The Ambiguous Legacy of the Balkans War Crimes Tribunal

MARKO ATTILA HOARE

The July 1995 massacre at Srebrenica of some 8,000 Muslim civilians, mostly men and boys, is Europe's only instance of genocide since World War II to have received conclusive judicial recognition. A quarter-century later, its two leading perpetrators, Radovan Karadžić and Ratko Mladić, respectively the top Bosnian Serb rebel political leader and military chief during the 1990s war in Bosnia-Herzegovina in the former Yugoslavia, are serving life sentences for genocide in a United Nations prison in The Hague. These are probably the most impressive achievements of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was in operation from 1993 until the end of 2017. Yet they were reached via a slow and twisting path, and the ICTY's legacy remains ambiguous and divisive. The tribunal has drawn enormous political and scholarly interest and inspired the establishment of several copycat international and mixed international-national tribunals devoted to past conflicts in other parts of the world. But it is a problematic model.

The ICTY was the first international or multinational war crimes tribunal since the International Military Tribunals at Nuremberg and Tokyo following World War II, and it may represent at one level a revival of their legacy. But the comparison is very much to the detriment of the ICTY. The Nuremberg and Tokyo tribunals were instances of victors' justice, the culmination of a victorious war waged by the Allied states against the Axis powers. Imposed by the Allies on militarily crushed and occupied adversaries, the tribunals were fired by the legitimate desire for righteous vengeance on the part of Allied leaders and populations alike, with no pretence of evenhandedness regarding the two sides of the war. (Nobody was going to try British, American, or Soviet leaders for war crimes.) Allied security forces could go wherever they wished to arrest suspects or seize documents. The tribunals targeted the very top officials of the Nazi and imperial Japanese hierarchies (with the exception of the emperor himself), such as Hermann Göring and Hideki Tojo. Retribution was meted out: of 24 indictees before the Nuremberg tribunal, 21 were convicted and sentenced to death or to long prison terms.

The ICTY was different in each of these respects. The post–World War II tribunals were multinational, created by a coalition of states as extensions of their own national sovereignties and judiciaries. The ICTY was, by contrast, international: it was a body of the UN. The initiative for this came in 1992 from the outgoing US administration of George H.W. Bush, which was concerned about its legacy, given its unwillingness to intervene to halt the bloodshed in the former Yugoslavia. The tribunal was also a sop to the vocal minority in the US that had called unsuccessfully for action. It consequently suffered from the start from tepid international support, a problem that would continue throughout its existence. Prime Minister John Major's British Conservative government, which had led the world's appeasement of and collusion with Slobodan Milošević's Serbia (and remained in office until 1997), avoided contributing to the ICTY's budget or providing it with intelligence and evidence.

As an ad hoc tribunal, the ICTY had to be established from scratch, with the structural incompetence that entailed; its temporary character and uncertain international support resulted in a constant coming and going of staff on short-term contracts, which inevitably proved detrimental to
efficiency. And the ICTY was tasked with punishing the perpetrators who acted on behalf of states and entities that, unlike Germany and Japan, had not been militarily crushed in the war: above all Serbia, the Republika Srpska (RS, the Bosnian Serb entity), and Croatia. They would have to be forced, kicking and screaming, to hand over their war crimes suspects. But without troops of its own, the ICTY was reliant on international diplomacy and pressure to obtain cooperation, which was not always forthcoming.

ICTY prosecutors were consequently forced into humiliating negotiations and compromises with Serbia, Croatia, and the RS that politicized the pursuit of justice. The most notorious instance was the tribunal’s failure to force Belgrade to make available the uneditied minutes of its Supreme Defense Council from the time of the Bosnian war. That prevented Bosnia from using the minutes as evidence in its own genocide case against Serbia before the International Court of Justice (ICJ).

