



International Criminal Tribunal for the former Yugoslavia

The death of Slobodan Milošević in his prison cell in The Hague on March 11, 2006, just weeks short of the conclusion of his trial at the UN International Criminal Tribunal for the former Yugoslavia (ICTY), brought to the fore once again the recent history and the future destiny of the countries of what was Yugoslavia. In the words of Carla del Ponte, the Tribunal's chief prosecutor, the death of Milošević who was charged with war crimes and crimes against humanity "deprives victims of the justice they need and deserve." The fact that the trial of the Tribunal's most important accused in custody ended this way led many commentators to question the credibility of the ICTY and the idea of progress in the Western Balkans. Moreover, questions resurfaced about whether this region can really become part of the European Union without bringing justice to the former Yugoslavia, the purpose for which the ICTY was established in the first place and which is the basic prerequisite of reconciliation in the region.

The enlargement of the European Union to include the countries of South East Europe would fulfil both the strategic interest of the EU and of the Western Balkans countries themselves. In order to start the accession process, the countries of the Western Balkans first have to make a clear separation with their recent past and open up a new chapter in which human rights and the rule of law are at the center of their democracies. The first and most important step in demonstrating that they are indeed ready is their full cooperation with the ICTY. Consequently, the European Union cannot promote stronger ties with countries that are not seen to be cooperating fully with the ICTY. Specifically, this means that Serbia cannot make any progress in the negotiations for the Stabilization and Association Agreement with the EU until it has delivered to the Tribunal Ratko Mladić and Radovan Karadžić, the two remaining high-profile accused still at large. The two are thought to be protected by some of Serbia's security services, most notably the military intelligence agencies.

Following del Ponte's positive assessment of Croatia's cooperation with the Tribunal, Croatia started accession negotiations in October 2005. Serbia remains the only country in the Western Balkans whose negotiations with the EU are closely tied to its cooperation with the Hague Tribunal. If Serbia were to fully cooperate with the ICTY, (i.e. by either delivering or helping to deliver Karadžić and Mladić to The Hague), the Tribunal's influence over the EU's enlargement policies in the Western Balkans would diminish dramatically.

A Brief History of the ICTY

The International Criminal Tribunal for the former Yugoslavia was established on May 25, 1993 by the United Nations Security Council Resolution 827, under Chapter VII of the United Nations Charter (actions with respect to threats to the peace, breaches of the peace and acts of aggression). Its mission is four-fold: to try persons

charged with violating international humanitarian law in the former Yugoslavia, to bring justice to the victims of the war, to deter future crimes, and to contribute to the restoration of peace by promoting reconciliation in the region. At first seen as a fig-leaf for the West's inaction and failure to prevent and intervene in the wars of former Yugoslavia, the Tribunal gained credibility in the summer of 1995 when it indicted two high-profile figures of the still-ongoing Bosnian war: General Ratko Mladić and Radovan Karadžić. This indictment, however, came too late to prevent or indeed stop the massacre in Srebrenica by Mladić's forces that summer. The Tribunal has been an important element of post-war policies in the territory of the former Yugoslav countries, but it did little to positively affect the situation on the ground during the war that ended with the Dayton Peace Accords in November 1995.

Since its establishment in 1993, the Tribunal has to date indicted 161 persons for serious violations of international humanitarian law including genocide, and about 50 of them are in custody at the UN ICTY detention unit in The Hague. The remainder are on provisional release, arrested awaiting transfer, transferred to serve their sentences, have had their indictments withdrawn, or have been reported deceased by national authorities. The cases of four indictees have been transferred to Bosnia and Herzegovina and Croatia for trial, and it is reasonable to expect that more such transfers will occur in the future. The national courts and the Tribunal have concurrent jurisdiction, though the ICTY has primacy over national courts and may request national courts to defer cases to them, and *vice versa*. Nevertheless, the same person cannot be tried by both the national courts and the ICTY for the same crime.

