



Refik Hodzic

## Bosnia and Herzegovina – Legitimacy in Transition

Expert Paper “Workshop 9 – Justice Mechanisms and the Question of Legitimacy: Concepts and Challenges”

Workshop is co-organized by the Working Group on Development and Peace (FriEnt), and the Center for Peacebuilding (KOFF) – swisspeace

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Nürnberg, 25. – 27. Juni 2007

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Transition**

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## 1. The ICTY and Bosnia and Herzegovina – A Unique Relationship

The mass atrocities committed in Bosnia and Herzegovina (BiH) in the early nineties have prompted the establishment of the first international war crimes court since the Nuremberg and Tokyo Tribunals. Ever since, the International Criminal Tribunal for the former Yugoslavia, the court which has marked a new stage in the development of international justice, has been shaped and influenced by the events in Bosnia and Herzegovina. At the same time, its existence and achievements have hugely impacted Bosnia and Herzegovina in its ongoing post-war transition into a democratic society. This relationship resulted in a unique case of international intervention in a post-conflict context and an unprecedented transfer of legitimacy of a justice process from an international body to local institutions.

The ICTY or "Tribunal", as it is commonly known in Bosnia and Herzegovina and elsewhere, has long been the most important vehicle of transitional justice in the country. The first person indicted by the Tribunal was a commander of a prison camp run by Bosnian Serbs, the first man arrested and tried by the Tribunal was indicted for crimes committed in Bosnia, and out of 161 persons indicted to date by the Tribunal more than 85% were charged for the crimes committed in Bosnia and Herzegovina. Although war crimes trials were conducted before local courts since 1992, they were limited to the courts in the Federation of Bosnia and Herzegovina and the standards of fairness were highly questionable<sup>i</sup>. In view of failed attempts by the civil society, international organizations and local authorities to implement other transitional justice mechanisms, ICTY continued to be the institution dealing with the legacy of mass atrocities in the most substantive way<sup>ii</sup>.

In 1993, when it was brought into existence by the United Nations Security Council, the conflict in Bosnia was still raging. In fact, some of the most abhorrent atrocities of the war, including the genocide committed by the Serb forces in Srebrenica, took place after the Tribunal's establishment. The images of the emaciated detainees of concentration camps in north-western Bosnia, the brutal siege of Sarajevo and reports of mass killings and rapes in the east of the country spurred the international community into action<sup>iii</sup>. When Bosnians and a large portion of international public expected a military intervention, the United Nations Security Council decided to establish a court whose mandate would be to "prosecute those most responsible for the serious violations of international humanitarian law", a court which was intended to deter future crimes and contribute to the establishment and maintenance of a lasting peace<sup>iv</sup>. Some saw it as a fig leaf and a way out for the supreme international body highly reluctant to get involved militarily.

## 2. Legitimacy of ICTY- A View From Bosnia

The Tribunal was set up under Chapter VII of the UN Charter, in an attempt to prevent the atrocities carried out in Bosnia from spreading and threatening international peace<sup>v</sup>. This fact, that it was founded by a political body of the UN, which is under the decisive influence of the five permanent members, has often been used by those trying to undermine its legitimacy. The method of its establishment was challenged in the ICTY's first case against Dusan Tadic, and

the decision on the legality of it counts as one of landmark decisions in the recent jurisprudence in international law<sup>vi</sup>.

The argument that the Tribunal was a political tool in the hands of the West, with the sole mission of advancing its political agenda in the countries of the former Yugoslavia is repeated by the opponents of Tribunal's mandate since its early days. This message has become the pillar of the propaganda effort by the political and intellectual elites in the countries of the former Yugoslavia whose sole aim was to justify the crimes that have been committed and render the facts established in the ICTY's cases irrelevant<sup>vii</sup>.

The faith in the Tribunal even by those who have founded it was almost non-existent during its early days<sup>viii</sup>. The founders did not believe that this court was going to ever indict anybody, let alone hold trials of those most senior in the political and military establishments in the region<sup>ix</sup>. The struggle for the Tribunal's legitimacy had to be fought on two fronts - in the region, in the countries of the former Yugoslavia and in the capitals of its international masters. The way that this effort was conducted has to a large degree formed the perceptions of this court and its legacy. The Tribunal has without a doubt developed into a respected and powerful instrument of international justice which has served as the platform for the establishment of various other courts including the ICTR, the Special Court for Sierra Leone and the ICC; in the former Yugoslavia, however, it has struggled to win the trust and full respect from the population which formed its natural constituency<sup>x</sup>.

