Ajla Škrbić

The legacy of the International Criminal Tribunal for the former Yugoslavia

Abstract

This article reviews the operation of the International Criminal Tribunal for the former Yugoslavia. The ICTY was set up in 1993 and was due to have wound up all its operations by 2010; nevertheless, as is clear, it continues to function. The author cites the powers of the Tribunal and the rules under which it operates, including the meaning of 'crimes against humanity'. The legacy of the Tribunal has both positive and negative aspects: in the former case, impartiality and the clarification of concepts important in international law; in the latter, the lack of convictions for genocide and the criticisms in individual cases that have been levelled at the ICTY President. It is the view of the author that the former outweigh the latter and that the existence of the Tribunal is necessary. Ultimately, however, the Tribunal does not exist to bring complete justice for victims or to deal with the past, and this means that it has taken away the ability to forget the past; for all its successes as regards jurisprudence and impact, it is the inability to reach out to victims that is its fundamental weakness.

***Keywords**: international criminal tribunal, Yugoslavia, international law, human rights, genocide*

Introduction

The International Court is the judicial body that brings to justice individuals who are accused of violating the international law. The idea to create the Court arose after the end of World War II, and it is based on the principle that all people, including high-ranking state officials, who are accused of committing serious international crimes must be tried.

International criminal tribunals should not be considered in the same way as domestic or national courts. When people hear the words 'court' and 'law' they immediately think that it refers to national law, but they are wrong. There is a distinction even between the personnel that work in international and national courts, as well as in other characteristics.

This article will put special emphasis on the work of the ICTY, describing a number of the Court's positive as well as negative aspects.

The ICTY

The ICTY[1] was established at the proposal of the UN Secretary-General on the basis of Resolution No. 827 of the UN Security Council of 25 May 1993. The territorial jurisdiction of the Court covers the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter: the former Yugoslavia), including its land surface, airspace and territorial waters.

The Court's temporal jurisdiction includes the period from 1 January 1991, but without a formal end,[2] although the Security Council ordered the Court to end its work by 2010, under Resolution No. 1503 of 2003 and Resolution No. 1534 of 2004. Due to these reasons, the Court was supposed to put an end to all investigations and the filing of all indictments by 2004; to end all trials by 2008; and all appeal proceedings by 2010. However, this is 2015 and the ICTY has not ended its work. According to some estimates given in December 2014, three out of four appeal proceedings are expected to be completed during 2015; while the judgment in the case of Ratko Mladić is expected to be rendered in March 2017 or even afterwards. However, in an address to the UN Security Council on 10 December 2014, Theodor Meron, the President of the ICTY, gave assurances that these forecasts do not mean the closure of the ICTY in 2017.[3]

The ICTY is an *ad hoc* court based in The Hague. The Court prosecutes only individuals, not organisations or governments. It has the power to impose life imprisonment as a maximum penalty, and it has signed agreements with a number of countries in order to enable enforcement of its penalties across their territories.

The huge role of the ICTY's Trial Chamber significantly determines the work of the ICTY and it implies wide powers for arbitrators and for initiatives relating to probative evidence.[4] The basic principles that the Court follows in its work are: justice; rapidity; and equality of arms.[5]

The aim behind establishing the ICTY was to bring to justice those responsible for violating international humanitarian law during the violent conflicts which brought an end to Yugoslavia.[6] However:

1 The full name of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991.

2 Article 8 of the Statute of the ICTY, 1991.

3 Krivokapić, B (2010) *Encyclopedic Dictionary of International Law and International Relations* Official Gazette, Belgrade, p. 557. See also ICTY http://www.icty.org/sid/10016 (17 September 2015).

4 Ivanisević, B *et al*. (2008) *Guide Through the Hague Tribunal – Regulations and Practice* 3rd Ed. OSCE Mission to Serbia, Belgrade, p. 198.

5 *ibid*. p. 199, fn. 1223. 'Equality of arms' is a doctrine giving each party the right to present a case under conditions that do not place him or her at a substantial disadvantage to the opponent.

6 Resolution of UN Security Council No. S/RES/827 (1993), adopted at the 3217th Session, 25 May 1993; and Report of the UN Secretary-General, S/257074, 3 May 1993, paragraphs 19-20.

