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The Gotovina, Perišić and Šainović Appeal Judgments:

Implications for
International Criminal
Justice Mechanisms

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Executive Summary

In February 2014, The Hague Institute for Global Justice, together with the International Center for Transitional Justice (ICTJ) and the Grotius Center for International Legal Studies – University of Leiden, convened a roundtable to address the controversial appeal judgments issued by the United Nations International Criminal Tribunal for the Former Yugoslavia (UN ICTY) in the *Gotovina, Perišić, and Šainović* cases.* The roundtable brought together a select group of seasoned legal practitioners, renowned legal scholars and distinguished military professionals to discuss the principal legal issues arising from these judgments, as well as their implications for international legal regimes and institutions.**

While the roundtable discussion addressed a number of substantive and procedural issues related to the abovementioned cases, this policy brief will focus on four specific themes, which have significant policy implications for future international criminal proceedings and the development of international law: (1) the fragmentation of international law and its implications for legality and the legitimacy of international criminal justice mechanisms; (2) the relationship between Chambers of Trial and Appeal, focusing on the appropriate scope of appellate review (final judgment); (3) the quality of judicial deliberation and expertise at international criminal tribunals; and (4) the impact of ICTY judgments in the former Yugoslavia.

This brief also presents several policy recommendations arising from these themes, which are directed at different entities including intergovernmental bodies that play a legislative and

oversight role with regard to international criminal justice mechanisms; relevant administrative, prosecutorial and judicial organs of such mechanisms; non-governmental organizations; and legal scholars and practitioners. The recommendations detailed below include: (i) creating an *en banc* appellate review mechanism for future international criminal tribunals; (ii) implementing the requirement of deference to the Trial Chamber on points of fact, unless the test is met that no reasonable trier of fact could have interpreted the facts in the manner of the Trial Chamber, leading to a miscarriage of justice; (iii) recruiting qualified judges and ensuring that they engage in continual learning, for instance through periodic training in international humanitarian law (IHL), international criminal law (ICL) and fact-finding; and (iv) adopting a comprehensive outreach strategy from the outset of the establishment of a tribunal for timely and accurate, comprehensible and holistic communication to all audiences with an interest in the tribunal's work.

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** The roundtable was held under the Chatham House Rule. Consequently, the views expressed by participants are not attributed to individuals where referred to in this brief.

Introduction

The ICTY was established in 1993 by UNSC Resolution 827 in response to the mass atrocities committed during the political disintegration of the former Yugoslavia. The accomplishments of the ICTY in the subsequent three decades have been many. Impressively, none of the tribunal's 161 indictees remain at large,² and through its work to bring perpetrators of international crimes to justice, the ICTY has played a pivotal role in the substantive and procedural development of international legal regimes and institutions. The ICTY was instrumental in defining the legal parameters of international crimes and developing rules of procedure and evidence, which provided valuable guidance to the drafters of the Rome Statute that established the International Criminal Court (ICC). The ICTY also did much to strengthen local judicial systems and build legal capacities within the former Yugoslavia, playing a key role in the establishment of a Section for War Crimes within the State Court and the State Prosecutor's Office in Bosnia and Herzegovina, as well as the establishment of a specialized War Crimes Chamber in the Belgrade District Court and a War Crimes Prosecutor's Office in Serbia.³ Mechanisms for dealing with cases involving war crimes were also created in Croatia and Kosovo with the involvement of the tribunal.⁴ Importantly, the ICTY has helped establish an evidence-based historical record concerning the crimes that occurred in the former Yugoslavia and set a precedent of holding high-ranking political and military officials responsible for international crimes in fair and transparent legal proceedings, providing many thousands of victims with some measure of justice.

Despite its seminal contributions to the development of international law and legal institutions, the ICTY is no stranger to controversy. The tribunal has endured criticism of the investigative strategies employed by various Prosecutors, as well as charges of ethnic bias, partly due to its initial failure to engage in outreach activities in a timely and effective manner. Recently, the ICTY has been the subject of serious dispute within the international legal community owing to legal issues arising from three appeal judgments rendered by differently constituted Chambers of

Appeal at the tribunal. The *Gotovina* judgment of November 2012, the *Perišić* judgment of February 2013 and the *Šainović* judgment of January 2014 have raised concerns about several substantive and procedural matters, including: divergent appellate rulings (final judgments) on the same or similar legal issues; the relationship between the Trial and Appeals Chambers; the quality of judicial deliberation and expertise at international criminal tribunals; and the legitimacy of appellate rulings and their impact on the legacy of the ICTY as a justice mechanism. This brief addresses these issues in greater detail and considers their policy implications for current and future international criminal justice mechanisms.

