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# Victors' justice is the only kind

By Marko Attila Hoare, 28th December 2008

## EXECUTIVE SUMMARY

**1. The effectiveness of the International Military Tribunal that tried the top Nazi leadership after World War II stemmed from the fact that it was the instrument of the Allied powers, which were determined to punish Nazi aggression. By contrast, the International Criminal Tribunal for the former Yugoslavia (ICTY), with no mandate to try crimes of aggression or crimes against peace and without strong support from the Western powers, has proved a damp squib.**

**2. The ICTY has treated Serbia, the state responsible for the war, extremely leniently, and limited most of its indictments to crimes carried out by perpetrators within their own respective republics, rather than**

**against the people of neighbouring republics, thereby obscuring the fact that the wars in Croatia and Bosnia were above all wars of aggression.**

**3. The fact that the wars in the former Yugoslavia ended with Serbia defeated but not crushed, has meant that the ICTY has been forced to negotiate with its leaders for the handing over of war-crimes suspects and evidence. This has politicised and corrupted the ICTY.**

**4. The record of the ICTY shows that there can be no real justice over war-crimes without the real defeat of the perpetrators.**

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Ever since the war in Bosnia, the phenomenon of international tribunals to prosecute war crimes and crimes against humanity has been growing. The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 has been followed by the creation of the International Criminal Tribunal for Rwanda; the Extraordinary Chambers in the Courts of Cambodia; the Special Court for Sierra Leone; and, above all, the International Criminal Court. The last of these has gained particular prominence with its indictment this summer of Sudanese President Omar Hassan al-Bashir. Yet for all the significance of its role as pioneer of international justice, the ICTY has been plagued with controversy since its creation and has been heavily criticised over its performance, not only by its opponents but also by its supporters. Most spectacularly, one of its most vocal champions, Florence Hartmann, former spokeswoman for Chief Prosecutor Carla del Ponte, has herself been indicted by the tribunal for contempt of court, for allegedly revealing classified information; Hartmann was trying to expose the ICTY's internal politics and machinations that have compromised its pursuit of justice, above all in the case against Slobodan Milosevic. The Hartmann indictment symbolises the way in which this institution, through its failings, has now become the target of the very people who once believed in it most strongly.

To explain the failings of the ICTY it is worth comparing it with the tribunals that conducted the Nuremberg trials of Nazi war-criminals after World War II, in particular with the International Military Tribunal (IMT),

that tried twenty-one of the most senior Nazi German leaders. The difference in aim and organisation between the IMT on the one hand and the ICTY on the other go a long way to explaining the difference in results.

The Nuremberg trials have been condemned by critics as a case of 'victors' justice'. Yet in fact, they represented the moderate option for the Allied powers, that had been victims of Nazi aggression or assault and that were determined that the German leaders be punished. Britain's Winston Churchill and the US's Franklin D. Roosevelt both initially favoured the idea of summarily executing hundreds or even thousands of leading Germans without trial, something to which the Allied publics would not have been averse. Yet in the end, it was the proposal of the US secretary of war, Henry Stimson, that the Nazi leaders be given fair trials, that was adopted. Thus, the Nuremberg trials were a case of victors' justice rather than of victors' injustice. Indeed, the contrasting experiences of the Nuremberg trials and of the ICTY suggest that victors' justice may be the only effective kind.

The Nuremberg trials were organised and carried out by Allied powers that had absolutely no intention of allowing the German leadership to go unpunished. The trials followed on from a war of unparalleled brutality in which the Allied armies, despite enormous losses, had totally crushed and occupied Nazi Germany. There was therefore no problem, as was the case with other such trials before and since, of risking Allied soldiers' lives to apprehend war-criminals; the sacrifice had already been made to defeat the Nazis, and the Allies were in a position to arrest war-criminals without incurring further losses of troops. Nor was there any question, of course, about trying Allied leaders for any war-crimes they might have committed against German or other civilians; the Nuremberg trials proceeded from the premise that Germany had begun the war and that it was wholly to blame for it, and this would determine which side would do the prosecuting and which side's leaders would be tried. The trials were about punishing the aggressor, not about justice for all, and certainly had nothing to do with the idea of 'reconciliation'. The entire weight of political pressure pushed the Allies toward harshness, not toward leniency.

