Shared memories, shared records, shared ownership: the presence of victims in the preservation, articulation, and retrieval of the ICTY archives

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4. Shared Memories, Shared Records, Shared Ownership: The Presence of Victims in the Preservation, Articulation, and Retrieval of the ICTY Archives

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Abstract: *When the International Criminal Tribunal for the former Yugoslavia (ICTY) finalised its proceedings, its official records became the archives of the ICTY. As these archives contain all materials pertaining to the ICTY and its proceedings, they also hold the testimonies, artefacts, and experiences of victims which were used as evidence. Yet to view these as items with only evidentiary – or historical – value would be an oversimplification of their meaning to victims. However, this particular relationship between the ICTY, its archives, and victim communities has remained unaddressed. This chapter aims to fill this gap by examining and questioning the organisation, presentation, and accessibility of the archives, using the concept of conflict as property to situate this examination and critical archival studies to highlight the victim's position within these archives. Additionally, some considerations are presented which could facilitate the incorporation of victims and their needs in the organisation, presentation, and accessibility of the archives.*

1. Introduction

In 2009, it emerged that the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY/Tribunal) had ordered the destruction of around 1000 artefacts found in the mass graves evidencing the massacre that took place after the fall of Srebrenica, Bosnia and Herzegovina, in 1995.[1] These artifacts, which included human tissue, personal belongings, and identification documents, presented a health risk due to decomposition, according to the Prosecutor's Office, and were destroyed in conformity with standard court procedure.[2] Victims and their relatives expressed their dismay, arguing that the items should have been returned to Bosnia and Herzegovina.[3] Hatidža Mehmedović, founder of the Mothers

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1 Balkan Investigative Reporting Network, 'Srebrenica Artifacts Destroyed in The Hague' (*Balkan Insight*, 16 July 2009) <https://perma.cc/SW2T-W8CM>.

2 ibid.

3 Olivera Simić, 'Memorial Culture in the Former Yugoslavia: Mothers of Srebrenica and the Destruction of Artefacts by the ICTY' in Peter D Rush and Olivera Simić (eds), *The Arts of Transitional Justice: Culture, Activism, and Memory after Atrocity* (Springer

of Srebrenica – a foundation representing around 6000 victims and their relatives –, stated that, '[w]hat the Hague did is a crime. In Srebrenica, they killed our children and in the Hague, our memories.'[4]

While the Prosecutor's Office denied that the artifacts were the property of the Tribunal,[5] the items were in fact part of the United Nations (UN) official records. The official records of the ICTY include all evidentiary items, such as objects, audio-visual materials, and documents, as well as recordings of proceedings, judgments, orders, motions, transcripts, and other documentation produced by and for the Tribunal.[6] As the Tribunal is a subsidiary organ of the UN, these records are the legal property of the UN.[7] From a formal perspective then, perhaps the destruction of decomposing evidence does not raise too many questions. However, such a strictly formalistic approach towards matters that do not have a purely procedural meaning or character provokes a certain sense of unease. Another example that elicits a similar, and perhaps more tangible, sense of discomfort are the short videos featured on the ICTY's website under the heading 'Voices of the Victims'.[8] The videos, most of which display the full name of the victim witness and the crimes they suffered, contain excerpts of testimonies by these victim witnesses. The original audio is replaced with the English interpretation, and each video is accompanied by a quote from the testimony. Again, the audio-visual recordings of ICTY proceedings are part of the official records of the Tribunal and can therefore be used, as is the case here, to exhibit the work of the Tribunal. Once again, this partic-

2014) 161–162; Balkan Investigative Reporting Network, 'Loss of Srebrenica Victims' Possessions Shocks Families' (*Balkan Insight*, 13 May 2009) <https://perma.cc/ZR65-SE8F>; Balkan Investigative Reporting Network (n 1).

4 Simić (n 3) 161.

5 Balkan Investigative Reporting Network (n 3).

6 Iva Vukušić, 'The Archives of the International Criminal Tribunal for the Former Yugoslavia' (2013) 98 History 623, 626–629.

7 UNST 'United Nations Archives and Records Management' (26 June 1991) UN Doc ST/SGB/242; UNSC 'Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals' (21 May 2009) UN Doc S/2009/258 6; UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966 art 27(1); Trudy Huskamp Peterson, 'Temporary Courts, Permanent Records' (2006) 170 Special Report – United States Institute of Peace 2.

8 United Nations International Criminal Tribunal for the former Yugoslavia, 'Voice of the Victims' <https://www.icty.org/en/features/voice-of-the-victims> accessed 2 January 2022.

ular use of the official ICTY records might not be considered particularly controversial considering the objectives of the Tribunal, but to view these videos and other evidentiary materials as just that – *evidence* – would be an oversimplification of their content, meaning, and value. The records of the ICTY cannot solely be defined as those materials used before the Tribunal to present, defend, and judge cases. These records contain the experiences of individual victims, their stories, and memories. The Tribunal, in pursuit of its objective to achieve justice for the victims, took possession of these materials and presented them in the courtroom, acting as a representative of the victims. Yet by perceiving and treating the victims' stories as having a purely procedural function, the individuals behind these records became invisible. Experiences only became valuable to the extent that they could prove the commission of a crime, show the severity of this crime, or testify to the immorality of the defendant. The background of the individual victims behind the stories was relevant only to provide context to their testimony. While present in their legal capacity as witnesses, there was no room for their presence as victimised persons.

The unease which results from the treatment of these individual experiences as legal commodities, as legal evidence as well as legal possessions, was conceptualised in 1977 by Nils Christie in the understanding of conflict as property.[9] In his article, he offered a critique of the modern criminal justice process, in which official institutions and professionals have taken ownership of the original conflict that exists between perpetrator and victim. In these modern systems, the state has taken on the role of victim representative, speaks on their behalf, presents their case, and receives reparations. The person of the victim has been removed from the process, and the original conflict has now become property of the state. Christie's critique, as well as his appeal to return ownership of the conflict to the victim and restore the victim's central position within the criminal justice process, has had profound effects on the development of restorative justice practices within domestic criminal justice systems.[10] These ideas also impacted the field of international criminal justice, which resulted, inter alia, in the creation of a multitude of offices within the permanent International Criminal Court (ICC) focused on victim representation, participation and

9 Nils Christie, 'Conflicts As Property' (1977) 17(1) British Journal of Criminology 1.

10 William R Wood and Masahiro Suzuki, 'Are Conflicts Property? Re-Examining the Ownership of Conflict in Restorative Justice' (2020) 29 Social & Legal Studies 903, 904.

reparation.[11] This shift in thinking within criminal justice, and the accompanying institutional changes, have received much attention from international legal scholars who chronicled these developments, from the absence of victims in the proceedings of the ad hoc Tribunals to the participation and representation of victims in ICC proceedings.[12] Even after the ICTY closed its doors, the Tribunal remained a thankful source of academic reflection and lessons for the future.[13]

Nevertheless, even though active proceedings before the ICTY have ceased, this does not mean that the ICTY, and in particular its relationship with victim communities, has become a subject with only historical importance. While the ICTY finalised its proceedings in December 2017, its remaining functions were transferred to the International Residual Mechanism for Criminal Tribunals (IRMCT/Mechanism), established in 2010.[14] Due to the closure of the ICTY, its legal records now constitute the official archives of the Tribunal and are currently being managed by the IRMCT, which carries responsibility for, inter alia, the preservation, accessibility, declassification, and protection of the archives.[15] Therefore, the records continue to exist, but now under the auspices of the IRMCT. The stories, experiences, and memories contained in these records of course continue to exist as well, but similarly remain under the authority of the Mechanism. Thus, Christie's critique, even if originally focused on active criminal proceedings, continues to be applicable here as ownership of the original conflict has been transferred from the ICTY to the IRMCT. The absence of

11 Victims Participation and Reparations Section, *Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC* (International Criminal Court 2020).

