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The Strange Case of the Hague Tribunal for the Former Yugoslavia

International Tribunal for Crimes in Former Yugoslavia: Origins and Activities

Essays Submitted to the 2nd Edition
of the International "Giuseppe Torre" Award

Summary

1. Introduction

Jean Toschi Marazzani Visconti

The second edition of the Giuseppe Torre Award sponsored by the Italian National Coordination for Yugoslavia took place in 2021. The jury chose the competition winners for the best essays on the International Crimes Tribunal for the former Yugoslavia in The Hague. The prize rewards authors of texts on a subject generally considered *untouchable*, if not true *heresy* against the single dominant thought. To understand the real importance of this courageous award and describe the context of its birth, we need to go back to recent history: the end of the Cold War.

On 8 December 1987, USA President Ronald Reagan and Soviet Union President Mikhail Gorbachev signed the INF Treaty (Intermediate-Range Nuclear Forces Treaty) for mutual control of nuclear weapons. This event seemed to mark the end of the Cold War. A new wind was blowing in the Western world. The fear of a nuclear confrontation had ended, the borders of the countries beyond the Iron Curtain had opened following the fall of the Berlin Wall, and the Soviet Union and the Warsaw Pact had dissolved. The general enthusiasm celebrated the return to peace, to a normality hoped for since the beginning of the Cold War in 1947. It was a hoax!

The United States was the only world power without competitors in 1991. Russia was painstakingly recomposing itself and China was still a long way from implementing the programs that would make it the global power that it currently is. The United States was in a hurry to put its advantage to good use. *The Project, for the New American Century* (PNAC), a theory formulated in the 1970s by a group of young intellectuals, called neocons, was allegedly implemented by both Republican and Democratic governments. The project's statement of principle was unequivocal and justified any action contrary to common ethics or international law for achieving its result of global leadership: *The history of the 20th century should have taught us to embrace the cause of American leadership* (www.newamericancentury.org-www.moveon.org).

In the 1980s, the United States was already planning to break up Yugoslavia, and in 1991 with some European partners (England, Germany) it began its dissolution. The Yugoslav Federation was an internationally recognized state; any external interference thus involved acts contrary to international law. The destructive scheme applied in Yugoslavia consists of five points with a deadly result for the target country: 1) cancellation of any loan, financing, and request for repayment of the debt; 2) funding for extremist groups to acquire power and intervene in the political balance of the country; 3) imposition of commercial, cultural and health sanctions on the basis of unlikely events, often provoked if not invented; 4) launch of a pounding disinformation campaign to convince public opinion that the antagonist is the great enemy, and the creation of news or staging to justify any military action; 5) armed intervention on the grounds of humanitarian motives.

The disintegration process of the six Yugoslav Republics, the civil war in Bosnia and Herzegovina, the bombing of Yugoslavia, the recognition of Kosovo independence –a historical Serbian region – would have been the *dress rehearsal* for the protocol used over the years in Afghanistan (2001), Iraq (2003), Libya (2011), Ukraine (2014), Yemen (2015), and initially attempted in Syria, Venezuela and Belarus without success, thanks to occasional Russian opposition.

Following the first point of the protocol, the United States condemned the economy of the Yugoslav Federation, withdrawing all financing and loans in 1991. At the same time, the US provided funding to nationalist parties or groups. Thanks to this financial aid, these groups broke into the Yugoslav political landscape. Weapons and military training were provided by Germany to Croatia. In 1995, Croatia ethnically cleansed Serbian Krajinas with the support of the Pentagon, and the technical help of the US State mercenary agency Military Professional Resources (MPRI). Turkey, with the support of the CIA, had provided for the dispatch of weapons and military training to the Kosovo *terrorists*, who were later transformed into *Freedom Fighters*.

Democratic President Bill Clinton authorized the arrival of Islamic mercenaries from various Islamic countries in support of Alija Izetbegović in Bosnia and Herzegovina. Through the CIA, weapons and aid from Iran, as well as Iranian secret services, penetrated into the Islamic area of Bosnia. This presence greatly influenced the Islamic area of Bosnia, even after the war. Once a free and secular society, Bosnia is now increasingly Islamized. Much money has flowed

from Saudi Arabia and Iran not to restructure the war-torn economy, instead to build mosques and Islamic schools, where young people (only boys of course) are educated. Although the Bosnian Constitution prohibits polygamy, the habit of having several wives and consequently many children is back in vogue. Turkey considers Bosnia its dominion, part of the Green Transversal, the territory once occupied by the Ottoman Empire. Therefore, in Europe today there is a free zone where Sunnis and Shiites live together with the blessing of Turkey, called the Great Mother.

Economic, cultural and health sanctions were applied to Serbs from the end of 1991 until the Dayton Treaty with serious and sometimes tragic consequences for the population. Hospitals in Serbia and in the Republika Srpska of Bosnia and Krajina lacked everything.

The disinformation campaign was carried out with great skill from the very beginning of the dissolution process using the major Communication Agencies. With a hammering technique, the media instilled in the public mind the concept that Serbs were the only ones guilty of what was happening in Yugoslavia by convincing the public that Belgrade wanted a greater Serbia and that it threatened the independence of the other Republics, which until recently had been Yugoslav Federation members.

In Bosnia, bloody scenarios had been staged in order to justify NATO interventions. I would like to recall the grenade on citizens lining up for bread in Sarajevo in 1992, and the two bombs dropped on the market of Vase Miškina in 1994 and 1995 with this latest massacre sparking US/NATO bombing throughout the Serbian territory in Bosnia. All these carnages were blamed on the Serbs, and Western authorities refused any inquiry commission and documentation contrary to the established truth.

James Harff, Ruder & Finn Global Affairs director, had worked between 1991 and 1992 for the Croatian Government, the Muslim Government of Bosnia and the Kosovar opposition. In an interview with the France2 TV journalist, Jacques Merlino (*Yugoslav truths are not all good to tell*, Albin Michel Ed., Paris 1993) explained his technique of taking any piece of news, and bouncing it on the media. He had grabbed the photo of the skeletal Muslim refugee photographed by a British film crew in the Trnopolje refugee camp. This news was used by Harff to suggest that Serbs had set up concentration camps. True or not, Harff

challenged the journalist to change the public opinion which by then portrayed Serbs as the 1992 new Nazis. After this campaign, it would have been easy to accuse them of any crime and to intervene militarily with public approval.

After the Dayton Peace Accords in 1995, there was a relatively quiet period where the population hoped for the strenuous recovery of normal life. It was another deceit, indeed a psychological torture technique, which consisted in making the populations hope for a return to normal life and then plunging them back into the anguish of war. For this purpose, the Račak trench with civilian corpses was staged in Kosovo. Consequently, the Rambouillet Conference was organized to obtain the official motive for the attack on Yugoslavia. Slobodan Milošević could never have accepted NATO occupation of Yugoslavia (Serbia and Montenegro). In fact, NATO troops were already deployed in Macedonia waiting for the green light (Colonel Jacques Hogard, *L'Europe est morte* à *Priština*, Hugo & Cie 2014). Curiously, during the conference, the Secretary of State Madeline Albright only spoke with Hashim Thaçi, a well-known figure to the European police, and never with Ibrahim Rugova. The latter was the President of the Kosovar shadow government, elected with 90% of the votes in secret elections that took place with a tacit Serbian agreement, and in favor of non-violence. It became evident that the United States would support a Kosovar government made up of criminals, with terrible consequences for the Kosovar people of non-Albanian ethnicity.

The crimes and violations that the US and NATO had committed in the Balkans would begin to be evident over time. The United States and NATO had knowingly violated a number of international treaties and agreements. In anticipation of this possibility, as early as August 1992 during an extraordinary meeting of the Commission on Human Rights in Geneva, an American representative suggested that the UN set up a Tribunal for crimes committed in the Balkans. On 25 May 1993, the UN Security Council with Resolutions 827 (1993) and 808 of 22 February 1994, created the International Criminal Tribunal for Crimes in the former Yugoslavia pursuant to Chapter VII of the UN Charter. The *ad hoc* Tribunal would strengthen and sanctioned the legitimacy of US and NATO actions in the Balkans.

The essays contained in this volume amply explain how this choice was operated on the edge of illegality and how the management of the ICTY trials

was completely outside the normal procedure of justice, bending laws and proceedings to the need of the court to convict some defendants and absolve others of the same charges.

Throughout the Balkan war period, no journalist was able to tell the truth about the events taking place without serious retaliation. More and more people, in Europe as in the United States, realized that freedom of speech and opinion was over, yet many fought to restore the truth of the facts. Austrian writer Peter Handke objected to the demonization of Serbs, fiercely criticized by the media. Michel Chossudovsky wrote his clear articles from Canada. In London, journalist Misha Glenny with his book *The Fall of Yugoslavia*, and Misha Gavrilović with his talk-show interventions, tried to explain the Serbian point of view. In Paris, Louis Dalmas published a monthly magazine, Balkans Infos, where authors excluded from media press could write uncomfortable realities. In Belgium, Michel Collon tried to awaken public consciousness with his writings. In Germany, Jürgen Elsässer was engaged with his articles and books.

In Rome, the counter-information began in 1993 with the radio broadcast *Voce jugoslava* on Radio Città Aperta edited by Ivan Pavičevac and Milena Čubraković. They were joined in 1994 by Manuela Marianetti, Maurizio Caldarola, Pino Arancio, Franco Marenco and Andrea Martocchia under the name of *Movement for the truth on the Yugoslav wars*. After the 1999 bombings, others joined the group, and in 2001 they created the current National Coordination for Yugoslavia in Bologna. In 2007, the National Coordination for Yugoslavia became a legally recognized association. A Coordination fan, Giuseppe Torre, died prematurely in 2014 and left a legacy to the group, to be used to reveal crimes against Serbs. From this bequest, the Coordination members and their secretary Andrea Martocchia launched the Giuseppe Torre Award for the best essays on the International Tribunal for Crimes in the former Yugoslavia.

The theme of the "ad hoc Tribunal" remains current and is indeed essential for those who want to devote themselves to the interpretation of the contemporary Yugoslav crisis. On the other hand, this Competition and our other initiatives on this subject are not only the fruit of our desire to clarify the uses and abuses of International Law, explained Andrea Martocchia.

In 2018, the first edition jury composed of Aldo Bernardini, Chiara Vitucci and myself awarded ex aequo Stephan Karganovic for his *ICTY and Srebrenica* and Jovan Milojevich for *When Justice Falls: Re-raising the Question of Ethnic*

Bias at the International Tribunal for the Former Yugoslavia (ICTY), a special mention was given to Tiphaine Dickson's essay *On the Poverty, Rise, and Demise of International Criminal Law*.

The two essay winners of the 2018 edition of the Giuseppe Torre Award, plus two further essays by Christopher Black, a well-known internationalist lawyer, and Višeslav Simić, professor of Geopolitics in Mexico, with the foreword of Canadian ambassador James Bisset and afterword of Peter Brock and mine were published in *The Hague Tribunal, Srebrenica and the Miscarriage of Justice* (Unwritten History Inc., Chicago 2019)[1].

Aldo Bernardini was unable to come to the Award Ceremony due to health problems that would soon take him away, but he sent this message:

> *The works presented by these authors constitute a strong contribution to an independent analysis, outside the framework of the single dominant thought, the legal basis and concrete functioning of the Hague Tribunal for the former Yugoslavia. This gives rise to ideas for reflection on the not too occult character of instrumentality of this body with regard to the planned destruction of a sovereign state such as Yugoslavia*.

In 2021, the second edition jury, composed of Ugo Villani, Ugo Giannangeli and myself, unanimously awarded the first prize to George Szamuely for *Securing Desired Outcomes: The Political Mission of the ICTY* and the second prize ex aequo to George Andrew Wilcoxson for *A critical look at the ICTY – The Tribunal's Origins and Behavior*, and to Jonathan Rooper on behalf of the BCRT collective (The Balkan Conflicts Research Team) for *Truth and Justice – the American Way. How the ICTY distorted history and perverted justice*.

The quality of all essays is excellent and the organizers of the Giuseppe Torre Award decided to publish them all with an additional fourth one by Jovan Milojevich. This book was thus born and, according to the cuts of various authors, delivers a vision of justice administered by the Hague Tribunal that corresponds to the Law infringements and violations of those who financed it to cover their own crimes against humanity.

[1] http://www.cnj.it/home/it/informazione/jugoinfo/9227-9105-analisi-e-ricerche-sul-tribunale-ad-hoc-dell-aia.html

2. International Law Subject to Politics

Ugo Giannangeli, Attorney

With a brief paragraph on 21 May 2021, the Italian daily newspaper Corriere della Sera informed us that a Pakistani citizen, Mr. Paracha, and a Yemeni citizen, Mr. Uthman, were released from Guantanamo prison. They had respectively been detained since 2003 and 2002, when Guantanamo's detention camp had been opened. About forty prisoners are still locked up (there were 700 in 2003). Neither Mr. Paracha nor Mr. Uthman ever learned the reason for their kidnapping and imprisonment. (I deliberately do not use more technical terms such as "arrest" and "detention" because these methods of capture and liberty deprivation resemble more the kidnapping methods of criminal organizations rather than the arrest procedures typical of State authorities). Deprivation of liberty was notoriously accompanied by various forms of torture in Guantanamo.

Guantanamo represents one of the most sensational forms of imprisonment without formalized accusations and without judicial control.

In Italy, we are apprehensively following the case of the Egyptian student Patrick Zaki, who has been locked up in an Egyptian prison for a year and a half with continuous extensions. Attention should obviously be paid to the Zaki case, but it would be equally necessary to remember that detention without contesting charges, without a fixed custody limit and without judicial control (so-called administrative detention) is the experience of hundreds of Palestinians. And yet, nobody talks about them.

The relationship between international law and politics was recently highlighted (I believe unwittingly) by Piero Fassino (MP for the Italian Democratic Party) at 6 July 2021 hearing of various experts before the 3 Foreign Affairs Commission of the Italian Chamber. Fassino, drawing as chairman the conclusions of the meeting, spoke of Yugoslavia. Why did he do this, as the hearing was about Palestine and the International Criminal Court? Fassino said with great clarity that international

law must be subordinate to politics and any process or Judiciary intervention/ interference can hinder the search for peace. He took as an example the case of Yugoslavia, where trials followed the end of hostilities on the ground (textual: "peace came first"). Fassino defined such trials as execution platoons for the defeated defendants (the essays published in this book show it well) and defined the search for peace as an armed aggression against a sovereign State.

Therefore, according to Fassino (but he is not the only one), politics must prevail over law. Mind you: the current policy is certainly not the good administration of the *polis* of ancient memory, but only a continuous search for geopolitical and military hegemony.

Someone went further. Not only international law must be subordinate to politics, but an appeal against it (for example by filing an action before the International Criminal Court) must be viewed with suspicion. In their book The Human Right to Dominate, Nicola Perugini and Neve Gordon explained the concept of lawfare: "The use of law as a war weapon, more precisely, the abuse of law and legal systems for strategic purposes of political or military nature" (op. cit., Nottetempo, p. 115).

Somebody went even further. Nicola Perugini and Neve Gordon reported a passage from a report dating back to 2010 in which the Israeli Foreign Minister stated "(...) if the German military theorist Carl von Klausewitz affirmed that war is merely the continuation of politics by other means, it must be recognized that legal warfare is also the continuation of terrorist activity by other means" (op. cit., Nottetempo, p. 102).

Are we far from equating magistrates to terrorists? Not very much. This explains the sanctions imposed by the United States and Israel against Mrs. Fatou Bensouda, Prosecutor at the International Criminal Court, guilty of having initiated an investigation and imposed sanctions against the judges of the Court, guilty of having considered their own jurisdiction.

We also recall the case of the sanctions requested by Donald Trump against the officials of the International Criminal Court charged with investigating possible war crimes of the United States Army in Afghanistan, the forces of the Kabul government and the Taliban during the conflict in the period from 2003 to 2014.

Prof. Benedetto Conforti (professor of International Law at the Federico II University in Naples) was a good prophet. In his Treaty of International Law, he stated: "In short, the opinion we have so often expressed about the scarce efficiency

and credibility of international law means of coercive implementation, in which the law of the strongest is reflected, remains definitively confirmed" (Scientific Editorial, 2002 ed., p. 374).

What conclusions to draw? One conclusion comes to mind, perhaps a slightly provocative one. If this is the case, if an honest judicial intervention is viewed with suspicion or even criminalized, is the absence of any judge not preferable rather than the presence of magistrates subservient to political logic, as the essays published here well demonstrate? In the case of former Yugoslavia particularly, why giving a semblance of posthumous legality to what was a war that began and continued in violation of the same international legal rules? Even politically moderate figures such as Sergio Romano (former ambassador, historian and essayist) and Paolo Mieli (journalist, historian and essayist) agreed on the judicially ruthless judgment on the losers. Mieli wrote in the Corriere della Sera on 14 December 2017, an article titled "The Hague Court is about to be demobilized, in 24 years it has tried 161 defendants, 90 have been convicted. All of them were among the losers. Former Yugoslavia, justice punishes only the vanquished."

We conclude with prof. Benedetto Conforti's words: "When force is used, especially when war violence is unleashed on a large scale (…) it is perhaps to be acknowledged that international law, both customary law and United Nations law, has exhausted its function. War cannot then be judged legally but only politically and morally" (op. cit., p. 377).

3. "Giuseppe Torre" Competition – Second Edition: the Call

"Giuseppe Torre" Award for Critical Studies about the International Criminal Tribunal for Former Yugoslavia - SECOND EDITION

1. Introduction

With the aim of spreading a critical view regarding the birth and activity of the "International Criminal Tribunal for Former Yugoslavia" (ICTY), JUGOCO-ORD ONLUS [a no-profit organization for social benefit, based in Italy] grants two prizes for the year 2020-2021.

2. Object

The prizes will be assigned for essays or scientific articles not to be published before the Call deadline, devoted to criticalanalysis of ICTY activity.

Papers, written in English or Italian, that do not exceed 50 editorial pages (90 thousand characters, spaces included) are eligible.

The submitted texts must offer a significant contribution to the study as well as to the popularization of the matter, while investigating the origin and acts of the ICTY.

In accordance with the intent of the prizes' Donor,[2] the activity of ICTY shall be investigated as a primary tool in the context of the international turbulen-cewhich first brought an end to the Socialist Federative Republic of Yugoslavia, and then the Federal Republic of Yugoslavia (Serbia and Montenegro).

[2] It is the legacy of an antiwar activist Giuseppe Torre, who passed away and made it possible to award this tender. His analysis of the Yugoslav crisis of the end of the XX Century can be

The papers will pass a first scrutiny by the Jury, which will verify their interest under one or more of the following aspects:

- legitimacy (of the institution itself);
- impartiality (in making allegations as well as imposing and executing convictions);
- contribution to peace among the conflicting parties on the territory of the former Federative Socialist Republic of Yugoslavia;
- protection of the rights of the accused (including: life, health, defense, rightful treatmentduring conviction);
- possible contradictions with the principles of sovereignty of the States, and self-determination of the (discriminated) Peoples, as it stands in international law.

Above all, submissions will be appreciated which, although scientifically in-depth and rigorous, are nevertheless suited to advancing the issue towards non-specialists through avoiding mere jurisprudential reviews and exaggerated technicalities.

3. Prizes

Two prizes will be assigned, the first amounting to 7.000 euros and the second 3.000 euros (both tax net), to those papers which will be chosen by the unquestionable decision of the Jury as best and second best.

JUGOCOORD ONLUS will take care of regulating the tax and social issues applicable.

The Jury may decide not to assign any prize to papers considered unworthy.

4. Participation

Citizens of all countries, ages, and qualifications are eligible to apply.

Each work must be mailed with four full identical paper copies, to be sent not later than 31 December 2020 (“Call deadline”) by registered post to:

found in the article "La dissoluzione della Iugoslavia e l’attuale disastro umanitario" (2006): http://www.cnj.it/AMICIZIA/giuseppetorre.htm#gamadi2006 .

JUGOCOORD ONLUS, C.P. 13114 (Uff. Roma 4), 00185 ROMA - ITALIA.

