

# The ICTY and the Challenges of Reconciliation in the Former Yugoslavia

Written by Janine Natalya Clark

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JANINE NATALYA CLARK, JAN 23 2012

Every year, thousands of tourists would flock to Yugoslavia to swim in the Adriatic Sea, to take in the breathtaking scenery and to sample the local cuisine. Yet there was a side to Yugoslavia that tourists never saw: mounting foreign debt, increasing tensions between the six republics, growing nationalist sentiment. In 1991, the teetering Yugoslav edifice finally crumbled but there was no 'Velvet Revolution'. Unlike the break-up of Czechoslovakia in 1989, the disintegration of Yugoslavia was violent and bloody. After first engulfing Slovenia and Croatia, war spread to Bosnia-Herzegovina (BiH) in 1992. Formerly peaceful towns were besieged and relentlessly shelled; paramilitary forces looted, pillaged and terrorized their victims; neighbours and friends turned on each other; and politicians planned and calculated their next moves.

Outsiders struggled to understand the conflict and too often fell back on simplistic stereotypes and misconceptions about the Balkans as an inherently violent part of the world. Yet while it was easy to gloss over the multiple and complex causes of the bloodshed in the former Yugoslavia, it was impossible to ignore the scale of atrocities and human rights violations occurring on a daily basis – massacres, ethnic cleansing, rape and sexual violence, torture. As the war in BiH raged on, there were growing calls for 'something to be done', and the idea of creating an international criminal tribunal began to take shape. In 1993, the United Nations Security Council – invoking Chapter VII of the UN Charter – established the International Criminal Tribunal for the former Yugoslavia (ICTY), to prosecute serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.

### The ICTY's achievement

Creating the ICTY was in many respects the easy part. The real challenge was always going to be to make the ICTY a fully-functioning, credible and successful institution, and from the outset the Tribunal faced significant hurdles. 'We had no seat, no courtroom, no prison, no budget, no computers, no law clerks, no secretaries and no set of rules governing the criminal procedure', recalls the first ICTY President (Cassese, 2004: 585). Nineteen years on, the Tribunal – which is located in The Hague, in the Netherlands – continues its work and has proven many of its early detractors wrong. Demonstrating that no one is above the law, for example, the ICTY has put on trial some of the key political and military leaders who drove the conflict in the former Yugoslavia. These include the former Serbian President, Slobodan Milošević (who died from a heart attack in March 2006 before the Tribunal could reach a verdict in his trial); Vujadin Popović and Ljubiša Beara, high-ranking figures within the Bosnian Serb Army who were sentenced to life imprisonment for genocide in 2010; and the Croatian general Ante Gotovina, sentenced to 24 years' imprisonment in 2011. The former Bosnian Serb leader, Radovan Karadžić, is currently on trial; and the former commander of the Bosnian Serb Army, Ratko Mladić, is awaiting trial.

While the judicial and legal achievements of the ICTY are significant, ultimately this is a tribunal that was set up to benefit the citizens of the former Yugoslavia, not least the many thousands of victims who are seeking justice. In order, therefore, to comprehensively assess whether the ICTY can be considered a success, it is essential to examine the impact that it is having on the ground. Of particular interest and importance is the Tribunal's impact on reconciliation, defined here as the repair and restoration of relationships and the re-building of trust. Although there is no explicit reference to reconciliation in the ICTY's Statute (UN Security Council Resolution 827), the document does

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state that one of the Tribunal's three official objectives is 'to contribute to the restoration and maintenance of peace', which clearly encompasses reconciliation. Over the years, moreover, various Tribunal officials have consistently emphasized the theme of reconciliation (see Cassese, 1994: §16; Kirk McDonald, 1999; Del Ponte, 2007; Brammertz, 2011). However, it was always going to be a tall order for a complex judicial body located outside of the former Yugoslavia to aid such a deeply personal and challenging process as reconciliation, and there are strong grounds for questioning whether it was even realistic to expect it to do so. Based on the findings of my research in the former Yugoslavia, I argue that there is little evidence of any positive nexus between ICTY trials and inter-ethnic reconciliation.