The rights and wrongs of the war, rather than the crimes committed in the course of the war, were foremost in the minds of the Allied leaderships that established the IMT; German leaders were tried for conspiracy to commit crime against peace and for planning, initiating and waging a war of aggression, with crimes against humanity – including even the Holocaust – receiving secondary prominence. The IMT has been described as being a ‘multinational tribunal’ rather than an ‘international tribunal’: it was organised by the Allied powers directly, rather than by an international body such as the UN; the Allies had ‘done together what any one of them might have done singly’. The IMT pursued and tried the leading war criminals, including such senior figures as Hitler’s successor as Fuehrer, Karl Doenitz; Interior Minister Wilhelm Frick; air-force chief Hermann Goering; former deputy Fuehrer Rudolf Hess; High Command Chief of Operations Alfred Jodl; Chief of Staff Wilhelm Keitel; Commander-in-Chief of the Navy Erich Raeder; and Foreign Minister Joachim von Ribbentrop. It was these big fish whom the Allied leaders had considered shooting without trial, and who were then the focus of the IMT, while lower-ranking offenders were dealt with subsequently by national tribunals organised by the Americans, Germans, Poles and others. Of the twenty-one prisoners sentenced by the IMT, eighteen were convicted of which eleven were sentenced to death, while the rest received sentences ranging from ten years to life.

The ICTY was different from the Nuremberg tribunals on almost every count. It did not follow a victorious war and was not imposed by the victims upon the vanquished, nor was it driven by massive pressure from the public and political classes for harsh action. On the contrary, the ICTY was conceived as a substitute for genuine action against the Serbian organisers of the war. The first steps leading to the establishment of the tribunal were taken by the outgoing administration of George Bush Snr in 1992, an administration which otherwise had taken virtually no action to halt Serbia’s aggression or punish its leaders. The ICTY was a sop to that section of political opinion in the West – at the time still the minority opinion – that was genuinely outraged by what was happening in Bosnia and demanded action. The ICTY was established by a UN Security Council resolution in 1993, while Western appeasement of Serbia was at its height, and should

rightly be viewed as a fig-leaf concealing the sheer extent of this appeasement. It was only in the late summer of 1995 that Bill Clinton's US administration was pushed, kicking and screaming, by Congressional opposition into taking serious military action against Bosnian Serb forces; even so, the peace imposed by the Clinton Administration on Bosnia, in the form of the Dayton Accord, snatched a Serb victory from the jaws of defeat, halting a victorious Croatian and Bosnian military advance and awarding 49% of Bosnia to the Serb rebels.

Instrumental in collaborating with Clinton's envoy Richard Holbrooke to impose peace on the Bosnians was the principal architect of the war himself: Serbian president Slobodan Milosevic. Milosevic was ready to sign the Dayton Accord, despite the fact that it pledged all the Bosnian authorities, including the Bosnian Serbs, to cooperate with the ICTY. At this stage, the tribunal had indicted the Bosnian Serb leaders Radovan Karadzic and Ratko Mladic – Milosevic's rebellions proxies, who had defied him during the war - but not any senior official of Serbia itself. Like Milosevic, Clinton and Holbrooke were ready to sacrifice Karadzic and Mladic, but they continued to view Milošević himself as a necessary collaborator and pillar of the peace.

We can imagine what the Nuremberg trials would have looked like if they had followed on from a war that ended with the Nazis being awarded 49% of Poland, and from a peace agreement between the Allies and Hitler in which Hitler was looked upon as a crucial partner. An IMT organised in these conditions, naturally, would not have tried and executed Hitler's interior minister, foreign minister and chief of staff. So it was with the ICTY, which was the product of concession, compromise and collaboration, not of victory and the desire for retribution. The ICTY was not imposed by the victims over the vanquished, but by outside powers over the victims and aggressors alike. It made no presumption as to the rights or the wrongs of the war as a whole, indeed it was not authorised to try crimes against the peace or of aggression. Rather, it was mandated to try only individual war-criminals from all sides. Even on this limited basis, it was really only the US, of the major Western powers most involved in the war, that showed any interest in the project; the

tribunal suffered, in its early years, from the almost complete lack of support, even obstruction, from Britain and France.