Together with the paper copies, the following items must also be sent in the same envelope labeled "Concorso Torre 2020":

* Four copies (at least one of them with original signature, albeit not authenticated) of the Application for participation to the prize, containing the following information: name and surname, date and place of birth, citizenship, postal address, email address and phone number to be used for receiving any communications connected with the competition, passport or identity card specifications, legal residence, tax number or equivalent.

The following must be also attached to the Application:

- a short text to explain the reason for participating in the competition and describing the projects ideas for future use of the paper itself;
- a declaration stating the paper is unpublished;
- the commitment that, in case of victory, JUGOCOORD ONLUS will be asked first, in case a publishing project for the paper is made, especially reserving to JUGOCOORD the rights of a possible Italian edition (rights, that the ONLUS will hand over without claim in case of a renouncement to publish);
- explicit confirmation that the sender read the present Call and accepted it fully;
- authorization to the processing of personal data for the purpose of the competition, as prescribed by the EU General Data Protection Regulations.

All received copies will NOT be sent back to the Authors, nor be transmitted to others, unless specific agreements were made directly between them and JUGOCOORD ONLUS. One of the received copies will be maintained in the Archive of JUGOCOORD ONLUS, the other will remain at the disposal of Jury members.

Applications will not be considered if sent beyond the Call Deadline or written in a manner inconsistent with the provisions of this Article.

5. Jury and Awards Ceremony

The Jury is formed by three experts on the topics dealing with the essays, who are not members of the ONLUS.

The Jury will proceed through unquestionable judgement to evaluate the submissions and assign the prizes taking into consideration, apart from what is contained in the Object of the Call: methodological rigor, relevance to the proposed theme, originality and possible impact to the aim of spreading a critical view on the institution and the activity of ICTY.

The awards will be made public starting 30 April 2021, on the internet site www.cnj.it.

Each prize winner will be informed at one of the given addresses in the respective Application for Participation before 15 May 2021, and will be invited, with refund of travel expenses, to take part in the awards ceremony which will be held during the following weeks.

For further information about this Call please contact: jugocoord@tiscali.it.

23 June 2020

4. The Winners of the "G. Torre" Award, ed. 2020

On 1 March 2021, the jury of the 2020 edition of the Giuseppe Torre award for critical analysis essays on the International Criminal Court on the former Yugoslavia met by telephone.

The three members of the jury, Jeannie Toschi Marazzani Visconti, Ugo Villani and Ugo Giannangeli, after careful examination of the six essays received and an in-depth comparison of opinions, reached a unanimous conclusion. The essays were generally considered to be of excellent quality, but three out of five were judged to be more compliant with the evaluation criteria indicated in the award announcement.

The jury therefore decided to award first prize to George Szamuely's essay "Securing Desired Outcomes: The Political Mission of the ICTY" and second ex aequo prize to essays by George Andrew Wilcoxson "A Critical Look at the ICTY – The Tribunal's Origin and Behaviour" and the BCRT collective (The Balkan Conflicts Research Team) represented by Jonathan Rooper "Truth and Justice – the American Way. How the ICTY distorted History and Perverted Justice".

Szamuely's essay is the one that most investigated the legal distortions, up to real aberrations, in the work of the Court. By way of example only: the protection of blatantly mendacious texts, the use of anonymous or "de relato" testimonies, the extreme extension of the participation in the crime, the substantial reversal of the burden of proof, the change of the rules in progress opera, the zeroing in the right of defense.

There is also a clear and well-motivated criticism as to the origin of the Tribunal and of its political and non-legal function: it was born on the initiative of the UN Security Council, however without adequate legal bases, but immediately revealed to be an instrument of NATO, the US and Western interests in the area.

The essay submitted by Rooper on behalf of the BCRT collective is analytical and well documented, with a correct examination, albeit less detailed than

Szamuely's of the fundamental legal aspects. The style is dry and concrete, the language is suitable for diffusion even among non-experts in law. A similar evaluation for Wilcoxson's essay which, like the other two aspects, albeit in a synthetic way, the parameters indicated in the award announcement: critical analysis of the work of the Court, its legitimacy (originally denied), its impartiality (denied in toto) , protection of the rights of the accused (non-existent).

All three essays show that the main declared aim, the Tribunal's contribution to reconciliation, was nil; on the contrary, the obvious anti-weed bias contributed to the persistence, if not even to the exacerbation, of interethnic hostility.

If the jury decided to award the prizes to these three essays, it is also true that the essay by Jovan Miloyevich deserves attention and diffusion, too; therefore, its publication is recommended.

Jeannie Toschi Marazzani Visconti
Ugo Villani
Ugo Giannangeli

The Jugocoord Association Board acknowledged with satisfaction the results of the 2020-2021 edition of the "Giuseppe Torre" Competition, and on the basis of the Members' Assembly decisions on 10 April 2021:

- approves an additional allocation to the Competition prize pool, so that each of the two second prize ex-aequo winners will be awarded € 2000 net of tax;
- proposes to the Authors of the winning and Jury recommended texts the publication of their works in a book that can internationally circulate in the context of Jugocoord "orientaMenti" (orientMinds) series as they are rich in information and deserving to be known by the public;
- will organize an online public initiative with this edition winners, the Jury members and other experts on the topics covered in the Competition, where to possibly present the above publication. The times and methods of this initiative will be defined with those directly involved.

10 April 2021

5. Securing Desired Outcomes: The Political Mission of the ICTY

George Szamuely, PhD

Abstract

The International Criminal Tribunal for the Former Yugoslavia, established pursuant to a United Nations Security Council resolution, was supposed to bring peace and reconciliation to the peoples of Yugoslavia. Yet, rather than serve the international community and foster reconciliation, the ICTY chose to act as the public-relations arm of NATO, demonizing, convicting and imprisoning (often with life sentences) the Serb military and political leaders of the 1990s – a leadership that had opposed the North Atlantic Treaty Organization's (NATO) political design for the Balkans. The ICTY accomplished this by revising the statute that the UN had mandated, by crafting a jurisprudence that went far beyond what was the common understanding of international humanitarian and criminal law at the time the tribunal was created, and by adopting Rules of Procedure and Evidence that made prosecution as easy as possible and defence almost impossible. Rather than adopting the good practices of the best legal systems – as expected – the ICTY rehabilitated the practices of the defunct and discredited Medieval Star Chamber.

1. Introduction

The work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is inextricably bound up with the issue of whom to assign blame to for the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) and for the wars that ensued.

A disinterested historian would find it hard to avoid the conclusion that the wars in Yugoslavia were triggered by the insistence of its republics and provinces to seek independence without bothering to negotiate the terms of their exit. Since there was no way that six-nation, six-republic, Yugoslavia could break up without war, and thus without the atrocities that are inevitable with war, responsibility for the humanitarian crises that bedevilled the successor states of the SFRY rests with those who insisted on secession at all costs, and those who, wilfully and recklessly, served as the secessionists' enablers. War was inevitable once the European Union and the United States accepted, or more accurately, encouraged, the dissolution of Yugoslavia in the face of fierce opposition from at least 40% of its population – the Serbs – and probably from a substantial majority of Yugoslavs.

Having made their bizarre decisions, granting statehood here, refusing statehood there, conjuring nations and states out of thin air while making others disappear, the Europeans and the Americans had to absolve themselves of any responsibility for the consequences. A villain had to be found to explain why the policymakers' self-evidently good intentions had resulted in such total fiasco. A ready candidate was to hand: the most implacable opponent of Yugoslav dissolution, namely, Serbia and the Serbian nation as a whole. The Western public had to be persuaded that the wars in Slovenia, Croatia, Bosnia and Kosovo were not about the EU's and the US's premature recognition of the secessionist states and their non-negotiable decree that the arbitrary administrative boundaries created by the Communist rulers of the SFRY should serve as international frontiers. It was not about millions of people suddenly finding themselves citizens of states to which they did not want to belong; no, it was about the aggressive war waged by the Serbs scattered throughout Yugoslavia to create a 'Greater Serbia'.

2. The need for a Tribunal

The Western powers needed to establish an institutional mechanism to ensure that their account of the breakup of Yugoslavia would prevail. Established in May 1993, the ICTY, ostensibly a criminal court responsible for punishing the gravest of war crimes, was assigned the task of promoting a self-serving and highly inaccurate account of the Balkan wars of the 1990s. The ICTY's challenge was to construct a tale according to which the Serbs, Yugoslavia's most populous nation, sought not to preserve their common state but to destroy it. To present NATO as a reluctant warrior selflessly intervening in the Balkans to punish the barbaric, recalcitrant Serbs, the ICTY needed to uncover a conspiracy hatched in Belgrade: first, to destroy Yugoslavia and, second, to create Greater Serbia. Michael P. Scharf, a former State Department official and one of the creators of the tribunal, has admitted that, from the start, the Serbs were the target of the ICTY:

> *In creating the [ICTY], the UN Security Council set three objectives: first, to educate the Serbian people, who were long misled by Milošević's propaganda, about the acts of aggression, war crimes and crimes against humanity committed by his regime; second, to facilitate national reconciliation by pinning prime responsibility on Milošević and other top leaders and disclosing the ways in which the Milošević regime had induced ordinary Serbs to commit atrocities; and third, to promote political catharsis while enabling Serbia's newly elected leaders to distance themselves from the repressive policies of the past.*[3]

As the ICTY's architects envisaged it, the wars would end with the satisfying spectacle of President Slobodan Milošević; Ratko Mladić, former chief of the general staff of the Vojska Republike Srpske; and Radovan Karadžić, former president of the Republika Srpska, arrayed in the dock, behind a glass wall, heads bowed, with human rights lawyers raining eloquent denunciations down on them.

The ICTY's record on prosecutions speaks for itself. During its 24-year existence, the ICTY indicted 161 individuals: 101 Serbs, 37 Croats, 9 Bosnian Muslims, 9 Kosovo Albanians, 2 Macedonians and 2 Montenegrins and, of

[3] Washington Post, 29 August 2004. Title of the article missing

course, no citizen of any NATO country.[4] Of the 161 indictees, 22 were charged with genocide, all of them of Serb nationality.[5] The ICTY has indicted seven presidents, all of them of Serb nationality. Of the 1,657 years of sentencing the ICTY has handed down, a mere 64 (3.86%) were for crimes committed against Serbs. Of those 1,657 years, 1,302.5 years (78.6%) were handed down to Serb defendants.[6]

Such extraordinary imbalance belies the promises the ICTY's creators made to the United Nations. Unlike the Nuremburg and Tokyo war crimes tribunals (which only prosecuted the leaders of the defeated Axis powers), this tribunal would not dispense victors' justice. "This will be no victor's tribunal. The only victor that will prevail in this endeavour is the truth," Madeleine Albright, US permanent representative at the UN, vowed to the UN Security Council.[7] Her promise was never intended seriously since it was obvious from the beginning that the ICTY and NATO would be joined at the hip, with NATO member countries setting the ICTY's agenda and providing lavish funding.[8] It was a NATO spokesman who disclosed the closeness of the ties between NATO and the ICTY. Speaking at a news conference in May 1999, at the height of NATO's bombing campaign against Yugoslavia, Jamie Shea ridiculed the idea that NATO could ever find itself in the ICTY's crosshairs:

> *NATO countries are those which pushed for this Tribunal to be established… We are the countries that overwhelmingly support this Tribunal, finance this Tribunal. The United States supplies the President, Canada supplies the Chief Prosecutor and*

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4 Viona Rashica, "The Main Characteristics of the International Criminal Tribunal for the Former Yugoslavia During Its Mandate From 1993 to 2017". *SEEU Review*, vol. 14, no. 1, 2019. Available at https://sciendo.com/article/10.2478/seeur-2019-0006.

5 Stuart Ford, "Fairness and Politics at the ICTY: Evidence from the Indictments". *North Carolina Journal of International Law and Commercial Regulation,* vol. 39, no. 1, 2013. Available at https://core.ac.uk/download/pdf/151516561.pdf.

6 Jovan Milojevich, "Justice for All? Revisiting the Question of Bias at The Hague Tribunal". *Serbian Studies: Journal of the North American Society for Serbian Studies*, vol. 30, no. 1, 2019, pp. 53-87. Available at https://muse.jhu.edu/article/771417.

7 UN Security Council, Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, S/PV.3217. Available at https://www.icty.org/x/file/Legal%20Library/Statute/930525-unsc-verbatim-record.pdf.

8 ICTY. Support and Donations. Available at https://www.icty.org/en/content/support-and-donations.

NATO countries provide many of the other judges and officials of the Tribunal. We… are in the forefront of countries supplying it with intelligence and materials to substantiate its indictments.[9]

3. Getting the ICTY off the Ground

The move to create a war crimes tribunal for Yugoslavia got off the ground with the Aug. 7, 1992, publication of the famous photographs of emaciated prisoners taken in the Trnopolje detention centre in Bosnia. The photos, which came from footage shot by ITN, were highly misleading and were presented in a way calculated to evoke memories of Auschwitz. For many years, the photograph featured prominently on the ICTY website's home page.

Within days of the publication of the photograph, the UN Security Council adopted the US State Department-drafted Resolution 771, calling

upon States and… international humanitarian organizations to collate substantiated information… relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.

The resolution made no mention of trials. Two weeks later, though, Western leaders, gathering at the London Conference on Yugoslavia, remedied this omission. German Foreign Minister Klaus Kinkel declared that "those responsible for all crimes and violations of human rights… must be brought to account. An international court of criminal justice has to be created."[10] French Foreign Minister Roland Dumas echoed this demand. The London Conference ended up issuing a vague commitment to take "all possible legal action to bring to account those responsible for committing or ordering grave breaches of the Geneva Conventions." And there was a promise to "carry forward a study of the creation of an international criminal court."[11]

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[9] http://www.pbs.org/newshour/bb/europe/jan-june99/nato_5-27.html. The page cannot be found so I cannot cite it properly.

[10] Balkan Odyssey Digital Archive, available at http://sca.lib.liv.ac.uk/collections/owen/boda/addrkink.pdf.

[11] International Conference on the Former Yugoslavia: Documents Adopted at the London Conference. *International Legal Materials*, vol. 31, no. 6, pp. 152-1548.

On Oct. 6, 1992, the UN Security Council adopted Resolution 780, which requested the UN Secretary General to establish an "impartial" Commission of Experts to "examine and analyse the information" that UN member states would be providing under Resolution 771. The commission – the name of which was intended to evoke memories of the United Nations Commission for the Investigation of War Crimes that paved the way for Nuremburg – would then offer its "conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law," and determine whether a criminal tribunal was warranted. Few doubted what its recommendation would be.

Resolution 780, like Resolution 771, made no mention of trials, and for a very good reason. Not everyone was sold on the idea of trials. A number of countries feared that trials might be an impediment to an otherwise attainable peace agreement. However, the United States was adamant that it would not accept any peace agreement that did not provide for war crimes trials. Washington would "not recognize… any deal or effort to grant immunity to those accused of war crimes," Albright promised the International Rescue Committee in 1993.[12]

However, despite Resolution 780's non-committal wording on the topic of trials, Western leaders loudly rejoiced that an international criminal court was about to come into being. "This decision, unprecedented since the creation of the [UN]," Roland Dumas told the Security Council, "opens the way for the establishment of a Permanent International Criminal Tribunal."[13] But a permanent court was not at all what the Americans had in mind. They wanted trials very badly, but an international criminal court in permanent session not at all. They preferred an ad hoc court.

The United States, in addition, wanted Egypt-born US academic M. Cherif Bassiouni to head the Commission of Experts. Bassiouni, a law professor at DePaul University in Chicago, made no secret of his sympathy toward the Bosnian Muslims and antipathy toward the Serbs. More important, Bassiouni shared the fundamental assumption of US policymakers: any peace agreement that did not provide for prosecution of war criminals was worthless. There could be

[12] Paul Lewis. "White House Is Adamant on Balkan War Crimes" in *New York Times,* 1993. Available at: https://www.nytimes.com/1993/11/03/world/white-house-is-adamant-on-balkan-war-crimes.html.

[13] William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone. Cambridge University Press*, Cambridge, 2006, p. 17.

no reconciliation without prior retribution. "As time passes, the zest for justice diminishes and world public opinion loses its interest in international justice," he lamented.

> *That is when a certain pragmatic realism devoid of moral ethical values overtakes the goal of pursuing justice. In the end, political leaders who prefer political settlements to the pursuit of justice can profess support for international justice without incurring its political liabilities*.[14]

However, UN Secretary-General Boutros Boutros-Ghali chose Dutch legal scholar Frits Kalshoven to head the commission. Kalshoven soon proved to be far too circumspect for the liking of the US He believed that the foremost priority should be an end to the war. "You must have some kind of peace… before you can start any criminal proceedings," he said.[15] Moreover, Kalshoven, unlike Bassiouni, did not seem interested in creating new international humanitarian law or in propounding sweeping theories of criminal culpability. He was not even sure that the evidence he had collected pointed unambiguously to the guilt of the Serb leaders. In February 1993, Kalshoven told the European Parliament that

> *despite testimonies of the victims and reports of international investigation teams it is still hard to collect solid proof that the Serbian leadership have ordered their troops to participate in systematic rape*.[16]

One newspaper even quoted him as saying "There is no way a tribunal could work in the present atmosphere of anti-Serb propaganda, which is rampant all over the world… It will never be possible to have an objective procedure."[17]

Moreover, the evidence of systematic criminality remained sketchy, a point he emphasized in his January 1993 interim report for Boutros-Ghali. Kalshoven warned that "Some reports appear to rely heavily on second-hand and media sources and many fail to provide important data." In addition, "In a number of cases, the alleged facts seem to be attributable to groups operating in a disor-

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[14] M. Cherif Bassiouni, "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal". *Fordham International Law Journal,* 1995. Available at https://ir.lawnet.fordham.edu/ilj/vol18/iss4/5/.

[15] "War crime Victims Face Long Wait for Justice". *The Independent,* 1993.

[16] "Bosnia: Doubts Cast Over Feasibility of War Crimes Tribunal". *IPS – Inter Press Service,* 1993.

[17] "War Crimes Unit Hasn't a Clue; UN Setup Seems Designed to Fail". *Newsday,* 1993.

ganized and undisciplined manner under very limited command and control." It was therefore "extremely difficult to determine whether such victimization occurred in the context of an armed conflict and to establish chains of command and command responsibility."[18]

Such perfectly appropriate judicial caution was completely absent from US Secretary of State Lawrence Eagleburger's speech delivered in Geneva in December 1992. Eagleburger promised "a second Nuremburg" for "the practitioners of ethnic cleansing." The "judgment, and opprobrium, of history awaits the people in whose name their crimes were committed."[19] Eagleburger was in no doubt as to who the guilty men were. He identified by name 10 men who were eligible for prosecution: seven Serbs, two Croats and one Muslim. The two Croats were paramilitaries, identified only by their nicknames; the Muslim was a camp commander – lowly officials, in other words. But it was the Serbs Eagleburger named that made his speech such a newsworthy event. The seven included Milošević, Karadžić and Mladić, who, Eagleburger asserted without hesitation, bore "political and command responsibility for crimes against humanity."

4. "Speedy Prosecution"

France also was lobbying for the establishment of a tribunal. French Foreign Minister Dumas delegated a committee of jurists to draft an outline for an international criminal court. On Feb. 10, 1993, the French jurists presented a detailed proposal for an ad hoc tribunal. An ad hoc court was necessary, they argued, because a permanent international court could not be "established within the necessary timeframe." There was no time to opt for the treaty route either. The "international negotiations and the diplomatic conference that would be required in order for an agreement to be reached… could be expected to take a long time, and the time required for its ratification would further delay its entry into force."[20]

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[18] Interim Report of the Commission of Experts established Pursuant to Security Council Resolution 780 (1992), S/25274, 10 February 1993, paras. 28 and 29.

[19] Balkan Odyssey Digital Archive, available at http://sca.lib.liv.ac.uk/collections/owen/boda/fmin4.pdf.

[20] Letter from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, UN Doc. S/25266, 10 February 1993, para. 28.

What unclear was the need for all this rush. The time for trials is surely after a war. The organization of the trials; the parameters for prosecutions; the charter, constitution and composition of the court – these were surely all matters that could be left to the peace negotiators. Investigation, collection of evidence, preparation for fair trials require an atmosphere free of political passions and military exigencies. The French justified their haste by invoking the familiar shibboleths of ending impunity and deterring future atrocities. The "use of judicial means while the conflict is still going on, rather than after it has ended," they argued, "can, through the speedy prosecution of those responsible for atrocities, help put an end to such excesses" – an assertion not backed up by any evidence from history.