“The ICTY has played a pivotal role in the substantive and procedural development of international legal regimes and institutions.”

The Fragmentation of International Law

The primary issue arising from the appeal judgments in the *Perišić* and *Šainović* cases is that of divergent appellate rulings on the “specific direction” standard. General Momčilo Perišić, ex-Chief of Staff of the Yugoslav Army, was convicted by the Trial Chamber for aiding and abetting crimes committed by the Bosnian Serb Army (VRS) in Sarajevo and Srebrenica from 1993-95 and sentenced to 27 years of imprisonment.⁵ The Appeals Chamber in *Perišić*, however, quashed that conviction, finding that General Perišić’s assistance to the VRS lacked specific direction vis-à-vis the crimes committed by the VRS.⁶ In other words, the Appeals Chamber required that, for the accused to have aided or abetted the indicted crimes, his or her conduct must have been **specifically directed** towards the crimes committed by the perpetrator(s).

Many international legal scholars and practitioners have balked at what they perceive to be the setting of an impossibly high standard, which according to legal expert James Stewart “... has no real grounding in customary international law” and is at odds with national equivalents.⁷ Others believe that the “specific direction” standard is necessary in order to distinguish assistance in direct aid of criminal activity from “neutral” or “general” assistance provided to an organization that is not solely criminal.⁸ For instance, writing the Minority Opinion in *Katanga*, Judge van den Wyngaert proposes applying the “specific direction” standard in the context of the mode of liability adopted under the Rome Statute (“common purpose” liability, Article 25 (3) (d)), to assess whether the accused’s assistance is specifically directed towards the criminal or non-criminal activities of the relevant group.⁹ Kevin Jon Heller further argues that, unlike criminal law doctrines that **expand** criminal responsibility, those that narrow it (such as “specific direction”) do not require a foundation in customary law, reasoning that for concepts which narrow culpability, the principle of *nullem crimen sine lege* – which requires that an accused could reasonably

know what constitutes criminal conduct before he or she chooses to act – does not apply.¹⁰

On the issue of “specific direction,” the appeal judgment issued in January 2014 in the case of *Šainović* takes the opposite position. The Appeals Chamber bases its stance on an examination of ICTY case law including the aforementioned *Perišić* appeal judgment, national legislation, and the *Taylor* decision from the Special Court for Sierra Leone. The Appeals Chamber in *Šainović* states that it:

“Unequivocally rejects the approach adopted in the *Perišić* Appeal Judgment as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.”¹¹

Following the *Šainović* decision, the Office of the Prosecutor at the ICTY filed a Motion for Reconsideration of the acquittal of *Perišić* for aiding and abetting the aforementioned crimes committed by the VRS in Sarajevo and Srebrenica. The motion was denied in March 2014.¹²

Marko Milanovic has expressed concern over these conflicting decisions, stating:

“... The case law of the ICTY remains in a state of flux and fragmentation on the specific direction issue – so much so that the guilt or innocence of specific accused will very much depend on which judges get assigned to their Appeals Chamber.”¹³

Several participants at the roundtable voiced similar concerns that the fragmentation of international law on the issue of specific direction, and the discord between the Appeals Chambers apparent in the language of the *Šainović* judgment, have the potential to stymie the coherent development of international law on this point and undermine the legitimacy of the Appeals Chambers and the tribunal as a whole.

As noted by several experts at the roundtable discussion, the ICTY has no formal mechanism for resolving disputes between differently constituted Appeals Chambers. A possible remedy for future tribunals facing comparable situations might be the

creation of an *en banc* appellate review mechanism, to ensure final, authoritative rulings on points of law subject to dispute amongst different Appeals Chambers. An appellate system such as that employed by the International Criminal Court, where **all** the judges of the Appeals division perform each final adjudication¹⁴ – thus preventing divergent final rulings on the same or similar legal issues due to a multiplicity of Appeals Chambers in a single court – could be a means of avoiding legal fragmentation and safeguarding the legitimacy of the Chambers and its rulings.