**Little Fish, Big Fish**

With its initial shoestring budget and ad hoc staff, the ICTY, in contrast with the Nuremberg and Tokyo tribunals, started not with the top leaders, but with the little fish it could catch. These were men like Duško Tadić, a minor local official of the Serb Democratic Party in Bosnia who was involved in abusing and killing civilians and prisoners in concentration camps; he was arrested in Germany in 1994. Another was Đorđe Đukić, who had served as an assistant commander for logistics in the Army of Republika Srpska. The ICTY’s case against him was weak, but he was likewise fortuitously arrested in 1996 when he strayed into a part of Bosnia under Muslim control.

Karadžić and Mladić were indicted in July 1995, but Bill Clinton had promised Karadžić immunity from arrest in exchange for his withdrawal from politics, while Mladić was carefully protected by Serbia’s military. The United States brokered the Dayton Peace Accords in late 1995 with the collaboration of both Serbia and the RS, and the Western powers did not wish to rock the boat by vigorously pursuing war crimes suspects, so international peacekeepers in Bosnia initially avoided trying to apprehend them. A turning point came in July 1997, when British peacekeepers shot and killed former Bosnian Serb police chief Simo Drljača while attempting to arrest him. But it would be many years before the international will could be summoned and sufficient pressure applied to force Serbia to hand over Karadžić and Mladić, which finally happened in 2008 and 2011, respectively.

NATO’s 1999 war against Serbia over Kosovo nevertheless put wind in the ICTY’s sails, since it turned the Milošević regime from the West’s collaborator into its outright enemy. The assurance of greater Western sympathy may have contributed to the tribunal’s decision to issue its most ambitious indictment to date in May 1999, accusing five leading Serbian officials of war crimes in Kosovo: Milošević himself, president of the Federal Republic of Yugoslavia (one of the five successor states of the original Yugoslavia); Milan Milutinović, president of Serbia; Dragoljub Ojdanić, the Yugoslav army’s chief of general staff; Vlajko Stojilković, Serbian interior minister; and Nikola Šainović, deputy prime minister of the Federal Republic. But Milošević—the leading architect of the wars in Croatia and Bosnia—was not indicted for his crimes in these countries until 2001, by which time his Croatian counterpart and collaborator in the destruction of Bosnia, Franjo Tudman, was already dead and beyond the reach of justice.

Furthermore, the ICTY, again in contrast with the post–World War II tribunals, was supposed to be evenhanded and ready to prosecute all sides in the conflict. It was subject to continuous, ferocious attacks, not only from Serb and Croat nationalists but also from an assortment of opponents in the West, ranging from outright apologists for the war criminals to right-wing and left-wing activists who objected to the tribunal’s infringement of national sovereignty and/or its “imperialist” character. This pressure led the ICTY to bend over backward in its efforts to appear fair.

The upshot of these limitations was an indictment policy that both wasted time and resources pursuing minor suspects and disproportionately targeted non-Serbs. Serb perpetrators were guilty of over 80 percent of all killing of civilians in the wars as a whole, and of over 86 percent of the killing in Bosnia. Yet in 2001, four out of eleven, or over a third, of the ICTY’s investigative teams were devoted to non-Serb perpetrators, who would comprise nearly a third of the ICTY’s 161 indictees in total.

In Kosovo, Serb forces were responsible for over 80 percent of the killing. But Serb officials made up only just over half of all those indicted over Kosovo: nine out of sixteen indictees. Albanians, responsible for less than 20 percent of the killing, comprised seven out of the sixteen indictees. The tribunal found time to prosecute Albanian camp
guards, and even two Macedonians, in connection with Macedonia's brief conflict with ethnic Albanian guerrillas in 2001—which claimed fewer than 250 lives, mostly military personnel.

