1 A world unto itself? The application of international justice in the former Yugoslavia

Laurel E. Fletcher and Harvey M. Weinstein

In the summer of 1992, the contrast between images of emaciated, half-naked Bosniak[1] men, baking behind barbed wire under a relentless sun at the Serb-controlled Omarska prison camp in north/central Bosnia and Herzegovina (BiH), and photographs of well-dressed, well-fed diplomats speaking with reporters outside the United Nations (UN) in New York about the Balkan conflict could not have been more stark. Yet the link between the powerless and powerful became palpable and assumed a distinct legal form when the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993. Its formation would be critical for those immediately affected by the war and serve as a harbinger of politics in the post-Cold War world. In fact, its creation turned out to be a watershed event that has altered dramatically the landscape of post-conflict interventions.

As demonstrated by the proliferation of war crimes tribunals and other institutional responses to war crimes in Rwanda, Sierra Leone, East Timor, and Kosovo, the question is no longer whether there should be accountability for mass violence, but what form it should take. There has been much debate about the relative merits of trials, truth commissions, or other forms of reckoning such as lustration (the wholesale firing from government positions of those who served under a repressive regime). Those who study how countries might best confront the human rights abuses of a prior regime propose an array of options, yet the events of the last decade suggest that trials, with international involvement, are the preferred response.

The international community's emphasis on criminal prosecutions has led to considerable achievements in the legal and institutional development of international criminal justice. However, there are important lessons to be learned from the challenges, successes, and failures of the ICTY. These lessons can be applied beyond the Balkans to the International Criminal Court, as well as to other international-local courts established in diverse countries and cultures.

In this chapter, we focus on the relationship between the political and social dimensions of the ICTY and its image, efficacy, and long-term impact in BiH and the Balkan region from three perspectives. First, we look at the expectations of the ICTY and argue that many diplomats, the media, and supporters of the court sought to expand its legal mandate beyond the goal of prosecuting alleged perpetrators of war crimes. They wanted the court to achieve a larger, more ill-defined, and unrealistic objective of promoting reconciliation among warring groups. These aspirations raise the provocative question of whether trials can promote reconciliation.

Second, we argue that attempts to link the ICTY to this broader social project, without the political will and infrastructure to support it, undermine the important contributions that international trials can make to post-conflict societies. For example, the ICTY has no formal mechanism through which it maintains a direct relationship to the Bosnian judicial system or to other important legal and social institutions in the country. As a result, the tribunal's public image has suffered and its legitimacy has been compromised. This loss of credibility suggests that without links between the ICTY and the process of national reconstruction these trials might become nothing more than a theoretical exercise in developing international humanitarian law. We argue that perceptions of international courts are critical. These tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted within affected societies.

Finally, the ICTY has not been directly involved with the larger task of preparing national courts in BiH to undertake domestic prosecutions of suspected war criminals. One premise of international tribunals is that prosecutions of key leaders are essential for a country that has experienced mass violence to begin the process of rebuilding its society. We argue that, given the limited number of international trials and the need to establish robust rule of law in post-war countries, the domestic judicial system assumes a vital importance. Consequently, the synchronization of these two systems of justice becomes critical, so that they work in tandem rather than at cross-purposes.

In this chapter, we examine some of the factors that contributed to the gap between the international community's aspirations for justice and how its application was perceived by those most affected by the violence in the former Yugoslavia First, we look at the relationship of the origins of the ICTY and increased UN responsibility for war crimes prosecutions, and the expectations by tribunal supporters of the ICTY's contribution to reconciliation. Next, we examine the impact of the court's structure on attitudes toward the ICTY by legal professionals within Bosnia.

In particular, the tribunal location, staff, and the "Rules of the Road" program – the process by which Bosnian authorities seek approval from the ICTY before issuing national war crimes indictments – increase the court's vulnerability to de-legitimization as a result of the geographic and legal distance between the court and national judicial systems. Finally, we turn our attention to the institutional relationship between the tribunal and the national judiciary, and its implications for establishing a judicial system in BiH capable of conducting war crimes trials. Before developing the central arguments of this chapter, however, we provide a brief description of the scope and substance of the study that informs our analysis.

Our ideas emerge out of data collected from a survey of Bosnian legal professionals that we conducted in 1999. Because little attention had been paid to understanding the views of those within BiH charged with national administration of justice for war crimes, we conducted an interview study of judges and prosecutors in the country. The survey data provide a perspective on the ICTY, national war crimes trials, and the relationship of justice to social reconstruction from those occupying an important site for transmission and incorporation of the lessons from the ICTY into the legal, political, and social culture of BiH. In particular, the data point to the challenges of applying the experience of the international court to developing the local judiciary. Also the study illustrates the difficulties in inculcating respect for international humanitarian and human rights law among those who engaged in or who supported the violence. In framing our concerns, we draw as well on other sources of data, such as UN documents, memoranda from the ICTY, interviews, and surveys conducted in the Balkans. These will be presented in detail in the chapters of this volume. Based on the experience in the former Yugoslavia (FY), we identify several aspects regarding the relation of international trials to the countries affected by them to promote the contribution of international justice to post-war societies.