On the subject of *en banc* review, Michael Stein identifies the uniformity of judicial rulings as one of its chief merits. Stein contends that uniformity advances the principles of equity and judicial integrity “... by ensuring that similar litigants receive similar treatment and, by thus injecting a measure of predictability into ... the legal process, providing the ‘consistency and moral stature essential for the public’s confidence in the justice system.’”¹⁵

This approach would seem to address concerns regarding the fragmentation of international law and the lack of authoritative guidance on specific points of law, as well as preserve the legality and legitimacy of (final) judgments.

However, *en banc* review is not without shortcomings. The most serious of these is, arguably, diminished judicial efficiency.¹⁶ While *en banc* review may be feasible when a tribunal has a limited caseload, adequate time and sufficient finances, it can encumber the judicial process significantly once the caseload increases, and time and money are in short supply. Legal scholar Mark Fleming underscores the importance of tribunals performing their work both “speedily and effectively” and notes that “the Appeals Chamber’s activity must be consistent with this aim by not interposing appellate proceedings where they are not warranted.”¹⁷ What then of *en banc* review?

A solution to this dilemma, proposed by an expert at the roundtable discussion, may be a system in which only exceptional cases are forwarded for *en banc* appellate review. This type of *en banc* review would require the establishment of clear criteria by which to determine whether a case is indeed “exceptional.” Guidance

regarding such criteria may be found in the statutes of other legal institutions such as the European Court of Human Rights (ECHR). For example, Rules 71-73 of the ECHR’s “Rules of Court” pertain to proceedings before the Grand Chamber and specify the circumstances in which cases may be relinquished or referred to the Grand Chamber.¹⁸ In particular, Rule 72(1) holds that “where a case pending before a Chamber *raises a serious question affecting the interpretation of the Convention or the Protocols thereto*, the Chamber may relinquish jurisdiction in favour of the Grand Chamber ...”; while Rule 72(2) holds that “where the resolution of a question raised in a case before the Chamber *might have a result inconsistent with the Court’s case-law*, the Chamber shall relinquish jurisdiction in favour of the Grand Chamber ...”¹⁹ [italics added].

Establishing a system of *en banc* appellate review with clear criteria for determining eligible cases would provide for uniform judicial rulings where there is serious disagreement amongst Appeals Chambers, particularly those which threaten the legitimacy of the international criminal justice mechanism in question.

Policy Recommendation

To future international criminal justice mechanisms and relevant intergovernmental bodies: Consider implementing a system in which exceptional cases may be subjected to *en banc* appellate review, to ensure uniformity of judicial rulings on critical points of law and preserve the legality and legitimacy of the Appeals Chambers and the tribunals as a whole. To this end, it may be useful for legal scholars and practitioners to examine the procedures of existing national, regional or international justice mechanisms to ascertain which criteria may be applied to determine whether a case can be considered “exceptional” and therefore suitable for *en banc* appellate review.

The Relationship between Chambers of Trial and Appeal and the Appropriate Scope of Appellate Review

A key point of contention with regard to the *Gotovina* appeal judgment – in which the Appeals Chamber overturned a unanimous Trial Chamber and acquitted all the defendants – was the decision of the Appeals Chamber to extend its review to factual issues (particularly with regard to the 200-meter standard) rather than confining the review to points of law. Several of the experts present at the roundtable concurred that while the Appeals Chamber is not prohibited from conducting such a *de novo* review of the evidence, judges who issue the final judgment owe deference to the trier of fact, i.e. the Trial Chamber.

This position is echoed by Marko Milanovic, who writes that:

“... In the common law-inspired procedure of the ICTY the main task of the Appeals Chamber is to correct errors of law made by the Trial Chamber. The Trial Chamber is owed deference with regards to its findings of fact, [which may be overturned] only if no reasonable trier of fact could have made the relevant finding on the strength of the record.”²⁰

Milanovic points out that if the Appeals Chamber in the case of *Gotovina* intended to conduct a proper *de novo* review, as found in continental legal systems, it should have identified the “deficiencies in the evidentiary process at [first instance] trial” and remedied it by way of a full-fledged investigation, for instance by calling new witnesses or otherwise uncovering new information.²¹

In his analysis of appellate review at international criminal tribunals, Mark Fleming attempts to demarcate its appropriate scope. He notes that appellate review serves two “jurisprudential goals,” namely, consistent verdicts (i.e. similar cases receive similar treatment) and the orderly development of law.²² To this end, he concludes that it is entirely appropriate for an Appeals Chamber to rule on errors of law made by a Trial Chamber. Errors of fact, however, do not justify appellate review in Fleming’s view for the “... obvious reason that factual decisions have no importance beyond each individual case,” **unless** no reasonable trier of fact could have reached the Trial Chamber’s conclusion, leading to a miscarriage of justice.²³

“While the Appeals Chamber is not prohibited from conducting a *de novo* review of the evidence, judges who issue the final judgment owe deference to the trier of fact, i.e. the Trial Chamber.”

