

Book Review



Diane Orentlicher

Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia (Oxford, Oxford University Press, 2018) ISBN: 9780190882273, hard cover, 496 pp.

In December 2017, the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague closed, 25 years after it was set up by the United Nation's Security Council (UN SC) Resolution 827. That decision by the UN SC, primarily in response to the brutality of the war in Bosnia and Herzegovina (BiH), completely changed the landscape of international law. American legal scholar Diane Orentlicher, a seasoned observer of the ICTY, provides in this book the most detailed assessment of its record to date. Countless journal articles, books, documentaries and panels, in the former Yugoslavia, The Hague and elsewhere discussed the ICTY but only in recent years has 'impact' become the focus of attention. Arguably, that was a consequence of the growing realisation that the tribunal cannot possibly do all that its numerous supporters hoped for. Now, Orentlicher has published a book that explores that, in what is obviously a result of long-term immersion in the topic, and countless interviews over the years.

The book is structured into six parts, divided into 11 chapters. The six parts are thematic, discussing the ICTY's relationship with the Republic of Serbia and the various authorities in BiH through time, the 'quality of justice' provided, the tribunal's impact on denial and acknowledgment of harm, and its effects on catalysing domestic prosecutions in the two countries. Serbia and Bosnia and Herzegovina are a logical focus of the assessment of ICTY impact, given that many of the crimes concern these two countries and their populations (BiH as the place where many of the gravest crimes were perpetrated, and Serbia as the state from which many perpetrators came, and the state that provided much of the support for perpetrators of those crimes – both at the time through funding and equipment, as well as after the fact by being the *de facto* shelter to ICTY fugitives).¹

1 On the ICTY case load, see online: <http://www.icty.org/en/cases/key-figures-cases>.

Orentlicher's work on the ICTY became widely known through two reports she wrote for the Open Society Foundation's Justice Initiative, in 2008 and 2010. First came 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia',² followed by 'That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia'.³ Those were some of the earlier attempts to grapple with tough questions about the limits of retributive justice in the former Yugoslavia. Those efforts to assess impact increasingly exist elsewhere too, analysing where transitional justice measures more broadly can provide constructive solutions to move post-conflict and post-dictatorship societies forward.⁴

The key question the book answers is, as the title suggests, the impact of the ICTY in Serbia and BiH. However, through that analysis, the book asks the fundamental question about what can (and cannot) be reasonably expected from a criminal tribunal set up in the aftermath of a long, brutal conflict. That question is fundamental not only as an assessment of the past, and the effectiveness of resources, and human and political capital that were invested in the tribunal. It is also as a forward-looking exercise that should influence our thinking on other (post-)conflict contexts: our expectations, resource management, and communication with key stakeholders in the future.

There was both cynicism and high expectations from the ICTY early on.⁵ The expectation and hope of reconciliation between the former belligerents ranked high on a list of desired outcomes. As this book, and the discussions about it show, the assessment of the work of this tribunal depends on the expectations people had about what it was supposed to do.⁶ They also stress that the impact of the institution changed over time, and that it was strongly influenced by what other actors, often collectively referred to as 'international community' did, or did not do, to support it. Post-conflict settings and the application of transitional justice measures sometimes even produce unexpected

2 D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Institute Justice Initiative, New York, 2008).

3 D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Institute Justice Initiative, New York, 2010).

4 A. Mihr, *Regime Consolidation and Transitional Justice: A Comparative Study of Germany, Spain and Turkey* (Cambridge University Press, Cambridge, 2018).

5 Book Launch, "Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia", min 19, held in New York on 31 May 2018, recording online at: <https://www.opensocietyfoundations.org/events/book-launch-some-kind-justice-icty-s-impact-bosnia-and-serbia>.