12 See, *inter alia*, Ilaria Bottigliero, Redress for Victims of Crimes Under International Law (Springer Netherlands 2004) 193–248; Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience' in Dominic McGoldrick and Peter Rowe (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004); Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014); Christoph Safferling and Gurgen Petrossian, *Victims Before the International Criminal Court: Definition, Participation, Reparation* (Springer 2021).

13 See, for example, Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (1st edn, OUP 2020).

14 UNSC Res 1966 (22 December 2010), UN Doc S/RES/1966.

15 ibid., art 27(2) and (3); UNSC 'Report of the Secretary-General' (21 May 2009) UN Doc S/2009/258 22; IRMCT, 'Archives' <https://www.irmct.org/en/archives> accessed 3 January 2022.

the person of the victim in the ICTY's proceedings has received extensive scholarly attention, yet the question of whether this absence persists in the Tribunal's archives has remained unaddressed. This chapter aims to fill this gap by examining how victims are represented in the Tribunal's archives, using the concept of conflict as property to situate this examination and critical archival studies to question the victim's position – or lack thereof – within the archives.

This chapter proceeds as follows. The next section first explains the theory of conflict as property, the context within which it was first developed, and its relevance to this study. This section also briefly explains the field of critical archival studies and how it is used here to structure the dissection of the ICTY archives. Subsequently, three different aspects of the archives are examined, namely their organisation, presentation, and accessibility, focusing attention on the presence, or absence, of the victims in these three areas. The final section proposes a number of ways in which the discussion on the relationship between victim communities, international adjudicative mechanisms, and archives of mass atrocities can be continued and further developed.

2. Conflict as Property

As stated previously, the understanding of conflict as property was first developed in 1977 by Nils Christie, in an article published in the British Journal of Criminology. Christie argues that, in our modern criminal justice systems, victims, perpetrators, and the wider community have been side-lined in the resolution of their own conflicts. As the criminal justice system, and in particular criminal trials, became increasingly formalised and institutionalised, the original parties to the conflict became increasingly disconnected from the process of conflict resolution. This distance has manifested itself in the physical removal of the process from the location where the original conflict arose, and from the homes of the victims and offenders, to centralised, imposing, and often difficult to navigate court buildings situated in the administrative centre of the nearby town or city.[16] In addition, a figurative distance has been created by the indirect representation of the parties to the conflict. Victims no longer represent themselves

16 Christie (n 9) 2–3.

but are represented by the state. The state presents their grievances, demands a punishment, and receives reparations. While the offender is still officially a party in the modern criminal trial, often he will be represented by a lawyer.[17] The centralisation of the criminal justice process has meant that there is no longer any room for the interests of the community in which the crime occurred – this has been replaced by the interests of society as a whole. In sum, the formalisation of the criminal process has meant that the original parties to the conflict no longer own their conflict, as it has been taken over by the state and other professionals.[18] Christie argues that ownership of the conflict between offender and victim should be returned to those parties – and especially to the victim. This would entail, most importantly, direct participation of the parties to the conflict in its resolution. Not only does such direct participation allow the victim to personally confront the offender with the harm caused, but it also allows for a personalised resolution of the conflict and tailored forms of redress. Furthermore, direct participation presents parties with the opportunity to address wider and underlying societal problems – thereby encouraging participation in public life.[19] In order to have a system in which victims could once more have control and ownership of their conflict, Christie proposed the creation of informal neighbourhood courts. These courts would be composed of peers who would represent themselves and who would strive to find a solution among themselves – avoiding professionals and professionalisation at all costs. The victim would take centre stage in proceedings before these courts, and the conflict resolution process would focus on the victim's situation, their grievances, and their needs regarding reparations.[20]

While Christie's ideal of replacing the formal court system with informal neighbourhood courts never materialised, his article made an important contribution to the field of restorative justice. This field centres around the idea that justice processes should provide perpetrators and victims with the opportunity to come face to face – to allow them to communicate about the harm suffered and to agree on the appropriate form of redress.[21] Since the article's publication in 1977, substantial changes have been introduced

17 ibid.
18 ibid., 7.
19 ibid., 7–9.
20 ibid., 10–12.
21 Wood and Suzuki (n 10) 903–904.

in many national criminal justice systems to provide for various forms of victim participation in trial proceedings and for effective means of reparation.[22] Eventually, the field of international criminal justice also became infused with these ideas, with international legal scholars and practitioners reiterating the importance of victim participation and redress in order to truly achieve the objectives of international criminal justice.[23] In this light, the ad hoc Tribunals were heavily criticised for not granting victims an official position or effective means of reparations,[24] despite two of the core objectives – and stated achievements – of the ICTY being the ability to give a voice and bring justice to the victims.[25]

Even though Christie's article, and general scholarship on the relationship between the ICTY and its victim communities, focus on the role of victims in criminal proceedings, the ICTY archives present an important opportunity to examine the question of ownership of conflict after judicial proceedings have ended. In his article, Christie does not provide a definition of either *conflict* or *property*, but William Wood and Masahiro Suzuki understand these terms, not as strictly legal concepts, but as describing certain social relations.[26] The term *conflict*, then, refers both to conduct that the state has classified as unlawful, and to the sequence of events that causes friction as well as societal or personal harm. Wood and Suzuki interpret the term *property* as the ability of the direct parties to the conflict to take charge of the conflict and to decide on the consequences of the harm inflicted.[27] Still, as the meaning of these two terms is determined specifically and solely in reference to the criminal justice process, this is a

22 ibid.

23 David Donat-Cattin, 'Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos 1999) 1682–1683; Haslam (n 12) 318–319; Moffett (n 12) 24–49; Safferling and Petrossian (n 12) 1–4.

24 Bottigliero (n 12) 196–211; Haslam (n 12) 320; Claude Jorda and Jérôme de Hemptinne, 'The Status and the Role of the Victim' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary, vol II* (OUP 2004) 1387–1390; Moffett (n 12) 67–85.

25 United Nations International Criminal Tribunal for the former Yugoslavia, 'Achievements' <https://www.icty.org/en/about/tribunal/achievements> accessed 3 January 2022; Amanda Potts and Anne Lise Kjær, 'Constructing Achievement in the International Criminal Tribunal for the Former Yugoslavia (ICTY): A Corpus-Based Critical Discourse Analysis' (2016) 29 International Journal for the Semiotics of Law 525.

