

Diane Orentlicher. ***Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia***. Oxford: Oxford University Press, 2018. Pp. xviii + 496. £35.99. ISBN: 9780190882273.

Diane Orentlicher's *Some Kind of Justice* is an impressive book. It examines, comprehensively and in much detail, the impact that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has had on the ground in Serbia and Bosnia and Herzegovina, mainly with regard to whether the Tribunal's accounts of the facts of specific crimes committed during the Yugoslav conflicts are believed by local audiences as well as the Tribunal's catalysing effect on domestic war crimes prosecution. Diane Orentlicher's book contributes to a growing literature on this subject¹ and builds upon two earlier studies she had conducted a decade ago in Bosnia and Serbia, which were commissioned by the Open Society Justice Initiative.²

In line with other literature on the subject, the book argues that the ICTY's impact in both Serbia and Bosnia has been modest in the near-to-medium term and is unknowable in the long term, but it potentially lays deep foundations for some future reckoning with the past. The ICTY's principal impact has been to provide some kind of justice by punishing a significant number of perpetrators deserving of such punishment (but far from all of them) and by thus providing a measure of satisfaction to their victims, while respecting international due process standards. But the Tribunal has failed to move the views of local audiences much with regard to the over-arching narratives of the Yugoslav wars or with respect to specific crimes; these views remain entrenched, highly polarized and embedded in nationalist ideology.

Orentlicher's methodology rests on two main pillars. First, she relies extensively on numerous interviews she conducted with local actors in the former Yugoslavia, both for the purpose of her two earlier studies and more recently. These individuals were mainly human rights and civil society activists who have invested an enormous amount of their time and energy in advocating for the ICTY before their local audiences, but Orentlicher also interviewed a sprinkling of ICTY sceptics. Her interviews thus focus on a particular elite sub-group and do not purport to be representative of the views of the population at large; rather, she taps her interlocutors' knowledge, experience and opinions that then inform her own analysis. Second, she relies on interdisciplinary research in the social sciences to provide both the hard data on what people in Bosnia and Serbia believe (or say they believe) with regard to wartime atrocities and a theoretical framework within which that data can properly be analysed. Thus, Orentlicher extensively examines (in Chapters 7 and 8) the surveys of public opinion in Serbia and Bosnia commissioned by the Belgrade Centre for Human Rights under the leadership of the late Vojin Dimitrijevic, which provide an exceptionally fine-grained insight into the views of the general public about specific crimes and enable a deeper appreciation of the nature of systemic denial.³ When it comes to her explanatory framework, Orentlicher is in agreement with recent scholarship arguing that understanding the mechanisms of the popular dismissal of the ICTY's factual findings as 'fake news' requires resort to sociological and social psychological research, particularly to the body

¹ See, e.g., J.N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (2014); Milanovic, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem,' 110 *American Journal of International Law* (2016) 233.

² D. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia' (2008), available at www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf; D. Orentlicher, 'That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia' (2010), available at www.opensocietyfoundations.org/sites/default/files/that-someone-guilty-20100708.pdf. Orentlicher did not conduct similar studies in Croatia and Kosovo, which are also outside the purview of the book.

³ The survey results, whether as detailed tables or shorter presentations, are available at www.bgcenter.org.rs/istravanje-javnog-mnenja/stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosu-du-za-ratne-zlocine/. Most of the detailed tables are available only in Serbo-Croatian.

of knowledge on biased cognition and the limits of human rationality.⁴ This allows us to better appreciate just how millions of otherwise reasonable and decent people can come to believe in unreasonable and indecent things and can do so persistently.

Two themes become apparent after the very first few pages of *Some Kind of Justice*: one is time and the other hope or hopelessness. In her first set of interviews, conducted for the purpose of her 2008 and 2010 Open Society studies, Orentlicher's interviewees and Orentlicher herself come across as moderately optimistic and hopeful for the future and reasonably generous in their assessments of the ICTY's positive impact. In her later interviews conducted for the book, however, almost all of that optimism is dispelled. Over less than a decade, things have changed quite dramatically for the worse. The ICTY issued several disappointing judgments, some of which entrenched deeply polarized alternative narratives about Yugoslav wartime atrocities. Bosnia became a completely deadlocked, dysfunctional polity dominated by increasingly extreme nationalist politicians. Serbia experienced the deconsolidation of whatever democratic institutions it had managed to build in the post-Milošević period. It regressed to nationalist rule with the rise of the soft authoritarian regime of the current president, Aleksandar Vučić, erstwhile apprentice of Vojislav Šešelj, the hyper-nationalist leader of the Serbian Radical Party whose trial before the ICTY was in its own special category of bad. Denial is everywhere, as are a great many very nasty people; domestic war crimes prosecutions are more or less marginalized, the ICTY has shut down and, among civil society, including Orentlicher's interlocutors, the depression runs very, very deep.

