2012

Book Review. The Legacy of the International Criminal Tribunal for the Former Yugoslavia edited by B. Swart, A. Zahar and G. Sluiter

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Bert Swart/Alexander Zahar/Göran Sluiter (eds.): **The Legacy of the International Criminal Tribunal for the Former Yugoslavia.** Oxford University Press, New York, 2011, 550 pages, ISBN 978-0-19-957341-7.

In this varied discussion of the International Criminal Tribunal for the Former Yugoslavia's (ICTY) legacy, we find the first little irony on the inside jacket: "[t]he publication of this book coincides with the year of cessation of major trial activity at the ICTY." Had that been true in 2011, the Tribunal's legacy would be quite different, with one of its most significant trials – *Mladić* – outside the calculation, along with most of *Karadžić,* the *Gotovina* appellate decision, and of course the reaction. One must go to print sometime, and it is not too early to ask about the ICTY's legacy; still, how contingent debates about legacy turn out to be, how extravagant early claims were, and how late in the game bets are still being placed.

Legacies are messy. The editors know the topic is overwhelming, greater than their collective powers to encompass it. But their introductory apologia for their incomplete efforts is understated and elegant, and we should not evaluate such a text against an impossible standard of omnivocality: no one could sum the Tribunal's legacy in 550 pages, so the better question is how the editors made use of them. Confronted with an unimpeachable set of eighteen commentators, we must consider the book as a whole – a precarious undertaking. Is it a whole? Is there coherence among its parts – at least collision?

The evidence from the book's structure is uncertain. The grouping of chapters – the interchangeable 'Battlefields' and 'Improvisation and Discovery' – seems arbitrary, *ad et post hoc.* That simply places this edited volume in the best, certainly the most common company among exemplars of this most tired workhorse of academia.

Still, common themes can be found: the need to fit the institution to the nature of international crimes (and how hard this is to do); and the urge to make sense of change over time – less *legacy* than *accounting.* These themes are related: models for fitting this institution to its circumstances are histories of its development. They are also related by a shared silence, in most chapters, on the most consequential question of legacy.

Theme 1: Fit the Institution to the Circumstances (But Which Ones?). Early chapters argue that there is no way to measure a tribunal's legacy without rigorously "articulating for which goals these institutions are being held accountable" (*King/Meernik,* 52); similarly, *Whiting* measures procedures "by how well they match up with the purposes and capabilities of the institution" (88). Later chapters apply similar models: *van der Wilt's* "central assumption is that defences [...] cannot be severed from the specific context from which they emerge" (277); *Acquaviva* argues the residual mechanisms are grounded on a balance between conflicting institutional concerns.

Of course, it is one thing to say 'first principles', another to decide what they are. The actual exercise yields "wide divergence of expectations and opinion regarding the missions of [...] tribunals" (*King/Meernik,* 52). The approach is generally one of two. Some define expectations downwards – institutional defence by attrition. Thus, *Eser* cautions against identifying political obstacles – to reconciliation and peace-building in the former Yugoslavia – as the Tribunal's failures (108). At the same time, he points out that the ICTY has embraced

broader claims such as reconciliation (113), along with historical record and truth (121) – a view he also embraces.

Whatever the precise goals, success is to be achieved by fitting expectations to the institution. This is an excellent prescription for the future, less satisfying for asking about that past, about what *this* institution accomplished.

Theme 2: Understanding Change over Time. The procedural chapters introduce a related theme about the ICTY's changing processes. Two theories contend: one stresses the experimental and improvisational; an alternate view advances an intentional, strategic theory of change.

Whiting sees the ICTY as "a laboratory [...] for developing a set of workable procedures" (84–85). *Ad hoc* revision was driven by the nature of international trials: "scale, complexity," (86) and "circumstances [...that created] substantial challenges to collecting evidence" (94). The results – flexible evidentiary rules, extensive written submissions – show experimentalism's malleability: *Zahar* charts the ICTY's improvised criminal code, while *Vierucci's* discussion of wartime special agreements shows how contingent that improvisation was; *van Sliedregt* tracks command responsibility across three generations of defendants. Criticisms of *ad hockery* arise too: *Tuinstra* sees the system of self-representation as unsystematic (373), suggesting the ICTY has experimented but not learned – for *Treschel,* "a dangerous experiment" (188). Authors characterise these processes differently – *Whiting's* experimental engagement is *Eser's* 'chauvinistic competition' between national models (120) – but most accept a theory of haphazard change.