Kalshoven's hesitations had little chance of prevailing against the Western war crimes trials juggernaut. On Feb. 22, amidst fulsome encomia to themselves, UN Security Council members, acting under Chapter VII of the UN Charter, voted to establish a tribunal for, in the words of Resolution 808, the "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Such a war crimes tribunal "would contribute to the restoration and maintenance of peace."

Loudest in self-congratulation was the US. The "Nuremburg Principles have been reaffirmed," Madeleine Albright exulted. "The lesson that we are all accountable to international law may have finally taken hold in our collective memory."[21] Then, foreshadowing the lack of even-handedness that would be a defining feature of the ICTY, Albright – who has been described as the "Mother of the Tribunal" by former ICTY President Gabrielle Kirk McDonald[22] – identified which crimes the ICTY would need to adjudicate:

> *Serbian ethnic cleansing has been pursued through mass murders, systematic beatings, and the rapes of Muslims and others, prolonged shelling of innocents in Sarajevo and elsewhere, forced displacement of entire villages, inhumane treatment of prisoners in detention camps, the blockading of relief to the sick and starving civilians.*

[21] Provisional Verbatim Record of the 3175th Meeting of the UN Security Council, S/PV. 3175, 22 February 1993.

[22] "The Ad Hoc Tribunals Oral Project". *Brandeis University,* 2016. An Interview with Gabrielle Kirk McDonald, International Center for Ethics, Justice and Public Life. Available at https://www.brandeis.edu/ethics/international-justice/oral-history/interviews/mcdonald-gabrielle-kirk.html.

Resolution 808 called on the Secretary-General to report back within 60 days with a blueprint for a tribunal. Boutros-Ghali duly reported back on 3 May with a draft of a statute.[23] In no time, on 25 May, the Security Council approved his report and adopted Resolution 827 creating the ICTY.

The ICTY was up and running and, by the summer of 1993, Kalshoven was gone. His replacement was Bassiouni, who did not have any of Kalshoven's qualms about the evidence collected. Eager to push humanitarian law in new directions, Bassiouni wanted rape and sexual assault to be designated as brand new war crimes, even though they had always been treated under the rubric of war crimes. He wanted a much looser definition of genocide and a much broader understanding of command responsibility.

Bassiouni was also a master of public relations, prone to overstate numbers in order to excite credulous politicians and sensationalist media. Testifying before the US Senate Intelligence and Foreign Relations committees on Aug. 9, 1995, Bassiouni declared that "at the time we concluded our work in May 1994, an estimated 200,000 civilians [had been] killed."[24] His figures flew in the face of serious studies of war-related deaths during the Bosnian war. For example, a 2005 study conducted on behalf of the ICTY by population experts Ewa Tabeau and Jacub Bijak, estimated that, in total, 102,622 people were killed in the war in Bosnia. Of those, 55,261 were civilians and 47,360 were soldiers.[25] Estimates so wildly off target should have brought the credibility of his commission into question. Instead, his commission's report became the database for the ICTY's investigations and prosecutions.[26]

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[23] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, S/25704, 3 May 1993.

[24] United States Congress, *War Crimes in the Balkans: Joint Hearing Before the Senate Intelligence and Foreign Relations Committees*. *Forgotten Books*, London, 1995.

[25] Ewa Tabeau and Jakub Bijak, "War-Related Deaths in the 1992-1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results", *European Journal of Population / Revue Européenne de Démographie*, vol. 21, no. 2/3, 2005, pp. 187-215.

[26] Frontline, *Background on the War Crimes Tribunal*. Available at https://www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/background.html.

5. Victims' Justice

The ICTY, in the words of its champions, was to dispense victims' justice, which, it was claimed, would bring reconciliation among the warring peoples of Yugoslavia. As the tribunal explained in its 2000 annual report:[27]

> *To achieve a lasting peace and bring an end to the cycles of violence in the Balkans, it will be essential for the ordinary citizens of the region of the former Yugoslavia to be satisfied that justice has been achieved. History has sadly taught that unless… such satisfaction is achieved, ordinary citizens will feel obliged to take justice into their own hands.*

This was something Richard Goldstone, the South African jurist appointed as the ICTY's first prosecutor, also liked to assert: "Justice, in all its forms, and fundamentally, is acknowledging what victims have suffered." But even more important, "For history's sake, it is important to get the leaders," Goldstone said. "The higher up you go to prosecute crimes, the more that sense of justice radiates out into the general population."[28] No peace without justice and no justice without prosecution of the "leaders."

The ICTY, its creators promised, would follow liberal jurisprudence and target individuals, not nations. "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes," Albright declared.[29] Future president of the ICTY, Theodor Meron, echoed this theme:

> *Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and the responsible leaders. Confirmation of the principle of accountability might also discourage those in the former Yugoslavia and elsewhere who envisage "final solutions" to resolve conflicts within their countries, and would serve to promote justice and the effectiveness of international law.*[30]

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[27] ICTY, *Annual Report,* 2000. Available at https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf.

[28] Robert Marquand, "A Dogged UN Judge Propels 'the Real Trial of the Century'" in *Christian Science Monitor,* 1995. Available at https://www.csmonitor.com/1995/1023/23071.html.

[29] UN Security Council, Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, S/PV.3217.

[30] Theodor Meron, "The Case for War Crimes Trials in Yugoslavia" in *Foreign Affairs,* 1993. Available at https://www.foreignaffairs.com/articles/yugoslavia/1993-06-01/case-war-crimes-trials-yugoslavia.

However, the "individual perpetrators" that Meron had in mind were the ones the French jurists had characterized as the "policy makers, those who turned the violation of basic human rights and the laws of war into a permanent system for attaining political objectives."[31] They were Goldstone's "leaders," whom it was "important to get." They were the "Government officials" whom Albright had vehemently denounced during the May 1993 UN debate on Resolution 827:

> *The crimes being committed… are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, military commanders, and disciplined artillerymen and foot soldiers.*[32]

Thus, the "individuals" the ICTY was instructed to prosecute were not the individuals who had actually committed war crimes or their commanding officers. The ICTY was to go after the "policy makers." But, by instructing the ICTY to go after political leaders, the Western powers were making explicit what had been implicit from the start: the ICTY was using the criminal legal process as an instrument of war against political leaders out of favour with the Western powers.

The ICTY has indicted no less than seven presidents, every one of whom was a Serb.[33] These were the *individual* perpetrators that Albright and Meron had in mind. By prosecuting all of the Serb leaders of the 1990s, the ICTY was of course prosecuting the nation that they had led – the people who had voted for them and had implemented their policies. In other words, collective guilt attached to the Serbs. Eagleburger at least had been honest about it. The "judgment, and opprobrium, of history awaits the people in whose name their crimes were committed," he had warned.

6. Outside ICTY's purview: crimes against peace

After setting up the ICTY, the UN Security Council made two bizarre but unsurprising decisions. First, it removed from the ICTY's jurisdiction the crime

[31] UN Doc. S/25266, 10 February 1993, para. 84.

[32] UN Doc. S/PV.3217, 25 May 1993.

[33] The seven included Slobodan Milošević (Serbia and FRY) and Milan Milutinović (Serbia); Radovan Karadžić and Biljana Plavšić (Republika Srpska); and Milan Babić, Goran Hadžić and Milan Martić (Republika Srpska Krajina).

that the Nuremburg Tribunal had deemed the supreme crime, namely, the crime against peace. Second, it declared the tribunal to be answerable to no one but itself.

Denial of ICTY jurisdiction over crimes against peace seems strange. The tribunal's raison d'être had after all been "restoration and maintenance of peace." And the crime against peace, "namely, planning, preparation, initiation or waging of a war of aggression," was, according to the 1945 charter of the International Military Tribunal, the first and most important crime. There was a reason for this. Once war starts, everyone is handed a weapon and ordered to kill. Horrific atrocities are inevitable.[34] This was why Robert H. Jackson, chief US prosecutor at Nuremburg, designated the crime against peace as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[35]

Furthermore – and this was something of which a UN-established body should have been aware – the United Nations had already unambiguously defined what constitutes the crime of aggression. UN General Assembly Resolution 3314, adopted on Dec. 14, 1974, declared aggression to be the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State" (Article 1). Furthermore, "no consideration of whatever nature… may serve as a justification for aggression. *A war of aggression is a crime against international peace*" (Article 5) [my italics].

The ICTY statute, however, says nothing about crimes against peace. The statute lists as crimes violations of international humanitarian law; grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide; and crimes against humanity. What is criminal is what takes place after a war starts; the act of starting a war, on the other hand, is not criminal. *Jus in bello* was within the ICTY's purview; *jus ad bellum* was not.

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[34] The Rome Statute of the International Criminal Court lists the "crime of aggression" among the crimes over which the court has jurisdiction. However, the statute immediately adds that it would exercise jurisdiction over this crime only after the adoption of a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."

[35] Count One of the indictment of the Nazi leaders addressed the conspiracy to wage aggressive war: "all the defendants… participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of Crimes against Peace, War Crimes, and Crimes against Humanity."

Not only was the ICTY turning its back on Nuremburg, it was doing so disingenuously. The ICTY's creators had entrusted it with the task of going after political leaders, not regular combatants, and Serb political leaders at that. Recall the words of Michael Scharf: the ICTY's goal was "to educate the Serbian people, who were long misled by Milošević's propaganda, about the acts of aggression, war crimes and crimes against humanity committed by his regime." Or the words of the French jurists who insisted that the tribunal would target the "policy makers, those who turned the violation of basic human rights and the laws of war into a permanent system for attaining political objectives." In other words, war crimes, in the view of the ICTY, do not arise in the heat of battle; to the contrary, they are integral to the malign schemes of malign politicians with malign political objectives. What else are such war crimes but "crimes against peace"?

The omission of "crimes against peace" from the ICTY's agenda was not hard to understand. The US, chief booster of the ICTY, has always opposed criminalization of the act of launching an aggressive war because it realized its own vulnerability on that issue.

7. An Unaccountable ICTY

Understandable also was the UN Security Council's stipulation that the tribunal brook no outside interference. Though a subsidiary organ of the Security Council, the tribunal was "to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions."[36]

On the face of it, the plan seemed unobjectionable. Modern democratic practice demands that judiciaries act independently of politicians. However, the analogy with domestic courts was inappropriate for a number of reasons.

First, judiciaries in democracies are not laws unto themselves. In a democracy, the chief prosecutor is a member of an elected government and is therefore accountable both to elected legislators and to electorates. In addition, trial court judgments are reviewable by different courts. Even the final judgments of the highest courts can be reviewed and overturned. Governments can re-open cases,

[36] UN Doc. S/25704, 3 May 1993, para. 28.

and chief executives can issue pardons, clemencies, sentence commutations and amnesties. The ICTY, on the other hand, is prosecutor, trial court and appellate court, all in one. ICTY judgments are not susceptible to any review by anyone. No living person can overturn a decision by the ICTY appeals court.

Second, the ICTY had been created with the explicit political purpose of restoring peace. If the UN Security Council, under Chapter VII, has the right to do whatever it sees fit to secure international peace (including the creation of an ad hoc criminal court), then it surely also has the right to determine whether a subsidiary organ is indeed furthering the cause of peace. Security Council oversight should have been mandatory.

Third, judicial independence has hardly been the defining characteristic of the ICTY. While it may have acted independently of the Security Council, it has not acted independently of the US and NATO.

Richard Goldstone, the ICTY's first prosecutor, disclosed that no sooner was the ICTY open for business than the US government was aggressively selecting ICTY prosecutors, staff and judges.[37] Goldstone recounted the UN Secretary-General's remonstrating with him over the amount of time he was spending visiting NATO government officials.[38]

8. The NATO-ICTY Nexus

Goldstone's regular visits to NATO capitals were understandable. From the beginning, the US envisaged ICTY indictments as a key part of its strategy in its conflict with the Serbs. As Michael Scharf explained, indictments would secure removal of political leaders that Washington wanted out of the way:

> *Indictments… would serve to isolate offending leaders diplomatically, strengthen the hand of their domestic rivals and fortify the international political will to employ economic sanctions or use force. Indeed, while the United States and Britain*

[37] As Richard Goldstone recounted in *For Humanity*, on his first day on the job he found that of the 40 people working in the prosecutor's office no fewer than 23 were Americans. They included "lawyers, computer technicians, and police investigators, all of whom had been assigned to the tribunal by the US government."

[38] Richard J. Goldstone, "For Humanity: Reflections of a War Crimes Investigator", *Yale University Press,* New Haven, 2000, p. 100.

initially thought an indictment of Milošević might interfere with the prospects of peace, it later became a useful tool in their efforts to demonize the Serbian leader and maintain public support for NATO's bombing campaign.[39]

This was standard ICTY practice. On 27 July 1995, the ICTY issued indictments against Karadžić; Mladić; and Milan Martić, president of the Republika Srpska Krajina. The date was significant. On Aug. 3, Croatia launched Operation Storm against Republika Srpska Krajina, leading to the end of the Serb autonomous region. US officials made no secret of their support for Operation Storm; indeed, NATO took an active part in it (NATO attacked the Croatian Serbs' early warning system, enabling Zagreb to use its air force against Krajina). On Aug. 29, NATO launched Operation Deliberate Force, a month-long massive bombing campaign against the Bosnian Serbs. The ICTY's demonizing of the leaders of the Bosnian and Croatian Serbs on the eve of these military attacks served to justify NATO and NATO-supported military action to a sceptical public.

Following the issuance of the indictments, ICTY President Antonio Cassese exultantly told reporters, "The indictment means that these gentlemen [Mladić and Karadžić] will not be able to take part in peace negotiations… I challenge anyone to sit down at the negotiating table with someone accused of genocide."[40] Cassese was right. Neither Mladić nor Karadžić was able to take part in the Dayton negotiations later that year that brought the war in Bosnia to an end.

Never did the ICTY work as actively on behalf of NATO as during NATO's 1999 bombing campaign. On 26 March, a mere two days after the start of NATO's attack, the ICTY's chief prosecutor, Louise Arbour, wrote to Milošević warning him:

I am gravely concerned that serious violations of international humanitarian law continue to be committed. It is my intention to investigate all serious violations of international humanitarian law that merit prosecution… I therefore look to you to exercise your authority over your subordinates; to exercise your leadership in

[39] Michael P. Scharf, "Indicted for War Crimes, Then What?" in *Washington Post,* 1999.
[40] ANP English News Bulletin, 27 July 1995.

> *order to prevent the commission of further crimes; and to take all necessary steps to punish any of your subordinates who commit serious violations of international humanitarian law in Kosovo*.[41]

Arbour did not feel the need to send such a letter to the leaders of NATO. On 8 April, ICTY President Gabrielle Kirk McDonald got in on the act, writing to NATO foreign ministers pleading for their help in building a criminal case against Yugoslavia:

> *All States and organizations in possession of information pertaining to the alleged commission of crimes within the jurisdiction of the Tribunal should make such information available without delay to the Prosecutor. Several NATO Member States have expressed a willingness to assist the Tribunal with providing such evidence. I am confident that all Members of the North Atlantic Council will assist the Tribunal in providing any evidence of criminal wrongdoing in their possession*.[42]

Arbour then embarked on a trek through NATO capitals collecting evidence of Serb crimes. Making no secret as to whom she intended to prosecute, she announced that she needed to turn the information NATO was providing her

> *into evidence that can be used in a criminal court, particularly so that we can determine the command structures of military and police forces, and prove the responsibility of military and political leaders for any war crimes that are being committed… Refugee accounts are critical, but they are not enough on their own. The victims didn't see the command structures or the people giving the orders at the highest levels. We therefore need the sophisticated kind of assistance that only states can provide*.[43]

By May, however, public support for NATO's bombing campaign was flagging. There had been the attack on the Chinese embassy, the destruction of an Albanian refugee convoy, the bombing of a passenger train, the attack on RTS TV station, the Niš marketplace cluster bombing. NATO badly needed a boost, and the ICTY was on hand to help out. On 22 May, Arbour issued indictments

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[41] Statement by the Prosecutor. Available at https://www.icty.org/en/press/statement-prosecutor-0.

[42] President McDonald Writes to NATO Ministers of Foreign Affairs on Situation in Kosovo. Available at https://www.icty.org/fr/press/president-mcdonald-writes-nato-ministers-foreign-affairs-situation-kosovo.

[43] ICTY Weekly Press Briefing, 21 April 1999. Available at https://www.icty.org/fr/node/1070.

against Yugoslavia's top leaders: Milošević; Milan Milutinović, president of Serbia; Nikola Šainović, deputy prime minister of Yugoslavia; Dragoljub Ojdanić, chief of staff of Yugoslavia's armed forces; and Vlajko Stojilković, Serbia's internal affairs minister.

Arbour's indictment, needless to say, hewed closely to the oft-repeated NATO narrative: the Serbs had directed a campaign of terror against the Albanians in order to secure demographic change in Kosovo. The Serbs had launched their campaign long before the first NATO bomb fell, and of course Yugoslavia's leaders had planned and controlled everything down to the minutest detail.

> *The operations targeting the Kosovo Albanians were undertaken with the objective of removing a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian control over the province.*[44]

Yet, despite her claims of a conspiracy hatched in Belgrade to rid Kosovo of its Albanian population, almost all of the Serb crimes Arbour listed in the indictment occurred after NATO had launched its attack.

Arbour's work on behalf of NATO continued after the bombing stopped. ICTY investigators rushed in hotfoot, trailing after NATO tanks, in search of the mass graves that supposedly littered the province. The ever-helpful NATO, the ICTY purred in its 2000 annual report, "found and secured the sites of mass graves, provided aerial surveillance of reported mass grave sites and generously gave logistical support to staff of the Tribunal."[45] NATO's generosity however yielded few dividends. In November 1999, when the ICTY stopped its digging, it had exhumed a total of 2,108 bodies, neither their manner of death nor their ethnicity immediately apparent – a far cry from the 100,000 killed-Albanians that NATO political leaders had been touting.[46]

There remained one final service that the ICTY had to render: the ICTY needed to exonerate NATO of any and all war crimes. On 14 May 1999, Louise

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[44] Prosecutor v. Milošević, et al., Initial Indictment, IT-99-37, 22 May 1999.

[45] ICTY. *Annual Report,* 2000. Available at https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf.

[46] Dana Priest, "Milošević Discussed as a Goal; Atrocities Lead to Backing for New Target" in *Washington Post,* 1999. Available at https://www.washingtonpost.com/archive/politics/1999/04/05/milosevic-discussed-as-a-goal/cb10de18-4f38-4eaa-a48e-7966e17873ca/.

Arbour set up a committee to assess allegations of possible NATO war crimes and, as she put it, to advise her whether there was sufficient basis to proceed with an investigation into "some or all the allegations… related to the NATO bombing."

The committee prepared an interim report and, on Dec. 6, 1999, handed it to Arbour's successor, Carla del Ponte. For months del Ponte sat on the report. Finally, on 2 June 2000, del Ponte went before the UN Security Council and proudly announced: "I am very satisfied there was no deliberate targeting of civilians or of unlawful military targets by NATO during the bombing campaign." After "full consideration of my team's assessment of all complaints and allegations," she had concluded "that there is no basis for opening an investigation into any of those allegations or into other incidents related to the NATO bombing."[47]

Del Ponte's announcement only served to shred what remained of the ICTY's credibility. Even if Del Ponte were right and there had been "no deliberate targeting of civilians," that did not prove NATO had complied with international humanitarian law, or that there was no basis for "opening an investigation." The Geneva Conventions prohibit any targeting that recklessly endangers civilian lives. The ICTY's statute authorizes investigation, prosecution and punishment of "wanton destruction of cities, towns or villages"; "extensive destruction… of property, not justified by military necessity"; and "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings."

Bombing a marketplace or a bridge in broad daylight can be expected to result in civilian deaths. Bombing a TV headquarters and studio will also, as likely as not, result in many deaths. They do not cease to be war crimes, just because the killings were incidental to the purpose of the attacks.

