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HISTORY AND THE COURT: THE ROLE OF HISTORY AT THE ICTY

Robert J. Donia
Center for Russian & East European Studies,
University of Michigan, Ann Arbor, USA

Should history have a place in trials before international war crimes tribunals? “No,” wrote Hannah Arendt in her classic work, *Eichman in Jerusalem: A Report on the Banality of Evil* (1963). For her, the courts had no business making historical judgments or attesting before history to Nazi crimes. “The purpose of a trial is to render justice, and nothing else,” she wrote. “Even the noblest of ulterior purposes – ‘the making of a record of the Hitler regime which would withstand the test of history’ – can only detract from the law’s main business.”

Furthermore, the judges at the Eichmann trial took same position, if anything more forcefully: “No one has made us judges” of other matters; and “no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought” to them, they wrote in their judgments.

Such judicial minimalism has not been true of the International Criminal Tribunal for the Former Yugoslavia. One of the longest-serving judges, Wolfgang Schomburg, said it this way: “This Tribunal is not only a criminal court. It is at the same time a peacekeeping mission. As stated in Security Council Resolution 827 of 1993, ‘This Tribunal must contribute to the restoration and maintenance of peace.’ We have to do our very best to break the vicious and at the same time fatal cycle of vengeance, intolerance, and hate.”

The Tribunal’s broader, more comprehensive mandate has included an on-going and intimate relationship with history and historians. My purpose today is to describe the ICTY’s relationship to history, and then to identify an opportunity for history and historians to exploit the ICTY as an historical source. I believe that the Hague Tribunal provides historians and history with a great challenge and an irre-

sistible opportunity to discover much of historical significance and write better history as a result.

It has been 19 years since the Tribunal was established by the UN Security Council. During those two decades, there has been a symbiotic but often cautious and prickly relationship between history and the ICTY. History and international human rights jurisprudence have occupied much of the same public space and shared many functions. That relationship has had two dimensions. The Tribunal has been both a consumer and producer of history. I will address each in turn.

First, the Tribunal has called upon historians and historical documents to aid it in its mission. The gathering of documents began long before the Tribunal itself was established, pursued both by sovereign governments and designated agencies.

The Republic of Bosnia and Herzegovina established a commission on war crimes at the very beginning of the aggression, "Državna komisija za prikupljanje činjenica o ratnim zločinima na području R BiH," headed first by Stjepan Kljujić and then by Bećir Gavrankapetanović. The tape and transcript of Radovan Karadžić's speech on the eve of the Serb plebiscite in November 1991 was among those collected by this commission.

Then the United Nations Commission of Inquiry, the forerunner of the ICTY, was created. It, too, collected documents and in 1993 turned them over to the ICTY, where they are now part of the archive.

The ICTY's gathering of documents has been aggressive and far-reaching. In the years after the Dayton Agreement, SFOR units conducted surprise raids for the exclusive purposes of gathering documents for The Hague. The most extensive of these was a raid on Prijedor, that led ICTY investigators to seize essentially all of the municipal archives, some 460,000 individual documents.

With time, large quantities of documents have also been turned over by the Republika Srpska, the governments of the Republics of Serbia and Croatia, and several sovereign states.

The ICTY issued subpoenas for various documents that pertained to specific cases. For some years, sovereign states ignored those requests; but after Tudjman's death in 1999 and Milosević's ouster in 2000, both neighboring states and the RS divulged much – though still not all – of what was requested. The Federation of Bosnia and Herzegovina has from the very founding of the Tribunal provided of its own volition the Tribunal's documents and has responded positively and forthrightly to all requests of which I know.

The ICTY hungered for documents NOT primarily in order to create an historical record, but to aid it in establishing the responsibility of individuals for the crimes of which they were accused. But the Tribunal collected many of the very same doc-

uments that historians require i in order to write a fuller history of Bosnia and Herzegovina in the years between 1990 and 1996.

The Tribunal also called upon historians as expert witnesses to better understand the situation in which crimes against humanity were committed. Among those who testified before the Tribunal were our late friend and colleague, Professor Iljas Hadžibegović, and myself. The judges themselves did not commission reports or summon these witnesses; rather, they were called by the prosecution and defense and typically offered radically differing interpretations of history.

The Trial Chamber in the Sarajevo siege trial of General Stanislav Galić defined an expert witness as, "a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute."

The Tribunal's use of historians as expert witnesses is highly unusual, and it may be considered an innovation. Why, then, do the prosecution, defense, and judges employ historians as expert witnesses?

In contrast to the Nuremberg, Tokyo, and Eichmann trials, the ICTY finds historians useful for two reasons:

First, the participants in the trial do not have a common, shared understanding about the master narrative of the past for the areas where crimes allegedly took place. The judges come from a variety of countries and continents. When they arrive, they typically know nothing of Bosnia or the former Yugoslavia, and require some understanding of the region and its people.

Second, the court is trying leaders together, as members of a Joint Criminal Enterprise, rather than in isolation. Members of the Joint Criminal Enterprises developed and implemented policies over time, and typically did not themselves personally kill people. Judges require an understanding of this political element in the crimes, and with the movement's background and context.

