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The Capitulation of the Hague Tribunal

By Marko Attila Hoare, 16th June 2005

The recent announcement that the International Criminal Tribunal for the former Yugoslavia will not be issuing any more indictments against war-crimes suspects is a disgrace. As a Research Officer, I worked at the Tribunal in 2001 on the case against Slobodan Milosevic. I believed in what the Tribunal was trying to accomplish, and continue to do so. Yet this announcement amounts to the Tribunal's capitulation: with the sole exception of Milosevic himself, the men most responsible for the bloodshed in the former Yugoslavia have escaped justice. For this there is no justification, whether in terms of principle, or expediency, or force of circumstance.

The Tribunal has scored some notable successes. The principal Bosnian Serb

war criminals have for the most part been indicted and are currently being brought to justice. The Serbian leaders most responsible for the atrocities in Kosovo in the late 1990s have been indicted and are being put on trial. The principal Croat war-criminals died of natural causes before they could be indicted, but the most important of their deputies are currently awaiting trial. Yet all these cases are of secondary importance: the Bosnian Serb perpetrators were merely the agents of higher authorities based in Belgrade; the Bosnian Croats their accomplices. Those indicted over Kosovo were indeed the principal culprits, but the death toll in Kosovo in 1998-99 was a fraction of the death toll in Bosnia and Croatia in 1991-95. Several Croatian commanders have been indicted over atrocities against Serbs in Croatia, but the death toll here was a smaller fraction still, barely reaching into four figures. Most of the killing in the whole series of Yugoslav wars, beginning in 1991 in Croatia and ending a decade later in Macedonia, was carried out by Serbian forces against Muslims and Croats between 1991 and 1995. The Yugoslav political and military leaders who organised and implemented this genocide, resulting in at least one hundred thousand dead, have mostly not been indicted.

To understand this, it is necessary to look at the command-control structure of the armed forces of Yugoslavia as they were during the years in question. Milošević is widely and rightly viewed as the number one war criminal. Yet as president of Serbia he was merely the leader of one of the Yugoslav republics. In principle, he had not the means to wage a war of aggression and extermination against his neighbours. He was able to do this thanks to his alliance with the top commanders of the Yugoslav People's Army (JNA). The men in question were Yugoslav Secretary of People's Defence Veljko Kadijević, Yugoslav Chief of Staff Blagoje Adžić, and their deputies Stane Brovet and Zivota Panic. In violation of the Yugoslav constitution, they allied the JNA to Milošević and commanded its operations during the war in Croatia. They laid the foundations for the Bosnian Serb army (the 'Army of the Serb Republic') and the war that it would wage against the Bosnian Muslim and Croat population. Following the retirement of Kadijević and Brovet in January 1992, Adžić and Panic commanded the JNA during the opening phase of the war in Bosnia. None of these commanders has been

indicted.

Above the top JNA commanders was a still more senior layer: the members of the collective Yugoslav Presidency, who formally comprised the JNA's supreme command. This body had ceased to function by the time the war broke out, on account of the conflict between its members. The last person to assume the post of President of the Presidency of Yugoslavia, Croatia's Stipe Mesic, was wholly unable to exercise any influence over the JNA. But in practice, the Presidency members from Serbia and Montenegro, above all Serbia's Borisav Jovic and Montenegro's Branko Kostic, continued to coordinate war strategy along with Milosevic and the JNA commanders. Finally, in October 1991, at the height of the war in Croatia, the Serbian and Montenegrin members of the Yugoslav Presidency carried out a coup, declaring themselves the acting Yugoslav Presidency and, consequently, the acting supreme command of the JNA. They remained in this role until the spring of 1992, and were centrally involved in planning the war in Bosnia. Yet none of them has been indicted, even though Jovic subsequently published his diary, revealing all this, and revealing himself to have been one of the principal architects of the Yugoslav war.

It might be objected that the men in question were merely figureheads, and that the real power lay at all times with Milosevic and his secret police. It is indeed true that Milosevic was the dominant figure, but it is untrue that the JNA commanders and Yugoslav Presidency members were not responsible: they were under no legal or constitutional obligation to follow his orders; nor could he have waged war without their consent.