26 Wood and Suzuki (n 10) 905.

27 ibid.

relatively restrictive interpretation. Conflict does not necessarily end with the completion of a criminal trial and the classification of certain conduct as unlawful and harmful. Conflict also manifests itself through the victim's intangible experience of the conduct, their testimony and memory, and through physical artifacts that are now intrinsically linked to the conduct, and which connect perpetrator and victim. These tangible and intangible objects evidence the existence of conflict – not just to a legal court, but also to victims, their relatives, and their community. Subsequently, having ownership of the conflict means having the ability to exercise control over these objects; it includes the ability to hold them, to hide, erase, or enshrine them, to reproduce and broadcast them. Thus, having control over these objects inevitably means having a high degree of power over them. In the case of the ICTY, while the victims and their relatives were the original owners of many of these objects, partial or complete ownership was transferred to the ICTY – sometimes without direct or explicit consent from the original owners. The ICTY thereby gained sole control over these objects and therefore holds power over them. This is problematic, because the objectives and interests of the actors involved do not necessarily align. The interests and objectives of the victims and the ICTY, which are often presumed to overlap, are likely to diverge on certain points – and even the interests of victims are not necessarily homogenous. Even when there is overlap, ideas about the manner in which these interests and objectives should be protected can diverge. Exclusive ownership of the ICTY archives, as granted to the IRMCT, leaves little room for the consideration and protection of the interests of victims.

The problems inherent in such exclusionary ownership, and related issues of power, inequality, and contention in historic recordkeeping, can best be examined within the framework of critical archival studies. While it is beyond the scope of this chapter to comprehensively discuss this particular branch of archival studies, it suffices to state here that the aim of critical archival studies is to identify inequalities, power imbalances, silences, and absences, not only in the structure of archives, but also, and perhaps more importantly, in the creation, management, and availability of archives.[28] These studies reject the understanding of archives as neutral depots of

28 See, *inter alia*, Michelle Caswell, Ricardo Punzalan and T-Kay Sangwand, 'Critical Archival Studies: An Introduction' (2017) 1 Journal of Critical Library and Information Studies 1; Eric Ketelaar, 'Tacit Narratives: The Meanings of Archives' (2001) 1 Archival Science 131; Joan M Schwartz and Terry Cook, 'Archives, Records, and Power: The Making of Modern Memory' (2002) 2 Archival Science 1; Terry Cook,

information about the past, and instead reframe them as institutions of power which can create and maintain inequality. A subsequent goal of such research is to offer practical tools with which to change existing archival practices. Following this approach, the next section of this chapter critically examines the organisation, presentation, and accessibility of the ICTY archives, by identifying issues within these three areas that testify to the existence of power imbalances in the exercise of ownership of the archives. Such an approach, in turn, allows for the identification and interrogation of silences, absences, and vacant spaces where the victim should be present, and for the articulation of a set of possible solutions.

3. The ICTY Archives as Touchstones of Memory

Laura Miller states that archives are 'touchstones upon which memories may be retrieved, preserved, and articulated.'[29] The three areas of accessibility, organisation, and presentation speak to the core of any archive, and it is in these three areas that the official institutions, whether it be the UN, the ICTY, or the IRMCT, can and do exhibit their power. It is also in these three areas that tensions, inequalities, and power imbalances in the relationship between the archives and victim communities arise, and in which the absence of the victim is most tangible. Therefore, this section examines each of these three aspects of the ICTY archives separately, whilst paying particular attention to the presence of the victim within these three areas.

3.1. Organisation

Before assessing the presentation and accessibility of the ICTY archives, an understanding and appraisal of their organisation is needed. In order to understand the current structures of the ICTY archives, it is imperative to examine the processes that preceded the eventual establishment of the archives, during which the framework and core principles of the archives were developed. The presence, or absence, of the person of the victim in

'The Archive(s) Is a Foreign Country: Historians, Archivists, and the Changing Archival Landscape' (2011) 74 The American Archivist 600.

29 Laura Millar, 'Touchstones: Considering the Relationship between Memory and Archives' (2006) 61 Archivaria 105, Abstract.

this process can explain the position of the victim in the current organisation of the ICTY archives.

The process which led to the eventual creation of the ICTY archives was an integral part of the inception of the IRMCT, which was founded in 2010 by the UN Security Council (UNSC).[30] Already in 2000, the Informal Working Group on the International Tribunals (the Working Group) was created, which consisted of a number of legal advisors from UNSC member states.[31] This working group consulted with both the ICTY and the International Criminal Tribunal for Rwanda (ICTR), on the completion strategies of both Tribunals and the responsibility for remaining residual functions.[32] In 2007, both ad hoc Tribunals submitted a report with their views on the creation of a residual mechanism to the UN Security Council.[33] Around the same time, the Registrars of both Tribunals established the Advisory Committee on Archives (the Advisory Committee), which specifically examined the question of the Tribunals' archives.[34] Consultations between the Working Group, the Advisory Committee, and officials from both Tribunals eventually resulted in a statement by the President of the UN Security Council in December 2008.[35] In this statement, the President acknowledges the need for an ad hoc mechanism that would be able to take over and carry out the residual functions of both Tribunals. Furthermore, the President requests the UN Secretary-General to draft a report on administrative and budgetary considerations for a number of possible locations which could house the residual mechanism and the Tribunals' archives.[36] While the reports from the Working Group and the Advisory Committee are not publicly available, the 2009 Report of the UN

30 UNSC Res 1966 (22 December 2020) UN Doc S/Res/1966.

31 UNSC 'Letter dated 19 December 2008 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council' (31 December 2008) UN Doc S/2008/849 1.

32 Konrad G Büehler, 'The Role of the UN Security Council in Preserving the Legacy of the Tribunals: Establishment of a Residual Mechanism and Preservation of Archives' in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers 2011) 59–60.

33 UNSC 'Letter dated 19 December 2008' (31 December 2008) UN Doc S/2008/849 1.

34 ICTY Registry 'Tribunals launch Archiving Study' (9 October 2007) Press Release LM/MOW/ PR1189e; UNSC 'Letter dated 19 December 2008' (31 December 2008) UN Doc S/2008/849 2.

35 UNSC 'Statement by the President of the Security Council' (19 December 2008) UN Doc S/PRST/2008/47.

36 ibid.

Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the ICTY and ICTR and the seat of the residual mechanism(s) for the Tribunals (the Report), is freely accessible.[37] The Report contains considerations and recommendations on a number of issues related to the functions, budget, and location of the residual mechanism. With regard to the functions of the mechanism, the Report states that the Tribunals identified eight core duties – of which the maintenance of their archives is a principal one.[38] According to the Report, the choices regarding the location and composition of the Tribunals' archives are influenced by both the uses and users of the archives, as well as a number of other factors, including costs, archival integrity, security, preservation, access, (de)classification, and technology.[39]

With regard to the uses of the ICTY archives, the Report references a 2007 bulletin by the UN Secretary-General on record-keeping and the management of the UN archives, which defines these archives as 'records to be permanently preserved for their administrative, fiscal, legal, historical or informational value.'[40] In broader terms, the Report stipulates that the archives have primary importance as a record of the Tribunals' judicial activities, and secondary importance for memory, education, and research.[41] The residual mechanism, as the institution that takes over the remaining judicial functions from the ICTY, and its various offices require direct, speedy, and secure access to the Tribunal's archives in order to perform those functions. This distinction between primary and secondary uses is also made by the Report with regard to the expected users of the archives.[42] Primary users are those whose work relates directly to the judicial activities of the Tribunals, and include judges, prosecutors, and defence counsel, as well as present and former staff members, and national authorities wishing to investigate and prosecute individuals indicted by the Tribunals. Victims, witnesses, relatives, and affected communities, as

37 UNSC 'Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals' (21 May 2009) UN Doc S/2009/258.

38 UNSC 'Report of the Secretary-General' (21 May 2009) UN Doc S/2009/258, 6.

39 ibid., 44.