Some Kind of Justice is hence much more modest – even in its title – in its assessment of the ICTY's local impact than Orentlicher's two previous studies. And that may be a good thing paradoxically because it shows us that it is not so much the ICTY's impact, but our perception of that impact, that has actually changed. This, in turn, tells us that we as scholars need to be careful to avoid the pitfalls of confirmation bias – when one supports international criminal justice, one is always tempted, consciously or not, to find it consequential. The book has two further particular strengths. The first is its comprehensiveness and the level of detail in its portrayal of the evolving political context in Bosnia and Serbia and relevant developments before the ICTY. The second is that Orentlicher allows her numerous local interlocutors to be heard in their own voice, adding richness and nuance to the book's overall narrative and argument. This will be of enormous benefit to readers who do not speak Serbo-Croatian or are otherwise not steeped in the politics and societies of the former Yugoslavia.

That said, Orentlicher's book at times leaves the reader wanting for more. Missing from *Some Kind of Justice* is some kind of prescription; looking back, could the principal actors concerned have done anything differently to improve the perception of the ICTY and the acceptance of its findings in the region (assuming they wanted to do so)? In other words, what were the key errors or misjudgments made by these actors that could have – not necessarily would have, but could have – made some significant difference in how things have turned out?

Orentlicher is rightly cautious and hesitant in drawing any categorical counter-factual conclusions. But she also may be a bit too hesitant. In some cases, she endorses very modest prescriptions that have been long discussed in the existing literature. She thus argues (correctly) that confirmation bias privileges beliefs acquired early in the cognitive process; the conclusion that she draws from this, however, is that better, more energetic outreach efforts early in the life of the Tribunal could have made a greater impact (at 310). While there is certainly some

⁴ See, e.g., Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms', 45 *Vanderbilt Journal of Transnational Law* (2012) 405; Milanovic, 'Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences', 47 *Georgetown Journal of International Law* (2016) 1321.

truth in this, she does not explain how even the best of all possible outreach efforts could have overcome the raging propaganda machinery at the disposal of nationalist elites in the former Yugoslavia – for example, the Serbian or Croatian state television stations. In short, even if the ICTY had had the most wonderful and well funded of all outreach programmes, the acceptance of the facts of the Srebrenica genocide among ethnic Serbs in Serbia could perhaps have been at 15 per cent, rather than at the 10 per cent that it is at now. But it would not have been 50 per cent. It is difficult to see how better outreach could have made a truly radical difference on the ground.

Similarly, Orentlicher appears to endorse the idea of some future ‘tipping point’ of accumulated evidence of mass atrocities that will make denial so cognitively difficult that it will start to dissipate (at 235–236). Again, it is hard to dispute that biased assimilation of information has its limits. But the information produced by the ICTY is so easy to discredit – for example, by portraying the Tribunal as an instrument of Western powers – that no tipping point can ever be reached realistically. To give an analogy, there are mountains of scientific evidence that humans are causing climate change, but this does not stop millions of otherwise decent people from disbelieving that evidence. There are mountains of scientific evidence that vaccines do not cause autism, but that does not stop otherwise decent people from refusing to vaccinate their children. There are mountains of scientific evidence that homeopathy does not work, but that does not stop otherwise sensible people from buying heaps of the stuff. Once people come to believe in certain things, especially if these beliefs relate to identity and have a strong emotional component, these beliefs cannot be dislodged simply through the presentation of contrary evidence.