If, on the other hand, one insists on the innocence of these men, on the grounds that the war crimes 'really' originated with Milosevic alone, it raises serious questions about the Tribunal's procedure. The Tribunal has several times indicted senior figures on the basis of 'command responsibility'; i.e., the principle that senior commanders are responsible for crimes carried out by their subordinates, even if they did not actually order these crimes. On this basis, the most senior commanders of the Bosnian Army during the war, Sefer Halilovic and Rasim Delic, and the most senior commander of the

Croatian Army, the late Janko Bobetko, have been indicted for crimes carried out by their subordinates.

Were the Tribunal consistent, it would have indicted the top JNA commanders and the Serbian and Montenegrin members of the Yugoslav Presidency for war crimes carried out by JNA forces in Croatia and Bosnia; for example, for the killings at the Vukovar hospital, for which an indictment of lower-ranking JNA officers has already been made. Yet none of them has been indicted for the crimes at Vukovar, or for the shelling of Dubrovnik, or for the spring offensive against Bosnia - which accounted for the bulk of the deaths. Only middle-ranking JNA officers have been indicted over Vukovar; two relatively high-ranking JNA officers were convicted over Dubrovnik, but given lenient sentences of a few years each. Their superiors have escaped untouched.

The scandal is that the principle of ‘command responsibility’ therefore applies to the Croatian and Bosnian victims of aggression, but not to the Serbo-Montenegrin aggressor. As the sole member of the top Serbo-Montenegrin political and military leadership to be indicted for war crimes in Croatia and Bosnia, Milosevic is effectively being made the sole villain of crimes that were the collective responsibility of this leadership. It is as if Hitler were punished while Himmler, Goering, Goebbels, Keitel and Jodl were let off.

As someone who worked at the Tribunal on the case against Milosevic, I can reveal that it was not initially the desire of our investigating teams to make Milosevic the sole indictee. The original intention was to indict a much larger circle of people. Traces of this intention can be found in the indictments against Slobodan Milosevic, which mention a ‘joint criminal enterprise’ involving Jovic, Branko Kostic, Kadijevic, Adzic and others. That most of the members of the enterprise - including all those mentioned here - have escaped indictment was not due to any lack of will on the part of the competent and committed investigators of the Tribunal, nor due to lack of evidence against them - the case against Milosevic himself was more difficult to mount, since his ‘command responsibility’ in Croatia and Bosnia

was less clear. It was due to a decision taken at the highest level, by Chief Prosecutor Carla del Ponte herself, to restrict the indictment to Milosevic alone.

The reason for this arbitrary decision, which betrays every principle that the Tribunal was supposed to uphold, can only be speculated upon. The claim of various Serb and Croat extremists, Western neo-Stalinists, and others, that the Tribunal is a ‘political court’ with its own, covert agenda, is nonsense. Yet like any legal body, the Tribunal can be swayed by sufficient political pressure. The determined resistance of the Serbian mafia and secret police, through their mouthpieces in the Serbian government, has successfully stonewalled del Ponte, causing her to limit her indictments of Serbian war-criminals: far fewer Serbs have been indicted from Serbia than from Western-controlled Bosnia. The assassination of the reformist prime minister of Serbia, Zoran Djindjic, was part of this resistance.

The Tribunal also suffers from structural problems that have hindered its effective operation. Established in 1993, at the height of Western appeasement of Milosevic’s Serbia, the organisation of the Tribunal reflects the dominant Western precepts of the day: that atrocities were being ‘committed by all sides’; that Serbia was quantitatively but not qualitatively more guilty than the other parties; and that the war in Bosnia-Herzegovina was a ‘civil war’ in which Bosnian Serb crimes were carried out autonomously from Belgrade. Instead of beginning with the ‘joint criminal purpose’ of Serbian, Montenegrin and JNA leaders that brought about the war, and working downwards and outwards, the Tribunal’s Office of the Prosecution began by fragmenting the war crimes according to ethnicity and territory: different investigative teams dealt with Serb crimes in Croatia, Serb crimes in Bosnia, Serb crimes in Kosovo, Croat crimes in Croatia, Croat crimes in Bosnia, Muslim crimes, Albanian crimes and - most recently - Macedonian crimes.