40 ibid., 12.

41 ibid., 12 and 14.

42 ibid., 14–15.

well as lawyers, researchers, journalists, and other courts and governments, are identified as secondary users, for whom the archives can also carry significance. However, according to the Report, even though these groups are identified as secondary users, these secondary users will become more important as the trials come to an end and the mechanism completes its residual functions – and can even become primary users.[43]

As stated earlier, these categories of primary and secondary uses and users were important factors in the decision-making process regarding the location and composition of the ICTY archives.[44] With regard to the location of the archives, the ICTY and the Advisory Committee agree in the Report that these should be located in Europe.[45] Multiple locations in Europe are considered in the Report, including Bosnia and Herzegovina, Serbia, and Croatia.[46] However, the ICTY and the Advisory Committee disagreed about the feasibility of locating the archives in one or more countries of the former Yugoslavia. While the Advisory Committee suggested that the UN should contemplate transferring physical custody – but not ownership – of the archives to one or more of these countries once the number of confidential documents had been significantly reduced, the ICTY considered this an option only if all confidential documents had been declassified and only if one location in the former Yugoslavia would be chosen.[47] The Report presents the respective arguments of both the Tribunal and the Advisory Committee, as well as the views of the governments of Bosnia and Herzegovina, Serbia, and Croatia on this question.[48] In the end, even though access to the archives is recognised in the Report as an important part of fostering reconciliation and memory,[49] none of the countries of the former Yugoslavia were chosen to permanently house the ICTY archives. With regard to the composition of the archives, the Report identifies three different types of records that will be stored in the archives: judicial records relating to the various cases, records that have been produced in the context of proceedings but which are not judicial records, and lastly, administrative records.[50] Judicial records are the records of each individual

43 ibid., 14–15.
44 ibid., 12 and 46.
45 ibid., 43–44.
46 ibid., 48–52.
47 ibid., 43–44.
48 ibid., 48–49.
49 ibid., 46.
50 ibid., 13.

case and include, inter alia, indictments, motions, correspondence, internal memoranda, orders, decisions, judgements, disclosure, exhibits, and transcripts, and the translations of these files. These records are produced by the different branches of the Tribunal, such as the Chambers, Prosecutor, Registry or Defence, but also by other actors, such as the accused, states, and amicus curiae. The second category are those records that are not related to any specific case or proceedings, but which are related to the overall judicial process. These records also originate from the various branches of the Tribunal and include, amongst others, evidentiary materials collected and kept by the Prosecutor which have not (yet) been used in proceedings, papers on the ICTY's policies and practices, annual reports and completion strategy reports, as well as meeting notes, correspondence, and personal records related to the defendants and witnesses. The final category of administrative records contains those files related to human resources, procurement, finance, and other administrative functions. The Report makes a further distinction between public files, temporary files, and confidential files which cannot be disclosed to the public.[51] According to the Report, duplicate files and those records that are deemed to have only temporary value can be destroyed.[52]

It is unclear if, and to what extent, individual victims, victim groups, or non-governmental organisations representing victim communities were asked to provide input for or comments on this Report. Regardless, the Report's distinction between primary and secondary uses and users confirms that victims were not placed at the forefront of the decision-making process. Overall, the fact that the form and organisation of the archives is determined, according to the Report, mainly by their use and users seems rather reductive. In other words, does the classification of victims – whose memories, whether psychical or otherwise, are now stored within this institution – simply as users of the archives who might wish to use these archives for their memory, do justice to their particular relationship with the ICTY's records? The Report does not consider this point.

With regard to the *uses* of the archives, while the Report does mention the archives' secondary value for memory, education, and research, it does not specify what is meant by the term memory.[53] Additionally, the Report refers to

51 ibid., 12–14.
52 ibid., 22.
53 The Report even mentions the 'duty of memory', without explaining what this duty entails. UNSC 'Report of the Secretary-General' (21 May 2009) UN Doc S/2009/258 49.

the aim of fostering reconciliation,[54] without explaining the role that the archives can and should play in this process – or in the process of memorialisation. Other important definitions are also missing from the Report. For example, the Report does not explain what qualifies as a temporary file, why its temporary status warrants destruction, and if and how other considerations play a role in its designation as a temporary file. For victims these could be essential questions – for example, did the items that were destroyed by the Office of the Prosecutor in 2005 and 2006 qualify as temporary files? The Report provides no further explanation here. As regards the *users* of the archives, while victims are specifically mentioned in the Report as users of the archives, they are grouped together with journalists and researchers, implying a common and overlapping interest in the ICTY archives. However, the relationship between victims and the ICTY is deeply personal – as opposed to the professional interest of journalists and researchers in the Tribunal's archives. This is not to say that journalists and researchers can never have a personal interest in the archives, but an immediate overlap between the interests of victims and those of journalists and researchers in this regard cannot be presumed. The fact that the Report does not acknowledge this important distinction and fails to recognise victims as a separate category of interested persons, shows the limited consideration that was given to this particular group of users. As a final point, the division between primary and secondary users seems counterintuitive in light of the Report's distinction between present and future uses and users. The Report clearly states that the primary users are only temporary users – whose use of the archives only lasts as long as active investigations and prosecutions are ongoing – while the Report expects that the secondary users will become the long-term users of the archives.[55] The choice to prioritise present users potentially creates a self-fulfilling prophecy; by having these primary users guide the decision-making process regarding the location and composition of the archives, these archives will meet the needs of those users and will be more accessible to them – thereby possibly preventing expected secondary users becoming primary users. This last issue in particular is further discussed below in the section on accessibility.