> Although it was obvious that many actions of the conflicting sides, people who fought within their ranks or who joined them, represent serious crimes under domestic law or the international humanitarian law (the former Yugoslavia ratified all the Geneva Conventions of 1949 and their Protocols of 1977), almost none of the suspects for these crimes was charged and brought to the Court until 1993.[7]

All violations that are put under the jurisdiction of the ICTY, and which represent a violation of international humanitarian law committed in the former Yugoslavia, are divided into the following categories:

- grave breaches of the Geneva Conventions of 1949
- violations of the laws or customs of war
- genocide
- crimes against humanity.[8]

The criminal defence of crime against humanity exists under the following conditions:

- in case of an attack
- if the accused committed the crime as part of the attack
- if the attack was directed against any civilian population
- if the attack was widespread or systematic
- if the accused knew that the acts were part of a pattern of widespread or systematic crimes directed against a civilian population and that these fitted that same pattern.[9]

Regardless of the rules that regulate the work of the ICTY, its employees are faced with several challenges.

The first challenge certainly refers to a rule that an individual may be punished for a grave breach of the Geneva Conventions under Article 2 of the Statute only if the crime for which he is charged was committed against persons and property that are considered protected.[10]

Another challenge is posed by Article 7, Paragraph 1 of the Statute; and Article 4, Paragraph 3 of the Statute. Namely, when the Court finds that the accused had no genocidal intent, but that he or she helped others to commit genocide, the question is which of these two provisions should be applied. The first Article envisages that responsibility for assisting in the commission of any criminal offence should be put under the jurisdiction of the Court; while the second Article envisages, *inter alia*, complicity in genocide.[11]

7 Ivanisević *et al*. (2008) *op*. *cit*. XIII (author's own translation).
8 Articles 2-5 of the Statute of the ICTY, 1991.
9 The general elements of crimes against humanity are envisaged in Article 5 of the Statute of the ICTY, and were elaborated in detail before the ICTY in the case '*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*' No. IT-96-23 and 23/1, 22 February 2001, paragraph 410.
10 Second-instance judgment in the '*Tadić*' case, 15 July 1999, paragraph 80.
11 Ivanisević *et al*. (2008) *op*. *cit*. p. 77.

Furthermore, the Court has the jurisdiction to act in cases of the commission of any of the criminal offences listed in Article 5 of the Statute, but only if the crimes were committed in an armed conflict. Therefore, armed conflict is a precondition for prosecution before the ICTY.

At the same time, the only Article of the Statute that relates to penalties is Article 24 that envisages an obligation on the Chamber, when sentencing, to take into account the gravity of the offence and the individual circumstances of the perpetrator.

However, it is Article 2 of the Statute that represents the biggest challenge since it envisages that every crime regulated by this Article is one that has been committed in the context of international armed conflict.

The first trial before the ICTY started on 7 May 1996, and the first verdict was rendered on 29 November 1996. So far, a total of 161 persons have been indicted. Proceedings against 147 persons have ended, while proceedings against fourteen individuals are still ongoing.[12]

Legacy of the ICTY

Countries across the former Yugoslavia greeted the establishment of the ICTY with great suspicion, complaining that a body which lacked competence (the Security Council) had established the Tribunal and that the Court could not be an impartial judicial body since it had been established as a subsidiary body to the executive authority (the Security Council).[13] However, this author shares the standpoint of Dr. Vojin Dimitrijević, who says that:

> In a sea of such attacks (...), the legitimate and legal reviews of critics about the way the Tribunal has been established, the advisability of some of the provisions of its Statute, the quality of the rules of procedure and so on, are lost (…).[14]

The author also shares the stance of Dimitrijević that the work and existence of the ICTY should be seen as a:

> Unique judicial experience in the actual application of international humanitarian law, with its written and unwritten rules and its very Statute as the first international criminal Tribunal; despite that it has been formed on a temporary basis, as an *ad hoc* court, it has acted over a long period and prosecuted so many people in various posts for so many crimes that are considered international crimes.[15]

12 ICTY http://www.icty.org/sections/TheCases/KeyFiguresoftheCases (17 September 2015). The website of the ICTY contains far more comprehensive content than websites of national and most other international courts.