## Road to nowhere? Reconciliation via the judicial route

When asked about inter-ethnic relations within their communities, people typically invoke the word *suživot* (coexistence). There are no real problems or tensions, they maintain, and the fighting has stopped, but relationships have changed. People of different ethnicities no longer celebrate religious holidays together; they do not visit each other's houses like they once did; and certain walls and barriers now exist. In other words, there has not been the repair and restoration of relationships that is such a key element of reconciliation, and the ICTY's trials have done little to improve the situation. Indeed in some respects, they have simply assisted in reinforcing divisions. Firstly, the ICTY's work has fundamentally contributed to the problem of competing truths within the former Yugoslavia. Far from helping to establish a broad-based consensus on the basic facts of what happened during the wars, the Tribunal's judgements have merely served to entrench conflicting and selective ethnic narratives that critically ignore 'inconvenient facts' about the wars (Hayden, 1996: 743). If truth is to aid reconciliation, the relevant populations must accept it; but in the former Yugoslavia, people typically continue to cling on to their own ethnic truths about the wars. To take just one example, although the ICTY recently convicted two Croatian generals, Ante Gotovina and Mladen Markač, finding them guilty of crimes against humanity and violations of the laws or customs of war, this judgement – aside from generating a wave of popular anger against the Tribunal – has had little impact in Croatia. Gotovina and Markač are still widely viewed, including by the country's politicians, as war heroes who were simply defending their country against 'Great Serbian aggression'. Not only is the ICTY's work inadvertently obstructing the development of basic shared truths, but in this way it is also helping to impede rather than aid reconciliation. Each side wants the other/s to acknowledge its suffering and such acknowledgement is a critical prerequisite for repairing and restoring relationships. Yet as long as people remain wedded to their own ethnic versions of truth, and thus fixated on the suffering inflicted *on* – rather than *by* – their own ethnic group, this much-needed acknowledgement is unlikely to materialize.

Secondly, in order for relationships to be re-built, it is essential that people see each other as individuals and not simply as members of an ethnic group. For example, although Serbs committed the largest number of atrocities, Serbs are not collectively guilty (Clark, 2008), and individual Serbs must be judged on the basis of what they *did* and not who they *are*. In theory at least, the ICTY can aid this process; one of the rationales for criminal trials is precisely that they individualize guilt. Following mass atrocities, however, no court can ever prosecute all war criminals, and this is particularly true in the case of ad hoc tribunals like the ICTY. Ad hoc means that the ICTY is a temporary body (it is currently due to complete its work by 2014), and this has necessarily impacted upon the number of indictments that it has been able to issue – a total of 161. In view of the scale of atrocities committed in the former Yugoslavia, 161 indictments is merely the tip of the iceberg, and indeed one of the main popular grievances with the Tribunal is that it has not prosecuted enough people. While local courts within the former Yugoslavia are now conducting their own war crimes trials, this has not been enough to offset a perceived 'justice gap'. In other words, the process of individualizing guilt has been a limited one, and thus it is not uncommon for people to make sweeping generalizations about entire ethnic groups and their collective culpability, habitually speaking in terms of *Mi* [Us] and *Oni* [Them].

Turning now to the second key element of reconciliation, namely the re-building of trust, an important distinction can be made between vertical trust (trust in institutions) and horizontal trust (inter-personal trust), with the former affecting the latter (Eek and Rothstein, 2005: 6). This means, therefore, that popular trust in the ICTY would potentially aid the building of horizontal trust. Within the former Yugoslavia, however, the ICTY commands little trust, particularly among Serbs and Croats; both regard the Tribunal as a political institution that is heavily biased against their own ethnic group. Serbs, for example, frequently allege that they have been disproportionately targeted by the

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ICTY and that crimes against Serbs – in BiH, Croatia and Kosovo – have been deliberately ignored. Croats feel similarly victimized, incredulous that the Tribunal convicts ‘Croatian heroes’ such as ‘*naša Gotovina*’ [our Gotovina]. Bosnian Muslims, for their part, feel aggrieved that the ICTY does not impose tougher sentences on those it finds guilty. The Tribunal to date has only sentenced four defendants to life imprisonment and it has handed down some very light sentences – as little as three years in the case of one defendant (Dragan Kolundžija). This is unfathomable to victims, critically undermining their trust in an institution whom they frequently accuse of rewarding war criminals (Clark, 2011).

