

American University Washington College of Law

## Digital Commons @ American University Washington College of Law

---

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

---

2018

### Building Victim-Led Coalitions in the Pursuit of Accountability

Diane Orentlicher

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch\\_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

---

## BUILDING VICTIM-LED COALITIONS IN THE PURSUIT OF ACCOUNTABILITY

This panel was convened at 9:00 a.m., Thursday, April 5, 2018, by its moderator Reed Brody of Human Rights Watch, who introduced the panelists: Marino Cordoba, Victim Advocate; Souleymane Guengueng, a victim and activist; Diane Orentlicher of American University Washington College of Law; and Kathy Roberts of the Transitional Justice Clinic.

### BUILDING VICTIM-LED COALITIONS TO PRESS FOR JUSTICE FOLLOWING MASS ATROCITY

*By Diane Orentlicher\**

Assurances of victim participation in proceedings before the International Criminal Court and Extraordinary Chambers in the Courts of Cambodia have been seen as a welcome corrective to the flawed model of earlier tribunals.<sup>1</sup> The first such tribunal created since the postwar period, the International Criminal Tribunal for the former Yugoslavia (ICTY), was established by the UN Security Council in May 1993<sup>2</sup> without even consulting those who survived the atrocities that gave rise to its creation, the majority of which took place in Bosnia-Herzegovina.<sup>3</sup> Nor were victims formally incorporated into the ICTY's work except for those who provided testimony and other evidence. (The same holds true for the International Criminal Tribunal for Rwanda, established by the UN Security Council in 1994;<sup>4</sup> in the interests of brevity, my remarks will focus on the ICTY.)

In striking contrast, victims were central to two landmark trials in the past five years—the prosecution in 2015–2016 of former Chadian dictator Hissène Habré before the Extraordinary African Chambers in Senegal,<sup>5</sup> which is the focus of other panelists' remarks, and the 2013 trial of former dictator Efraín Ríos Montt in Guatemala.<sup>6</sup> While several factors account for these historic trials, robust and sustained campaigns by victims provided crucial impetus for both. In myriad ways, moreover, Chadian and Guatemalan victims' persistent engagement may have enhanced their satisfaction with justice long delayed.

\* Professor of Law, Washington College of Law, American University.

<sup>1</sup> See, e.g., IMPUNITY WATCH, VICTIM PARTICIPATION IN TRANSITIONAL JUSTICE MECHANISMS: REAL POWER OR EMPTY RITUAL? 6 (2014); Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 299–301 (2012).

<sup>2</sup> SC Res. 827 (May 25, 1993).

<sup>3</sup> See Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 291 (2001).

<sup>4</sup> SC Res. 955 (Nov. 8, 1994).

<sup>5</sup> See *A Milestone for Justice in Africa* (editorial), N.Y. TIMES (July 22, 2015).

<sup>6</sup> Ríos Montt was the first former leader to face trial in a national court on genocide charges. After a five-month trial, he was convicted of genocide and crimes against humanity based on atrocities committed in 1982–1983 and sentenced to serve eighty years in prison. Although that conviction was later overturned, Ríos Montt faced new charges at the time of his death in 2018. See Stephen Kinzer, *Efraín Ríos Montt, Guatemalan Dictator Convicted of Genocide, Dies at 91*, N.Y. TIMES (Apr. 2, 2018).

At a time of diminishing great-power support for retrospective justice, it is well worth our while to mine these experiences as models that might be adapted to other contexts in which victims demand justice yet face numerous obstacles. While other panelists will take up this task, my primary goal here is to offer a corrective to a widespread perception perhaps implied in my earlier remarks: that victims of atrocities prosecuted before the ICTY were marginal to its work except for their crucial contributions as witnesses. This perception pervades the English-language literature on the ICTY, which typically explains the Tribunal's creation in terms of the actions and motivations of relevant states and intergovernmental bodies.<sup>7</sup>

To be sure, as a creature of the UN Security Council, the ICTY exemplifies top-down, externally imposed justice. Yet standard accounts of the Tribunal, which relegate victims to the role of bystanders to its creation and render them peripheral to its operation except as witnesses, erase their contributions and agency. In fact, well before the ICTY was created, Bosnian rape survivors were actively engaged in documenting mass rapes with a view to prosecutions, and became active participants in global efforts to ensure justice for crimes of sexual violence once the Tribunal was launched. Survivors and other activists also shared valuable evidence with the ICTY prosecutor, and pressed governments to cooperate with the Tribunal. Advocates in former Yugoslav states have, moreover, long pressed their governments to build on the ICTY's findings by undertaking meaningful gestures of acknowledgment and penance.<sup>8</sup>

English-language literature on the ICTY has also largely obscured the central role of domestic lawyers in developing national war crimes institutions in Bosnia, which are among the ICTY's most tangible (albeit imperiled) legacies. Understandably, accounts of Bosnia's war crimes chamber (WCC) and Special Department for War Crimes in the Office of the Prosecutor, which began operating in 2005, typically emphasize the roles of the ICTY and the Office of the High Representative (OHR) for Bosnia in developing these institutions.<sup>9</sup> While the ICTY and OHR indeed played key roles, Bosnian legal professionals were deeply involved in developing these institutions.<sup>10</sup>

Acknowledging their role is not just a matter of getting the facts right. Obscuring the contributions of domestic lawyers has compounded already formidable challenges to Bosnia's fragile war crimes institutions. Judge Patricia Whalen, who served as an international judge on the WCC, recalls: "All you ever heard about was the OHR, the ICTY, the OHR, the ICTY."<sup>11</sup> In her view,

<sup>7</sup> See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 207–15 (2000); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 *AJIL* 639, 639–43 (1993).