Background to the ICTY and questions of its legitimacy

The establishment of the ICTY was a historic event. For the first time since the end of the Second World War, an international court would try individuals accused of the most egregious violations of international humanitarian law. For some fifty years, no international mechanism had existed to hold perpetrators of war crimes criminally accountable for their deeds. In the absence of such a mechanism, international humanitarian law had restrained war to the extent that states and combatants perceived it in their interests to do so. Supporters of the ICTY hoped that the

court would rekindle the principles of Nuremberg by holding Balkan war criminals *individually* accountable. They hoped the tribunal would build political momentum to establish a permanent international criminal court, an idea that had been discussed for decades.

Yet the formation and the structure of the tribunal created vulnerabilities that left it open to attacks on its legitimacy from many individuals in the Balkans. For example, regulations devised for the ICTY specifically excluded nationals of the war-affected states from holding legal positions at the court. This decision, understandable though it was to avoid accusations of bias, had negative ramifications. The exclusion of nationals contributed to feelings on the part of some groups in the former Yugoslavia of being abused by the international legal community. Their lack of participation also contributed to a feeling among Bosnian Croats and Bosnian Serbs that the work of the tribunal did not reflect their concerns, and therefore they could not claim any ownership in the judicial process. Another effect of this rule was that those who prosecuted and judged were not citizens of the same country as the accused, nor did they necessarily share the culture or traditions of the alleged perpetrators. This fact alone contributed to misunderstandings and distortions that were used by those opposed to the ICTY. This problem subsequently has been addressed in other countries through the development of hybrid or national courts with international advisors.

The ICTY gave rise to a new generation of legal scholars devoted to the study, exploration, and intellectual inquiry of international criminal law. However, many in the former Yugoslavia did not embrace wholeheartedly the work of the tribunal. Particularly, many within the Bosnian Serb and Bosnian Croat communities perceived its work to be biased and unfair, usually to their own national group. Some noted that it was not the perpetrators from the great powers that were in the dock. The accused came from the Balkan countries – states with relatively weak international political clout. While at first glance this seems reasonable, it became fodder for accusations that the ICTY was a political court and incapable of rendering impartial justice.

These perceptions of the ICTY exposed the fact that, despite the explicit expectation that the court would contribute to peace in the region, the architects of this new court gave little thought to how it would relate to those most affected by the carnage. Given the challenges to build an institution in the midst of war, perhaps this oversight is not surprising. However, it is critical that we begin to understand the untoward effects of establishing international institutions that directly affect people in their own communities. For example, the tribunal's lack of attention to the political and social processes and consequences of its work in BiH

threatened the legitimacy of the court in the eyes of the society it was trying to help.

Moreover, the absence of mandated institutional links between the tribunal and those institutions working toward the broader goals of social reconstruction in the former Yugoslavia meant that, from the perspective of those living in the region, the ICTY was a world unto itself. The tribunal was removed physically, culturally, and politically from those who would live most intimately with its success or failure. International justice and national social reconstruction occupied separate spheres, with unfortunate effect. By 1998, the then President of the ICTY, Justice Gabrielle Kirk McDonald, discovered a "crisis in confidence" of the tribunal within Bosnia and undertook efforts to address it. What contributed to this crisis and, more immediately, what can be done to avoid similar mishaps in the future? We designed our study to shed light on these important questions.

The study[2]

We conducted an interview study during the summer of 1999 of a representative sample of thirty-two judges and prosecutors with primary or appellate jurisdiction for national war crimes trials. The samples were drawn from three areas of BiH – the Bosniak-majority area of the Federation, the Republika Srpska (majority Bosnian Serb), and the Bosnian Croat majority area around the city of Mostar. We developed a semi-structured questionnaire, consisting of forty-five items, to solicit information on the following topics: demographics; the role of the judge/prosecutor and courtroom process in BiH; the domestic effects of the ICTY, including perceptions of its practices; common legal definitions in international law; opinions about domestic war crimes trials; attitudes toward the international community; and hopes for the future.

The principal findings indicated that although all participants supported the concept of accountability for those who commit war crimes, their views were modified by national identity as well as identification of their group as "victims." Further, almost all Bosnian Serb and Croat participants expressed concern that the ICTY was a "political" organization, where "political" meant "biased and incapable of providing fair trials." There was a striking lack of understanding by most of the participants of the procedures and work of the tribunal and its blend of common and civil law procedures, selection of cases, issuing of indictments, evidentiary rules, and the length of detention and trials. Although all desired more information with legal content, they perceived their sporadic contact with the ICTY as a sign of disrespect. Further, their contact with international

lawyers working to monitor domestic trials and to train local judges was seen as condescending, ignorant, and disrespectful.

