

## TRANSCRIPT

# "BOOK LAUNCH—SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA"

*A conversation with Diane Orentlicher, Tea Sefer, and David Tolbert*

*Moderated by Aryeh Neier*

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### **ANNOUNCER:**

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### **ARYEH NEIER:**

I think-- the publication of this book is a-- significant event-- in the-- the discussion of-- accountability for-- mass-- atrocities. I'm not aware-- of a-- a comparable effort to-- examine-- the actual impact-- of-- this kind of-- accountability-- mechanism-- on the-- the countries-- which have been the-- the focus-- of its work.

And Diane is-- a scholar, but also-- a participant in efforts to-- to promote human rights, who has been following the developments-- in the-- former Yugoslavia for, I think, the entire period-- in which the-- the International Criminal Tribunal for the former Yugoslavia has operated. As-- many of you, or most of you, know-- the tribunal was-- established a-- quarter of a century ago.

When it was-- established-- not many people-- took it-- very seriously. It was-- not able to-- obtain-- custody-- of the-- the people who had-- been responsible for the crimes that were taking place in the former Yugoslavia-- during its earlier period. And there were-- times-- after it was created when-- many thought-- that it was going nowhere-- and that it should-- not be maintained. And there were also arguments that it would interfere-- with a peace settlement-- in the-- the former Yugoslavia.

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So now-- 25 years have elapsed. There is-- quite a story to be told. But I think we don't really-- understand fully-- what the impact of the tribunal has been. And I think Diane Orentlicher's book-- is-- a major effort-- to-- to help us to-- understand-- what we created-- and what impact-- it-- it has had. I will introduce the-- the people on the panel-- in a moment. But before I do so-- I want to call on Anna Myriam Roccatello, who is the-- deputy director of the International Center for-- Transitional Justice. And-- the ICTJ is joining the Open Society Justice Initiative-- in sponsoring the event this evening.

## **ANNA MYRIAM ROCCATELLO:**

Yes. Ladies and gentlemen--

## **MALE AUDIENCE MEMBER:**

The microphone, please.

## **ANNA MYRIAM ROCCATELLO:**

Yeah. To the Open-- Society Justice Initiative for giving us the opportunity to all host this important event. And more importantly, I would like to thank and welcome Professor Orentlicher, and-- our panelists tonight for sharing with us their reflection on the work of the International Criminal Tribunal for the former Yugoslavia and its impact in the countries-- directly affected by its work, namely Serbia and Bosnia.

Professor Orentlicher's book-- *Some Kind of Justice*, relates to the very core of the perennial struggle from criminal accountability. At the end of the day, what kind of justice, and w-- how much justice do these tremendous efforts yield?

So reading the book, I-- was, of course, reminded of my many years in Kosovo trying to bring justice-- to bring the perpetrators of mass atrocities to justice. And I was reminded of the outright hostility that the Kosovo young professionals that I was meant to train and prepare for take of this this big responsibility of the national prosecution of crime against humanity and war crimes were demonstrating against the ICTY.

As the author under-- underlines-- the ICTY inspired governments to create war crimes tribunals in other countries. It also catalyzed-- national efforts to prosecute-- atrocities committed beyond the state borders, and its contribution to the development of the international criminal law is universally recognized.

But the impact on the countries that experienced the crimes under its purview, until Professor Orentlicher's were-- was unassessed-- remained unassessed. And at the book pre-- as the book presents very well, that impact changed over time, depending on circumstances, political dynamics, and-- and it was certainly a study that presented challenges. So-- my organization, ICTY-- ICTJ's mission is to challenge the causes and address the consequences

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of massive human rights violation in order to affirm victims' rights and dignity, fight impunity, and promote responsive institutions.

And we do that because we believe that breaking the cycle of massive human rights violations can lay the foundations for peace, justice, and inclusion. We are constantly confronted with the very topic of the book, what society and victims expect from these efforts.

And I vividly remember a particular interview with a key witness in a war crime case-- against a group of Kosovo-- Albanian-- militants associated with the Kosovo Liberation Army that had perpetrated crimes against the fellow Kosovo-Albanian labeled as collaborator of the Serbian regime. And these lady-- these key witness traveled for miles on a bus with their-- with her very young children to provide her testimony.

I-- in my official capacity, I had no resources to pay for her ticket, to offer her refreshment, or care for her children while we were taking her testimony. And at the end of the-- of the statement, I couldn't help but ask her, "Why do you do this?" And in my mind it was, "Do you realize the risk you are putting yourself and your-- young family under?"

And the answer was very simple. It was, "Because it's the just thing to do. I was the one who witnessed it all. And even if I'm a Kosovo-Albanian, there is no way I can justify what I saw." So this is-- is why, for us, in this line of work understand what different society, different communities within the society, different individuals mean for justice is critical to help them determine what type of process, what types of institutions or mechanism is better fitted to address the needs and the atrocities that were committed within their context. (COUGH)

These efforts and the resulting institution inevitably have different level of success. But we are, in ICTJ, convinced that the-- each step toward justice has an impact that needs to be evaluated in the longer term. Because there are often unintended effects from a certain effort that can result with the time and societal changes in opening opportunities in the future.

And there-- and that's, therefore, crucial, in my opinion, that was take real inspiration from studies like-- *Some Kind of Justice*, and we continue to learn what works, and how, and depending on the circumstances, and depending on the historical moment we are-- living in, and with all of that, I just-- thank you all, and I'm joining the audience for this fascinating discussion. Thank you. (APPLAUSE)

## **ARYEH NEIER:**

Let me now-- introduce the-- the members of the panel. I will start at the-- the far end. (COUGH) David-- Tolbert-- in currently a-- Ford Foundation-- fellow at-- Duke University. But until-- very recently-- he served as the-- the president of the International Center for Transitional Justice.

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I believe he was at the ICTJ from 2010-- until-- 2018. And-- David has-- a long history of dealing-- with these issues, including a number of-- significant positions at the-- International Criminal Tribunal-- for the former Yugoslavia. One of his positions-- was as the-- deputy chief-- prosecutor for the-- the ICTY.

He has also-- represented the United Nations in dealing with the-- tribunals for Lebanon, and also-- the Extraordinary Chambers-- for-- Cambodia. So he brings-- very rich experience. I could go on to a few other things, but (COUGH)-- his experience is-- very great in-- in dealing with these issues.

Tea Sefer is new to me. I haven't met her-- previously. I'm delighted to-- to meet her. She is (COUGH)-- a 2013-- graduate of-- American-- University. And-- a-- leading activist-- in the-- the Bosnian diaspora-- in the United States. A co-founder of Bosnian and Herzegovina-- Diasporic-- Con-- Conference.

She herself was-- an immigrant-- to the United States-- and became-- at an early age, an activist on I think quite a range of issues, including-- LGBTQ-- issues. And-- I think it's-- very-- important to hear from-- somebody who has-- closely engaged in-- the activities of the Bosnian dias-- diaspora about the-- the impact of the tribunal. And then the-- the author-- of the book-- Diane Orentlicher, is somebody I've had the-- pleasure of working with for-- a great many years, going back a number of years before the-- establishment-- of the-- Internal Criminal Tribunal (SNEEZE) for the former Yugoslavia.

I knew-- Diane first when she was-- deputy director of what was then called the Lawyers' Committee for Human Rights. Today it is-- Human Rights-- First. Diane is a professor of international law-- at the Washington College of Law of-- American-- University. She has-- served in the-- the State Department-- as-- deputy ambassador for war crimes.

She has-- served as a United Nations-- independent-- expert on combatting-- impunity, and she has-- written extensively-- on-- the-- the question of-- accountability-- for-- mass-- atrocities. And-- the format we're-- we're going to pursue-- is I'm going to start by posing-- a few questions-- to Diane-- and then I will-- pose-- a couple of questions to the other members of the-- the panel, and-- Diane can-- respond to them, and-- engage in colloquy. And then-- I will open it up-- to-- questions-- from the-- the audience. I see quite a few people-- here who I recognize, who are-- themselves-- very knowledgeable about-- these issues.

So I expect that we will have-- an excellent-- discussion. And, Diane, I-- I-- I'd like to begin-- with-- with this question. I-- I was one of those who was-- heavily involved in the-- attempt to establish the-- the International Criminal Tribunal for the former Yugoslavia. And in that period-- we talked about-- the-- the rationale-- for-- establishing-- a tribunal.

