



## Lost in translation?

### The ICTY and the legacy of war crimes in the Western Balkans

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The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in May 1993 by the United Nations Security Council. As an enforcement mechanism created under Chapter VII of the UN Charter, its mandate was to contribute to the restoration and maintenance of international peace and security. It was supposed to achieve this goal through judicial means in recognition of an explicit link between peace and justice. An additional unstated, but often assumed, goal was reconciliation, which was considered by some to be implicit in its mandate and inherent to its function as a tool of peace building.<sup>1</sup> Almost twenty years later, and with its judicial work nearing completion, has it succeeded in fulfilling its mandate?

On one hand, the Tribunal can boast significant achievements in that it has

#### At a glance...

- *The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been very successful in bringing many accused to justice, in leading to the establishment of a permanent International Criminal Court and in demonstrating that holding leaders accountable is possible.*
- *However, there is considerable dissonance between the ICTY's judicial achievements in The Hague and attitudes and perceptions of the Tribunal in the region.*
- *In order for the Tribunal's legacy to have lasting impact, extensive efforts must be made to leverage the record of judicial success so as to ensure that its work is not 'lost in translation'.*

<sup>1</sup> Unlike the International Criminal Tribunal for Rwanda (ICTR), there was no explicit reference to reconciliation as a goal of the ICTY in its mandate. However, President Judge Jorda spoke of the Tribunal's "mission of reconciliation" during a speech in Sarajevo in 2001, and this mission was referenced in successive reports to the United Nations Security Council by the Tribunal's Presidents and in statements by its Chief Prosecutor, Carla Del Ponte. See Clark, Janine Natalya, "Judging the ICTY: Has it achieved its objectives?", *Southeast European and Black Sea Studies* 9 (2009): 123-142.

indicted and tried a large number of people including those at the highest levels of responsibility, and handed down a number of significant judgments, including on gender-specific crimes and relating to genocide. On the other hand, there remains considerable dissonance between this record of achievement in The Hague and how the

work of the Tribunal is perceived by those most directly affected by the crimes under its jurisdiction.

How and why this dissonance has arisen, and what might be done to address it, is the subject of this briefing paper. It will be argued that the dissonance between perceptions of the Tribunal in the region and the reality of its work in The Hague is (i) the manifestation of a considerable gap between the international community's aspirations for justice and the expectations of those in the region<sup>2</sup>; and (ii) a function of the way in which discussion of the ICTY has been framed by the media and in public discourse in the former Yugoslavia. There is room for cautious optimism, insofar as the trials have played a role in 'shrinking the space for denial' by prompting closer scrutiny of certain events and prompting public acknowledgement of responsibility for war crimes.<sup>3</sup> At the same time, there is some way to go before the legacy of these trials can be deemed to have played a truly significant role in the process of building lasting peace in the region. In order for the work of the Tribunal not to be 'lost in translation', extensive efforts must be made to leverage the judicial record and to build on the work undertaken by the Tribunal's outreach program.

### Doing justice, building peace

With regard to the first of its goals, delivering justice, the Tribunal can boast tremendous success. As of June 2012, the Tribunal has concluded proceedings against 126 of its 161 accused. Among its indictees are those at the highest levels of political and military responsibility. Its cases reflect the broad sweep of crimes, targeting all groups, and addressing the most notorious examples of ethnic cleansing and even genocide. On May 16, 2012, the trial of one of the last accused to be taken into custody, and one of the most notorious of its indictees, former Bosnian Serb military commander, General Ratko Mladić, opened in The Hague. Alone this is significant,

and in the context of the judicial record of the Tribunal thus far, even more so.

A residual impact of this record of judicial success was its impact on the peace process. The Tribunal made a pragmatic contribution through the indictment of certain key individuals (including the Bosnian Serb political and military leadership), which, by ensuring their removal from political and public life, created space for change.<sup>4</sup> The Tribunal also had an impact on rule of law and judicial reform in the region, acting as a catalyst for the creation of specialized war crimes courts in Bosnia, Croatia and Serbia, and transferring evidence and disseminating knowledge and jurisprudence to those courts. Lastly, the Tribunal cites its wider international impact among its achievements. Most significant is its role as a precedent, proving that international criminal justice is viable and leading to the establishment of other ad hoc international tribunals—and, in July 1998, a permanent International Criminal Court. It has also pioneered a number of significant developments in international criminal law and procedure that are outside the scope of this paper.<sup>5</sup>

But what of the Tribunal's contribution to building long-term peace through reconciliation? This aspect of the Tribunal's legacy is more ambiguous and difficult to assess. Reconciliation is taken here to mean the process of coming to terms with the past and with one another, which was thought to be vital to the process of building lasting peace in the region. Advocates of war crimes trials argued that strategies of ensuring individual accountability (rather than collective guilt) and establishing an historical record would help facilitate processes of reconciliation. On this measure, the record

4 Although there was unease at the time about the wisdom of such a move, in the end the publication of indictments against Radovan Karadžić and Ratko Mladić in July 1995 was instrumental in allowing for a peace agreement to be concluded because it effectively excluded them from the negotiations that led to the Dayton Peace Accords. See Kerr, Rachel, *The International Criminal Tribunal for the Former Yugoslavia: Law, Diplomacy and Politics* (Oxford: Oxford University Press, 2004), p. 187; Gow, James, "The ICTY, war crimes enforcement and Dayton: The ghost in the machine", *Ethnopolitics* 5/1 (2006): 49-65.

