Making Sense of Archives

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Archives of Mass Violence: Understanding and Using ICTY Trial Records

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Abstract: The most relevant collection for studying the wars accompanying the breakup of Yugoslavia, which resulted in over 130,000 dead or missing, is the archive of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. The Tribunal established by the UN Security Council in 1993 to prosecute genocide, crimes against humanity, and war crimes indicted 161 people and had accumulated millions of pages of testimony, military and police reports, and videos when it closed in late 2017. This invaluable record details the massacres and includes well-known incidents, such as the mass executions after the fall of Srebrenica, but also killings and torture elsewhere in the former Yugoslavia. This article investigates the history of this archive, analyzes its contents, and argues that the collection has two important features which present both a huge opportunity and a significant challenge for research—the immense volume of the archive, and a lack of access to important parts of it.

Keywords: war crimes, international criminal justice, International Criminal Tribunal for the former Yugoslavia (ICTY), genocide, archives

Introduction

In December 2017, the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, the first international criminal court since Nuremberg and Tokyo, officially closed. Established in May 1993 by the Security Council of the United Nations (UN), it was tasked with prosecuting those most responsible for the attacks on civilian populations; the killings, beatings, torture, rape, and looting.[1]

1 United Nations Security Council, Resolution 827 (25 May 1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; United Nations, Updated Statute of the

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Some of the wartime violence was retold, in real time, through news reporting, by survivors, and shocking images were broadcast to living rooms across the globe. Pictures reminiscent of the Holocaust preceded this novel approach in international law and diplomacy—the establishment of a tribunal—and almost 30 years later, the ICTY leaves behind a complicated legacy (Orentlicher 2018; Stahn et al. 2020). One particularly fascinating part of that legacy, and one vital to scholars—especially historians—are the ICTY archives (Ketelaar 2018; Steinberg 2011; Vukušić 2013).

The nature and purpose of the institution shaped the form its archives took, and this article will reflect on those processes at the Tribunal—an institution that, at the time it was established, had little in terms of tried and tested practices to build on. Importantly, the International Residual Mechanism for Criminal Tribunals (IRMCT), a kind of daughter institution to the ICTY, holds the records of the Tribunal for the former Yugoslavia, and those of the international criminal proceedings relating to the genocide in Rwanda (United Nations. International Residual Mechanism for Criminal Tribunals. n.d.(a)).[2] This, transitional justice scholars will know, is a consequence of the two tribunals, the ICTY and International Criminal Tribunal for Rwanda (ICTR) being set up a year apart and having similar statutes and mandates. The IRMCT is now tasked, among other things, with the preservation of the archives of both tribunals (United Nations. International Residual Mechanism for Criminal Tribunals. n.d.(c)).

These archives are, in a word, colossal. Collectively, the archives of the ICTY and the IRMCT "Hague branch",[3] i.e. the section dealing with the former Yugoslavia, contain approximately 2400 linear meters of physical and 1.5 petabytes of digital records. These include both judicial and non-judicial records (and the latter include administrative materials relating to the management of the institution). There are no figures on the precise number of pages or separate documents in the archives, but there are details that illustrate their vastness. At the moment, 310,000 judicial records are available through the public judicial records database. More than 100,000 of these records are in BCS—the acronym for Bosnian/Croatian/Serbian—the ICTY's term for what used to be called Serbo-Croatian. There

International Criminal Tribunal for the Former Yugoslavia (September 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. All online references were accessed on 4 October 2022.

2 The IRMCT was established in 2010 to "perform a number of essential functions previously carried out by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY)." For years, the Mechanism operated in parallel with the two Tribunals, preparing to take over residual tasks. As the ICTR closed in 2015, and the ICTY in 2017, the IRMCT began operating as a stand-alone institution.

3 The part of the IRMCT dealing with the ICTR is seated in Arusha, Tanzania, where that tribunal was located.

are approximately 194,000 public exhibits (i.e. pieces of evidence), and 83,000 of them are in BCS. There are also 24,500 public transcripts and tens of thousands of hours of courtroom session recordings. Crucially, 70% of all of the judicial records are public.[4] As this article will show, this material presents a crucial opportunity for research, especially for historians.

Over its 25-year history, almost 5000 witnesses testified at the Tribunal, and some of them did so multiple times (United Nations. ICTY, n.d.). Another illustration of the sheer volume of material is the fact that at each of two recent trials of leadership figures, Bosnian Serb president Radovan Karadžić and army commander Ratko Mladić, almost 600 witnesses were heard.[5] The Mladić trial included almost 10,000 individual exhibits.[6] Proceedings in the Karadžić case were similar, with 11,469 exhibits.[7] This archive is the central collection of evidence on the violence unleashed in the early 1990s. It includes diverse materials about civilian and military structures, at the state, regional, and local level, which committed violence and even genocide; about perpetrators, political leaders and parties, and local authorities. These records give us unique insight, from the actors themselves but also observers, such as journalists, peacekeepers, and diplomats, into the patterns of violence. It shows how violence was planned, instigated, and implemented, and by whom.