And-- one rationale that was expressed was (THROAT CLEARING)-- we need to do this, because we need to do justice. The people who have-- committed-- terrible crimes-- ought to be subject to-- to rep-- retribution. Another-- argument for establishing the tribunal was that it was a way of demonstrating-- our respect for the-- the victims-- of great abuses. And that

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putting on trial-- the people who had been responsible for their victimization-- was part of what we-- we owed to the-- the victims.

Another argument was that-- when this conflict is over, we need to-- (COUGH) to restore a sense of justice. And if there is-- such a tribunal, it will-- contribute to that. And another argument, not necessarily consistent-- with some of the other arguments-- was that it would-- promote-- reconciliation. (COUGH)

Yet another argument was that it was-- part of the-- the truth process. That is-- inevitably there would be efforts to revise history. And if there were court proceedings-- which had-- established the facts of-- of what took place, that would-- help to prevent the-- the rewriting of history. And then the other argument-- that I remember is that-- the nature of such a tribunal is that it would individualize guilt. We didn't want to say that a whole people-- the Serbs-- the Croats, whoever had-- committed these crimes, individuals-- were responsible for those crimes. And if those individuals were indicted, and prosecuted, and their guilt was established-- that would-- counteract the collectivization of guilt-- and would help to-- to individualized guilt.

Diane, having looked at the-- the impact of this tribunal-- has it-- had-- I mean, deterrents-- was also a-- a-- a f-- a factor that we-- talked about. Has it had any of these-- effects? Has it had some of them? To what degree-- has it-- had-- this kind of impact? And-- to complicate matters more, what-- what value would you attach-- to these various-- arguments-- that were made for the establishment of such a tribunal?

## **DIANE ORENTLICHER:**

Thank you. So, first of all, I wanted to-- thank everybody for coming here-- on a rainy evening-- to talk about a pretty serious subject. And-- I'm especially grateful to ICTJ, which has been a partner in-- in so much of this work-- as Aryeh indicated. David, I can't even remember when I first met David, because he's been working on these issues.

## **DAVID TOLBERT:**

I didn't have such blonde hair on the-- (LAUGHTER)  
(OVERTALK)

## **DIANE ORENTLICHER:**

Yes, you did. (LAUGHTER) And, as Aryeh indicated very modestly, he was really-- a seminal voice calling for the establishment of the ICTY-- and-- and the organization he led at that time sent me on my first mission to what was then Yugoslavia in 1991. So it's especially meaningful for me to be able to reflect on what we've learned in the last 25 years.

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And it's literally almost exactly 25 years, because the ICTY was created 25 years ago, I think Monday of this week. A few days. And-- and as-- their-- earlier remarks indicated, really unexpectedly set off a whole era of international justice. Something we did not anticipate. Among the many-- things we looked to the ICTY to do 25 years ago, that one we did not expect.

But it-- it just set in motion a whole contemporary period of international justice. So-- it's fascinating for me to hear you recall all of the goals that were ascribed to the ICTY. I haven't focused lately on what we all expected of it, 'cause I've been so immersed in trying to understand what Bosnians and Serbians expected of it.

But-- but where your-- recap aligns with what I heard in Bosnia is that an enormous amount of expectations were projected onto this court. And it's-- a somewhat paradoxical thing. Because, as you indicated, there was also a lot of cynicism and skepticism when it was created. The-- the word that was most often used to describe the ICTY when it was created was fig leaf. It was a fig leaf for-- the security council's failure to intervene to s-- to halt the slaughter underway.

So they weren't gonna do anything robust. They'll create a court to cover their-- consciences. So there was this cynicism on the one hand, but enormous expectations on the other. I was fiddling while-- Aryeh mentioned some of these goals because I was trying to find some of the early expectations of Bosnians. And I'm gonna read you just one person's words. But I heard things like this all the time.

So this is a journalist in Bosnia, Nijara Achmed Tossovich (PH). I hope I said that (LAUGH)-- properly. Remotely close. She said, "Many people here, maybe even I, expected that the tribunal (NOISE) will erase all the suffering, and the pain, and everything bad." And another person, Ad-- Adine Hojich (PH), made a similar point. "We thought here in Bosnia that the judicial paradigm would do everything. Would do the job of dealing with the past. That some good things will emerge from the trials on their own, and trials will have a positive impact on all other activities."

Another woman-- in Serbia said something along the lines of-- we-- attributed all these amazing powers to the ICTY. We thought it would bring justice. We thought it would bring reconciliation. We thought it would be reconciliation. So there were-- you know, despite the sort of skepticism around this create that was-- launched, there was also astonishing expectations.

And so the whole-- question that set me off on this journey, and Aryeh was the one who enabled this to happen when I did my original study-- was well so how is this working out for victims? By the time I did the first smaller version of this study, the ICTY had-- amassed a lot of successes that were visible internationally. It had-- achieved-- it had acquired custody over a lot of fugitives who were not easy to find. It was-- handing down path-bakin- - path-breaking jurisprudence. And we were all celebrating that.

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But then the question was, yeah, but so how is that working out for victims? Are they as excited as we are-- here in New York, or-- in-- in the global community? And what I found (so I'm finally gonna answer your question, Aryeh) (LAUGH) is—

## **ARYEH NEIER:**

You're answering it.

## **DIANE ORENTLICHER:**

--that-- (COUGH) so I-- I'm gonna try to make this short for now. So the-- so Bosnian survivors-- have many, many, many, many disappointments in the ICTY. And I try to honor that in this book. I think the longest chapter is the chapter that describes their grievances. The-- the trials take too long, sentences are too short-- judges don't control the courtroom, not enough people were prosecuted. And it really goes on at some length. And they're not trivial complaints. And they're passionate.

They're-- people feel very angry at the ICTY. And I didn't wanna sugarcoat that. And I hope I didn't. But-- you would be missing the point of the book if you took away from that that Bosnians are overall frustrated that the ICTY-- with the-- the experiment of the ICTY. And what I found over the course of-- interviews, over many visits over an eight-year period, was that after I would hear a long-- series of-- justified-- complaints about the ICTY, I would ask people, "Okay," at the end of the interview-- "I've heard you. You're frustrated with this, you're angry with that.

"Now that you know how it's actually worked out, in light of everything you now know, and what you've just described, was it a mistake to have created this tribunal?" And then they would say, "Oh, no, no, no, no, no. (LAUGH) If we didn't have the ICTY, we wouldn't have had justice. And that's the most important thing." And if I can quickly find one quote, (I'm not gonna fumble for it) but there's one person who-- so beautifully captured that.

I'm not gonna be able to quickly find this. (LAUGHTER) He-- he s-- he criticized the tribunal. And the words aren't coming to me there. But then he said-- after giving what seems like a devastating verdict, he said-- "But overall, it was excellent that it was created." And-- and it was that paradox that I heard over, and over, and over again.

So my takeaway from that is-- that of all the goals that we hoped the tribunal would achieve, unambiguously, it provided justice. And I-- I periodically-- have to reread my book-- (LAUGHTER) as I did yesterday-- in preparation for this. And-- and I am always so moved when I read the words of people I interviewed who talk about what justice meant to them. And in-- as an academic, we're used to trying to capture things in hard metrics. It's very hard to capture what the survivors so eloquently expressed about what justice meant to them, and what testifying meant to them-- and what-- what it meant to bear witness for those who didn't survive.

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And it was-- and-- and their words are so eloquent, and-- and powerful, and moving. And I-- I want so much for people in the policy world that I have-- been part of to understand how important that is. And it's-- it's deeply precious, it-- it's inestimable, and it's very hard to capture.

Second takeaway is that we have to do better. The complaints I mentioned are legitimate, and they're correctable. And so for me, the good news is that judges-- and other judicial officers at-- the International Criminal Court, and other tribunals-- can learn lessons. They can do better. Most of the complaints that Bosnians have have been echoed by international experts-- and-- and there are things that can-- there-- there are ways to correct those, and to deliver-- justice better.

A second major achievement of the ICTY, and this is one that I didn't expect-- was that it catalyzed domestic prosecutions. And I'm sure David will talk about this later. He played a very central role when he was at the ICTY in developing the partnership that emerged-- between the ICTY and-- the Bosnian court system, and-- Serbian court system, and other local courts.

That, to me, is an amazing story. It was unanticipated. (MUSIC) At a certain point, for reasons David might get into-- the-- the ICTY consciously decided to cultivate a domestic partner in Bosnia. It did not set about to have that effect in Serbia. It did not consciously work with the Serbian judiciary to-- to-- strengthen it.

Nonetheless, it had a catalytic effect in stimulating the creation of war crimes institutions in Serbia that nobody expected to be created. They're not operating perfectly. In fact, they're in serious trouble right now. But they've provided some measure of accountability that would not have happened without the ICTY.