5 <http://www.icty.org/sid/324#developing>.

2 Stover, Eric, and Harvey M. Weinstein, eds. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. (Cambridge, UK: Cambridge University Press, 2005), p. 30.

3 Orentlicher, Diane F., *Shrinking the Space for Denial: The Impact of the ICTY on Serbia*, Open Society Justice Initiative, May 2008.

of the Tribunal is less impressive: while some small signs of progress exist, narratives of denial and victimhood remain deeply entrenched and attitudes and perceptions of the Tribunal in the region remain largely negative.

### Shifting narratives

On a positive note, there were signs that the ICTY was ‘shrinking the space for denial’ in Serbia.<sup>6</sup> Even in the absence of a judgment, the Milošević trial served an important purpose in this regard. The release of important visual evidence and key witness testimony was significant in opening up discussion of Serbia’s responsibility with respect to Srebrenica in particular.<sup>7</sup> More recently, the March 31, 2010 declaration of the Serbian parliament regarding Srebrenica, “condemning in the strongest terms the crime committed in July 1995 against the Bosniak population of Srebrenica” and apologizing to the families of the victims was seen as a “step in the right direction,”<sup>8</sup> followed up in 2011 with the arrest and transfer to the Tribunal of the last two remaining accused from Serbia, Ratko Mladić and Goran Hadžić. There were also signs that the Tribunal’s Outreach Programme and associated efforts to engage the younger generation was reaping benefits, although it is too soon to judge in the absence of systematic evaluation of these programs.<sup>9</sup>

However, the problem for the ICTY and its legacy in the former Yugoslavia remains that denial of responsibility

among Serbs and Croats goes hand in hand with, and is reinforced by, narratives of victimhood—to an extent that is proving difficult to shift. The results of a recent opinion poll conducted jointly by the OSCE, Ipsos Strategic Marketing, and the Belgrade Centre for Human Rights confirmed that attitudes toward the ICTY in Serbia remain largely negative (with 71% of respondents expressing negative (45%) or extremely negative (26%) views of the ICTY, compared with only 14% positive or extremely positive.)<sup>10</sup> According to a recent study, the situation is little better in Croatia, where negative perceptions of the ICTY were based on its perceived failure to address crimes against Croats (in particular, the November 1991 siege of Vukovar).<sup>11</sup>

Among Bosniaks, initial enthusiasm for the ICTY gave way to a sense of disconnection, disillusionment and disappointment.<sup>12</sup> In part, ambivalence toward the Tribunal can be attributed to inherent shortcomings associated with the relationship of retributive justice to the needs of victims. The Tribunal was simply not equipped to satisfy the myriad expectations placed upon it (nor was it the appropriate mechanism to do so). Attention is now shifting toward finding alternative, but complementary, restorative justice approaches aimed at addressing more directly the needs of victims, and in particular, their expressed desire for compensation.<sup>13</sup> This is long overdue, but it might prove a fruitful way of engaging and utilising

6 Orentlicher, *Shrinking the Space for Denial*.

7 The June 2005 release of the videotape in which members of a Serb paramilitary group, the Scorpions, were shown executing a number of young Bosnian Muslim men after the fall of Srebrenica in July 1995 was instrumental in opening up discussion of Serb responsibility for war crimes, which until then were subject to blanket denial. For discussion, see Zverzanovski, Ivan, “Watching War Crimes: The Srebrenica Video and the Serbian Attitudes to the 1995 Srebrenica Massacre”, *Southeast European and Black Sea Studies*, 7, 3 (2007): 417-430.

8 The International Centre for Transitional Justice dubbed the Resolution “an imperfect but important step” in a press release issued shortly afterwards on 9 April 2010. <http://www.ictj.org/en/news/features/3619.html>

9 “IWPR’s Bosnian Films Offer Alternative Vision”, 16 May 2012, at <http://iwpr.net/report-news/iwprs-bosnian-films-offer-alternative-vision>; Also see: <http://www.icty.org/sections/Outreach>.

10 *Attitudes toward war crimes issues, ICTY and the national judiciary*. Poll conducted by the OSCE, Ipsos Strategic Marketing and Belgrade Centre for Human Rights, Belgrade, October 2011. Compare with the same poll conducted two years earlier, in which 72% were negative or extremely negative and 14% positive or extremely positive. *Public perception in Serbia of the ICTY and the national courts dealing with war crimes*. OSCE, Ipsos Strategic Marketing and Belgrade Centre for Human Rights, Belgrade, 2009.