From the establishment of the Tribunal, the ICTY principals and observers placed an important emphasis on its presumed role in reconciliation. Since then, this laudable goal has been largely abandoned, as specialists in the field slowly realized that it was little more than wishful thinking. Trials can and do achieve important goals—they establish key facts about events, punish those proven to have perpetrated crimes "beyond a reasonable doubt", and send a message about which kinds of actions and behaviors are not legal and will not be tolerated. But trials do not seem to bring reconciliation. In fact, trials on their own seem to do very little to reconcile populations in the aftermath of mass violence (Trahan and Vukušić 2020; Clark 2009). It was becoming more common to invoke the archives as an accomplishment just as talk of reconciliation was fading—especially in the

4 Helena Eggleston, IRMCT Spokesperson, personal communication, The Hague, 21 December 2020.

5 In the Karadžić trial, 586 witnesses testified, while in the Mladić trial, 591 were admitted, see: ICTY Prosecutor v. Radovan Karadžić, IT-95-5/18, Case Information Sheet, no date. https://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf; ICTY Prosecutor v. Ratko Mladic, IT-09-92, Case Information Sheet, no date, https://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf.

6 ICTY *Mladić*, Trial Judgment Summary (22 November 2017), https://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf.

7 ICTY *Karadžić*, Trial Judgment Summary (24 March 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf.

last decade before the ICTY closed. The archives were a tangible achievement the Tribunal would leave behind.

After all, billions of dollars were spent over the years and it was key to justify the expense, as well as the effort, as the closure of the institution was approaching. It is the archives, their contents, their contribution to knowledge about the past, and, presumably, the potential for increased mutual understanding between members of different ethnoreligious groups that made them attractive. The archives were transformed from what was initially an afterthought—something set up to serve the judicial process—to publicly accessible records, and an achievement in its own right (United Nations. ICTY, 2017.). It was a logical step for the Tribunal to take, as the archives existed, were undoubtedly rich and valuable, and were something that could easily be pinned down (unlike reconciliation). They were also completely under the Tribunal's control. The archives were a promise the ICTY could actually keep and as such, they received more and more attention.

The ICTY was established in 1993, as a war was raging that would go on to leave over 100,000 dead or missing in Bosnia and Herzegovina (BiH) alone (Tabeau and Bijak 2005). Most of the cases dealt with crimes in BiH, and the only cluster of events legally labeled as genocide (and with individual convictions for the crime) were the mass executions following the fall of Srebrenica on 11 July 1995. But the crimes committed in BiH were many, and they took place in towns large and small. They were also diverse, from shelling civilian areas and snipers shooting ordinary people on the streets of Sarajevo, to the targeting of hospitals and markets, widespread expulsions and looting, arbitrary arrests, torture and killings in camps, sexual violence, as well as numerous attacks on cultural and religious heritage.

The perpetrators who were held accountable were all men, except Biljana Plavšić, a Bosnian Serb politician and high-ranking official who in 2002, pleaded guilty to the crime against humanity of persecutions.[8] The men in the dock were civilians and military staff, of differing ranks and positions in hierarchies of power. They ran ministries, towns, and villages, they were parliamentarians and party members, or members of local bodies managing the war. Some of the men were paramilitary members, and others camp guards. Their roles in the bloodshed were also diverse.

The ICTY records are invaluable to understanding the violence that was unleashed in the 1990s across the former Yugoslavia, and we know what we know (and we know a lot) largely because of them (Dizdarevic et al. 2020; Halilovich 2014). This article proceeds with three goals in mind: 1. to emphasize the

8 ICTY, Prosecutor v. Biljana Plavšić, IT-00-39 & 40/1, Statement of Guilt (17 December 2002), https://www.icty.org/en/content/statement-guilt-biljana-plav%C5%A1i%C4%87.

importance of this collection, 2. to outline its contents and describe how it was created, and 3. to provide insight for researchers, especially historians, into how to explore it. Given that the archives are a product of the process that created them—constrained by procedural rules—, for those aiming to use them, it is essential to understand how these war crimes trials worked.[9]

Investigations and Trials

There is nothing easy about investigating and prosecuting war crimes, crimes against humanity, and genocide. Until the 1990s, there was little jurisprudence or relevant experience that was applicable, and the ICTY prosecution staff, the judges, the defense, the translators, the legal officers, the investigators, and analysts learned on the job. The work was inevitably emotionally taxing with constant exposure to evidence of human depravity. The proceedings lasted for years, and losing a case brought relentless critique. Despite numerous challenges and disappointments along the way, the trials produced a remarkable set of records. The documents contain accounts of victims who narrated some of the worst experiences of their lives. With saddening frequency, those who followed the trials day in and day out will recall, witnesses narrated the last moments in the lives of others—often loved ones. It was not uncommon for some of those testimonies to be etched into the researcher's memory and for them to remain there.[10]

When, in 1994 and 1995, the first investigators and lawyers were being hired by the Prosecutor's office, it was clear that the work was going to be immense, and that they would need a place to start. By then, the violence was widespread and was raging across a third of Croatia, and much of Bosnia and Herzegovina. Over a million people were expelled and it was still dangerous for investigators to go to the region to collect witness statements and seize documents. Access to government documents was not granted—requests were rejected or ignored, and files hidden. This was exactly why the early investigations needed a foothold, and

9 These procedures vary from court to court, so if a researcher wants to study trials at the International Criminal Court or other judicial institutions, they should familiarize themselves with the procedural rules governing them.