Here again, I think there's some super important lessons to learn from the ICTY's experience. One of the most-- important points-- that emerged from my research was that the current prosecutor, Serge Brammertz, seized the opportunity that emerged, when far beyond the-- the four corners of his mandate, and developed a very creative relationship with domestic prosecutors and courts-- han-- and has really been there helping, partnering, assisting, bolstering, prodding when necessary.

And that's often necessary. So I think we have some great models that-- are worth emulating. The harder-- story-- (LAUGH) and I don't know that I should get into it now because-- I wanna leave room for other people to talk, and this is a bigger story.

The harder story to tell is what the impact was on acknowledgement. So, as you indicated, one of the-- really-- most important hopes that many people-- in both countries-- but particularly notably in Serbia, one of their most cherished hopes was that the ICTY would dispel denial. Which is a pervasive phenomenon in both countries.

And if there was a sort of conscious theory behind their hopes, it was the ICTY, an international institution, a credible, impartial court-- will establish the facts in a way no one can challenge. And nobody will be able to deny that these atrocities happened, or that they



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happened to the degree that they did. It didn't work out the way they expected. And again, that's a more complicated story.

The-- the, I guess, short answer is the ICTY had some impact in that sphere, and it was palpable for a while-- during the period when conditions were relatively auspicious in both Bosnia and Serbia. For the past ten years there's been a retrenchment. And so it-- it did not have the magical effect that many people hoped it would have. So I'll say-- leave it at--

**ARYEH NEIER:**

Can-- can-- can I--

**DIANE ORENTLICHER:**

--there for now.

**ARYEH NEIER:**

--can I pursue that--

**DIANE ORENTLICHER:**

Sure.

**ARYEH NEIER:**

--question? One of the-- the virtues of the-- the ICTY-- from my standpoint-- has been that-- it did-- prosecute-- war criminals-- from all parties--

**DIANE ORENTLICHER:**

Uh-huh (AFFIRM).

**ARYEH NEIER:**

--to the-- the conflicts in the-- the former Yugoslavia. And-- that has not been the case-- with respect to-- to other-- international tribunals. The-- the International Criminal Tribunal-- for Rwanda, for example, has been-- criticized-- because it did not prosecute-- anybody-- associated with the-- the Rwandan-- Patriotic Front.

And-- I-- I wonder whether you feel-- that that-- had a significant part in enhancing-- the-- the credibility-- of the-- the ICTY-- or whether the complaint that it didn't prosecute enough

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people-- from certain-- parties-- in effect overrode-- what-- I think of as-- a very evenhanded performance--

**DIANE ORENTLICHER:**

Uh-huh (AFFIRM).

**ARYEH NEIER:**

--by the-- the ICTY.

**DIANE ORENTLICHER:**

Right. So-- I think it was absolutely essential that it ex-- examined-- war crimes committed by all sides to the conflicts in the former Yugoslavia. It would've had no credibility if it hadn't done that. Unfortunately, that wasn't enough to dispel denial.

And-- and-- and-- you know, again, I wanna be careful here. Because I think it did have an impact, and I think that it did make it harder, credibly, to deny that atrocities occurred on a vast scale. It did not settle arguments once and for all about-- the-- the-- degree to which different parties were responsible. Right? It did not do that. So, for example, to be more specific-- many Serbs-- in Bosnia-- believe that, or-- or assert that all sides committed war crimes equally. So it's-- it's a very dominant narrative. All sides committed atrocities. And the implication is equally.

And on surveys, when they're asked-- questions p-- on public opinion surveys who committed the most crimes, the answer that-- is most frequently checked by-- by Serbs in Bosnia is all sides equally. And so-- un-- unless the ICTY charged all sides equally and convicted all sides equally, many of the Serbs in Bosnia will consider it biased. And it-- they're not comforted by the fact that the ICTY also prosecuted perpetrators of crimes against Serbs. Particularly since some of the most high profile defendants who were prosecuted for crimes against Serbs were acquitted. So it's-- it's-- I wish it were that easy, Aryeh. It's--

**ARYEH NEIER:**

Uh-huh (AFFIRM).

**DIANE ORENTLICHER:**

--it's a lot messier.

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## ARYEH NEIER:

Okay. I-- I see in the audience-- Pricilla Hayner. And we had a discussion-- here recently-- about Pricilla's-- new book, which deals-- with the-- the conflicts-- that can arise between-- the effort to-- establish peace, and the effort to-- to do justice.

And I wonder if you feel there are-- any lessons that can be learned from-- what happened-- in the former Yugoslavia-- with respect to that issue. It was debated, for example-- in advance of the-- the Dayton-- peace talks when-- the-- the-- the prosecution-- of the ICTY had previously-- indicted-- Radovan Karadžić and-- General Mladić.

But it indicted them, again-- just before the-- the Dayton-- peace talks. It indicted them at that point for the-- the massacre at Srebrenica. And-- it was-- therefore, impossible for them to attend the-- the Dayton-- peace talks. And the argument was-- that the effort to do justice-- is-- making it impossible to-- to negotiate a peace settlement. It didn't work out that way. But is that something that was peculiar to the situation in Yugoslavia? Or is there any general lesson that we can learn-- from the way that issue played out-- in the former Yugoslavia?

## DIANE ORENTLICHER:

Yeah. So I actually recently bought Pricilla's book, and I am dying to read it. I haven't yet. So I can't wait to see-- what you say about this. (MIC NOISE) But my own sense is everything is so fact specific that it's hard to-- and I'm looking to Pricilla to see-- Pricilla's nodding-- that it's hard to generalize from it.

What I think is useful about the Bosnia case study is that it is an example of a context where at-- at several points-- during the pre-peace and post-peace moment-- there was a peace versus justice dilemma. And it was, you know, teed up in those terms, and a raging debate about whether the ICTY was gonna imperil the prospects for peace. And-- at each moment in the resolution for that debate, I think the justice side prevailed in-- by-- by which I mean-- it turned out that indicting-- to f-- to pick up on your example, indicting-- Karadžić and Mladić right before the Dayton peace negotiations did not derail the negotiations as diplomats had warned it would.

And in fact, because Karadžić was indicted, he could not participate in the negotiations in Dayton. And-- the Bosnian president, who did participate, said he wouldn't have if Karadžić were there. So most people who've looked at-- at that moment-- conclude that it turned out-- that the high profile second indictment by Goldstone-- was helpful-- facilitated a peace negotiation. The facts--

## ARYEH NEIER:

Although that was not Goldstone's purpose-- in the indictment.

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**DIANE ORENTLICHER:**

He wanted to-- avoid an amnesty, right? I mean-- did-- did-- was there something else that you--

**ARYEH NEIER:**

No.

**DIANE ORENTLICHER:**

--wanted to-- yeah, right. So-- so I think (COUGH)-- and-- and another moment that I would mention that I think is important is after the peace-- agreement was concluded, it had-- it authorized the NATO force that was deployed in Bosnia to arrest people indicted by the ICTY, but d-- but did not require them to do so.

So there was a period of 18 months or so when the NATO force would not indict-- I'm sorry, would not arrest (COUGH)-- indicted fugitives. It would waive-- high profile-- suspects, like Karadžić, through checkpoints, just wouldn't arrest them. And then finally things changed, and they started arresting people. What--

**ARYEH NEIER:**

The British government changed.

**DIANE ORENTLICHER:**

The British government changed. Tony Blair-- Robin Cook brought in an ethical foreign policy. They were the leading edge in that change. Clinton was elected for a second term, Madeleine Albright became secretary of state. Leadership changes-- in several countries-- played a really important role in that.

And-- and then-- and then people were arrested. And suddenly the force discovered they could arrest war criminals without derailing the peace. So the reason that connects to the peace versus justice debate is that the NATO forces and the governments they reported to were afraid that it would destabilize the fragile peace that had finally been put in place to arrest these high profile suspects.

Everybody I interviewed for this book believes with great certainty (and again, there may be people who see things differently) that had the NATO forces arrested the war criminals earlier, the peace would've been much stronger. And that that period, that crucial period of the first 18 months, was a period where the war criminals were able to regroup,

reconsolidate, strengthen their criminal networks, and that Bosnia's still-- (COUGHING) paying the price for that period.

So I think Bosnia is a case study that shows us that there are times when-- when it makes sense-- when-- when you-- can best advance your objectives of securing the peace by not shortchanging justice. I don't think you can generalize from that.

