

Different Perceptions of International Justice

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Introduction

The war in Bosnia and Herzegovina following the dissolution of the former Yugoslavia in the early 1990s is rightfully regarded as one of the bloodiest conflicts since the World War II. As such, this war impacted individuals, society, as well as the relations among different groups to a large extent (Kostic 2012:664). Looking retrospectively at the conflict, one might conclude that this impact had to be expected, mostly due to the enormous diversity (i.e. ethnic, cultural) among the people, which created huge cleavages that could not be overcome at the time. The fact that the war ended with the externally imposed peace is a good indicator of these cleavages – this negotiated compromise meant that there were no victors and no losers in the war (Williams and Scharf 2002:160-1). Following the end of the Cold War, Samuel P. Huntington was largely praised and credited for invoking the ‘clash of civilizations’ thesis. Looking at the Balkans, it is noticeable that ethnic patchwork and historical divisions among different groups burden the region itself, which is even more exacerbated with the differing political tradition and levels of economic development (Simonovic 1999:440). Whether the region itself can be considered as the best case study of the living ‘clash of civilizations’ thesis is debatable, but it is clear that the cleavages among the groups were an enormous exacerbating factor in the conflict itself.

The International Criminal Tribunal for the former Yugoslavia (ICTY), the court established to preserve justice and promote reconciliation among the people of the former Yugoslavia, left different impressions on the people when it comes to the question of its success or failure. It would probably be too harsh to label the court and its work as failure, especially from this time-point (it is probably too early to give definite conclusions) and after taking into account that people in the Balkans would probably still wait for the justice to serve them and for the start of the processes supposed to lead towards the reconciliation, if there was not for the ICTY. However, controversies regarding its work, leniency, plea bargaining, and emphasis on deterrence and not on retribution; all of these factors, including others will be mentioned throughout this paper as the reasons influencing the dissatisfaction with the court and the emerging sense of injustice. In order to explain the work of the ICTY, it is first necessary to explain the notion of the international justice, as well as its importance in promoting the reconciliation among the warring sides through its “truth seeking value” (Rosenberg 2008). Apparent failure of the ICTY to satisfy the appetites of the people in Bosnia and Herzegovina led some of them to start favouring the local courts, disregarding many negative aspects related to their work.

Rationale behind the establishment of the ICTY

Ever since the war that happened on the territory of Bosnia and Herzegovina, the growing number of international tribunals with the jurisdiction to prosecute war-related crimes is evident (International Criminal Tribunal for Rwanda, Special Court for Sierra Leone and the International Criminal Court). Many scholars argue that international criminal justice has to be considered as a precondition for peace and security, and consequently, as a necessary tool for the promotion of reconciliation, which was regarded as the hardest goal to be achieved after the war. Even today, many people regard the complete reconciliation as a distant feature, impeding the creation of the community and the sense of nationhood on the entire territory of Bosnia and Herzegovina. It is impossible for the members of different communities to live together and work in achieving the common goals if they all perceive each others as the main culprits. This is where the international community steps in, especially if one is to be considered as the neutral arbiter in adjudicating and establishing the necessary feeling of justice. Since the 1980s, the idea that those who suffered during the episodes of mass atrocities have a right to justice had become entrenched in the international law (Rosenberg 2008), and both tribunals (in Rwanda and Bosnia and Herzegovina, respectively) have been established with the same purpose. The biggest reason why the international jurisdiction seems as the better fit in the situations like the one in question is the fact that domestic judicial mechanisms are considered as unable to perform the role they are supposed to perform within the new boundaries. In other words, as a consequence of the break up of Yugoslavia, the judicial system in Bosnia and Herzegovina, in line with other institutions, suffered from severe deficiencies (TRIAL 2013), and, as already noted, there was no prospect that the perpetrators would ever be prosecuted through national trials immediately after the war (Humphrey 2003:495).

Established as an ad-hoc court (located in the Hague, Netherlands) by the United Nations Security Council in May 1993, the ICTY is considered as an answer to mass killings that took place on the territory of Bosnia and Herzegovina and Croatia. It is the first war crimes tribunal established by the UN, and the first of this kind after those in Nuremberg and Tokyo. Along with democratic elections, peace negotiations and truth commissions, the international tribunals are designed to promote reconstruction of the society after mass atrocities (Humphrey 2003:496). The real pioneer in the tribunals of this kind, the one established in Nuremberg, differs from the ICTY in numerous features. Most importantly, the trials that took place at the Nuremberg tribunals were designed to punish the aggressor, and not to achieve justice or reconciliation, which were, and still are, the principal goals of the ICTY. Contrary to the Nuremberg tribunals, the ICTY did not come after the victorious war and was not enforced by the victims, but was rather envisaged as a substitute for the inaction by the international community against the Serbs during the war (Hoare 2008). Given the

fact that it was not designed to impose the victor's justice, the ICTY embodied a breakthrough in implementing the international criminal law – the implementation of the law was imposed on all sides involved in the conflict for the first time in history (Simonovic 1999:444).