The IMT had been set up by the Allied powers themselves; it proceeded briskly and efficiently, with the executions carried out a mere year after the trials had begun, and a year and a half after the war ended. By contrast, the ICTY was a body of the UN – an organisation with which inefficiency, bureaucratism, corruption and nepotism are synonymous. Fifteen years after the tribunal's establishment, and thirteen years after the war's end, the trials are still plodding along; some have not yet even begun. Milosevic's trial lasted four years and ended, incomplete, with his death in custody by natural causes. This has had the inevitable effect of reducing public interest in the trials, above all in the world outside the former Yugoslavia. The powerful body of Western, above all US public opinion that, outraged by what was happening in Bosnia, provided the decisive catalyst for the tribunal's emergence, has largely faded away over the years; what has remained has been a tribunal bureaucracy subject to its own momentum. As an autonomous body in world affairs, it has not enjoyed the support that the IMT received from the victorious allies; as Hartmann recounts in her published memoirs, Chief Prosecutor Carla del Ponte had to struggle for attention and support from the Western powers.

With no driving idea of which side was to blame, which of its leaders had orchestrated the mass murder and who should therefore be punished, the ICTY prosecution has proceeded to indict individual suspects on a piecemeal, haphazard basis, beginning with small-fry like the concentration camp guard Dusan Tadic, and largely leaving the top leadership of Serbia untouched. Although the Office of the Prosecutor entered a more ambitious phase in 1999, during the Kosovo War, when Milosevic, as President of Yugoslavia, was indicted along with the Serbian president, Yugoslav deputy prime-minister, Serbian interior minister and Yugoslav chief-of-staff, for war-crimes against Kosovo Albanians, this proved the exception rather than the rule. Not only has the ICTY had no mandate to try crimes of aggression, but the prosecutions have overwhelmingly been for crimes carried out by the perpetrators within their own state, rather than against the inhabitants of

neighbouring states. Thus, the aforementioned top Serbian leaders were indicted for war-crimes against the Albanian inhabitants of Kosovo, then a Serbian province. Bosnians have been indicted for crimes against other Bosnians; Croatians for crimes against Croatian Serbs and vice versa. But very few officials from Serbia have been indicted for war-crimes against the people of the neighbouring republics of Croatia and Bosnia.

Thus, over Bosnia, where the greatest part of the mass killing occurred – organised, initiated and executed by the Milošević regime in conjunction with the Yugoslav People's Army (JNA) – *only six* officials from Serbia were ever indicted: Slobodan Milosevic, Zeljko Raznatovic-Arkan, Jovica Stanisic, Franko Simatovic, Vojislav Seselj and Momcilo Perisic. Other than Milosevic himself, they were all officials of secondary importance or lower at the time the crimes were committed. The most senior of these was probably Stanisic, who was Serbian interior minister during the Bosnian war, while Perisic became Yugoslav chief of staff only in 1993, after the crimes directly executed by Serbia in Bosnia had already been carried out and Serbia's direct participation in the war in Bosnia ended. None of the six has yet been convicted. With Milosevic and Arkan dead, the maximum number of officials from Serbia who might be convicted of war-crimes against Bosnians is four. In addition to these, a further seven officers of the JNA, all relatively minor figures, were indicted for war-crimes in Croatia, only one of whom has received a sentence of more than a few years. The total number of officials from Serbia who have been indicted, at twenty-one, is smaller than the number of indicted Bosnian Croats, at twenty-six. The number of officials from Serbia indicted for war-crimes in Bosnia, at six, is smaller than the number of indicted Republic of Bosnia-Herzegovina officials, at ten.

The most senior officials of Serbia, Montenegro and the JNA who planned and carried out the aggression against Croatia and Bosnia were, however, never indicted. They include Yugoslav Presidency members for Serbia and Montenegro, Borisav Jovic, Jugoslav Kostic and Branko Kostic; the most senior JNA officers, Yugoslav defence secretary Veljko Kadijevic and Chief of Staff Blagoje Adzic; their deputies Stane Brovet and Zivota Panic; Montenegrin president Momir Bulatovic; and JNA intelligence chief



Aleksandar Vasiljevic. Four of these - Jovic, Branko Kostic, Kadijevic and Adzic – escaped indictment despite having been named as members of the ‘Joint Criminal Enterprise’ in Milosevic’s indictment for war-crimes in Bosnia and Croatia. By any standards, Serbia has got off extremely lightly – virtually unpunished – for the wars in Croatia and, in particular, Bosnia.

