

# Exiting international justice

VIEW

I RECENTLY TOOK PART IN A CONFERENCE in Belgrade entitled "Dealing with the Past in ex-Yugoslavia". Although the rest of post-communist Europe confronted such questions a decade ago, the Balkan wars of the 1990s left both perpetrators and victims stuck in a time warp of justice delayed.

As the conference's participants made their way into Belgrade's Hyatt Hotel, an angry band of mostly older protesters bearing posters that read, "Free Milosevic" greeted them. In a flurry of media and security, they confronted Carla Del Ponte, chief prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY) in The Hague. Del Ponte is pressing Serbia's government to cooperate in the still unresolved cases of Radovan Karadzic and Ratko Mladic, who ordered, implemented, and oversaw the massacre of 7,000 Muslim men and boys at Srebrenica in 1995.

The protesters are not unrepresentative of Serb opinion. Almost a decade after the start of the ICTY's work, debate still rages over responsibility for war crimes, with little agreement on even the most basic facts of the conflicts in Bosnia, Croatia, and Kosovo. Serbian prime minister (then president) Vojislav Kostunica's attempt in 2001 to set up a truth commission was doomed from the outset by allegations of bias. The commission was disbanded within a year.

The ICTY is also in trouble. To be sure, Milosevic is on trial in The Hague for war crimes, crimes against humanity, and genocide. But comparisons to the post-WWII Nuremberg tribunal have worn thin: as the proceedings drag on, observers wonder why it has taken so long to establish criminal liability. After all, at Nuremberg, the top rung of the Third Reich was tried and convicted within months.

By contrast, Milosevic has taken advantage of the ICTY's procedures to delay his trial, while challenging its jurisdiction and legitimacy. This plays well back home, where indicted war criminals are still touted as heroes. Indeed, Serbia's last presidential election became something of a referendum on Milosevic — and hence on Serbia's relations with the West and the wider world. The pro-Milosevic candidate, Tomislav Nikolic, lost, but he received 46 percent of the vote.

Despite his campaign promises, Serbia's President Boris Tadic has so far failed to cooperate with the ICTY by assisting in turning over Mladic (Karadzic is probably not in Serbia), who would surely testify against Milosevic. One understands his trepidation: the first post-Milosevic



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prime minister, Zoran Djindjic, cooperated with the tribunal, and paid for it with his life.

Such foot-dragging exposes the ICTY's fundamental weakness: unlike the Nuremberg tribunal, the international community convened it *during*, not after, a war. Without full control of either the evidence or the accused, the ICTY lacked from the outset the legitimacy and authority of "victors' justice".

This continues to impede the case against Milosevic, raising questions about whether there is sufficient proof directly linking him to the policy of genocidal ethnic cleansing, although this is likely to be less problematic since the charges against him turn not on "command responsibility", but instead on the ICTY's charter principles of individual responsibility. These implicitly authorise prosecution of those responsible for a "joint criminal enterprise," thus linking liability for criminal behaviour, such as deportations and

removals, to other foreseeable atrocities.

But time is running out. The ICTY must wrap up new indictments this year, and disband by 2008. It enters this end game facing diminished resources and waning political will with the international community.

What will be the Tribunal's legacy? From the start, the ICTY's aims were ambitious, having been launched under the UN Security Council peacemaking powers. If this meant that the Tribunal was intended to deter further violence then it failed, at least in the short run. After all atrocities — including the Srebrenica massacre — continued after the ICTY began operating.

What about ethnic reconciliation? The ICTY's first chief prosecutor, Richard Goldstone, called for condemnation of ethnic persecution in order to enable all sides to transcend identity politics and move towards a more liberal political order. Individual accountability would somehow break the chain of ethnic identity and communal vengeance.

But fostering ethnic reconciliation is a tall order for any court, and the ICTY hasn't yet delivered. A liberal political order implies a rule of law that recognises precedents and analogical thinking. But many Serbs hold on to their sense of historical exceptionalism and unique suffering. Indeed, the coincidence of the NATO bombing in 1999 with the indictment of Milosevic helped convert both events into "attacks on the Serbian people".

Historical denial is no less evident in Croatia, where the polarities of blame and suffering have simply been reversed. There, too, the ICTY will not be missed.

So the talk nowadays is of the right "exit strategy" from international justice. When the ICTY closes its doors, where should its unfinished cases go? Del Ponte has called for "new partnerships for justice". That sounds fine, but what, realistically, are the choices? Can the ICTY's investigations and indictments really be turned over to national courts? So far, the picture is not promising: the few domestic trials in the region continue to reflect the fractious politics and pervasive ethnic bias that surround them.

As in many parts of the world, it may be several generations before the region's crimes can be worked through. The ICTY's responsibility should be to forge and disseminate a record that limits the possibility of historical denial. —DT-PS

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