Yet many of the leading Serbian, Montenegrin, and Yugoslav war criminals who had planned the wars in Croatia and Bosnia were never indicted. Among them were Veljko Kadijević, the Yugoslav defense secretary and top military official during the war in Croatia; Blagoje Adžić, Yugoslav army chief of staff during the war in Croatia and the outbreak of the war in Bosnia; Borislav Jović, Serbia's representative on the Yugoslav federal presidency, who had helpfully published his extensive diary detailing his central role in planning the war in Croatia and Bosnia; and Momir Bulatović, the wartime president of Montenegro.

The ICTY was more forthright in indicting the two top military commanders of Bosnia—the country that was the principal victim of the war and whose Muslim population sustained by far the largest number of civilian casualties. The case against the two was weak: the first, Sefer Halilović (indicted in September 2001), was wholly acquitted, while the second, Rasim Delić (indicted in March 2005), was convicted only on the relatively minor count of failing to prevent and punish crimes committed by his subordinates in one particular location in the country, for which he received a sentence of three years. (Delić had stood a good chance of being acquitted on appeal, but died before his case could be heard.) The September 2002 indictment of the ailing 83-year-old Janko Bobetko, the Croatian army's popular chief of general staff in 1992–95 and a Partisan veteran of World War II, was an unfortunate choice on a number of grounds, not least because he avoided the possibility of extradition when he died several months later.

FAULTY PERCEPTION

To some extent, the failures and successes of the tribunal were due to the personal choices of its prosecutors and internal politics among its staff. The most important individual was probably Carla del Ponte, a former Swiss attorney general who served as chief prosecutor from 1999 until 2003, when the ICTY was at the height of its activity and prestige. She and her colleagues did not begin their work with a clear perception or historical understanding of how the wars of the 1990s were organized and waged—unlike the prosecutors at Nuremberg, who, on the basis of their perception of centrally planned Nazi aggression and criminality, had selected for indictment the top German officials from all relevant branches of the Third Reich's establishment.

The ICTY prosecutors, by contrast, began with the crime bases—the outcomes of the war in each region of the former Yugoslavia—and worked their way upward. This resulted in individual investigative teams being dedicated to Serb crimes in Croatia, Serb crimes in Bosnia, Serb crimes in Kosovo, Croat crimes in Croatia, Croat crimes in Bosnia, and so forth. The ensuing pattern of indictments reinforced a faulty perception of the war as a series of interlinked local conflicts in the different parts of the former Yugoslavia, obscuring understanding of the war as a seamless whole.

The indictments of Serb perpetrators for crimes in Croatia and Bosnia disproportionately targeted locals—Croatian Serbs and Bosnian Serbs—rather than the top perpetrators who had actually organized the violence. Only six perpetrators from Serbia or the federal Yugoslav regime in Belgrade were ever indicted for war crimes in Bosnia: Milošević, Jovica Stanisavljević, Franko Simatović, Milomir Perišić, Željko Raznatović Arkan, and Vojislav Šešelj.

Arkan was assassinated before he could be extradited. Milošević died of natural causes during his trial. Perišić and Simatović were acquitted, had their acquittals quashed, and are currently being retried before the International Residual Mechanism for Criminal Tribunals, whose function is to complete the remaining tasks of the ICTY and the International Criminal Tribunal for Rwanda following the cessation of their activities. Only Šešelj, a figure of tertiary importance, has been successfully prosecuted to date. After his obstructive behavior strung his trial out for years, he was acquitted and released. Then a retrial was ordered. He was convicted on the second attempt, but sentenced only to time already served. Such are the paltry results of the ICTY's efforts to prosecute perpetrators from Serbia for war crimes in Bosnia.

Lacking a proper historical analysis of the war, del Ponte and her colleagues pursued an indictment strategy that focused on the most notorious
individuals (Milošević, Arkan, Šešelj) and crimes (the Srebrenica massacre, the siege of Sarajevo). As a result, the chief perpetrators of the Srebrenica and Sarajevo crimes have been relatively well punished, but this is not true of the initial Bosnia-wide program of massacres in the spring and summer of 1992, which killed a substantially larger number of civilians than were killed at either Srebrenica or Sarajevo.

