

Assessing the ICTY's legacy

Last week (22-24 June 2017), Sarajevo hosted the [ICTY Legacy Dialogues Conference](#), organized by the International Criminal Tribunal for the former Yugoslavia (ICTY), in order to discuss what it had accomplished before it closes its doors this December. After two decades, 161 accused, a number of complex trials finished, and with zero fugitives remaining, over 200 people gathered in the once-besieged city to talk about this important institution. The ICTY is, indeed, important, as it signaled a dramatic change in how the actors often vaguely called 'the international community', respond to mass atrocity. It was a reaction to the carnage in the former Yugoslavia, at a moment when it was politically possible in the UN Security Council, and it was the first time since Nuremberg that numerous states came together to support pursuing justice. Some of the first ICTY employees spoke at the conference, describing how in the early days they had nothing – almost no colleagues, no budget, no rules of procedure and evidence, no judges, no roadmap as to how to investigate and prosecute cases, no indictments, and no defendants. This post is a reflection on what the court has achieved.

Perceptions of Justice

The justice the ICTY rendered was imperfect. Some of the factors leading to unfortunate outcomes are now, with the benefit of hindsight, easy to spot. A good example is the never-completed Milosevic trial. Goran Hadzic died too, before judgment, leaving us speculating over how the trial would have ended. Others died before they were apprehended and transferred to The Hague. Of course, there were also controversial acquittals. Acquittals are to be expected and they happen domestically, and there is something to worry about if the tribunal sentences every single defendant, almost automatically. However, some of those acquittals seemed to stand on weak ground, thereby opening themselves up to accusations of being unfair.

Sentencing was another issue that created frustration in the victim communities. As we know, the public rarely has the time or the energy to follow proceedings in detail – trials go on for years, several times a week, multiple hours a day. It's a full time job, following the evidence being presented. The public reacts to the decision, guilty or innocent, and the sentence, much else is lost in the noise. The journalists covering the trials are often on patriotic missions, and not professional ones. These trials are complicated, dealing with complex legal questions, and expecting the public to follow them daily is unrealistic. That is why outreach is vital, providing facts about the crimes, and the trials, to the local communities, through events, and documentary films. Transcripts and live streaming, these incredible resources, were mostly used by those with a particular interest in trials, such as historians, and not the general public.

That is why specialized reporting was, and remains, incredibly important. The work of the [Sense News Agency](#) that produced thousands of daily reports, hundreds of weekly TV reports, and several documentaries on the trials is crucial. They produced those reports for the public to consume free of charge, and those reports were accurate. Sense brought stories and experiences from survivors, and hundreds of them told us about what were the worst days of their lives. As hard as it is to select one testimony that touched me personally, Witness O, a survivor of the mass killing campaign after the fall of Srebrenica testifying in the Krstic trial, feels like a punch in the stomach every time I hear it. Sense brought us testimony from insiders, unveiling how structures that implement violent campaigns work: political structures, parties, armies, police and paramilitaries. Had it not been for the Tribunal, those stories would largely have been left untold.

Those testimonies, and the judgments the ICTY renders do not necessarily contribute to reconciliation, as we have seen, but they do 'shrink the space for denial' as Diane Orentlicher observed some years ago. Jennifer Trahan made the point at the conference, that proceedings do not achieve reconciliation on their own, but provide a building block for reconciliation in the long-term, and support the

establishment of the rule of law. To expect a court to reconcile is simply unrealistic, and the ICTY now seems to realize that its early ambitions were overly optimistic.

As stated by ICTY President Agius, ICTY's first achievement was to counter impunity, and with that we must agree. Many cases still remain to be prosecuted in the future, locally, but without the ICTY – there would have probably been nothing, apart from maybe prosecutions done by local authorities with the purpose of scoring political points. Much has been said elsewhere about ICTY contributions in jurisprudence, so I won't go into it in detail. The conference heard about how the Office of the Prosecutor approached investigations and building cases; about contributions in dealing with sexual violence in court; about the practices in witness protection and support; and the challenges the defense faced.

Legacies

The importance of the ICTY is visible in a number of its contributions. For a historian such as myself, one stands out, and that is the vast, incredibly rich archive that this tribunal leaves behind. Today, the ICTY archives are the single most important repository of the horrors that ripped Yugoslavia apart. For a former Yugoslav such as myself, it holds the some of the answer to the question: what happened to us? Without the ICTY's trials, we would not know so well what happened in Vukovar, Dubrovnik, Prijedor, Sarajevo, Srebrenica, Foca, Visegrad, Zvornik, Bijeljina, Mostar, Ahmici, Celebici, Podujevo, Suva Reka, and many other places. For the people that suffered there, we have an obligation to know.

