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# The Hague: a tool of 'legal vengeance'

**ESSAY:** The ICTY's Kafkaesque decision to bump up a prisoners' sentence by 12 years shows that it is nothing like a proper court of law.

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**Imagine that you are convicted of a crime and sentenced to five years' imprisonment. But, just as you are about to finish serving your time, the court decides that its original verdict wasn't harsh enough and sends you back to prison for a further 12 years.**

It's the sort of nightmarish thing you might think could happen only in a totalitarian regime. Yet it happened last week at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, a court fêted by its supporters as a model of international justice.

The target of the ICTY's Kafkaesque brand of 'justice' was Veselin Šljivančanin, a former officer in the Yugoslav People's Army (JNA), who was originally convicted in September 2007 of 'aiding and abetting torture' during Croatia's war of secession from the federal Yugoslav state in 1991. At the time of his conviction, Šljivančanin had already been in the ICTY's custody for more than four years. He was released at the end of 2007, pending appeal. But last week the ICTY's Appeals Chamber overturned his original five-year sentence and imposed a 17-year term of imprisonment, while dismissing all counts of appeal entered by Šljivančanin and his co-defendant and former superior officer, Mile Mrkšić.

The Appeals Chamber's decision was not based on any new facts. No fresh evidence was brought to light to challenge the original verdict. The Appeals judges themselves noted that the 2007 judgement 'did not err in its factual findings'. Nevertheless, a majority of them (with two out of five judges dissenting) agreed with the prosecutor that 'a five years' imprisonment sentence does not adequately reflect the level of gravity of the crimes' (1).

The ICTY gave two key reasons for its new sentence. First, it argued that Šljivančanin had been wrongly acquitted

at his original trial of aiding and abetting murder. On the basis of nothing more than the record of its own trial acquitting him of this charge, the ICTY now found him guilty. Second, it asserted that the five-year term imposed in 2007 – for aiding and abetting torture – had to be revised because it was not clear whether the judges had given sufficient weight to the suffering of the victims and their families. Both of these spurious arguments reveal more about the tribunal's flaws than about Šljivančanin's culpability.

## The 'hospital massacre'

Šljivančanin's case concerns what is often – sensationally and misleadingly – referred to as the Vukovar 'hospital massacre'. You might imagine him marauding through wards attacking doctors and patients. Over the years, that is what many journalists and commentators have imagined. In the *Observer*, for example, Tim Judah described how 'Yugoslav army commanders went into the hospital and dragged out 200 of the wounded and hospital staff… beat them and shot them dead' (2). In the *Telegraph*, Julius Strauss wrote that Serbian forces 'took nearly 300 wounded from the hospital and executed them' (3). Such 'reports' bear little resemblance to what happened back in 1991.

After prolonged fighting, Croatian forces surrendered the city of Vukovar to the Yugoslav People's Army (JNA), on 18 November 1991. The JNA took prisoners of war to the nearby village of Ovčara and kept them there overnight before transferring them to a POW facility at Sremska Mitrovica in Serbia, where they were to be held with a view to arranging a future prisoner-exchange with Croatia.

Some Croatian fighters, however, had taken refuge in the city's hospital, hoping to be evacuated along with its civilian occupants to Croatian-held territory. On 20 November the JNA apprehended those in the hospital whom they suspected of being enemy combatants – over 200 men and two women – and took them to the local barracks. Contrary to what was often claimed in media reports after the event, these were not civilians seized on a pretext. The ICTY itself accepts that 'the evidence reveals that at least the vast majority of them, if not all, had been involved in Croat military formations active in the fighting at Vukovar' (4).

The original intention was evidently to send them to Sremska Mitrovica like the earlier group of POWs. But Serbian paramilitaries and local Territorial Defence men were out for revenge. The local Serbian civil authorities – an *ad hoc* government formed in opposition to Croatia's nationalist regime – were also unhappy about prisoners being transported out of the area. The prisoners were instead sent to the site at Ovčara used the previous day.

There, the POWs were severely beaten by the local Territorial Defence and paramilitaries. The JNA military police who had been sent to guard the prisoners made what the ICTY called 'inconsistent and insufficient' efforts to protect them from abuse. That evening, Mrkšić ordered the withdrawal of JNA troops from Ovčara. This left the prisoners at the mercy of the local Territorial Defence and paramilitaries, who subsequently took the revenge they had been waiting for and massacred them.

Neither Šljivančanin nor Mrkšić ordered, participated in, or was even present at the killing of prisoners. The charge of aiding and abetting murder – for which Šljivančanin was acquitted in 2007, but of which both men are now thought guilty by the ICTY – hinges on Mrkšić ordering the withdrawal of JNA personnel from Ovčara and Šljivančanin failing to disobey that order. In extending Šljivančanin's sentence, the Appeals Chamber found that, 'even though [he] no longer had *de jure* authority over the military police deployed at Ovčara, he could have informed [them] that Mr Mrkšić's order was in breach of the overriding obligation under the laws and customs of war to protect the prisoners of war' (5).