It does not appear that the Trial Chamber in *Gotovina* misinterpreted the facts so greatly as to occasion a miscarriage of justice. As stated by an expert at the roundtable, the 200-metre standard (i.e. the Trial Chamber’s finding that impact sites within 200 meters of legitimate targets were evidence of a lawful attack, while impact sites beyond 200 meters from such targets were evidence of an indiscriminate attack) was **not** devised by the Trial Chamber as

a legal standard or a *per se* standard. Moreover, the Trial Chamber did not consider the 200-meter standard to be the lynchpin of its findings.²⁴ Yet, it appears that the Appeals Chamber overturned the trial judgment essentially on the basis of its rejection of the 200-meter standard.

Furthermore, in rejecting the 200-meter standard, the Appeals Chamber failed to specify whether this element of the Trial Chamber judgment was an error of law or fact. The 200-meter standard could constitute an error of fact insofar as it concerns the actual location of impact sites, or an error of law insofar as it concerns the culpability of the accused for an indiscriminate attack. As observed by an expert at the roundtable, the Appeals Chamber has an express duty to provide exhaustive reasoning when pronouncing judgment. Omissions, such as failing to specify the nature of the error concerning the 200-meter standard, damage principles such as legal certainty.

On balance, it appears that the Appeals Chamber in *Gotovina* showed little regard for the Trial Chamber's role as the primary finder of fact. This, along with the tone of the appeal judgment, which implies a lack of respect and collegiality between the majority and the minority,²⁵ undermines the integrity of the Appeals Chamber and the legitimacy of its judgment.

should provide exhaustive reasoning when issuing judgments in the interest of consistent verdicts and the orderly development of law.

“The Appeals Chamber has an express duty to provide exhaustive reasoning when pronouncing judgment. Omissions, such as failing to specify the nature of the error concerning the 200-meter standard, damage principles such as legal certainty.”

Policy Recommendation

To current and future international criminal justice mechanisms and relevant intergovernmental bodies: Implement the requirement that the Trial Chamber is owed deference with regard to findings of fact. The final adjudicator undertaking appellate review should, in principle, restrict this review to an examination of errors of law. The review should extend to errors of fact only when no reasonable finder of fact could have reached the conclusion under review, leading to a miscarriage of justice. Furthermore, Chambers

Judicial Deliberation and Expertise at International Criminal Tribunals

Experts at the roundtable noted that judges at international criminal tribunals lack the shared judicial culture found amongst judges in national legal systems. This, together with differences in professional experience and training may have a negative impact on the quality of judicial deliberations, thereby compromising the quality of the decisions rendered. Highly trained judges who possess the requisite legal expertise are indispensable at international criminal tribunals, where the scale, complexity and notoriety of cases place an additional burden upon the judicial process.

The importance of proper training in international humanitarian law (IHL) and fact-finding for judges was highlighted during the expert discussion of the *Gotovina* case. Several participants noted that the Appeals Chamber in *Gotovina* failed to consider the totality of the evidence in assessing the culpability of the accused, and, as previously discussed, misconstrued the 200-meter standard as a legal standard rather than an evidentiary tool for the determination of facts. As Janine N. Clark puts it “... what is striking is not only the brevity of the Majority’s analysis [of the evidence] but also the narrow and compartmentalized way in which it approaches the evidence,” which was caused by “... the excessive weight that the Appeal Chamber attaches to the 200-meter standard.”²⁶ The *Gotovina* case concerned “complex targeting decisions involving the use of artillery against a range of military objectives in populated areas during a sustained assault,”²⁷ and as such, is likely to become a persuasive source of authority regarding the application of IHL in armed conflict. The Appeals Chamber in this case has missed a valuable opportunity to provide legal and military experts with

clear guidance on the laws of targeting and exposed the Chamber to criticisms concerning its competence.

