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International Justice Marks Its Fifteenth Anniversary: A Preliminary Assessment of the ICTY's Impact in Serbia¹

*By Diane Orentlicher**



December 14, 1996 signing of the Dayton Peace Agreement in Paris, ending the war in the former Yugoslavia.

Fifteen years ago, the UN Security Council responded to devastating violence in the Balkans by taking novel action: it created a war crimes court as an enforcement measure under Chapter VII of the UN Charter.² At the time, many saw the Council's action as a cynical gesture, aimed at placating public demand for more assertive action to halt the carnage then in full rage in Bosnia-Herzegovina. Few, if any, believed that the Council's ad hoc innovation would become precedent for future action.

Yet despite its inauspicious beginning, the International Criminal Tribunal for the former Yugoslavia (ICTY) launched a new era in international law and institutions. What had long seemed implausible—a revival of Nuremberg-type tribunals—soon became a normal though hardly routine response to mass atrocities. A year and a half after it created the ICTY, the Security Council created a similar court to provide some measure of justice for those who survived the 1994 genocide in Rwanda.³ Since then, the UN has played a key role in creating—sometimes together with a host State—courts empowered to address notorious crimes committed in Sierra Leone, Timor Leste, Kosovo, Cambodia, Bosnia-Herzegovina and Lebanon. By the time a permanent international criminal court began its legal life in 2002, the institutionalization of global justice seemed more inevitable than remarkable.

The proliferation and lengthening life of contemporary tribunals has spawned robust debate about their accomplishments. Citing their substantial costs, critics charge that war crimes tribunals have accomplished comparatively little and may even at times stand in the way of progress in areas as urgently important as securing a peaceful end to conflict or a stable foundation for social reconstruction. Proponents acknowledge that international tribunals have hardly operated in a flawless fashion and are quick to note that expectations for such courts should be kept within reasonable bounds. Yet, they argue, these bodies have helped dispel impunity for vicious crimes, deepened jurisprudence concerning international humanitarian law and, perhaps most important, honored and partially redeemed victims' suffering for crimes that should never have been permitted to sweep unchecked.

While views on all sides have evinced deep conviction, they have rarely been grounded in empirical evidence. In this setting, and with the fifteenth anniversary of the ICTY then looming on the near horizon, I devoted a recent sabbatical year to studying the ICTY's impact on the ground in countries most directly affected by its work.⁴ In May 2008, on the fifteenth anniversary of the ICTY's creation, the Open Society Justice Initiative published the first tranche of this research in a report, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* ("Shrinking the Space for Denial").

The report identified tangible impacts—these include, of course, the incapacitation of indicted war criminals, such as former Yugoslav President Slobodan Milošević—while trying

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to capture the unquantifiable but consequential significance of these and other ICTY-related developments for Serbian society, both positive and negative. In brief, the study identified several key categories of *impact*—a concept whose meaning for purposes of the report was informed in part by the views of Serbian citizens.⁵

Serbian supporters of the ICTY believe that, in myriad ways, the Tribunal's work has strengthened social norms and institutions that form a crucial bulwark against a return to the violence of the 1990s.

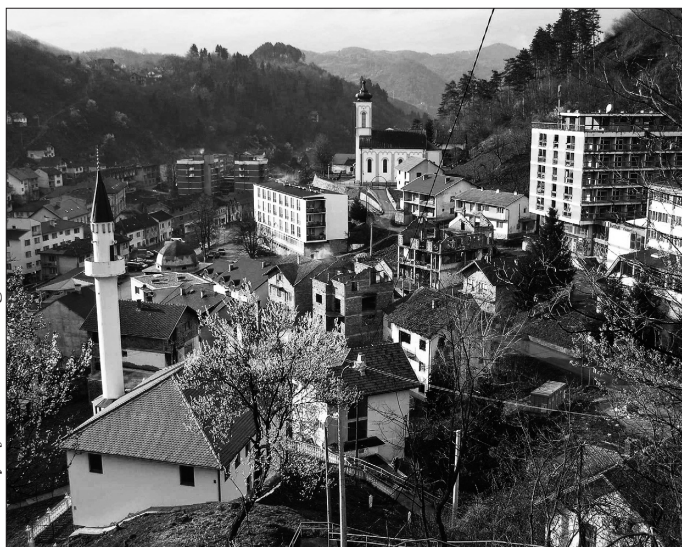
DETERRENCE VS. PREVENTION: DISPELLING IMPUNITY

Tribunal skeptics charge that the ICTY has failed to achieve one of its core aims—to deter further atrocities. As has often been noted, the worst atrocity in Europe since the Holocaust, the 1995 genocide in the Bosnian town of Srebrenica,⁶ occurred *after* the ICTY had begun operating. Nor did the ICTY prevent Serbian atrocities in Kosovo, which prompted a 1999 military intervention by the North Atlantic Treaty Organization.

