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Ostojić Mladen, Queen Mary, University of London, ostojicmladen@gmail.com

The Politics of Cooperation with the ICTY in Serbia 2000-2011

Introduction

The issue of cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and, more generally, the legacy of the wars of Yugoslav succession represented one of the biggest challenges for the democratization and Europeanization of the countries issued from the former Yugoslavia, especially Serbia. With the creation of the ICTY, the international community had mobilized unprecedented political and financial resources to bring to justice war criminals from the former Yugoslavia. The ICTY was the first international criminal tribunal created by the UN as a mandatory mechanism for the restoration and maintenance of peace. It had primacy in the prosecution of war crimes over local authorities, which were legally obliged to cooperate with the Court.

In spite of the powers conferred on the Tribunal by the international community, it soon became clear that the ICTY depended on the goodwill of target states in order to collect evidence on war crimes and, especially, in order to get hold of war crimes suspects. During the nineties, the work of the Tribunal was obstructed by the reluctance of the authorities in Serbia and Croatia to arrest and transfer indicted war criminals to The Hague. Aside from a few exceptional cases, the nationalist authoritarian regimes of Slobodan Milosevic and Franjo Tudjman shielded war crimes suspects from prosecution. As a result, the ICTY initially targeted low-level perpetrators to which it could get access.

It is only after the death of Tudjman in Croatia and the overthrow of Milosevic in Serbia in 2000 that the conditions were created for the Tribunal to become fully operational. These two regimes were replaced by democratic governments which endorsed the principles of liberal democracy and human rights, and were in theory supportive of war crimes trials. However, in practice, the situation only changed insofar as the Serbian and Croatian democratic governments were much more responsive to foreign pressure for cooperation than their authoritarian predecessors. State cooperation with the ICTY was almost entirely driven by the policies of conditionality deployed by the US and the EU which conditioned financial assistance and European integration on the transfer of indictees to the Tribunal. In spite of these incentives, cooperation with the ICTY was sporadic and protracted both in Croatia and Serbia. It took over 5 years to Croatia to extradite all the Croatian war crimes suspects and over 10 years to Serbia to extradite all the Serb indicted war criminals sought by the ICTY, the last one being Goran Hadzic who was arrested in June 2011.

The existing literature on ICTY cooperation has essentially focused on the interaction between the tribunal, the target states and the international community in order to determine the mechanisms of state cooperation with international tribunals. My research seeks to contribute to this literature through an in-depth analysis of policy-making on ICTY cooperation in Serbia following the overthrow of Milosevic. I wanted to understand why the Serbian democratic

authorities struggled to cooperate with the ICTY for over ten years and why they were reluctant to embrace the work of the Tribunal. I came to the conclusion that the Serbian authorities were unwilling to endorse the Tribunal essentially because they perceived it as a potential threat to democratic stability and state interests.

Justice and Stability

The ICTY undermined political stability in Serbia for several reasons. First of all, the democratic authorities which assumed power after the overthrow of Milosevic were deeply divided on this issue. On the one hand, the Serbian government was led by a reformist figure, Zoran Djindjic, who sought to cooperate with the ICTY in order to gain access to financial aid and advance the country's prospects of integration into Euro-Atlantic institutions. On the other hand, the newly elected president Kostunica considered that ICTY cooperation should not impinge upon the country's sovereignty and national interests. The disagreements over this issue – particularly with regards to the extradition of Milosevic – generated a split among the authorities which reduced the government's capability to transfer indictees to the ICTY.

Secondly, the army and the security services actively obstructed cooperation with the ICTY out of fear that their own members will be extradited to the Tribunal. In November 2001, the Serbian government faced a mutiny of the Special Units which requested that the authorities suspend cooperation with the ICTY. Two years later, the Serbian Prime Minister Djindjic was murdered by members of these same Special Units in an action dubbed 'Stop the Hague'. In other words, the Serbian government was exposed to the threat of a coup by the remnants of the former regime, which could revert the democratisation process.

As a result of this, the authorities increasingly shied away from carrying out arrests. Instead, they sought to convince the indictees to surrender to the Tribunal by providing them with legal and financial support. This practice culminated with the policy of 'voluntary surrender' which was first introduced by the Croatian government and then emulated in Bosnia and Serbia. This policy consisted in providing moral and material support to those indictees who surrendered. The government portrayed these surrender of indictees as patriotic acts and contributions to Serbia's integration in the EU. The indictees who surrendered were received by state officials who would then escort them to The Hague as if this was an official delegation visiting a foreign country.

This policy proved very effective in delivering indictees to the ICTY, but it also undermined the legitimacy of the Tribunal among the Serbian population. Public opinion polls carried out throughout the last decade show that only 15 per cent of the population supported cooperation with the ICTY for the sake of justice. The majority of the population supported cooperation with the ICTY only for the sake of avoiding sanctions or enabling Serbia's integration in the EU. In other words, most people in Serbia thus saw the ICTY as a necessary evil imposed by the international community.