In Bosnia and Herzegovina, the Tribunal was perceived differently among the three constituent communities, Bosnian Muslims, Bosnian Serbs and Bosnian Croats. In the years following the end of the war, Bosnia was directly exposed to the systematic propaganda efforts directed against the ICTY construed by the regimes of Slobodan Milosevic in Serbia and Franjo Tudjman in Croatia. Consequently, the overwhelming majority of Serbs in Bosnia and Herzegovina believed that the Tribunal was established to try only Serbs and suppress them under the instructions from Washington. At the same time, Croats supported the view that ICTY's sole aim was to undermine the legitimacy of Croatia's war of independence and thus the foundations of the young state. Bosniaks were the only community which supported the work of the Tribunal, seeing it as the institution providing at least some justice for countless crimes committed during the conflict, but frustrated with the slowness of the trials and the sentences given by the judges<sup>xi</sup>. It could be said that the "popularity" of the Tribunal was inversely proportionate to the number of those indicted coming from the ethnic community in question.

Busy with strengthening the judicial capacity of the fledgling institution, developing procedures and ensuring that international community provided the necessary cooperation in gathering the evidence and arresting indictees, the ICTY did not invest a great deal of effort in communicating with its constituents in the former Yugoslavia during the first six years of its existence. It had no capacity to address them in the languages spoken in the region, leaving the information about the Tribunal reaching the audiences to be filtered by the media. The media largely controlled by the same regimes which saw the Tribunal as a great threat.

It was at the end of 1999 that the president of the Tribunal, American judge Gabrielle Kirk McDonald, appalled by the apparent ignorance and outright denial of the facts established in the first ICTY judgment in the community in which the crimes happened, decided that a unit had to be established within the Tribunal that will communicate directly to the people of the former Yugoslavia. With the establishment of the ICTY's Outreach Programme began the new stage of the Tribunal's involvement in the process of transitional justice in Bosnia and Herzegovina. Until then an institution which communicated only through its

indictments, judgments, legal decisions and from a position of primacy over the local courts, began to explain what it does and how it functions to the citizens from its jurisdiction.

Over the years, more and more information on the Tribunal became available to the public in Bosnia and Herzegovina. An office of the Outreach Programme was opened in Sarajevo and started acting as a direct link between it and the media and civil society in the country. It can not be said that it completely changed the misperceptions of the Tribunal present in the various section of the Bosnian public - the propaganda against it and denial of its work are still present in some political and media circles - but it surely did contribute to a far more objective view of the institution and the facts established in its cases.

### **3. Creation of War Crimes Chamber – ICTY's Crucial Intervention**

At the same time, The ICTY got the opportunity to start learning about what its impact on the ground was and how it could benefit from the strengthening of local justice mechanisms that it was always supposed to complement. The Tribunal used this relationship to implement one of the most important interventions of its existence which was beneficial for both Bosnian society and the Tribunal itself.

The Bosnian context was specific in comparison to other countries of former Yugoslavia due to the robust presence of the international community. The military forces ensured the peace, but also served as the main lever of the Tribunal's power - its police force arrested indictees and raided locations otherwise inaccessible to collect information and evidence. The political presence embodied in the de-facto government of Bosnia - the Office of the High Representative (OHR) - at first apprehensive about the Tribunal's influence on the political situation in the country, later became the main ally in the channelling of its influence on the nascent judicial system aiming to seriously take on prosecution of war crimes.

It was this power of international community that enabled the Tribunal to boldly define first the political and later substantive, expertise-driven intervention which saw the establishment of a local judicial mechanism capable of trying complex cases of crimes against humanity and war crimes according to the highest international standards. It was the creation of the War Crimes Chamber of the State Court of Bosnia and Herzegovina (WCC) which ensured that a serious attempt will be made by the society to address the crimes through the criminal justice institutions in a systematic and objective manner. At the same time, it ensured that ICTY will be able to use it as an outpost to which it can transfer a certain number of cases, thus being able to set a framework for the completion of its work. The transfer of lower and mid-ranking accused from ICTY to domestic courts became the backbone of ICTY's Completion Strategy<sup>xii</sup>. A vast majority of these cases were transferred to the War Crimes Chamber of the Court of BiH.

In September 2001 the Tribunal's Office of the Prosecutor first presented an idea about the establishment of a special war crimes court in Sarajevo<sup>xiii</sup>. Although it received the tentative support of the Bosnian Government, nothing happened until almost a year later when a group of experts, led by a former head of ICTY's investigations, were commissioned by the High Representative to write a report on the need for such a court<sup>xiv</sup>. They suggested that it was crucial for the country's effort to prosecute war crimes that a court is established on the state level, as part of an already existing State Court.

