

Convincing the people of international criminal courts: what can outreach really achieve?

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by:

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The context: The ICTY and the former Yugoslavia

26 years ago, the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) was set up by the United Nations Security Council to try perpetrators of war crimes, crimes against humanity, and genocide committed during the conflicts of the 1990s in Croatia, Bosnia and Herzegovina (BiH), Serbia, and Kosovo. The ICTY had dealt with 161 defendants until it closed in December 2017, convicting the worst war criminals and acquitting those whose responsibility could not be proven. In doing so, it significantly contributed to the global understanding of international humanitarian law and developed important norms of international criminal law and criminal procedure.

While its trial work is widely renowned as a success story, its effects “on the ground”, in the countries of the former Yugoslavia, are more contested. Has the Tribunal contributed to more peaceful relations between the people in the region – in particular, between Serbs, Croats, Bosniaks, Albanians? Has it contributed to the rule of law and to a culture of legality? Has it contributed to truthful storytelling about what happened during the wars? To put it short: hardly anyone in the former Yugoslavia is convinced that it has. People in the region have always been and still are deeply divided in their perception of the ICTY, with many outright hating it, some thinking that it has neither done good, nor bad, and few thinking that it has furthered peace, reconciliation, and the rule of law in the former Yugoslavia.

Using the example of Serbia and Bosnia and Herzegovina, this post analyses why the people in both countries react so differently towards the Tribunal. It starts by explaining the ICTY’s biggest PR strategy mistake. The post then goes on to explain the factors that limited the Tribunal in having a greater positive effect on the ground that are largely beyond its control. I conclude by admitting that while mistakes were made, under the given conditions, the ICTY could hardly have achieved more in terms of acceptance of its verdicts, had it not made that initial mistake.

Outreach: too little, too late

When the ICTY was established 1993, its agents’ and supporters’ main aim was to make it a

functioning criminal court. The truth is, that it took more than a year until the first indictment against a suspected war criminal (Dragan Nikolić) was filed, another year until the first defendant (Duško Tadić) arrived in The Hague, at the seat of the Tribunal, and yet another year until his trial began. It would take until the beginning of the new century until the Tribunal's courtrooms would be used at their full capacity. Hence, while people were still preoccupied with getting the Tribunal running, no one really thought about how the ICTY's work would be perceived in the region of the former Yugoslavia. Only in 1999, then-president of the Tribunal Gabrielle Kirk McDonald established the so-called outreach programme. As its name suggests, the programme foresaw measures to reach out to the local constituencies of the Tribunal. The goal was to bring its work closer to the people, to explain them its functioning, and to engage them in its successes.

Many have criticised that the ICTY's outreach programme came too late and was too limited in scope. By the time it was established, opinions about the Tribunal had already settled and it would be impossible for it to change people's minds with nothing more than a few promotion events in the region. Indeed, the outreach programme suffered from a constant lack of funding, mainly caused by the fact that it was financed by voluntary donations instead of the Tribunal's budget. This significantly limited its possibilities. The outreach programme did conduct a series of events in Serbia, Bosnia and Herzegovina, Croatia, and Kosovo, it invited local stakeholders to The Hague, it conducted trainings for local legal professionals, and workshops for local journalists. However, its scope and scale was nothing compared to the powerful political and media propaganda machines often working against the ICTY in the region.

Could outreach have changed something? An analysis of local debates

Indeed, Serbs – both, in Serbia and in Bosnia and Herzegovina (the Bosnian entity “Republika Srpska” is mostly inhabited by Bosnian Serbs – have a very low opinion of the ICTY, often tipping over into open animosity or outright hatred. Serbs feel that the Tribunal is biased against their people, as most of the indictees and most of the convicts are of Serb ethnicity. At the same time, a few high profile accused (like General Ante Gotovina from Croatia, the former KLA commander Ramush Haradinaj, or the Bosnian Army commander Naser Orić) were acquitted by the ICTY. Serbs often criticise the Tribunal for “victor's justice”.

In contrast, Bosniaks (Bosnian Muslims) are mostly positive about the ICTY – often precisely for the same reasons Serbs hate it. Bosniaks are the largest victims' community and many find at least some satisfaction in the existence and work of the Tribunal, especially, for instance, for its guilty verdicts for the genocide committed in Srebrenica against Bosnian Muslims in July 1995.

Croats – both, in Croatia and in Bosnia and Herzegovina (the Bosnian entity “Federation” is partly inhabited by Bosnian Croats) – don't have a particularly favourable opinion about the Tribunal, but go along with liking or hating the Tribunal whenever one of “theirs” was acquitted or convicted.

The media and political elites: Active sabotage of the ICTY

The perceptions have been reinforced by the media, of which large parts have been constantly misrepresenting the ICTY's work, by exaggerating its flaws and omitting its successes. The same tactic is followed by many politicians. Especially in the deeply divided society of Bosnia and Herzegovina, the ICTY became the punching ball for politicians, especially in the run-up to elections. But also in Serbia, ICTY bashing still today helps casting a few more votes.