On the other hand, whereas Milošević had been indicted as part of a group of five for war crimes in Kosovo (subsequently expanded to include four others), he was indicted alone for crimes in Croatia and Bosnia. Cynics suggested that this reflected del Ponte’s craving for a personal courtroom confrontation with the villainous mastermind. The unfortunate outcome was that when Milošević died in 2006, the trial ended. The Kosovo trial, by contrast, survived his death and ended with convictions.

Yet it was del Ponte’s historic achievement to insist on prosecutions of Milošević and others for genocide. She did this in the face of resistance from colleagues, including Geoffrey Nice, the chief prosecutor in the Milošević trial, who felt that such cases were risky and it would be a safer strategy to prosecute for lesser crimes that were more easily proven. Del Ponte’s riskier and more ambitious strategy was largely vindicated by a string of convictions for genocide-related offenses, beginning in August 2001 with that of Radislav Krstić, former deputy commander of the RS army’s Drina Corps, and culminating in the genocide convictions of Karadžić and Mladić in 2016 and 2017, respectively. These cases judicially established that genocide had occurred at Srebrenica and that the top leaders of the RS were guilty of it. Karadžić’s conviction was upheld on appeal in May 2019.

The precedent of the Srebrenica genocide finding was upheld by the ICJ in its 2007 ruling in Bosnia and Herzegovina v. Serbia and Montenegro, and enabled the ICJ to find Serbia guilty of failure to prevent and punish genocide. Still, all attempts by the ICTY to prosecute suspects, including Karadžić and Mladić, for genocide in Bosnia outside of Srebrenica were unsuccessful, and the ICTY likewise ruled that genocide had not occurred apart from Srebrenica. (This verdict is complicated by the fact that prosecutions of Bosnian Serb war crimes suspects in German courts resulted in the genocide conviction of Nikola Jorgić, a paramilitary leader, for his activities in the Doboj region in northern Bosnia in 1992, as well as rulings that genocide had occurred in both the Doboj and Foča regions in 1992. The European Court of Human Rights upheld the legitimacy of Jorgić’s conviction for genocide in 2007.)

**Unreconciled**

Part of the problem for the ICTY and its legacy is that different supporters and observers wanted and expected different, often conflicting things from the tribunal: to establish the facts of the crimes; to punish (some of) the perpetrators; to promote regional reconciliation; and to establish a mutually accepted historical record of events. Consequently, evaluations of the ICTY’s success or failure depend on which yardstick they are measured against.

The conclusion that genocide had occurred, at least at Srebrenica in July 1995, was a tremendous success for those who wanted the criminality of the Serb perpetrators to be recognized. The accumulation of huge quantities of documentary evidence and witness testimony, in a format readily accessible to researchers, is one of the great achievements of the ICTY, as it was of the post–World War II tribunals.

But insofar as it was hoped that the ICTY’s proceedings would promote reconciliation—by revealing what had happened in the wars, apportioning guilt fairly, creating a sense that justice had been served, and in the process establishing historical truths that all could accept—this has not happened. Instead, the historical record remains bitterly contested in the former Yugoslav lands, and none of the tribunal’s findings has promoted reconciliation. Indeed, the verdicts generally served to inflame opinions further.

There was a widespread belief among Serbs that their side had been unfairly singled out for punishment, and among Muslims that they had not received adequate justice. The acquittal on appeal in 2013 of former Yugoslav army chief of general staff Momčilo Perišić, accused in connection with Srebrenica and the siege of Sarajevo, provoked particular bitterness and widespread condemnation of the ICTY as a political court.