13 Krivokapić *op. cit.* p. 557.

14 Ivanisević *et al.* (2008) *op. cit.* XIV (author's own translation).

15 *ibid.*

There is no doubt that there are positive and negative aspects of international criminal proceedings led before all courts.[16] Positive sides of the proceedings before the ICTY are certainly a higher level of impartiality; easier ways to collect evidence; uniformity in the application of international law; and the greater preventive effect that international trials possess.[17] Namely, it is logical that people who are not involved in a specific dispute, i.e. judges who are not related to armed conflicts will be more objective in determining the dispute. National courts are almost always insufficiently objective, and these courts are not sufficiently interested in leading proceedings against their own nationals who have committed crimes against foreign nationals. At the same time, the nature of proceedings led before an international court is that these and all other conflicts within the international community are set to be uniform, with a continuity in application of the law and decision-making process.

A set of proceedings before the ICTY does not fully meet all the demands which the right to a fair trial presents the Court, but practice does give the hope that proceedings will come closer to the standards of a fair trial.[18] Proceedings led before the ICTY are complex, but this was inevitable because it was established quickly as a reaction to the situation on the ground (for example, states harmonised their stances on the formation of the International Criminal Court over a period of years). Principles like those of the Geneva Conventions of 1949 (ratified by most states in the world) would certainly remain only a dead letter if there were no courts like the ICTY. Namely, such courts have defined armed conflict, when an armed conflict commenced, etc.

One of the important specifics that refer to international crimes is the existence of a large number of victims. The procedural status of victims and witnesses in criminal proceedings for these crimes is a particular problem in international judicial practice because of the direct or indirect risk of intimidation, reprisal or retaliation against the victims.[19] For these reasons, the rules of the ICTY include adequate provisions on the protection of victims and witnesses in the proceedings. For example, such provisions are stipulated in the rule that the main hearing will be held in the absence of the public; the rule about the protection of the identity of victims; and the rule on the formation of the Department for Victims and Witnesses, as the body in charge of providing support and advice to victims and witnesses, and proposing measures for their protection.

The ICTY has contributed to the clarification of some basic concepts that are of major importance for international criminal law and international humanitarian law. For example, the rule on the obligation to distinguish between civilians and combat-

16 Every international criminal tribunal has its positive and negative sides. However, practice has shown that each of them acts preventively, no matter how few are the positives it has achieved. For example, even the International Criminal Court, which is the most criticised of all courts, is believed to have had a preventive impact in the Congo in terms of reducing the recruitment of children into the Army and in terms of the number of rapes, and so on.

17 Cassese, A (2005) *The International Criminal Law*, Belgrade Center for Human Rights: Belgrade, p. 520-521.

18 Ivanisević *et al*. (2008) *op. cit*. p. 226.

19 *ibid*. p. 195-196.

ants was clarified in the judgments in the cases of Tadić, Martić and Kupreškić; the rule to distinguish civilian from military facilities was clarified in the judgments in the cases of Kupreškić, Kordić and Čerkez; the judgments in the cases of Kunarac and Furundžija defined torture; etc. For the first time in history, an international court found that rape (although prohibited by humanitarian law) may constitute torture. This is also the first international court which included sexual violence as a crime against humanity in its Statute.[20] In addition, the Court has also made a huge contribution to the interpretation of serious violations under the Geneva Conventions.[21]

According to its current President, Theodor Meron, the ICTY has demonstrated to the world that, after half a century of impunity, it is possible to lead complex trials at international level in accordance with the highest international standards. The ICTY has developed an influential body of jurisprudence concerning a large number of procedural issues, as well as issues related to evidence, and has thus created the conditions for the establishment of new international and mixed criminal courts. The support for a strengthening of national judicial systems relating to war crimes trials is certainly one of the most positive things in the heritage of the ICTY.[22]

On the other hand, many criticise the ICTY for the reason that not all the accused have been convicted; in particular, those accused of the crime of genocide. However, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 stipulates very strict conditions for proving genocide. Genocide[23] is a crime that does not have to be committed during armed conflicts: it can be committed in peacetime; during a war; against civilians and against combatants; with or without committing widespread or systematic attack. Under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948:

> ... genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[24]

20 The case of Kunarac is the first case in the history that deals exclusively with sexual harassment, and the first case which defined sexual enslavement. Some lawyers believe that the definition is correct, although others believe that the definition given in the case of Akayese (the case before the International Criminal Tribunal for Rwanda, 2 September 1998) is more relevant. The case of Biljana Plavšić is the only case before the ICTY so far in which a woman has been accused of sexual violence.