The indictments policy of the ICTY prosecution requires some explaining. At Nuremberg, the Allies knew who was guilty, wanted to get them and set out to do so. By contrast, the ICTY was set up more for the sake of appearances than for the sake of results, and the choice of indictees was made by prosecutors according to their own agendas, which had little to do with actually punishing those principally responsible for the war. One of the factors that influenced the prosecutors’ policies was the fact that Serbia, unlike Germany, was a defeated but not a crushed and occupied country. The Hague prosecutors could not simply rely on occupation forces to arrest suspects and seize documents, but had to negotiate their handover with the Serbian authorities themselves. The latter have, of course, not only been far from forthcoming - to the point where Serbia was convicted last year by the International Court of Justice (ICJ) of failure to punish genocide – but have repeatedly accused the tribunal of anti-Serb bias. Meanwhile, the Western powers have been uneven in their readiness to apply pressure on Serbia to surrender suspects and documents. Even with regard to ‘Republika Srpska’, where there were international troops on the ground, the Western powers have been wary about offending the Bosnian Serb leaders or risking the lives of their troops to apprehend war-crimes suspects. They may even have entered into secret arrangements that allowed leading war-criminals, such as Radovan Karadzic, to evade capture for many years.

The need to negotiate and compromise with the Serbian authorities, and to counter accusations of ‘anti-Serb bias’, appears to have politicised and skewed the prosecution’s indictments policy. Contrary to myth, in terms of numbers indicted, Serb war-crimes suspects have been under-represented in proportion to their share of the crimes. By any reckoning, Serb forces were responsible for well over 80% of the civilian casualties in the wars of the former Yugoslavia combined, and non-Serb forces (Croatian,

Bosnian/Muslim, Kosovo Albanian, Macedonian and NATO) for less than 20%. Yet of 159 indictees, only 108 or 68% were Serb officials (including non-Serbs who fought on the Serb side, like Drazen Erdemovic and Franko Simatovic) and 51 or 32% were Croatian, Bosnian, Kosovo Albanian or Macedonian officials. The percentage reflects not the respective proportions of killing carried out by Serbs and by non-Serbs, but the respective resources devoted by the prosecution to investigating Serb crimes and non-Serb crimes. Thus, when I was working as a Research Officer at the Office of the Prosecutor in 2001, out of eleven investigative teams, only seven – less than two-thirds – were devoted to investigating Serb war-crimes, and four to investigating non-Serb war-crimes.

Thus, the ICTY prosecutors distributed their human resources so as to guarantee that Serb war-criminals – responsible for over four-fifths of the killing of civilians – would comprise only two-thirds of indictees. And of the 108 Serb indictees, only 21 were from Serbia itself; the remainder were mostly Bosnian Serbs (83) and a few Croatian Serbs (4). Even with regard to the Serb share of indictments, Serbia itself has been largely spared while its local collaborators in the countries it attacked – above all Bosnians – have borne the brunt. And while the top Serbian/JNA commanders who planned and executed the Serbian aggression against Bosnia and Croatia have escaped indictment, the top Croatian and Bosnian commanders who led the defence of their countries – Janko Bobetko, Sefer Halilovic and Rasim Delic – have been indicted for crimes much smaller in scale, or for which they were not directly responsible. Thus, Kadijevic and Adzic escaped indictment for Vukovar or for what happened in Bosnia up to 19 May 1992, which was when the Yugoslav Army officially withdrew from Bosnia. But Bobetko was indicted over Croatian Army crimes committed at the Medak pocket in 1993, and Delic for crimes carried out by the foreign mujahedin.