But what I think is useful about that, and I-- I really came to appreciate this when I was in the State Department, you face crises every day in-- in (BANGING NOISES) the State Department. Every day-- there-- there's-- a new calamity of-- you know, if not every ten minutes. (LAUGH) And you don't have time to reflect, you don't have time to research, and you don't have time to bone up on-- similar situations. And you have to-- be able to draw quickly on analogous-- context that might have a lesson.

And I think it's useful to be aware of these moments. Because there were times when-- I encountered new challenges in the State Department. And it was really helpful for me to be aware of how similar situations played out in Bosnia. And I could be more effective-- making arguments-- in our internal policy debates about what we should do by being able to pull out-- an example that was very similar to the facts we were confronting. And-- and people listened. And they cared. Because it was an experience that had a lesson, that seemed relevant now. Would it be relevant to every situation? No. But it was relevant to some. And that was-- incredibly valuable. It was very precious to know that.

## **ARYEH NEIER:**

Okay. Diane, I-- I could keep asking you questions for a long time. But I want to turn to our-- other panelists. And-- let me start with you-- Tea. I'm-- I-- I wonder if-- you would-- tell us how you, as-- a Bosnian in the diaspora-- and you, and your family, and your friends, and the other members of the-- the Bosnian diaspora-- with whom you are in contact, how do you feel-- about the court? Do you think of it as-- a great achievement? Do you think-- it-- played an immensely significant role?

## **TEA SEFER:**

First of all, thank you for having me here. I'm very excited-- to just be on this panel, and to be talking with you all. And also having the chance to read Diane's book was very-- just powerful for me. I wanted to-- in my head I was making a joke earlier, Diane, when you were talking about Bosnians felt about-- the court, and the fact that-- we have a lot of criticisms, but at the end of the day we're like, "No, no, no, no, no. It's good."

'Cause that's, like, our-- our cultural thing, right? (LAUGH) Like, we're very hypercritical. But we're like, "No, no, no. We like this thing. It's just terrible in all these ways." (LAUGHTER) So, like-- (LAUGH) and so when-- then it comes to a personal, you know-- (LAUGH) situation, it-- it gets amplified.

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And so-- coming from my perspective, and some of you might be saying-- seeing I'm wearing this white armband. Today's the white armband day to-- recognize-- what happened in Prijedor. Many-- Bosnian Muslims were required to wear white armbands, or put white sheets outside of their homes (NOISE) in Prijedor, and across Bosnia, to signify that they were Muslim, so that they could be basically open targets.

And-- and we're talking about-- you know, how much time has passed. My birthday was last week, and I turned 26, and it's been 26 years since my dad was in a concentration camp and tortured. And he had to wear this armband walking out of that camp. So when, you know, my family talks about this, and when-- when my community talks about this-- I remember watching the trials and-- and watching the verdicts come out, and watching the sentencing.

And my experience, and a lot of the experience of my community was like, "Oh, thank God somebody's finally talking about it." Like, there's this level of validation that I think a lot of people were looking for. And part of that validation, and I-- and I do wanna get-- I'll probably get more into this later, is-- the-- the former Yugoslavia was stuck in this, like, mid-- like, right?

It was in the East, but also in the West. We kinda played friends with everybody. And so looking for validation from the ICTY was like, "Oh, look, Mom and Dad are on our side." (LAUGH) Like, the West actually believes us for once. Like, they-- or, not for once. But, like, you-- but the West believes what we're saying. They-- like, there is truth, and-- and there is justice in that.

I can-- I held that feeling while at the same time being extremely heartbroken that-- there-- it was not declared that there was genocide in my hometown, even though, you know, I would say that it happened there. And that's-- that's the issue that we run into with legal definitions of what is genocide, and what-- and h-- what courts can actually serve, right?

If we're using-- and-- and Diane talks a lot-- about this a lot in her book. If we're using the Holocaust and how Germany faced justice, and-- and-- and kind of punishment, and the perpetrators faced-- punishment in that realm, if-- if we're using that as the bar that you have to achieve, there is-- it is very hard for-- any other folks involved in any other conflict to achieve that bar in order to feel like their-- struggle was-- valid. So I-- I see that a lot in my community of-- of-- Srebrenica is recognized. Peop-- people talk a lot about Foca because of the-- extreme sexual violence that happened there. (BANGING NOISES)

But this happened all across the country. And just because a l-- there wasn't an-- an ability to find a legal definition, and-- and to meet the legal qualifications of what is genocide-- doesn't mean that that trauma doesn't exist. So I feel like that's part of the tension, right? Like, there is-- there's still an appreciation for the court, (COUGHING) and that it existed.

But also a disappointment that it can't go further. As for-- I'm also Serbian. So as for my Serbian side of the family-- (LAUGHTER) this is the fun line I get to dance across. You know, it-- it's-- I don't think the court decisions impacted them as much as their fury at the Serbian government during the '90s. And the (COUGH)-- and, you know, the-- every time I

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read a book about, like, how Serbians feel about Milošević, and-- and I'm not gonna deny that there aren't a lot of-- people who do-- really respect and see him as this-- you know, this god to them.

There's also many that blame him, rightfully so, for the extreme economic desolation of Serbia. And the fact that the unemployment rates are-- are skyrocketing. And-- and-- there is very few opportunities there. So-- that's just from my own personal network (LAUGH) and what that kind of looks like.

I think the other aspect to it-- so my hometown's in Republika Srpska. So if you wanna get more complicated, just, like, keep asking me details. I'll come up with more ways that my life is interesting. But-- within Republika Srpska, it-- it-- it intensifies-- a little bit, right? Because we have this narrative of-- (BANGING NOISES) the West coming after Serbs, right? And the-- and the West is-- anti-Serb, and that's why Serbians have to align with the East.

And, you know, we're not gonna ignore that-- and I'm gonna conflate a little bit Serbs in the RS and-- and Serbs in Serbia, but-- President Vučić was at-- Putin's coronation recently, right? (LAUGH) So this is-- you can't ignore that these things are-- are happening together. I don't think that any international-- court could have tried any war criminals without it being framed as, "Oh, the West is coming at--" I-- like-- as a continued-- narrative of the West coming to get the Serbs, because everyone's against us. So all of these things kind of ex-- there's these multiple truths and these multiple things happening at the same time.

## **ARYEH NEIER:**

David-- I was told before-- this panel that you were particularly taken with Diane's-- Chapter Seven on denial and acknowledgement in Serbia. So I wonder if you would-- say something about that subject.

## **DAVID TOLBERT:**

Yeah. I think I told you. (LAUGH)

## **ARYEH NEIER:**

Okay. Well somebody told me. I--

## **DAVID TOLBERT:**

I didn't mean to sound-- (LAUGHTER) I didn't really mean to set it up that way. But (LAUGH)-- before I turn to your question, I-- I did wanna say a couple of things that have been talked about. Dayton, I think, is something that's worth examining and discussing in-- in some detail.

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It may have stopped a conflict. But in a way, the divisions that it created between the Republika Srpska, and the-- and-- and Bosnia Herzegovina-- or the-- sorry, the Federation, is something that we can never get over, in a way. So when we think about peace and justice, sure-- I mean, I think that the justice discussion is really important. But here is a peace agreement that at its heart leads to more conflict, or leads to great-- disaffection between the groups.

So one of the-- you know, one of the key issues here when we're thinking of peace and justice and the discussion, let's never have another Dayton again. (LAUGHTER) I mean, Dayton has created an ongoing conflict that I think everybody recognizes. For now, ever since the agreement has been signed in 1995. And what is the way out of that? We're stuck with Dayton, and how to get out of that.

Out of that moment. So I think-- when we-- when we think about, you know, the peace and justice equation-- we have to be a little bit more visionary and try to think a little bit more under the-- I know there's a great deal of pressure. There's an enormous amount of pressure to-- to stop the killing. But there has to either be a mechanism or approach which addresses that on-- a longer term. Because you have a frozen conflict, and now you have each party going to their own corners, they're going to their own schools.

And you've c-- you-- you've done what Milošević and the radical nationalists want. And that is what Dayton has resulted in. So I-- I think all the-- you know, all the-- the justice issues are important. And I'll go into that. But I-- I do think it's worth keeping that in mind. I-- I-- if I-- if I can come back to Diane's book, I thought it was-- a tremendous book. And I-- I'm not being paid to-- (LAUGH) to-- to tout it.

But I really-- as was mentioned, I spent-- nine years at the Yugoslavia Tribunal, and another three years with another organization working in the region. And I went back and did a big study on the-- on the Bosnia state court, which I wanted to wor-- which I worked on extensively. And-- I have one, or two, or three little differences with Diane that maybe we'll get into later. But I do think it is, you know, an enormously-- informative book. It is deep, both-- not just from a legal point of view, but from a sociological point of view.