10 One such example is the testimony of witness O in the Krstić trial. Witness O was one of the few survivors of the mass executions after the fall of Srebrenica. On 13 April 2000 in court he said, about his experience of waiting to be shot in July 1995: "I was really sorry that I would die thirsty, and I was trying to hide amongst the people as long as I could, like everybody else. I just wanted to live for another second or two." see: ICTY Prosecutor v. Radislav Krstić, IT-98-33, hearing, witness O (13 April 2000), transcript p. 2910, https://www.icty.org/x/cases/krstic/trans/en/000413ed.htm.

they found it in the reports of various commissions and rapporteurs, acting on behalf of the United Nations and other institutions (Korner 2020).

However, much remained unknown:

> The majority of the crimes committed during the break-up of the former Yugoslavia were totally unreported. A few did attain almost instant world-wide publicity. In general, however, unspeakable atrocities took place in isolated locations, under cover of darkness, in non-descript buildings, in common fields and forests, out of sight of media cameras or military surveillance, totally unknown to the wider world (Harmon and Gaynor 2004, 405).

What happened in those non-descript buildings, in the fields and forests, and out of sight was to be slowly exposed over the next two decades, in painstaking detail, during long courtroom sessions day after day, year after year. Many who followed the trials recall the tediousness of some of those sessions. During the investigations, information trickled in: one account of a beating in a camp led to another, and then that witness spoke about another place of detention, maybe a garage or a basement. Witnesses recalled the torture they experienced, about hearing of other places of detention like warehouses and schools, and learning about other detainees and what they had endured, too. This is how the investigation progressed, step by step. Refugees gradually recovering in faraway countries began speaking up and demanding justice. Names of villages and hamlets started emerging, dates of expulsions and mass killings began forming timelines of death and suffering. It is because of these investigations that now, nearly 30 years later, we know how events unfolded in some situations, such as after the fall of Srebrenica, almost hour by hour.

However, it was not the aim of these investigations to produce a general survey of the breakup of Yugoslavia and the violence that followed. That is not what a court, or more specifically the prosecutor, does. While historical context mattered, especially early on as the prosecutors and judges were finding their way in understanding who was who, and learning the names of towns and important actors, soon their efforts became more pointed. Inevitably, prosecutors needed to focus their attention on some crimes in some places, and disregard others. This prioritization, while controversial and frustrating for victims the crimes against whom were not included in indictments, is standard practice, both internationally and nationally.

Allocation of resources and case selection thus shapes the archives, resulting in us knowing about Srebrenica, but not about the hundreds of incidents where civilians were shot in the darkness and thrown in a river, or where one family was set alight in a remote hamlet. When incidents are not included in an indictment, and do not reach a courtroom, there are gaps and silences in the record and those are there to stay. These processes are naturally exacerbated by news reporting, which largely focused, early on, on the fall of Vukovar, and later on camps in western Bosnia, the siege of Sarajevo, mass executions after Srebrenica fell, and

other events which were seen as major. This focus spilled into trial coverage and the same locations and types of violence attracted all the attention.

Who did the ICTY (and its successor, the IRMCT) prosecute then and what does it mean for the archives? Starting with Duško Tadić, a Bosnian Serb from Kozarac in western Bosnia—reserve police officer, café owner, and karate enthusiast—the ICTY was to prosecute a varied list of characters. Some were household names: politicians, generals, and political leaders involved in negotiations, but many were not. Many were former waiters and warehouse workers, or schoolteachers and doctors, most of whom had no previous record of criminal or violent behavior. Many used the opportunity to rise to levels of importance they had never had before the war. A cursory look at the list of indicted individuals tells us that 90 of them were sentenced, 18 acquitted, and 10 died before being transferred to the ICTY, while 7 died after transfer to The Hague (United Nations. ICTY, 2021). A well-known name in the latter group is Slobodan Milošević, former Serbian and then Yugoslav president during the 1990s. His was one of the most important trials, covered regularly by journalists up until his death in 2006 when proceedings were terminated with no verdict.

Most of the cases, and as a result most of the archives, concern Bosnia and Herzegovina. Given the dynamics of the breakup of Yugoslavia and the accompanying violence, that is hardly surprising. It is there that most of the victims were killed, with several armed conflicts unfolding simultaneously, with numerous regular and irregular units active across the country for four years. This brutality and wide-scale perpetration of mass violence led to probably half of the ICTY cases focusing on BiH. In Croatia and Kosovo, the Prosecutor brought charges for crimes between 1991 and 1995 and in 1998 and 1999 respectively, while little attention was given to what was, in comparison, lower intensity violence in what is now North Macedonia.[11]

The Prosecutor's office investigated different warring parties, so there were Croats (from Croatia and BiH), Serbs (from Serbia proper, but also Croatia and BiH), Kosovo Albanians, and Macedonians in the dock. However, as ICTY observers will be well aware, Bosnian Serbs constituted the largest number of defendants. Again, given the dynamics of the conflict and perpetration of violence, this is not surprising. The outcomes of these trials and the charging practices of the Prosecutor's office were the source of much frustration and endless commentary in the professional circles of ICTY observers, but even more so in the heated discussions among affected communities across the former Yugoslavia. Survivors were an important voice in these debates, and they were frequent critics of the judgments.

11 ICTY Prosecutor v. Boškoski and Tarčulovski, IT-04-82, Case Information Sheet, no date, https://www.icty.org/x/cases/boskoski_tarculovski/cis/en/cis_boskoski_tarculovski_en.pdf.