Six of the accused are still at large; of those six, the two with the highest profile are Radovan Karadžić and Ratko Mladić. In the last ten years, all attempts at locating them by the national authorities and capturing them by NATO Special Forces have failed due to a lack of cooperation from authorities in the Republika Srpska and in Serbia itself. The two have thus become not only symbols of the inefficiency of international law, but also a reminder that despite the democratic changes since the fall of Milošević, Serbia is still haunted by the legacy of his regime and the wars in the former Yugoslavia. Furthermore, military intelligence does not seem to be under full civilian and democratic control and Gen Mladić is, in effect, being protected by the army. Most recently, the EU had to suspend negotiations with Serbia and Montenegro after the April 2006 deadline for handing over Ratko Mladić to The Hague expired.

The Tribunal's chief prosecutor Carla del Ponte, and before her Louise Arbour, has at times been a very outspoken critic of the governments in Croatia and Serbia, proving her political independence and single-mindedness. This has not always been popular. The new democratic governments in these countries have claimed that such pressure put them in a difficult position, as radical nationalists were only too happy to paint this as the West's interference in their domestic affairs and use it for electoral ends.

The former Yugoslav countries have not been completely uncooperative. To the contrary; apart from the shameful record on the Karadžić and Mladić case, the Tribunal, working together with the authorities on the ground, has achieved noteworthy success by bringing to dock almost all of the accused including many of

the highest political and military officials. Slobodan Milošević himself, the first acting head of state in history to be indicted by an international court, was handed over to the Tribunal in 2001 following his fall from power in October 2000. His trial dragged on for over four years, and included 66 charges for crimes committed in Bosnia and Herzegovina, Croatia and Kosovo over a ten-year period. He died shortly before its completion. The Court's credibility rested on gaining a conviction in this high profile case and some have argued that it should have attempted to prosecute for a lesser but more achievable range of offences. In spite of Milošević's death, the Tribunal's credibility was back to square one by not being able to secure a sentence for its most famous suspect. The Tribunal's history has been marked by such highs and lows, but it should be noted that at the onset very few believed that this UN institution would secure many arrests, let alone go on for as long as it has, exert such vital influence on the EU affairs regarding their enlargement policy in the region, and leave a lasting precedent in the realm of international humanitarian law.

The Tribunal is a temporary body which has been given an expiry date. The UN Security Council Resolutions 1503 and 1534 (of 2003 and 2004 respectively) determined a gradual completion of the Tribunal's mission by the year 2010, when all trials and appeals should be finalized. The deferral of cases to the national courts and their involvement is set to increase and the Tribunal itself will continue to concentrate on the trial of the most senior accused. Of those, the two most important ones remain Karadžić and Mladić. Their arrest and trial would not only help Serbia and Montenegro on their path to joining the EU, but would also signify a "mission accomplished" for the Tribunal.

Enlargement

The state of Yugoslavia started collapsing into violent wars at the same time as the (then 12) members of the European Community were meeting in Maastricht, in late 1991, to discuss political changes to the organization. Ironically, one of the five key goals of the Maastricht strategy was the establishment of common foreign and security policy. This was ironic, as the European Union, as it then came to be called, proved to be glaringly inefficient in coping with the challenge of a civil war in its backyard. Europe failed its first foreign and security policy test and the Dayton Peace Accords and the intervention in Kosovo relied on the Americans and NATO, who were the only military actors with necessary capabilities, to put an end to the violence.

After the war, integrating this region into the European Union made political and economic sense. The prospect of joining the EU became the engine of reform in these countries. In the words of Olli Rehn, the EU Enlargement Commissioner: "Countries have to be sure that they have a realistic chance of joining the EU, even if it is many years away, if reformist leaders are to convince their public that it is worth making enormous efforts to meet the EU's conditions." However, the pace of reform was bound to differ greatly between the different countries of former Yugoslavia and Albania. For example, Slovenia, which was the most developed of the Yugoslav republics and which emerged quite unscathed from the wars of the 1990s, was eligible to join the EU relatively quickly and did so in May 2004. Other post-

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Yugoslav countries, namely: Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro (including Kosovo whose political future is yet to be determined), as well as Albania, constitute what the EU refers to as the Western Balkans region (South East Europe). In the Declaration from the EU-Western Balkans Summit held in Thessaloniki in June 2003, the EU reiterated that “the future of the Balkans is within the European Union,” and further confirmed that “the Stabilization and Association Process (SAP) will remain the framework for the European course of the Western Balkans countries, all the way to their future accession.”