6 For another discussion on the benchmarks of success for the ICTY, see: J. Trahan and I. Vukusic, 'The Legacy of the ICTY: The Three-tier approach to justice in Bosnia and Herzegovina', in C. Stahn et al. (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Account* (Oxford University Press, Oxford, forthcoming).

consequences. For example, the ICTY has effectively started a new era of international law. It developed practices in investigations such as in working with vulnerable witnesses, and brought jurisprudence in areas that needed clarification, from a clearer understanding of what constitutes mens rea in genocide to the prosecution of sexual violence. The courts that followed looked to the ICTY for lessons learned. At the time of the ICTY's establishment, it was not at all something that was expected.⁷

If the main argument of the book is to be summed up, then it is that the ICTY was an experiment: one that had many ups and downs through the years, but one that, even as imperfect as it was, made incredible strides forward in international law, and provided some justice to some of the victims. Bosnian survivors, as this book shows, have a long list of grievances towards the ICTY, including its inability to prevent denial, and for sentences widely perceived as too short. However, they are still overwhelmingly pleased that it had existed.⁸ Orentlicher writes that post-conflict recovery takes decades, and it is complicated, but in the case of the former Yugoslavia, the ICTY did contribute in constructive ways.

From its start, advocates supporting the tribunal, as well as many of its early principals seemed to think the tribunal had one exceptionally important role. That role was achieving reconciliation. However, in the years that followed it became clear that that was not so simple, and questions emerged: do trials help reconcile communities in the aftermath of violence, and if they do not, what are the other benefits atrocity trials can potentially deliver?⁹ Furthermore, how can trials be utilised in combination with other measures to improve post-conflict societies and the lives of survivors?¹⁰ Those are some of the questions that are answered by Orentlicher in this detail-rich book. Moreover, Orentlicher talks about acceptance (or the lack thereof) of the tribunal and the support for it. This assessment can be read in parallel with Marko Milanovic's contribution explaining why the ICTY faced such resistance among Serb(ian) communities.¹¹ This book proves particularly valuable when discussing denial, and lack of acknowledgment of harm, the contribution the judicial proceedings

7 Book Launch, *supra* note 5, comments by Diane Orentlicher, min 18.

8 *Ibid.*, min 22.

9 Orentlicher writes about statements by ICTY principals on reconciliation on pps. 104, 105.

10 J.N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (Routledge, Abingdon, 2014).

11 M. Milanovic, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-mortem', *American Journal of International Law* (2016) 233–259.

made to the establishment of facts and to the knowing of history,¹² and to the importance the ICTY had in catalysing war crimes trials in the region.¹³

It is hard to find faults or missed opportunities in this extensively-researched volume. Both the content and the reasoning are sound, well-structured and clear, and the arguments Orentlicher presents are convincing. One could probably, if nit-picking, find issues the author should have discussed, sources she should have or could have included, but given the vastness of the writing on the topic in the fields of political science, law, sociology, and history, but also in genres such as memoirs,¹⁴ that would hardly be fair. One observation that can be made is that Orentlicher's work is mostly informed by the perspectives of prosecutors, survivors, and human rights activists. It may have been useful, and interesting, to explore the perspectives of defendants and their counsel, and issues like the length of detention, or equality of arms in court.

The value of this book is in analysing ICTY's impact in a clear-headed way, in detail, and by giving a voice to citizens from the region: activists, scholars, lawyers, and survivors, to present their views. We hear from western scholars about the ICTY all the time, and more space should be provided for others whose lives are influenced by the tribunal to speak out. As the ICTY was an expression of justice delivered from an external source, physically removed from where many of the atrocities were perpetrated, and where many survivors live, it is paramount to hear those voices. With the help of Orentlicher's book, it will be easier for policymakers in the future, both internationally and domestically, to have a better grasp of what can reasonably be expected of criminal proceedings, leading to, hopefully, better thought-out policy solutions. Given the dire needs in (post-)conflict settings like Syria, Myanmar and Yemen, and limited resources, this help should be well received.

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- 12 R. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, Cambridge, 2011).
 - 13 Orentlicher writes about supporting local prosecutions in detail in part five of the book. This section can be particularly useful to those engaged in judicial capacity building projects in other contexts.
 - 14 V. Petrović, 'The ICTY Library: War Criminals as Authors, Their Works as Sources', *International Criminal Justice Review* (2018) 1–16, <https://doi.org/10.1177/1057567718766221>.