The ICTY archives, and the trials they were created through, create an opportunity for us to learn. The fact that these records are put online, in the [ICTY Court Records Database](#), has to be commended as other courts are reluctant to grant such access. Looking back, and thinking of the legacy of the ICTY, it seems that, for a historian, the process, i.e. the trials mattered almost as much as the outcome. Historians are

not burdened by the 'beyond a reasonable doubt' standard, and can write, using the archives, for decades to come.

Much focus has been placed on genocide, when discussions turn to ICTY judgments, while forgetting that crimes against humanity are just as horrible, and that the victims that died as a result of them are just as dead, and their families suffered just as much. It seems to be unhelpful to focus exclusively on legal qualifications, while forgetting that some justice, imperfect justice, has been achieved: someone is going to prison, and some facts have been established.

The Tribunal has contributed greatly in establishing facts, and even helping to determine individual destinies of victims by searching for mass graves, and contributing to the efforts to establish their identities. Not directly tied to the ICTY, but visible during the conference, was the large number of individuals speaking both on the podium, and from the audience, showing just what kind of thriving civil society has been built in the past twenty years across the region. NGOs support traumatized survivors; preserve and share documentation concerning mass atrocities and ethnic cleansing; lobby, advocate and legally represent survivors and families of victims; and fight for the rights of camp detainees, victims of rape, sexual abuse and torture. People spoke eloquently and passionately about the work they do, and the cooperation they have with other associations across state borders and ethnic divides.

The future

As much as the closure of the ICTY seems like an end, in fact – much remains to be done. At the end of this year, we should see the first instance judgment in the case of Ratko Mladic. Furthermore, The ICTY has to finalize the mammoth Prlic et al. trial. The Mechanism for International Criminal Tribunals (MICT), the ICTY's residual institution, has much on its plate: few cases, but complex ones – Stanasic and Simatovic, Serbia's State Security chiefs are currently on retrial, and the appeal in Karadzic and Seselj remain, all complex cases.

The MICT will also be doing the Mladic appeal. For that, the Outreach department, with the ability to communicate effectively with the peoples in the region, in the languages they understand, must remain as a constituent part of the institution. The public must be appropriately informed about the process and outcomes of these important proceedings, to counter destructive nationalist narratives. Stanasic and Simatovic, Seselj, Mladic and Karadzic are not something minor, which we can now just forget about.

For the future, special attention must be paid to local prosecutions, across the region. Those efforts still suffer from numerous problems: political pressures, underfunding, lack of capacity in some cases, and lack of will in others. I worked at the State Court in Sarajevo, for the Special War Crimes Department, a decade ago. What I heard during this conference is that the problems the local prosecutions face now are pretty much the same ones we faced ten years ago. Only now, there seems to be less political pressure, and support, from abroad. Much time has passed since the war, and the international actors are (understandably) moving their attention elsewhere. However, after what the international community has invested, it would be a shame to see all that potential not being carried through. Realistically, we have a decade or so left, before many of the potential defendants are dead. Local prosecutors must prosecute complex cases, against everyone, irrespective of ethnicity, and without political agendas, decisively and – this is key – go up the chain of command.

Saranda Bogujevci, a survivor of a horrendous crime in Kosovo, spoke eloquently in Sarajevo about the need to support witnesses. That must be a constituent part of local efforts in the future. Furthermore, robust support must be ensured for the defense in war crimes trials, so that counsel have the ability to defend, and that fair trial rights are observed. If these trials are unfair, then the entire project of prosecuting alleged war criminals is tainted.

Now, as we see the ICTY close, it is important to think about ways in which others can learn from this experience, in places like Syria. Sense

News special projects, like the online narrative on Srebrenica, must continue, to bring the work of the ICTY closer to the public. The Humanitarian Law Fund from Belgrade, and others, should continue their efforts to unmask the role of structures and individuals in the massive victimization people in the former Yugoslavia suffered. For that, the archives are key: they must be made as accessible as possible. Maybe harmony and shared histories are impossible to reach between different communities in the region, but what we can and should expect is a fact-based discussion about the past, and trying to hear each other with an intent to understand, and not to blame.

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