The generosity the ICTY extended to NATO was never extended to Serbs. If Serbs are found to have taken insufficient care to distinguish military from civilian targets the ICTY has no trouble inferring that their intent was "deliberate targeting of civilians." Take the case of Bosnian Serb Major General Stanislav Galić. In 2003, the ICTY convicted him of crimes against humanity for, among other things, shelling Sarajevo airport. The airport was supposed to be used exclusively by UN personnel for UN purposes. However, as the ICTY

[47] NATO Press Release, 7 June 2000. Available at http://www.nato.int/docu/pr/2000/p00-060e.htm.

acknowledged, Bosnian Muslim "troops dressed as civilians used to cross the runway with military supplies for the city."[48] There was also a tunnel under the airport which the Muslims used to bring in weaponry and to transport troops.

When the UN failed to put an end to this practice, the Bosnian Serbs began to shell the airport. The ICTY concluded that, by doing so, the Serbs had intended to attack civilians. The Bosnian Serbs, according to the ICTY, "shot without knowing whether the movements they saw on the runway were caused by civilians or by soldiers dressed as civilians."[49] Piously, the trial court opined that "when there is doubt whether a person is a civilian or a military, that person is not a legitimate military target." The ICTY happily convicted Galić because "a number of civilians trying to cross the airport tarmac were targeted in full awareness of their civilian status or in the reckless disregard of the possibility that they were civilians."[50]

Interestingly, having accepted without dispute Human Rights Watch's estimate of 500 civilians killed during NATO's bombing campaign, the ICTY-appointed committee determined that 500 was too paltry a number to provide "evidence of the necessary crime base for charges of genocide and crimes against humanity."[51] The ICTY's May 1999 crimes-against-humanity Kosovo indictment, incidentally, was based on the deaths of 340 Kosovo Albanians.

9. Failing to Follow the Statute

There was something else troubling about the stipulation that the ICTY act independently of the United Nations. The ICTY was a subsidiary organ of the UN and, while the Security Council had had a say in the drafting of the ICTY statute, it had had no say in the creation of the ICTY's Rules of Procedure and Evidence. The ICTY alone came up with these rules, amending them no less than 51 times since 1994 (the statute itself has been amended nine times). These rules, as well as the daily practices and legal doctrines that guide ICTY

[48] Prosecutor v. Galić, IT-98-29-T, Judgment and Opinion, 5 December 2003, para. 412.

[49] Galić, paras. 415 and 416.

[50] Galić Galić, para. 743.

[51] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 90. Available at https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal.

judgments, not only contradict the statute (and thus implicitly the wishes of the Security Council), they also go far beyond Nuremburg jurisprudence or indeed the common understanding of international humanitarian and criminal law at the time the ICTY was created.

Rule amendment is the prerogative of ICTY judges and prosecutors; neither defence lawyers nor UN Security Council members have any say in the matter.[52] Unsurprisingly, rule amendment has been directed toward making prosecution as trouble-free as possible.

Practicing "victims' justice," the ICTY prides itself, in the words of Patricia M. Wald, a former ICTY judge, on the "lavish use of witness testimony."[53] That means ICTY operations are severely compromised when, as frequently happens, the credibility of witnesses is called into question. Rule amendment has served to protect dubious prosecution witnesses.

"Victims' justice" means that other requirements of justice such as ensuring fair trials for defendants fall by the wayside. It means unquestioning acceptance of victims' allegations. ICTY practice has shown that a defendant who challenges the truthfulness of a purported victim's testimony will win few favours from the judges. He will be deemed to be inflicting further humiliations on his victim and thereby offering more evidence of his reprehensible (and guilty) character. Rule 75 of the ICTY's Rules of Procedure and Evidence, for example, mandates that "a Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation." Harassment and intimidation are of course inseparable from cross-examination.

The Milošević trial provided innumerable examples of purported victims running into trouble in the face of probing cross-examination.

There was for example Agim Jemini, a Kosovo Albanian engineer who claimed to have hidden in the attic of his house while Serb forces were rampaging through his village, and to have overheard the radio conversations of Serb soldiers who were in the house opposite to his.[54] Milošević asked how he could have overheard

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[52] Rules of Procedure and Evidence, 8 December 2010, Rule 6. Available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf.

[53] Patricia M. Wald, "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal". *Yale Human Rights & Development Law Journal,* 5(1), 2002. Available at https://digitalcommons.law.yale.edu/yhrdlj/vol5/iss1/6.

[54] Milošević Trial Transcript, 7 June 2002, p. 6540.

conversations, given that the house opposite to his did not have windows facing him. Moreover, would not all these Serbs shooting indiscriminately, breaking into houses, yelling and looting have made a terrible noise, effectively making it impossible for him to overhear a conversation in a nearby house? The ICTY judges swiftly ended the cross-examination.

Then there was Xhevahire Syla, a Kosovo Albanian woman, who testified about NATO's 17 April 1999, attack on a refugee convoy at Djakovica that led to the death of some 70 refugees. NATO had at first denied responsibility for the attack, accusing the Serbs of having bombed the convoy. Eventually NATO admitted to having carried out the bombing.

In her testimony, however, Syla asserted that the planes that had bombed the convoy had the Yugoslav tricolour painted on them. NATO's original falsehood was therefore true. When Milošević pointed out to her that NATO had already accepted responsibility for the bombing, she replied, "This was the entire plan of the accused, to do this sort of thing and blame NATO."[55] Even admission by NATO was not enough to change the mind of this witness as to Serb responsibility. The ICTY was helping out NATO even when NATO did not want its help.

Another doubtful witness was Ali Gjogaj, a Kosovo Albanian gravedigger. Gjogaj had made two statements, one in February 2000 and one in June of the same year. In his first statement, he had recounted that in April or May 1999, Serb police had forced him to exhume bodies in Pusto Selo and to rebury them elsewhere in Kosovo. In his second – June 2000 – statement, he spoke about Serbs taking him to a military firing range in April 2000 and forcing him to carry out exhumations there.

Milošević asked the obvious question: why had Gjogaj forgotten to mention the events at the firing range in his first statement? At this point, Richard May, the presiding judge, intervened to explain irritably to the obviously obtuse Milošević that, since Gjogaj in his June 2000 statement was describing an event that had taken place in April 2000, he could hardly be expected to describe in February 2000 an event that had yet to take place. Milošević retorted that the events of April 2000 could only have taken place in Gjogaj's imagination. For in April 2000, "there were no Serb authorities or Serb police in Kosovo."

[55] Milošević Trial Transcript, 17 July 2002, p. 8209.

Yet, rather than admit that he had gotten his dates wrong, Gjogaj angrily continued to insist that the exhumations at the firing range had taken place in April 2000. Extraordinarily, May continued to support him before speedily bringing proceedings to an end.[56]

Next day's session began with the prosecutor's announcing that there had been some confusion the day before. The events at the firing range had taken place in April 1999, not in April 2000. This admission, however, left a key question unanswered: why had Gjogaj insisted on April 2000, even when he had been offered an opportunity to correct his statement? Had he been misled by incompetent prosecutors? Or was he perhaps describing a different event – and thereby pointing to different, and thus non-Serb, culprits – that had indeed taken place in April 2000?

Milošević turned to the witness and asked whether the exhumations at the firing range had taken place in the spring of 2000.[57] May however did not permit Milošević to ask this question. Instead, May turned to Gjogaj and asked why he had made no mention of the exhumations at the firing range in his February 2000 statement. This was Milošević's question from the day before that the witness had answered: because the exhumations took place in April 2000! Now, however, Gjogaj changed his story: the prosecutors who had interviewed him in February 2000 had made no mention of the firing range episode, and had only brought it up during the second interview in June 2000. Apparently, he needed to be reminded of traumatic events, otherwise he could not remember them.

Milošević wondered what had made the gravedigger change his testimony. Had he talked to anyone after the end of the previous day's proceedings? May again jumped in, reformulating the question: "Did you talk to anybody from the Prosecution during the adjournment?" The obviously well-coached witness was ready for that question and unhesitatingly replied "No." Another witness was saved from serious challenge.

[56] Milošević Trial Transcript, 3 July 2002, pp. 7411-7419.
[57] Milošević Trial Transcript, 4 July 2002, pp. 7421-7427.

10. Protecting Witnesses

Such examples can easily be multiplied. It is understandable therefore why the ICTY had to go out of its way to shield witnesses from cross-examination. ICTY rules permitted witnesses to testify anonymously (aided by the use of facial and voice distortion techniques) and even by videotape. Witnesses frequently testified in closed session. They gave multiple statements, enabling them to bring their recollections into line with prosecutorial requirements. Hearsay was permitted and regularly employed. Prosecutors could present pretrial witness statements as witness trial testimony. Since statements made to, and prepared by, prosecutors are essentially prosecution statements, prosecutors were able to use witnesses as conveyor belts to tell the court whatever stories the prosecutors wanted told.

Even this was not enough. Prosecutors and judges continued to amend rules to restrict the scope of cross-examination and to limit witness appearances in court. Rule changes allowed prosecutors to conceal sources of information and to enter into evidence material that would be inadmissible in any self-respecting domestic court.

One example of self-interested amendment was adoption of Rule 66(c). The rule, according to the ICTY's 1995 annual report, permits prosecutors to "apply for non-disclosure of information where its disclosure could prejudice investigations, affect the security interests of a State or might otherwise be contrary to the public interest." Then there was amendment of Rule 70. This rule, according to the 1996 annual report, "was amended in order to allow the Prosecutor to use as evidence information provided to him on a confidential basis, while at the same time protecting the source by restricting the power of a Trial Chamber to order the source to produce additional evidence or to summon a representative of the source as a witness."[58] Even more helpfully, Rule 70 (D) stipulated that a court could not even ask the "source" about the origin of his information: "if the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any

[58] The amended Rule 70 (B) stated that "if the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person… providing the initial information."

question relating to the information or its origin." Thus, prosecutors could introduce illegal wiretaps and dubious footage or audio recordings, the authenticity of which remained unverified and the provenance of which remained secret.

Then there was Rule 68, which, before its amendment, had stipulated that prosecutors were obligated to disclose to defendants any exculpatory information in their possession. Following the 2004 amendment, a prosecutor was permitted to "apply to the Chamber sitting *in camera* to be relieved from an obligation… to disclose information in [his] possession… if its disclosure may prejudice further or ongoing investigations, or for any other reason which may be contrary to the public interest or affect the security interests of any State." Most jurisdictions deem prosecutors' non-disclosure of evidence favourable to a defendant as an egregious violation of due process.[59]

Another serendipitous rule change was the December 2000 adoption of Rule 92 bis. This rule permits the ICTY to "dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement" or in the form of a transcript of that witness's testimony from another trial. Such a witness is thus effectively shielded from having to face any cross-examination at all. Admission of testimony from another trial means admission of testimony that an accused has not had the opportunity to challenge.

Denial of the right to challenge the veracity of witness testimony seriously calls the fairness of a trial into question. Geoffrey Gilbert in his classic, *The Law of Evidence*, argued that the

> *credit of Depositions ceteris paribus falls much below the Credibility of a present Examination viva voce, for the Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes*.[60]

Rule 92 ter (adopted in September 2006), admits written statements, in addition to oral testimony, made in another trial. Admissible, under Rule 92

[59] In the United States, prosecutors are required to disclose to defendants all potentially exculpatory material in their possession whether or not defendants asked for it. This is known as the Brady Rule, following *Brady v. Maryland*, 373 US 83 (1963).

[60] Gilbert Geoffrey, "The Law of Evidence, 5th ed.", Gale – The Making of Modern Law 1788, p. 59.

quater (also adopted in September 2006), is "evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally."

Rule 92 quinquies (adopted in December 2009) goes even further. This rule states that the court "may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal" even if "the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect." Thus, pretty much any statement, no matter how questionable the source, no matter how dubious the circumstances in which it was given, is admissible at the ICTY.

By introducing into evidence witness statements that defendants had not been given the opportunity to challenge through cross-examination, the ICTY was reverting to the practices of the Star Chamber, an English legal institution that by the middle of the 17th century had become synonymous with tyranny. According to one scholar, in Star Chamber trials, "proof usually consisted of reading statements that had been made out of court, such as depositions, confessions of accomplices, and letters."[61] During Sir Walter Raleigh's 1603 treason trial, for example, the principal "witness," Lord Cobham, Raleigh's alleged accomplice, "never testified before the jury. Instead, the prosecution relied almost exclusively on witnesses testifying to statements that Cobham had made to officers of the Crown." Raleigh claimed Cobham had lied to save himself, and demanded that Cobham appear in person. The judges refused, and Raleigh was convicted and sentenced to death. As a consequence of this case, the US Supreme Court has argued,

> *through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused face to face at his arraignment… Courts, meanwhile, developed relatively strict rules of unavailability.*[62]

[61] Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model". *University of Minnesota Law Review*, vol. 76, p. 557, 1991. Available at https://scholarship.law.umn.edu/mlr/1875.

[62] Crawford v. Washington, 541 US 36, 2004.

11. Denying Defendant Rights

In addition to amending rules in order to help protect prosecution witnesses, the ICTY has amended rules to deny basic rights to defendants. For example, the ICTY statute meticulously follows the International Covenant on Civil and Political Rights in promising that a defendant would have the right to be "tried in his presence, and to defend himself in person or through legal assistance of his own choosing." Yet the ICTY has regularly imposed attorneys on unwilling defendants. In September 2004, during the Milošević trial, immediately following the closure of the prosecution case, the judges imposed an attorney on Milošević. As justification, they cited concerns over his health-a concern, it should be noted, that did not allow Milošević to receive the medical treatment he and his doctors had requested. The judges argued that, in light of their obligation "to ensure that the trial is fair and expeditious" and of "the risk to the health, and indeed the life, of the Accused" it would be "irresponsible to allow the Accused to continue to represent himself."[63]

Unable to find a judicial precedent anywhere for the denial of self-representation, particularly on the grounds of ill-health, the ICTY came up with the peculiar argument that since the "right to defend oneself in person is not absolute" "there may be circumstances where it is in the interests of justice to appoint counsel." Furthermore, the ICTY asserted, there exists "no authority from domestic jurisdictions which indicates any reason in principle why counsel should not be assigned." From that, judges leapt to the happy conclusion that the "overarching right to a fair trial… may, where appropriate, lead to the assignment of counsel for the Accused to conduct his defence."

In typical ICTY fashion, this momentous decision became precedential and, in November 2008, the ICTY amended its rules, decreeing, "The Trial Chamber may, if it decides that it is in the interests of justice… assign a counsel to represent the interests of the accused." Yet the words in the ICTY's statute outlining defendant rights have remained unaltered.

There is no legal justification for such a drastic curtailment of the rights of defendants. It goes beyond both Nazi Germany or apartheid South Africa. In

[63] "Reasons for Decision on Assignment of Defense Counsel," Prosecutor v. Milošević, IT-02-54-T, 22 September 2004, Paras. 50 and 51.

1934, Communist International functionary Georgi Dimitrov was permitted to represent himself in the Reichstag-fire trial, as was Nelson Mandela in the 1963 Rivonia trial.

Another example: there is no mention anywhere in the statute that an indictment can be amended after a trial commences. Yet the ICTY regularly amends indictments during a trial, thus seriously jeopardizing the rights of defendants who are left perpetually in the dark as to what they are accused of. (The indictment of Milošević was last amended some six months after the prosecution had finished presenting its case).

Similarly, there is no mention in the statute of plea-bargaining. Yet the ICTY accepts and encourages plea bargains. Plea bargains were not envisaged for a reason. They encourage defendants to confess to crimes they have not committed and to incriminate others in exchange for lenient treatment. The ICTY, set up to go after the "leaders," is bound to be very eager to extract incriminating but fabricated confessions from relatively lowly officials in order to build cases against its targets. Given the draconian sentences the ICTY metes out and the virtual certainty of conviction in a court untroubled by the presence of jurors or review by an outside body, a defendant would have every incentive to testify falsely in exchange for a substantial reduction of his prison term.

12. Expanding Criminal Liability

Without doubt, the ICTY's most flagrant violation of the statute is its all-encompassing theory of criminal culpability.

Convictions at The Hague, as at Nuremburg, depend in large part on the supposed mechanics of command responsibility. Command responsibility is of two kinds. There is the straightforward kind, namely, the issuance of an illegal order. Criminal liability in such cases is easy to determine. However, that is not what is usually meant by command responsibility. Command responsibility refers to the responsibility of a commander for the crimes of subordinates that he did not himself order but that he failed either to prevent or to punish.

Command responsibility has always been a troublingly nebulous legal notion. Criminal law is based on individual responsibility; under the theory of command responsibility, a person is held liable for the criminal conduct of someone else.

Command responsibility liability is one of omission rather than commission, as is clear from the wording of Article 86(2) of the 1977 Additional Protocol I to the Geneva Conventions:

> *The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility… if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*

Article 86(2) does not say that strict liability attaches to a commander as a result of his dereliction of duty.

To be sure, Article 7(3) of the ICTY statute is based on Article 86(2). There are significant differences though. The ICTY statute states,

> *the fact that any of the acts referred to in… the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*

The ICTY statute replaces "penal or disciplinary responsibility" with "criminal responsibility." And "feasible measures within their power to prevent or repress the breach" is replaced by "necessary and reasonable measures." The change of wording is important for it shifts the burden of proof from prosecutor to defendant. It is no longer incumbent upon a prosecutor to prove that a superior had knowledge of impending crimes and had the power to prevent them. It is now up to the superior to prove his lack of knowledge of crimes and/or his lack of power to prevent them. According to Protocol I, effective command has to be proved; according to the ICTY statute, effective command is assumed. Crucially, the commander is not held liable under a lower standard, such as dereliction of duty. Instead, the commander is held liable for the actual crime itself.

Liability for serious crimes on ground of omission is unusual in criminal law. As the authoritative International Committee of the Red Cross commentary on Article 86 pointed out, not every case of negligence is criminal. To be criminal, "the negligence must be so serious that it is tantamount to malicious intent."

Intent is key. The commentary explains that it is "precisely on the question of intent that the system of penal sanctions in the Conventions is based. This applies both in the field of breaches resulting from a failure to act in general and with regard to breaches resulting from negligence."[64]

From the start, the US had wanted the ICTY to commit itself to a sweeping theory of command responsibility. The US advocated the so-called *Yamashita* standard. Japanese Imperial Army General Tomoyuki Yamashita had been found guilty and executed, Michael Scharf wrote approvingly, "not on the ground that he knew or had reason to know of [atrocities committed by Japanese forces under his command] but on the ground that he condoned a general atmosphere of lawlessness that pervaded the troops under his command."[65]

Under the broad standard sought by the US, anyone in command – and that meant political leaders above all – could be prosecuted for any crime committed by anyone under their command. Needless to say, such an expansive reading of command responsibility would apply only to NATO's adversaries, never to NATO, or to fighters aligned with NATO.[66] Ironically, criminal culpability via command responsibility was a far cry from the extravagant claims of Albright, Goldstone, Meron and the French jurists that the guilty men were the political leaders who ordered the commission of crimes as a matter of policy.

It soon became clear to ICTY prosecutors however that no matter how far-reaching the command-responsibility standard, the ICTY would still have a hard time netting the sought-after "leaders." Command responsibility is hard to prove in the absence of evidence that a commander was in a position to exercise control at the time the crime was committed. In the case of the ICTY's biggest fish, Slobodan Milošević, he was not in command of forces either in Bosnia or in Croatia. The ICTY soon began rummaging around for something a lot more all-encompassing.

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[64] ICRC Commentary on Protocol I Additional to the Geneva Conventions of 1949 at 1013.

[65] Michael P. Scharf, "Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg". *Durham*, 1997, p. 59.

[66] No one would have dreamt of assigning responsibility for the infamous "turkey shoot" at Rumaila during Gulf War I to President George H.W. Bush; or Abu Ghraib, Falluja and the slaughter of more than 1000 prisoners at Mazar-e-Sharif in Afghanistan to President George W. Bush.

13. Joint Criminal Enterprise

In the very first case it adjudicated, the ICTY came up with a novel and startling theory of liability, one that is mentioned nowhere in the statute: the "joint criminal enterprise." The JCE has turned out to be the court's most notable contribution to international jurisprudence.