But if the ICTY failed to deter *these* crimes, this does not close the book on the question whether or to what extent a more fully functioning international tribunal can deter crimes (or even whether the ICTY has deterred *some* crimes). After all, the ICTY had managed to secure custody over just one, low-level suspect by the time the Srebrenica massacre occurred, and its ability to secure custody of indictees remained problematic at the time abuses surged in Kosovo. Many are convinced that over time, as the ICTY has gained custody over most of its indictees, including senior officials, it has deterred atrocious crimes that would have been committed but for its existence—a proposition that by its nature cannot be proved. (Indeed, the study did not attempt to reach conclusions on this dimension of impact.)

While it is impossible to gauge the extent to which (if any) the ICTY has deterred criminal conduct, this point should not be confused with a related question: whether it has served a broader preventive function. Serbian supporters of the ICTY believe that, in myriad ways, the Tribunal's work has strengthened

Courtesy of Daniel Zollinger



Srebrenica, Bosnia and Herzegovina – City Center.

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Many Serbians are convinced that, without the ICTY, there would have been wholesale impunity for 1990s era atrocities committed by, or with the indispensable support of, Serbian leaders. In the words of Serbian journalist Filip Svarm, “It’s simple. If not for the Hague Tribunal, no one would ever actually bring to trial anyone who committed these crimes.”⁷ “The message,” Serbian human rights lawyer (and WCL alumnus) Bogdan Ivanišević believes, would have been that “one can do whatever he wants to do because he’s in power and that’s it. That kind of message would be disastrous. The ICTY prevented that from happening.”⁸ Instead of allowing wholesale impunity, another Serbian activist told me, the ICTY demonstrated that “there is no one who can order killings and stay unpunished.”⁹

IMPACT ON THE RULE OF LAW: DOMESTIC WAR CRIMES PROSECUTIONS

While many Serbians believe that the ICTY’s prosecutions have themselves gone a long way toward dispelling impunity, a more tangible contribution—one that is closely bound up with the Tribunal’s preventive function—has been its role in spurring the creation of a credible system of domestic war crimes prosecutions. Almost everyone I interviewed in Serbia believes that the ICTY provided crucial impetus for the creation in 2003 of a War Crimes Chamber (WCC) in the District Court of Belgrade and that the ICTY has bolstered that court’s capacity to investigate and prosecute war crimes.

Striking in its own right, this development is the more remarkable because strengthening domestic legal capacity was not one of the original goals of the ICTY. To the contrary, a central premise behind its creation was that courts in the former Yugoslavia were unable or could not be trusted to bring perpetrators of atrocities to justice.

Space does not permit more than a few, incomplete observations about how this unexpected contribution came to pass (*Shrinking the Space for Denial* examines the phenomenon in some depth). Notably, Serbians see the ICTY’s operation as a harsh judgment on Serbian justice. Once political conditions in Serbia made local war crimes prosecutions viable (this develop-

ment emerged alongside pressures for the ICTY to wind up its own work in part by transferring some of its cases to domestic courts), the Serbian War Crimes Prosecutor was keen to demonstrate local competence, as a matter of national and professional pride. In larger perspective, as the President of the WCC told me, the ICTY was “the embryo” for his court, providing the “idea” as well as “know how”.¹⁰

Against a protracted period of Serbian hostility toward the ICTY, it is nothing less than remarkable that the word most often used to describe the relationship between the ICTY Prosecutor and his Serbian counterpart is that of “partnership.” Notably, when the ICTY at long last obtained custody of Radovan Karadžić—one of its most notorious fugitives from justice—in July 2008, ICTY Prosecutor Serge Brammertz hailed the achievements of his “colleagues in Belgrade” who secured custody of Karadžić, including the Serbian War Crimes Prosecutor.¹¹