54 UNSC 'Report of the Secretary-General' (21 May 2009) UN Doc S/2009/258 46 and 55.
55 ibid., 15.

3.2. Presentation

More than a year and a half after the publication of the UN Secretary-General's 2009 Report, the UN Security Council adopted Resolution 1966, which establishes the International Residual Mechanism for Criminal Tribunals with two branches: one seated in The Hague for the ICTY, and one seated in Arusha for the ICTR.[56] As stated in the introduction of this chapter, Resolution 1966 assigns the management of the archives to the IRMCT and locates the ICTY archives with the Mechanism's branch in The Hague.[57] Information about the physical archives can be found on the website of the Mechanism, although locating the specific webpage on the archives within the Mechanism's website is not straightforward.[58] The English-language version of this webpage provides some general information about the contents and purpose of the archives, as well as information concerning access to the archives. Details about the physical archives located in The Hague are scarce – in fact, the physical address of the archives can only be found through the 'Frequently Asked Questions' webpage.[59] While the webpage does provide some practical information for those wishing to visit the archives, there is no description of the physical appearance of the archives and it is not immediately clear to outsiders that the archives are housed in the former ICTY building, now the seat of the IRMCT. Unfortunately, at the time of writing it was not possible to visit the archives in person due to COVID-19 related restrictions.[60] Additionally, the IRMCT website does not explain in much detail what is contained in the physical archives, only that it stores 'thousands of linear metres of physical records and more than 3 petabytes of digital records [...].'[61] Otherwise, the website reiterates the distinction made in the UN Secretary-General's Report between the three different categories of records. There is no detailed overview of the records held in the physical archives, or an online catalogue

56 UNSC Res 1966 (22 December 2020) UN Doc S/Res/1966 art 3.
57 ibid., art 27.
58 IRMCT (n 15). A visitor of the Mechanism's homepage has to click 'About' in the bar at the top of the page, and then choose 'Functions' within the 'About' bar. At the bottom of that page is a link to the 'Archives' webpage. The fact that the official website of the ICTY is still operational creates further confusion about the correct information channel.
59 IRMCT, 'Records and Archives – Frequently Asked Questions' <https://www.irmct.org/en/about/functions/archives/faq> accessed 5 January 2022.
60 IRMCT, 'Visits' <https://www.irmct.org/en/about/visits> accessed 3 February 2022.
61 IRMCT (n 15).

or other search tool through which to assess the contents of the physical archives.

However, in addition to the physical archives, there are a number of online databases which contain digital records. Most importantly, the Unified Court Records (UCR) database was launched in September 2020,[62] which contains the public court records of both ad hoc Tribunals and the IRMCT – corresponding to the first category of judicial records mentioned in the Report. According to the UCR User Guide, this database includes legal documents, such as indictments, motions, orders, decisions and judgments, as well as evidence submitted during proceedings, and transcripts and audio-visual recordings of hearings.[63] First-time visitors have to create an account before being able to use the UCR database. Subsequently, the database can be searched through keywords contained in either the title or full text of a record, and by entering a variety of other details, such as the name of the accused, case number, exhibit number, document source, document type, and date. While it is not possible to select the name of a particular victim-witness from a dropdown menu, as is possible with the names of the accused, a victim-witness's name can be used in a keyword search – but only when searching the full text of a record, as the names of victim-witnesses are not included in the title of records. It is also not possible to filter results on the basis of specific crimes, items of evidence, or the location where crimes were committed. In essence, the search function of the database is most accommodating to those users who are familiar with and search for the numerics assigned to files by the ICTY. In other words, the records in this database are named, filed, and categorised according to their legal value and can best be retrieved using this institutional classification. While this is a logical choice for legal institutions such as the ICTY and the IRMCT, it must be remembered that for victims and their relatives those records have a different value, one that is not properly captured by a legal or institutional classification.

The press release which announced the launch of the UCR seems to imply that the UCR will eventually replace two pre-existing databases, namely the ICTY Court Records (ICR) and the Judicial Records and Archives

62 IRMCT, 'Unified Court Records' (2020) <https://ucr.irmct.org/> accessed 3 January 2022; IRMCT, 'Mechanism Launches Unified Court Records Database' (1 September 2020) <https://perma.cc/BWX9-JAKX>.

63 IRMCT, Unified Court Records Database User Guide (IRMCT 2020) 3 <https://perma.cc/B2A3-YJXU>.

Database (JRAD).[64] The ICTY Court Records database is very similar to the UCR as this database also contains the public court records of the ICTY.[65] The ICR, which also requires the user to create an account before it can be accessed, essentially has the same search options as the UCR database – except that the ICR does not differentiate between title searches and full text searches. The ICR continues to be updated, as is evidenced by the dates of files uploaded on the 'Recently Posted Records' webpage of the database's website. Conversely, the JRAD used to be an internal database of the ICTY, which was gradually opened up to other, external users through access keys.[66] Currently, the homepage of the JRAD website states that this database contains the public judicial records of the ICTR and of the IRMCT itself – but not of the ICTY – and that the JRAD has not been updated since September 2020.[67] A final database of public judicial records is the Case Law Database (CLD) of the IRMCT, which contains just the judgments and decisions of the ICTY, ICTR, and the IRMCT.[68] It must be noted here that the original website of the ICTY is still live and accessible, and also contains some digital archival materials. For example, visitors can find the 'Voice of the Victims' videos mentioned in the introduction of this chapter there.

A very different database, which is not publicly accessible, is the Electronic Disclosure System (EDS),[69] which is managed by the Office of the Prosecutor. This database is a tool through which the Prosecutor can securely disclose evidence to the Defense and contains the record of materials collected during the investigation phase.[70] Those materials which have been presented by the Prosecutor at trial are often publicly accessible through either the UCR database or the ICTY Court Records – these files fall within the first category of judicial records as mentioned in the UN Secretary-General's Report. However, even some of those files that have been presented at trial are still not publicly available, because they have

64 'Mechanism Launches Unified Court Records Database' (n 62).
65 ICTY, 'ICTY Court Records' (2009) <http://icr.icty.org/> accessed 3 January 2022.
66 ICTY, *ICTY Manual on Developed Practices* (UNICRI Publisher 2009) 174 <https://perma.cc/NP9Q-VNTD>.
67 IRMCT, 'Judicial Records and Archives Database' (2015) <https://jrad.irmct.org/> accessed 5 January 2022.
68 IRMCT, 'Case Law Database' (nd) <https://cld.irmct.org/#> accessed 3 January 2022.
69 ICTY, 'Electronic Disclosure System' (2004) <https://eds.icty.org/> accessed 3 January 2022.
70 ICTY (n 66) 62–63; Vukušić (n 6) 627–630.

been classified as confidential by the Office of the Prosecutor. Files can be classified as confidential, for example because they contain information about the identity of protected witnesses, because they relate to closed trial sessions or because they are files that have been given to the Prosecutor in confidence.[71] Materials that have not been used at trial are not publicly accessible, as they may still be used in future cases before the IRMCT, or because they are considered unreliable.[72]

The contrast between the relatively little information that is available about the physical archives on the one hand, and the plurality in online databases on the other hand, may seem surprising. However, if one keeps in mind the classification of and distinction between uses and users of the archives as made in the UN Secretary-General's Report, this particular attention for digital accessibility becomes a more logical choice. If the primary users of the archives, at least in the short term, are considered to be those directly involved in the judicial work of the Tribunal or Mechanism, then quick, easy, and efficient access to those records is essential. For those actors, accessing the physical archives might be unnecessary if the contents of the records can just as successfully be retrieved online. In addition, the majority of those primary users might already be familiar with the physical archives, as these are located in the same building as the former Tribunal and the Mechanism. In light of this prioritisation of primary users, it is possible that familiarity with the ICTY and its premises is assumed, and thus additional information about the physical archives is deemed unnecessary. Regardless, while the IRMCT's management of the archives is stated to be based on openness and transparency,[73] this is not evident from the manner in which the archives are presented – especially to users who do not fall within the category of primary users. On the one hand, the absence of any substantial information about the physical archives means that, for those unfamiliar with the ICTY premises, its appearance and composition is left to the imagination. For those actors – and perhaps even more so for victims – the archives are located in an unknown building, in an unfamiliar city, in a faraway country. On the other hand, the variety of digital databases is overwhelming and confusing. Not only is it unclear what the differences between the various databases are, but there is also