The idea was already being discussed by the senior officials at the ICTY as the way forward to fulfil the demands made by the Security Council that ICTY completes its work by 2010. The Tribunal engaged the OHR directly and came up with the framework for a court which would initially be financed by the international community, with a substantive involvement of foreign judges and prosecutors and international experts which would help set up the institution. The Bosnian government was brought on board when concrete proposals were developed between ICTY and OHR and the process progressed relatively smoothly, with the necessary laws ultimately adopted by the Bosnian parliament. The War Crimes Chamber was inaugurated on 9 March 2005<sup>xv</sup>

The Tribunal provided not only the expertise and advice that formed the judicial framework for the functioning of the WCC through the adoption of amendments to the Criminal Code and the Code of Criminal Procedure, but also helped define the organization of the WCC. The ICTY's experience was taken into a Bosnian context, adapted to the specifics of a national judicial system to form the foundation of a unique justice institution. Most international staff that helped WCC get off the ground were former ICTY officials. This included a number of prosecutors and some judges.

### 4. Transfer of Cases as Transfer of Legitimacy

At the same time, ICTY passed necessary amendments to its rules to allow for the transfer of its cases and investigations to the authorities in the region<sup>xvi</sup>. The rule 11 *bis* regulates the transfer of cases where indictments were already issued. The first case was transferred in June 2005 and it involved Radovan Stankovic, indicted for mass rapes and murders of Bosnian Muslim women in the town of Foca<sup>xvii</sup>. To date 10 accused have been transferred to the Court of Bosnia and Herzegovina for trial. One case, that of Stankovic, has already been completed, in another a judgment was issued by the trial chamber and is currently on appeal, three trials are ongoing and three pending. There are currently only two accused whose transfer is being considered by the Appeals Chamber of the ICTY. This will conclude the transfer as envisaged by the Completion Strategy.

Through its influence on the process of establishment of the WCC and the partnership it formed by transferring its case for trial before it, ICTY has invested its legitimacy into a local institution and its long term mission. The successes of the WCC in providing fair trials in these complex cases are successes of the Tribunal in fulfilling its unique mandate. At the same time, although WCC inherited certain legitimacy issues that ICTY grappled with, the challenges on this front were somewhat different.

International judges and prosecutors were brought in largely because there was a huge dose of mistrust towards the local judiciary in the Bosnian public. The judiciary was seen as unprofessional and corrupt, and war crimes trials held in entity courts were largely regarded as political and targeting only the members of the "other side"<sup>xviii</sup>.

The idea was that the best among the local judges and prosecutors, vetted by an independent High Judicial and Prosecutorial Council would work alongside international experts to ensure fair and expeditious trials. However, there was a concern among some observers that this would be seen by the public as an attempt to create a "Mini Tribunal" in Sarajevo, just another ad hoc international institution which would pack up and leave as soon as the transferred cases were dealt with - a court in which the local judges and prosecutors would only act as extras, without real involvement or contribution.

This was not the case. It was recognized from the start that this has to be run and seen to function as a Bosnian institution, with Bosnians taking responsibility for its success early on. The decision to appoint Bosnians to the positions of the president and the chief prosecutor, the leaders of prosecution teams and presiding judges in chambers dealing with war crimes, gave the institution a Bosnian face and identity. The WCC started to develop as a truly Bosnian institution with active international assistance, rather than a 'mixed' court which can function while internationals are there and is bound to collapse when they leave<sup>xix</sup>.

This was also recognized in the public, or at least among those most interested - the victims. It allowed for the WCC to acquire an authentic legitimacy, distinguishing it from the original source of it - the ICTY. Among other factors, its efficiency, resulting from the legislative framework which imposed strict deadlines for the trial length, became one of the main distinctive characteristics in comparison with the Tribunal. While certain misgivings about its capabilities to successfully try war crimes were present throughout its existence and especially in early days, it was also perceived as the start of a new phase in criminal justice effort which will be able to avoid some of the shortcomings of the ICTY.

For example, despite the initial vocal opposition to it among Serb victims because of its location - it is situated in a former military court building in which, it is claimed by some Serb victim groups, Serbs from Sarajevo were tortured and killed - it received their support when it declared readiness and intention to investigate and prosecute crimes committed against Serbs with the same dedication as all other crimes<sup>xx</sup>. It could be said that it built on the legitimacy it had as a partner of an international institution by developing a sense of ownership in the public that never existed in their relationship with the ICTY.

In addition, its proximity and the absence of a language barrier, but also the lessons learned from the Tribunal's experience, prompted the WCC to start communicating with the public from the moment it was established. In its first year it conducted a comprehensive outreach effort, adopting the models of communication used by the Tribunal, while developing original outreach initiatives including the Court Support Network, a network of NGOs acting in the communities on behalf of the War Crimes Chamber through outreach and witness support<sup>xxi</sup>. As the number of trials increased and with it the flow of witnesses, the outreach effort was somewhat reduced.