Now, of course, there were quite a few indictees who refused to surrender. The authorities initially went around this problem by arresting these indictees and portraying these arrests as voluntary surrenders. But the problem was how to arrest the 'big fish' who could still enjoy some support within the state institutions and the wider public. Considering its highly divisive and destabilising potential, the arrest and transfer of high-profile indictees such as Karadzic or Mladic required wide political consensus on this matter. While this consensus was largely built

around the aspiration to join the EU, it was first and foremost premised upon the pacification of the Serbian political scene which involved closing the books on the legacy of Milosevic's rule. This was essentially achieved through the rehabilitation of the parties issued from the former regime and their acceptance as legitimate political partners. The restoration of the SPS through its support for Kostunica's minority government and, especially, its participation in a coalition government with the DS allowed for the emergence of a consensus on ICTY cooperation for the sake of EU integration. Cooperation with the ICTY was thus premised on 'national reconciliation' which, paradoxically, entailed absolving the former regime from political responsibility for war crimes.

International Justice and State Interests

Another reason why the Serbian authorities were reluctant to endorse the ICTY is that they perceived the Tribunal as a potential threat to state interests. This became apparent during the trial of Slobodan Milosevic.

The Serbian government extradited Milosevic with the hope that his trial would contribute towards restoring the legitimacy of the Serbian state by individualizing responsibility for war crimes. They also hoped that this trial would contribute towards confronting the Serbian public opinion with the war crimes perpetrated by Serbian forces, thereby discrediting his authoritarian nationalism and strengthening domestic support for democracy. However, none of this happened. In fact, the trial of Milosevic had quite the opposite effects. The broadcasting of the trial reinforced negative public perceptions of the ICTY and discredited the Tribunal in the eyes of the liberal elite. Indeed, the trial generated a dramatic increase in Milosevic's popularity among the population as well as renewed support for his political ideas.

What's more, the trial of Milosevic raised fears among the Serbian authorities that the Serbian state could be held accountable for genocide if Milosevic were to be found guilty. Milosevic had initially been indicted for war crimes and crimes against humanity committed in Kosovo. The indictments for Croatia and Bosnia against Milosevic were issued in autumn 2001, after he had been transferred to The Hague. The Bosnian indictment included charges of genocide, which was very problematic for the Serbian authorities for two reasons. Firstly, the Bosnian state had, as early as in 1993, instigated a lawsuit for genocide against the Federal Republic of Yugoslavia before the International Court of Justice (ICJ), and secondly, the ICTY had already established that the Srebrenica massacre amounted to genocide in the landmark Krstic case in 2001. This meant that Serbia could have been found responsible for genocide at the ICJ if it were established that the authorities in Belgrade had command over the troops on the ground in Bosnia. So, Milosevic's conviction for genocide at the ICTY would have substantially increased the probability of an unfavourable verdict for Serbia before the ICJ.

Although these concerns were rarely voiced in public, the fear that Yugoslavia could be the first state ever held responsible for genocide substantially informed the attitude of the Serbian elites towards cooperation with the ICTY and truth-telling. This concern for state interests led to the tacit provision of state support for the defence of Milosevic. More importantly, it reduced the scope for truth-telling as the Serbian authorities requested protective measures for some of the documents requested by the Prosecution so that they would be cited only in closed sessions before the judges of the Hague Tribunal. This primarily concerned the transcripts of the meetings of the Supreme Defense Council at which Yugoslavia's most high-ranking political and military officials discussed about the military operations in Bosnia and Croatia. The Trial Chamber

conceded the protective measures as the Serbian authorities were successful in arguing that an ICJ conviction would undermine peace and stability in the region and would thus undermine 'vital national interests'.

This episode remains the subject of controversy among the protagonists and observers of the Milosevic trial. But what I want to emphasise here is that the trial of Milosevic and the genocide lawsuits which were running in parallel at the ICJ blurred the distinction between individual and collective responsibility in the eyes of the Serbian authorities. Had Serbia been the first state ever to be held responsible of genocide, it would have suffered a massive blow in terms of its international legitimacy in addition to potentially having to pay substantial monetary compensations to Bosnia and Herzegovina. Paradoxically, instead of promoting a break with the past, international war crimes trials have restricted the scope for truth-telling and acknowledgment of past atrocities in Serbia by raising the spectre of collective responsibility.

Conclusion

The arrest and transfer of ICTY indictees to The Hague has often been praised as a proof of the effectiveness of the policies of conditionality deployed by the EU and an instance of Europeanisation in the former Yugoslavia. While it is undeniable that Serbia's cooperation with the ICTY was primarily driven by US and EU conditionality policies, the results and impact of these policies largely depended on domestic political dynamics. Rather than enabling democratisation, externalised justice was enabled by democratic consolidation on the ground.

This observation challenges both the 'norm adoption' theory and the pragmatist view that Serbia's cooperation with the ICTY was driven purely by external material incentives. This cooperation did not come merely as a result of the internalisation of international norms of justice, as legalist scholars would suggest. Nor did it arise out of Serbia's process of Europeanisation, as argued by some policy-makers in Brussels. There is indeed nothing to suggest that the Serbian authorities were more committed to universal norms of justice and European values in 2011 than they were in 2001. What has clearly changed in the meantime is the domestic political and institutional context. It is the pacification of the domestic political scene and the strengthening of democratic institutions that gradually improved prospects for establishing accountability.

My research substantiates the view that there is a systemic tension between justice and stability in the early stages of the transition, but that this relationship varies according to the degree of democratic consolidation. The Serbian case demonstrates how premature and excessive demands for justice risk disrupting democratic consolidation by undermining the stability of the new regime. This suggests that international tribunals should take into account political circumstances on the ground when administering justice, rather than attempting to 'rise above politics'. Naturally, the general validity of this principle needs to be checked against other instances of international judicial intervention.