It is worth emphasising that this crucial decision was based, not on any new information or evidence, but simply on re-reading the trial record from 2007 when Šljivančanin had been acquitted of aiding and abetting murder. As one of the dissenting Appeals judges, Fausto Pocar, observed, the Appeals Chamber has made 'a conviction based on the trial record without having observed the witness testimony or the presentation of evidence, factors which may be particularly important in assessing witness credibility'. Noting the past 'inconsistent' practice and 'oscillating jurisprudence' of the Appeals Chamber, Pocar also disputed whether it even had the authority under its own rules to enter new convictions or impose longer sentences.

The other dissenting judge, Andrésia Vaz, went even further, pointing out that the new judgement was based on

'speculative suggestions as to what Šljivančanin should or could have done to prevent the crimes'. In particular, the Appeals Chamber's verdict hangs on the assertion that Šljivančanin could and should have acted after he learned about the decision to withdraw the military police from Ovčara, but does not establish when he learned about it. Complaining of a 'lack of precision' and an absence of 'clear evidence', Vaz doubted whether Šljivančanin had either the opportunity or the means to prevent the murders, and concluded that the prosecution had therefore 'far from [succeeded] in eliminating "all reasonable doubt"' as to his guilt (6).

The Appeals Chamber has substantially increased Šljivančanin's sentence despite the protestations of one of its own judges that it lacks the power to do so. And one of its key justifications for this decision is that Šljivančanin committed a crime of omission, of which he was previously acquitted, by failing to prevent murders carried out in his absence by people not under his command. As Judge Vaz put it, this decision violates the 'fundamental principle of criminal law' that 'where there is doubt, there can be no conviction entered'.

## A hierarchy of victimhood

The charge on which Šljivančanin was found guilty in 2007 was another crime of omission: aiding and abetting torture by failing to ensure that, when JNA personnel were still at Ovčara, they protected the prisoners from abuse at the hands of the Territorial Defence and paramilitaries.

Media reports of last week's verdict have often noted that public opinion in Croatia was very critical of Šljivančanin's original five-year sentence for this crime as too lenient (7). The Appeals Chamber seemed to acknowledge this in explaining why the sentence now needed to be more than tripled, emphasising that it was unclear whether the original judgement had 'weighed the consequences of the torture upon the victims and their families, or whether or to what extent it considered the particular vulnerability of the prisoners, in the determination of Mr Šljivančanin's sentence' (8).

This is such a specious argument it defies belief. First, it is obvious that that original judgment did take account of the suffering of victims – by noting, for example, that 'close family members have been left without their loved ones. In almost all cases the anguish and hurt of such tragedy has been aggravated by uncertainty about the fate which befell these victims.' (9) According to the Appeals Chamber, such statements at the 2007 trial did not constitute full enough consideration of victims' suffering. Apparently, the 'correct' level of consideration could only have led to a 17-year sentence.

Second, it is clear from the ICTY's track record that some victims do not count as much as others. In 2006, for example, the ICTY convicted Bosnian Muslim commander Naser Orić of failing to prevent the ill-treatment and murder of Serbian prisoners by men under his command. The sentence? Two years. Since he had already been detained for longer than that during the trial, he was immediately released. Last summer, Orić's case also went to the Appeals Chamber, which promptly overturned the conviction and acquitted him. Orić became notorious for murdering Serb civilians during the Bosnian war: he even made bizarre snuff videos as trophies and showed them to journalists as he boasted about his exploits (10). In his case, however, the victims seem to have weighed hardly at all in the deliberations of the court.

It is worth asking why, as the ICTY puts it, there were such 'intense feelings of animosity harboured by the Serb Territorial Defence and paramilitary forces against members of the Croat forces' in Vukovar. This question is seldom asked, probably because the evil of the Serbs is simply assumed. Yet it was not just the pent-up anger and tension generated by weeks of fighting that sealed the fate of the Croatian POWs at Ovčara, but the long-standing grievances of local Serbs. As one reporter noted in 1999, 'Before the war, Vukovar was one of the most ethnically integrated cities in Croatia… But the relative harmony that prevailed here since World War II was upset in the late 1980s by an outburst of Croatian nationalism.' (11) This article was a rare exception to the general trend, which is to ignore or deny the plight of Serbs under Croatian nationalist rule.

Long prior to the battle of Vukovar – certainly since the election of Croatia's nationalist leader Franjo Tudjman in spring 1990 – Serbs in Croatia had become an increasingly persecuted minority, sacked from their jobs, driven out of their homes, attacked and killed. Even before the outbreak of war, 20,000 Serbs had fled Croatia (12). Tudjman's government revived the symbols of Croatia's fascist Second World War regime, which had exterminated Serbs

along with Jews, Gypsies and other 'undesirables'. To ethnic Serbs in Croatia, there was plenty of evidence to suggest that they were once again becoming 'unpersons'.