## 5. Challenges Ahead

The work is not complete for ICTY in ensuring the long term success of its intervention in Bosnia and Herzegovina and legitimacy of the institution it helped to create. It has to ensure that the transfer of know how and resources which will further cement the WCC in its effort to mete out justice for crimes against humanity and war crimes continues and after it has transferred the last case to it. It must not allow for the WCC to be seen as merely a dumping ground for its cases that enabled the Tribunal to close its door before the deadlines set by the UNSC. The support for its work has to be one of the main elements of its legacy. This will ensure the legitimacy of the WCC as an authentic Bosnian vehicle of transitional justice, but also the legitimacy of the ICTY as an instrument of international justice that fulfilled its mandate of contributing to a lasting peace.

## Endnotes

- <sup>i</sup> "War Crimes Before Domestic Courts in Bosnia and Herzegovina: Progress and Obstacles", OSCE Mission to Bosnia and Herzegovina, March 2005.
- <sup>ii</sup> "Bosnia and Herzegovina: Selected Developments in Transitional Justice", International Center for Transitional Justice, October 2004.
- <sup>iii</sup> In October 1992, the Security Council adopted Resolution 780, ordering a Commission of Experts is established to investigate "grave breaches of the Geneva Conventions and other violations of international humanitarian law" in the conflict in the former Yugoslavia. The Commission of Experts was given the broadest possible mandate of any international investigative body since Nuremberg.
- <sup>iv</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993) (hereinafter *Secretary-General's Report*), reprinted in 32 ILM (1993) 1163.
- <sup>v</sup> Charter of the United Nations, Chapter VII 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'.
- <sup>vi</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, 2 October 1995, para. 141.
- <sup>vii</sup> "The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses?", Gabrielle Kir McDonald, Council on Foreign Relations, 12 May 1999.
- <sup>viii</sup> "The Tribunal's Four Battles", Mirko Klarin, *Int. Criminal Justice*.2004; 2: 546-557.
- <sup>ix</sup> "It was easy enough to take the first vote in February to get the Tribunal created, but nobody really believed that it would work.(...) And then the question was how to get a prosecutor. And that was very complicated, and nobody thought that would happen. And then nobody thought that there would ever be a court that actually functioned, that would be set on what the precedents were going to be. And we then in May voted on how the -- 1993, voted on how the procedure of the Tribunal would work. And then still nobody thought it would work. They said that there would never be indictees, and then they said there would never be any trials, and then they said there would never be any convictions, and there would never be any sentencing." Madeleine Albright, Former US Secretary of State, sentencing hearing, Plavsic (IT-00-39 & 40/1) "Bosnia and Herzegovina", 17 December 2002.
- <sup>x</sup> "The Tribunal's Four Battles", Mirko Klarin, *Int. Criminal Justice*.2004; 2: 546-557.
- <sup>xi</sup> Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia, Dan Saxon, *Journal of Human Rights*, Volume 4, Number 4, Number 4/October-December 2005 , pp. 559-572(14); "Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak About ICTY" Kirsten Cibelli and Tamy Guberek, TUFTS University, 1999.
- <sup>xii</sup> UN SC Resolution 1503, 28 August 2003.
- <sup>xiii</sup> Speech of the Court of BiH President Meddzida Kreso at the inauguration of the War Crimes Chamber, Sarajevo, 9 March 2005.
- <sup>xiv</sup> "The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina", Consultants' report to the OHR, submitted by John Ralston, Peter Bach, Kjell Björnberg and Almir Rodrigues, May 2002.
- <sup>xv</sup> "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina", Human Rights Watch, February 2006.
- <sup>xvi</sup> See ICTY, Weekly Press Briefing, September 23, 2004, [online], [www.un.org/icty/briefing/2004/PB040923.htm](http://www.un.org/icty/briefing/2004/PB040923.htm) (retrieved September 28, 2004) (statement by Jim Landale, Spokesman for the ICTY Registry and Chambers).
- <sup>xvii</sup> "Radovan Stankovic Transferred to Bosnia and Herzegovina" ICTY Press Release, 29 September 2005, [www.un.org/icty/pressreal/2005/p1008-e.htm](http://www.un.org/icty/pressreal/2005/p1008-e.htm)
- <sup>xviii</sup> "War Crimes Before Domestic Courts in Bosnia and Herzegovina: Progress and Obstacles", OSCE Mission to Bosnia and Herzegovina, March 2005.
- <sup>xix</sup> "Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber", Human Rights Watch Report, 12 February 2007.
- <sup>xx</sup> "Citizens of BiH have divided opinions on War Crimes Chamber", Center for Investigative Journalism, Sarajevo, 26 June 2005 (online in Bosnian). [http://www.cin.ba/Stories/P3\\_Reconciliation/?cid=201,2,1](http://www.cin.ba/Stories/P3_Reconciliation/?cid=201,2,1)
- <sup>xxi</sup> Registry of the State Court of Bosnia and Herzegovina, "Court Support Network Project," Progress Report, p. 45. December 2005; "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina", Human Rights Watch, February 2006.