The pursuit of evenhandedness and symmetry of guilt among the parties resulted in some weak indictments of Croatian, Bosnian, and Kosovar perpetrators that ended in acquittals. Most notable
were three Croatian officers indicted for their roles in Operation Storm in 1995, which crushed the Croatian Serb rebellion; Naser Orić, the Bosnian army’s commander in Srebrenica; and Ramush Haradinaj, a Kosovo Liberation Army officer who later served as prime minister of Kosovo. Even many foreign experts on the conflict did not accept that these verdicts, particularly the acquittal of Operation Storm officers, had established the innocence of the accused, but rather took them as evidence of political intrigues on the part of the ICTY judges.

In a “private” statement that was soon leaked to the public, Frederick Harhoff, a member of the panel of ICTY judges in the Šešelj case, attributed the acquittal on appeal of the Operation Storm officers and of Serbia’s Perišić to string-pulling by outside powers. He suggested that the president of the appeals panel, Theodor Meron (a Jewish US citizen), had somehow been involved in Israeli machinations (of which Harhoff could provide no evidence). For their part, Serb nationalist critics have taken the Operation Storm, Orić, and Haradinaj acquittals as evidence of the ICTY’s long-assumed “anti-Serb” bias and unwillingness to punish crimes committed against Serbs.

The ICTY may also be faulted for the comparatively mild sentences it handed down, most of which were not even served in full. The two most important Bosnian Serb convictions after Karadžić and Mladić were former RS vice president Biljana Plavšić and national assembly president Momčilo Krajišnik, who were released early after serving only 8 and 13 years, respectively. In Plavšić’s case, this was despite the fact that in prison she retracted the admission of guilt and statement of remorse she had made as part of a plea bargain that withdrew two counts of genocide against her. Krajišnik, for his part, was found to have been the “number two” in terms of power and influence in the Republika Srpska, and convicted of persecution, deportation, and “the forcible displacement of several thousands of Muslim and Croat civilians, among them women, children, and elderly persons, throughout the period of April to December 1992.”

Similarly, the notorious Bosnian Croat commander Ivica Rajić, convicted for his role in the October 1993 Stupni Do massacre of at least 37 people, pleaded guilty to charges including willful killing and inhuman treatment, involving the cutting of prisoners’ throats and the murder and burning to death of elderly women and children. He was sentenced to twelve years and released after eight. Such sentences might be compared with the prison term of 15 years handed down by a Bosnian court to 22-year-old Wahhabi Mevlid Jašarević for his 2011 lone-wolf attack on the US embassy in Sarajevo, in which he wounded two people and killed no one.

**Fading Contrition**

The ICTY has undoubtedly had some positive political effects. By presenting Serbia, Croatia, and the RS, in particular, with the choice of cooperation or international pressure and isolation, it has facilitated differentiation between moderates and hardliners that has generally worked to marginalize the latter and promote political liberalization. In Serbia, the former hardline nationalist Zoran Đinđić, as prime minister, switched to a policy of collaboration with the ICTY, deporting Milošević to The Hague in June 2001. This collaboration cost Đinđić his life when he was assassinated by former members of Milošević’s special forces in March 2003, but the murder only created a public backlash against the war criminals. In June 2005, the Council of Ministers of the State Union of Serbia and Montenegro declared:

> Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre, represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance. Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them, or ordered them, and not only in Srebrenica. Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime.

The national courts of Serbia, Croatia, and Bosnia-Herzegovina have all prosecuted war criminals, with general public acceptance, though they have tended to focus on low-ranking perpetrators. In Croatia, the end of the Tudman regime in 1999–2000 and opposition election victories led to a readiness to cooperate with the ICTY. Tudman’s former party, the Croatian Democratic Union (HDZ), itself collaborated with the ICTY under Ivo Sanader, after he became prime minister in December 2003. Although Croatia’s failure to hand over the war crimes suspect Ante Gotovina delayed its European Union accession, the Croatian authorities ultimately assisted in the process that
led to Gotovina’s arrest in the Canary Islands in December 2005. A Croatian court in March 2003 convicted General Mirko Norac of crimes against Serb civilians in the September 1991 Gospić massacre, after his case had been transferred from the ICTY. This was a major step toward establishing the rule of law in Croatia.