The Bosnian legal professionals, in 150 hours of transcribed interviews, expressed six areas of concern: *professionalism*, reflected in the participants' emphasis on high standards and the strict application of legal rules to a case; *justice*, as evidenced by their adherence to the principles of justice; application of the law; support for the *western European legal tradition*; concerns about *corruption* and decline in professional standards; anger about the corrosive effects of *politics* on the judicial system and the threats to an independent judiciary; and finally, their concerns that *international lawyers* acted in Bosnia in ways that reflected little understanding of civil law or any appreciation for Bosnian legal professionals' support of an independent judiciary.

In this chapter, we amplify the results of this investigation to address a critical gap in the effectiveness of an international tribunal – its linkage to the domestic judiciary and its ability to adjudicate national war crimes trials.

The ICTY: aspirations and realities

Justice may have different meanings for world leaders, scholars, human rights activists, and those living in communities emerging from mass violence. The worldwide upsurge of sectarian violence that occurred after the fall of the Berlin Wall raised serious questions about international responsibilities to quell the bloodshed and to achieve peace. One response of the international community has been to strengthen the application of international criminal law. Indeed, the statute of the ICTY frames international prosecutions as a way to achieve peace and stability in the region. Our study suggests that the particular model for justice that the ICTY implements may be too narrow to fulfill this broader political aspiration. To reach these broader goals, additional interventions are necessary to complement the work of criminal tribunals.

Political strategist Rama Mani identifies three forms of justice – rectificatory, legal, and distributive – that can emerge in post-war societies.[3] Rectificatory justice, she argues, is "minimalist" and focuses on redressing specific wrongs. International commitment to criminal trials is retributive – punishing violators of international humanitarian law. Legal and distributive justice are "maximalist" and seek to achieve broader goals. Legal justice is directed at the rebuilding of a judicial system, while distributive justice addresses power relationships and access to opportunity. While the ICTY is pursuing rectificatory justice in the former Yugoslavia, non-governmental organizations (NGOs) and some

multi-lateral organizations labor to provide legal justice; their focus is to rebuild the national judicial system and to repair the basic infrastructure. Legal justice includes providing resources, improving judicial and prosecutorial quality, and monitoring trials for compliance with the rules of due process. However, in the case of BiH, the rectificatory justice goals of the ICTY are not sufficiently integrated with the legal and distributive justice efforts of the Office of the High Representative (OHR) and other international and NGOs. Furthermore, those organizations addressing judicial reform do not incorporate into their efforts the broad meaning of justice that addresses the larger questions of power. Thus, international programs to rebuild the BiH judicial system do not explicitly address the underlying processes, like nationalist extremism, that led to the ethnic cleansing or genocide.

The lack of coordination and its focused mandate have adversely affected public perceptions of the ICTY and its ability to play a central role in post-conflict social reconstruction. Ultimately, the absence of an integrated approach becomes a question of resolving conflicting goals and expectations between those working within the tribunal to promote its strict legal mandate and the ambitions of those inside and outside of the Balkans who see the work of the tribunal as part of a more expansive vision for social reconstruction. To understand how this gap developed, we turn now to the confluence of forces that created the court.

Origins of the ICTY

The Balkan conflict was the first post-Cold War crisis to test UN political resolve to end large-scale violations of international humanitarian law and human rights abuses. After years of acquiescence to mass atrocities, diplomats at the UN resurrected Nuremberg as a model for responding to ethnic cleansing and genocide in the FY. Why at that moment was there a renewed and reinvigorated international mandate to uphold international humanitarian law?

First, the war had spun out of control. Hundreds of thousands of refugees were streaming out of the Balkans; photographs in the media daily revealed the horrors of ethnic cleansing; reports of thousands of rapes of Muslim women in Bosnia evoked powerful responses, particularly from women in the West; the destruction of holy places was widespread and devastating. Diplomacy seemed to falter and the leaders of these atrocities appeared invincible. The creation of the ICTY has been attributed to such factors as guilt on the part of the western nations that allowed ethnic cleansing to occur; as a sop to those who could not tolerate the escalation of human rights abuses but did not want to initiate

military action; and as a triumph of liberal thinking over those devoted to realpolitik who were concerned more with stability than with rectifying terrible wrongs.