And this is why one of the r-- reason I had so much interest in the denial chapter. And I-- I-- I-- I-- I read the whole book. I didn't read all the footnotes, as I told Diane earlier. But I do think it is-- it's a masterful piece of work. And even if I do have one or two points of minor disagreement, I-- I think it's, you know, a very comprehensive-- look at a lot of different issues.

Including one that I worked on extensively, which was the-- you know, the relationship with the Bosnia state court, and building that up. And then it's very interesting to see how that has worked out. I thought the chapter on denial was particularly significant. Because I think if you work in the fields of transitional justice and accountability that question of acknowledgement and, you know, the-- kind of the-- the flipside of that, (COUGH) denial, are the key issues that we deal with.



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Because ultimately victims are looking to be acknowledged. And they want the state authorities, they want others to acknowledge what's happened. Now, court judgements help that. But-- apologies help that. Truth commissions help-- help that. And one thing that gave me a second thought when I was reading through the book is that the ICTY, I-- I worked for McDonald. And I was very close to Arbor (PH), and they really put the brakes on the proposed truth commission in Bosnia.

Which, in retrospect, is something I don't-- I don't think we should've done. I mean, we should've let that play out. Because the more measures and mechanisms that might've been involved, I think the more acknowledgement, or at least denial might've been eroded.

But what I find so int-- so useful, and-- about the-- about this chapter on Serbian denial, there's also a chapter on Bosnia living in-- in forced denial-- that I thought was very good too. But that-- that-- socio-- the sociologists and social scientists are brought into that part of the book, and their discussion, and ex-- explained in-- in a very-- straightforward but analytical way-- about the-- (NOISES) the-- the forms of denial.

Motivated forgetting. We all do a little bit about that-- do the-- of this. But-- we see this in-- in the Republika Srpska, and Serbia. And particularly-- you know, belief perseverance. And I think it was a really-- important chapter. Because it explained not simply in legal terms, or in terms of those of us who work on accountability and transitional justice. But it ex-- explained it in social science terms.

And I-- and as I think back-- you know, at the ICTY we had a lot of experts on a lot of things, including a wit-- a victims and witnesses unit. But I don't think we ever-- thought through what the ICTY might do around denial. And how those judgements might be used. We cr-- when I worked with-- Gabrielle McDonald when she was president, we created this outreach program, which I think was really the first time this had h-- this had happened, where we (COUGH) tried to explain what happened-- in the Yugoslavia Tribunal due to all this great misunderstanding and actually-- you know, misuse of the judgements and propaganda.

Because we were s—in this court setting in the Hague, and the-- and the-- the victims are out in Bosnia and-- and-- and-- elsewhere. We-- we focused on Bosnia. And tried to explain that. And-- it would've been really useful, I think, to have a better understanding of these-- the-- the sociological concepts. May-- maybe we had one or two experts-- at that. But we really-- I don't think we understood, or we didn't talk about the-- the-- the importance of acknowledgement.

We didn't talk about the importance of either the judgements of the tribunal, or other sources, to combat denial. Because ultimately I think m-- the ICTY's were, to some-- to-- to a large extent in-- in Serbia-- has been undermined by this persistent denial. And I-- I-- I-- I think we should-- we should try to learn from that and-- and other transitional judge-- justice mechanisms and courts how we can-- how can better b-- how we can better get across the-- these decisions and these processes in a way that gets a denial and moves forward on acknowledgement.

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And frankly, if I think about my years there, I don't think we ever talked in terms of acknowledgement and-- and denial. And I think we were a court, obviously, but-- the court became a a battleground in many ways. Or the court's decision became a battleground in-- in many ways. And this question of the role of acknowledgement and denial, I think, is such a critical one.

I also would-- just as-- a side-- a sidebar, because it-- I think-- Diane's book does a good job of describing it, I think there were a lot of-- we shot ourselves in the foot, or we had our own goals pers-- particularly with the Gotovina, Perišić, Haradinaj, Šešelj. (LAUGH) There's a long list of cases in which-- the judgements were baffling for insiders and for outsiders.

You can't control, ultimately, what judges do. But I think it goes to a point that I felt very strongly about when I was there, and continue to feel about it to this day. You need judges who actually have done some judges. I think, for the most part. And sometimes-- some of the judges I felt like got lost in-- theorizing. One has to have an understanding of what the victims are feeling and suffering. You can't base guilt or-- or innocence just one that.

But-- some of doctrines I felt like led the court astray and completely confused and baffled the outside world. And I think that is-- you know, a lesson that we should learn. And something that I have great regrets about. And I think probably anybody associated with the tribunal. So those are a few comments. And--

## **ARYEH NEIER:**

Yeah. And that-- and, Diane, I wonder-- you-- you indicated-- that-- some of the acquittals-- of-- Croat defendants had undermined the-- the credibility-- of the-- the tribunal in Serbia. And I-- I wonder if you'd-- sort of reflect on some of the relatively recent decisions-- by the-- the appeals-- chamber-- of the-- the tribunal, and whether you think those have-- significantly-- diminished-- the-- long-term impact of the-- tribunal.

## **DIANE ORENTLICHER:**

Sure. Did you wanna say something else though? You looked like you wanted to.

## **TEA SEFER:**

I did.

## **DIANE ORENTLICHER:**

You.

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**TEA SEFER:**

I wanted to say really briefly-- thank you.

**DIANE ORENTLICHER:**

Sure.

**TEA SEFER:**

I wanted to say really briefly that I think this question of-- denial-- especially by-- by folks in Serbia-- is complex. And I-- and I won't try and belabor this for too long. Given how the court was structured, and the order in which-- prosecution happened, and-- and what cr-- criminals were g-- gone after in what order, (COUGHING) I think there was-- a panic and a worry about would the court go after smaller perpetrators of crimes?

Would it go after everybody? Or would it just go after the leaders? So I think that has spurred a lot of continued denial in the Serbian community because these were mothers, and parents, and sisters watching their brothers and sons go off, unwillingly in many cases, to war.

And so if you start admitting and saying, "Yes, this happened," you're not just saying, "Yes, it happened over there." You're saying, "Yes. And maybe my son is gonna go to jail for it." And I think there's-- a complexity there of-- of protection. And-- and even as I was reading kinda, like, the survey respondents, and-- and who thought what actually happened, or who should serve-- who should face justice for it, and-- and it comes up in that way of-- of people were trying to protect each other.

I mean, you look again at what happened in Yugoslavia after World War II and how justice was served to-- to ust-- Ustaše and Chetniks. There was serious punishments that came out of that. So-- and that is-- that was not that long ago. So people knew that that happened to their parents, to grandparents, to people that were forced out of the country, or were-- or were put in prison.

And they didn't wanna see that happen to their kids. So I feel like it's easier to do that psychological spin and be like, "No, that-- that-- there's no way that happened-- because of that fear of what that justice would look like in the '90s and the thou-- and the 2000s, and even to this day.

**DAVID TOLBERT:**

Hmm.

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**DIANE ORENTLICHER:**

Hmm. Thank you. Can I also just react to that--

**ARYEH NEIER:**

Yes.

**DIANE ORENTLICHER:**

--and then answer your question? So I'm glad you said that. I-- I found that whole issue of denial, and the phenomena of denial-- fascinating. And I hate to say fascinating, because that sounds dangerously close to fun. And it's serious and d-- discouraging. But-- but a lot of the social science research that I talked about in which-- which Serbians I interviewed, you know-- dis-- they reached the same conclusions as-- social science research without knowing it.

They described to me, in brilliantly astute, perceptive terms, the psychological denomic-- dynamics at play-- along the lines of what Tea described. And then I read all the social science-- research, which gave-- you know, put fancy labels on the phenomena that these very insightful Serbs-- described to me.

And-- and so there are these very human dynamics at play-- which help-- helped me understand denialism in terms that were sometimes less sinister than I suppose I-- imagined it before I understood this before. David and I were both at a conference a couple of weeks ago in-- in Tokyo-- I'm sorry, in Nuremberg--

**DAVID TOLBERT:**

Nuremberg.

**DIANE ORENTLICHER:**

--about the Tokyo tribunal. And one of the most memorable moments for me of this conference was a Japanese government official-- was talking about the-- something-- you know, some anodyne thing. Japanese government's diplomatic position negotiating international criminal court, duh, duh, duh.

And then she just added, out of nowhere, at the end of this two-conference-- "And-- and it's really hard looking back." 'Cause she had been hearing-- allusions to people kinda dancing around-- not really squarely addressing, but dancing around the fact that Japanese society overall has not embraced the findings of the Tokyo tribunal, which handed down its judgement 70 years ago. Seventy years later it's still not accepted widely.

