continuous, agglutinated mass of fantasies, distortions, myths and lies' (Ignatieff, 1996, 119). For victims and survivors of mass atrocities, the past stays on, as Frijda asserts, as 'unfinished business': they and their families keep on searching for meaning to understand how the humiliations, the cruelties, the systematic destruction were ever possible (Frijda, 1997). They may label their search for meaning, searching for *the* truth or *the* history, but it is in fact no more and no less than a meaning-making process to confirm and reconfirm identity (Fuhrei, 2004), constructing and reconstructing their community's memories and narrative truths, engaging the community in rituals of commemoration. The ICTY cannot – or can only minimally – live up to the expectations of a 'secular ritual of commemoration' (Akhavan, 1998, 784).³⁸ Such a ritual with its beneficial effects on individuals and communities has to be set up elsewhere, with the help of people and institutions engaged in memory-practice (Osiel, 1997). Among these institutions are, of course, memorial museums, including sites, that are established in 'the global rush to commemorate atrocities', as the title of Paul Williams' recent book on memorial museums includes. Williams acknowledges that we only have a fuzzy awareness whether and how 'concrete spaces like memorials and museums are effective social spaces for aiding reconciliation' (2007, 170). But they provide space for rituals of commemoration, as for example the Srebrenica memorial and cemetery in Poto  ari (Bosnia), where annually on 11 July commemoration ceremonies are held (Williams, 2007, 17–18).

Archives could also become such spaces of memory-practice, where people can try to put their trauma in context by accessing the documents, not primarily seeking *the* truth or searching *the* history, but transforming their experiences into meaning. Accessing the archives of the ICTY, and weaving them into private and public memories, may constitute a healing ritual. Archives as a space of shared custody and trust. Archives as places where records are preserved through time, long enough perhaps to destroy the agony and heal the communities (Ketelaar, 2008).

A living archive

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

Challenging the archive

According to one of the UN Human Rights Commission's principles, people are entitled to challenge the validity of the information in archives concerning them by exercising their right of reply (Ketelaar, 2006a). The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. A comparable right of correction, enshrined in the data protection legislation of all European Union states, should be given to people involved in trials before the ICTY, especially because in some cases discrepancies between the witness' evidence and the official record of it have been found (Human Rights Watch, 2004).

Contesting the archive

Any archive is a place of contestation (Harris, 2000, 80; Harris, 2007). Like memorial museums, archives are spaces where battles about the politics of memory are fought. Like memory, an archive is not just an agency of storage, but a process, a mediated social and cultural practice (Ketelaar, 2006b). A living archive allows for what Hayden White calls

three different kinds of discourse about 'what happened' and 'what is to be done'. First, the disaster can be assimilated to communal memory by its mythification. Secondly, it can be assimilated to communal memory by the conventions of classification, cataloguing, and storage techniques of the rationalising sciences. And thirdly, the disaster can be assimilated to communal memory in such a way as to force a revision and delegitimation of traditionalised memory itself.

White, 2000, 55³⁹

Different as these kinds of discourse may be about what happened and what is to be done, they have to be related. Myth and rationality are not entirely

independent of collective memory; they are mutually constitutive (Olick, 2007). The third component – revision and delegitimation – entails hospitality to contestation and renegotiation. As Michael Moss writes: the archive is ‘a place of “dreams” of re-enactment for both the user and the archivist (curator), who together always are engaged either passively or actively in the process of refiguration that is never ending’ (Moss, 2008, 83). I believe that the archive is not merely (as White suggests) a rational storage technique but primarily a space to escape from a monolithic truth, history and memory, by allowing questioning myth and rationality – including the myth and rationality contained in the archive.

This is even more relevant in the former Yugoslavia, where the past is no common past. After the Second World War there was ‘never a discourse on how a multiethnic society whose population consisted of extremely divergent individual and collective memories could manage this complex legacy sufficiently to come to terms with its complex past’ (Hoepken, 1999, 204). And when the Yugoslav state disintegrated, the historical memory disintegrated too. The post-Yugoslav republics created ‘a new fragmented memory along not only ideological, but ethnic, borderlines’ (Hoepken, 1999, 226). Different ethnic groups each claim their own memory of suffering, to be framed in a space only trusted by and accessible to members of their own group. This ‘ethnization of memory’ (Corkalo et al., 2004, 157) may lead to ‘ghettoization of history’ (Williams, 2007, 168). The archives of the ICTY, however, cannot be split up according to the ethnic provenance of perpetrators, victims and witnesses. It is a joint albeit a contentious heritage that should be accessible from any of the places in former Yugoslavia (and from anywhere in the world) where people live who want to use the archives. The contentiousness of the archive might even prove beneficial because it can show ‘how people can live with continuing disagreements about what exactly happened in the past and why, and still respect each other as fellow citizens’ (Gutmann and Thompson, 2000, 35). Reconciliation, as Christodoulidis (2000) argues, has to take risks, and one of them is that memories and identities are not arbitrated, that constituencies for communities are not fixed. I believe that the risk of contentiousness of the archives should be taken, too.