71 UNSC 'Report of the Secretary-General' (21 May 2009) UN Doc S/2009/258 12–13.
72 Vukušić (n 6) 627–630.
73 IRMCT 'Access Policy for the Records held by the International Residual Mechanism for Criminal Tribunals' (4 January 2019) UN Doc MICT/17/Rev.1 art 7(1).

no comprehensive overview of the materials that are contained in these databases. Apart from the classified materials stored in the EDS by the Office of the Prosecutor, there are also judicial records from other branches of the Tribunal that cannot be accessed through any of the aforementioned databases, because they have been classified as confidential for a variety of reasons.[74] For victims, identifying and using those databases that might be relevant for them is challenging and not straightforward. Thus, the manner in which the archives and its contents are presented seems to be in line with the principles that also guided the creation and organisation of the archives – meaning the distinction between primary and secondary uses and users. Yet this manner of presentation also shapes the perception that those unfamiliar with the ICTY, the IRMCT, and its premises, have of these institutions. In turn, as is discussed below, all these factors severely impact the accessibility of the ICTY archives, especially for victims.

3.3. Accessibility

While public accessibility of the ICTY archives is one of the Mechanism's core guiding principles,[75] the previous sections on the organisation and presentation of the archives have identified a multitude of issues that directly affect the accessibility of the archives – particularly for victims. This section aims to concretise these issues by examining the accessibility of the ICTY records explicitly, distinguishing between the two ways in which these records can be accessed: in person, by visiting the ICTY archives in The Hague, and online, by using the digital databases previously discussed. There is, however, one overarching issue that impacts the accessibility of the archives as a whole: the absence of a comprehensive overview of the contents of the archives. This not only includes a survey of the different databases – including the physical archives – but also a description of the types of materials that can be accessed in each database, which databases overlap and what their differences are. Importantly, such a survey would also clarify which materials cannot be found in these databases, why not, and when they might be made available to the public. Subsequently, it remains a challenge to get a complete picture of the different databases and their respective purposes.

74 ibid., art 10(3).
75 ibid., art 7(1).

As described in the previous section, the physical ICTY archives are located in the same building as the Mechanism's branch in The Hague – namely, the former seat of the ICTY. While the ICTY and the Mechanism shared these premises until the ICTY closed its doors in 2017, the Mechanism has since become the sole occupant of the building.[76] The archives can be visited in person, although, as stated previously, not at the time of writing. A visit must be planned in advance, however, as the archives can only be accessed by appointment. Such an appointment can be made by filling out the 'Records and Archives Enquiry Form' on the website of the Mechanism, which requires the name and email of the visitor, as well as an explanation of the enquiry.[77] Some logistical information for those travelling to the archives, either by public transport or by car, is provided on a separate page.[78] The website also contains a 'Frequently Asked Questions' webpage, which answers inquiries about the nature of the archives, rules regarding the use of the records, and services provided by the archives.[79] In addition, this page provides guidance for those who are looking for information about specific witnesses, places, accused, fugitives, or the different branches of the Mechanism. Unfortunately, the 'Frequently Asked Questions' webpage does not include any information for those looking for specific victims, crimes, or items of evidence. It is important to note that all these pages, except for the Research Room Rules,[80] are also available in Bosnian, Croatian, and Serbian.[81] As such, the information that is available online does increase the accessibility of the archives for those victims, relatives and communities located in the countries of the former Yugoslavia. However, a major impediment remains the location of the physical archives. The ICTY archives are far removed from the affected communities, as was the ICTY itself when it was still operational. During this time, this distance was already considered to be a major obstacle to

76 UNSC 'Letter dated 18 November 2019 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, Annex I: Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Carmel Agius, for the period from 16 May 2019 to 15 November 2019' (18 November 2019) UN Doc S/2019/888 6.

77 IRMCT, 'Records and Archives Enquiry Form' <https://www.irmct.org/en/records-enquiry> accessed 5 January 2022.

78 IRMCT, 'Directions' <https://www.irmct.org/en/news/directions> accessed 5 January 2022.

79 IRMCT (n 59).

80 IRMCT, 'Research Room Rules' <https://perma.cc/8KHX-DW24>.

81 These webpages are not available in Albanian or Macedonian.

the effective achievement of the Tribunal's objectives, and a recurring point of critique in writings on the ICTY.[82] This distance has remained due to the decision to locate the ICTY archives in the same building as the Tribunal. The location of the archives means that individuals from affected communities who wish to travel to The Hague can only do so if they have the necessary means – including financial resources, but also the time and ability to travel abroad. In this light, it must be kept in mind that, of all the affected countries, only Croatia is set to join the Schengen Area in 2023,[83] and while there are agreements which ease visa requirements for those visiting the EU from the other affected countries except Kosovo, this circumstance does present an extra obstacle.[84] Unfortunately, according to the Mechanism's 'Frequently Asked Questions' webpage, even though Mechanism staff can 'provide general advice and assist with simple searches for records', they are not able to help with detailed research inquests.[85] This implies that it is not possible for individuals unable to travel to The Hague to ask the Mechanism to conduct research in the archives for them – although it could be that exceptions are made in practice.

In addition, it should be noted that, apart from physical distance, there can also be a mental distance. In other words, the archives are located in a city and country that could be regarded as distant due to factual or perceived societal differences. Unfamiliarity with The Netherlands, or an understanding formed through limited exposure – for example due to its portrayal in local media or by public figures,[86] can create obstacles that are as palpable as geographical or logistical obstacles. Finally, it must be kept

82 William W Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 Texas International Law Journal 729; Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 American Journal of International Law 295; 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; ICTY (n 66) 10.

83 Cory Bennett and Camille Gijs, 'Croatia to Join Schengen Free-Travel Zone in 2023' *POLITICO* (Washington, 8 December 2022) <https://perma.cc/UH97-Z5Z5>.

84 The European Travel Information and Authorisation System, 'ETIAS Visa Waiver Requirements' <https://www.etias.info/visa-requirements/> accessed 2 January 2022; SchengenVisa Info, 'Kosovars Travelling to Europe – EU Entry Requirements for Kosovan Citizens' <https://www.schengenvisainfo.com/kosovo/> accessed 15 September 2022.

85 IRMCT (n 59).

86 Refik Hodžić, 'A Long Road Yet to Reconciliation: The Impact of the ICTY on Reconciliation and Victims' Perceptions of Criminal Justice' in Steinberg (n 32).

in mind that the location of the archives in a building that served, and continues to serve, as a court also affects the accessibility of the archives. Court buildings are designed to convey the power of the law and instil respect, reverence, and awe in those who enter. They are by their very nature imposing, and the building housing the IRMCT and the ICTY archives is no different – even though it was originally built for an insurance company.[87] Of course, it would be impossible to ascertain whether these specific issues have in fact prevented victims or relatives from travelling to The Hague. Nevertheless, the distance between the ICTY itself and the affected communities had an undeniable impact on their relationship and on the legacy of the ICTY overall. It is hard to imagine that the continuation of this distance with regard to the archives does not have a similar, if not the same, effect on the victim communities.