Given that trials, irrespective of their outcome, generate large amounts of evidence, it is crucial to understand the process of proving crimes in court, to a standard of "beyond a reasonable doubt", and the roles of the prosecution and the defense. The trials conducted at the ICTY were adversarial proceedings, where the prosecutor is driving the process forward. The prosecutor's office initiates investigations, collects evidence, presents charges, and argues cases in court. The indictments are the basis of the legal process, in which the prosecutor presents the legal arguments based on evidence. The defendant, often but not always represented by counsel (some chose to represent themselves), then responds by challenging the prosecution evidence and their case and presenting counter arguments and evidence. This process, admittedly described here in such simplified terms that it will certainly make lawyers frown, is how the proceedings work.

Finally, a word about categories of evidence. Broadly speaking, there are two kinds of evidence: crime-base and linkage (Nystedt, Nielsen, and Kleffner 2011, 42–43). The latter is particularly important for the accused in positions of leadership, as they are often physically removed from the crime scene, and this kind of material is presented in an effort to prove a link to the atrocity. It is a way for the prosecutor to prove an accused ordered or knew about the crime and did nothing to prevent or investigate it in the aftermath and punish those responsible. The former, the crime-base evidence, is more straightforward, and generally more easily found. It is evidence that a crime took place, so in court this could be a survivor testifying about their experiences and victimization.

Much of the evidence is presented in open court, but sometimes witness testimony and documents are confidential and presented in closed sessions.[12] All evidence that is presented is ultimately assembled in one file, which judges assess in order to reach their verdict. The process is always time consuming and can last over a decade—from first appearance in court to final judgment. That is because the case normally goes to appeal (when either the prosecution, the defense, or both contest the trial judgment). The archives that are created include materials presented at different stages of proceedings.

Contents of Archives and Their Importance for Research

There has been a lot written about the role of trial archives—in cases of genocide, crimes against humanity and war crimes, in knowing history. Wilson rightly

12 ICTY Rules of Procedure and Evidence, Rule 78 and 79 (8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

argues that the presentation of histories of conflicts are, within courtrooms, driven by the legal actors' differing strategies, approaches, and motivations. These actors present the interpretations of the past that are most useful to them as they try to construct, or reject the construction of, legal categories like genocide (Wilson 2011, 70; Sander 2021; Wilson and Petrović, forthcoming). Zammit Borda (2020) also recognizes the limitations of trials in writing historical narratives and identifies important blind spots to be aware of. However, these complex and long-running disagreements about the extent to which tribunals should be expected to participate in both the discovery and dissemination of historical knowledge are beyond the scope of this piece.

A valuable practical approach when starting research is to not look for one overarching story—a simple and straightforward grand narrative—that is ready to use. While, of course, the prosecution and defense have a story about what happened and the role of the accused—a narrative of each case—the archives on the whole offer no easy answers to questions about past events and how they should be presented and shared with the public. The place to look for a succinct version of this narrative, and how the evidence and law support it, is the opening, and even more importantly, final arguments in each trial. These are provided by both parties, and they present a summary of their case with an emphasis on key arguments. In fact, the archives hold, as a result of all the factors discussed, what Petrović (2017, 249) calls "selective abundance". This abundance is also atomized—the primary organizing principle of the archive of exhibits is the trial—as the material presented in one trial will be grouped together. These are military, intelligence, and police documents, witness statements, meeting minutes, intercept evidence, and much more.

These exhibits are marked with a unique number. What is crucial is that the material has been extensively vetted. Issues of authenticity were regularly raised, and judges took great care to establish it. Experts poured over thousands of pages of documents and examined details such as signatures and stamps, and questions were raised about where documents originated from as chains of custody were meticulously proven. Some evidence was assessed numerous times in different trials.

The judicial archives are a consequence of choices made by the prosecutor about which crimes to prosecute and in which locations, and which individuals to charge (Nielsen 2008, 95). They reflect choices about the allocation of resources prosecutors needed to make on a daily basis (Jarvis and Vigneswaran 2016, 33). This selectivity is logical, and it is to be expected. There is no legal system, and no court which can address every single crime in a war as long, brutal, and as geographically spread out as the one in the former Yugoslavia. No institution or system has the capacity, i.e. the resources, the staff, or the infrastructure to

conduct thousands of investigations concerning thousands and thousands of suspects in the aftermath of mass violence, unless the process of pursuing accountability is substantively different.[13]

Therefore, choices needed to be made. These included decisions about which incidents and which potential suspects to focus on. The criteria for those decisions were complex and lie beyond the scope of this paper, but they included, for example, the gravity of the crime (Schwendiman 2010). Investigations are thus a process of selection—pursue one incident, not another, and pursue one suspect, not another. There is selectivity also in the material presented once charges are brought against a suspect. Time and resources must be preserved, and trials conducted in a reasonable amount of time, so prosecutors cannot charge every single crime they potentially could. A number of trials at the ICTY and IRMCT are good examples of this balancing act, from the very broad case against Slobodan Milošević to the more targeted approach in the cases of Radovan Karadžić and Ratko Mladić.

Importantly, this selectivity has a number of consequences for the archive, namely, if a crime is not included in the indictment, it will be peripheral, and for the most part any testimony about it, if it comes up, will be cut short. Relevance is frequently on the judges' minds, as they try to be expeditious with the use of the court's time. At the judgment stage, judges base their decisions on a collection of evidence and the legal arguments made by the parties. It is never one piece of evidence that leads to a conviction. There is no smoking gun (Nielsen 2013).