Of particular interest is the fact that one impetus for the ICTY came as the result of a field mission undertaken by six UN ambassadors to the killing fields of BiH, underscoring the importance of witnessing in motivating redress. During their mission, which was proposed by Pakistan and led by Ambassador Diego Arria of Venezuela, what these diplomats saw in the Bosnian towns of Srebrenica and Bihac – the burning of homes and the charred bodies, the terror of refugees, and the wanton devastation – had a lasting impact. Ambassador Arria speaks of the camaraderie that fast developed among the members of the delegation as their reactions to the horror drew them together as witnesses to ethnic cleansing.[4] Not only were the diplomats outraged by what they observed, they pushed the UN Security Council to take action. Members of the smaller and historically non-aligned countries believed that more had to be done to protect the nascent countries of the FY – after all, if inaction became politically acceptable in the post-Cold War era, small, non-aligned countries could expect the same treatment. While there was much ambivalence within the UN regarding the creation of an international tribunal, Nuremberg became the "common denominator" – perpetrators had to be held accountable.

Aspirations for the ICTY ran high. Security Council records are replete with discussion of the need to punish those guilty of war crimes in order to bring justice to the victims, to pave the way for the truth about atrocities to emerge, and to deter would-be war criminals from initiating similar acts. Ambassador Arria recalls that the UN debates did not consider reconciliation as a direct outgrowth of the ICTY. The primary objectives of the tribunal were the punishment of war criminals and restoration of peace and security. Yet the record of debate at the Security Council suggests that the seeds for another goal for the court – that of promoting reconciliation – were planted at its inception. For example, the Hungarian Ambassador to the UN stated during the Security Council debate before the vote to create the court:

> The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict.[5]

In the words of the Ambassador, we hear what soon emerged as a secondary goal of many who supported the establishment of the tribunal – "healing psychological wounds." Ultimately, the goal of reconciliation became associated with these trials for many supporters in and outside of BiH.

Linking the ICTY mandate and social reconstruction

Tribunal architects hoped the court would create an unassailable historical record of the war capable of engendering contrition among supporters of war criminals.[6] In addition, they hoped to facilitate acceptance of bystanders in communities victimized by the violence. However, in the early years, the ICTY had neither the necessary financial and political resources nor the inclination to take up this larger mandate. Indeed, the tribunal struggled to establish its legitimacy and overcome criticism that it was a "'fig leaf' of the international community established to hide its shame for inaction in the former Yugoslavia."[7] The court defined its mandate narrowly, leaving to others the task of drawing the links between its work and rebuilding social relations within communities in the region. Moreover, as the tribunal began trying cases and handing down verdicts, little, if any, effort was put into facilitating public discussion within the Balkans regarding the relationship of the tribunal's work to social reconstruction. Neither international nor local NGOs saw this important step as central to their mandate. This lacuna contributed to some of the sources of misunderstanding regarding the ICTY and further weakened the court's role in BiH.

Although some supporters hoped the tribunal would contribute to social reconstruction, an explicit mandate to do so and the mechanisms to achieve this aim were not included in its statute or rules (the mandate of the subsequent International Criminal Tribunal for Rwanda [ICTR] explicitly included that goal). The UN resolutions creating the ICTY make no mention of the need to build foundations for social reconstruction in the former Yugoslavia, including consolidation of a national, shared history of the war; the creation of domestic legal institutions that promote and respect strict adherence to the protection of human rights; and democratic institutions capable of guaranteeing individual rights and freedoms. Indeed, it is difficult to imagine that an international criminal court could have achieved these far broader goals.

The legal professionals we interviewed held divergent views about the relationship of the tribunal to social reconstruction. Bosniak participants

adhered most closely to the view that the ICTY would promote social reconstruction. They saw the tribunal as an important vehicle for acknowledging the status of Bosniaks as victims of Bosnian Serb and Bosnian Croat aggression and of their fraternal sponsors, Serbia and Croatia. Bosniak judges and prosecutors also viewed the eventual punishment of major accused war criminals such as Slobodan Milosevic and Radovan Karadzic as contributing to social reconstruction. Bosnian Serb participants held decidedly mixed views about the relevance of the tribunal to rebuilding their country. Even those who should have had a professional interest in the ICTY expressed ambivalence about its work. As one Bosnian Serb judge observed: "When someone wants to forgive somebody, he'll do it without a court."[8] Others expressed the opinion that the ICTY was irrelevant to social reconstruction: "The ICTY is not significant for the life of those people here," one participant remarked.[9] Another shared the opinion of several Bosnian Croat legal professionals that economic development, rather than legal accountability, was most critical to promote social reconstruction. Many Bosnian Croat participants echoed the view of their Bosniak counterparts that the ICTY played an important role in stimulating public discussion about the events of the war, which they felt could help improve social harmony.

The study points to the lack of consensus among Bosnian legal professionals regarding the contribution of international criminal trials to reconciliation. It also suggests that the link between international accountability and social reconstruction is not axiomatic. In the case of Bosnia, national politics and the politics of post-war nationalism colored the views of legal professionals toward the tribunal and will require further interventions to secure their support, as a group, for the court.

