

Commission on Security and Cooperation in Europe

Hearing on “Bosnia-Herzegovina: Outstanding Issues in Post-Conflict Recovery and Reconciliation”

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Chairmen and distinguished members of this Commission, thank you for inviting me to testify about the importance of justice to the social reconstruction of Bosnia and Herzegovina. More than any other government body, this Commission has consistently kept sight of the important and challenging issues confronting the Balkans. While others have lost focus despite the need for sustained engagement, you never have.

My testimony reflects research that I am currently undertaking on behalf of the Open Society Justice Initiative, which has taken me to Bosnia and Herzegovina as well as Serbia twice in the past year.¹ This research examines the impact of the International Criminal Tribunal for the former Yugoslavia, or ICTY, in the region that is directly affected by its work.

I will make four principal points. First, the work of the ICTY is deeply important to Bosnians, for whom the hellish conflict that ended in 1995 is all too fresh and for whom criminal accountability is an essential element of their recovery.

Second, while some of the ICTY’s prosecutions have already brought an important measure of justice, Bosnians are profoundly disappointed in what the ICTY has so far *failed* to accomplish. Above all, the fact that the two men who personify their suffering—Ratko Mladić and Radovan Karadžić—are still at large more than twelve years after they were first charged with genocide is an almost incomprehensible failure of justice. For this, Bosnians blame not only the ICTY but the international community, which Bosnians see as aiding and abetting these two fugitives’ impunity.

Third, one of the most tangible contributions of the ICTY has been its role in spurring the establishment of a domestic War Crimes Chamber in Bosnia, which is bringing justice home. But far more work remains to be done.

Fourth, in Bosnia as in other countries in the former Yugoslavia, the positive impact of the ICTY would be significantly greater if the Tribunal were able to devote more resources to “outreach”, that is, to communicating effectively with Bosnian society.

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The Importance of Justice

Justice is important to victims of all three major ethnic communities in Bosnia, but since the overwhelming majority of victims are Bosniaks, and also because the attitudes of Bosnian Serb and Croat victims toward the ICTY are comparatively complex, my observations will focus on Bosniaks' need for justice.

While the Bosniaks I have interviewed this year expressed many disappointments in the achievements of the ICTY, including disappointment in what many consider grossly inadequate sentences, virtually everyone emphasized how important the Tribunal's work is to them and to their country. I was able to get a particularly vivid sense of this last November: I was in Sarajevo when the ICTY Appeals Chamber raised to life in prison the sentence of Stanislav Galić, whom an ICTY Trial Chamber had sentenced to 20 years in prison for his leadership role in the siege of Sarajevo. Sarajevans were deeply gratified by this decision, which in their view honored their suffering and restored a moral balance that had been frightfully put awry.

Bosniaks felt a similar sense of vindication by the ICTY's determination in an earlier case that what happened at Srebrenica was a genocide. As one Bosniak woman put it (and as many said in similar terms), the ICTY's "finding that what happened at Srebrenica was genocide is the most important achievement and without the ICTY this would not be possible." (She said this before the International Court of Justice (ICJ) reached the same conclusion in its February 2007 judgment, but I do not believe she would modify her views in light of that judgment. After all, the ICJ judgment relied heavily on the ICTY's findings—and other aspects of its judgment are a profound disappointment to Bosniaks.)

Some of my interlocutors told me that the ICTY's recognition of rape as international crime has helped many rape victims in Bosnia. As one woman put it, "ICTY judgments created a new kind of awareness that women had been used as a means of war. They became visible, personalized, and recognized as one kind of victim. This enabled them to become more active," for example in exercising their rights to obtain civil benefits.

When I asked victims if the work of the ICTY was important to them, those I interviewed invariably said yes. When I followed up by asking them to explain *why* it was important, they found my question almost incomprehensible and assumed that I did not understand what they had experienced. What else could explain my question?

I had one such exchange with a man in Prijedor who was 17 years old when he was detained in the infamous concentration camp at Omarska. While he survived this horrific ordeal, his 15-year-old brother and father were killed, along with dozens of other members of his extended family. When I asked him to explain why he believed, as he had told me, that it is important to punish those who commit crimes, he looked at me as though I had asked a thoroughly nonsensical question and patiently explained, "what I went through, whoever was in my shoes would like to see some justice being done."