Though suggestive of a conspiracy, JCE does not refer to a joint agreement to do anything specific. A JCE is a shared state of mind. ICTY prosecutors have been able to define the scope of any JCE any way they wished. Its participants do not actually join it. Indeed, they do not even know of its existence – they are assumed to be members on account of their supposedly sharing the conspiracy's aims, which, however, remain cloudy.

The JCE freed prosecutors from the burden of having to prove individual criminal intent or direct command responsibility. Prosecutors could now impute any common criminal purpose to a random collection of individuals, and then declare of anyone that, since he shared the aims of everyone else in this joint criminal enterprise, he must bear criminal responsibility for the crimes committed by any member of this enterprise. A member of a JCE becomes guilty of any and all of the crimes perpetrated by every other member. "Provided the agreed crime is committed by one of the participants in the joint criminal enterprise, all the participants are equally guilty of the crime regardless of the role each played in its commission."[67]

The ICTY's first attempt to define a JCE came in 1999. In *Prosecutor v. Tadić*, the ICTY Appeals Court identified three distinct categories of JCE. The first category was relatively straightforward: the alleged perpetrators act pursuant to a common design and share the same criminal intent. Acting "pursuant to a common design," the ICTY explained, the defendants

> *possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.*[68]

[67] Prosecutor v. Milomir Stakić, IT-97-24-T, Judgment, para. 435.

[68] Prosecutor v. Tadić, IT-94-1-A, Appeals Judgment, 15 July 1999, para. 196.

The second category involves "concentration camp" cases and is also fairly straightforward. According to the *Tadić* court, a "common purpose" can be imputed to "members of military or administrative units such as those running concentration camps." An accused would be guilty of the crime of ill-treatment, because of his "position of authority" within the concentration camp system and because he had "the power to look after the inmates and make their life satisfactory" but failed to do so.[69]

The ICTY's most notorious innovation however was the so-called third category JCE. A defendant could be deemed responsible for a

> *crime other than the one agreed upon in the common plan if… (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk*.[70]

The *Tadić* court cited "ethnic cleansing" that resulted in murder as an example of a JCE in which a perpetrator "commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence… of that common purpose."

> *While murder may not have been… part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was… a predictable consequence of the execution of the common design*.[71]

A defendant becomes liable for crimes that he neither committed, nor wanted committed, nor believed would be committed, once the court concludes that the crimes were a foreseeable consequence of a crime he did intend or, rather did not intend but joined a criminal enterprise that intended it or, rather did not actually join it but was taken to have joined it. Leave aside that what is and what is not foreseeable is a subjective question, the ICTY's reasoning flies in the face of common sense. How can someone be held liable for crimes committed by others that he did not intend and may indeed have actively opposed?

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[69] *Ibid.* paras. 202 and 203.
[70] *Ibid.*, para. 228.
[71] *Ibid.* para. 204.

"There is little explanation for the result in *Tadić* other than the Appeals Chamber's conviction that Tadić was guilty of killing the villagers in Jaskići despite the prosecution's inability to produce evidence of Tadić's participation – and, indeed, in spite of the Trial Chamber's conclusion that there was not enough evidence that the group in which Tadić had acted had committed the killings," a pair of legal scholars have written.[72]

The crimes the ICTY was seeking to punish, the *Tadić* court explained, are crimes that

> *do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design… [I]nternational criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.*[11]

It had taken no time then for the ICTY to demonstrate the hollowness of those pious claims that the crimes the court would be addressing were the crimes of individuals!

Command responsibility liability had already lowered the threshold for culpability from intent to negligence. Categories one and two JCE had provided a mechanism to establish criminal liability for any and every crime committed by fellow members of a conspiracy whose existence is inferred by the ICTY itself. Category three JCE expanded liability to each and every crime that the ICTY infers to be a foreseeable consequence of an ICTY-inferred conspiracy. Extraordinarily, the continual lowering of the mental state requirement led to no diminution in the sentences the ICTY imposed.

In propounding the "joint criminal enterprise" theory of criminal liability, the ICTY was in effect admitting that it would be unable to net the big fish under any of the standard theories of liability. Contrary to the expectations of the international justice zealots, evidence for the criminality of Goldstone's "leaders" was hard to come by, as Kalshoven had warned back in 1993.

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[72] Allison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", *California Law Review,* vol. 93, no.1, 2005, pp. 75-169.

14. ICTY and Punishment

The ICTY also failed to follow UN Security Council guidelines when it came to punishment. According to Article 24 of the ICTY statute, prison terms would be in accord with the "general practice regarding prison sentences in the courts of the former Yugoslavia." The statute followed word-for-word Boutros-Ghali's recommendation.[73] This upset the Americans, who became anxious that the tribunal would mete out punishment that was insufficiently severe. The criminal code of the SFRY had prescribed the death penalty for the most serious crimes, including murder and genocide. However, the code stipulated that a prison term could not be longer than 15 years. In the event that death penalty is not imposed, a "sentence of twenty years' imprisonment may alternatively be imposed." In other words, under the Yugoslav criminal code, the maximum penalty was 20 years or death. Life imprisonment was impermissible. The ICTY statute, on the other hand, reflecting enlightened European attitudes, had ruled out the death penalty. Thus, if the ICTY were to follow SFRY sentencing practice, it could not hand down punishment more severe than 20 years.

An alarmed Michael Scharf pointed out that 20 years was far "too lenient for the types of crimes committed in Bosnia."[74] (A 20-year prison term, incidentally, would have been harsher than anything handed down by post-World War II German courts on Nazi war criminals. Twenty years sufficed as punishment at Nuremburg for Nazi armaments minister Albert Speer and Hitler Youth chief and Nazi governor of Austria Baldur von Schirach). Albright insisted that, whatever the Yugoslav criminal code might say, the "Tribunal may impose a sentence of life imprisonment, or consecutive sentences for multiple offences."[75] This, of course, flew in the face of Article 11 of the Universal Declaration of Human Rights which stated that a "heavier penalty" may not be "imposed than the one that was applicable at the time the penal offence was committed." The Netherlands,

[73] UN Doc. S/25704, 3 May 1993, para 111.

[74] Michael P. Scharf, "Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg", *Durham*, 1997, p. 60.

[75] UN Doc., S/PV. 3217.

which had agreed to host the ICTY, also warned that "sanctions should not be more severe… than those imposed under national norms in order to safeguard the *nulla poena sine lege* principle."[76]

The ICTY, needless to say, followed the prescriptions of Albright and Scharf, and adopted Rule 101 (A), which declared, "A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life." By doing so, the ICTY not only violated its own statute and thus the will of the UN Security Council, it also made ex post facto law. The point was obvious even to Bassiouni, who wrote that the crimes listed in the ICTY statute "are only punishable by a maximum of 20 years under the applicable national criminal codes. A higher penalty, which appears to be authorized by Rule 101(A), would violate principles of legality and the prohibition of *ex post facto* laws."[77]

15. Helping out the Prosecutors

The ICTY has been no more punctilious in following universally recognized appellate practices. Article 25 of the ICTY statute allows appeal on only two grounds: "an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice." Yet prosecutors regularly appeal the supposed leniency of sentences, an issue that involves neither error of fact nor error of law. More troublingly, prosecutors may appeal acquittals – a clear violation of the universal prohibition of double jeopardy. Thus, at the ICTY, acquittal does not mean automatic release; instead, according to Rule 99(B), the ICTY "may, on application in that behalf by the Prosecutor… issue an order for the continued detention of the accused, pending the determination of the appeal."

Boutros-Ghali had also ruled out trials in absentia. An accused, he stated in his report, following the wording of Article 14 of the International Covenant on Civil and Political Rights, would be entitled to "be tried in his presence." The ICTY got around this requirement by devising a peculiar rule of its own. Rule

[76] Letter from the Permanent Representative of the Netherlands to the UN Secretary-General, S/25716, 4 May 1993.

[77] Prosecutor v. Delalić, IT-96-21-T, Judgment, 16 November 1998, para. 1209.

61 allows prosecutors to present evidence against an indictee even if he has not been apprehended. Rule 61(C) says that "If the Trial Chamber is satisfied on that evidence… that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine."

Trial in absentia is a fundamental violation of any norm of justice. In the United States, for example, the US Supreme Court ruled back in 1884 that

> *[t]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution*.[78]

Rule 43 of the Federal Rules of Criminal Procedure states that "the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury empanelment and the return of the verdict; and (3) sentencing." In 1993, the US Supreme Court declared, "The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial."[79]

Interestingly, the ICTY even gets around lawyer-client privilege. Though Rule 97 solemnly intones that "All communications between lawyer and client shall be regarded as privileged," it quickly adds that such communications can nonetheless be introduced as evidence if a "client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure." The "third party" in this case would obviously be a prison snitch or a prison administrator or a prison doctor, all of whom are in the employ of the ICTY, and all of whose veracity is doubtful.

[78] Hopt v. Utah, 110 US 574 (1884).
[79] Crosby v. United States, 506 US 255 (1993).

Then there is Rule 98bis: at first glance, it seems to enshrine the principle that, at trial, the burden of proof is on the prosecutor, who has to prove guilt beyond a reasonable doubt. Following the presentation of the prosecution's case, the trial court would assess whether there is any need for a defendant to present a case:

> *If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more offences charged in the indictment, the Trial Chamber, on motion of an accused… shall order the entry of judgement of acquittal on that or those charges.*

Variants of Rule 98bis exist in many jurisdictions. In the United States, for example, Federal Rule of Criminal Procedure 29(a) states, "After the government closes its evidence… the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The court reads the prosecution's case in the way most favourable to the defendant. If there's any doubt as to the credibility of a witness or the reliability of a piece of evidence, the doubt must redound to the benefit of the defendant.

However, as invariably happens at the ICTY, this rule was quickly reinterpreted to mean that, if a motion for acquittal is filed, the prosecution's case must be read in the way most favourable to the prosecutors. In December 2004, the ICTY rewrote Rule 98bis entirely. It now reads, "At the close of the Prosecutor's case, the Trial Chamber shall… enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction." *No evidence*! So, as long as prosecutors present some – any – evidence, no matter how flimsy, the case must go forward. The rule happily enshrines the core ICTY principle: the burden is on a defendant to prove his innocence.

As for the legal practice that guides it, the ICTY claims it follows both common law and civil law traditions. In reality, the ICTY takes from each tradition whatever it needs to strengthen the hands of prosecutors and weaken those of defendants. One notable ICTY contribution was the role it assigned to judges. Under the adversarial system, a judge is supposed to act as an impartial referee. Under the inquisitorial system, a judge takes an active role in the proceedings. A judge's task then is to discover the facts, however long this takes. Under the aegis of the ICTY, though, judges do take an active role, but only in so far as this helps prosecutors. As Scharf explained, ICTY judges during a trial can "or-

der the production of additional evidence to ensure that [the court] was fully satisfied with the evidence on which its judgments were based and to minimize the possibility of a charge being dismissed for lack of evidence."[80]

At trial, ICTY judges' passivity and unquestioning acceptance of prosecutorial claims contrast starkly with their aggressive, hostile behaviour during the defence's presentation of its case. Judges bully defendants and defence witnesses, ask leading questions and express exasperation over defence arguments. Moreover, judges preside over a number of trials at one and the same time, trials during which, though the defendants are different, the same issues are debated and haggled over. Judges thus get to hear a lot of additional material that pertains to a defendant, material that the defence has no control over and is in no position to challenge.

16. No Outside Investigators

The ICTY permits no outside investigation of its inner workings, and indeed threatens with imprisonment any official who reveals something it wants kept secret.[81] Milošević's sudden and mysterious death in March 2006 was the subject only of an "internal" inquiry, which, needless to say, absolved everyone at the ICTY of any culpability. The ICTY's report, which blamed Milošević himself for his untimely death, throwing out all manner of baseless accusations against him, while defending its decision to deny him proper medical treatment, was not subject to any review by the Dutch government, the European courts or the UN Less than a week before Milošević's death, Milan Babić, the Croatian Serb leader, also died in its detention centre, apparently as a result of suicide. Here too, the ICTY investigated itself and again absolved itself of any blame.

At the ICTY, pretrial detention can be indefinite. Defendants can sit at the ICTY's prison for years, thousands of miles away from family and friends. Following Milošević's death, the ICTY invited a team of Swedish penologists to carry out an audit of Scheveningen, its pre-trial detention centre. The Swedes

[80] Michael P. Scharf, "Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg", *Durham,* 1997, p. 67.

[81] The ICTY, in 2009, convicted former ICTY spokesperson Florence Hartmann of contempt of court for disclosing secrets about its operations. She was fined €7000. Following her refusal to pay the fine, she was jailed by the ICTY in 2016 for seven days.

found that something like two-thirds of the people detained at Scheveningen have not been convicted of anything. "At the time of our visit," they revealed, "half the inmates had been in custody for at least three years. The detainee of longest standing had been there for 8½ years."[82]

17. Conclusion

The ICTY can be said to have accomplished its mission – a political, not a legal, one. It helped fulfil the agenda of NATO, not that of the United Nations to which it was nominally answerable. The narrative of the breakup of Yugoslavia and the subsequent wars that it propounded gratified NATO and justified NATO's military interventions. It prosecuted the political leaders that had resisted NATO plans and that NATO wanted prosecuted. As a result, the men and women who led the Serbs during the 1990s have either died in its portals or are serving life prison terms.

The ICTY accomplished this by inventing an international criminal jurisprudence that bore no resemblance to what was understood to be international criminal law at the time the ICTY was created. To secure convictions, the ICTY has had to deny defendants the protections that are enshrined in innumerable international declarations, not to mention in its UN-drafted statute. Rather than adopt the best practices of the best legal systems, the ICTY went back in time and adopted the court practices of the Star Chamber, practices that had fallen into disrepute by the 17th century.

It would be a legal travesty were the International Criminal Court or any ad hoc court to take the ICTY's procedural and jurisprudential practices as precedential.

[82] "Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia," 4 May 2006. Available at https://www.icty.org/x/file/Press/PR_attachments/DU-audit.pdf.

6. Truth and Justice – the American Way. How the ICTY Distorted History and Perverted Justice

BCRT collective[83]

In any war, truth is the first casualty. Yugoslavia was no exception. Global opinion believes the Serbs were to blame for starting the civil wars in the former Yugoslavia. In a crude but effective caricature, the Serbs are routinely demonised as modern-day Nazis in a genocidal endeavour to achieve a Greater Serbia. Their territorial aggression is routinely pictured as a threat to the European order.

But who says so and why? Where is the hard evidence for this harsh judgment? This paper will demonstrate how surprisingly little there is and how partial our view has been of 'a dark and bloody conflict'. It exposes the myths and misconceptions surrounding 'Serb aggression', re-examines the evidence of alleged massacres and traces the real roots of ethnic tension. It will also analyse the reaction of the international community and question the motives behind intervention. And it will look very hard at the court set up by the United Nations, the International Criminal Tribunal for the former Yugoslavia.

The Serbian experience of truth, justice and the American way was actually one of falsehood, injustice and 'the American way-or-else'. American PR firms and US foreign policy have been brilliantly successful in branding Serbs as mass murderers and condemning them as outcasts of the global community. Croatia

[83] Text submitted by Jonathan Rooper on behalf of The Balkan Conflicts Research Team. Twitter: @ResearchTeam. *The Rogue Tribunal* documentary: http://bit.ly/33PWgGG. Version with Serbian subtitles: http://bit.ly/2MCuCaA. Website: http://bit.ly/2P9qLDu.

and the Bosnian government recruited Washington-based Ruder Finn Global Public Affairs.[84] James Harff, a director of the company, explained that they achieved their goals by targeting the American Jewish community:

> *We pulled this off remarkably well: bringing the Jewish organisations into play on the side of the Bosnians was an extraordinary gamble. This immediately opened the way for us to equate Serbs with Nazis in the public eye... We knew that the game should be played like that. In targeting the Jewish audience we had played the right card. There was an immediate and visible shift in terminology in the press, using expressions with a strongly emotive element such as ethnic cleansing, concentration camps etc, all intended to invoke Nazi Germany, the gas chambers and Auschwitz. The emotional impact was so great that no one could go against it without being accused of revisionism. We had hit the mark*.[85]

Ruder Finn won the 1993 US Public Affairs Award for their work on this account. The truth may have died in the first strike but Harff shed no tears:

> *We had a job to do and we did it. We are not paid to moralize. Speed is vital. It is the first assertion that counts. All denials are entirely ineffective*.

The voice of reason is hard to hear in the heat of battle. In a complicated war, it is always easier to hate than it is to understand. But there is no monopoly of evil – in Bosnia all parties sometimes behaved badly. The crucial point is that conflicts can only be resolved if there is understanding on all sides and this can only be achieved through a process of open and honest debate. Lies and injustice cannot be left to fester. They must be confronted and exposed. To stigmatise as a 'genocide denier' anyone who dares to question a blatant distortion of history is deeply dishonest – it is simply a tactic calculated to shut down any further debate. But it is precisely when an apparent orthodoxy is demonstrably false that the moral imperative to tell the truth and to set the record straight is at its most powerful. This paper is one such attempt.

Facts are stubborn, awkward things; they may be inconvenient but we ignore them at our peril.

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[84] Ruder Finn was paid more than $100,000 dollars by Croatia for its services.

[85] Jacques Merlino, *Les vérités Yougoslaves ne sont pas toutes bonnes à dire*. *Albin Michel*, Paris, 1993.

1. The Context

1.1. Nationalism

Josip Broz Tito, Yugoslav president-for-life from 1945-1980, ruthlessly eliminated all opposition to his Communist Party. In 1948, following his split with Soviet leader Stalin, Tito completed the process by purging remaining traces of dissent within his party. Politics in Yugoslavia had effectively ended. Tito then achieved ideological consensus among the populace in two ways: internally through the concept of "Brotherhood and Unity" and externally through the threat of invasion – by either the Soviet Red Army or by NATO, whichever was most plausible at a given moment. The bitter ethnic tensions of the past were largely swept under the carpet, along with other disruptive forces. Communism had not done much to aggravate such grievances; nor had it done much to resolve them.

The foundation of the case for demonising the Serbs is the allegation that they were the "aggressors" in all the conflicts that broke out in former Yugoslavia, in pursuit of their ambition for a "Greater Serbia". This does not stand up to examination. The process of disintegration, which started many years before the conflicts even began, involved all Yugoslav ethnic groups.

Even before Tito died, the system he had introduced was beginning to show strains. The huge sums of foreign aid, readily forthcoming since his rupture from Stalin, had begun to dry up as the decline of the USSR made Yugoslavia's non-aligned position of less strategic importance. The prosperous lifestyle of many Yugoslavs in the late 1970s concealed the fact that the country had built up $30 billion of foreign debt and was saddled with hopelessly inefficient state-run industry.

Fearing the resurgence of the old Second World War divisions, Tito had bequeathed a system of rotational leadership to Yugoslavia. This prevented immediate crisis upon his death, but – in continuing a long succession of decentralising reforms – ensured political breakdown in the longer term. By the end of the 1980s, the central government had become ineffective and the economy was on the verge of collapse, with inflation rates reaching 1,250%.

This was exacerbated on 5 November 1990 when the US passed legislation making further aid payments conditional on the organisation of "democratic"

elections in each of the Yugoslav republics (elections which were bound to give a boost to nationalists and encourage the secession of the constituent republics).[86] In practice, this meant an effective end to aid; it also threw the Yugoslav Federal government into crisis because it was unable to pay the enormous interest fees on its foreign debt or even to arrange the purchase of raw materials for industry. Credit collapsed and recriminations broke out on all sides.

Politicians throughout Yugoslavia had not been slow to read the signs. In April 1987, Slobodan Milošević – consolidating his power within the Serbian League of Communists – attended a rally near Priština, the capital of Kosovo, and witnessed Serb demonstrators being beaten up by the local, mainly Albanian, police. His denunciation of the police action, declaring "no one has the right to beat you," endeared him to Serb nationalists and helped pave the way for his election as President of Serbia in 1990.