With regard to online access to the ICTY records, the number of databases is overwhelming, and it is challenging to distinguish between the different sources and websites. While lawyers, researchers and other professionals might have the knowledge, resources, and time to sift through the different databases to find the one most relevant to them, the same cannot necessarily be said for victims or their relatives. Using those databases presumes, first of all, access to a computer with an internet connection to search and download, as well as software to read, watch, and listen to files. In addition, finding and using the relevant databases is anything but straightforward. Without relatively advanced knowledge of the ICTY, the Mechanism, and their organisation, it would be difficult to know where and how to start. As stated above, the webpage on the ICTY archives is well-hidden within the general website of the Mechanism. Searching for the ICTY archives by using a popular online search engine generates a list of potentially relevant results – but no source which lists and explains the different databases and allows users to compare them. Most likely, after some preliminary research through the official website of the Mechanism, users will arrive at the UCR, which is clearly structured to accommodate those first-category users as identified in the UN Secretary-General's Report. While the UCR User Guide is certainly of great help,[88] it is only available in English and seems to presume a certain level of knowledge about the

87 Rijksdienst voor het Cultureel Erfgoed, 'Monumentnummer: 530892 Churchillplein 1 2517 JW Te 's-Gravenhage' (Rijksmonumentenregister) <https://monumentenregister.cultureelerfgoed.nl/monumenten/530892> accessed 15 September 2022.

88 IRMCT (n 63).

ICTY, its structure, and its cases. Additionally, the User Guide and the database itself also presume pre-existing knowledge about the specific object of inquiry and, most importantly, its classification within the ICTY system. In order to generate results in the UCR database, a user must enter keywords and other details – such as a date, document type, case, or exhibit number. For those without the necessary knowledge who wish to locate a specific exhibit or file, it can be challenging to find the right combination of keywords and details. An incorrect combination can yield no results, or an overwhelming amount of most likely irrelevant results that the user has to sift through. None of the public databases provide any options to ask for assistance – there are no 'Help' buttons, no troubleshooting pages or online forms to ask questions. Another fact to consider is that, even though the UCR can be accessed in Bosnian, Croatian and Serbian, and the majority of files have corresponding translations, the titles of those files are not translated and remain in English. There are many of such seemingly minute issues, which together can create an insurmountable wall for those without the required knowledge and know-how.

Finally, access to the ICTY archives is limited, and to a certain extent justifiably so, to those records that are public. As stated above, the records that have not been disclosed due to a variety of reasons cannot be viewed by the public – including victims. According to Article 11 of the official Access Policy of the IRMCT, which is only available in English, requests for access to undisclosed files can be made to the Mechanism, but these have to meet a number of requirements.[89] First of all, Article 10(3) of the Access Policy lists several types of records that are exempt from disclosure, mostly because of their confidential nature or the security risks associated with their disclosure. According to Article 11(2), requests for access to classified judicial records not covered by the exceptions of Article 10(3) must be made in accordance with the procedures described in another document, namely the Practice Direction on Filings made before the International Residual Mechanism for Criminal Tribunals, which is a document detailing the rules regarding all filings made before the Mechanism.[90] However, it is unclear which articles of this document are applicable to disclosure requests. In addition to this requirement, Article 11(2) of the Access Policy also stipulates that requests for access to classified judicial records must be made pursuant

89 IRMCT (n 73) art 11.

90 IRMCT 'Practice Direction on Filings made before the International Residual Mechanism for Criminal Tribunals' (4 January 2019) UN Doc MICT/7/Rev.3.

to other applicable Rules and Practice Directions – without specifying which other rules and practice directions could be applicable. Article 11(3) states that requests to access other, non-judicial classified records have to be submitted to the Access Focal Points of either the Registry or the Office of the Prosecutor, as listed on the Mechanism's website. Disclosure requests may be submitted in English or French, according to Article 11(4). Disclosure requests can be denied by the Mechanism, inter alia, if the information requested is non-specific, too broad, does not exist, is not held by the Mechanism, cannot be found, or if the information cannot be located without extensive examination or research.[91] Therefore, a request for access has to specify the sought after materials or files, and it is thus presumed that the person submitting the request knows, first of all, that the files exist, secondly, that the files are contained in the archives, and thirdly, that these files have not yet been disclosed. For those who do not possess this information, submitting a request for access is not a viable option.

The above paragraphs have identified a variety of obstacles that those who do not possess the necessary knowledge and expertise, and in particular victims and their relatives, could face when trying to access the physical and digital archives of the ICTY. Again, the prioritisation of those identified as the primary users of the archives means that the archives are most accessible to those actors who are professionally connected to the Tribunal or the Mechanism, who possess the knowledge, skills, and means necessary to search the archives. While it would be interesting in this regard to examine statistics on the number, location, and background of the archives' users over the years, these figures will of course not reveal any information about those actors who wish to – but have been unable to – use the archives.

4. Restoring the Balance

In light of the above, one must conclude that the ICTY archives have been designed for a very specific target audience, and are consequently quite inaccessible – in a multitude of ways – for the uninitiated. Overall, the person of the victim specifically seems to be absent in the current structures of the archives. This absence is not caused by malice, ignorance, or even negligence. The discussion surrounding the creation and management of the archives, the online databases and websites, and the maintenance of

91 IRMCT (n 73) art 11(6).

the physical archives all testify to the importance of the archives, not just to a restricted group of professionals, but to the global community. The archives exist and they are public, and – to that extent – accessible. Yet their classification as a record of the ICTY, its proceedings, investigations, and administration, ignores the undeniable fact that these archives are also a record of its subject matter. In other words, if one considers the archives as a touchstone of memory, the ICTY archives are not only a memory of the Tribunal, but also of the Yugoslav Wars themselves. The archives contain the conflict which the ICTY was created to judge. While this may seem obvious, the multifaceted nature and meaning of the archives is not visible in the archives' organisation, presentation, or accessibility. However, adopting a wider, more in-depth view of the archives' meaning is highly important. Not only can incorporating this idea into the organisation and presentation of the ICTY archives improve their accessibility to victim communities, giving consideration and equal weight to different understandings of the archives can potentially provide these communities with a sense of ownership – over the archives, and over the conflict contained therein. Returning to Christie's argument, to regard conflict as property that belongs to victims of crime, and to acknowledge their status as the original owners of conflict, can return to these victims a sense of agency that was taken away by the crime. This reasoning can be extended to the records that remain after judicial proceedings have ended, which preserve, present, and prove the existence of the original conflict.