The historian therefore may be described as a canvas-painter. Like the artist painting a landscape with people in it, the historian describes the context, the background, as well as providing information about the people who appear in the portrait.

Experts called by the prosecution are typically answered by experts called by the defense, setting up a clash of historical narratives between two historians. Skillful judges often find a way to create their own narrative in the judgment. They weave together those facts or evidence on which the prosecution and defense experts agree, yielding an account that is often brief and reduced to a sequence of facts rather than interpretations or long-term trends. They often move seamlessly to the accounts of eyewitnesses, some of whom also offer their interpretations of history.

Judges rely on both documents and historical testimony to reach their conclusions, but they may not always cite or quote either in their judgments. Both the histo-

rian and the documentary record provide judges with a breadth of understanding that they may record only indirectly in the judgment, but the judges emerge more confident of their findings after mastering at least some of what historians and the documents tell them. History, therefore, has become important in providing the information consumed by the ICTY in exercising its mandate to try the accused.

The ICTY also produces history. The Tribunal's "output" takes three forms. First, the Tribunal makes available some of the documents it holds. Second, the trials end with judgments, most of them very lengthy. These judgments are filled with carefully-weighed conclusions that are of great value for historical study as well as determining guilt or innocence of the accused. Finally, the Tribunal documents and makes available the experiences of thousands of victims and perpetrators, many of whom would not otherwise memorialize their experiences.

Judgments are public documents, even though the judges may rely on protected witnesses or sealed documents to reach their conclusions. Happily, judgments are not limited to pronouncements of individual responsibility and legal findings, but also include a substantial account of what happened. The judges' findings are not necessarily intended to be finished history, but they reflect the best judgment of three or more highly skilled individuals – that is, judges -- who have weighed the relevant evidence carefully for relevance and reliability.

Some judgments are more revealing than others, but all of them convey in rich detail a narrative of events that would otherwise be impossible to compose without massive documentary evidence and eyewitness accounts. The Stakić case judgment contains a rigorously impartial and detailed account. It gives intimate details about the crimes the judges found to have taken place, but also gives extensive background of the events of 1990-1992 that preceded them. That judgment, in short, is a superb historical account—not complete, to be sure, but extremely useful and indispensable for anyone wishing to write a more complete history. The judges then move on to determine Stakić's responsibility, and to characterize it legally, in the next section.

I am happy to say that ICTY judgments have been used by several historians in constructing historical narratives of the time. There remains much to be done, particularly in comparing the contexts and causes of genocide and other crimes in various regions and municipalities of Bosnia.

The judgments may be valuable, but they are not nearly as valuable for historical studies as the documents in the Tribunal's possession.

First, it is important to understand the "archive" that the Tribunal has amassed is now completely electronic in character and digital in form. Any document that enters the Tribunal from any source is scanned and digitized, and users find that document, search it, analyze it, and submit it into evidence in digital form.

There are situations, of course, that it becomes necessary to consult the paper original, for purposes such as verifying a signature, determining if contrasting colors of ink were used by the same individual at different times, and occasionally even to clarify barely legible words.

But those situations are exceedingly rare. In fifteen years of reading, interpreting, admitting, and testifying about documents in 15 different cases, I have yet to touch or even see an original. All significant information in and about these documents is digital in form.

There is, somewhere, a huge warehouse of the millions of documents in the Tribunal's possession. But some original documents have already been returned to their originators. Thus the physical mountain of paper is no longer a complete archive; a complete collection exists only digitally. Furthermore, the physical mountain is not well organized and all but inaccessible; the digital collection, on the other hand, is searchable via electronic findings aids and traceable through several numeric index systems. In a second or less, all occurrences of a single word in these millions of documents can identified with the use of a computer containing the data base.

The physical archive, therefore, is nearly useless. It is indeed tragic that so many people have devoted so much time and energy to arguing for the physical core of the archive to be located in Bosnia when the trials are complete. That physical archive is a cadaver; it will be an albatross to whatever organization ends up possessing it. It is so vast that no single human being can ever master its contents, and even a large team will find it an insurmountable challenge. It is also a huge, costly burden to whoever will be tasked with preserving it, requiring millions of euros a year for security, storage, air conditioning and heating, and finally sorting.

No, the critical issue with the ICTY archive is not its final resting place; it is *access* to its living, breathing digital Doppelgänger, the digital archive. Today, each Tribunal employee has a computer terminal that provides access to almost all of those documents, and a choice of finding aids to locate individual references. It is that access, and the ability to search rapidly, that the historian craves. I urge the Tribunal to make that possible, and I urge each of you to join a popular movement to persuade the Tribunal to move toward universal access to the electronic archive.

As I have already mentioned, the Tribunal collects documents first and foremost to try individuals and determine individual responsibility, not to provide an historical record. Some of those documents are procured with strings attached – either conditions imposed by the sovereign states who provide them, or made up by the Tribunal itself.

Researchers may go to great lengths to take sworn statements from victims. Many victims are not only willing, but eager, to tell their stories in full to the world.