A similar process was taking place in Croatia at the same time. Former Communist leader, Franjo Tudjman (an active member in the "Croatian Spring" nationalist movement in the early 1970s, and later a nationalist historian) travelled to Canada, Australia and other countries in the spring of 1987 to raise money from the Croatian diaspora – many of whom were from of families which had fled Yugoslavia fearing reprisals for their Nazi sympathies – cash that was used to fund his campaign and to purchase armaments. As Steve Hrkač, who represented diaspora Croats in Tudjman's government, told the Canadian magazine Saturday Night:

The first dollars came from Canada. We bankrolled the revolution.[87]

In Bosnia, Alija Izetbegović launched a Muslim-only political party, the SDA (Party of Democratic Action) in 1990 – the first of several 'ethnic' political parties to be formed in Bosnia. He reissued his 1970 pamphlet,[88] which had led to his imprisonment in 1983, and released a video to coincide with the launch of the

[86] Senator Robert Dole buried just 23 lines in Foreign Appropriations Bill 101-513 that denied further foreign aid to Yugoslavia. It was $31 billion in debt (nearly three times its GNP). Included also is a provision giving the individual Republics within Yugoslavia separate funding as long as they held free elections within six months. See full text at https://bit.ly/2VOH7TJ.

[87] Patrick Graham (1997). "Canadian warlord". *Saturday Night* magazine. Available at: https://bit.ly/2XO3s4T.

[88] For the full text of Izetbegović's "Islamic Declaration", see https://bit.ly/3fe5y5Q.

SDA. As principal narrator, he set out the party's purpose of restoring Muslim ascendancy, openly praising the Ottoman Empire as some sort of Golden Age for Muslims. Both the Islamic Declaration and the video were later withdrawn. Izetbegović declared to the Bosnian Parliament in 1991:

> *I would sacrifice peace for a sovereign Bosnia-Herzegovina, but for that peace in Bosnia-Herzegovina I would not sacrifice sovereignty.*

It has often been claimed (most notably in the BBC's Brian Lapping-produced series "The Death of Yugoslavia") that a speech made by Slobodan Milošević in Kosovo in June 1989 was the starting point of the disintegration of Yugoslavia. "Without question, it was Milošević who had wilfully allowed the genie out of the bottle," as Misha Glenny wrote (The Fall of Yugoslavia, 1992). This argument is not sustainable.

Nationalism had been emerging well before the Milošević speech. Indeed, it is arguable that it can be dated back to before Tito's death in 1980, when Tito publicly lamented the development of eight separate "autarchies" (the six 'Republics' and two "Autonomous Regions") and declared their rivalry with each other to be ruining the state of Yugoslavia. Moreover, scrutiny of Milošević's speech shows that, far from espousing intolerance, he was extolling the values of multiculturalism. Indeed, throughout his political career, this was his unswerving position.[89]

Nationalism was certainly evident early in the post-Tito era. In Croatia, for example, Franjo Tudjman was expelled from the Yugoslav Communist Party in 1986 when he publicly linked himself to the nationalist cause. From 1987 onwards, he was making many connections abroad using his nationalist credentials.

In Slovenia in 1987, secessionist leader Janez Janša had been jailed for publishing a secret report and Milan Kučan, the Slovene President, like many other former Communist *apparatchiks*, had been busily espousing the nationalist cause as he tried to reinvent himself.

In Bosnia, Alija Izetbegović, imprisoned by Tito for three years in 1946 for his involvement with the *Mladi Muslimani* (Young Muslims) movement, served

[89] For the full text of Milošević's speech, see https://bit.ly/3cyVO3P.

a further 5-year jail term for separatist agitation between 1983-88, a period when there was still a reasonably effective, broadly-based SFRY (Socialist Federal Republic of Yugoslavia) regime.

The unsurprising reality of what happened was that, as the grip of the SFRY leadership weakened during the 1980s, nationalism began to emerge as an attractive alternative.

1.2. International Recognition

There is a consensus among commentators that the intense fighting in Bosnia in 1992 was triggered as a result of its international recognition, which was in turn dictated by the "premature" recognition of Croatia three months earlier. Despite having always been denied, strong suspicions persist that the basis for Croatia's recognition was a shabby deal between the UK and Germany in which Germany compromised on certain British demands for the Maastricht treaty while Britain dropped objections to recognising Croatia. Three months after the recognition of Croatia, the US forced the recognition of Bosnia.

In his account of the proceedings, Henry Wynaendts,[90] one of three European politicians involved in EC attempts to negotiate a peaceful settlement in Yugoslavia, made clear that Yugoslavia was never treated as a problem in its own right. Instead, it was used as an opportunity to demonstrate the authority of the new Europe, emerging from the seismic collapse of the Berlin Wall and the Soviet Empire. These representatives of the new order seized control of the communities living in Yugoslavia to impose their own agenda.

International recognition of the new states was in breach of the 1933 Convention of Montevideo on the recognition of new states which required a government in full control, clearly established borders and a stable population. It was also in breach of The Helsinki Final Act of the Conference on Security and Co-operation in Europe 1975: "The participating states will respect the territorial integrity of each of the participating states. Accordingly they will refrain from any action… against the territorial integrity, political independence, or the unity of any participating state." Recognising Slovenia and Croatia, Germany made a

[90] Henry Wynaendts, *L'Engrenage: Chroniques Yougoslaves, juillet 1991-aout 1993. Denoël,* Paris, 1993.

deliberate decision to violate the territorial integrity of Yugoslavia, which under the Helsinki Act was one of the "participating states". This hardly generated a word of protest.

1.3. Borders

Borders were a considerable aggravating factor in the disputes between the Yugoslav republics. The writer, Milovan Djilas,[91] one of the three men entrusted by Tito in 1945 with drawing up the borders of the constituent components of the Yugoslav federation, reported Tito as saying "with us (the Communist Party), these demarcation lines will be no more than administrative frontiers." In seeking to establish a Yugoslavia that would not be in thrall to powerful constituent elements, the Tito-defined borders took little or no account of where different groups lived. Thus substantial Serb communities in Croatia and Bosnia, and Croat communities in Bosnia, were left exposed when Yugoslavia broke up. Alexander Solzhenitsyn, in The Times on 21 August 1997, noted that the roots of the Yugoslav conflicts lay in Tito's imposition of arbitrary internal borders, adding that

> *blame lies also with the venerable community of western leaders, who – with an angelic naivety – took those false borders seriously, and then hastened, at a moment's notice, in a day or two, to recognise the independence of several breakaway republics whose political formation they apparently found to be advantageous.*

2. The JNA

As the wars developed, the former federal army, the JNA, began to play a greater role, taking control of areas in Croatia and then Bosnia. This was represented by the world's media as a massive land-grab, to further a "Greater Serbia" policy. It was, in fact, very limited in scope, and mainly tactical rather than territorial, with the objective to secure isolated Serb populations and lines of communication. Much was made of the statistics according to which Serbs had "seized" 70%

[91] Milovan Djilas (1911-1995) was a Yugoslav communist politician, theorist and author. He was a key figure in the Partisan movement during World War II, as well as in the post-war government.

of Bosnia within the first few months of the war – neglecting the fact they had controlled more than 60% before the fighting had even started. Many Bosnian Serbs were peasant farmers, whereas Muslims were mainly city dwellers. Divergent views between urban and rural communities are commonplace around the world and would no doubt come into play in many countries unfortunate enough to descend into civil war. The recent bitter disputes in Britain over Brexit provide a classic example. Over the next two and a half years, there were highly publicised campaigns in Bosnia, with some ebb and flow of territory, but overall territorial changes were minor. In Croatia, apart from two incursions of the Croatian Army in January and September 1993 which were reversed by the UN, the front lines were static for nearly four and a half years. The "UN Protected" Serb areas of Western Slavonia and Krajina were then overrun by the Croatian Army with barely concealed assistance from official and unofficial US forces.

Charges of "Serb aggression" were rooted in the false notion that the JNA was an invading force sent in by Serbia. In reality the JNA, though Serb-dominated at officer-level, was a genuinely pan-Yugoslav conscript army which had emerged from Tito's WWII Partisan forces. Multi-ethnic and with a high command that was strongly Yugoslav rather than Serbian in character, by 1990 the JNA was the last remaining truly "Yugoslav" institution. Its job was to defend the Federation; the high command would refuse orders which were not consistent with this. In June 1992, the JNA was dissolved and became the VJ, the army of a Yugoslavia which consisted only of Serbia and Montenegro.

The JNA had bases throughout the republics of Yugoslavia. It was already in Croatia and Bosnia when fighting started – as it had every right to be as the federal army.

When Bosnia gained international recognition, the JNA formally withdrew; this was formally confirmed by the UN. Many members of the JNA who came from Bosnia were demobilised and became members of the Bosnian Serb Army (BSA), retaining much of their military equipment including heavy weapons. They were ever-after characterised as "Serb aggressors," even though they were Bosnians living in Bosnia. That the JNA was not regarded as wholly partisan is evidenced by the fact that, as late as April 1992, Alija Izetbegović called on them to intervene to prevent fighting and thanked them warmly when they did. Presumably it was only later that he realised that the JNA had "invaded" Bosnia.

The concept of Serb "invasion" was of crucial importance. If the conflicts in the former Yugoslavia were deemed to be civil wars, there was no legal basis for international intervention of any kind (including the setting up of the War Crimes Tribunal). The continuing sensitivity on this point was demonstrated when the CNN teletext service referred to the Bosnian conflict as a "civil war": in a statement, the party of Bosnia's war-time Prime Minister Haris Silajdžić said that this interpretation "helps to indemnify the aggressor and the ideologues of the genocide and the greatest crimes against humanity committed in Europe since the second world war."

Such "confusion" was widespread. Politicians all over the world, from Bill Clinton to British Foreign Secretary Douglas Hurd, repeatedly described the war in Bosnia as a "civil war." Henry Kissinger, in The Washington Post on 22 September 1997, wrote: "in Bosnia, populated by Croats, Serbs and Muslims whose reciprocal hatreds had broken up the much larger Yugoslavia, the attempt to bring about a multi-ethnic state evoked a murderous civil war."

What did not happen in Slovenia, Croatia or Bosnia was a physical invasion of any kind by Serbian forces. The conclusion that "aggression" occurred in the former Yugoslavia is based entirely on the decision of the United States, the members of the then EEC (European Economic Community), and the United Nations to recognise Croatia and Bosnia despite Belgrade's vehement objections. By declaring the Yugoslav state defunct and ignoring those in all the republics who wanted to keep the federation intact, the US/EEC/UN arbitrarily redefined as wars of external aggression what were in fact civil wars which had been ongoing since June 1991 and April 1992.

The tortuous nature of this was shown by the Hague Tribunal which regarded anything that happened in Bosnia prior to the April 1992 recognition as "internal," anything that happened whilst the JNA was still in Bosnia (until mid-May 1992) as "international," and what occurred afterwards as mostly "internal" again – albeit "internal" to Bosnia, not Yugoslavia.

The way these conflicts were dealt with by the international community triggered the shockwaves of a geo-political earthquake – one that would reshape the map of Europe and reconfigure world politics. Madeleine Albright, the former US Secretary of State, widely known as the "Mother of the ICTY tribunal," wrote in her memoir:

> *During my time in government, the Balkans provided the context for a debate about the global role of the United States, the relevance of NATO, the evolution of Russia, the limits of sovereignty, and the possibility of extending democracy to lands lacking a democratic tradition.*[92]

The powerful political tool created specifically to shape that debate was the International Criminal Tribunal for Yugoslavia. The ICTY was designed to promote the US as a global force for good, protecting human rights and democracy. As the distinguished journalist and authority on Balkan affairs, Nora Beloff, observed:

> *Clinton's resolve to make war against the Bosnian Serbs might have left him vulnerable to charges of arbitrary action. What his aides knew he needed and what they managed to get for him, was a device to reassure US opinion formers that Washington policy was strictly in accordance with international law.*[93]

Sadly, it was anything but.

3. The International Criminal Tribunal for Yugoslavia (ICTY)

A courthouse in The Hague was for 23 years the seat of the International Criminal Tribunal for Yugoslavia. Known as the ICTY, it was created by the United Nations to bring to justice those who had violated international humanitarian law during the conflicts of the 1990s.

The ICTY closed in 2017 claiming to have brought peace and reconciliation to the region and to have transformed international humanitarian law. These claims are neither true nor credible. A close examination of the facts leads to very different conclusions.

[92] Thomas Blood, *Madam Secretary: a biography of Madeleine Albright. St. Martin's Press*, New York City, 1999.
[93] Nora Beloff, *Yugoslavia: An Avoidable War. New European Publishing*, London, 1997.

3.1. The Core Principle

The right to a fair trial and due process of law is universally acknowledged. It has been recognised for centuries as a core value and key principle of civilised society – a fundamental human right. Each of us looks to the law to protect what we hold most dear – our life and our liberty. When the well of justice is poisoned, some of us may die and all of us suffer.

Justice should be objective and impartial, administered without fear or favour, regardless of identity, money, power, or weakness. Since the 15th century, the figure of Justice has been portrayed blindfold to symbolise impartiality, just as her scales represent the fair weighing of evidence. These are principles we ignore at our peril.

Eleanor Roosevelt once famously stated:

> *Justice cannot be for one side alone but must be for both.*

Ironically it is American political influence that has done much to unfairly weight that balance and pollute the process of international justice.

3.2. The Creation of the ICTY

In 1993, the UN Security Council urged on by the United States and its NATO allies established the UN's first criminal court – the ICTY. The rationale was that state sovereignty provided a cover for dictators to wield unfettered power, therefore a supranational body was needed with powers to step in, take control and restore order. The argument may be seductive but it is specious because it may simply allow the international community or even a superpower to wield unrestrained power instead. If that were the case, then who on earth could constrain a global force like the UN?

A self-empowered, ad hoc court, the ICTY was part of a New World Order determined to treat what was clearly a civil war in Yugoslavia as a threat to international peace and security. In doing so it overrode the principle enshrined in the UN's own charter – namely that states are sovereign within their own borders.

The power to prosecute criminals is one of the key attributes of state sovereignty. The supranational imposition of justice destroys the link between a sovereign power and its people, abolishing ties of history, tradition, language and culture.

The judges at the Nuremberg war crimes tribunal in 1945 were careful to explain that their right to judge the Nazis only flowed from the unconditional surrender of the Germans. This meant that there was literally no German government in Germany. It was the allied powers who provisionally held supreme authority. This was not the case in Yugoslavia which was still a functioning sovereign power.

But a flood of grossly distorted reports in the western media of war crimes and genocide on a massive scale understandably provoked a demand for retribution.

The problem was that under its Charter, the UN does not have, and has never had, any right or power to set up its own criminal tribunal. The ICTY was the ultimate anomaly – an illegal court. The considered opinion of former US Attorney General, Ramsey Clark, is unequivocal:

> *Examination of the history, background, drafting and approval of the UN Charter will convince everyone that there would never have been a United Nations if the five permanent members established in the Charter... thought there was any possibility it could create a criminal court. A review of the UN Charter reveals that it grants no power to the Security Council, or elsewhere, to create a criminal court. It was deliberately denied any criminal jurisdiction.*[94]

And yet create one it did. Security Council members expressed deep reservations about the legality of establishing the Tribunal under the powers of Chapter VII of the UN Charter, but reluctantly gave their support on the basis that the humanitarian crisis was very serious (which later proved to be a great exaggeration) and that a report submitted by The Committee of French Jurists had concluded that Chapter VII powers could be used in this way. In fact, the French jurists had not quite said this – the crucial passage in their report said:

> *… the establishment of an international criminal jurisdiction, although it would not satisfy those with the most exacting consciences, was a step forward in achieving respect for the rule of law and a better lot for the victims of conflicts.*

Their reservation clearly reflects serious doubts over the strict legality of creating the Tribunal under the UN Charter – and was only overcome by the

[94] Balkan Conflicts Research Team. Illegal Tribunal Illegal Indictment. Available at: https://yugofile.org.uk/bcrtwp/illegal-tribunal-illegal-indictment/.

apparent urgency of humanitarian considerations. These legal doubts were to be spelt out in much greater detail in a note by the then Secretary General of the UN himself, Boutros Boutros-Ghali.[95]

4. The Political Context

The collapse of the Soviet Union in 1989 and the end of the Cold War left the United States globally omnipotent. In the words of President Carter's National Security Adviser, geostrategist Zbigniew Brzezinski:

> *The last decade of the twentieth century has witnessed a tectonic shift in world affairs. For the first time ever, a non-Eurasian power has emerged not only as a key arbiter of Eurasian power relations but also as the world's paramount power. The defeat and collapse of the Soviet Union was the final step in the rapid ascendance of a Western Hemisphere power, the United States, as the sole and, indeed, the first truly global power.*[96]

Brzezinski, Madeleine Albright's foreign policy mentor, quickly saw that this new reality put "a premium on manoeuvre and manipulation in order to prevent the emergence of a hostile coalition that could eventually seek to challenge America's primacy... the most immediate task is to make certain that no state or combination of states gains the capacity to expel the United States from Eurasia or even to diminish significantly its decisive arbitration role."[97]

President George H Bush was clearly heavily influenced by this doctrine in his State of the Union speech of 29 January 1991 when he famously spoke of a New World Order[98] 'for the next American century'.[99] In the early 1990s it became fashionable among some western politicians to express the view that the

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[95] Balkan Conflicts Research Team. Secretary General's formal note on legality of ICTY (S/25704). Available at: https://yugofile.org.uk/bcrtwp/1473-2/.

[96] Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and its Geostrategic Imperatives*. *Basic Books*, New York City, 1998.

[97] Ibid. 13, p. 198.

[98] Balkan Conflicts Research Team. George H Bush – New World Order quote. Available at: https://yugofile.org.uk/bcrtwp/george-h-bush-new-world-order-quote/.

[99] Balkan Conflicts Research Team. George H Bush State of the Union 29 January 1991. Available at: https://yugofile.org.uk/bcrtwp/george-h-bush-state-of-union-29-january-1991/.

day of the sovereign nation state was over. The future, they argued, would be a much more globalised world, where – as in the European Union – individual states surrendered their sovereignty to experienced international politicians. The major world blocs would negotiate with each other and get things done far more efficiently.

Robin Cook, UK Foreign Secretary 1997-2003, was one of many western politicians who concluded that 'the old, independent nation-state is a thing of the past'. Many thought Bush's talk of a New World Order referred to the so-called peace dividend that would result from no longer having to spend vast amounts on the arms race. Little did they know the Americans sensed a far greater prize and the perfect opportunity to seize it.

Diana Johnstone, author of "Fools' Crusade: Yugoslavia, NATO & Western Delusions",[100] wrote that it was "a hegemony based on military supremacy, ideological ascendancy, technological innovation and domination of the world's financial system… through a new web of global linkages that is growing exponentially outside the more traditional nation-state system."[101]

The long-established consensus, embodied in the UN Charter, was that the sovereignty of nation states was the best means of confining and containing any potential threats to world peace. The Brzezinski doctrine provided a means to undermine this safeguard through a series of apparently innocent humanitarian initiatives.

One example was an extraordinary meeting of the UN Security Council in January 1992, requested by the British Prime Minister John Major, designed to prepare the way for the UN "to update and develop the means – by which collective security is upheld through the United Nations and its Secretary-General, with a view to enhancing their ability to handle crises."[102] Human rights interventions by the 'international community', backed by war crimes tribunals to make sure that the first version of history provided the necessary justification, were an essential part of the formula for global American control.

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[100] Diana Johnstone, "Fools' Crusade: Yugoslavia, Nato, and Western Delusions", *Monthly Review Press,* New York City, 2002, p. 17.

[101] Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and its Geostrategic Imperatives*, *Basic Books*, New York City, 1997

[102] Dimitris Bourantonis, "*The History and Politics of UN Security Council Reform*, *Routledge*, Oxford, 2007.

This was the hidden agenda when the Tribunal was first suggested by the United States in the autumn of 1992, but it was far from certain at that stage whether the UN's approval for this radical idea could be secured. In hindsight, it was probably only made possible by the temporary reluctance of China and Russia to stand in the way of the US, not least because they believed US objectives to be essentially humanitarian.