Expanding the archive

The living archive should be expanded, in the first place by linking the content to the holdings of the broad range of governmental and non-governmental agencies within and outside the former Yugoslavia that continue to collect material about the conflict (Djordjevic, 2002). Second,

the archive should be expanded by gradually releasing the numerous classified documents, classified because of protection of witnesses, privacy and state secrets. Most of the transcripts contain redacted passages, sometimes amounting to more than 50% as in the case of Miletic et al., where 7994 pages of the more than 16,000 pages of transcript contain redacted passages. And third, by allowing people to enrich the ICTY record with their comments and stories. Witnesses, victims, as well as convicted and indicted people (and bystanders) should be allowed to tell their stories. Stories are not only vehicles for understanding, they are also a means of remembrance (Arwood and Magowan, 2001). Writing down and submitting their stories – co-creating and constituting the archive – allows people to articulate their own war histories and, in psychoanalytic terms, gives them an opportunity to express and thus begin to incorporate them into the present (Twomey, 2003; Pillemer, 2004; Adler et al., 2009). I propose permeating the boundaries between what Hayden White calls the communal traditionalized memory and the communal rationalized memory; the first consisting of stories of the past, the second of ‘accounts of a community’s past, contained in its archives and catalogued and processed in the form of written or visualized “histories,” so that it can be “accessed” on demand’ (White, 2000, 53).

Of course archival institutions, as the rationalized receivers of story, should, in Verne Harris’s words, ‘Be ever vigilant. Cherish what story gives us, but always probe its telling, explore other tellings and other stories. Know that as compelling as it might seem, as seamless and satisfying and healing, it remains story not truth. We should never allow story to be more than a platform to our own search for meaning’ (2007, 415).

Archival institutions around the world are moving into new ways of capturing, storing and using public and private documents, stories, images and sound. Digital systems of distributed custody of the holdings of both public institutions and private individuals and communities are already in place. Web 2.0 applications stimulate social navigation, and uploading ‘evidence of me’ (McKernish, 1996) to an archival institution’s server thus creating and maintaining a living archive out of private and public documents (Ketelaar, 2003, 2008; Šajkaš, 2007). The ICTY archive presents ‘an unprecedented challenge to use new technology and innovative finding aids to assure access and usability to future generations’ (Donia, 2006, 400; Donia and Bedirevic, 2008).

Conclusion

The ICTY archives, as any other archives, allow for contestation. But paradoxically that quality may help members of a community not only to

come to grips with their own past but also to acknowledge that the past they share with neighbouring ethnic and political communities is not a monolithic truth, history or memory, but allows, even requires, questioning and contestation. For this, the archive provides a space. As South African judge Albie Sachs stated, archivists are caring for archives 'not as we used to think, to guard certainty: they are doing it to protect uncertainty because who knows how the future might use those documents' (2006, 14). Each community is a community of records, marking the limits to other groups and their members. The risk of 'ethnization' (or exclusiveness) of memories may be abated by giving each community in the former Yugoslavia not just a share in a joint heritage, but by making each community a co-custodian of the living ICTY archive, constantly challenged and challenging.

Notes

- 1 A slightly different version constituted my paper 'Truths, Memories, and Histories in the Archives of the ICTR and the ICTY', presented at the conference '60 Years Genocide Convention' organized by the Amsterdam Center for Holocaust and Genocide Studies, the Amsterdam Center for International Law and the Peace Palace Library, The Hague, 8 December 2008.
- 2 I refrain from dealing with 'memoricide': eradicating communities' identities by destroying their archives. See Kolarovic, 1996; Kovacevic, 1996; Riedlmayer, 2007.
- 3 The territory of the former Yugoslavia comprises the states of Bosnia and Herzegovina (consisting of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska), Croatia, Kosovo, Republic of Macedonia, Montenegro, Serbia and Slovenia.
- 4 See www.icty.org.
- 5 I was assisted by postgraduate students enrolled in the Master of Archival Science programme of the University of Amsterdam: Ernestine Baake, Esther Balkestein, Jelle Bosma, Marie-Christine Engels, Kees Fluyt, Wim Mastenbroek and Nansja Pels. I presented some of the results of this research to the Second International Conference on the History of Records and Archives (ICHORA2) in Amsterdam, 1–3 September 2005.
- 6 The other members of ACA were Justice Richard Goldstone, former Chief Prosecutor of the ICTY and the ICTR (chair), Salim Mbaye, former national archivist of Senegal, Judge Mohamed Othman, a member of the Tanzanian High Court, former Prosecutor at the East Timor UN Administration and former Chief of Prosecutions at the ICTR, and Cecile Aptel, former staff member of both the ICTY and ICTR. I have benefited greatly from the insights and fellowship of the ACA. I also want to record my gratitude to Hans Holthuis, registrar of the ICTY, and his staff for their invaluable assistance and support to my research.