It is not only over indictments policy, but also over evidence collection, that the ICTY has allowed political or tactical considerations to sway its pursuit of justice. Serbia was required to submit to the ICTY judges in the Milosevic case the minutes of the Supreme Defence Council of the Federal Republic of Yugoslavia – the body made up of the presidents of Serbia, Montenegro and

Yugoslavia – i.e. of Milosevic and two of his allies. This body initially had command over all Bosnian Serb forces, up until 19 May 1992, and subsequently remained in command of the Yugoslav Army up to and after the time of the Srebrenica massacre, during which it collaborated with the Bosnian Serb forces. The judges at the ICTY, however, allowed Serbia to withhold certain passages from this set of documents in the version seen by the public and by the ICJ. Bosnia could not therefore use these crucial documents for its case against Serbia for genocide at the ICJ. This, combined with the ICJ's own concessions to Serbia, helped ensure Serbia's acquittal. Phon van den Biesen, a member of the Bosnian team, has gone on record to say that the full documents would probably have demonstrated that the Bosnian Serb forces were under Serbia's control during the Srebrenica massacre, which has been legally established to have been an act of genocide by both the ICTY and the ICJ.

This brings us on to the crime of genocide, which has assumed much greater international prominence as a result of the events in Bosnia and Rwanda in the 1990s. With its successful prosecution of the Bosnian Serb officer Radislav Krstic for genocide at Srebrenica, the ICTY is the first of three international courts to determine that Serb forces were guilty of genocide in Bosnia; it has been followed by the ICJ and by the European Court of Human Rights. In this respect, the ICTY has gone further than the Nuremberg trials went, for although the IMT indictment accused the German leaders of 'deliberate and systematic genocide', it did not charge them with this crime, as the term 'genocide' had then only recently been coined, and the concept was only beginning to gain credence. Thus, the German leaders were charged merely with 'crimes against humanity', though it is for the genocide of the Jews, of all their crimes, that they are principally remembered.

Yet despite its importance in determining that genocide occurred in Bosnia, the ICTY has proved, in this regard as in others, to have been a toothless tribunal. It has successfully prosecuted only one individual, the lowly deputy corps commander Krstic, for a genocide-related offence. A second Bosnian Serb officer, Vidoje Blagojevic, was convicted of genocide but subsequently acquitted on appeal of all genocide-related charges, while Momcilo

Krajisnik, a member of the Republika Srpska presidency, was acquitted of genocide straight out. Thus, the ICTY has established the occurrence of a genocide for which almost nobody – and nobody senior – has yet been found guilty. The ICTY is not, of course, solely to blame for these meagre results: the international community has so far failed to pressurise Serbia into handing over Ratko Mladic, suspected as the mastermind behind the Srebrenica massacre, to the tribunal.

One final difference separates the IMT from the ICTY: the issue of ‘reconciliation’. The UN Security Council resolution establishing the tribunal justified it as something that would ‘contribute to the restoration and maintenance of peace’, and its supporters frequently argue that prosecution of individual war-criminals is necessary in order to free the respective former-Yugoslav peoples of the stigma of collective guilt, thereby facilitating reconciliation between them. Paradoxically, however, it was the more overtly retributive IMT and subsequent Nuremberg tribunals, by determining in advance that one side was guilty and efficiently punishing its top surviving leaders, that appear to have been more effective in achieving reconciliation between Germany and the nations it attacked. For Germany has not been allowed to escape condemnation as the side guilty for the war, while those it attacked have witnessed that justice has been done.

By contrast, there is no evidence to suggest that the ICTY – with no prior allocation of guilt to one side in the war, by treating war-crimes on a purely individual basis, and by lumping together war-criminals from all sides – has made any contribution to reconciliation between the former Yugoslavs. On the contrary. Unlike after World War II, the international community has failed to impose a narrative of who was to blame for the War of Yugoslav Succession, and to force each side to accept it. Consequently, each side continues to see itself as the victim in the conflict, and to see the tribunal’s record purely in terms of how too many of its own people and/or too few of the other sides’ have been indicted, or how the other sides’ indicts have been wrongfully acquitted or received too short sentences. According to a recent study by an international team of scholars led by Vojin Dimitrijevic and Julie Mertus: ‘The hope that it [the ICTY] might promote reconciliation

between the peoples of the region does not appear to have been realised.’

There is a lesson to be learned from the respective experiences of the IMT and ICTY: so far as war-crimes are concerned, there can be no real justice without the real defeat of the perpetrators.

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