4.1. Changing Priorities

Originally the ICTY's costs were to be borne by the UN. But, in its early days, it was largely staffed and funded by the Americans. As it became clear how useful the court was in furthering US policy objectives, its budget grew exponentially to a staggering total of more than $300 million a year.[103] With NATO approaching its 50th anniversary and eager to celebrate and justify its post-Cold War existence, the scene was set for the US to extend its sphere of influence in the Balkans. In the words of Clinton's foreign policy adviser Anthony Lake:

> *Bosnia was the cancer eating away at US foreign policy, undermining American and NATO credibility abroad.*

Kosovo is often presented as the problem to which NATO was the solution; in truth it was the other way round: Kosovo became the solution to NATO's identity problem.

4.2. ICTY: The Early Years

From the outset, the Tribunal was more concerned with condemning political enemies than seeking justice. Not that you would have guessed that from the soaring rhetoric of the US ambassador to the UN, Madeleine Albright, speaking at the inaugural session:

> *Today we begin to cleanse the hatred that has torn apart the former Yugoslavia. A few months ago I said this will be no victor's Tribunal. The only victor that will prevail in this endeavour is the truth. Truth is the cornerstone of the rule of law and*

[103] Balkan Conflicts Research Team. ICTY's Exploding Budget. Available at: https://yugofile.org.uk/bcrtwp/ictys-exploding-budget/.

it will point towards individuals and not peoples as the perpetrators of war crimes. It is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.[104]

The reality fell short on every count. The ICTY was demonstrably a victor's Tribunal where truth did not prevail, due process was flouted and justice denied. The people of an entire nation were demonised as the greatest perpetrators of war crimes and genocide since Hitler and the Holocaust. Far from cleansing hatred and starting a healing process, the ICTY left an open running sore.

4.3. The Major Flaws

The ICTY has been rightly condemned as a rogue court with rigged rules predicated on the monstrous lie that might is right. These harsh judgments are based not on prejudice or opinion but firm evidence and hard fact.

A key requirement for due process is that a defendant be tried by a body "established by law." But as we have seen, the Security Council is not a law-making body. When accused during an early trial of being an illegal court, the Tribunal did not refer the allegation to another body, such as the International Court of Justice. It decided to deal with the charge itself. Unsurprisingly it found in its own favour. The deeply-rooted principle that no man be a judge in his own cause clearly did not apply to the ICTY.[105]

4.4. Legitimacy

The legitimacy of the court was a matter of crucial importance. This was recognised by the UN Secretary General himself, Boutros Boutros-Ghali, who had given this advice to the Security Council just before it met to set up the ICTY:

Security Council resolution 808 (1993) states that an international tribunal shall be established for the prosecution of persons responsible for serious violations

[104] For the UN video coverage of the establishment of the ICTY, see https://www.youtube.com/watch?-v=K2asbvO9944.

[105] Balkan Conflicts Research Team. John Laughland's summary of the Hague's tribunal illegality. Available at: https://yugofile.org.uk/bcrtwp/john-laughlands-summary-of-the-hague-tribunals-illegality/.

of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991. It does not, however, indicate how such an international tribunal is to be established or on what legal basis.

The traditional approach to establishing an international tribunal would be the conclusion of a treaty by which State parties would set up a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or an especially convened conference).[106]

These points were not squarely addressed by the Security Council before the vote to create the ICTY. Indeed, Security Council members were never given a precise legal basis for the creation of the Tribunal. They were merely shown two reports. The first by the Committee of 'French jurists' which seemed to suggest that the Security Council did have the requisite power but provided no substantive basis for this conclusion. The second was a report by the UN 'Committee of Experts' on the scale of the humanitarian crisis in Bosnia. Again, this was produced at great speed. It seems the committee did little more than study the press coverage. Neither of these reports could be considered 'hard evidence'.

The closest Security Council discussions came to identifying a power within the UN Charter which might justify the creation of an international criminal court by the UN was the suggestion that Chapter VII gave the Security Council special humanitarian powers. It was not stated explicitly, but the implication was that such powers could extend to the creation of an international criminal court.

This notion does not square with the clear advice given by Boutros Boutros-Ghali (see above). Nor does the previous use of the Chapter VII powers by the Security Council suggest any precedent. The powers had only been used previously to make practical arrangements with local organisations to facilitate the distribution of humanitarian aid. They were invoked in slightly more controversial circumstances when Iraq invaded Kuwait in 1989, but not in a way at all comparable to the decision to create an international criminal court. It is highly questionable whether the creation of a war crimes Tribunal is properly covered by powers associated only with humanitarian relief.

[106] Balkan Conflicts Research Team. Legality and running of the ICTY – evidence from Security Council minutes. Available at: https://yugofile.org.uk/bcrtwp/legality-and-running-of-the-icty-evidence-from-security-council-minutes/.

It was nevertheless claimed that an international Tribunal would fall under this provision of the UN Charter being

> *a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, a breach of the peace or act of aggression.*

But was there any such threat? As Canadian lawyer and former ICTY Amicus Curiae Defence counsel Christopher Black explains, this very clear requisite determination could only be made by moving the goalposts:

> *Chapter VII of the UN Charter requires that there be a threat to the peace or an act of aggression before the Security Council can make use of its special powers set out in that chapter. It has always been interpreted to mean, and was meant to mean, a threat to international peace not national peace. The members of the Security Council recognised this and so had to redefine a national problem as an international one.*

The warring parties in Yugoslavia quite evidently did not pose a threat to international peace, they were focused on change within the territory of Yugoslavia. In reality it was the international community that was focused on intervention in Yugoslavia for their own political ends.

Numerous members of the Security Council including China, Spain, Venezuela, Japan, UK, New Zealand and Brazil expressed unease over the creation of the ICTY under Chapter VII. It was only the apparent urgency of the humanitarian crisis that persuaded them to vote in favour. The fact is that the Resolution of the Security Council had no legal force because it was *ultra vires*. Boutros Boutros-Ghali admitted in report S/25704[107] that the only justification he could offer was 'expediency' – which turned out to be based on false media coverage.[108]

Even the first Chief Prosecutor of the Hague Tribunal expressed surprise that the ICTY had been created under Chapter VII of the UN Charter:[109]

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[107] Balkan Conflicts Research Team. Secretary General's formal note on legality of ICTY (S/25704). Available at: https://yugofile.org.uk/bcrtwp/1473-2/.

[108] Balkan Conflicts Research Team. Illegal tribunal – illegal indictment. Available at: https://yugofile.org.uk/bcrtwp/illegal-tribunal-illegal-indictment/.

[109] This exchange came in the BBC Radio Documentary "The Final Judgement: Searching for International Justice", September 9, 2003. The BBC's Edward Stourton was talking to Richard Goldstone, the ICTY's

EDWARD STOURTON (interviewer): *It's interesting, you said, that the court was… the courts were established under chapter 7 of the United Nations Charter which is really about peace and security not about justice – that was… was that sort of creative law making – making a link between the idea of justice and the idea of peace and security that was established at the time that the Yugoslavia and Rwanda courts were set up?*

RICHARD GOLDSTONE: *It was indeed and for that reason it came as huge surprise to international humanitarian lawyers that a first ever international criminal court would come from the Security Council and not from a treaty*.

Having created the ICTY by procedural sleight of hand, the Security Council distanced itself from all responsibility for the monster it had brought to life. It failed even to make the slightest protest when the ICTY submitted a Statute[110] for UN approval that ignored every single binding stipulation for its operation set down by the Security Council and the Secretary-General. The only formal consideration given to the question of the Hague Tribunal's legitimacy came when the defence team for Duško Tadić, who had been convicted in one of the early ICTY trials, put down a motion on this point before the beginning of his Appeal hearing.

4.5. The Tadić Appeal

If trial by tribunal – itself an illegal court – was perverting the course of justice, then the process of appeal was a double perversion. When the defence in the case of Duško Tadić challenged the ICTY's legality, primacy over national courts and jurisdiction, the decision of the trial chamber was predictable. It refused to rule on the issue of legality and dismissed all other grounds. When the Tadić defence went to the Appeals Chamber, they once again faced a foregone conclusion but this time for very different and highly convoluted reasons.

The supporting legal argument, though characteristically dense, was transparently contrived. Riddled with contradiction, it reeked of hypocrisy. Again

first Chief Prosecutor about The Hague Tribunal (ICTY).

[110] Balkan Conflicts Research Team, ICTY Statute. Available at: https://yugofile.org.uk/bcrtwp/icty-statute/.

the Appeal court was judge and jury in its own cause. The age-old principle applicable almost everywhere in the world that any complaint against a court should be heard by an independent and higher court was ignored.

The trial chamber judgement had been that the Tribunal was not competent to rule on the legality of its own establishment. It took the view that since the decision to establish the tribunal was a political decision then it was non justiciable. The Prosecutor maintained that:

> *(1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case*
>
> *(2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises 'political questions' which are 'non-justiciable' (id. at 12-14).*

It was further argued by the prosecutor and held by the trial court that:

> *[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.*

(Decision at Trial, at para. 5; see also paras. 7, 8, 9, 17, 24, passim.)

That is of course the crucial reason why this fundamental issue should not under any circumstances have been considered by the ICTY itself. Logically it should have referred the question to an independent and higher court.

The line taken by the Appeals Chamber was quite different:

> *The Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.*

It cited Article 25 of the Statute of the International Tribunal:

> *… adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter Statute of the International Tribunal) adopted by the United Nations Security*

Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal.

International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966)

One of the main reasons this was included in the ICTY Statute was of course to ensure that it could always sit in judgement on any motion raised against its own legality and operational integrity. The universal principle that no man should be judge in his own cause was violated yet again:

On the issue of jurisdiction the prosecutor had told the trial chamber I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent (...) it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that. Rule 72 (which enables the tribunal to make a temporary ruling on its powers of jurisdiction) goes no further, in my submission, than providing a useful vehicle for achieving... justice because but for it (...) one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

So, it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place'. (The court's apparent solicitude did not stop the Milošević case dragging on for 4 years – the longest criminal trial in legal history – and still far from completion on his death in custody).

So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.

No, that is clearly not the case. The Security Council had instructed the ICTY to enforce only "existing international law."

It did not give ICTY judges power to make amendments to the ICTY Statute that were contrary to this instruction. Under international law, a fundamental challenge to the very legality of a court is surely one that cannot properly be heard by the self-same court.

4.6. Propaganda

Inflated death numbers was an integral feature of the Balkans conflict right from the start. It was calculated to aggravate world opinion, provoke calls for international intervention and justify armed action. The origin of the figure of 250,000 killed in Bosnia has since been traced back to its source, the Croatian propaganda ministry. A later allegation by the Bosnian Prime Minister Haris Silajdžić that 70,000 Bosnian Muslims had been massacred at Bihac made headlines around the world but was subsequently found to be totally untrue.[111]

The use of false statistics continued throughout the crisis years. At the outset of the final conflict, the Kosovo war in 1999, US Defence Secretary, William Cohen claimed:

> *We have now seen about 100,000 military aged Albanian men missing, they may have been murdered.*[112]

David Scheffer, US ambassador at Large for War Crimes put the potential number even higher, citing:

> *225,000 ethnic Albanian men aged 14 to 59.*[113]

The peak figure was positively stratospheric. According to the Boston Globe, the State Department reported that:

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[111] For a video of BBC Foreign Editor John Simpson confront Silajdžić over this false claim, see https://youtu.be/yjnJpbC2Y_M.

[112] Balkan Conflicts Research Team. Cohen fears 100,000 Kosovo men killed by Serbs. Available at: https://yugofile.org.uk/bcrtwp/cohen-fears-100000-kosovo-men-killed-by-serbs/.

[113] Balkan Conflicts Research Team. 'Motivated to believe the worst'. Available at: https://yugofile.org.uk/bcrtwp/motivated-to-believe-the-worst/.

> *As many as 500,000 ethnic Albanian men are missing and may be victims of Serb genocide... no fewer than 100,000 Albanian men are unaccounted for and may be lying in mass graves throughout the separatist province.*[114]

The final number of deaths on all sides in the Kosovo war was just under 4,000. More than 50% of these deaths were a consequence of NATO bombing.[115]

As for the Bosnian War, there were relatively few periods of intense fighting. Even basic research would have shown the improbability of 250,000 deaths in the first six months of fighting. British military losses during six years of World War II totalled 383,700. UK civilian losses totalled 67,200 and this included the London Blitz, the bombing of Coventry and other cities, and the intense fighting in the Far East.[116]

Cherif Bassouni, the leader of the UN's expert commission investigating war crimes in the former Yugoslavia, was probably the first person to suggest that more than 200,000 had been killed in Bosnia. He inflated by 1,000% the figure being used by the Bosnian Muslim government and did so during the winter when very little fighting was actually taking place.[117]

George Kenney, acting head of the Yugoslav desk in the US State Department in 1992, had access to all military information. He knew the figures put out officially and publicised widely, were a fiction and said so:

> *The news media's fundamental pervasive lie has been to report uncritically, in lockstep, wildly inflated death statistics provided by the Bosnian government. This stirred up a massive public outcry in turn ultimately leading to formal charges of genocide being rendered against the Bosnian Serbs. But there has never been a shred of evidence – none at all – for repeated claims that 200,000 or more people, mostly Muslims, were killed.*[118]

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[114] Balkan Conflicts Research Team. Boston Globe 500,000 Missing Claim. Available at: https://yugofile.org.uk/bcrtwp/boston-globe-500000-missing-claim/.

[115] Balkan Conflicts Research Team. 'Motivated to believe the worst'. Available at: https://yugofile.org.uk/bcrtwp/motivated-to-believe-the-worst/.

[116] "World War II casualties". Wikipedia, Wikimedia Foundation, last updated 12 July 2021. https://en.wikipedia.org/wiki/World_War_II_casualties#Total_deaths_by_country.

[117] Balkan Conflicts Research Team. ICTY demographers reduce Bosnia death total by 50% - Norwegian News Agency. Available at: https://yugofile.org.uk/bcrtwp/icty-demographers-reduce-bosnia-death-total-by-50-norwegian-news-agfency/.

[118] Email from Kenney to BCRT researcher. source to be specified

The most recent statistic put out by the ICTY in 2004 cuts that figure in half with a revised death toll on all sides to be around 100,000. Even now, in 2020, it is believed that fewer than 40,000 bodies have been recovered in Bosnia and indeed that the actual total may be fewer than 20,000. The Security Council was undoubtedly convinced that, in the particular circumstances of the former Yugoslavia, an international tribunal would put an end to barbaric crimes. But then again, as it turned out, those particular circumstances were hugely exaggerated.

There is startling and very recent evidence that western media, having framed the Serbs as the villains of the piece, could be less than scrupulous when it came to publishing anything which validated the 'official' version of events. At a conference on 25 May 2020, The Times' columnist Melanie Phillips told of her time at the highly respected Guardian newspaper when it became clear that a front page story about Bosnian Muslim suffering at the hands of Serbs was a complete invention. The reporter concerned admitted that she had simply made it up. After some discussion, the editorial consensus was that it was alright to run with the story because, although it was a tissue of lies, it nevertheless illustrated the 'broader truth' of Serb aggression.[119]

4.7. Undisguised Partiality

When it came to indictments, the court was brazenly biased in deciding whom to prosecute. 80% of those indicted were Serbs and yet all sides were implicated in war crimes, not least NATO with its 78-day bombing campaign in Kosovo. But that was a war crime the court steadfastly ignored. Despite the fact that NATO itself had no locus to launch a bombing campaign in Yugoslavia and had not sought UN approval to do so, it went on to break nearly every rule of war, deploying cluster bombs against civilians, using weapons containing depleted uranium, targeting shops, schools and hospitals – and it did so with impunity. Only 2% of its precision guided missiles hit military targets. Its intensive bombing was intended to destroy the Yugoslav economy.

In all Balkan conflicts, the clearest case for an indictment was the case against NATO. NATO had committed the ultimate crime of waging a war of aggression. The United Nations Charter Article 2 prohibits interventions in the domestic

[119] For a video of Melanie Phillips on false reporting at the Guardian, see https://youtu.be/IJvDI_U_gP0.

jurisdiction of any country and forbids threats of force or the use of force by one state against another. To characterise the bombing of Kosovo as 'humanitarian intervention', as NATO did, was grotesque.

But there was never any doubt that NATO would not be brought to book. Asked whether NATO leaders could ever be indicted by the international Tribunal, the Alliance's spokesman, Jamie Shea, responded:

> *As you know, without NATO countries, there would be no International Court of Justice, nor would there be any International Criminal Tribunal for the former Yugoslavia because NATO countries are at the forefront of those who have established these two tribunals, who fund these tribunals and who support on a daily basis their activities. We are the upholders, not violators, of international law.*

Walter J Rockler, one of the Nuremberg prosecutors and co-author of the Nuremberg principles, declared that the NATO bombing of Yugoslavia constituted:

> *The most brazen international aggression since the Nazis invaded Poland.*

Later, Rockler said this in a speech recorded for a conference:

> *NATO delivered a non-negotiable ultimatum to the effect that Kosovo must be turned over to NATO rule with a view to ultimate Albanian independence of the province. The ultimatum was backed by a threat to pound Yugoslavia into submission. The Yugoslav government rejected the NATO proposal with the result that NATO was allegedly forced for quote humanitarian reasons unquote to carry out its bombing threat. This resulted in ceaseless day and night bombing with an estimated 14,000 sorties over almost three months. Using smart bombs, dumb bombs, cluster bombs, and bombs incorporating depleted uranium, the bombings in the service of humanitarianism killed more than a thousand men, women and children. It struck factories, water works, electric works. TV and radio facilities, bridges, trains and ordinary houses, to say nothing of the Chinese embassy.*[120]

And Rockler told the American press:

> *The NATO action violates and shreds the basic provisions of the UN Charter and other conventions and treaties.*

[120] For a video of the Rockler ultimatum, see https://youtu.be/SSGIt4XWFrQ.

UN resolution 2131 declares a forceful military intervention in any country to be aggression and a crime without justification.[121]

4.8. Bending the Rules

The Tribunal was itself complicit in NATO killings. ICTY indictees could be shot dead by NATO hit squads for resisting arrest even though they had no idea they were being sought to stand trial. They were the subjects of secret or sealed indictments the contents of which were not made public. Such indictments – issued routinely by the ICTY – were intended to reduce the risk of flight but they also removed any possibility of voluntary surrender.

Siniša Drljača witnessed his father's fatal encounter with NATO:

> *Suddenly six heavily armed men sprang out of nowhere and ordered us to keep calm, to lay with our heads on the ground and not to resist. I obeyed, and so did my uncle. At that time three soldiers jumped on my father. He shook all three off and attempted to flee. The soldiers shot him and my father fell on the ground. He was not dead. I heard him breathing. Then a soldier came up to him and shot him point blank in the head.*

It should be remembered that the NATO Stabilisation Force (SFOR) had no authority whatsoever from the UN or any other relevant authority to operate in Serbian territory. Every step and action they took was illegal under international law. For a man to be shot dead in cold blood for resisting illegal arrest, under a warrant he knew nothing of, was an outrage.

4.9. Due Process

For those war crimes it did prosecute, the court's conduct showed a shocking disregard for the very thing which distinguishes rule of law from retribution – namely due process.

It is a fundamental principle that the law must be stable. Yet this golden rule was repeatedly broken. As John Laughland has pointed out:

[121] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX). Available at: https://www.refworld.org/docid/3b00f05b22.html.

> *The ICTY's Rules of Procedure were in a state of permanent flux. They were drafted in just two months and published on 11 February 1994. They were then amended twice in 1994, four times in 1995, four times in 1996, twice in 1997, twice in 1998, three times in 1999, twice in 2000, three times in 2001, four times in 2002, three times in 2003, four times in 2004 and five times in 2005. The ICTY Statute itself was amended eight times by 2006. And the changes were not minor: in January 1995, 41 of the 125 rules were changed and a further 19 were changed in December 2002. Many of these changes reduced the rights of defendants – something that Article 6 of the Rules says is not allowed.*[122]

All of these changes were made by the judges themselves without any independent oversight and often by a simple exchange of emails. Again they were a law unto themselves. Far from seeing anything wrong with this, the ICTY's first annual report boasted of its 'purpose made set of rules: as an ad hoc institution, the Tribunal has been able to mould its rules and procedures to fit the task in hand' (Point 75 1st Annual Report ICTY).