Legal scholars have expressed concern over the lack of appropriate professional experience amongst judges at international criminal tribunals. Mia Swart notes that not all judges at international criminal tribunals have a legal background, a significant concern given that “the institutional culture of the Chambers is influenced *inter alia* by the professional backgrounds of the judges.”²⁸ In her analysis of the ICTY Chambers, Swart divides the judges into three distinct categories: (1) civil servants, (2) academics and (3) practitioners.²⁹ Based on Swart’s categorization, out of the twenty permanent judges that currently sit at the ICTY, four fit into the academic category, twelve fit into the practitioner category and four into the civil servant category. The presence of former civil servants or diplomats on the bench is particularly problematic since these individuals may lack the expertise and training necessary to decide on complex legal matters in cases of considerable international significance.³⁰ There was near unanimous agreement amongst experts at the roundtable on this point.

The International Criminal Court (ICC) has attempted to ensure the recruitment of competent judges with the requisite professional experience and training by introducing the requirement of expertise as a condition of judgeship. The court has identified two categories of candidates based on expertise: criminal law and procedure experts and international law experts (including IHL experts and human rights law experts).³¹ Despite the existence of these criteria for recruitment, however, questions have been raised regarding the selection of judges at the ICC. In a recent letter to Ministers of Foreign Affairs of States Parties to the ICC, Human Rights Watch (HRW) urges States Parties to give “serious consideration” to analyses provided by the Assembly of States Parties’ Advisory Committee on Nominations (ACN) regarding candidates’ expertise and fluency in the working languages of the court.³² In addition to the criteria provided in the Rome Statute for selecting judges, HRW underscores the importance of “... electing judges who possess substantial practical experience in criminal trials and who can meet the many demands associated with adjudicating

complex and time-intensive cases.”³³ It is to be hoped that adhering to such measures will improve the quality of both judicial deliberation and the resulting decisions, thereby contributing to the development of international law and enhancing the credibility and legitimacy of international legal institutions.

Adjudicative capacity at international courts and tribunals could be further enhanced by facilitating the greater involvement of IHL experts in legal proceedings. One of the deficiencies of international criminal proceedings at present is that IHL specialists (e.g. military experts) are rarely heard when crucial issues pertaining to IHL are being decided. One method by which to remedy this situation is to request that IHL specialists submit an *amicus curiae* brief on the relevant issue(s).

Policy Recommendations

To future international criminal justice mechanisms and intergovernmental bodies vested with the authority to select international judges (e.g. the UN General Assembly for the ICTY, and the Assembly of States Parties for the ICC): Adhere to strict selection criteria to ensure that those appointed as judges possess the requisite expertise in IHL, ICL, and fact-finding, as well as relevant experience as a legal practitioner.

To current and future international criminal justice mechanisms: Judges should receive regular trainings to update their knowledge of IHL, ICL and fact-finding, and stay abreast of new technologies and methods for fact-finding and evidence analysis.

To the international community, including relevant intergovernmental bodies and non-governmental organizations: Invest in training judges across the world in IHL, ICL and fact-finding to ensure that it is possible to recruit judges who possess the requisite legal expertise and training to perform well in international criminal proceedings.

To international judges, prosecutors and defense counsel: As judges cannot reasonably be expected to possess expertise in all matters relevant to the adjudication of a case, call upon specialists to aid the adjudicative process via direct participation in legal proceedings or the submission of *amicus curiae* briefs.

The Impact of Judgments in the Former Yugoslavia

The impact of appellate judgments in the *Perišić* and *Gotovina* cases in the former Yugoslavia was also discussed during the roundtable. An expert observed that the acquittals in *Gotovina*, and the Appeals Chamber’s rejection of the Joint Criminal Enterprise (JCE) mode of liability – a central component of the indictment against the accused – were interpreted by many in Croatia to mean that those in senior military and political positions bore no responsibility at all for the crimes committed against the Serb population in the Krajina region. Marko Milanovic writes that the *Gotovina* judgment served to entrench popular narratives about the war in both Croatia and Serbia, which are not conducive to reconciliation or the creation of an accurate historical record:

“In Croatia, the appeals judgment is conclusive evidence that the war they fought with the Serbs was not only defensive and just, but also pure and unsullied ... in Serbia, the judgment only confirms the perpetual victim narrative – the ICTY and the international community never really cared about crimes against Serbs ...”³⁴