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And she was reacting to this theme that was always percolating around the surface of the conference. And she just blurted out, "You know, it's really hard to accept that our grandparents and our parents did something this awful." And so some of the dynamics behind denialism that Tea, you know, very beautifully described, it's your family. You're talking about your family.

It's very hard to imagine that your son, or your f-- your husband-- killed somebody, or killed a child. It's really hard to imagine that. And then there's so many other more complex things layered onto that. So the psychological barriers are very real. And-- and it is important to understand. And I found myself challenged at times by some of the things I heard. For me, one of the most-- challenging things-- in the sense of-- challenging some of the things I've always believed is-- a really impressive-- Bosnian Serb-- who ha-- has worked tirelessly to educate fellow Serbs about the extent of Serb atrocities.

He was describing a program that the ICTY developed called Bridging the Gap which was-- very consciously designed to engage the issues David was talking about. So the whole concept was, "Oh my gosh. There's all this misunderstanding, there's all this misinformation about the ICTY."

We're demonized. They don't understand what we're doing at all. They say we're doing this, we're not doing-- you know, it was like-- and so we've gotta do something about this. So somebody who-- David had worked with in a number of contexts-- a brilliant, wonderful-- journalist and activist-- named Refik Kojić (PH), designed a program called Bridging the Gap which brought ICTY officials, including David to some, right?

## **DAVID TOLBERT:**

Yeah. The first-- the first one.

## **DIANE ORENTLICHER:**

In-- yeah, in Bershka (PH).

## **DAVID TOLBERT:**

And other-- and other places.

## **DIANE ORENTLICHER:**

Uh-huh (AFFIRM). And so they would go to the towns where atrocities that had been-- prosecuted at the ICTY had actually occurred. And officials like David and investigators would explain, "So here's how we went about investigating. Here's why we-- ended up with these defendants. Here's why the-- judgement reached these conclusions." And they would

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do that when-- the appeal judgement was over. So there was no more-- case work ahead. And in some of the-- Bridging the Gap town halls-- there was, like, a transformative--

## DAVID TOLBERT:

Uh-huh (AFFIRM).

## DIANE ORENTLICHER:

--dropping of the scales. There w-- and-- and it brought chills to-- you know, to my-- down my spine to hear about these moments. And-- and this wonderful guy, Renco Tedorović (PH), would describe a town where denial was just thick as a wall, and it seemed impossible to pierce denial.

And-- and they would show a film of somebody from Foca who had been-- convicted talking, testifying on the stand, and the prosecutor would ask-- "And so--" correct me if I've got this wrong, David. "And so you raped a 12-year-old child?" "Yes, I raped and, you know-- and--" and he said something like, "And I would've done worse things. But I have a daughter at home too." (LAUGH)

And-- and so-- so Renco Tedorović is describing this. And he said, "You could hear a pin drop." And he said, "And I thought it was so heavy. And this is a town where denial is--" you know, it's hard to exaggerate. I've been there. It's really thick, thick, thick. And-- and he said, "I thought nobody would come back after lunch. But everybody did. And they listened."

And-- and so the-- the thing he said that really stuck in my mind, and I mentioned this in the book, and it really has challenged me, is he said, "Sometimes when you demand that-- that people," and he was talking about Serbs there, "say, 'Yes, it happened. And we're guilty too because we-- we're bystanders and we didn't stand up. Yes. Yes. What do you want me to say? Yes, we're all terrible.'"

And he said, "When you push them in a wall, they have nowhere to go. But, you know, if you sort of step back and let them discover this-- and don't keep on pounding the table and say, 'Stop denying--' they can come to this." And I was fascinated by that. And I think about it a lot. And I'm not quite sure what the lessons are. But I do think that this whole issue that I deal with principally in Chapter Seven, but also when I go into Bosnia-- presents challenges that those of us in the field have to sort of-- do a better job of grappling with.

To your question, Aryeh, (LAUGHTER)-- so-- yeah, so the ICTY had a series of terrible judgements. And it was-- it was heartbreaking because it came late in its life. And it took a long time for the ICTY to apprehend-- the people who were kind of the faces of evil for many survivors. The people who were the masterminds of mass atrocity.

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They eluded justice for a very long time. (NOISE) He wasn't able to stay for the whole program, but David Pressman was here a little earlier. He was in the White House when I was at the State Department. And one of the things we spent a lot of time on was trying to get Ratko Mladić arrested. He was the-- and he was arrested-- while we were still there. And it was-- it took so long for him to be arrested. It happened like 15 years after he was first indicted for genocide. And-- and every-- so for survivors, they waited so long for this. They waited so long for the top guys to finally get to court.

And they were getting older, and-- and sadly, many of the people who cherished this hope for so long didn't live to see-- Mladić arrested, much less convicted. And finally the later years arrive, and they're arrested. All these guys are finally apprehended after epic-- searches to apprehend them.

And-- and then the (COUGH)-- instead of this beautiful, sweet moment of long-delayed justice at last, the tribunal kind of lost its sense-- senses, went crazy, started issuing, as David said, incomprehensible judgements. And-- and it-- and it was-- beyond frustrating for survivors because they had waited so long-- for justice. And then there were these very controversial acquittals. So that's very-- problematic-- to say the least-- for-- human rights advocates who had really taken great risks in their own country to defend the ICTY, to confront denialism in their societies, to say, "Listen, you've gotta stop denying that a genocide happened in Srebrenica. The ICTY has held that it did."

And now people were saying to them, "Yeah. Your ICTY, the one you keep tellin' us we have to believe, aren't they the ones that came up with this loony theory and acquitted Šešelj, and acquitted Gotovina, and acquitted Haradinaj?" And-- and so these advocates, it was like the rug was pulled out from under them.

And so it was a terrible period. And when you're in international court you don't have forever to get it right. You have a finite period. Every decision counts. So it's a terrible period for the ICTY. Even its most staunch defenders lost faith in it. The good news-- the good news is there was a course correction. And one of the-- really terrible-- acquittals was reversed. And now the two people who were acquitted are on trial again in front of a residual mechanism.

Thankfully-- Ratko Mladić was convicted and-- sentenced to life in prison. And he was convicted of genocide. And it was so powerful. It was just such a powerful moment. And it was-- it would've been powerful under any circumstances. But after all these awful-- decisions, it was especially important to survivors. And--

## **DAVID TOLBERT:**

Yes.

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**DIANE ORENTLICHER:**

--and I-- I remember one woman who had testified in his trial talked about what it meant for him to be convicted. And she talked about how-- it brought peace to her soul. And after everything she had lost, that was an astonishing thing to say. So horrible, but got better.

**ARYEH NEIER:**

Okay. Okay. We don't have much time left. And I'd like to open this-- to-- a few questions from the audience. If you want to ask a question-- would you come to the mic? And would you identify yourself? And if you ident-- as you identify yourself, please know that we're recording this, and-- we will use-- the-- the recording. So-- (LAUGHTER) you are giving your consent-- to-- have your-- your question-- broadcast. So-- with that, if you'd come to the mic. (LAUGHTER) Richard Wilson?

**RICHARD WILSON:**

One thing I would like to mention briefly--

**ARYEH NEIER:**

And identify yourself.

**RICHARD WILSON:**

Richard Wilson, University of Connecticut-- School of Law. I'd like to mention just the quality of the decisions. Yes, there were some baffling-- decisions in Šešelj and-- and other cases. But-- the quality of law-- of international criminal law is-- is really the highest of any tribunal--

**DIANE ORENTLICHER:**

Uh-huh (AFFIRM).

**RICHARD WILSON:**

--thus far. So the ICTY is the high water mark of international criminal law. And the-- the-- the precedent that rape is a war crime comes through the ICTY, the genocide decisions in-- Popović, in Mladić, and in Karadžić are much better done than the ICTR. So the body of jurisprudence that it's leaving-- for future prosecutions for mass atrocities is really generally quite good.



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And we can say, "Compared to what?" Compared to other tribunals. But I don't know if you've looked at domestic criminal justice recently. But there are many baffling decisions at the domestic level as well. Just to point that out. One of my questions would be-- looking forward to the ICC, was-- to what deg-- so my question, and I-- and I guess this is-- is really for-- for-- Diane and for David-- is some of that success related to the ICTY being an ad hoc tribunal? The ICC has not provided the same high level of productivity or jurisprudence. It's a permanent court.