REMOVING DANGEROUS INDIVIDUALS

In the view of some Serbians interviewed for my study, another key dimension of the ICTY’s preventive impact, broadly defined, is the Tribunal’s role in “physically removing some of the worst criminals” from the region, which journalist Dejan Anastasijević describes as an important contribution “that is usually neglected by experts.”¹² Some believe that the ICTY’s prosecution of former President Milošević in particular facilitated Serbia’s transition to democracy (a process that has nonetheless been halting and vexed). In the words of an official of the first post-Milošević administration, the former leader’s “removal . . . was something that had to be done in order to make the next step in our democratization process. He would have been an unbearable burden [if he were tried] in Serbian jurisdiction.”¹³

SHRINKING THE SPACE FOR DENIAL

Serbian who support the ICTY believe that one of its most important functions is to foster a fuller reckoning by Serbian society with past atrocities committed by or at the instigation of their leaders—and to condemn them unequivocally. Public opinion surveys suggest that the ICTY’s impact in this regard has been modest at best. Only half of the respondents surveyed in December 2006 reported, for example, that they believed reports that a large number of Muslims had been massacred in Srebrenica.¹⁴

Yet few doubt that evidence introduced in The Hague has, in the words of Serbian attorney Ivan Janković, significantly “shrunk the public space” for denying the truth about notorious crimes committed by Serbs.¹⁵ A video of a Serb paramilitary unit executing six Bosnian Muslim men who were taken from Srebrenica during the 1995 genocide there, shown during the trial of Slobodan Milošević, had a galvanizing impact in Serbia. Repeatedly rebroadcast on Serbian television, the video “ripped away the veil of secrecy and denial of Serbian military operations in Bosnia,” the *Washington Post* reported. “No longer was it possible to label atrocity tales as Bosnian Muslim propaganda . . . , as many Serbs had done for a decade.”¹⁶ Still, as civic leader Jadranka Jelenčić noted, this knowledge “doesn’t necessarily make people regret” crimes they can no longer credibly deny.¹⁷

THE WORK OF GENERATIONS

Fifteen years after the ICTY’s creation, it is now possible to take a preliminary measure of its impact. By equal measure, however, it is far too soon to know its legacy. Scholars of the Nuremberg Tribunal know that its impact in Germany has unfolded and evolved across decades. So, too, the impact of the ICTY will be the work of generations. **HRB**

ENDNOTES: International Justice Marks Its Fifteenth Anniversary

¹ This essay is adapted from Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Justice Initiative, 2008).

² S.C. Res. 827, ¶ 2 (25 May 1993). This resolution was preceded by an earlier resolution in which the Security Council decided that such a tribunal would be established. SC Res. 808, ¶ 1 (22 Feb. 1993).

³ S.C. Res. 955, ¶ 1 (8 Nov. 1994).

⁴ Research support was provided by the Canadian Government, the Open Society Institute and the Washington College of Law.

⁵ As the report explains, it does not explore the important issue of ICTY impact on victims, as this dimension of impact is relevant principally for countries and regions in the Balkans other than Serbia proper.

⁶ The Srebrenica massacre has been judged to constitute genocide by the International Court of Justice and the ICTY. See Case Concerning the Application of the Convention on the Prevention

and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ¶ 297, 26 Feb. 2007; *Prosecutor v. Radislav Krstić*, Case No: IT-98-33-A, Appeal Judgment, ¶ 37 (19 Apr. 2004).

⁷ *Shrinking the Space for Denial*, p. 17.

⁸ *Id.* at 17–18; 39.

⁹ *Id.* at 18; 39 (quoting Andrej Nosov).

¹⁰ *Id.* at 48 (quoting Judge Siniša Važić).

¹¹ See *id.* at 6.

¹² *Id.* at 17; 41.

¹³ *Id.* at 17; 42 (quoting Dušan Protić).

¹⁴ See *id.* at 60.

¹⁵ *Id.* at 19; 63.

¹⁶ Daniel Williams, *Srebrenica Video Vindicates Long Pursuit by Serb Activist*, *Washington Post*, June 25, 2005.

¹⁷ *Shrinking the Space for Denial*, pp. 19; 63.