But the Tribunal treats all witness statements the same, as sealed documents unless and until they are required for evidence in a trial.

The court does not have the resources to consider all victim statements, and in any case requires that those who provide statements must be available for cross-examination by the other side. In most cases, the witness statement is admitted only after cross-examination is complete, and only at that point does it become public – assuming that the witness testified in open court without protective measures.

In general, the Tribunal does not make public any document, unless and until it has been admitted as an exhibit for the prosecution or defense. This may seem to be prohibitively restricted, given the immense volume of documentation in the Tribunal archive.

In practice, the restriction is not significant. Prosecutors and defense attorneys alike have tendered as evidence the most important and most revealing documents, and have done so in considerable quantity. In building the case against Momčilo Krajišnik, the prosecution commissioned Patrick Treanor, head of the Leadership Research Team in the Office of the Prosecutor, to compile all relevant documents for the case. It then called Treanor as an expert witness. He submitted many hundreds of documents, filling 17 notebooks, all part of a single exhibit, numbered P67A, which the Trial Chamber then admitted into evidence.

As the Krajišnik case shows, a single exhibit may contain hundreds of documents and number many thousands of pages. Exhibit P67A includes nearly complete records of the SDS before the war, the RS Presidency, and the RS Government (Vlada) through most of 1992.

In the Karadžić case, I testified at length based on the debates of the Bosnian Serb Assembly from 1991 to 1996, based on the complete transcripts (zapisnici) provided in several different batches by the Secretary of the Assembly in the RS. These transcripts have great forensic (pravni) value. They became indispensable in the cases against Milošević, Krajišnik, and Karadžić. But they also have great historical significance. They are the first source to consult for anyone investigating the origins and first five years of the Republika Srpska. They reveal the goals and plans of the key leaders, and how those changed over the years.

Afterward my testimony in June 2010, the prosecutor moved to admit all 63 sessions into evidence in full. The judges were clearly not inclined to grant this motion – until Karadžić, representing himself, joined in the prosecution motion to admit them. He had concluded, as had I, that the transcripts represent an irreplaceable source for examining the historical phenomenon of the Bosnian Serb nationalist movement, and his role in it, and he was determined to use the very same records to justify himself before history.

The judges were faced with a "united front" of prosecution and defense. They voted to admit as individual exhibits the first 57 sessions (sjednice) along with the English translations of them, amounting altogether to around 7,000 pages. They are now fully in the public domain and open to anyone who wishes to use them as an historical source.

There is much, much more historical evidence available in those documents that have been admitted into evidence.

In the Milošević and Krajišnik cases, the Trial Chambers admitted over 300 intercepted telephone conversations based on tapes and transcripts made by security services of the government of Bosnia made possible by tapping the phones of Karadžić and other key leaders. When coordinated with information available from the periodical press and other records, these transcripts are incredibly revealing of the thinking and plans of Serb leaders. Many similar records exist for the Croat and Bosniak political leaders as well.

To sum up, much of the Tribunal archive exists in accessible form, and it is available now for historical inquiry of the 1990s.

But there are challenges with using this material. First, the material is publicly available in principle only. In reality, the Tribunal has not been helpful in making it available. Several years ago the Tribunal established a website for all publicly available documents, but it is exceedingly difficult to use, archaic, and slow. It includes very few exhibits, and almost none from the more recent, and more important, trials of leaders.

I believe all of us as historians have both an opportunity and an obligation to take up the challenge that these documents hold for us, to write histories of Bosnia in the 1990s. We can now write them as we write histories of other times and places. We can write them based on a wealth of documentary information, some of it already reviewed for accuracy and authenticity by judicial experts. Whereas many writers have relied heavily on the legal conclusions of the judges to verify their own interpretations of events, we can now move beyond legal judgments to historical examination, not limiting ourselves to specific crimes or the most obvious deeds.

I believe we must move beyond the common characterizations of events, as genocide, murder, persecution, expulsion, or ethnic cleansing, however horrible those characterizations must be. We must raise new questions and provide fresh answers to them. We must examine the dramatic changes in Bosnian society in the 1990s, in addition to describing the most conspicuous violent deeds that so tragically contributed to those changes.

And above all, we must move beyond merely assessing criminal liability to understand the deeper processes that drove the division of Bosnia. There is much to be learned from such studies, and much to be gained from heeding them.

To conclude, in the words of Martin Luther King, "The arc of history is long, but it bends toward justice." It is our job, as historians and students of history, to assure that it also bends toward truth ■

Summary

Should history have a place in trials before international war crimes tribunals? "No," wrote Hannah Arendt in her classic work, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963). For her, the courts had no business making historical judgments. But at the International Criminal Tribunal for the Former Yugoslavia, history and historians have routinely been a part of trials. Donia, who has testified in fifteen trials at The Hague as an historical expert witness, assesses the successes and failures of incorporating history into the trials, using judicial decisions for writing history, and using the documentation assembled by the Tribunal to advance historical understanding of the region's history in the last decade of the twentieth century ■