Very often, and this is certainly part of the post-conflict period in Bosnia and Herzegovina, perceptions of the different sides that were part of the war differ, mostly on the question of who is a victim and who is a perpetrator. This is even more influenced by the facts on the ground, especially when taking into account that different schools in the country teach different perceptions of the history. Up to this point, it is questionable whether the ICTY achieved anything when it comes to defining the victims and perpetrators and whether it should be empowered with the authority to shape the historical narrative, which is occasionally how scholars tend to define the tribunal. However, the problem is that most of the people associated with the court do not understand this, as even the best judges believe it is enough for them to simply deliver the judgments, in the process effectively ignoring the broader context and the fact that the judgments may be used by the local politicians in the way they deem fit and to further their own goals (Bonora 2013). Different versions of the truth are still mostly held at the local level in Bosnia and Herzegovina, and these differ among the ethnic groups. It is difficult to automatically assume that the 'westernized' rule of law can displace these feelings – on the contrary, it is much 'safer' to say that the international justice would be largely disappointing by making victims even more victimized, as the politicians misuse the local versions of the truth (Rosenberg 2008).

Ordinary people have a tendency to relate the failed reconciliation with the broader problems in the country, which to some extent stem from the divergent definitions of the national identity originating with each ethnic group. People in Bosnia and Herzegovina are still unable to find a common language and agree on the identity of the country marred by a huge diversity. As Dayton peace process exemplifies, restoration is really difficult once interethnic coexistence is ferociously interrupted. Consequently, one can compare Bosnia and Herzegovina to many countries in the Middle East that are not far from being classified as the 'failed states'. Many parallels can be drawn between Bosnia and Herzegovina on the one hand, and Lebanon on the other – both countries are examples of the diverse countries, where the wars (although fought for different reasons) destroyed any sense of community upon which the prosperous entity could be built. The inability to meet different international criteria (i.e. Copenhagen criteria) is connected with the underdevelopment, which is more of a rule, rather than the exception in the Balkans. However, it is obvious that all of the ex-Yugoslav republics have to follow the paths of Slovenia and Croatia (most recently) in fulfilling the necessary criteria for the accession to the EU, since the membership in the EU is very often considered as the necessary ingredient towards the "healthier and brighter" future.

Even today, many people believe that reconciliation will never be achieved and will always be an impediment towards the better future. Civil society development is largely influenced by ethnic agendas, while ordinary people try to cope with the effects of the war. Part of the problem is that the reconciliation process is constantly delayed, especially since the people are unable to triumph on the small gains and continue building towards the larger ones. In this process, the importance of the international justice cannot in any way be exaggerated – “international justice punishes the perpetrator, providing retributive justice to the victim; international justice deters future crimes; international justice establishes the rule of law in broken societies; international justice creates an irrefutable history; and international justice promotes reconciliation.” (Rosenberg 2008). Even in this definition, the reconciliation comes the last, but what is certain is that this process should not be delayed as is mostly done in Bosnia and Herzegovina. The special importance of the international justice is reflected in the fact that it is carried out for and in the name of the victims (Delpla 2007:220). Consequently, international justice is supposed to have an enormous impact on the emergence of the mutual forgiveness and mutual healing among different ethnic communities.

Criticism related to the ICTY and its work

Criticism of the ICTY's work plays a huge role in undervaluing all the positive things associated with it. However, some people believe that the ICTY issued several excellent judgments in the past and must be considered as an important institution for Bosnia and Herzegovina, which is certainly the case. It is doubtful whether the national courts or any other tribunal would succeed in collecting the extensive documentation or issuing the judgments, if there was no ICTY (Bonora 2013). For all these reasons, the effects of the ICTY in Bosnia and Herzegovina after the war are really difficult to measure. It is still uncertain how Bosnians perceive justice and whether their perception of justice overlaps with the justice embodied by the international criminal tribunal (Delpla 2007:211-2). However, it is far more certain that the ICTY is capable of symbolically deciding who is considered the 'victor' and who is 'vanquished' (Kutnjak Ivkovic and Hagan 2009:36). Thus, the ICTY is still part of “the battle for hearts and minds” (Klarin 2004:552), or, more precisely, it is still battling to defend its legitimacy in the eyes of the people mostly affected by its decisions. This battle is still very much alive and the outcome is still uncertain (Kutnjak Ivkovic and Hagan 2009:3) and for that reason, marking tribunal as a failure would be completely irresponsible and biased.

Although it has to be considered as one of the pioneers when it comes to the international justice, the criticism coming from its opponents, as well as its supporters, undermined its value (Hoare 2008). As already noted, the work of the tribunal has had a huge influence on the people affected by its work. This essay is mostly going to focus on the people in Bosnia and Herzegovina.

However, other groups will be mentioned but due to the space constraints, they will not be thoroughly analysed, but rather used as a method to better explain the differences related to the fact that each group has its own perception of the work of the court in general, as well as to specific judgments. One of the most obvious critics, too often brought in the context with the work of the ICTY, is the court's failure to catch the war criminals when promised – or put in another terms, there is a vast timespan between the date of indictment and the date of arrest. Moreover, the court itself does not have the power to arrest a war criminal, but is rather dependent on other agencies to do that. This criticism extends to the point that the court has been described as an exercise in futility due to its inability to bring all those responsible for the war to justice – even when it did bring some of the responsible ones, those were mostly the small-fry and not those truly responsible for the direction of the war itself (Kerr 2004:184). When talking about this, it is necessary to mention the names of three war criminals – Ratko Mladic, Goran Hadzic and Radovan Karadzic. Ratko Mladic was indicted in 1995 and captured in 2011, while Goran Hadzic was indicted in 2004 and captured in 2011. This is considered as the matter of controversy since the reasons for not catching the war criminals soon after the indictments were issued are mainly unknown. It has been suggested that many international organizations were aware where Ratko Mladic was until he was caught. Moreover, Radovan Karadzic was considered as a fugitive from 1996 until 2008 when he was arrested in Belgrade. What is interesting about him is that he lived and worked at a private clinic in Belgrade under the alias Dr. Dragan David Dabic. Many people believe that it is impossible that nobody knew his real identity, even though he lived 'under the mask'.