There are a number of different types of exhibits, and the majority are digitized and accessible. First and foremost, there are documents such as military orders and communications, intelligence reports, police reports, and official notes from important meetings. These came into the possession of the prosecution through searches and seizures in military and state archives across the region. There is of course also a wealth of forensic evidence, such as blindfolds and ligatures used on victims of mass executions. The archives contain video and audio material, as well as images (including aerial images, filmed using drone-like surveillance technology which was crucial for finding mass graves after the fall of Srebrenica). There are photos and videos created by the perpetrators themselves, such as one by the Scorpions unit cameraman, as his comrades were executing men and boys captured after the fall of the enclave (Vukušić 2018). This type of material is rare, however—murder and torture were not commonly filmed. Finally, all the open court sessions are recorded and transcribed, and English-language as well as BCS transcripts are available for most of the trial sessions. Each witness testimony is

13 For an example of accountability on a massive scale, as well as the problems it brings, it is worth examining the community-based Gacaca process in Rwanda.

recorded in full (although testimony in closed sessions, which the public was not allowed to attend, is not available).

It is impossible to systematize and highlight all the crucial individual exhibits presented in the ICTY (and IRMCT) courtrooms over almost three decades. What can be presented, however, is a glimpse into this wealth of material. For example, there is a document commonly known as the "Six Strategic Goals", outlining the Bosnian Serb war aims.[14] Then there is the "Kula video", filmed at the celebratory gathering in May 1997 to mark the anniversary of the establishment of a special armed unit of the Serbian Ministry of Internal Affairs. Pretty much anyone who was anyone in Serbian state security was there, including president Milošević.[15] The speeches at the event were particularly revealing about how the Milošević regime and its Ministry of Internal Affairs organized and supported Serbs in Croatia and Bosnia in seizing territory.

Then there are videos of the meetings in the Hotel Fontana in Bratunac, where Ratko Mladić met UN peacekeeper commanders and the Bosniak civilian representatives after the fall of Srebrenica.[16] Another fascinating source are the notebooks in which Mladić described his meetings throughout the war. Indeed, chief prosecutor Serge Brammertz referred to these notebooks as some of the most important documents ever received by the Tribunal (Simons 2010). Then there is the video of the shelling of Stari Most, the 16th-century bridge in Mostar, in November 1993, causing the ancient structure to collapse into the river below.[17] Furthermore, there is rich evidence from cases which ended in controversial acquittals, such as the trial of Naser Orić (commander of the Bosnian Army forces in the Srebrenica area) and the case against Ante Gotovina, the Croatian general charged with crimes connected to the expulsions during and after Operation Storm, in the summer of 1995.

A special kind of evidence comes from insiders, i.e. people who were "inside" a warring party's political leadership or armed unit and decided, for different reasons, to speak up. Some insiders were themselves charged and then pleaded guilty, accepting responsibility for some of the crimes and appearing in court to help convict other defendants. Well-known examples are Milan Babić, a Serb politician from Croatia who spoke up about radicalizing and arming Croatian Serbs on the eve of the war. Babić later committed suicide, but his testimony was used in a number of subsequent trials. Then there is Dražen Erdemović, a man whose

14 The Six Strategic Goals became evidence in a number of trials—see, for example: ICTY *Karadžić*, exhibit no. P00781.E (22 April 2010). Public court records as well as exhibits can be found through the Unified Court Records database, https://ucr.irmct.org/.

15 ICTY Prosecutor v. Stanišić and Simatović, exhibit no. P00061.E (27 August 2009).

16 ICTY *Karadžić*, exhibit no. P01458.E (20 August 2010).

17 ICTY Prosecutor v. Prlić et al., IT-04-74, exhibit no. P09889 (17 May 2007).

testimony made a significant contribution to propelling the investigation in Srebrenica-related crimes forward.[18] Erdemović was a member of an elite unit of the Bosnian Serb Army. Other comparable examples are the testimonies of Momir Nikolić and Dragan Obrenović, Bosnian Serb Army officers, both of whom pleaded guilty for crimes after the fall of Srebrenica. Insiders are important because they are likely to know what no one else, on the outside, does.

Finally, there are numerous records buried in the vaults of the ICTY and IRMCT archives that are unlikely to see the light of day at any point soon. Among them, understandably, are medical records. This is uncontroversial. What is controversial, however, is the prosecution archive. After all, everything discussed so far relates to the archives of the court, many of which are accessible (there are confidential records which remain inaccessible, and I will return to those in the next section). What is not accessible to the public at all are the numerous records held by the prosecution, a separate organ of the court, collected over almost 30 years of investigations. There have been calls, even by former prosecution staff, to open up these collections (Dojčinović 2018). Predrag Dojčinović, in his piece, describes the contents of the prosecution records as "ten million pages of original documents, nearly fourteen thousand audio recordings, over nine thousand video recordings, three and a half thousand discs and about fourteen thousand artefacts in total". Artefacts are objects—bullet casings, blindfolds, watches, and toothbrushes dug up in mass graves, etc. However, these records are still closed and this is likely to remain the case for the foreseeable future.[19] Bearing this in mind, the following section will outline how to work with what *is* available.

Working with the Archives

The size of the archive is intimidating to researchers, especially those not sufficiently familiar with the cases that unfolded in The Hague. If one searches the list of ICTY cases on the website, what comes up is a seemingly endless list of names, 90% of which no one except ICTY experts will ever have heard of. This, alongside the immense volume thus presents a challenge, but also provides an opportunity—an opportunity to study what has not been studied before. This section will emphasize what researchers should consider if they want to explore

18 Jean-Rene Ruez, chief investigator for Srebrenica at the Prosecutor's office, e-mail interview, January 2021.

19 The Office of the Prosecutor at the IRMCT never answered any of the questions they received about this. They had several months to do so.

the archives, outline the ways to start, and briefly present some opportunities and challenges in navigating the collection.