The ICTY has always claimed to act on behalf of victims. 'For us the victims are the most important', said chief prosecutor Richard Goldstone 1996: 'The victims of the Yugoslav war want legal vengeance.' (13) The tribunal emphasises its advocacy for victims because it stands outside the societies to which it applies its 'international law'. Lacking any real connection with the people over whom it sits in judgement, the claim to speak for victims is a way to assert its legitimacy. Yet it is difficult to see how a mission of 'legal vengeance' is compatible with dispensing impartial justice. In practice, it leads to double standards and politicised judgements.

## A political tool

Michael Scharf, a lawyer who helped to write the original ICTY statute for the US State Department, has acknowledged that 'the tribunal was widely perceived within the [US] government as little more than a public relations device and as a potentially useful policy tool'. The tribunal's usefulness in this regard was demonstrated most vividly during the 1999 Kosovo conflict, when it indicted Serbian president Slobodan Milošević at the very moment when NATO was bombing his country. For the British and American governments, Scharf observed, the ICTY was 'a useful tool in their efforts to demonise the Serbian leader and maintain public support for NATO's bombing campaign' (14).

From the outset, the ICTY has been fundamentally shaped by a simplistic, good-vs-evil narrative of the Yugoslav wars, perpetuated by Western politicians and the media. The 'hospital massacre' was one of the key events in establishing that narrative, and was one of the main events highlighted by the US State Department in 1992 when it first suggested that Milošević should be indicted for war crimes (15).

In 1999 it was raised again by those seeking to promote the argument that Milošević should be indicted. Prominent British human rights lawyer Geoffrey Robertson claimed to know of 'compelling evidence that he personally approved the massacre of 200 patients at Vukovar hospital' (16). Once the indictment had been issued, Robertson was beside himself, urging that Milošević should also be 'charged with ordering the Vukovar hospital massacre in 1991, when his army machine-gunned 260 Croatian patients, doctors and nurses into a mass grave' (17). This scenario existed only in Robertson's imagination. The beating and execution of prisoners of war is surely bad enough. Yet advocates of 'international justice' often appear driven to ladle on the horror in order to sustain their own fantasies of righteousness.

One key rationale often given for the existence of the ICTY is that the states involved in the Yugoslav wars would be incapable of holding the guilty to account themselves. Yet more than a dozen of those who – unlike Šljivančanin and Mrkšić – were directly involved in the mistreatment and murder of POWs at Ovčara have been convicted and sent to prison by Serbian courts. The ICTY, meanwhile, pursues its peculiar, politicised 'legal vengeance', supposedly on behalf of selected, 'worthy' victims.

In reality, the ICTY serves no useful purpose except as a political tool of its Western sponsors. In common with other international tribunals, as it sits in judgement on other people's wars it allows Western leaders to set themselves up as morally superior to weaker states, including those they bomb.

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(1) Appeals Chamber Judgement, 5 May 2009 (pdf)

(2) This war criminal must be brought to justice, Tim Judah, *Observer*, 4 October 1998

(3) Massacre that started long haul to justice, Julius Strauss, *Daily Telegraph*, 30 June 2001

(4) Trial Chamber Judgement, 27 September 2007 (pdf). The judgement also notes that 'the two Croat women included with the men were also thought by the JNA to have been involved in the Croatian forces'

(5) Appeals Chamber Judgement Summary, 5 May 2009 (pdf)

(6) Appeals Chamber Judgement, 5 May 2009 (pdf)

(7) See, for example Hague triples Vukovar jail term, BBC News, 5 May 2009

(8) Appeals Chamber Judgement Summary, 5 May 2009 (pdf)

(9) Trial Chamber Judgement, 27 September 2007 (pdf)

(10) 'Weapons, cash and chaos lend clout to Srebrenica's tough guy', John Pomfret, *Washington Post*, 16 February 1994

(11) 'In the Misery of Vukovar Lies an Awful Model for Postwar Kosovo', Blaine Harden, *International Herald Tribune*, 3—4 April 1999

(12) 'A Brief History of Ethnic Cleansing', by Andrew Bell-Fialkoff, *Foreign Affairs*, Vol. 72, No. 3, 1993, p118

(13) Quoted in *Fools' Crusade*, by Diana Johnstone, Pluto Press, 2002, p96

(14) Indicted for war crimes, then what?, Michael Scharf, *Washington Post*, 3 October 1999

(15) Michael Evans and Jamie Dettmer, US wants Serbia war crimes trials, The Times, 17 December 1992

(16) 'Should Milosevic be indicted as a war criminal?', Geoffrey Robertson, *Guardian*, 6 April 1999

(17) 'No right without wrong, no peace without justice', Geoffrey Robertson, *Independent on Sunday*, 30 May 1999