As soon as it was established, the court was marred with one deficiency – it was not established by the UN General Assembly, but by the narrow UN Security Council. This led Slobodan Milosevic to label it as the 'false tribunal' (Kutnjak Ivkovic and Hagan 2006) and to emphasize the court's political, rather than its judicial function (Kerr 2004:1) since the court itself has no legal authority apart the one granted by the UN Security Council. What is even worse, Milosevic was not the only person to hold this view. Bosniaks strongly believe they are entitled to justice and some of them even criticize the court's inability to issue a death penalty (the maximum punishment is a life imprisonment), which they believe is the only proper punishment for some of the war criminals comparing to what they did to them during the war. Thinking of the case of Stanislav Galic, who is held responsible for the deaths of about 12,000 Sarajevans during the siege of Sarajevo, and his punishment (20 years imprisonment, later extended to life imprisonment) is the case in point (Kutnjak Ivkovic and Hagan 2006). However, during Galic's trial in 2002, Sarajevans were more likely to talk about Danis Tanovic's Oscar winning movie (No Man's Land) than about his trial (Delpla 2007:218). This is closely related with the problem mentioned above – the fact that the reconciliation process is constantly delayed, as people seem to be 'too afraid' to confront the ghosts of the not too

distant past. Otherwise, they do not seem to be interested to seek the justice, which is a requirement for any type of mutual healing to commence. However, the ordinary people cannot bear the sole guilt, but the public relations of the court are part of the problem. It seems that each group has its own vision of the court, constructed at the highest echelons of the society, among politicians and people who are not directly influenced by the court's work. As expected, while Bosniaks believe that the sentences are too lenient and soft, Croats, and especially Serbs are truly convinced that the ICTY is biased against them (Kutnjak Ivkovic and Hagan 2009:19).

Already mentioned connection with the politics and the fact that people believe that the judges are biased and closely involved in the politics is something that critics underline very often. One may look at the highly politicized process of the judges selection – “no two of whom may be nationals of the same State” (Updated Statute of the ICTY2009: Article 12) – in order to conclude that this has a firm base. Consequently, it has been widely questioned whether the ICTY's trials are fair or these should be considered as simple political witch-hunts (Ford 2013). Logically, the court was established as apolitical and remains as such in its internal mandate. Nevertheless, it has been mostly operating in a highly politicized context and this was part of the abovementioned criticism (Kerr 2004:11). In case of the ICTY, law and politics are obviously more or less mutually reinforcing, rather than mutually irrelevant or incompatible. The reason for this is its political function, presented as a mechanism for the maintenance and restoration of international peace and security. The bottom line is that the ICTY had to engage in diplomacy and politics to function (Kerr 2004:3-6), regardless of the fact that many scholars suggested that its credibility and attainment would be judged on its success in being apolitical (Delpla 2007:226). The accusations of having the ‘anti-Serb bias’ clearly influenced the work of the court, since after these accusations, the indictments issued by the court became even more political and specifically targeted non-Serbs, even though, regardless of any accusation, it has to be noted that Serb war-criminals have been underrepresented in front of the court in proportion to their share of the crimes committed during the war (Hoare 2008). As trials and indictments become more political, they consequently become less fair as the focus shifts more towards the concerns regarding the consequences of the trial, one of which is surely getting rid of the ‘anti-Serb bias’ suggested by Professor Greenawalt (Ford 2013:94). Irrespective of the extent to which one can minimize the politicization of the ICTY, it is clear that the court has to take political realities into consideration when selecting which cases to prosecute (Simonovic 1999:445) and that the failure of some countries to track suspects (Gotovina in Croatia; Karadzic, Mladic in Serbia) was an impediment in the relationship between the specific country and the EU (McMahon and Miller 2009:22).

The prosecution of large-scale atrocities can hardly be universal and involves the political and symbolical selection designed to maximize the public acceptance of the trial processes by those

considered as the victims since the justice is supposed to serve them in an attempt to reverse the victimization created during the war (Humphrey 2003:496-9). However, as is clear, the justice is never the same in the eyes of all the groups. Obviously, the biggest obstacle towards the functioning of the court is finding the balance between the politics and the justice, which is the key. Justice is not only supposed to be done, but has to be seen to be done (Kerr 2004:93), especially after identifying the court's political mandate as the restoration of peace. This identification is evidently the way of retaining the goodwill of the states involved in the work of the ICTY. Further impediment that prevented the ICTY to fulfill its role of securing justice is the limited jurisdiction, which specifies that the court has no mandate to try crimes of aggression, nor the crimes committed against the inhabitants of the neighboring states. Due to this limitation, very few Serbian officials have been prosecuted for the crimes committed against the people living in Bosnia and Herzegovina or Croatia (Hoare 2008). In the victims' eyes, the court has totally neglected them and has given them secondary importance in order to complete all the prosecutions assigned to it. This might simply mean that the expectations of the victims (related to the court's assignment) were too great, but reality suggests that the court did have the opportunity to be of major importance in the victim communities, an opportunity that it somewhat wasted. Losing the victims as its partners in the fulfillment of its original goal was probably the biggest blow related to its work, since that was essential from the very beginning and remains essential even today (Steinberg ed. 2011:104).