21 Ivanisević *et al*. (2008) *op*. *cit*. XV.

22 Daily newspaper in BiH, *Dnevni Avaz* XX(6955), 19 December 2014, p. 5.

23 The word 'genocide' comes from the Greek word 'genos' which means tribe, or race; and the Latin word 'caedere' which means killing.

24 Article 2 of the Convention on Genocide of 1946. The following documents define genocide in a similar way: Article 6 of the Rome Statue of the International Criminal Court of

This definition reads that it is the state of mind of the perpetrator of the crime of genocide that matters (that he or she committed the crime with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group: *dolus specialis*). Therefore, certain groups, and not individuals within the group, should be the main objective of the acts and, likewise, the destruction should be of a physical or biological nature, not a cultural one.[25]

Proving responsibility for the crime of genocide is harder than proving responsibility for any other international crime. If a prosecutor fails to prove that intention, it is considered a crime against humanity or a war crime – and the ICTY is not authorised to prosecute these crimes.

The latest criticisms directed against the work of the ICTY are addressed to President Theodor Meron, an experienced US (Israeli) lawyer and judge. Many believe that he made terrible mistakes in the individual trials which he chaired, especially in the cases of Gotovina and Markač, Stanišić and Simatović and, in a particularly interesting case from the legal point of view, the case of Momčilo Perišić.

The judgment in the case of Perišić established a new legal standard of command responsibility, providing an amnesty to political leaders and military commanders in the case of the commission of war crimes in the future. Namely, the appeal judgment in Perišić's case has adopted a new specific criterion of direction, which has not existed up to now in international customary law. The question is whether or not the Court's judgments discourage future threats against human civilisation. The UN Security Council established the ICTY in response to the endangerment of peace and security;[26] nowadays, some experts believe that the ICTY has turned into its own contradiction subsequent to Perišić's acquittal, with its decisions jeopardising international peace, security and order.[27]

1998; Article 4, Paragraph 2 of the Statute of the ICTY; Article 2, Paragraph 2 of the Statute of the International Criminal Tribunal for Rwanda; Article 171 of the Criminal Code of B&H (*Official Gazette of B&H* No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, 47/14, 22/15, 40/15); and Article 141 of the Criminal Code of the Former Yugoslavia (*Official Gazette of SFRY* No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90).

25 This is the standpoint of both the Convention on Genocide of 1948 and the ICTY. However, judge Shahabuddeen partially accepted the principle of cultural destruction in the appeal procedure in the case of Radislav Krstić. In this case, the ICTY Trial Chamber's judgment found that Bosnian Muslims constituted a protected group. Part of the group was constituted of Bosnian Muslims from Srebrenica, and physical destruction was directed against able-bodied men from Srebrenica. Krstić's defence argued in the appeal that the physical destruction of able-bodied men in Srebrenica does not represent destruction of part of the group, but the ICTY Appeals Chamber ruled that killing them is proof that there was an intention to kill all Muslims in Srebrenica ('*Case Prosecutor v. Radislav Krstić*', No. IT-98-33, of 2 August 2001).

26 Resolution of UN Security Council No. S/RES/827 (1993), adopted at 3217th Session, 25 May 1993; and Report of the UN Secretary-General, S/257074, 3 May 1993, paragraphs 19-20.

27 International Institute for Middle East and Balkan Studies (IFIMES) (2013) *ICTY: 'Meronisation' of our future* Ljubljana, 20 March.