Finally, while Orentlicher extensively discusses the evolving political dynamics in Bosnia and in Serbia, she could have been a bit more forceful in pointing out the truly pivotal character of some events and decisions that contributed to the ICTY’s local failure. Comparative experience has shown that elite disruption – that is, the extent to which the elites currently dominating a society differ in personnel, interests and ideology from those that led it during the conflict – is the single best predictor of whether an international tribunal dealing with wartime atrocities will be believed, especially if the society in question is not genuinely pluralist.⁵ And it is here that both Bosnia and Serbia failed. That failure was not preordained – things could have turned out differently, if some decisions had been made differently by those who had the power to make them. In Bosnia, the premature end of international tutelage (coupled with failures in long-term thinking, such as allowing segregated schools with separate ethnic curricula) enabled the rise of nationalist leaders whose primary *modus operandi* was to polarize inter-community relations (examined in detail by Orentlicher at 52–57). In Serbia, the pivotal moment was the 2003 assassination of its first democratic prime minister, Zoran Djindjic, by a secret police unit enmeshed in war crimes and organized crime.

While Orentlicher discusses the assassination and its aftermath (at 70–75), her main focus is on the effectiveness of the European Union’s (EU) conditionality policies with regard to Serbia in order to secure the surrender of persons sought by the ICTY. She grapples only marginally with the issue of whether the West could have done more to support those forces in Serbia that advocated for radical discontinuity with the Milošević regime, regardless of conditionality policies and their effectiveness. Similarly, she does not devote much attention to how the passivity of Western policy-makers not only failed to arrest, but also positively enabled, the democratic deconsolidation that Serbia has now experienced under Vučić, who is rarely criticized by

⁵ See Milanovic, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’, in K. Heller *et al.* (eds), *The Oxford Handbook of International Criminal Law* (forthcoming), available at <https://ssrn.com/abstract=2887090>.

European leaders despite his increasing nationalist authoritarianism.⁶ Short-termist thinking of the worst sort pervades EU policy to this day – the powers that be are hoping that Vučić will soon solve the Kosovo issue for them, remain cooperative on any refugee questions and are fearful that if they push him too hard he might fall into the embrace of the Kremlin. That the health of Serbia's democracy – one that should at least nominally be moving towards EU membership – is eclipsed by such considerations should not be surprising. After all, the EU allowed democratic deconsolidation to run rampant even within its own borders, as in Hungary and Poland. The ICTY's relative marginalization in such a climate should also surprise no one, nor are there many reasons to hope for a more positive trend in the near to medium term.

As noted above, it is hard to fault *Some Kind of Justice* for some of its caution. What Orentlicher has chosen to do, she has done impressively well. The book makes an interesting and original contribution to the literature, and I am sure that it will be read for many years to come.

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Jean d'Aspremont. ***International Law as a Belief System***. Cambridge: Cambridge University Press, 2017. Pp. 176. £85.00. ISBN: 9781108421874

The 'fundamental doctrines' of international law are unjustifiably perceived as an unjudged and unproved truth. This is the claim that Jean d'Aspremont makes in his 2018 book *International Law as a Belief System*. Suggesting a different perspective on international legal reasoning, the book is a thought-provoking reflection on certain international legal doctrines and international law in general. It sheds a critical light on what appear to be accepted assumptions in international legal discourse, sharpening the reader's mind on the multi-layered influences that have contributed to their development.

The aim of the book is twofold: first, it intends to 'expos[e] the international belief system at work behind the fundamental doctrines of international law' (at 103) and, second, it invites international lawyers to 'temporarily suspend the belief system' (at 103). The analytical claim ('exposing the belief system') dominates the major part of the book (Chapters 2–4), which might be summarized as follows. First, international legal discourse is based on certain 'fundamental doctrines'. As examples of such doctrines, the book discusses – without drawing up an exhaustive list – the doctrine of sources, the doctrine of interpretation, the doctrine of responsibility, the doctrine of statehood, the doctrine of *jus cogens* and the doctrine of customary international law. Second, these fundamental doctrines have three features: they constitute rules ('ruleness'), they are derived from international instruments as a result of a fictive history ('imaginary genealogy') and their formation and functioning is explained by fundamental doctrines themselves

⁶ Perhaps the most shameful example is that of the European Union commissioner for enlargement, Johannes Hahn, who on one infamous occasion actually asked the Serbian press to prove to him that they are not free. See 'Hahn Demands Proof of Serbia Media Censorship', *Balkan Insight*, 17 February 2015, available at www.balkaninsight.com/en/article/hahn-calls-for-evidence-on-media-censorship-in-serbia.