The criticism closely tied with the court's leniency has been more on the agenda recently in the wake of three decisions handed down in 2013. These decisions involved high-ranking Serbian and Croatian defendants, whose judgments exemplified that the notion of command responsibility was effectively thrown away by the ICTY. More precisely, the court ruled that the superiors could be found guilty only if they give specific orders for the crimes committed. Commenting on this decision reached by the ICTY, the expert on its work Chuck Sudetic ironically noted that even Adolph Hitler would have gotten off if charged under these standards (Bardos 2013). Moreover, apart from this shocking and brutal criticism, Serbian politicians suggested that the release of Gotovina and Markac is an evidence of the politicization of the court (Ford 2013:48). Currently, it seems that whatever the court does, each group will have its own interpretation of it. Inability of the court to influence the views of the ordinary people leaves a lot of space for the political leaders to present each decision to their constituents as they deem fit in order to serve their own interest. Furthermore, right to a speedy trial is one of the postulates upon which every judicial system is built – at the ICTY, defendants can forget about it. Vojislav Seselj voluntarily turned himself to the ICTY in 2003, and eleven years later, his trial still has not concluded (Bardos 2013). Moreover, the traditional '*ne bis in idem*' principle does not apply as well – in case of the dissatisfaction with the way national courts prosecuted the specific person, under certain conditions, the ICTY has the ability to repeat the trial

against the same defendant for the same offence (Simonovic 1999:444). Having this in mind, one can rightfully question the willingness and the ability of the court to satisfy the highest criterions of the human rights.

Looking at the several surveys conducted throughout the Balkans in the 2000s, it is clear that only the respondents from Kosovo showed support for the ICTY – the surveys conducted in 2003 in Sarajevo, in 2004 and 2005 in Belgrade expressed rather negative assessments of the ICTY's fairness, or at best conveyed the halfhearted support (2004 Vukovar) (Kutnjak Ivkovic and Hagan 2009:31). The way in which the local politicians describe the work of the ICTY creates a wave of opposition among the ordinary citizens, even more fuelled with the arrests of the top military and political leaders, who are very often praised as the local heroes. It seems that the cooperation with the ICTY effectively means that you are 'against' the current regime (Kutnjak Ivkovic and Hagan 2009:10). Accordingly, even in 2003, 59% of the respondents in Serbia strongly believed that their country should not cooperate with the court as they regarded the ICTY as biased and an impartial arbiter as far as the Serbian defendants are concerned (Arzt 2006:232). Although Serbs generally did have a more negative perception when it comes to the ICTY fairness than the Croats and Muslims in general, even among these groups one can find many people with mostly negative perceptions of the ICTY.

No justice – no reconciliation

After the war that happened on the territory of Bosnia and Herzegovina, people living there just wanted hope, and the establishment of the ICTY surely provided them with some kind of hope, but nowadays it is widely questioned whether the court succeeded in fulfilling the goals set up in the beginning. As already noted, one of the most important goals set up before the ICTY was to restore the sense of justice that many Bosniaks lost during the war. The difficult question is whether the tribunal ever had the ability to achieve that goal. Dissatisfaction and the sense of injustice connected with the ICTY emerged and expanded slowly, since most of the people considered its establishment as a proper move of the United Nations. People who lost members of their families during the war wanted to see, the so called 'Western world', intervening and trying to restore the sense of justice they have lost during the war. However, it is debatable whether the establishment of the ICTY can be considered as simply the way to appease the victims, and to try to save whatever is left, due to the non-intervention (or at best, non-effective intervention) and silence of the international community during the war. Looking from this perspective, it seems that the tribunal really was established as a method to clean the conscience of the international actors. The fact that it has come so far is mostly thanks to the prosecutors and judges and not to the people who established it at the first place (Bonora 2013).

The biggest problem related to the reconciliation is that there is no clear-cut and universal definition of what counts as reconciliation, or what the people should expect – is it the end of armed conflict, forgiveness or a decrease in nationalist vote (Delpla 2007:216)? It is really difficult to define and envisage reconciliation as the universal phenomenon, as it mostly depends on the specific political and cultural aspects. International organizations engaging in the process of peace-building very often encounter the same obstacle, as their representatives do not have time or will to really understand the situation inside the specific country. For that reason, the institutions created during the processes of peace-building very often do not last for too long nor can these be regarded as successful. As the reconciliation depends largely on the cultural and political features, it goes hand in hand with the discovery of durable solutions to political problems related to the incompatibilities in the country. In both countries that experienced large-scale atrocities in the early 1990s, Bosnia and Herzegovina and Rwanda, reconciliation means the acceptance by the people who survived the genocide and ethnic cleansing that they have to live with those who committed those heinous crimes (Humphrey 2003:502). Historically, different measures have been specifically designed and used to facilitate this process of inter-group reconciliation, considered as a necessary pillar for the sustainable peace-building in the war-torn societies. The goal of these measures (i.e. truth commissions or tribunals) is to generate and decide who is accountable for the war-crimes, individualize that accountability and facilitate an understanding of the past that is supposed to be accepted by all warring sides (Kostic 2012:651).