The structure of the ICTY and its image in the Bosnian legal community

Establishment of the *ad hoc* tribunals implies a new, critical role for the UN in implementing rectificatory justice. The shift toward a legal framework that holds individuals criminally responsible for war crimes reflects the ascendance of the liberal perspective in international relations.

Two traditions underlie foreign policy. The first, the realist perspective, focuses on state security and holds that the nature of governance of a state is irrelevant so long as power remains balanced. The second, the liberal or idealist perspective, promotes democracy, human rights, and individual freedom based upon the assumption that democratic countries promote stability and peace. By framing the debate in post-conflict BiH in human rights terms, those subscribing to the liberal perspective clashed

with, but ultimately triumphed over, the strategy of realist diplomats who courted such leaders as former Serbian President Milosevic and Bosnian Serb leader Karadzic to broker a peace agreement. Since the conclusion of the war, the perceived necessity for post-conflict accountability has become accepted widely by the major powers. Yet if international criminal accountability has quickly become the norm for post-conflict countries, it has brought new and unforeseen challenges. With this endorsement, the UN and a wider circle of international tribunal supporters have become invested with establishing the legitimacy of these legal mechanisms. However, this leads us to ask what makes the tribunal legitimate, and to whom.

International scholars, diplomats, and human rights advocates may measure the court's success by its ability to fill its courtrooms with defendants, promulgate evidentiary and procedural rules, and deliver well-reasoned opinions that update and apply international criminal laws to contemporary conflicts. Those living in post-conflict BiH may judge the tribunal according to different criteria, however. For example, the findings of our study suggest that membership of a national group was the most important factor in determining attitudes toward the ICTY. Thus, Bosniaks, almost universally seen as the principal victims of the war, were most supportive of the ICTY. Bosnian Serbs, usually seen as the aggressors in the conflict, held the most negative attitudes; and Bosnian Croats were somewhere in between. Each group sought from the court confirmation of its status as "victim."

This divergence of views prompted a UN commission of experts examining the impact of the ICTY in BiH to observe in November 1999: "It is likely that, except for a very small fraction of the populations of the former Yugoslavia and elsewhere, there is large-scale, if not total, lack of knowledge regarding the international humanitarian laws enforced by the ICTY."[10] A year earlier, ICTY President Justice Gabrielle Kirk McDonald had taken seriously the emerging gap between The Hague and community perceptions in the region. She directed the ICTY to initiate an outreach program that would link the tribunal to communities in the former Yugoslavia. After a weak beginning, the outreach program, to its credit, has made considerable strides. It has begun programs to educate legal professionals and those in the larger community such as high school students, about the work of the tribunal.

Given the lack of past examples of models to inform the public about the accomplishments of international criminal tribunals, it is not surprising that the implementers of this important process struggled to establish appropriate mechanisms. However, its work has been hampered by the unwillingness of countries to provide it with adequate financial resources.

This stinginess reflects the lack of importance given to the problem by those countries that support the ICTY. Moreover, while the international media have given considerable attention to the ICTY's achievements and shortcomings, it has, for the most part, failed to report in any depth on how the Bosnian people view the tribunal's work. The UN, by creating the ICTY, entered into a relationship with post-conflict communities. This relationship needs to be nurtured. An important finding from our studies is that the structure of the court and its interaction with post-conflict communities exert a profound impact on how these communities perceive the work of an international court. In turn, these perceptions may negatively affect the ability of the court to fulfill the social and political aspects of its mission.

"Victor's justice" and the politics of the tribunal

Although proponents of the ICTY hailed the court as a neutral arbiter of Balkan war atrocities, many of those living in the region did not perceive the tribunal as being above politics. Paradoxically, as the Office of the Prosecutor (OTP) became more successful in obtaining the arrest of accused war criminals in the period 1996–98, criticism of the ICTY became more vocal within BiH. In its early years of operation, the tribunal did not devote attention to how it was perceived in BiH. Outright political distortions by nationalist politicians and rumors about the work of the court circulated in the press, particularly in Bosnian Serb and Bosnian Croat areas. These reports served to undermine its credibility and legitimacy within the region.

For example, most Bosnian Serb participants in our study alleged that the tribunal was politically biased against them, basing their view on misinformation that the ICTY had indicted only Serbs. Meanwhile, Bosnian Croat legal professionals felt rebuked by the lack of indictments in connection with the 1991 Serb attack on Dubrovnik and the Bosniak expulsion of Bosnian Croats from central Bosnia in the early years of the war. A few Bosniak participants viewed the court as a cynical gesture from the West, which prosecuted "small fish" while the intellectual masterminds of the carnage remained in positions of power.

Most Bosnian Serb and many Bosnian Croat participants viewed the ICTY as a contemporary form of "victor's justice" imposed on them by the international community. However, virtually all Bosniak participants welcomed the imposition, acknowledging that only an international authority could fairly adjudicate war crimes trials. One Bosnian Serb legal professional stated: "[The ICTY] is too artificial a court and it is under the jurisdiction of powerful societies. There is no justice in that court."