- 7 Unlike my 2005 study and the ACA report the present paper does not deal with the current management and the future location of the ICTY archives. The views expressed in this paper are those of the author in his personal capacity and do not necessarily represent the views of the UN.
- 8 The term archives applies, according to the UN administrative instruction ST/AI/326 of 28 December 1984, 'to those records to be permanently preserved for their administrative, legal, historical or informational value'. Records are, following the definition in that instruction, 'all documentary materials, regardless of physical type, received or originated' by the Tribunal. I have updated some figures (Peterson, 2006) on the basis of information provided by ICTY staff, as of November 2007/August 2008.
- 9 According to Rule 11bis (D) of the ICTY Rules of Procedure and Evidence, when a case is referred to another court, 'the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment' (United Nations, 2006).
- 10 The archives of the International Military Tribunal and the US Nuremberg Military Tribunals are, some 60 years since their creation, used very rarely by lawyers and professional historians, but mostly by private individuals interested in a relative who testified or served in some capacity with the court, or people who are a relative of a victim of Nazi aggression and so on (T. K. Nenninger (US National Archives and Records Administration), personal communication to E. Balkestein, University of Amsterdam, 15 March, 2005).
- 11 This reasoning resembles James Booth's (2006, 182) argument that we have some measure of choice in determining how our understanding of the past will be shaped.
- 12 Annette Wieviorka (2006b, 396) writes 'Each person has the right to fashion his or her own history, to put together what he or she remembers and what he or she forgets in his or her own way. . . . Each person has an absolute right to his or her memory, which is nothing other than his or her identity, his or her very being. But this right can come into conflict with an imperative of the historian's profession, the imperative of an obstinate quest for the truth.'
- 13 Scharf (1997, 215) argues, 'While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process.'
- 14 The ICTY continues in asserting that 'It is therefore imperative to document these "incredible events" in detail. However, the central issue in this case is the role that one man, General Krstić, played in the criminal acts and whether he is legally responsible for conduct that amounts to war crimes, crimes against humanity or genocide.'
- 15 Lawrence Douglas, while conceding that didactic trials as the Eichmann trial 'are not well equipped to render history in its complexity', and not denying 'that history and

law are governed by differing epistemological and evidentiary conventions', warns against over-exaggerating the differences (Douglas, 2006, 98, 101).

- 16 The Tribunal stressed that this exposé was exclusively based upon the evidence presented in court. Scharf concludes that the record of the Tadić trial 'provides an authoritative and impartial account to which future historians may turn for truth, and future leaders for warning' (Scharf, 1997, 215).
- 17 According to Booth (2006, 113–15), both the court and the historian depend on absence, on what is no longer present. However, justice, as Booth writes, seeks to act on the past by making it present.
- 18 Here Akhavan writes about 'the sacred aspect of remembrance' and the 'public ritual of atonement'.
- 19 White adds: 'Programmes for recovery from the disaster (or the reconstruction of the afflicted society) can thus be subordinated into public debates about the relative merits of different ways of construing the causes of the disaster.'

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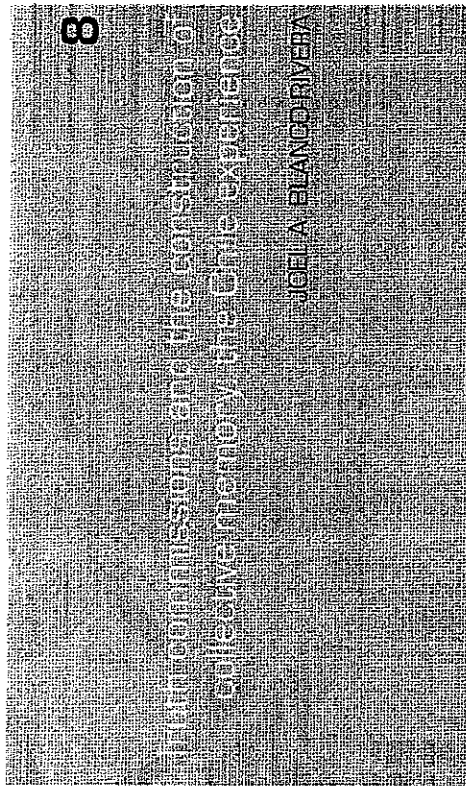
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Introduction

Following the death of Augusto Pinochet in December 2006, Michelle Bachelet, the current President of Chile, reacted to the news. Herself a victim of torture from the Pinochet regime, President Bachelet stated, 'I'm not going to deny, in this moment, that I have a very fixed concept concerning a painful, dramatic and complex period that our country lived through . . . What we learn from the past ought to help us confront the future' (Reel, 2006).

Records became a powerful resource during this process of 'learning from the past'. In the US, the 24,000 documents produced by the Chile Declaration Project became strong evidence of the role of the US government during the overthrow of Salvador Allende and the establishment of the Pinochet dictatorship. In Chile, the National Commission on Truth and Reconciliation presented a report documenting 2279 cases of human rights violations. Organizations of victims' relatives and human rights groups along with the human rights programme of Chile's Ministry of Interior have played an important role in establishing memorials. Additionally, the Archbishopric of Santiago de Chile established an archive that is considered the main repository of materials documenting the repression during the Pinochet years. Pinochet's death also displayed the profound divisions among Chileans over his legacy. While one sector went into the streets to celebrate, others gathered to cry over the death of one whom they saw as Chile's saviour from communism. A fragmented and divided memory of the Pinochet years is still present in Chilean society.