The common historical understanding is clearly one of the necessary preconditions for the successful process of reconciliation, as diametrically opposed narratives regarding the role of different groups and the causes of war create even larger divisions in an already war-torn society. Part of the problem is that these hate narratives have deep roots in the society, and unless these are changed, nothing can change in Bosnia and Herzegovina. It is difficult to expect of the victims to live beside the perpetrators if they cannot sense any justice. However, as is already noted, the externally imposed transitional justice has been the subject of harsh criticism. In Bosnia and Herzegovina specifically, the country marred by diversity, each group maintains divergent perspective when it comes to the memories of wartime actors and events, sharing the view that they fought a defensive war against the aggressor (other group) (Kostic 2012:653-7). Apart from this, the members of ethnic groups seem to be interested in the trials concerning only the members of their own group, totally ignoring other trials (Kostic 2012) although they consider these judgments as a precondition for reconciliation (Bougarel, Helms and Duijzings eds. 2007). This selective hearing is another obstacle in the reconciliation process, since groups basically choose what they want to hear, effectively disregarding the entire truth and the story coming from the other side. Alex Boraine recognized that apart from determining guilt or innocence, systems of criminal justice are supposed to contribute to

a peaceful society and are critical component of the reconciliation (Subotic 2012:45). However, the ICTY has proven to be a toothless tribunal, especially regarding the genocide that occurred in Bosnia. In this context, the ICTY failed in completely ‘healing’ the society by punishing and prosecuting the perpetrator (Humphrey 2003:500).

Regardless of the importance of international justice for the reconciliation, promising more than it can in fact deliver may have consequences that would be impossible to handle. The real defeat of the perpetrators is necessary for the justice to be achieved (Hoare 2008), and citizens of Bosnia and Herzegovina mostly started to lose faith that justice will ever be achieved. Many of them rightfully think that the international criminal law mainly has intent to achieve deterrence (prevention of the future crimes that may happen), rather than retribution. This is clearly emphasized by the ICTY’s Trial Chamber on several occasions. More precisely, the Chamber emphasized the fact that deterrence is considered as the most important factor in establishing the length of the sentence (Kutnjak Ivkovic and Hagan 2006). On the other hand, victims are more concerned about retribution (punishing the offenders as they deserved) because that is the only possible way to achieve the justice, at least in their minds. It has to be said that the justice is meant to serve the victims and not the perpetrators or criminals, and thus it is necessary for the courts to satisfy the victims in order to achieve justice. Indictments without arrests cannot be considered as satisfactory and trials, as already noted, do not attract major attention – for that reason, the ICTY influences Bosniaks mostly through arrests and sentences, as the way to put an end to impunity and past injustices (Delpla 2007:225). If either of these is missing, the popularity of the ICTY drastically falls and the reconciliation process does not advance in any way. Looking at the two surveys conducted in Sarajevo, it is clear that Sarajevans favor retribution, as opposed to deterrence – 65% in 2000 and 73% in 2003 favored retribution (Kutnjak Ivkovic and Hagan 2006).

On the other hand, ethnic Serbs strongly believe in the ‘anti-Serb bias’, since they were the ones accused of the genocide and most of the people convicted are the Serbs. They contend that the ICTY is disregarding their part of the story, considering them as scapegoats used to appease the public (Ford 2013; Kutnjak Ivkovic and Hagan 2006). Although they did make up the largest percentage of those accused, this is best explained by the simple fact that they were responsible for the gravest crimes and violations of international criminal law during the conflict. Accordingly, attitudes towards the ICTY in Serbia have been largely negative, since they do not consider the court as fair. This is unfortunate, as the audience of the ICTY cannot be limited to one country, but rather the entire territory of the former Yugoslavia (Ford 2013). Their perception of bias can as well be explained by the common Serb ‘victimhood narrative’, which is clearly in contradiction with the ICTY’s narrative attributing the biggest responsibility for the conflict to Serbs (Ford 2013:71). Looking at the discourse used by Biljana Plavsic, it is clear that she uses the ‘adverse World War II memory’,

still alive in the minds of the Serbs, to develop the fear that they cannot ever again be victims as they were in the 1940s (Subotic 2012:43). Clearly, the ICTY had nothing to do with the development of this narrative, but the hostility and doubts about its fairness are even more strengthened with the fact that two-thirds of the completed cases by 2004 involved a defendant of Serbian ethnicity (Kutnjak Ivkovic and Hagan 2009:37). In order to balance this bias, the ICTY is engaging in the 'political witch-hunts' by indicting non-Serbs, the balancing act that does not end up unnoticed among the ordinary people. Thus, one of the respondents of the survey conducted in Sarajevo notes that the ICTY is trying to prove that all parties are responsible for the war that happened, which is, according to him, not correct (Kutnjak Ivkovic and Hagan 2006).