Here, the lack of access to important parts of the archives comes to the fore, through observations regarding the ongoing trial of Jovica Stanišić and Franko Simatović, Serbian state security officials whose ICTY journey has lasted almost 20 years so far (raising issues of fairness both to the accused and the survivors). Their first trial ended in an acquittal which was so flawed, the judges of the Appeals Chamber argued, that it was necessary to retry the case.[20] That retrial ended in June 2021, with a trial judgment and 12 years of imprisonment for each of the accused, and an appeal followed. The two were found guilty only in relation to crimes in one municipality, Bosanski Šamac, in April 1992 (Balkan Insight 2021). The anticipated end date of this legal saga is likely to be sometime in 2023.

Archives produced through the process of criminal proceedings have many commonalities with "conflict archives" (Balcells and Sullivan 2018). Considerations about how to ethically work with these kinds of records should not be an afterthought. After all, these archives contain the crushingly painful memories about the last time a husband hugged his wife, a daughter saw her father dragged away in the distance, a mother begged a man not to take her child away.[21] There are instances of palpable grief when survivors talk about not knowing where the remains of their loved ones lie, and ask, in anguish, for clues, to be able to provide them with a dignified burial.[22] This pain is obvious when watching videos of courtroom testimonies and survivors recalling what they endured. Instances of interpreters breaking down as they translate what the witness is saying, were not uncommon. Therefore, ethical treatment of sensitive material must be the starting point of any research (Subotić 2020).

Getting Started

Most researchers with no previous experience with this collection will struggle at first. The interface of the Unified Court Records, the database containing the ICTY and IRMCT archives and exhibits, requires substantial knowledge about the

20 The procedural history and important information about the two trials (one at the ICTY and the other, now ongoing, at the IRMCT), are available here: ICTY Prosecutor v. Jovica Stanisic & Franko Simatovic, IT-03-69, https://www.icty.org/en/case/stanisic_simatovic; ICTY Prosecutor v. Jovica Stanisic & Franko Simatovic. MICT-15-96, https://www.irmct.org/en/cases/mict-15-96.

21 ICTY *Krstić*, hearing, witness DD (26 July 2000), https://www.icty.org/en/sid/10124.

22 ICTY Prosecutor v. Dragan Nikolić, IT-94-2, hearing, witness Habiba Hadžić (3 November 2003), https://www.icty.org/en/sid/10123.

trials.[23] It does not exactly lend itself to casual browsing. Again, the trials are the organizing principle of the archives. It is therefore essential to know who was indicted for what. This kind of information can be found in indictments, which are usually well under a hundred pages, and for a summary, one can search for "case information sheets" on the ICTY and IRMCT websites. A small taste of the archive can be found online, curated by IRMCT staff (United Nations. International Residual Mechanism for Criminal Tribunals. n.d.(d)). There is also a user guide for the database (United Nations. International Residual Mechanism for Criminal Tribunals, 2020).

While each researcher will have their own approach, depending on what they are working on, their discipline, and other considerations, when I do research, I never look at the outcome of a trial. I know how a trial ended, of course, but I do not rely on that outcome in my work (which, to use one example, focused on paramilitaries during the violent breakup of Yugoslavia). I never base my findings on any individual legal declaration of guilt (or the lack thereof). I use exhibits, i.e. evidence, to research irregular armed forces, and the perpetrators and perpetration of mass violence (Vukušić 2021). After all, law and history, while related in that they both rely on vetted sources to determine something, are practiced by different epistemic communities. There are researchers who belong to both, but that is rather rare. What makes reliance on judgments and outcomes unsuitable for historians is that decisions on criminal responsibility depend not only on evidence but, crucially, on legal interpretations which generally make little to no sense to most historians (United Nations. International Residual Mechanism for Criminal Tribunals. n.d.(b)).[24]

One clear example highlights this difference between how different epistemic communities, in this case lawyers and historians, approach the subject matter. Milanović (2006, 556) reminds us that there is a significant difference between the lay understanding of the word genocide, which draws on the interpretation of the concept in the humanities and social sciences, and the legal concept. The understanding in international law, as defined in Article II of the 1948 Genocide Convention, is narrow, and excludes, for example, many of the killings during the

23 Anyone who has registered with a valid e-mail address can access the UCR: http://ucr.irmct.org/.

24 A good example of this is "specific direction" (and whether or not it is an element of aiding and abetting liability required for conviction). It was a hugely controversial concept which resulted in a number of acquittals at the ICTY, much litigation, and passionate disagreements between legal professionals. The Criminal Law Database provides a summary, but to non-lawyers it will mostly be cryptic.

Khmer Rouge rule in the late 1970s. Therefore I tend to avoid terms which, in a legal setting, carry different meanings than in other disciplines. For example, I do not try to establish whether the crimes in a certain location constitute genocide or a crime against humanity. This is not something that I see as part of my remit. I research what perpetrators did to their victims and try to establish whether those attacks had recognizable patterns. I investigate whether crimes were widespread and planned, whether they targeted certain groups in certain ways, and what kind of units were more likely to commit what kind of violence.