Participants distinguished between political prejudice in judicial decisions and the political dimensions of the ICTY as an institution created by a world body. These legal professionals correctly understood that a political process within the Security Council led to the creation of the court and the appointment of judges and a prosecutor. Unfortunately, supporters of the ICTY are less candid about these aspects.

International tribunals are inherently political in terms of how they are established, their policies and priorities, their relationship to the large multi-lateral organizations and to the police or military units that will arrest the indicted. As the debate regarding the adoption of the ICTY statute makes clear, a goal for the tribunal was to punish those most responsible for atrocities. This objective clearly is a judicial mandate with a forthright political mission to arrest and try the military and political leaders who directed ethnic cleansing. Bosnian Serb and Bosnian Croat legal professionals did not understand the indictments of members of their national group as a natural consequence of the court's mission. They felt the court was singling out their national group for responsibility for atrocities rather than acknowledging them as victims. We believe that more proactive outreach by the ICTY to judges in BiH to explain this "political" aspect of the mission might have helped diminish the sense among Bosnian Serb and Bosnian Croat legal professionals that the court was an illegitimate instrument of the great powers.

The international community, Bosnian legal professionals, and the ICTY

Particular aspects of the court's structure and operation contributed to political resistance to the ICTY by Bosnian legal professionals. For example, as we have noted, the exclusion of nationals of the region from legal positions in the ICTY may have helped to avoid charges of bias against the court, but it meant that those who prosecuted and judged were foreigners. This and other aspects of the court's structure unintentionally reinforced negative attitudes of Bosnian legal professionals toward the international community.

One source of ill-will on the part of the Bosnian legal professionals was the "Rules of the Road" program. The OTP reviewed evidence from BiH authorities under international standards before Bosnian law enforcement could arrest suspected war criminals for trial in a Bosnian courtroom. This vetting process exacerbated rather than reduced tensions between the international and national judicial systems.

According to one NGO representative involved in the program, the OTP viewed the "Rules of the Road" program as an intrusion into their

work. Staff resented the additional workload, which the international community had mandated they undertake but for which they had not committed financing.[11] As a result, files from BiH sat in The Hague, unopened. Although the international agreement creating the review process was signed in February 1996, it was not until three years later that the tribunal established a review procedure. Bosnian judges were not informed of these institutional constraints and began sending cases to the ICTY after the agreement was signed. By mid-2002, several years after the OTP finally had its system in place, there was a backlog of some 500 cases. We saw the negative ramifications of this delay reflected in our study.[12]

The attitudes toward the tribunal of the Bosnian judges and lawyers we interviewed need to be considered in the broader context of their interactions with the international community. While legal professionals agreed that the active involvement of the international community was necessary to maintain the peace and rebuild BiH – particularly the judicial system – many felt diminished by representatives of the international community with whom they came in contact. Participants across national groups reported that they perceived that the international community saw them as intellectual inferiors who were ignorant of the relevant law. They, in turn, viewed representatives of the international legal community as ignorant of domestic Bosnian law, its traditions, and the legal institutions in BiH.

In 1999, Elizabeth Rehn, the Special Rapporteur for the UN in BiH, stated that the Bosnian judicial system was corrupt.[13] And the OHR pushed legal reform. Study participants expressed concern about Rehn's allegations. Many alluded to colleagues taking bribes and the lack of training of those entering the profession, but they also felt that remarks from high-level UN officials undermined respect for the Bosnian judicial system. Participants felt that such accusations tarnished the entire profession and gave insufficient praise to those judges and prosecutors who were struggling, in the face of inadequate salaries and resources, to discharge their duties with professionalism. Although the ICTY had no direct role in OHR policy, Bosnian judges' perceptions of the tribunal and its work were colored by their reactions to OHR policies.

Here the focus on legal justice and structural reform affected how legal professionals perceived the rectificatory functions of the ICTY. There was no mechanism to inform the ICTY of this unintended consequence of international legal assistance. Nor did the ICTY have in place any tools, such as regular face-to-face meetings between tribunal judges and staff and Bosnian legal professionals, to address problems as they developed. The Outreach Program currently works to address these and other

misunderstandings, and should help to improve and maintain a more positive image of the court within the region.

The ICTY and the rule of law in BiH

The divergence between the aspirations of many ICTY supporters that these trials would enable the devastated countries to move on and the more skeptical perceptions of Bosnian legal professionals raised for us the provocative question of why there appeared to be a gap between the idealized goals of international justice and the views of many Bosnians that such a tribunal was irrelevant. Was the failure of the ICTY to establish its importance to post-war social reconstruction in BiH the result of flawed implementation, flawed design, differing expectations, or a reflection of the limitations of international justice? And, from a normative perspective, what should be the long-range interests of the international community *vis-à-vis* the ICTY? Should it be to create a robust enforcement institution of international criminal law? Or should it be to meet the needs of victims and all citizens by helping to create a domestic judicial system capable of delivering justice? We suggest that the tribunal must succeed not only in delivering rectificatory justice but also in taking the opportunity to help establish domestic legal justice.