One has to consider plea bargaining as being closely related to the lenient punishments, which are by some considered as an important barrier towards the reconciliation. More precisely, in the surveys conducted in Sarajevo, the usage of plea bargaining was approved by only 6% of the respondents. The case of Biljana Plavsic has to be considered as a good example of this criticism. Due to the fact that she surrendered herself to the ICTY and plea bargained with the tribunal afterwards, which dropped the genocide charges, she received a relatively mild sentence (11 years imprisonment), and was later granted an early release (Subotic 2012:55). However, the fact that represented an insult to all the victims and their families was that she served her sentence in Sweden, where she had better living conditions than most of the people who lived and worked hard in Bosnia at that time. In the eyes of the victims, this surely cannot be considered as a tool for achieving justice (Kutnjak Ivkovic and Hagan 2006). In order to justify the lenient treatment of Biljana Plavsic, the ICTY cited gender, and her image as the reasons. However, it is uncertain how plea bargaining can be used in the cases of crimes against humanity or genocide, which are considered as the gravest violations of human rights – it serves the bureaucratic aims of efficiency, speed and resource maximization, and surely is not a method that can be used in pursuit of justice (Subotic 2012:45).

To a large extent justice and reconciliation depend on the establishment of truth. However, there can be no truth without the acceptance of the responsibility by the groups and states (Rosenberg 2008). Justice should not be accepted as being in between vengeance and forgiveness, but it is on the totally opposite side of the vengeance and has to include forgiveness (Delpla 2007:218). In the situation like this one, accepting responsibility is an extremely difficult task since the Croats and Muslims mostly identify themselves as victims of the war and defendants of their countries. Accordingly, they completely decline to consider themselves as aggressors (Kutnjak Ivkovic and Hagan 2009:37). This is part of the problem that necessitates the creation of the feeling that the ICTY has an in-built 'anti-Serb' bias, because people whom they consider as aggressors are either free or acquitted (i.e. Naser Oric).

As a consequence of the criticism connected with the work of the ICTY and the emerging sense of injustice in the eyes of people in Bosnia and Herzegovina, many of them started to prefer local courts instead of the ICTY. This is obvious when comparing the 2000 and 2003 survey conducted in Sarajevo. However, there are still those who think that the ICTY is the best possible solution for adjudicating on the war-related issues. In 2003 survey, the respondents' grouped their criticisms into six categories: "perceptions that the ICTY's process is too slow, disapproval of plea bargaining, perceived leniency of the decisions, the ICTY's perceived inability to arrest all the offenders, its politically biased decisions, and 'other' comments." (Kutnjak Ivkovic and Hagan 2006) The respondents even urged the court to be harsher in sentencing and not to feel sorry for the criminals (Kutnjak Ivkovic and Hagan 2006). Obviously, nothing will ever be able to justify why some war criminals received such mild sentences – i.e. Drazen Erdemovic receiving 5 years of imprisonment after he admitted the killings of at least 75 people (Hodzic 2013). Taking all these critics together, one might say that the objectivity of the ICTY and the judges involved in the work of that court is properly being questioned by the Bosniaks. They feel that people involved in the work of the local courts are more familiar with the events that happened during the war and thus more suitable to adjudicate on the war-related issues than some international judges sitting at the ICTY. In their eyes, these international judges are the 'strangers' who do not care for them or for justice or reconciliation. Moreover, connected with this is the feeling on the part of many Bosniaks that local judges understand reasons for the war more than the ICTY's judges, as well as the current situation in the region, which can be their advantage allowing them to concentrate solely on the law and the facts (however, we have to bear in mind here that very often law and justice do not coincide, especially knowing that different perceptions of justice are omnipresent in the Balkans). These are cited as the most important reasons why citizens of Bosnia and Herzegovina started to prefer local courts instead of the ICTY.

However, the respondents that preferred the ICTY held that view due to the perceived influence politics has over the local judges (the public life in Bosnia and Herzegovina is mostly driven by the politics and it would surely influence the judges), as well as their involvement in the corrupt practices (Stover 2005:114). Regardless of the rationale behind the questionable objectivity of the ICTY judges, it is clear that the judges working at the local courts would be more subjective and biased because of the possibility that many of them were personally affected by the horrors of the war in different ways. The principle of the fair trial would be hard to satisfy on the local level if the judges are not completely objective. Nevertheless, after 2000, the only group that still strongly supported the ICTY were the respondents in Pristina (Kutnjak Ivkovic and Hagan 2009:29). Jack Snyder and Leslie Vinjamuri argue that trials should be used only as a method of last resort in promoting stability and preventing future conflict and that local courts should try to accomplish

these objectives if necessary. Otherwise, amnesties and truth commissions are, argue Snyder and Vinjamury, much more effective (Bardos 2013). In July 2002, the UN Security Council decided to adopt a strategy and start transferring the cases (involving lower to mid-level rank suspects) to national jurisdictions (TRIAL 2013). By establishing the War Crimes Chamber of the State Court of Bosnia and Herzegovina, the goal is to achieve the reconciliation among the groups in Bosnia and Herzegovina by bringing the war criminals to justice, something that the ICTY was supposed to do from its very establishment.