Should we care about how the judgments of international criminal tribunals are perceived or interpreted in the regions where the crimes concerned took place and where many perpetrators and victims still live? The answer appears to depend on the vision of international criminal justice to which one subscribes. Frédéric Mégret distinguishes between an “internal’ or ‘forensic’ vision” and an “external’ or ‘strategic’ vision” of international criminal justice – the former is focused on the specifics of each case and the development of international law, while the latter considers how justice is perceived and understood by relevant constituencies.³⁵ Both visions have shaped the work of the ICTY. Mégret quotes former ICTY Spokesperson and Outreach Coordinator for Bosnia and Herzegovina, Refik Hodzic, who elaborates on the internal or forensic vision of international criminal justice:

“... Some judges at the tribunal as well as others who have worked for or been involved in it ... [believed] that the tribunal’s only task was to provide [a] fair trial in accordance with the highest international standards [...] but anything that happens outside the tribunal is not its concern ... the impact that it has on core affected communities ... is simply something that they were not concerned with or should not be concerned with.”³⁶

Hodzic and many other experts, including several of those present at the roundtable discussion, reject this narrow view of international criminal justice.

The UN Security Council, in Resolution 827 which mandated the creation of the ICTY, adopts a broader vision of international criminal justice, holding that the tribunal should “... contribute to the restoration and maintenance of peace” in the region.³⁷ A former President of the tribunal, Gabrielle Kirk McDonald, also embraces this broad or “external” vision, writing that:

“... If justice is to support the maintenance of peace in the former Yugoslavia... it must be from a judicial system that is understood and considered to be legitimate by those for whom it was established.”³⁸

McDonald believed that fulfilling the mandate of the ICTY required a “... proactive information campaign that informs the people of the region of

the impartiality and independence of the Tribunal ...”³⁹ However, the tribunal only implemented a formal outreach program in 1999 – six years after the tribunal was established and well after the alienation of its constituents in the former Yugoslavia had become apparent. The consequences of this delay were not insignificant. As noted by a former Deputy Prosecutor of the ICTY, David Tolbert, “... the tribunal’s work was subject to gross distortions and disinformation in many areas in the former Yugoslavia.”⁴⁰ The ICTY’s initial outreach efforts, which consisted of providing information about the trials in local languages at field offices, have also been criticized for being “too limited in scope.”⁴¹

“The tribunal only implemented a formal outreach program in 1999 – six years after the tribunal was established and well after the alienation of its constituents in the former Yugoslavia had become apparent.”

The negative public image of the ICTY fostered by the tribunal’s detractors has arguably been mitigated in recent years as a result of a more ambitious outreach strategy. This strategy rests on “four pillars” of activity: (1) providing information (e.g. engaging the public via social media and working with journalists in the former Yugoslavia); (2) producing informational material (e.g. creating documentaries that are screened at regional and international film festivals); (3) organizing conferences (e.g. the “Bridging the Gap” and “Facing the Past” event series); and (4) networking with regional NGOs (e.g. conducting joint outreach activities about the tribunal’s work).⁴²

A particularly noteworthy effort was the “Bridging the Gap” series, which consisted of “... one-day events, held in the towns where some of the most serious crimes took place, [which] included candid and comprehensive presentations from panels of Tribunal staff who were directly involved in the investigation, prosecution and adjudication of alleged crimes.”⁴³

While the importance of communicating with constituents in the former Yugoslavia through specially designed information campaigns cannot be disputed, it is imperative to realize that the impact of the tribunal is not solely a function of such campaigns. As Refik Hodzic explains:

“... Everything that an institution of this kind does can be seen as a form of outreach. The way it investigates and engages with potential witnesses is outreach, the announcements that courts make is outreach, the conduct in the courtroom is outreach, the judgments [are outreach].”⁴⁴

It is important, therefore, to conceptualize outreach comprehensively and understand that the remoteness and/or unfamiliarity of international criminal tribunals and related processes necessitate additional efforts to secure the support and investment of local constituents. In this regard, future international or hybrid mechanisms should pay close attention to the outreach strategy of the Special Court for Sierra Leone (SCSL), which is often referred to as an outreach success story.⁴⁵ Innovative strategies employed by the SCSL to engage successfully a “largely rural-based population, among which there are high rates of illiteracy and poverty”⁴⁶ include using town hall meetings and university clubs to discuss the tribunal’s work⁴⁷ and facilitating two-way communication between the court and local people via public phone booths that allow court staff to respond to inquiries.⁴⁸ Such examples are instructive for future tribunals, especially those operating in challenging environments with limited resources. Finally, alongside efforts to improve outreach, it is important to assess the impact of outreach activities on different constituencies

relevant to the work of international courts and tribunals.