When it comes to criticisms related to the impact of the ICTY judgments on victims of the conflict, we must take into account that, when it comes to individual criminal responsibility, the ICTY is authorised to prosecute crimes, but it has no opportunity to adjudicate the question of adequate compensation for victims of those crimes.[28] Namely, the primary role of the ICTY is retributive: the Court renders a judgment and defines whether or not someone is guilty of a certain crime, and orders an appropriate punishment for that crime.[29] Of course, the ICTY has also a restorative function, and it aims to ensure accountability; establish facts; bring justice to victims and give them the right to speak; enhance the rule of law; and pave a way for reconciliation in the region. However, the ICTY is not established to be a means of bringing complete justice to victims or a means of dealing with the past.

Regardless of these facts, the ICTY has taken away from us the ability to forget the past. Thus, the legacy of the ICTY is greater and more significant than the occasional mistake and judgments rendered without legal explanation; the Court will provide an insight to future generations as regards judgments on and the facts about the atrocities.[30]

Conclusion

This article has led us to the conclusion that, when it established the ICTY, the international community directly contributed to the adoption of sanctions against the state policies and individuals responsible for the initiation and conduct of armed conflict on the territory of the former Yugoslavia. The article has also led us to the conclusion that the judgments rendered by the ICTY have clarified some theoretical parts of international humanitarian law, international criminal law and international human rights law.

Despite the many criticisms directed against the ICTY, the author believes that the ICTY has registered more positive than negative results. Expectations as regards the work of the Court have been unreasonably high. Ultimately, when conflict starts and when crimes happen, people nowadays say: 'Send him to The Hague', which was not the case a few years ago when there was no court authorised to prosecute the perpetrators.

There is no doubt that the existence of such a court is necessary; this we could see clearly in the case of Leipzig in 1921, when Germans were allowed to try themselves on their own. The result was that audience, judges and prosecutors greeted some people accused of crimes when they entered the courtroom; not to mention that all sanctions were minimal: two months, six months and four years of imprisonment. Therefore, the author believes that foreign judges have not brought expertise in proceedings related to this territory, but impartiality.

28 *Večernji List* http://www.vecernji.hr/svijet/javnost-je-obmanuta-haaskim-tuzbama-828733 (17 September 2015).
29 Article 24 of the Statute of the ICTY, 1991.
30 *Peščanik* http://pescanik.net/sada-sam-druga-osoba/ (18 September 2015).

Furthermore, the author considers the following as the greatest contributions of the ICTY:

- the ICTY is a legal body that represents a basis for the establishment of new judicial bodies
- it has revealed limitations of trials
- it has left a legacy.

At the same time, that the ICTY has primarily focused on jurisprudence and impact, without realising how important it is to reach out to victims; this is the main deficiency of this body.

References

Cassese, A (2005) *The International Criminal Law* Belgrade Centre for Human Rights: Belgrade.

Ivanisević, B *et al*. (2008) *Guide through The Hague Tribunal – Regulations and Practice* 3rd Ed, OSCE Mission to Serbia: Belgrade.

Krivokapić, B (2010) *Encyclopedic Dictionary of International Law and International Relations* Official Gazette, Belgrade.

Dnevni Avaz XX(6955), 19 December 2014 [daily newspaper in BiH].

Second-instance judgment in the Tadić case, 15 July 1999.

The ICTY, http://www.icty.org/.

Report of the UN Secretary-General, S/257074, 3 May 1993.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

Criminal Code of BiH *Official Gazette of BiH* No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, 47/14, 22/15, 40/15.

Criminal Code of the former Yugoslavia *Official Gazette of the former Yugoslavia* No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90.

International Institute for Middle East and Balkan Studies (IFIMES) (2013) *ICTY: 'Meronisation' of our future Ljubljana* 20 March 2013.

Peščanik, http://pescanik.net/sada-sam-druga-osoba/.

Case of the International Criminal Tribunal for Rwanda 'Prosecutor v. Jean-Paul Akayesu', Case No. 96-4-T, 2 September 1998.

Resolution of UN Security Council, No. S/RES/827 (1993), adopted at the 3217th Session, 25 May 1993.

Statute of the ICTY, 1991.

ICTY case 'Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković', No. IT-96-23 and 23/1, 22 February 2001.

ICTY case 'Prosecutor v. Radislav Krstić', No. IT-98-33, 2 August 2001.

Večernji List http://www.vecernji.hr/svijet/javnost-je-obmanuta-haaskim-tuzbama-828733.