## Where the Tribunal went wrong

An important question is whether the ICTY could have had a positive impact on reconciliation, and what is clear is that it needed to invest more in communicating and engaging with local people in the former Yugoslavia. Nineteen years after its creation, the ICTY remains a poorly understood institution and while this is not solely the fault of the Tribunal (local media is also heavily to blame), there is no doubt that it could have done far more to reach out to local communities in the former Yugoslavia and to provide much-needed information about its work. Regrettably, the ICTY did not commence any outreach activities until 1999 – six years after the Tribunal’s establishment – and the outreach work that has been undertaken over the years has been somewhat limited. Part of the problem is simply a lack of resources. The ICTY’s outreach unit is small and under-funded, due to the fact that outreach work is inexplicably excluded from the Tribunal’s main budget (Clark, 2009), and this has necessarily affected the degree of outreach work that the ICTY has been able to undertake. It has engaged in important capacity-building work with local judges, prosecutors and so on, to ensure that national courts in the former Yugoslavia are fully prepared to deal with vast numbers of war crimes cases. However, there has not been enough attention given to the grassroots level, and this has almost certainly impaired the Tribunal’s impact on the ground. An ex-combatant in the Croatian town of Vukovar recently told me that as far as the ICTY is concerned, people are only interested in the sentences that it imposes. They want to know how many years a particular defendant will spend in prison and this is all they need to know, the ex-combatant insisted. The problem is that if people do not understand how the Tribunal reaches a verdict and how it decides on an appropriate penalty – and this is where outreach has a vital role to play – they will continue to harbour negative feelings towards it. If they were better informed, on the other hand, they might have more trust and confidence in the Tribunal and thus be more likely to accept its judgements.

Yet while a better outreach strategy, and specifically one that was more focused on the grassroots level, could have made a positive difference, any discussion about the ICTY’s impact on inter-ethnic relations cannot ignore the fact that there are major obstacles to reconciliation in the former Yugoslavia. These include the unresolved fate of large numbers of missing persons, which is both preventing their families from moving on with their lives and critically fuelling inter-ethnic mistrust; the limited amount of psycho-social assistance available to victims and ex-combatants, which means that trauma often remains unaddressed; the nationalistic rhetoric that is prevalent in various local media, which serves to reinforce and strengthen rival ethnic narratives and competing claims of victimhood; and the use and abuse of memorials, which can encourage renewed tensions and antagonisms.

## Conclusion

In view of the enormous challenges that reconciliation poses, could local communities in the former Yugoslavia manage without it? One commentator, for example, asks: is the term reconciliation ‘even meaningful in a consideration of rebuilding the social infrastructure of violated communities?’ (Weinstein, 2011: 2). Certainly, societies can function without reconciliation and with only minimal levels of trust (Clark, 2012). Nevertheless, without something deeper than mere coexistence – whereby communities live side by side but not together – peace in the former Yugoslavia will remain fragile, a negative peace characterized by little more than the absence of direct violence (Galtung, 1969). Some level of reconciliation is therefore needed. The critical point, however, is that the ICTY cannot be over-relied upon to assist the process. At this stage, we simply do not know enough about whether and how tribunals like the ICTY can positively contribute to reconciliation in post-conflict societies. There is still much more research to be done.

It is a widely-held view within the former Yugoslavia that reconciliation will take time, perhaps even two or three

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generations. Of course reconciliation is a process that cannot be rushed or forced, but it will not happen by itself. It has to be worked on and at present there is not enough being done to aid the process. One ongoing initiative, known as RECOM, is to establish a regional truth and reconciliation commission which would give all victims – regardless of ethnicity – the opportunity to tell their stories and to be heard. The idea of creating such a commission, however, is contentious and hence unlikely to materialize, at least not in the near future. More immediate steps must be taken to promote reconciliation. In particular, there needs to be more investment in resolving the issue of missing war victims (from all sides); more opportunities must be created for members of different ethnic groups to come together and talk about the past, in order to facilitate a greater awareness of cross-ethnic shared experiences and suffering (the loss of a loved-one, for example); and small-scale projects that allow people of different ethnicities to work together on common projects – such as re-building houses, selling local produce or promoting the area to prospective tourists – would provide the contact that is such a critical prerequisite for reconciliation to progress.

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## **The ICTY and the Challenges of Reconciliation in the Former Yugoslavia**

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