11 In actual fact, as Clark notes, Goran Hadžić was indicted for crimes committed in Serb-run camps in Vukovar and throughout Croatia. The other cases concerning Vukovar either ended before judgment was issued, due to the death of the accused (Dokmanović), or were transferred. See Clark, Janine Natalya, “The ICTY and Reconciliation in Croatia: A Case Study of Vukovar”, *Journal of International Criminal Justice* 10 (2012): 397-422.

12 Saxon, Dan, “Exporting Justice”, 562.

13 See, for example, Simon Jennings, “EU Urged to Boost Balkan Reconciliation Efforts”, IWPR Report, May 2009; and *The EU and Transitional Justice: From Retributive to Restorative Justice in the Western Balkans*, Humanitarian Law Centre, Belgrade, 2009.

the judicial legacy of the Tribunal. Other, more concrete complaints concerned sentencing decisions, the practice of plea-bargaining, and criticism that the Tribunal did not reach further down the chain of command. For victims, it is not always the most senior perpetrators who matter the most: “Everybody talks about Karadžić and Mladić, but the whole Drina River Valley is full of Karadžićs and Mladićs who still walk free, and haven’t even been indicted for the crimes they committed.”<sup>14</sup>

From every angle, then, there are degrees of dissonance between the The Hague’s record of success and the largely negative way in which it is perceived in the region. The reasons for this dissonance are manifold and complex. However, one clear lesson is that, in general, the policy of ‘Hague conditionality’ has been both a blessing and a curse: a blessing in that it forced both governments finally to begin to comply with requests from ICTY (allowing it to function), but a curse in that discussion of ICTY and war crimes issues was overlaid by questions of ‘Hague conditionality’ rather than fostering direct engagement with issues of moral and legal responsibility. In Croatia, years of non-compliance and negative propaganda concerning the ICTY under President Franjo Tudjman were followed by instrumental cooperation and a grudging acceptance of the necessity of dealing with the war crimes legacy in order to achieve the highly valued goal of EU accession.<sup>15</sup> Even more than Croatia, Serbia’s path to EU membership was caught between the Scylla of ‘Hague conditionality’ and the Charybdis of denying Serbia’s role in the commission of war crimes.

A key element in all this was the way in which the ICTY was presented by politicians and in the media

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14 Cited in, “The Hague Tribunal and Balkan Reconciliation”, Institute for War and Peace Reporting, London, The Hague and Ahmici, 21 July 2006.

15 For discussion of how issues of cooperation and dealing with the legacy of war crimes was ‘hijacked’ by domestic politicians, in particular in relation to goals of EU membership, see Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, NY: Cornell University Press, 2009).

within Serbia and Croatia, as well as among Serb and Croat constituencies in Bosnia, as a cross to be borne rather than an opportunity to address the legacy of the region’s violent past. Entrenched narratives of denial and victimhood, and the nature and tone of public discourse and media reporting of the Tribunal, created significant obstacles to its ability to transmit an alternative narrative. They thus impeded its capacity to contribute to the process of coming to terms with the legacy of war crimes in all three countries. Media coverage of the Tribunal tended to focus on a handful of high-profile cases concerning crimes committed against Serbs or Croats respectively; and indicted persons who surrendered to the custody of the Tribunal were treated as heroes.<sup>16</sup> Of course, this is not the Tribunal’s fault; but its failure early on to engage in effective outreach meant that it lost the initiative in communicating its work and establishing its legitimacy.


### Lessons and legacies

One clear lesson for transitional justice processes and mechanisms, especially courts, is that outreach aimed at fostering real critical engagement with the process, as well a sense of ownership of it, must be made a priority early on and pursued consistently and forcefully throughout. Second, more consideration must be given to alternative paths to reconciliation and how they interact with the process of doing justice. In particular, there is a pressing need to consider how better to manage inherent tensions arising from overlapping and/or contested interests, values, and expectations of justice. Understanding and fully acknowledging the role and function of transitional justice as just one element in the complex and multi-dimensional process of peacebuilding—conceptually and materially and in both the short and long term—

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16 Content analysis of local media coverage of ICTY using WorldNews Connection for the years 2005-2010. See, for example, “Serbian Minister Says Orić Verdict Strips ICTY of ‘Last Traces of Credibility’”, Tanjug, 3 July 2006; “Jocic: Verdict in Orić Case Constitutes Grave Injustice”, BETA, 3 July 2006; “Tribunal’s Verdict Is Sombre One, Mockery of Justice: Koštunica”, Tanjug, 3 April 2008.

offers the best chance for it to achieve a measure of success as a tool of peace.

There is room for cautious optimism in the former Yugoslavia. The scope of the Tribunal's outreach programme has transformed radically from its first faltering steps, so that it now has real potential to change attitudes. (This is particularly true among the younger generation, with whom it is focusing much of its efforts and resources.) These efforts deserve support as a means of utilising and leveraging the record of the Tribunal and fostering real critical engagement with its work—not to indoctrinate, but to encourage questions and discussion. Such a result is critical because unless perceptions of the Tribunal shift over the course of the next few years, its legacy will suffer the consequences and its record of achievement will be forever lost in translation, mediated by political manoeuvring and a hostile media. 

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