Where judgments are very useful is in searching for exhibit numbers, which is the easiest way of finding documents in the database. These numbers will come in formats like P1234 (and there are examples of these in this article), or D123, where the "P" usually stands for prosecution and "D" for defense, letting the researcher know whose evidence it is.[25] Other possibilities include reading the Prosecution and Defense Final Briefs, if available (and they do tend to be available), where both parties present a narrative of their case—the evidence and the legal arguments woven together.

Finally, an incredibly important resource, and a crucial one for getting started, is the expert witnesses. They are usually invited by the parties and they "digest" much of the material (which may be inaccessible to the public), write reports, and testify in court about their findings. What is particularly important is that these are professionals, such as demographers, historians, military officers, linguists, pathologists, and anthropologists (to name but a few) analyzing material in an effort to systematize and interpret it. Ewa Tabeau testified in a dozen or so trials about demographic losses during the conflicts, Robert Donia poured over documents from the Bosnian Serb political leadership and appeared in around 15 trials, while András Riedlmayer analyzed the destruction of cultural and religious heritage (such as the intentional blowing up of mosques and churches). Reynaud Theunens researched military aspects of the conflict, and Christian Axboe Nielsen wrote about the Bosnian Serb police, its structure, and decision-making. John Clark, forensic pathologist, and William Haglund, forensic anthropologist, as well as Thomas Parsons, expert on DNA analysis, provided in-depth analyses of human remains found in mass graves following the fall of Srebrenica. The work of these experts, and many others, are a rich and valuable resource. Their testimonies and reports are usually accessible, while the accompanying documentation, or large parts of it, are not.

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25 For reasons that are unnecessary to expand on here, sometimes P1234 can be entered into the database as P01234, P001234, or P0001234 (and the other way around). Therefore, if an exhibit number initially does not appear to be in the database, it is worth playing around with the zeros.

Opportunities

Opportunities for research provided by this material are numerous. The obvious ones include being able to study structures that perpetrated violence (institutions, individuals, and networks, formal and informal) and unearthing previously unseen patterns of violence. Studies can be conducted about political decision-making processes or individual figures such as political leaders, military commanders, and paramilitary bosses. Events can be studied, as can military and paramilitary units and armies, as well as military operations. Certain kinds of crimes can be researched, and so too the effects they had on survivors, such as in cases of torture and sexual violence. Furthermore, the documents produced by the institution, by the lawyers and judges, as well as speeches by principals of the Tribunal, can and should be used to reconstruct the history of the court. This material can be used to research prosecutorial and defense strategies, discourses about the conflict and how the institution positioned itself in and helped shape political developments in the former Yugoslavia over the past 30 years.

When it comes to studying evidence material, micro-studies are another important avenue for research, as much is known about Srebrenica, for example, or Sarajevo, but there are countless towns, villages, and hamlets where virtually nothing has been recorded to allow a history of the violence that was unleashed in the 1990s to be written. The work of Hikmet Karčić (2017, 2022) and Vladimir Petrović (2015) are good examples to explore. Both wrote insightful contributions on wartime events in regions where civilians suffered significant victimization. Additionally, histories should be written about crucial trials, so they are do not vanish for good. There are histories of the Milošević trial, but not much else (Tromp 2017; Boas 2007).

Scholars interested in how violence becomes a viable path forward for some communities and how people came to attack their neighbors can use the archives to further their insight into these complex processes. As ICTY witness Ed Vulliamy (1999, 605), who was one of the journalists reporting in the summer of 1992 from camps in western Bosnia said: “This was a war of macabre intimacy in which people knew their torturers.” It is thus important to try to capture this intimacy of violence by closely exploring trial records. Comparative work within and beyond the former Yugoslavia is another fascinating opportunity to pursue.

Much has been done by journalists to investigate and present to the public the materials held in the ICTY archives. Two news organizations stand out for their years of dedication to these topics: the SENSE Transitional Justice Center and the Balkan Investigative Reporting Network (BIRN). These organizations created user-friendly websites dealing with the Srebrenica genocide, the destruction of

cultural heritage, the crimes during and after Operation Storm and in Kosovo in the late 1990s, the massacre in the Bosnian village of Ahmići, as well as providing in-depth reports on the siege of Sarajevo and attacks on Vukovar, to name just a few (SENSE Transitional Justice Center 2019, 2016a, 2016b, 2015; Sorguc 2020; Vladisavljevic and Stojanovic 2020). There are other notable and recent examples of the value of ICTY evidence, such as the use of transcripts in research conducted as part of the Memorial Center Srebrenica's project on "Genocide Transcripts" (2021). Arts-based research projects have also found ways to engage with this material (Academy of Fine Arts Vienna, n.d.).

Challenges

Beyond the volume of material, one significant challenge to research is the lack of access to important documents falling into the category of what can be called "state secrets". Confidentiality and redactions mean a researcher can find documents where large sections, or pages upon pages, are blacked out. Alternatively, searches in the database may simply return no results. Transcripts in such instances appear as blank pages. One can see traces of the documents mentioned in Briefs and Judgments, and sometimes even make out what these are likely to be about. Some redacted material is to be expected in war crime trials, as states successfully argue that there are national security reasons for preventing access. The problem is that the public, and any interest the public may have in accessing important historical sources, is not really factored in, and once the documents are classified, it is impossible to read them. This makes research on state involvement in mass violence uniquely difficult.