This inevitably created a structural pressure for each team to produce a certain number of ‘big kills’ - hence the indictments of Delic, Halilovic and Bobetko. The two teams responsible respectively for investigating Croat

crimes in Croatia and Muslim crimes were widely regarded among my fellow investigators as two of the Prosecutor's least competent teams. In indicting such figures as Bobetko and Halilovic, the Tribunal chose targets who were easily indictable on the basis of 'command responsibility', regardless of their actual degree of guilt. When - in 2001 - I asked an investigator working on Croat crimes whether he believed Bobetko might be indicted, he said that it was legally possible to mount a case against him, but that he did not believe it would make any practical sense to do so. Likewise, an investigator working on Muslim crimes told me that he believed Halilovic was being framed by hostile members of the Bosnian authorities. The investigator was therefore, he said, trying unsuccessfully to convince his fellow investigators not to construct a case against Halilovic. Yet both Bobetko and Halilovic were subsequently indicted - the Office of the Prosecutor chose the easy option.

Several teams have dealt solely with Bosnian Serb perpetrators, while Serbia's perpetrators of crimes in Bosnia - in reality, the most guilty group - were the sole preserve of a single team (at least when the present author was working there). Hence the paradoxical indictments of much Bosnian Serb and Bosnian Croat small fry - figures scarcely worthy of mention in a history of the Bosnian war - while the aforementioned big fish have escaped justice. And this despite the Tribunal's stated priority of trying the big fish. Only six officials from Serbia of any significance have been indicted for war crimes in Bosnia: Milosevic, Zeljko Raznatovic-Arkan, Vojislav Seselj, Jovica Stanisic, Franko Simatovic and Momcilo Perisic. The same number of Croatian officials was indicted for crimes during the Medak pocket and Oluja operations: Rahim Ademi, Ante Gotovina, Mirko Norac, Janko Bobetko, Ivan Cermak and Mladen Markac. The Medak pocket and Oluja produced a combined civilian death-toll, according to the indictments, of about 180. To this can be added several hundred Serb civilians killed in the wake of Oluja. In del Ponte's eyes, therefore, these fewer than one thousand Serb victims of official Croatia warrant the same number of indictments as the more than one hundred thousand Bosnian victims of official Serbia. This despite the fact that the Medak pocket and Oluja were defensive operations aimed at recapturing occupied territory, while Serbia's operations in Bosnia were

wholly aggressive.

Recent decisions by the Tribunal highlight the lingering policy of appeasement practised by the West in relation to the Serbian secret services and mafia. The Tribunal has allowed Serbia to present key documents in the Milosevic trial on condition that they remain hidden from the public, greatly reducing any positive impact the trial may have in awakening the Serbian public to Milosevic's criminal responsibility. The Tribunal has, furthermore, granted Stanistic and Simatovic provisional release while awaiting trial. These two men - the first Milosevic's former secret service chief; the second his chief of police special forces - have blood up to their elbows and powerful underworld connections in Serbia: it was members of Simatovic's 'Red Berets' who murdered Djindjic. It is questionable how easy it will be to persuade Stanistic and Simatovic to return to the Hague for trial, and even more questionable how safe potential witnesses against them will be from intimidation.

All this occurs in an international context in which the West is losing interest in justice for the Balkans - insofar as it was ever seriously interested. The Tribunal has helped to placate the section of Western public opinion that felt 'something must be done', while the old policy of appeasing the nationalists and war criminals has quietly continued. Washington's recent handing over of a Legion of Merit to the daughter of Serbia's leading Nazi collaborator Draza Mihailovic - who was originally awarded it posthumously in 1948, despite his trial and execution in Belgrade as a war criminal - is part of this trend. Mihailovic was head of the 'Chetnik' movement that pursued a genocidal policy against Muslims, Croats, Jews, Albanians and others during World War II - a policy that Milosevic resurrected in the 1980s and 90s.

Meanwhile, the post-Tudjman governments in Croatia, instead of lobbying hard for the indictment of Kadijevic, Adzic, Jovic and other architects of massacres of Croats, have confined themselves to obstructing the Tribunal's prosecution of their 'own', Croat war criminals - an expression of the lingering influence of the Tudjman-era nationalist mafia of which Ante Gotovina is the poster boy. Thus, those responsible for the war and the

atrocities continue to obstruct justice and progress for the peoples of the former Yugoslavia, hindering Serbia's and Croatia's integration into European institutions. Even the 'tough' del Ponte has been forced to back down: she has proved to be a straw woman.

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