Political elites in Serbia, but also in Bosnia and Herzegovina, did not only verbally fight the Tribunal – other actions have also contributed to undermining the ICTY’s impact on the ground. For instance, Serbia has a long history of constant non-cooperation with the Tribunal, interrupted only by a few moments of “coerced willingness” (most notably, the EU used its leverage on behalf of the ICTY over Serbia in the context EU accession negotiations) to surrender accused or give access to evidence located in Serbia. In addition, in the early years, Serbia had a law in place that would foresee the accused’s legal fees to be paid with tax payers’ money. This clearly sent the message that “they are still one of us” and that the state would be (literally and figuratively) supporting them throughout their trials at the ICTY. In recent years, when ICTY convicts started coming back to Serbia after having served (two thirds of) their sentences, Serbian politicians currently in power have been welcoming them with open arms (sometimes literally, as the [Serbian ministers for labour, defence, and justice awaited war crimes convict Vladimir Lazarević at the Belgrade airport in 2015](#)). This gesture is not only an affront to their victims, but undermines the message of the ICTY that convicts have committed terrible crimes and are not worthy of public recognition and appreciation. While criticising the ICTY is one thing, these ways to actively boycott its work amounts to a whole other level of sabotage.

Legal professionals: Aligning with the public opinion

Another relevant group in the discourse about the ICTY are local legal professionals. In Bosnia and Herzegovina, large parts of the legal community have, in one way or the other, been in touch with the Tribunal, either as defence counsel, or as interns at the ICTY Office of the Prosecutor, or as one of those who are nowadays working in the domestic institutions dealing with war crimes. The latter group has had extensive contacts with their ICTY colleagues, either through trainings, mutual visits, or on a daily basis while exchanging evidence or cooperating over protection of common witnesses and the like. Many of them are aware of the ICTY’s legal flaws and the criticism that also international legal experts sustain towards the ICTY (think of the overly long trials, with extreme cases of defendants being in “pre-trial” detention of up to 11 years, as in the case of Vojislav Šešelj, or, concerning substantive law, the concept of joint criminal enterprise III which very much resembles guilt by association). Nevertheless, Bosnian legal professionals’ overall assessment of the ICTY is generally positive. During field research in Bosnia and Herzegovina, I talked to about 30 legal professionals, with almost all of them expressing their greatest respect for the ICTY, its fair trials, knowledgeable judges and prosecutors, and legally sound and well-written judgments. With this in mind, one understands that the Bosnian war crimes institutions seek to pick up the work where the ICTY left it: judges, prosecutors, and defence counsel read ICTY jurisprudence and cite both the facts and the law the Tribunal has established, when relevant and useful to their own cases. Legal concepts that the ICTY has developed, such as joint criminal enterprise, are largely followed in BiH. The factual findings of domestic institutions are mostly congruent with those of the ICTY, most notably, the finding that genocide has been committed in Srebrenica.

In contrast, in Serbia, even legal professionals don’t recognise the genocide of Srebrenica (not even to speak of political elites and the general population): in a recent indictment – the first for the events in Srebrenica – the domestic war crimes prosecutor has charged the defendants with war crimes, instead of genocide. The legal professionals I spoke to in Serbia tend to join in into the negative perception of the Tribunal in The Hague. It is interesting to see that while their criticism of the ICTY’s legal work is similar to that of their Bosnian colleagues, they come to a different conclusion, namely that the Tribunal has not done a good job and is not an authoritative institution worth of their respect. As one former ICTY defence counsel explained it to me: “When speaking to students, or my colleagues, and friends, I want to

support some positions of [the] Tribunal.” However, he finds the fundamental shortcomings of the ICTY to be “very difficult to explain”. This illustrates the dilemma of the Serbian legal community: while many of them might *want* to promote the Tribunal towards their compatriots because they support its mission of establishing accountability for crimes, they feel that they lack the necessary arguments to do so. And their disappointment with the Tribunal also significantly lowers their motivation to work against the powerful propaganda machines of the media and political elites. Consequently, in Serbian war crimes institutions, one would rarely reference the ICTY, and certainly not in order to support one’s arguments.

Civil society organisations and the international community: important supporters

This illustrates that in Serbia there is almost no one who would counter allegations of bias or incompetence towards the ICTY. While there are a few civil society organisations, who work meticulously and seriously on the issue of war crimes and addressing the past and who promote the Tribunal, their voice is hardly heard. They don’t get much – and certainly not favourable – media coverage and so their message is heard only by a very small selective community.

This is very different in Bosnia and Herzegovina. Political elites and media resort to a more moderate language when it comes to the ICTY – also because they know that too harsh criticism would immediately be countered by one of the numerous and powerful victims’ associations who are very active in Bosnia and Herzegovina. In addition, the ‘international community’ that settled into the country after the war in order to build up its ruins is also still very present and a loyal supporter of the Tribunal.

Conclusion: different explanations are warranted

In Serbia, people lack any direct experience of the crimes the ICTY adjudicating, as the wars mostly took place in Croatia, BiH, and Kosovo. In addition, as ordinary people are also not following the trials, they depend on third parties as mediators of information. As has been shown, in this respect, the Tribunal could count on hardly any supporters in Serbia, but on many in Bosnia and Herzegovina.

Under these circumstances, surely, explaining the ICTY’s mandate and its achievements earlier, more, and better to the people could have helped in convincing a few more. However, the fact that even those who did know and understand the work of the ICTY – the legal professionals – have a generally negative view on it, suggests that something more than just knowledge is necessary.

Indeed, recent scholarship has suggested that cognitive biases shape the processing of any information about mass atrocities, essentially pushing individuals (at an unconscious level) to believe what they want to believe and reason about the ICTY and its work in a way that is most protective of their own sense of identity. This makes the Tribunal operate in a bias-driven downward spiral: the more it challenged established nationalist narratives the more it generated distrust, and hence the less likely it was that it would be believed. To put it simply: the more Serbs the ICTY convicted, the more it would be disliked by Serbs, no matter the quality of its judicial work and no matter its PR strategy. No outreach programme in the world could have been stronger than the natural human need of identity.