The OHR's failure to incorporate the rectification process into its reformation of the national judicial system in BiH has important ramifications. It has meant that international law has thrived while change in the domestic legal processes has been slow. Moreover, legal reform has been hampered by great resentment from local and national governments dominated by nationalist political parties. Furthermore, the legacy of the political history of the country that centered power in the hands of the Communist elite – or those with connections to the Party – has led to on-going problems with corruption and injustice. Our study points to the need for international trials not only to conduct trials but to support the development of parallel teaching and rehabilitative structures addressed to domestic audiences. In this manner, international trials might contribute to achieving justice in its broadest sense. However, this potential has remained largely untapped.

The drama of a controversial trial is the stuff of many Hollywood films. Is there a role, then, for public education in the context of international criminal trials? These tribunals are established to prosecute the most serious international crimes – crimes considered so horrible that they are viewed as crimes against all. We suggest that this value is so important that the pedagogical nature of these trials is a critical dimension of their success or failure. Establishing a historical record, contributing to

the collective memory of a society, and securing public support for the scrupulous application of the rule of law might create a social legacy that could strengthen communities against any resurgence of support for the political forces that led to the conflict in the first instance. In other words, society must be aware of the nature and retributive consequences of international trials in order to repudiate the leaders and policies that led to the aggression.

These trials support the underlying societal objective of conferring shame on a much larger body of people – bystanders and the lesser involved. International criminal trials have the effect of stigmatizing groups despite the emphasis on individualizing guilt. Therefore, public pedagogy condemns the political movement or policies for which the defendant is the symbol. Yet our study revealed that trials alone cannot establish an incontrovertible record. Each national group reinterpreted the "facts" according to the views held by that group. If one measure of the success of these trials is society's ability to internalize these lessons and to remember the horrors of the conflict, then educating the public is critical. We want to clarify here that we do not suggest trials should be used as moral theater. Rather we suggest that the process and outcome of trials can be used in ways to counteract the passivity and acquiescence of the population that led to the violence.

Whose obligation is it to carry out this educative function? Clearly, it cannot be that of the court. The court has an obligation to inform and to assure that the population it serves understands the nature of the process and the events as they transpire (as exemplified by the work of the ICTY's Outreach Program). Yet it must fall to a parallel structure, perhaps through a multi-lateral organization, to attend to the moral lessons that emerge from these trials. We suggest that the obligation of the court in this process would be to provide information and cooperate with that organization to facilitate community education.

Two important implications arise from our perspective on public pedagogy: (1) the relationship between a tribunal and the local populace is a critical dimension of its success and (2) the domestic legal system must be influenced by the international one for effective war crimes trials to take place in the country where the crimes occurred. Without these ties to those most affected by human rights abuses, history may well judge the ICTY a success in expanding the reach of international humanitarian law but a failure in promoting the growth and development of a domestic legal system that meets international standards. Unfortunately, to date, these implications largely have escaped attention.

Although it can be argued that fundamentalist or nationalist perspectives are always difficult to influence, the lack of attention to public

pedagogy as an outgrowth of the work of the tribunal was evident in our study. Bosnian legal professionals were reluctant to acknowledge that war crimes had been committed in their name and to repudiate the leaders and policies that had led to the war. Across national lines, the interview subjects voiced their belief in universal criminal accountability for perpetrators of war crimes. Yet when asked who was responsible for the war, with few exceptions only the Bosniak participants – whose national group was internationally recognized as the primary victim of aggression – named individual political leaders. Generally, Bosnian Croat and Bosnian Serb legal professionals either were unable to attribute the war to any specific cause or were unable to identify political leaders of their national group – beyond the presidents of Serbia, Croatia, and Bosnia – as directing the violence.

With each national group self-identifying as victims, one dimension of the educative function of the ICTY could have been to pierce the denial about atrocities and for bystanders to acknowledge the crimes committed in their name. The ease with which legal professionals dismissed the trial record suggests that this education would have been critical not only for the general public but also for those trained in the law. Sadly, our study suggests that nationalist perspectives distort the basic principles of legal education. Greater effort is needed by the international community to promote acceptance by domestic judges and prosecutors of the ICTY record about the war and its consequences. This effort should be a high priority if local courts are to assume an expanded role in prosecuting war criminals. A countervailing and accurate presentation of the work of the tribunal becomes more urgent where nationalist politics and media distort the record of the ICTY, intimidate Bosnian legal professionals, and undermine the independence of the judiciary. This educative effort requires cross-fertilization between rectificatory justice and legal justice.