In the RS, the government officially apologized for Srebrenica in November 2004, and the following summer its president, Dragan Čavić, attended the tenth-anniversary commemoration of the massacre, held at Potočari, in a private capacity, alongside the president of the State Union of Serbia and Montenegro. Later in 2005, Čavić demanded that the fugitives Karadžić and Mladić surrender to the ICTY. The RS extradited its first indictee to The Hague in 2006.

Čavić paid for these acts with his political career, and no subsequent RS president has attended any of the annual Srebrenica commemorations. In April 2010, Serbia’s parliament narrowly voted to issue a rather mealy-mouthed condemnation of the massacre and an apology to relatives of the victims, in a manner that seemed to imply recognition of the massacre and an apology to relatives of the victims. This grudging gesture reflected the international circumstances of the time, when the United States and the EU were at their most committed to genocide prevention, Euro-Atlantic integration, and liberal reform in the Balkans.

Today, in the era of Donald Trump, Brexit, stalled EU enlargement, and an ever-more aggressive Russia under Vladimir Putin, contrition in Serbia has faded. The current Serbian president and prime minister, Aleksandar Vučić and Ana Brnabić, explicitly and openly deny the genocide. (Vučić was pelted with projectiles when he attempted to attend the 20th anniversary commemoration of Srebrenica in 2015.) Milorad Dodik, the dominant political figure in the RS, has built his regime on genocide denial. Likewise, the outgoing president of Croatia, Kolinda Grabar-Kitarović of the HDZ, and the party’s leader in Bosnia, Dragan Čović, have both publicly honored ICTY-convicted Croat war criminals.

**BUSINESS AS USUAL**

If the legacy of the ICTY has been ambiguous in the former Yugoslavia, so it has been internationally. The tribunal has inspired a succession of copycat courts—international and mixed—for a number of countries and regions that have experienced conflict. First was the International Criminal Tribunal for Rwanda in November 1994, followed by tribunals for Cambodia, Indonesia, East Timor, Sierra Leone, and Lebanon. The process culminated in the establishment of the permanent International Criminal Court (ICC) in July 2002, and the adoption of the Responsibility to Protect (a doctrine justifying humanitarian intervention) at the World Summit of the United Nations in September 2005. These other tribunals have achieved varying but mostly modest degrees of success.

Meanwhile, the world has continued along the same bloody road as before. The genocide in Darfur was as much of an international cause célèbre in the 2000s as the genocide in Bosnia had been in the 1990s, and the ICC indicted Sudanese President Omar al-Bashir for genocide in July 2010. But Bashir remained unrepentant, no serious steps were taken to arrest him, and the indictment was condemned by the Arab League, the African Union, the Non-Aligned Movement, Russia, and China.

In 2011, Muammar el-Qaddafi of Libya and Bashar al-Assad of Syria, undeterred by any fear of prosecution before an international tribunal, attempted to drown the revolutions in their respective countries in blood—in Assad’s case, apparently successfully. Nor have outside states such as Russia, Iran, Saudi Arabia, and Turkey been deterred from intervening brutally in the wars in Syria and Yemen. Myanmar and China have not been afraid to embark on genocidal policies against Muslim minorities—the Rohingya and the Uighurs, respectively.

The international reaction against the US-led invasion of Iraq in 2003, the chaos following NATO’s military intervention in Libya in 2011, and a widespread backlash against liberal internationalism and universal values have combined to make both military and judicial action against perpetrators of genocide and crimes against humanity less popular, among both leaders and populations. In Africa, resentment at the ICC’s almost exclusive focus on African perpetrators has prompted several countries to threaten to withdraw their recognition of the court. Israel has been unrestrained in waging war in Gaza, and it called for sanctions against the court if it attempts to investigate US citizens. For all their limitations, the ICTY’s achievements may come to be seen as a high point in the history of international justice.