

IHRP Fellowship – Final Report, September 2017

International Criminal Tribunal for the Former Yugoslavia

Office of the Prosecutor

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This summer, I had the pleasure of interning in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia. I worked in the Appeals section of the OTP, and in this capacity, I worked on several ICTY appellate proceedings, including: *Prosecutor v. Radovan Karadžić*, *Prosecutor v. Prlić et al*, and *Prosecutor v. Popović et al*. As the ICTY is approaching the completion of its mandate, the United Nations created a new organization, the Mechanism for International Criminal Tribunals (MICT), to carry forward its work, along with that of the International Criminal Tribunal for Rwanda. Because of this bureaucratic shift, I also worked on post-conviction review proceedings in the Rwandan matter of *Prosecutor v. Augustin Ndirabatswe*, and I assisted prosecution teams with a review of fugitive case files for indicted individuals who have not yet been caught and tried before the ICTR.

My responsibilities as intern ranged from the mundane to the more elaborate. As part of my more basic responsibilities, I proofread court submissions in the matters I listed above and verified that their contents were fully substantiated in the jurisprudence of the tribunals. The most complex work involved examining case files and pre-trial materials as part of the review of fugitive files.

From my first day at the Tribunal, my experiences were eye-opening and thought-provoking. Although I knew I was signing up for an internship in a tribunal, I was surprised by the extent to which my work emphasized legal analysis and required me to engage with a complicated and unsettled jurisprudence. The task of prosecutors at the ICTY is to collect evidence and prepare legal arguments that prove, beyond reasonable doubt, the guilt of an accused. Given that the accused who appear before an international criminal tribunal are generally senior military or government officials, they are often far-removed from the crimes with which they are charged. It is inordinately difficult to prove the guilt of an accused who sat in an office hundreds of miles from the location at which a crime was being perpetrated by somebody else. The evidentiary burdens on the prosecution are massive and the jurisprudence is labyrinthine, which leads to trials that take years.

I have always found international criminal courts fascinating precisely because of the extent to which their trials are elaborate and lengthy. The cases require so many people to work so hard, and they require the international community to spend so much money. And yet, I have always wrestled with whether these courts actually serve a meaningful purpose, given that their work invariably takes place so long after atrocities have occurred. The cynical view is that international courts exist only to exonerate those more powerful nations that abdicated their responsibility to prevent atrocity from occurring in the first place, but I approached my internship with the goal of thinking past the cynicism in identifying a purpose and meaning behind the work of international criminal courts.

Pondering this question all summer, I kept fixating on what I think is the strangest thing about international criminal law, namely the task of prosecuting a small number of individuals for crimes that affect entire villages, cities, countries, and races — and humanity, more broadly. The

crimes involve the destruction of so much: towns burnt to the ground, bodies strewn across a once fertile landscape, and cultural heritage sites lost forever. Sitting in the courtroom of an international criminal tribunal, one can't help but look to the accused, who is most often slouching in his¹ seat with a look of apathy and boredom, and wonder how important the guilt of that single individual is against the backdrop of crimes that truly are directed at humanity at large.

This, for me, is the central paradox of international criminal law. Even if the prosecution proves the guilt of the accused, does humanity at large, or even just the relatively small chunk of humanity that experienced war crimes firsthand, benefit from having that specific accused waste away in jail for many years? The objective of all post-conflict justice is probably to foster the healing of victims and the reconstruction of broken communities, but victims appear in the proceedings only insofar as their testimony provides useful evidence, and the proceedings themselves invariably take place far away from the site of the conflicts. And yet, we have to do something with the alleged criminals, who are entitled to the human rights regime's procedural safeguards.

I don't think there is any easy answer to this question, but I left my internship believing that the ICTY, at least, is a strong example of a court that served a meaningful purpose in post-conflict reconciliation within its specific context. Because Yugoslavia collapsed into several smaller states whose people had no vested interest in getting along in the future, each state could benefit, at least in theory, from an impartial international arbiter to punish its and its peers' most serious perpetrators of war crimes. In practice, the court has been accused of biases against Serbs and in favor of Croats, but I still believe its overall model, functioning, and history fulfilled many worthwhile objectives for post-conflict reconciliation. Namely, the court created a strong historical record of the conflict that formed its mandate, which I think is hugely important for reconciliation: setting down the truth of what happened acknowledges the suffering of victims and promotes their healing. Furthermore, the court convicted several significant accused, which was also doubtless a boon to the healing of victims. The court's acquittals, although perhaps less helpful to victims, were important in establishing its legitimacy and in moving international criminal law beyond its history of show trials like those that took place after World War II.

On this last point about acquittals and the court's legitimacy, I thought a great deal this summer about the role of defense teams in international criminal law. I have observed that the public does not look kindly upon international criminal defense lawyers, and I have personally witnessed these lawyers field questions like, "How could you possibly want to defend these guys?" A colleague in the ICTY's prosecution team who worked as defense counsel for an accused before another international court once pointed out to me that these questions reveal a strong presumption of guilt against alleged war criminals (one could not possibly want to defend those guys, because they must be guilty) and ignore the manifest inequality of arms between the defense and prosecution at an international criminal court (prosecution teams are massive and benefit from significantly more resources than defense teams). If the goal is to have fair,

¹ All accused before the ICTY, ICTR, and ICC have been men, with the exception of Biljana Plavšić, who pled guilty to persecution as a crime against humanity before the ICTY in 2002, and Simone Gbagbo, who was indicted by the ICC in 2012 for crimes against humanity in Côte d'Ivoire.

legitimate trials, the courts must benefit from vigorous defense teams that ensure the prosecution is held to the highest standards.

For these reasons, I left my internship finding the work of the defense teams to be so important and so valuable. My moral quibbles were placated, at least in theory, by the thought that if the prosecution does its job and the judges interpret the law correctly, a truly indefensible accused will, indeed, have no compelling defense. The corollary is that if the accused is innocent, he should not go jail — a truism that bears repeating in the context of international criminal law, where it is all too easy to leap from newspaper headlines about far-away wars to a quick presumption of guilt against those involved.

Before completing this report, I would like to thank the IHRP for making this experience possible. As I wrote above, working for the ICTY was one of the most stimulating and fascinating professional experiences of my life, and it would not have been possible without the IHRP's generous funding. I would also like to encourage future U of T students to consider internships in international criminal law: although the field seems niche and inaccessible, internship opportunities abound, and they open many doors to career paths in the field and in international law more broadly.