Distributive justice

The aftermath of the war in BiH saw the collapse of a well-entrenched system of power based in the institutions erected by the Communist system. The rising tide of nationalism that reached a tipping point in 1989–1990 and led to the bloody conflict reflected many factors, including economic disparity, a struggle for wealth, power, and influence, and greed. Communist party officials reinvented themselves as nationalist politicians and succeeded in acquiring control over state assets.[14] A criminal class emerged from war-profiteering and introduced new social, economic, and political distortions in the country. While nationalist parties presented themselves

as the protectors of their own, many people on all sides who survived the war felt powerless to influence the future of their country as they observed the corruption and scandals that followed in the wake of the Dayton Accords.

Against this backdrop, many Bosnian legal professionals felt increasingly powerless and devalued both as citizens and as professionals. Their situation reflected, in microcosm, the power imbalances that were rife throughout post-war Bosnian society: loss of status, economic insecurity, displacement from their homes, threats to their lives, and political interference with their professional obligations. The attitude of the judges toward the ICTY was influenced not only by nationalism but also by their own experiences living in a country emerging from war and plagued by on-going disarray. The international community must address the anger and lack of efficacy of BiH legal professionals if it hopes that judges and prosecutors will support the tribunal. As with other citizens of the country, attention to issues of social justice that affect them must be considered part and parcel of the strategies put into place to secure the rule of law and social justice.

Conclusions

For Mani's three dimensions of justice to be effective, each component needs to reinforce and build upon the other. Given the political exigencies of post-war BiH, prosecutions of the highest-ranking war criminals will need to be held under the aegis of the international community. Yet a strong rule-of-law system will be delivered not from The Hague but by the national courts of Bosnia and Herzegovina. The ICTY and national judicial officers have much to offer to each other. On a practical level, by prosecuting the "big fish" the tribunal can remove those responsible for past horrors from the reach of contemporary power structures. ICTY judgments build a body of international norms that national courts can apply. BiH judges can use international law to build a legal regime that establishes the respect for human rights necessary to rebuild democratic societies.

For the work of international tribunals to gain traction within the countries where the fighting took place, the cooperation of national judicial systems must be secured. The sheer numbers of potential defendants make national courts the primary force for prosecutions. Judges and prosecutors must have a clear understanding of international law and its administration to enable them to amplify the intended effects of international criminal trials. Furthermore, trials cannot be fair and effective without a court system supported by trained personnel and adequate resources

to carry out its function. Finally, judges do not operate in a vacuum: the broader issues of equity and access must be attended to as well.

The longevity and viability of systems of international criminal justice and the emergence of the rule of law in countries emerging from mass violence will depend in large part on the ability of these judicial institutions to work in tandem, not in isolation. With purposeful interactions, these institutions can create synergies that help the rule of law take firm root within national soil.

NOTES

1. The term "Bosniak" emerged during the 1992–1995 war in Bosnia and Herzegovina to differentiate those who followed the Muslim faith and traditions from those who were Roman Catholic (Croats) and Orthodox (Serb).The term "Bosnian" refers to all citizens of the state of Bosnia and Herzegovina.
2. The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Center for Human Rights, University of Sarajevo, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors," *Berkeley Journal of International Law* 18 (1999): 102.
3. Rama Mani, "The Rule of Law or the Rule of Might? Restoring Legal Justice in the Aftermath of Conflict." In M. Pugh, ed. *Regeneration of War-Torn Societies* (London: Macmillan Press Ltd., 2000).
4. Ambassador Diego Arria, telephone conversation with Laurel Fletcher and Harvey Weinstein, 17 December 2002.
5. Virginia Morris and Michael P. Scharf, *A Documentary History and Analysis*. Vol. II of *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irving-on-Hudson, N.Y.: Transnational Publishers, 1995), 171.
6. Madeleine Albright (1993). Quoted in Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal." *Human Rights Quarterly* 20 (1998): 765.
7. Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven and London: Yale University Press, 2000), 77.
8. The Human Rights Center, *Justice, Accountability, and Social Reconstruction.*
9. Ibid., 132.
10. *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, A/54/634, 22 Nov. 1999, at para. 97.
11. Mark S. Ellis, "Bringing Justice to an Embattled Region – Creating and Implementing the 'Rules of the Road' for Bosnia-Herzegovina," *Berkeley Journal of International Law* 17 (1999): 1, 8, 19.
12. International Criminal Tribunal for the former Yugoslavia, "Report on the Judicial Status of the International Criminal Tribunal for the former

Yugoslavia and the Prospects for Referring Certain Cases to National Courts," 2002. (Unpublished.)

13. Available at Radio Free Europe/Radio Liberty website on World Wide Web at http://www.rferl.org/newsline/1999/07/260799.html.
14. Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Washington, D.C.: The Brookings Institution, 1995), 15–17.