I wonder if you would just assess that-- in relation to each other. To what degree is-- is-- is this a model? I mean, in-- in-- insofar as we can understand U.S. foreign policy, it seems like the State Department's preferred model is an ad hoc tribunal for-- for, say, Syria, or some future conflicts. Is that a better model? Or should we be putting more emphasis on the international criminal court?

### **ARYEH NEIER:**

Who wants to take that?

### **DIANE ORENTLICHER:**

Do you wanna?

### **ARYEH NEIER:**

Sure. David?

### **DAVID TOLBERT:**

Yeah, sure. I-- I think that's a couple of great questions.

### **TEA SEFER:**

Wait a sec. I think you--

### **DIANE ORENTLICHER:**

I think you have to turn your mic on.

### **DAVID TOLBERT:**

Can you hear me n-- can you hear me now? Okay. I think a couple of-- great questions. Very much appreciated. I do think the quality of the law was very high at the ICTY. In terms of--

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I think what-- if I can just say two-- two sentences about the judgements that went off the rail, which I'll do, and then I think I'll come to the more important question about ad hoc tribunals and so forth.

(INAUDIBLE QUESTION)

## **DAVID TOLBERT:**

Yes. How-- how about this? Can you all hear me now?

## **FEMALE AUDIENCE MEMBER:**

(LAUGH) Thank you. I have great hearing--

(OVERTALK)

## **DAVID TOLBERT:**

My wife usually sits in the back of the room and-- (COUGH) "Louder. Louder." So-- so what I was saying is that I-- I do agree that I think the-- the-- the-- overall, the quality of the-- ICTY's judgement and jurisprudence, and I would also say the quality of the advocacy on the prosecution side, and sometimes the difference, I wouldn't be-- I think that was more spotty-- was-- was very high.

I think one of the-- the problems is that with joint criminal enterprise and some other doctrines that were applied-- we perhaps had a few too many-- now, the question was asked by an academic, so it would be unfair to s-- to point the finger at academics.

But-- a little-- may-- maybe overly sophisticated and-- got pointed in the wrong direction. What I think is more harmful there, actually, is there were, you know, allegations that these decisions would help the Americans, or the Israelis, and so forth. So-- that is that the decisions-- would-- be beneficial to a great-- to a military power. This was certainly writ-- written up in articles and so forth. So this was part of the-- it was one of the elements that-- people don't wanna talk about.

But-- it certainly unmined the credibilities. You know, the-- the decisions couldn't be understood. And therefore there were a lot of conspiracy theories. Secondly, on the-- the question of whether ad hoc tribunals-- or I think I would also include hybrid tribunals and other-- mechanisms.

I mean, there's-- there's also the organ trafficking tribunal in-- in the Hague on Kosovo as well. I think actually after looking at the ICC for a number of years, I think everybody is really disappointed. There are a limited number of cases. The quality of the lawyering and judicial-- side have been lacking, to some extent. I think the ICC has gotten stronger. But it's pretty clear that the ICC is only going to deal with-- a relatively small number of-- cases.

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So I think that we should-- should think about all the tools in the toolbox. Including-- the-- the model from the Special Court for Sierra Leone. I wouldn't say the e-- ECCC, because I worked on that for a year, and that's not the model you wanna follow. But the-- the court in Cambodia.

But I think there's-- other examples that if you're serious about criminal accountability for serious crimes, you should be looking to do this. And we are seeing in-- in the Central African Republic there's an attempt on a hybrid-- model. Very, very tough situation. And a couple of other instances as well. I don't think the ICC by itself is going to provide, at least in the near term, a great deal of accountability. And so I think you're right-- Richard, that we ought to be looking much more broadly.

## **RICHARD WILSON:**

Thanks.

## **ARYEH NEIER:**

If I can add to that, I-- I would share the-- disappointment with the ICC. But I don't think the-- the State Department's reasons for preferring ad hoc tribunals-- should be given that much credit. Ultimately-- the State Department is concerned that-- the ICC would have-- jurisdiction over Americans if Americans commit crimes-- in-- countries that are parties to the-- the ICC.

And so-- I think that-- hostility to the ICC may explain-- to a certain extent, the-- the preference for ad hoc-- tribunals. I don't say necessarily the State Department when you were there. But I think that would be true of the-- the State Department today, and-- perhaps the State Department at the time that the-- the ICC was created.

## **DIANE ORENTLICHER:**

Can I touch a really-- a quick-- just very briefly--

## **ARYEH NEIER:**

Yes.

## **DIANE ORENTLICHER:**

--'cause I don't wanna keep you waiting. But-- one thing that strikes me a lot about the ICTY is that it had-- a kind of-- commitment and consensus behind-- political consensus behind it that we haven't seen quite for any other court. And it-- it's remarkable that it apprehended everybody that was at large.

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It doesn't happen easily. But part of what happened was there was a very strong consensus behind it that the ICC has never had just a really strong consensus. And advocates locked in some of the power behind that consensus in a way that carried the ICTY through periods when the consensus might have frayed. For example, the policies of conditionality that the-- that-- first Washington, and then the European Union deploy to-- put pressure on Serbia to arrest fugitives.

There were-- if you went back five years after the ICTY was operating and tried to pass some of the legislation rebuilding conditionality, it would've been really hard to build a consensus to really wield those levers of-- of pressure effectively. But the-- the policies were locked in, the legislation was passed when the consensus was strongest. And it was-- that proved to be enormously important later when the consensus broke down. And the ICC never got the consensus in the first place, and has never had anything remotely comparable. So beyond all the other things that-- that my book focuses on, I think the ICTY is a great study in advocacy around tribunals and what it takes to make them succeed.

## **DAVID TOLBERT:**

Diane, can-- can I-- can I just ask Diane a question? And I'll-- I'll make it very short. (BACKGROUND VOICE) You know, there was this window in the '90s. Berlin Wall comes down, the Soviet Union becomes Russia, et cetera. You know, it-- this happens for a period of ten years. ICTY evo-- evolves.

ICC is adopted. By the end of that period, we-- that-- that-- that ends. And now we're in a pretty deep crisis. So to me, the political situation ultimately determines all of this. And what we have to reinvigorate, or try to invigorate is the human rights movement-- for accountability and so forth more broadly.

Ultimately this has to be a driven, civil society. And changing the political context, because ultimately it's the political context that allows for whatever form of accountability you're going to have. And to me, that is the real challenge that faces us. Not just in the U.S., but across the world. And-- and if we can't change that political context-- whatever mechanism we're gonna put forward is not gonna work, so.

## **ARYEH NEIER:**

Great.

## **FEMALE AUDIENCE MEMBER:**

Thank you. Considering what happened in the former Yugoslavia, and you saw it firsthand, considering what's happening in South Africa, with the whites fleeing to Australia, considering that I just read in the *Wall Street Journal* this week that George Soros, Open Society, said that it was a mistake to bring so many people from around the world with

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different persuasions to countries in Western Europe, we should've helped the people stay in Africa by giving them aid, do you think that it's been a mistake to have so many different peoples of different groupings-- mixing together when maybe human nature won't-- won't allow for it? Or maybe we're just not ready. Evolution haven't-- hasn't reached that point yet? (LAUGHTER)

**ARYEH NEIER:**

Question.

**PRICILLA HAYNER:**

There we go.

**ARYEH NEIER:**

Go ahead.

**FEMALE AUDIENCE MEMBER:**

Right on. (LAUGH)

**PRICILLA HAYNER:**

Thanks very much. Fascinating panel.

**ARYEH NEIER:**

Pricilla?

**PRICILLA HAYNER:**

Sorry. Pricilla Hayner. And-- and thanks very much, Aryeh, earlier, for your mention of-- of my book, which I'm gonna make reference to in-- in a minute. What I thought was actually the most interesting, and important, and actually shocking thing that you all have said was in fact 25 years in, this is the first sort of serious, in-depth treatment as to what the impact is of the tribunal in-- in the country, or countries at hand.

Which I think is actually sort of an indictment on-- on the rest of us, in a sense. And thank you very much, Diane, for-- for doing this for-- for all of us. The second thing I thought was really interesting and important is, David, that you said that actually from within the ICTY,

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when you were there, it actually wasn't sort of a priority question on-- on you all's minds as to how to have that effect in country on countering denial and advancing acknowledgement.

So one thing that I tried to argue in the context of particularly the ICC, but really any tribunal, in my book is-- is that, in fact, international tribunals or hybrid tribunals, essentially they're political animals, whether they want to be or not. They're affected by politics and local realities, and the context at hand. And they're-- and they're going to affect it whether they intend to or not. And in the case of the ICC, they of course influence national actors' decisions, including through a deterrent effect, if they operate wisely and take into account all the contextual factors.