Importantly, it is not argued here that victims of crime own the records of judicial proceedings, nor is it the aim of this chapter to argue in favour of returning full ownership of the ICTY archives to the victim communities. It would not be feasible or realistic to propose such far-reaching institutional changes here. Rather, what this chapter proposes is first and foremost a change in mindset regarding the relationship between the remaining ICTY records and victim communities. This is by no means a quick, short-term, or straightforward undertaking. Building and maintaining a close relationship with affected communities was also the main objective of the ICTY's Outreach Programme, and it achieved mixed results.[92] Funding of the Programme came from external sources – not from the regular ICTY budget – which meant that the planning, organisation, and implementation of its

92 Petar Finci, 'Was It Worth It? A Look into the Results of the ICTY's Outreach Programme' in Stahn and others (n 13).

activities were determined by various donors. This, in turn, meant that it became almost impossible to adopt an overarching set of objectives and policies to guide the Programme, and that, consequently, assessments of the overall impact of the Programme's activities have been ad hoc and incomplete.[93] However, the ICTY's Outreach Programme was the first of its kind and when successful, its achievements were significant. For example, the translation of the ICTY website into the languages of the region was part of this Programme, and Petar Finci estimates that the majority of official information available in the region about the ICTY was distributed through the Outreach Programme.[94] Therefore, when considering any possible venues for improvement, it is important to be mindful, not only of budgetary, institutional, and logistical constraints which are likely to hamper the implementation of any proposed recommendations, but also of the measures that have already been taken to make the ICTY archives accessible to victim communities. Nevertheless, it would be neglectful to refrain from discussing potential improvements just because of these considerations, especially in light of the – presumably – infinite existence of the ICTY records. Furthermore, just as the ICTY and ICTR were the first of their kind, so are their archives. Subsequent institutions were, and continue to be, built on the foundations of these two tribunals, and, while imperfect, they have provided invaluable lessons for the future. Similarly, the management of their archives functions as a framework through which the interrelationship between mass atrocities, victims, adjudicative institutions and their records can be further developed.

A starting point could be consultations with victim communities in order to understand and chart the meanings that the ICTY archives might have for them. How do these communities perceive the archives, what is their relationship with them – if there is a relationship at all? Subsequent questions could focus on the desired relationship: what kind of relationship would these affected communities want to have with the archives, or, if necessary, what additional information, communication, or action would they require in order to express their needs and desires? Such consultations could be carried out in partnership with external research institutes or universities.[95] The outcomes of such research could then be used to further

93 ibid., 357–359.
94 ibid., 361 and 369.
95 In 2016, the ICTY Outreach Programme established a partnership with the Castleberry Peace Institute of the University of North Texas. See, ICTY, 'ICTY Launches

give expression to the differentiated nature and meaning of the archives. Distinguishing between these meanings, and giving them equal weight, can bring balance into the further decision-making process regarding the archives. In addition, institutional acknowledgment of the gaps that exist in the Mechanism's widely accepted, yet limited, understanding of the ICTY archives can initiate discussion on potential venues for improvement. Such discussion could be facilitated by, for example, a specialised UN working group. The activities of such a working group could be a recurring section in the annual reports or the biannual progress reports drafted each year by the IRMCT.[96] In cooperation with victim communities, or their representatives, this working group could draft long-term solutions based on a careful consideration of different interests and needs. In addition, if possible and feasible, this working group could be consulted or otherwise involved in decisions made regarding the archives – for example, concerning the archivalisation,[97] declassification, or destruction of certain records.

There are also smaller changes that could be implemented to counterbalance the current primacy of those first-category users and improve the accessibility of the archives for other users. A first step towards improved accessibility could be the creation of a chart or compendium of the different databases and their contents – which would be beneficial to all users. This compendium could also explain what is contained in the physical archives versus the digital archives, and in which situations a visit to the physical archives is to be preferred. This overview, and descriptions of the databases, could incorporate and distinguish between the different objectives that prospective users may have. Similarly, the Mechanism could provide more, and more accessible, information about the number and types of classified records that remain undisclosed. It could be that the majority of those records are of little interest to victims or their relatives, yet information about these records is scarce, difficult to find, and confusing for those unfamiliar with UN documentation and the lingo used therein. More generally, the Mechanism's website could be more inclusive in its presentation of the archives, taking into consideration the variety of potential users. One way to achieve this would be the creation of a digital research guide specific-

Report on the Witness Experience' (6 October 2016) <https://perma.cc/K2V5-42E93>.

96 IRMCT, 'Documents: Reports' <https://www.irmct.org/en/documents/reports> accessed 3 February 2022.

97 Ketelaar (n 28) 132–133.

ally tailored to the needs and knowledge of non-professional users of the archives. With regard to the physical archives, another possibility would be the publication of an online photo gallery of the actual archival rooms and stacks, online guided tours, or even an instructional video. Currently, visitors of the website of the Mechanism can view a number of online exhibitions which showcase a variety of evidentiary items and explain how these were used in judicial proceedings.[98] Even though these exhibitions seem to focus on the work of the Tribunals, rather than the underlying conflicts or the archives, such exhibitions are an excellent way to introduce the archives to the public and can bring these archives to life. With regard to the digital databases, one question that can only be answered by those who manage these databases and who have the required technical know-how, is whether their search engines can be adapted in order to better facilitate searches by non-professionals – and victims in particular. Unfortunately, it is beyond the scope of this chapter to examine this question further, but even adding a 'Frequently Asked Questions' webpage to each database, or a troubleshooting webpage, could be useful for users. An alternative solution would be to appoint a liaison officer who is tasked specifically with assisting those users who are unfamiliar with the ICTY, the Mechanism or the archives, or who are otherwise unable to access the archives themselves. This liaison officer could assist with specific searches, individual visits, or draft disclosure requests. Perhaps a chat function could be added to the webpage on the ICTY archives, which could be made available to users for a few hours per week. Of course, even those suggested changes that might seem minimal require time, money, and effort, and it is possible that some – or perhaps all – proposed solutions are unfeasible. Nevertheless, this section presented some preliminary ideas with the aim of inspiring further discussion and research on the relationship between victim communities, international adjudicative institutions, and their shared archives.

5. Conclusion

This chapter studied the ICTY archives in light of Christie's understanding of conflict as property, according to which the victims of the Yugoslav Wars are the original owners of the conflict that exists between them and those who committed mass atrocities. This conflict manifests itself in the experi-

98 'Archives' (n 14), bottom of the page.

ences, memories, and stories of these victims. However, the compilation, use, and preservation of these memories by the ICTY to realise its institutional purpose have resulted in a collection of records that contain not only the original conflict, but also the work of the ICTY. Following Christie's approach, this multifaceted meaning of the ICTY archives should mean that the victim communities and the ICTY – or, presently, the Mechanism – share ownership of these records. Nevertheless, officially the UN own these records, and they have tasked the Mechanism with managing the archives. This perception of the archives as solely the records of the ICTY and its proceedings is also reflected in the organisation, presentation, and accessibility of the archives, which mainly accommodate a limited group of professionals and not necessarily affected communities. Borrowing from the field of critical archival studies, this chapter explored the ways in which victim communities are absent in the current organisation, presentation, and accessibility of the ICTY archives, and how this ignores the plural meaning that these records have. Finally, this chapter proposed a number of recommendations for change which can restore the balance in the relationship between the Mechanism and the victims as shared owners of the conflict and its records. While not meant as an exhaustive, or even a particularly in-depth, list of suggestions, the hope of this author is that these ideas will encourage further debate on these questions of memories, archives, and ownership.