<sup>8</sup> I develop these points in DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA* (2018).

<sup>9</sup> See, e.g., David Tolbert & Aleksandar Kontić, *The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 135, 145–47 (Carsten Stahn & Göran Sluiter eds., 2009); Fidelma Donlon, *Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION: HUMAN RIGHTS AND RULE OF LAW IN POSTWAR BOSNIA AND HERZEGOVINA* 257, 269–80 (Dina Francesca Haynes ed., 2008); Mechtild Lauth, *Ten Years After Dayton: War Crimes Prosecutions in Bosnia and Herzegovina*, 16 *HELSINKI MONITOR* 253, 257–58 (2005). This focus is understandable in part because the ICTY's development of a completion strategy provided crucial impetus for creating Bosnia's war crimes institutions, and, as noted in the text, the ICTY and OHR played central roles in developing those institutions.

<sup>10</sup> See ORENTLICHER, *supra* note 8, at 341. The ICTY did not play a similar role in launching Serbia's war crimes institutions, which have operated since 2003, but nonetheless played a crucial part in catalyzing their development. See *id.* at 388–93.

<sup>11</sup> *Id.* at 352 (quoting Judge Whalen).

the misleading perception that the WCC was essentially a foreign institution “became a weapon that was used against” it by nationalists opposed to the chamber’s work.<sup>12</sup>

Most accounts of the ICTY also obscure the degree to which the Hague Tribunal’s work helped mobilize civil society advocates in Bosnia, Serbia, and other former Yugoslav states, some of whom have partnered with Tribunal officials in programs aimed at advancing domestic processes of reckoning with wartime atrocities.<sup>13</sup> This type of influence can, at least in some circumstances, have powerful reverberations: by mobilizing domestic advocates, international criminal courts can indirectly help advance accountability for past atrocities in national forums.<sup>14</sup> To the extent this leads to human rights prosecutions in domestic courts, we may see a valuable downstream impact: a growing body of research has found a “strong and statistically significant” correlation between such prosecutions and decreased levels of repression.<sup>15</sup>

So far I have sought to correct a pervasive belief that the ICTY, as well as domestic war crimes institutions it helped launch, are solely the work of international actors. Yet this is not to suggest that the role of victims and other local actors in shaping the ICTY’s legacy is comparable to that of victim-led coalitions that relentlessly and successfully campaigned to bring Hissène Habré and Efraín Ríos Montt before the bar of justice. An intriguing question is whether differing degrees of victim engagement in *bringing about* trials before the ICTY on the one hand, and prosecutions before the Extraordinary African Chambers in Senegal and the Guatemalan court that tried Ríos Montt on the other hand, influenced victims’ experience of justice before these courts.

Any answer must be tentative and qualified, not least because victims’ perceptions of justice result from the complex interaction of many factors. With appropriate caveats, then, I suspect that many Chadian and Guatemalan victims experienced *long-delayed* justice with special satisfaction in part because *they* had overcome seemingly insurmountable odds to bring Habré and Ríos Montt, respectively, to justice; in contrast, by the time many of the ICTY’s high-level defendants were brought to trial, many Bosnians had grown weary of waiting for the kind of justice they thought the international community had promised to deliver decades earlier, when the ICTY was established. As I note in *Some Kind of Justice: The ICTY’s Impact in Bosnia and Serbia*, Bosnian survivors “did not experience long-awaited trials [of major suspects] the same way they would have years earlier.”<sup>16</sup> Even so, when the ICTY rendered its final trial verdict in late November 2017, convicting Ratko Mladić of genocide and sentencing him to life in prison,<sup>17</sup> many Bosnians savored the long-awaited judgment.<sup>18</sup>

## CONCLUSION

The image of top-down justice widely associated with the ICTY has obscured the active engagement of victims and other civil society actors in demanding justice and shaping the Tribunal’s

<sup>12</sup> *Id.* at 352–53.

<sup>13</sup> See, for example, initiatives described in *id.* at 311–14.

<sup>14</sup> See Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT’L AFF. 191, 197 (2010).

<sup>15</sup> Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. SOC. SCI. 269, 280 (2013).

<sup>16</sup> ORENTLICHER, *supra* note 8, at 158. It is possible, of course, that Bosnian victims would have felt much the same way as Chadian survivors if the ICTY, like the Extraordinary African Chambers, had been created *closer in time to the trials of senior suspects*, even if those trials occurred long after their crimes. Notably, as well, the trials of Habré and Ríos Montt did not last as long as major leadership trials in the ICTY. This, too, may go some way toward accounting for survivors’ apparently high levels of satisfaction with the outcome of these trials.

<sup>17</sup> Prosecutor v. Mladić, Case No. IT-09-92-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017).

<sup>18</sup> See ORENTLICHER, *supra* note 8, at 159.

achievements. In some respects, our failure to recognize their contributions has undermined civil society actors working under perilous conditions.

Going forward, at a time of diminishing global support for international criminal tribunals, the role of civil society actors in ensuring justice for grievous harms is likely to become more important than ever. If they succeed, their efforts may bring uniquely gratifying results.