The countries of the region are in different stages of this accession process. The EU opened negotiations on Stabilization and Association Agreement with Bosnia and Herzegovina and Serbia and Montenegro in the fall of 2005, and Albania is about to conclude one. In December 2005, the former Yugoslav Republic of Macedonia was granted EU candidate status, Croatia opened accession negotiations in October 2005, and around the same time international talks started on the future status of Kosovo.

The progress of Croatia’s and Serbia’s negotiations with the EU has been conditioned to a large degree by their satisfactory cooperation with the ICTY. The Tribunal has been working in apparent synergy with the EU to influence the process of integration into the Union. Using the Tribunal as a means to introduce conditionality worked more often than not, but it may also have put these fragile new democracies perilously close to the risk of a resurgence of nationalism. This strategy also meant that the ICTY chief prosecutor, Carla del Ponte, has played quite an unusual and enhanced role in shaping EU enlargement policy in this region. It is fair to say that this has not always been well-liked by the EU members themselves. For example, Austria, which is opposed to Turkish accession, would have preferred not to have to block the negotiations with Croatia in spring 2005 because General Gotovina, the third on the Tribunal’s most wanted list, had not been handed to The Hague yet. Nonetheless, the joint ICTY-EU strategy did produce results as in the example of Croatia’s cooperation in the arrest of General Gotovina, which cleared the way for Croatia’s entering the accession negotiations in October 2005.

The pace of progress of EU negotiations will inevitably differ from country to country. In the case of Serbia, much depends on the issue of cooperation with ICTY and the talks on the status of Kosovo. Bosnia and Herzegovina, for example, is yet to achieve a full sovereignty through a constitutional reform that would end the EU’s semi-protectorate now in place. Then there are the many other social and economic drivers that influence EU accession talks. Considerable economic reform in both the relatively developed countries, like Croatia, and in the less developed countries, like Albania, are inevitable and are going to cause economic, political and social difficulties. Organized crime and political corruption remain significant challenges in this region that require time and concerted efforts on part of both the local and international law-enforcement agencies. Furthermore, not all the human rights issues will be resolved by satisfactory cooperation with the ICTY. The countries of the Western Balkans have Turkey to remind them that accession is not guaranteed, not even after waiting for over 30 years.

Conclusion

In the short term, the success of bringing to justice those responsible for the worst crimes committed in the wars of former Yugoslavia will help the new Balkan states come to terms with their recent past and allow them to move forward towards an eventual membership in European Union. In the long term, it will enhance the normative and practical standing of international law, despite the fact that the issue of state sovereignty and whether leaders can be bound by international law has remained unresolved. The death of Milošević has dealt a blow to the Tribunal, to justice and to the idea of reconciliation in Western Balkans. However, this setback in no way signifies the end of the Tribunal and its efforts to bring a measure of justice to this region and help it usher in a new era in a Europe where human rights are at its core. The Tribunal was set up as an experiment and it has, despite all the setbacks, been a successful one, paving the way for other international war crimes tribunals in Rwanda and Sierra Leone.

The European Union was institutionally and politically constrained in the Yugoslav civil war which has led to a popular conception of ineffectiveness. However, it has used its economic and political might in tandem with the ICTY to produce political and cultural change in the Balkans.

Finally, the linkage of EU enlargement issues to the cooperation of individual countries with the ICTY did create problems for the countries concerned and at times caused tensions within the EU. In concrete terms, however, Serbia is the only country left that is affected by this and once it has handed over Karadžić and Mladić to The Hague, the ICTY will no longer have to exert pressure on EU enlargement policy. That said, these countries may find out that hunting down war criminals is easier than seeing through the necessary economic reforms and fighting organized crime and corruption.