Combs suggests something different. Rather than *Whiting's* learning curve, for *Combs* change is anticipated, a "maturing of international criminal law as a whole" (297). The early Tribunal had a precarious legitimacy, and allowed defendants "free rein to select their counsel" in order to secure their cooperation and avoid challenges (320). Newer, stricter standards for *Karadžić* "can reasonably be seen as signalling a new, less tolerant attitude" (313). *Combs'* arguments has implications for future tribunals: *Whiting's* path dependence is, for *Combs,* strategic, predictable – not simply a legacy, but a model. Is this right? The editors' "favela of ICTY procedure [...] that has developed around the self-represented accused" (1) better captures the shambling, seedy contours of this ill, – even unplanned construction. But *Combs'* argument is a serious one.

And whether by improvisation or intention, patterns were set (like the Tribunal's adversarial 'birth defect' (*Eser,* 120), or the ICTY's confused genocide jurisprudence (*Jørgensen,* 249), and that is a legacy too, "one of the most enduring [...] – the journey away from politics and towards law." (*Combs,* 321) For if the context for the ICTY was no context – a free-wheeling frontier – that is no longer true for the International Criminal Court, whose horizons have been defined by this first modern tribunal; bold experimentation may not continue (88)).

Inward Abstraction. These two themes share a focal point, and therefore a blind spot: an orientation that sees the external world as a challenge the Tribunal must meet – data for calibrating the institution.

This view lacks the political and particular. For all the insistence on evaluating institutions in light of real conditions, there is little engagement with Yugoslavia: chapter after chapter parses some procedure or norm, but says little, if anything, about its impact there. *Sluiter's* chapter, on the effect of individual opinions, is a missed opportunity to ask about effects *outside* the Tribunal, making only oblique references to 'perception by the public' (197). Analysing the Tribunal's "'discovery' of the crime of persecution" (220), *Nilsson* shows the experimental balancing of considerations that produced "a suitable category to address the types of crimes committed in the former Yugoslavia" (219) – without a word about the *reception* of this 'novel' crime (246). Similarly, in *Acquaviva's* discussion of residual mechanisms – the Tribunal's literal legacy – the region surfaces only as the challenge to protect witnesses' identities (520) and in regret that artifacts from Srebrenica were destroyed without consulting 'local stakeholders' (522).

Abstraction causes deformation. *Ohlin's* critique, a "new account of punishment [...] designed to vindicate the Rule of Law" (332), aims at "restoring international peace and security, deterrence, [and] retribution" (323). With such goals, one expects an examination of the post-Yugoslav condition, but the pull of abstraction is strong: A war criminal is "not just as an enemy of his victim but [...] of the community" (332) – by which *Ohlin* means the *international* community. Indeed, when effects *are* in focus, they are on the international plane, like *Treschel's* concern with the ECHR, or *Prost's* survey of State cooperation that barely touches the Balkans. If anything, *King/Meernik's* plea for closer attention to the ICTY's constituencies simply provides a conceptual basis for what many chapters do: think about the institution itself, in relation to institutions like it – the International informing the Literature.

A few chapters turn to the former Yugoslavia, but most do not. *Clark's* is the signal exception, engaging comprehensively with the Tribunal's legacy in the former Yugoslavia – with the legacy that surely should matter more than the Tribunal's institutional concerns, which after all are "necessary adjunct[s] of its performance for whatever purposes it has" (*Eser,* 111).

Reconciliation ... The first two chapters directly address the impact of the Tribunal in the former Yugoslavia. *King/Meernik,* proponents of the 'fit-the-institution-to-its-purposes' approach, conclude that the ICTY wasn't designed to do much reconciliation or "to affect the interests of its local constituents in the former Yugoslavia" (13), and "[t]oo often we find that tribunals [...] have been evaluated and unfairly criticized for their shortcomings in areas [...] where they possess no explicit mandate, or [...] where their powers are limited" (52).

But their own *tour d'horizon* reminds us of the enormous difficulty in saying anything meaningful about impact, and the endemic tendency to look for, and find, something positive. For despite lowered expectations, *King/Meernik* are pretty bullish on the Tribunal, finding all kinds of tentative but extraordinary impacts, such as a 'preliminary and suggestive' (49) correlation between convictions at the ICTY and improving human rights records in the Balkans that leaves an interval in the reader's confidence.

There is much to criticise about *King/Meernik's* methodology – ill-suited, clinical, detached, and incongruent – but readers can profitably turn to *Clark's* chapter for succinct criticism, using those adjectives, of similar work by *Meernik* (60 *et seq.*). *Clark's* own interviews yield little evidence of impact, showing what should be clear to all observers: reconciliation has

not happened. It is hard to tell clear causal stories about anything, but harder to tell them about nothing.