Judges make decisions about access, and they have little incentive to reassess the accessibility of different documents later on. Given the volume of material, doing that would be extremely time consuming. In a shrinking institution such as the IRMCT (which now has only one active war crimes case concerning the former Yugoslavia), such resources are probably difficult to justify. The Residual Mechanism, which is the custodian of the material, is thus unlikely to burden itself with this task. The Stanišić and Simatović case, where the accused are former Serbian State Security officials, is a good example of a case where access is exceptionally limited. At the moment, the rules do not allow for the public to request the review of classified material.[26]

26 IRMCT Press Office, personal communication, December 2020.

States' claims to be protecting their secrets may very well be legitimate, but there is a convincing argument to be made for this classified status to be periodically reviewed, and for state-sponsored crimes to ultimately be exposed. After all, trials in which state officials are held accountable are a part of that effort. In light of this, the scholarly community in the region and elsewhere should become more vocal about accessibility, and support projects like the University of Connecticut's ICTY Digital Archive Project, which aims to make records more easily accessible (Dodd Impact, n.d.). Accessibility is also an issue when it comes to material unrelated to state leadership, such as testimony of survivors of sexual violence. Parts of testimony which may expose a protected witness are often omitted from the record. It is thus important to understand that not everything can or should be public, at least not during survivors' lifetimes, but that restrictions should be scrutinized more carefully.

Archives reflect prosecutorial decisions, as described above, and the choices of the defense to argue a case a certain way. As a result, there are gaps in the archives and not every violent incident is covered. There are also inconsistencies, and this is a major challenge. If a person gave a statement to three different organizations during the war, for example to a news reporter, the Bosnian authorities, and the Red Cross, and was interviewed a few times at various stages of the ICTY investigations, and then they appeared in court, discrepancies are inevitable. Witnesses were often invited to appear multiple times in multiple trials, especially survivors of different attacks. They were invited to talk about their memories again and again, during a span of almost three decades. Crucially, a number of testimonies over the years are consistent in important ways, showing their authenticity, but, as in all research, caution is necessary. Additional caution should be exercised when working with insider witness testimony and statements made by those who pleaded guilty, as they had powerful incentives when testifying which may have negatively impacted their truthfulness.

Conclusion

The openness of the ICTY and IRMCT archives is unique and it stands as a great example to follow. No other international court provides as much access. What this article has shown is that the contents of these archives are vital to understanding the numerous aspects of the violence that engulfed Yugoslavia as it disintegrated. However, researching the materials is made more difficult for individual researchers because of the volume of the collection and the inaccessibility of key documents. This collection does not provide all the answers, and gaps will remain—about crimes that were not extensively investigated and about personal motivation

for perpetration. There are, after all, limits to what is knowable about why someone tortures and kills (Straus 2017; Bouwknegt and Nistor 2019, 93). What is knowable, however, is how state ministries worked with paramilitaries to expel civilians, how the army perpetrated crimes, and how commanders ordered massacres. Given the importance of the records which contain this information, classified documents should be subject to periodical review. The IRMCT itself should, in cooperation with scholars and civil society, aim to release as much as possible. Procedure should be amended to allow the public to request access to documents, especially given that it is almost 30 years since many of them were created.

There is currently a trend concerning "conflict archives" and the "exponential growth in access" which is seen as "key to transitional justice" (Balcells and Sullivan 2018, 2). The scholarly community interested in the ICTY and the former Yugoslavia should unequivocally demand openness whenever possible, in the interest of research. But not only research, as this material is vital for combating denial, a persistent problem in the region, and preserving the memory of the brutal violence which killed over 100,000 people and traumatized many more (Genocide Denial Report 2020). In the coming years, the collection held by the Prosecutor's office should be subject to renewed discussion about opening it to the greatest extent possible without jeopardizing legal proceedings or the safety of witnesses.

As already noted, these records, like all records, were collected with a specific purpose in mind and are therefore selective. Many of them were assembled in a prosecution-driven investigation and trial process, but defense teams also collected and presented evidence for their clients, and much of this is now within reach. As Nielsen (2013) argued regarding the Milošević trial, but the same could be said about the work of the Tribunal more broadly, the ICTY provided "a reasonable first draft of history" (Waters 2013, 348). While it is a treasure trove for historians and other scholars, there are limits to this material in terms of what it can say about some topics. For example, wider narratives about life before, during, and after the war will be missing, which is why efforts to collect oral histories, like that of the Memorial Center in Srebrenica, are an important way forward (BIRN 2020). New methods and opportunities are being discussed in the literature on perpetrators, which could be useful to scholars considering working on the ICTY archives (Anderson and Jessee 2020). Therefore, depending on the topic the researcher is interested in, there may be a need to reach beyond the archives of the Tribunal.

In sum, at the ICTY, the archives were initially an afterthought, but over the years, they became a crucial contribution, helping war-affected communities know more about what happened to—and in—their country, and how and why so many civilians were brutally attacked. The lesson for other judicial institutions, international and domestic, is to follow the example set by the first international *ad hoc* Tribunal. The courts can provide accountability, fight impunity, and do

something meaningful for history and the long-term memory of the conflicts. From the start, courts should accept this broader social role, ensure that it does not threaten their core work of prosecuting individuals, and guarantee that as much as possible is accessible, without jeopardizing the legal process or the rights of the accused. After all the trials are done, and the courtrooms are silent and empty, these archives are a meaningful legacy that remains for posterity.

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