The reasons why Bosniaks have placed hope in the ICTY are notably different than the reasons why progressive Serbians support the Tribunal, but its work is deeply important to them as well. During my interviews this past year, Serbian supporters of the ICTY expressed various reasons why they support the Tribunal, including the debt that Serbian society owes victims of atrocious crimes. But the most pervasive reason was framed in terms of Serbians' hope that the legal truth established in The Hague would help dispel many of their fellow citizens' continuing denial when it comes to Serbia's role in the atrocities that raged across the former Yugoslavia in the 1990s. In their view, Serbia cannot move forward as a stable and mature democracy unless its society accepts this truth and the responsibility that comes with it.

As my previous observations suggest, for Bosniaks the justice of the ICTY is more personal. Yet in both Serbia and Bosnia, many of my interlocutors expressed a common belief that justice is a necessary foundation for long-term reconciliation. Speaking of the ethnic atrocities committed during the 1990s conflicts, one Bosnian woman made the point this way, "If you just push it under the carpet, it will grow and it will be a real problem" in future inter-ethnic relations.

Failure to Arrest Radovan Karadžić and Ratko Mladić

While the contributions that the ICTY has already made are important, they risk being overwhelmed by one monumental failure: the fact that Ratko Mladić and Radovan Karadžić, the two men who personify Bosniaks' suffering, remain at large more than twelve years after they were first indicted on genocide charges. One of the people whom I interviewed in Sarajevo summed up what I heard from many Bosniaks: In her view, the ICTY has done "so many good things but they're in the shadow of Karadžić and Mladić." Because these two suspects have eluded justice for so long, she said, "many ordinary people [in Bosnia] can't see the good things the ICTY has done."

In February 2007, the International Court of Justice ruled that Serbia's continuing failure to apprehend Ratko Mladić and transfer him to The Hague is an ongoing violation of the 1948 Genocide Convention. This was the first time since the Convention's adoption nearly half a century ago that a State has been legally judged to be in breach of the treaty. In the wake of this judgment, the international community should have redoubled its efforts to ensure that Mladić is apprehended. This has not happened.

The international community has failed effectively to exercise its leverage to ensure the arrest of Mladić, who is known to have been sheltered in Serbia and is believed still to be there, and Karadžić, who is believed to be somewhere in the former Yugoslavia, possibly Serbia. As has often been noted, political pressure, particularly from the United States and the European Union, has been essential to Serbian cooperation with the ICTY. As a result of that pressure, Serbia has surrendered almost 40 suspects to the ICTY since 2000. Yet at crucial times, the international community has failed to maintain that pressure, and this has enabled Mladić and Karadžić to elude arrest.

Yesterday the European Union (EU) took a preliminary step toward Serbian membership in the EU by initialing a Stabilization and Association Agreement (SAA) with Serbia. This action followed an informal assessment by the ICTY Chief Prosecutor, Carla del Ponte, to the effect that, while Serbia still has not extended full cooperation to the Tribunal, it has made sufficient progress in its cooperation to merit initialing the agreement.

In a public assessment three weeks ago, Ms. del Ponte was less sanguine: Acknowledging that Serbian cooperation was better than it had been one year ago—a notably low bar of achievement—she found that while there had been some activity in the Serbian government’s “efforts to locate fugitives and identify networks protecting them” in recent months, “these actions were slow, irresolute and unsystematic.”² In particular, “[t]he fact that Ratko Mladić is still at large after all the promises and declarations that have been made over the years clearly demonstrates that fact.” She concluded, “I am absolutely convinced that Serbia’s Government possesses the resources and the means to locate and arrest the fugitives.”

Having initialed the SAA, it is manifestly important that the EU require Serbia to secure Mladić’s transfer to The Hague before it signs an SAA with Serbia. Similarly, if we obtain intelligence indicating that Karadžić is in Serbia, his surrender, too, must be secured.

The United States must do its part, as well, to ensure that the shameful sheltering of Mladić and Karadžić at long last ends. We owe it to Bosnia as well as to Serbia to find effective ways to make clear that our relationship with Serbia will not be the kind of relationship that two mature democracies enjoy with each other until Serbia stops shielding a man who has twice been indicted for masterminding genocide.

Earlier this year, the United States certified that Serbia had met congressional preconditions, one of which is cooperating with the ICTY, for disbursing U.S. economic aid appropriated for Serbia. This certification followed Serbia’s role in securing the arrests of two fugitives from the ICTY, which represented a welcome resumption of cooperation by the newly-formed government in Belgrade after a protracted period of non-cooperation. While this cooperation deserved recognition, the relevant certification law specifically mentioned the surrender and transfer of Ratko Mladić as an example of the type of cooperation expected from Serbia.

A similar law was recently approved in the House and is now in conference. Although United States aid to Serbia is no longer substantial, the certification process required by U.S. law provides an important opportunity to convey to Serbia the importance we attach to its apprehension of Mladić.