So of course it naturally raises the question as to whether in this case, especially David, but certainly Diane and Tea as well, are there things that you all see that the ICTY, looking back, could have understood differently about its mandate so it didn't think that its impact was only through having correct, legally sound, clear, strong judgements, but actually through its statements, through its outreach, through thinking about how it can impact-- in various ways, the decisions, and the views, and understanding of local populations?

I mean, there aren't any. You know? There-- they didn't have other transitional justice mechanisms agreed at Dayton. And you don't want a tribunal to try to fill all of those gaps. But it seems as if having a purely legal approach in the context where the local population is expecting these wider impacts sort of was a missed opportunity, perhaps. Or the question is, was it? Thanks very much.

## **DAVID TOLBERT:**

Yeah. I think-- (BACKGROUND VOICE) the earlier understanding, particularly of judges and prosecutors and so forth was, "This is accord. It speaks through its judgements, et cetera." Like a traditional national court. I think that did change to some extent.

So if I wasn't clear about that, I think the creation of an outreach program-- which includes what we were talking about in Bershka-- which-- and-- and Diane talked about it in Foca and other places, I actually-- you know, that probably was my proudest day. And the ICTY was when I cheered the meeting in Bershka, which was the first (COUGHING) what we call Bridging the Gap. Because we spent the day and actually went through the cases, but we went through the victims, and we went through the what they said, and we played testimony. (COUGH)

And before that we walked around with a large group of people and we saw where the executions occurred, and so forth. I think that kind of-- that-- that-- that kind of discussion, where we spent a whole day going through investigation-- judgement-- showing who the victims were had an impact-- in a kind of deep kind of way.

I think that there's some criticism there. And, you know, when did we do that? Probably-- you know, in 2006 or 2007. I mean, so it's well into the tribunal's mandate. And the outreach program was something that-- I worked with on Judge McDonald (SIC). And she left. And it

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was kind of an orphan child for a long time. Because-- courts don't do that. So t-- this was-- an enormous fight. Refik fortunately joined me and others in this kind of struggle. And I think that battle was won over the long term.

But what I think also has happened, and I see this at the ICC, is that-- and Refik coined this term, not me. But I use it. It's called check the outreach box. You know, we-- well because now outreach is-- a thing, I think is what they call it-- we need to do some outreach.

And therefore, we're gonna have some programming. And the outreach department of the-- of the ICTY put out-- you know, a 45 slick page-- pamphlet/brochure about all the great work they did, and paid for by the European Union. And I looked at it and I went ballistic. Because this is-- this is not what outreach is about. It's actually reaching victims. And I wrote them a really nasty note. So I probably can't go back to the ICTY any time soon. (LAUGH) But it seems to me (LAUGH) that this has-- becomes the-- kind of the problem. Is that outreach needs to be something beyond out-- how do you engage the victims of these crimes who were affected by those judgements. And that's what happened in Bershka, and that's what happened in Foca. And not nearly enough happened. And I'm afraid, from what I've seen at the ICC, and it be unfair to make a full judgement, is that it's-- it's m-- it's-- it's much more of the kind of check the box-- and-- talk about victims rather than dealing with victims. And it's a step for a court.

But it's a critically important step if you're going to address that issue of denial and if you're going to actually be a court that addresses the n-- you know, the needs of victims, and not simply-- of course-- dispensing justice is important. But you-- you've got-- you've got a moral duty to go much further, in my view. So hopefully I clarified that. Yeah.

## **DIANE ORENTLICHER:**

I just wanna very quickly-- say I agree with everything David said. But one of the themes that sort of emerged for me in the course of the research was that how-- effective the ICTY was. However-- however we define effective. And that's, you know, a long story.

How effective it was on the ground in the countries that l-- that experience violence turn, to an enormous extent, on how effectively external actors were address politics on the ground in those countries. So you know, Pricilla, better than most people how arduous the process of recovery is after a conflict. It's hard work. It's the work of generations. And-- and the work never ends.

Because the dangers are always there. And you think you have a solid, vibrant democracy, and wham, you just get hit upside the head. And-- and everything is upside down. You don't know how to get new bearings. And you have to reconstruct-- and do super hard work. And one of the things that-- one of the-- very-- one of the many wise observations I heard from a Serbian activist was-- courts don't set political reality right.

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And that a big mistake many activists made was expecting the ICTY to do everything. And-- and it sort of-- made them complacent, sometimes, about doing all the other hard work that had to happen politically in their societies. But the ICTY had a relatively good impact on acknowledgement and other things when-- the high representative was exercising his extraordinary powers in Bosnia in a robust way when he was firing-- people from positions of political power who were war criminals and stirring up trouble.

And in Serbia the ICTY-- actually in some ways indirectly empowered reformists. And right-- and when there's a transition it's a struggle. There's a struggle be-- between the old guard and the reformists who wanna get a country back on track. And-- and the power dynamics are complicated and messy, and all important to how-- to the trajectory of the recovery, right?

And so what often happened during the early-'20s is that external actors, first the United States, and then the European Union, intervened in a concerted and smart way. And it was about politics. It was somewhat about the ICTY, but it was about the internal politics. And for a period in time, the ICTY and the politics (NOISE) came together in a really constructive and interesting way.

And so one of the-- so one of my own lessons learned-- from the ICTY experiences that-- we-- you know, we-- these tribunals can do something that's absolutely necessary and vital, and inestimably important and precious. And we should never underestimate how important-- it-- the ICTY was to survivors. But-- but there's so much more they can do if we do all the other things we have to do, and pay attention to the hard work of recover in a society that has-- seen the worst and gone through unthinkable atrocities.

And-- and when we pay attention to those other things-- tribunals can have a rather constructive impact in ways that we can't even imagine. And-- and just to give one little example, I think we talked earlier about-- I know, I'll-- I'll wrap it up. (LAUGH) The impact in catalyzing domestic prosecutions.

One of the reason that-- reasons that matters is that there's now a lot of research showing that-- the more domestic human rights trials you have, the better your human rights environment is. So there's a lot of knock on effects that can happen, but we can't look to tribunals to do all that hard work for us. We have to do it in other spheres.

## **ARYEH NEIER:**

Okay. We have time for-- we have time for one brief question and very brief response. (LAUGHTER) Okay? It's-- it's almost eight-- it's--

## **ELDANI ALI:**

I'm asking David. (LAUGH)



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**ARYEH NEIER:**

It's-- it's almost 8:00. So I-- I--  
(OVERTALK)

**ELDANI ALI:**

Yeah. Eldani Ali (PH). I would like to comment from the reparative justice point of view, which is multi-disciplinary, which answers some of what you just raised. Yes, j-- a court doesn't do everything to address what justice really means to victims, to societies, to communities, to the world. So I would like us to work more multi-disciplinary as a matter of course—

**ARYEH NEIER:**

We-- we have time for a question, not for a statement.

**ELDANI ALI:**

The question is-- actually, no, it's-- it's a matter of-- sounding apologetic for the ICC. But I'm not an apologist for the FCC. But--

**ARYEH NEIER:**

No. Do you have-- do you have a question?

**ELDANI ALI:**

--would you-- yeah, I'll try to turn it into a question. Would you consider the victims provisions-- and the theory of the ICC, not necessarily the practice, as David pointed out-- far more advanced than the ICTY even had a chance to reach?

**DIANE ORENTLICHER:**

Does anybody wanna-- David, do you wanna--  
(INAUDIBLE CONVERSATION)

**ARYEH NEIER:**

And a very brief response.

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**DAVID TOLBERT:**

I think the answer is yes. So-- very clearly yes. (LAUGHTER) If judges solely in theory. (LAUGHTER)

**ELDANI ALI:**

I said in theory.

**DAVID TOLBERT:**

In theory, yes. In practice-- I'd like to look at an assessment. I think it's-- there are real questions about that. And-- and it's well designed. And you deserve credit, as does-- do a number of other people. I wish I could say something about domestic prosecutions, but then I will lose Aryeh's friendship forever, so.

**ARYEH NEIER:**

Okay. (LAUGHTER) Diane-- a last word. But only-- a very brief last word, if you-- if you would like.

**DIANE ORENTLICHER:**

No. I-- I just wanna-- my last word will be to thank all of you not only for coming here this evening, but for all of the contributions so many people in this room have made over-- decades, and I know will continue to make. So--

**ARYEH NEIER:**

Okay.

**DIANE ORENTLICHER:**

--thank you very much.

**ARYEH NEIER:**

Okay. (APPLAUSE) Thank you very much. Again-- the book is called *Some Kind of Justice*.

\* \* \*END OF TRANSCRIPT\* \* \*