Policy Recommendations

To future international criminal justice mechanisms and relevant intergovernmental bodies: Develop a comprehensive outreach strategy suited to the operational environment of the justice mechanism in question as of the beginning. The cost of an outreach strategy should be factored into the institution’s operating budget.

To the staff of international criminal justice mechanisms: All staff (including judges) should be part of the outreach strategy in that their behavior conforms to the highest professional standards and they undertake to communicate the rationale behind their actions and decisions in a reasoned and accessible manner.

To the international community, including relevant intergovernmental bodies and non-governmental organizations, and current and future international criminal justice mechanisms: Devise and implement improved methods by which to assess the impact of outreach activities on different constituencies relevant to the work of international courts and tribunals.

Conclusion

This policy brief has attempted to provide policymakers and those interested in strengthening international criminal justice mechanisms with an overview of important policy issues arising from an expert roundtable discussion of controversial appeal judgments at the UN ICTY. The brief does not address all the substantive and procedural issues raised during this off-the-record meeting, focusing instead on those aspects of the discussion with clear policy implications. The policy recommendations made in this brief seek to enhance the quality of international judges, judgments, and the judicial process, as well as improve the image of international criminal justice institutions.

The policy issues addressed concern the implications of the fragmentation of case law for legality and the legitimacy of international criminal justice mechanisms; the relationship between Chambers of Trial and Appeal, focusing on the appropriate scope of appellate review; the quality of judicial deliberation and expertise at international criminal tribunals; and the impact of judgments in the former Yugoslavia.

The policy recommendations proposed include creating a system of *en banc* appellate review at future tribunals; adhering to the principle of deference by the Appeals Chamber to the Trial Chamber with regard to factual findings; recruiting qualified international judges and providing the requisite training for sitting judges to update their knowledge regularly; and engaging in comprehensive outreach from the moment a tribunal is established.

Endnotes

- 1 | *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Appeal Judgement (28 February 2013) Para 10. See also *Prosecutor v. Ante Gotovina & Mladen Markač*, Case No. IT-06-90-A, Appeal Judgement (16 November 2012) Para 13; and *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Appeal Judgement (19 July 2010), Para 12.
- 2 | “The Fugitives,” UN ICTY, accessed August 05, 2014, <http://www.icty.org/sid/10010>
- 3 | “Development of the Local Judiciaries,” UN ICTY, accessed August 5, 2014, <http://www.icty.org/sid/10462>
- 4 | “Development of the Local Judiciaries.”
- 5 | *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Trial Judgment (06 September 2011), Para 1840.
- 6 | *Prosecutor v. Momčilo Perišić*, Appeal Judgement, Para 41.
- 7 | James G. Stewart, “The ICTY Loses its Way on Complicity – Part 1,” *Opinio Juris*, April 3, 2013, accessed August 06, 2014, <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>
- 8 | Kevin Jon Heller, “Everything You Ever Wanted To Know About Specific Direction But Were Afraid To Ask,” *Opinio Juris*, October 26, 2013, accessed August 06, 2014, <http://opiniojuris.org/2013/10/26/talk-london-defending-specific-direction-requirement/>
- 9 | *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert (7 March 2014), Paras 287, 305.
- 10 | Heller, “Everything You Ever Wanted To Know About Specific Direction.”
- 11 | *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeal Judgment (23 January 2014), Para 1650.
- 12 | *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81, Decision on Motion for Reconsideration (20 March 2014).
- 13 | Marko Milanovic, “The Self-Fragmentation of the ICTY Appeals Chamber,” *EJIL:Talk!*, January 23, 2014, accessed August 06, 2014, <http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/>
- 14 | Rome Statute of the International Criminal Court

- (entry into force July 1, 2002), Article 39(2)(b)(i).
- 15 | Michael Stein, "Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review," *William & Mary Law School Scholarship Repository: Faculty Publications*, Paper 694 (1993), pp. 821-822, citing John E. Simonett, "The Use of the Term Result-Oriented to Characterize Appellate Decisions," *William Mitchell Law Review* 10 (1984), pp. 187, 202.
- 16 | See Stein, "Uniformity in the Federal Courts," p. 829-851 for a detailed discussion of the demerits of *en banc* review.
- 17 | Mark C. Fleming, "Appellate Review in the International Criminal Tribunals," *Texas International Law Journal* 37 (2002), pp. 111-155.
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