Yet so strong is the desire to see something, that, even *Clark* pleas defensively for realistic baselines (57). As with *King/Meernik,* this elides the role outsized expectations played in the creation, operation, and reception of the ICTY. Those are questions valuable in themselves, and useful, too, in considering future designs. Given the sensible framework *King/Meernik* propose for a sensible institution, why did we not use it? It *is* implausible that the Tribunal could do much to bring peace to the former Yugoslavia – therefore worth pondering why sensible people ever thought it could, and built a Tribunal to help do it. Nor, admitting the difficulty, should we instantly defend the institution on whatever limited grounds we can. If one weren't so busy researching the legacy, one might ask, *why are we doing this?*

The danger in Tribunal scholarship's analytic narcissism is not only its inattention to effects, but its casual assumption that they exist, with proofs defining 'impact' as development of the institution itself. Contributions to the law, public relations – these are institutional artefacts, not evidence of social rapprochement or deeper peace. Even if things were getting better – and a trip around the region can be discouraging – it is equally possible that the causal arrow is flying in the opposite direction: that people's views of the Tribunal are a function of other changes. The ICTY may be a weathervane, not the weather.

... And Truth. At core, *Clark* is right about the irreducible problems that go beyond presentation: "tribunal truth is ultimately less important for reconciliation than the everyday events and developments taking place within individual communities," which contribute to the "the problem of *rejected truth*" (73, emphasis original). The conceit that correct processes (a dossier system or 'witnesses of the court' (*Eser,* 134, 145–146); the inevitable calls for better outreach) will produce a magisterial, dispositive truth – which Eser assumes leads to reconciliation – fails to apprehend the context to which those truths are addressed. *Van der Wilt's* recounting of Norwegians' outrage at the acquittal of General *Rendulic* after WWII (286) is a reminder that correct doctrine does not guarantee truth's acceptance by an injured community, which prefers a good hanging.

And what is this Tribunal truth? We may imagine two kinds: fact-specific narratives, and narratives of characterisation. The latter, if accepted, would be more valuable to reconciliation: No one could or needs to know the details of six million murders, but everyone needs to know about the Holocaust. The kinds of procedural moves many of these chapters discuss in confident detail will, at best, produce a narrow fact-specific truth; they seem incapable of contributing to dispositive general narratives.

The real problem with expecting Tribunal truth to be accepted is that acceptance is not a question of procedural design, but of political orientation. Debates over procedural issues simply replicate this underlying problem of international criminal law's relation to the political. Limiting self-representation can prevent prominent defendants – *Milošević, Šešelj, Hussein* – from making trials into political theatre (176, 179), but fixing a procedural defect doesn't fix the underlying fact that international trials have a political context; it reads out, but does not erase, what *Combs* reminds us is "precisely what is disputed in the individual actions that are the object of the trial" (319, quoting *Koskenniemi*).

Consider the penultimate chapter, sketching the ICTY's codification project (474 *et seq.*) – surely one of its great legacies *within* the law. *Zahar's* focus is the creation of the law itself – there is no discussion of the war – and one might think that was its *purpose.* Yet what of that law's use – 20 years of application? Do we build only for the future? Do we only teach others to teach others, or do we expect, in each generation, some to go out and work in the garden? For it was a particular evil growth, in those years and in that place, and it was out of its soil the particular rules sprang, and to which, in turn, they were to be turned. It is an *ad hoc* tribunal: we associate the Latin with 'unsystematic, unplanned,' but it actually means 'to *this*'.

A Lawyer's Accounting. Perhaps it is unfair to place so much weight on what is not here. This is a lawyer's book, for lawyers. The themes are close to practice, attentive to process and doctrine; several chapters are excellent – but in ways that underline the problem of inattention to the Tribunal's broader legacy – the problem *with* the Tribunal's broader legacy, to which this book, as a whole, does not attend.

Not everyone must ask about core purposes all the time, but this book set out to do just that, to measure the Tribunal's legacy. For a project that "harbour[s] ... a particular interest in the question of the difference, if any, that the Tribunal has made in the countries of the former Yugoslavia" (1), the inclusion of just two essays in reply, in a volume mostly silent on the matter, is disappointing, and disappointingly typical of an entire discipline turned inward and introspective: procedure, doctrinal debates, everything a lawyer might desire – if not, perhaps, a grieving widow or an angry man walking into a voting booth in a town he did not grow up in. All to say that, sadly, the editors have nonetheless done better than many. A curiously narrow legacy.

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Antonios Tzanakopoulos: **Disobeying the Security Council.** Oxford University Press, New York, 2011, 276 pages, ISBN 978-0-19-960076-2.

The book makes a subversive and unorthodox argument, as *Tzanakopoulos* calls for 'disobedience' to the United Nations Security Council (SC). The author evaluates the practice of States and international institutions, and engages in a vigorous debate with scholarship, making the best out of an almost unwinnable situation. *Tzanakopoulos'* argument is built in a systematic way, and attempts to reframe norms and principles of relevance to the function of the SC. The author makes a great contribution to the reinvigoration of the debates on the role of the SC in the post-9/11 era, but, still, the analysis has weaknesses undermining the validity of his construction.