Many Bosniaks would feel deeply betrayed if the ICTY were to close its doors while Mladić and Karadžić continued to bask in the impunity of Serbian complicity. And there is no doubt that they would blame the United States as well as the EU for squandering the

influence they can bring to bear to ensure that, however long delayed, justice is not forever denied them.

Domestic War Crimes Prosecutions

One of the most tangible contributions the ICTY has made in Bosnia (as well as Serbia) is to stimulate the creation of a national War Crimes Chamber and to help ensure that it meets international standards of fair process. A major impetus for the establishment of the Chamber was the impending end of the ICTY's work, which is supposed to complete all of its proceedings by 2010. To ensure that it could do so, the ICTY needed to be able to refer many of its pending cases to national courts. Since the majority of ICTY cases not yet prosecuted but under investigation or indictment emanated from Bosnia, the Tribunal wanted to ensure that Bosnia in particular could handle referrals. And so, as part of its completion strategy, the ICTY helped establish a domestic court in Bosnia to which it could confidently refer cases that the Tribunal would be unable to complete itself.

The ICTY's efforts to put its completion strategy in place coincided with a comprehensive reform of the Bosnian criminal system by the Office of the High Representative (OHR). The two institutions collaborated in designing a national war crimes chamber for Bosnia, and in early 2005 the OHR established the War Crimes Chamber (WCC) as part of a new State Court of Bosnia and Herzegovina. The United States and the Organization for Security and Cooperation in Europe have played important and constructive roles in preparing the Chamber to operate effectively.

Until the WCC began to operate, the record of Bosnian courts in prosecuting war crimes committed during the 1990s conflicts was abysmal. Although many thousands of people were victims of atrocities during the 1990s conflict, only 54 domestic war crimes cases are known to have reached the trial stage in Bosnian courts before 2004.

This picture has changed dramatically as a result of the WCC's work. Now, credible war crimes prosecutions are taking place in the country where the overwhelming majority of victims reside. While the ICTY does not deserve all of the credit for this development, it is hard to imagine the WCC operating today without the ICTY paving the way. In the words of a Bosnian journalist whom I interviewed during one of my visits to Bosnia during the past year, "If there had been no Hague Tribunal, it's a big question when or whether domestic bodies would start processing war crimes cases."

The process of devolving ICTY cases to national war crimes prosecutors in the Balkans has had wider benefits in terms of regional cooperation. In the words of an attorney in the OSCE Belgrade mission, "Co-operation among the prosecutors in the region is generally steadily progressing in war crimes matters. They meet each other frequently and they exchange evidence and information in concrete cases. ..."³ This is not to say that war crimes-related cooperation with the region is what it should be, but it has improved significantly. While several developments, including the ICTY's recent verdict in the Vukovar Three case,⁴ have revived tensions among the region's major ethnic

groups, the national war crimes prosecutors, according to the OSCE mission in Belgrade, “were those who were calming the tensions down, often publicly commending each other’s work.”

The establishment and operation of the WCC is a milestone, and the Chamber has benefited in myriad ways from the infusion of expertise as well as evidence provided by ICTY staff and other institutions. Yet it faces several major challenges. Among them, the Chief Prosecutor has not yet adopted a national strategy for prosecutions. Without one, his office has often been reactive rather than strategic in its selection of cases.

In addition, the Bosnian War Crimes Chamber suffered a major setback in May, when Radovan Stanković escaped from prison after being convicted by the WCC of serious war crimes, including responsibility for supervising a notorious rape came in Foca and personally raping three women there. Stanković’s case was the first one transferred from the ICTY to the Bosnian War Crimes Chamber and his conviction was the Chamber’s first. The ICTY is understandably concerned about Stanković’s flight from justice, noting that the failure to apprehend him “has undermined the reputation of the judicial and other institutions in [Bosnia and Herzegovina]”⁵

Six months after his escape, Stanković is thought to be hiding in Serbia or Montenegro. What is more certain than his exact whereabouts, according to press accounts, is that “there is almost no cooperation with Serbia concerning the search for Stanković.”⁶ Once again, there is a direct line between thwarted justice for Bosnian victims and Serbian obstruction.