As already explained, coexistence among people of different ethnic backgrounds is widely questioned in Bosnia and Herzegovina – mutual forgiveness and mutual healing are still far from being achieved. People are still denying the war crimes committed as part of the defense of their people and this remains an important problem, one not tied to the specific group. Serbs perceive the criminals and thugs as the national heroes while in the 1990s, a Croatian Supreme Court justice argued that it is impossible for a Croat to commit a war crime. A Bosnian Muslim general, who was held responsible for war crimes committed against Croats and Serbs, received a state funeral with all military honors in Sarajevo in April 2010 (Bardos 2013). Events like the one mentioned above do not have a pleasant reception among the members of the other groups and the ordinary people are usually outraged by the treatment these war criminals receive by ‘their groups’. The work done by the ICTY is even more undervalued with these acts, as the deeds of these people are celebrated as the heroic acts, and those in power use their ideologies as a method of nation-building process (Hodzic 2013). This is best described by looking at the 2001 opinion poll conducted in Serbia, which revealed that 75% of the respondents consider Radovan Karadzic and Ratko Mladic as the defenders of the Serbian nation, and furthermore, could not list a single war crime committed by Serbs (Kutnjak Ivkovic and Hagan 2009:17-8). Evidently, the group identity (either as victims of the war or international interference) is extremely strong, and as such prevents the realization that the members of one group can be both, victims and aggressors (Kutnjak Ivkovic and Hagan 2009:19).

As already explained, too often local politicians use the decisions of the ICTY in the way they seem fit by interpreting them in line with their own objectives and agenda. Accordingly, ordinary people simply decide to stick with these interpretations, as these are easily spread among the lower strata of society. It would be unwise to solely blame the ICTY for the bad situation in Bosnia, as these problems mostly originate from other sources, which have taken firm root in the system and are almost impossible to change. Very often, victims receive their funds from the ‘political oligarchs’, who are not supportive of the ICTY. The politicized sources of funding and support easily change the perception of the ICTY’s legacy among the victim communities, since media and politics easily shape these and construct everything associated with the ICTY as the ‘them’ and ‘us’ issue (Kutnjak Ivkovic and Hagan 2009:4). Part of the problem is the geographical distance of the ICTY from these

communities as well as its public relations strategies, which do not target the specific communities in the proper way (Steinberg ed. 2011:105). Undoubtedly, the ICTY has a severe PR problem in the region, which is supposed to be influenced by its work for the better. Whatever the judges sitting at the court do remains dependent on the interests of local intellectual and political elites. However, this is not supposed to mean that the ICTY could not have done more to improve this public perception (Klarin 2011:111). Lack of confidence among the people when it comes to its work is not only the result of a negative perception created by the local elite, but is also a result of the passivity and disinterest of the ICTY in responding to this campaign. The final legacy of the ICTY largely depends on how the local courts will continue its work, since these will be able to achieve something that the ICTY never achieved – establish the connection with the victim communities in the former Yugoslavia (Klarin 2011:112-4). It is the political reality across the former Yugoslavia that the political leaders have the power to shape the public opinion, as well as to emphasize ethnic tensions when necessary (Kutnjak Ivkovic and Hagan 2009:9). Hopefully, their ability to do this will not remain as strong in the future as it was in the past. It is doubtful whether the ICTY ever had the tools and commitment to achieve its goals, and whether its primary constituency was the people whom it was meant to serve or the policymakers in key world capitals (Hodzic 2013).

Local Courts

Regardless of the work performed by the ICTY and international criminal tribunals in general, their verdicts have to be strengthened through national prosecutions. It seems that the local courts must act as final umpires and have the final word in consolidating justice. The point is for the local courts to restore the law and justice after the conflict, and to affirm these in national communities through the laws and constitutions (Humphrey 2003:504). The limited lifetime of the ICTY means that it will not be able to prosecute all the war crime suspects and for that reason its task has to be continued by the chambers, specifically established for this purpose. Efforts to build capacity for the successful prosecution of the suspects through the national judiciaries using the Outreach Programme were even more enhanced by the UN Security Council, which succeeded in involving donors and the international community as a whole in this process that lasted from 2002 until 2004 (ICTY – TPIY). Clearly, these courts cannot be blamed for being too distant geographically from the communities shattered by the war and here lies one of its advantages if compared to the ICTY. Looking at the post-war development in Rwanda, it is clear that the national trials played the most important role in re-establishing the state authority, as well as the sense of justice among the communities (Humphrey 2003:501). Even though thus far the national trials in Bosnia and Herzegovina have not been successful to the same extent as the ones in Rwanda, this process is still

far from being over, and for that reason, it is still too early for the final judgment on the influence of the national courts on the intercommunity relations in the former Yugoslavia. It is fair to emphasize the complexity of the courts and that could present a tangible problem that has to be avoided at all costs. Clumsy interpretation of the law, which led toward its wrong application by the Constitutional Court of Bosnia and Herzegovina, is something that cannot happen in the future, as this is much worse than 'any bad' done by the ICTY in the past. The release of the convicts by the court as a consequence of the wrong law application will not facilitate the emergence of the reconciliation nor it will have any positive impact on the people in general (Tausan 2013).