Finally, while donors have understandably focused on the WCC, which plays the leading role in Bosnia’s war crimes prosecutions, they have not yet provided adequate support to entity-level courts. Yet just as the ICTY can prosecute only a relatively small fraction of war crimes committed in Bosnia, the WCC can prosecute only the most serious cases that have not been prosecuted by the Hague tribunal. If the ICTY is to succeed in paving the way for what must be a sustainable process of providing justice to victims of ghastly crimes, international actors must play their part to ensure this happens. More specifically, the United States and other donors need to ensure that a coordinated approach is in place for prosecuting outstanding war crimes cases and that all of the courts that will play a role in this process are able to conduct fair trials.

Outreach

As has so often been noted, the ICTY’s geographic and cultural distance significantly affects the ability of Bosnians to engage with the Tribunal. But its location in The Hague would not be so problematic in this respect if its work were better understood throughout Bosnia. Unfortunately, however, the ICTY’s judgments have been interpreted by local politicians who politicize its verdicts as well as by nationalist media. As an astute observer in Republika Srpska noted, for much of the ICTY’s history the only reflections in Bosnia of what was happening in The Hague “were the ones that could pass through the manipulation of the media and political bosses here in Bosnia and Herzegovina.”

While this failure lies squarely on the shoulders of political leaders, the ICTY can do more to counter manipulation of its work. But it needs donor support to make this possible.

Within the limited budget available for outreach activities in Bosnia, the ICTY has in recent years participated in some remarkable programs in towns that were once the scene of horrific crimes. Organized in collaboration with local partners, these programs have provided an opportunity to bypass the distortions of local politicians and media and explain directly to local residents what crimes have been judged to have been committed in their midst—and why.

An extraordinary Bosnian Serb, Branko Todorović, has played a leading role in organizing these programs. Last November, when I visited Todorović in Banja Luka, he described for me the transformative impact of these programs. Other Serbs whose knowledge of the ICTY had long been filtered by local political leaders and ethnic media were, in Todorović's words, finally "able to see the factual truth, not the political truth," and they grasped that "the truths are horrible." This revelation was, he said, "very, very powerful." These outreach programs provided local Serbs with an opportunity "to say that what happened is horrible and I want to be different."

Todorović illustrated the value of these programs by describing breakthrough moments in various ICTY outreach programs. Let me share with you two examples. First, the representatives of the ICTY at a program in Brčko were able to dispel a pernicious rumor that had long festered and grown within the Muslim community of Brčko. The rumor was that Serbs had burned the bodies of Muslim victims in ovens normally used to cremate animals. One participant in the ICTY outreach program asked ICTY representatives why they had not investigated this allegation, and an ICTY police investigator was able to explain that in fact they had investigated reports of this episode. He explained in detail how the investigators were able definitely to establish that Serbs had not in fact burned Muslim victims, as had long been rumored. Todorović thought that, if this expert had not been able persuasively to set this rumor to rest, "it would always cause hate" in Brčko. Instead, "the book on that was closed."

Todorović also told me about a man at an ICTY outreach program in Prijedor who had lost many family members as a result of Serb atrocities during the 1990s conflict. At the end of the outreach program, this man said that that day had been one of the most important in his life since the dearest members of his family had been killed fourteen years earlier. In Todorović's words, "it meant so much that his neighbors, Serbs, were present and therefore admitted that the crime was committed. It was a contribution to the reconciliation after the war."

These examples provide a small glimpse into the kind of impact that the ICTY's justice could have if the Tribunal had a greater outreach capacity. Yet outreach has always been an extra-budgetary and under-funded program. This is shortsighted: When a court delivers justice from afar, its verdicts do not speak for themselves. Too often, their meaning has been deformed by nationalist leaders.

Conclusion

Chairmen, most people outside of Bosnia and Herzegovina cannot begin to fathom the importance of justice to survivors of Bosnia's passage through hell. But this Commission has understood, and has insisted that our country not lose sight of the important challenges we still confront. Above all, as the ICTY approaches the end of its mandate, it is critically important to ensure that its contributions are not undermined and overwhelmed by its failure to try the two men who, for Bosnians, are the faces of their collective nightmare—Ratko Mladić and Radovan Karadžić.

¹ This research was supported by the Canadian Government, the Open Society Institute and American University's Washington College of Law.

² Address by Carla del Ponte to the General Affairs and External Relations Council of the EU, Luxembourg, Oct. 15, 2007.

³ E-mail communication, November 7, 2007.

⁴ One of the defendants was acquitted, another sentenced to only five years' imprisonment, and the third sentenced to 20 years' imprisonment for a massacre that was the worst atrocity committed in Croatia during the 1991 conflict with Serb forces.

⁵ Erna Mackic, "Stankovic: The Forgotten Fugitive," Justice Report, BIRN, at <http://www.bim.ba/en/87/10/5438/?tpl=58>.

⁶ Id.