The local courts have to look towards the ICTY for any guidance and learn from the mistakes made by the ICTY, in that way improving whatever is possible to be improved. One of the first things that has to be amended by the local courts is to prevent the nationalist tendencies so evident in the former Yugoslavia to influence how the constituency views their work. As is obvious from what has been said so far, this is where the ICTY especially failed, as the local leaders have the ability to present the work of the ICTY in the way they want and this almost always involves nationalist dimension (Kutnjak Ivkovic and Hagan 2009:3). Changing the way these courts handle their public relations, which are of extreme importance in this situation and probably the biggest single issue that has to be improved, would change many things. It is essential for the courts to be as close to public as possible, especially after taking into account the fact that the people living in the former Yugoslavia were not even interested to follow most of the trials conducted at the ICTY. Consequently, it is clear that the dialogue with the public is of extreme importance to avoid repeating the same mistakes. Once the mandate of the ICTY finishes, its archives have to be transferred to the region. In order to create a better connection with the victims (one aspect that was certainly lacking as far as the ICTY is concerned) it is necessary to produce as many documentary films and books about the trials as possible. The work of the ICTY and the local courts has to be presented to the communities through exhibitions, screenings and other methods of presentation, as well as debates, seminars and conferences that would sometimes involve even the judges that used to sit at the ICTY and the academics closely involved in its work. Furthermore, it is necessary to first establish the connection with the local NGOs, think tanks, media and other interested institutions that can be that necessary binding element between the public and the courts (Klarin 2011:113-4).

The judges sitting at these courts could not be blamed for the unfamiliarity with the local setting (Kutnjak Ivkovic and Hagan 2009:38), but they have to do whatever is necessary in order to remain distant from the politics, independent and not subject to corruption. They should not care about what journals and their superiors have to say about their judgments (as seemingly the judges sitting at the ICTY did), but should look towards the ordinary people and care simply about their feedbacks (Hodzic 2013). The local courts have to build a credible image by giving voice to the

victims; they have to be present under their own names, and not simply as numbers, the fact that clearly undermined their importance, which is always an obstacle for the establishment of justice. These local courts should not promise more than they can fulfill and thus garner unrealistic expectations regarding their objectives. By trying to avoid that, their policymakers could redress these crimes in a better way (Rosenberg 2008). When adjudicating on these issues, it is impossible to look towards the short-term changes, but rather these courts have to play a long game. By playing the long game, collecting convincing evidences related to the guilt of the accused, and by presenting these in the seemingly fair trials they may reshape problematic narratives these groups have (Ford 2013). ICTY clearly failed in addressing and treating the root causes of the war – the local courts are more familiar with the local settings and for that reason they cannot allow themselves to treat only symptoms but have to tackle the essence of the problems in the society itself. That is the only way to improve the relations among the groups.

Conclusion

The president of the ICTY Theodor Meron suggested that the tribunal performed much better than were the initial expectations (GlobalPost 2013). On the other hand, in the eyes of ‘Mothers of Srebrenica’, no ‘outreach’ will be able to improve the image of the ICTY after the court decided to destroy artefacts exhumed together with their loved ones (Hodzic 2013). Furthermore, Hatidza Mehmedovic accused the ICTY that it could do much more to prosecute perpetrators that committed those heinous crimes during the war (Milovanovic 2012). This unpopularity of the ICTY may lead one to conclude that it was mostly set up for the sake of appearances than the results, and as such, it did not care about justice or reconciliation. Looking retrospectively at its work, it seems that it failed in contributing to reconciliation between different ethnic groups on the territory of former Yugoslavia. International community certainly did fail in imposing a common narrative and forcing all the groups to accept it and by not doing this, it effectively created a vacuum for each side to judge the work of the ICTY from its own perspective (Hoare 2008). Maybe these were just too ambitious goals set before the ICTY. Claiming that international justice will subsequently promote reconciliation by creating a common narrative of what happened during the war may only disappoint those whom it is meant to serve (Rosenberg 2008). However, one has to bear in mind that the ICTY faced a tough challenge in the unwillingness of the states in the region to collaborate with the organizations such as IFOR and SFOR in bringing the criminals to the court to face the trial. Certainly, there are many positive aspects related to the ICTY, and it would not be sound to place the sole guilt on it, as even the permanent International Criminal Court looked towards the ICTY for guidance. Moreover, even though it is premature to make definite judgments regarding the work of the ICTY, it has to be noted

that the ICTY certainly improved international criminal law in general, as well as the capability to prosecute war criminals in particular. The prosecution of the people responsible for the atrocities committed during the war would probably never start, if that task was left for the local courts. Taking into account this observation only, it is clear that the ICTY cannot be marked as a failure.

The creation of the lasting peace and the improvement of the relations among different sides was not only the task put in front of the ICTY. The completion of this task has always been up to the ordinary people, who have to face what they did to each other and in that way bring justice to the victims. Accordingly, it is up to the state institutions to get to the truth by punishing the perpetrators and dealing with the past. This is now the task for the local courts (Hodzic 2013). However, it is premature to finalize the thoughts on the legacy of the ICTY. The UN has to ensure that the ICTY finishes its mandate and do as much as possible during that period. Only then one can talk about the impact of the ICTY on the former Yugoslavs.

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