Madeleine Albright and her advisers were quick to spot opportunities to change international law by covert means. At the Security Council meeting on 25 May 1993 at which Resolution 827 was approved, the ambassadors of various powerful states voiced their support for supranationalism to supersede the sovereign nation state. Thanks to Albright, their entirely impromptu views were to assume the force of law. In "clarifying" the new statute, she claimed the 1977 Additional Protocols to the 1949 Geneva Convention were included under Article 3 of the ICTY Statute even though this was not the case. Although the Secretary-General's report had specifically said that customary international humanitarian law (IHL) excluded the 1977 Additional Protocols, Albright's intervention had the effect of extending the field of customary international law – by simple declaration. A radical revision of the law was effected by sleight of hand – a clear case of subordinating the judicial process to the demands of politics.

This cavalier attitude to law and its principles characterised all ICTY jurisprudence. Michael Scharf, the US official who drafted the terms of UN Security Council Resolution 991 (13/8/92) which led to the creation of the ICTY, confessed to using "the language of news reports rather than strictly following

[122] John Laughland & Ramsey Clark. *Travesty – The Trial of Slobodan Milosevic*. *Pluto Press*, London, 2006.

the legal terminology of the Geneva Conventions." He also admitted that the court's rules of evidence were drafted so as 'to minimise the possibility of a charge being dismissed for lack of evidence.' The Appeals Chamber of the ICTY is on record as stating "the purpose of the rules is to promote a fair and expeditious trial and the Trial Chambers must have the flexibility to achieve this."[123]

One of the key questions the ICTY had to address was whether an international armed conflict existed at the time of the alleged acts. This is because, generally, the international laws of war come into force only in international conflicts. The evidence on the ground of what occurred in Yugoslavia suggests that there were isolated incidents of mass killing carried out by all sides. But they lacked the scale and intent required to constitute the crime of genocide which under the Geneva Conventions "requires the unique mental element of specific intent to destroy in whole or in part, a national, ethnical, racial or religious group."

The problem confronting the ICTY was that the alleged killing of Muslim men of military age in Srebrenica to remove a future military threat did not readily fit those criteria. The victims did not constitute part of the protected groups of civilians specified in the convention. It was to overcome this difficulty that the Tribunal sought to shape the law to suit its own ends by incorporating the Geneva Conventions into its own Statute. Although using exactly the same text and definition of genocide, Article 4 of the ICTY Statute contrived to ignore the original context. The Tribunal thereby gave itself the flexibility to interpret, not just apply, the law. It could then decide for itself the nature of the conflict in which the alleged crimes had occurred. ICTY lawyers claimed this was simply a reasonable attempt to ensure that, despite different circumstances, similar crimes attracted similar penalties. But in practice the Tribunal was bending the rules to get convictions.

All charges of genocide, predominantly against Serbs, were brought under Article 4. Despite this, the specific intent required for a charge of genocide was never established. Nor was evidence produced of the necessary scale of death. Nevertheless, the process ground on relentlessly, with indictments for genocide being issued before the facts were known. Even years after sentences were handed down, the evidence on which they were supposedly based was still being sought.

[123] Ruling on the admissibility of evidence in the Aleksovski trial.

An indication of the ICTY's fundamental failure as a court of law to have even a grasp of the facts was provided by one of its judges, the late Patricia Wald. After sitting on several trials resulting in the convictions of Serbian defendants for genocide at Srebrenica, Judge Wald wrote that Srebrenica had had a population of 37,000 at the time it fell to the Bosnian Serb Army. She was apparently wholly unaware that more than 37,000 survivors had been officially recorded, making the claimed genocide of up to 8,000 men and boys – or even a part of the 8,000 – a mathematical impossibility.[124]

There was no excuse for such a lapse. The Hague Tribunal had every opportunity to acquaint itself with the facts of Srebrenica by studying and hearing evidence from the authors of the Dutch NIOD report. This 7,000 page, 5-year study is believed to be the most detailed report ever prepared on an event of this kind. But the ICTY dismissed it, on the basis they thought it 'too nuanced'. In reality they seemed far more concerned with securing convictions than establishing what had actually happened.[125]

Throughout the various amendments to the rules of procedure and the jurisdiction of the Tribunal, the tendency, if not intention, was always to reduce the rights of defendants and lower the level of proof required to secure a conviction.

5. A Brief Catalogue of ICTY Abuses:

The Tribunal failed to adopt best practice and was not objective, fair and impartial at all times.

It ignored strict instructions from the Security Council to implement only existing international law. Furthermore, it created new laws criminalising actions retrospectively.

The court had no definition of the burden of proof required for convictions such as 'beyond reasonable doubt.'

There was no right to bail or a speedy trial.

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[124] Balkan Conflicts Research Team. ICTY Judge Patricia Wald on the Krstic Trial. Available at: https://yugofile.org.uk/bcrtwp/icty-judge-patricia-wald-on-the-krstic-trial/.

[125] Balkan Conflicts Research Team. Transcript: DR Cees Wiebes and Chris Stephen Interviewed by Clive Anderson on Radio 5 Live, October 2004. Available at: https://yugofile.org.uk/bcrtwp/transcript-dr-cees-wiebes-and-chris-stephen-interviewed-by-clive-anderson-on-radio-5-live-october-2004/.

There was no trial by jury. Verdicts were reached by a team of three judges who also heard appeals and resolved legal questions about trial procedure. In practice the ICTY was judge and jury in its own cause.

Almost half the judges had little or no courtroom experience. They were academics, diplomats or from a political background. Gabrielle Kirk McDonald who went on to become President of the ICTY was amazed to be invited to serve as a judge. When she explained that she knew nothing about international criminal trials, the US State Department told her "that's not a qualification, don't worry, you'll learn."

The Tribunal created a new hybrid of the adversarial and inquisitorial legal systems which greatly reduced the rights of defendants. This was condemned at the time by Sir Howard Morrison QC, a former ICTY trial judge, later President of the Appeals Division of the International Criminal Court: "some of the limitations imposed on the defence run counter to the idea of any level playing field as between the defence and the prosecution and strike at the very heart of professional effective representation."

The defence were regularly denied full access to all evidence. This meant they were unable to call their own expert witnesses to test and challenge the prosecution case and freely cross-examine key witnesses.

Defendants were often ignorant of the charges and testimony against them. Some were tried in absentia.

It was decided that in cases of rape or sex crimes no corroboration of the victims' testimony would be required. This is perhaps explained by the extraordinary absence of credible evidence despite widespread claims that 20,000-50,000 Bosnian Muslim women were raped leading to 1,000 pregnancies. These figures came from a report in 1992 by an investigating commission in Bosnia-Herzegovina under the chairmanship of Dame Anne Warburton which reported after just three days of taking evidence. It contained only 2-3 direct testimonies of women who claimed to have been raped and made no attempt to prove claims that the rapes were 'organised or systematic'. The EC committee on the Rights of Women rejected the 20,000 estimate because of the lack of documented evidence and testimonies. At the same hearing, Frits Kalshoven representing the UN fact finding mission stated that the data collected up to that point could not be used as evidence in court. Commission member Simone Weil dissociated herself from the report telling journalist Nora Beloff that the group arrived in Zagreb with

no programme, no interpreter, no agenda and just opened the door to anyone who cared to come and tell them about rapes. Their report failed to authenticate the grossly exaggerated figures being fed as daily horror stories to the Western media. No official inquiry has since substantiated the figures.

Defendants were exposed to double jeopardy. The court scrapped the long held principle that no one may be tried twice for the same crime. Article 25 of the Tribunal's Statute gives the prosecutor the right to appeal an acquittal and obtain a conviction.

Hearsay evidence and secret testimony were admitted, sometimes from witnesses who were dead. Best legal practice would never have allowed this. John Laughland, author of 'Travesty – the trial of Slobodan Milošević' (2007), said in an interview: "Trial is like a scientific experiment, it has to be conducted in controlled circumstances – all external influences must be removed from the laboratory when the experiment is conducted otherwise the experiment will not be valid. The same is true for a criminal trial. Hearsay evidence is an example of one of these external influences that has to be excluded if the scientific nature of a trial is to be preserved because a trial is a laboratory in which testimony is tested as much as possible." And yet academic studies reveal a huge reliance on hearsay evidence. Professor Michael Scharf of the Case Western Reserve University School of Law estimated that 'over 90%' of the evidence cited in Tribunal proceedings was from hearsay sources.

Sir Ninian Stephen, an ICTY Judge for four years, was deeply critical of the Tribunal's use of anonymous or protected witnesses: "he right to a fair administration of justice holds so prominent a place in democratic society... that it cannot be sacrificed to expediency... if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable… the dangers inherent in such a situation are obvious."

The conduct of the court was often hostile towards defendants. Slobodan Milošević was interrupted by Judge Sir Richard May no less than 70 times

during his highly effective cross-examination of William Walker, the veteran US diplomatic fixer who 'announced' the Račak massacre to the world.[126,127,128] Milošević also often had his microphone arbitrarily cut off by Judge May.

The court machinery for investigation and evidence gathering had an inbuilt bias. The Tribunal allowed its driving force to be the United States, though the US had armed and aided the Croatian and Bosnian Moslems from 1992 onwards.

The ICTY was far too close to the USA. Former ICTY President Gabrielle Kirk McDonald told the US Supreme Court in 1999 that Madeleine Albright, the permanent representative to the UN, "worked with unceasing resolve to establish the Tribunal. Indeed we often refer to her as 'the mother of the Tribunal."

Prosecution witnesses frequently complained that their official written statements did not accurately reflect what they had told investigators. While cross examining witness Nikola Samardžić about his statement, Slobodan Milošević was told: "I did not say that, whatever is written there, I did not put it that way. I am presenting here before the tribunal matters as I recall them. Now if this were put into my mouth I don't think that is in order."

The most notorious example of fabricated evidence was exposed in the very first trial conducted by the ICTY – that of the Serb commander Duško Tadić.

The star prosecution witness, known only as witness L, was about 20 years old and he had already been sentenced himself to 10 years for crimes of genocide and rape committed when he was a guard at the Trnopolje detention camp. He testified that he had served under Tadić and saw him commit similar crimes. But upon questioning, Witness L admitted he had given false testimony. He said he had neither written nor read his statement and only signed it after death threats from the Bosniak intelligence agency which was desperate to convict the Serb defendant. Witness L said the Bosniaks beat him, coached him on what to say and even took him to the scene of alleged crimes so that he could describe them. All of it was a lie, he said, prearranged by the federation and the Tribunal investigators.[129]

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[126] Balkan Conflicts Research Team. William Walker & the Racak 'massacre'. Available at: https://yugofile.org.uk/bcrtwp/william-walker-the-racak-massacre/.

[127] Balkan Conflicts Research Team. Two more pieces on William Walker. Available at: https://yugofile.org.uk/bcrtwp/two-more-pieces-on-william-walker/.

[128] For a video of Walker's weak argument for declaring a massacre just 3 hours after arriving, see https://youtu.be/zXXeyDE2ZeM

[129] For Sheena Macdonald's BBC TV report, see https://youtu.be/Zrl76oLfcMU.

If the court was having trouble finding evidence to support the indictments already issued, it would simply rewrite the indictments to make the task easier. If it wanted to perform something not allowed under its Statute, it routinely amended the latter to obtain the powers it needed.

In 1993 the American Bar Association expressed no fewer than 150 general and specific concerns about the ICTY statute.[130] They included the use of secret testimony and hearsay evidence, limitations on the rights of the accused to confront accusers and the provision to allow appeals by prosecutors.

6. Evidence-gathering

- The International Commission for Missing Persons, the agency set up to conduct exhumations and DNA identifications, was established at the behest of the US President Bill Clinton. In reality it was no more than an adjunct of the Muslim Commission for Missing Persons, set up by Bosnian Muslim President Alija Izetbegović as soon as the Bosnian war had ended in 1995.
- Its chairmen, exclusively American, included former Republican presidential candidate Bob Dole (1997-2001). He saw no conflict of interests in his role as chairman despite his blatant pro-Muslim sympathies. His election campaigns had been funded by numerous ex-pat Albanian constituents; he had allowed Kosovo Albanians to use his Washington office for their PR campaigns; and during a visit to Sarajevo in 1992 had been caught on camera telling his Bosnian Muslim hosts 'we are on your side' despite the official US policy of neutrality. Dole was not alone. Throughout its existence over 90% of staff in the ostensibly impartial ICMP were Bosnian Muslims largely investigating crimes and atrocities against their coreligionists allegedly committed by Bosnian Serbs. Such inherent bias, of course, totally undermines the concept of impartial justice. Yet the ICTY investigations Team Leader, Dean Paul Manning, confirmed this was the case in evidence to The Hague Tribunal in 2003 when he told the court:

[130] American Bar Association Special Task Force on War Crimes Committed in the former Yugoslavia. Chicago IL: American Bar Association, 1993.

These graves have not been exhumed by the ICTY. The responsibility for exhuming these graves has been handed over to the Bosnian Commission for Missing Persons and the International Commission for Missing Persons.[131]

- Forensic and DNA staff at the main ICMP laboratory in Tuzla, which was wholly unaccredited, invariably found themselves working on specific, routine tasks and had little knowledge of the complete process. A number expressed strong concern about the way things were done by the ICMP. But many had volunteered for the work because of its perceived humanitarian importance. They felt that any shortcomings were more than mitigated by the greater good of bringing war criminals to justice.
- The ICMP's most crucial forensic and DNA evidence was never made available to the court, far less to the defendants and defence teams. It was merely reported to the court and written into the record as established fact. It is clear from information now in the public domain that none of this apparent evidence would have survived the rigorous scrutiny of a proper trial.
- It became known in 2017 that deliberate steps had been taken in 1998 to ensure that the ICMP was above and beyond the law and could never be held to account. In fact, there was never the remotest possibility that its crucial scientific evidence would be made available for independent scrutiny.[132]
- Research by the International Association of Genocide Scholars revealed the ICMP had been granted extraordinary and unprecedented immunity in a deal with the governments of Croatia and Moslem Bosnia. The Headquarters agreement[133] between the commission and the council of ministers of Bosnia Herzegovina gave the ICMP the status of an intergovernmental organisation. Article 3 granted the ICMP:

  Immunity from every form of legal and administrative process.

[131] Prosecutor v Slobodan Milošević IT-02-54 page 12 of the transcript, available from: https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.pdf.

[132] Genocide Studies and Prevention: an International Journal (2017). 11(1) – from page 72. Available from: https://yugofile.org.uk/bcrtwp/wp-content/uploads/2020/06/ICMP-Immunity-Paper-entire-paper.pdf.

[133] Balkan Conflicts Research Team, IMCP immunity document. Available at: https://yugofile.org.uk/bcrtwp/icmp-immunity-document-english-version/.

And Article 4 stated:

> *The premises of the ICMP shall be inviolable. The property and assets of the ICMP shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, judicial, administrative or legislative action.*

Only a decision by the ICMP itself to waive these immunities could render it accountable. Thus the age old principle – be you never so high, the law is above you – was cynically side-lined.

6.1. DNA Evidence

DNA is unquestionably useful in establishing the identity of missing persons but quite useless as an evidentiary tool in determining genocide. This is because even a perfect match cannot determine when, how or why someone died. This was confirmed by the ICMP's Director of Forensic Sciences, Thomas Parsons, under cross examination by the Bosnian Serb President, Radovan Karadžić:

KARADŽIĆ: *So is it your claim that those people whose DNA profiles you have established were killed in an unlawful manner and did you separate that from those who were killed in action?*

PARSONS: *The ICMP does not concern itself with the legal question of how these people were killed, particularly whether their deaths were lawful or not. I am reporting on the identifications that have been made with regard to mortal remains recovered from these graves. Now the ICMP has performed a great deal of work with regard to excavations of these sites, and the evidence which was recovered there and much of which has been covered in previous trials and as I understand it roughly also with regard to this, there's a lot of evidence that goes to whether or not… to the circumstances under which these people lost their lives. But of course the DNA matches themselves don't indicate that.*

When the Karadžić defence team pressed to see the primary DNA evidence, the ICMP agreed to provide it for 300 cases. The defence requested DNA for 5 specific cases selected by Dr Karadžić and a further 295 cases which they chose as a perfect random sample.

At that point, the ICMP responded they could not proceed with the request because some of the relatives who had given their DNA would not agree for it to be handed over. Eventually DNA printouts were provided for the 5 cases chosen by Karadžić but the other 295 cases were selected by the ICMP.

The defence team saw no point in reviewing this information because what was provided was not primary DNA evidence. Nor was it a random sample because the ICMP had made the final selection and it provided no basis for any meaningful conclusions.

Nevertheless, despite this fundamental denial of a defendant's right to see all of the evidence against him, not just a tiny percentage, Kathryne Bomberger, Director General of the ICMP, sought to present this as evidence of the court's even-handedness:

> *The work that we did with Mr Karadžić who was mounting his own defence where he wanted all the genetic reference samples related to Srebrenica which were huge. The trial chamber in that case ruled that we could work with Mr Karadžić, that he could select 300 cases himself randomly which he did and we went back to 1500 families of the missing because remember we had to have three reference samples per missing person to see if they would be willing to provide their genetic information to the alleged perpetrator so we were able to do that. We met the needs of the defence in these cases and in each one of these cases there was irrefutable evidence regarding the identity of this person.*

Professor Oliver Stojković, the independent DNA expert appointed by the court to the Karadžić defence team has confirmed that none of the sample material handed over to him was of any probative value.

He was unable to conduct any tests because there was no physical evidence such as blood or bone to examine, merely DNA profiles on paper – essentially printouts confirming what had already been reported to the court with no explanation of how the results were achieved. Without full access to all the original tissue samples for independent testing and analysis there was literally no way the ICMP findings could be either challenged or verified.

The shocking fact remains that the court admitted material findings that were totally unsupported by any solid physical evidence as core evidence. Nonetheless, the court went on to convict defendants. Twenty years on, it is still the case that the DNA used to identify a claimed 6,800 bodies has never been properly shared

with anyone, not even the DNA community. Given that DNA methodologies are highly complex, with huge operational problems such as contamination, there is effectively no hard evidence of any kind to support the identifications made by the ICMP or the many genocide verdicts handed down by the ICTY. It follows that none of these verdicts are safe. The evidence of genocide is as non-existent as the evidence claiming Iraq possessed weapons of mass destruction.

6.2. Plea Bargaining

The ICTY's struggle for evidence to support its indictments and the need to speed up the glacial trial process led to a rapid increase in plea bargaining. Encouraging defendants to cooperate in return for a lighter sentence or better treatment could have put them under a degree of duress now categorised as torture by the UN and may not serve the course of justice. It is often easier to say what is required than simply tell the truth.

The ICTY's star witness, Dražen Erdemović, a self-confessed killer, was a prime example. A Croatian mercenary who had fought on all sides in the civil war, he was initially judged mentally unfit to stand trial. Yet despite his certified mental instability, the Tribunal chose to use him as the key prosecution witness in numerous high profile cases, including those of Milošević and Mladic.

Erdemović had confessed to killing at least 70 Moslems in Srebrenica. He claimed to be one of an 8-man execution squad that shot dead 1200 Moslem men in cold blood in the space of just five hours.

But Erdemović had done a deal with the court. He was sentenced to a mere 5 years and only served three and a half. Incredibly the entire case for genocide was largely constructed on the confused and contradictory testimony of this one highly unstable individual.

During the Milošević case, his written statement that men of all ethnicities had taken part was challenged by the defendant. When Milošević asked him directly whether he had seen or heard Serbians at the time of the shootings, Erdemović admitted that he had not.

His self-serving version of events was never corroborated by the ICTY whose search for the truth stopped short of seeking out his seven accomplice killers.

Even though their names and addresses were public knowledge from 1997, unaccountably, the Tribunal made no attempt to interview them or bring them to justice before it stopped accepting new cases in 2004.[134]

6.3. Making New Law

Despite the formal instruction (in the resolution of the UN Security Council approving the creation of the ICTY) to confine itself to implementing only existing international law, the Tribunal created many new laws. The current UN Secretary General, Antonio Guterres, boasted about it at the ICTY closing party:

> *The International Criminal Tribunal for the former Yugoslavia has been a pioneer in creating the contemporary architecture for international criminal justice.*[135]

Patricia Sellers-Viseur, an ICTY prosecutor, was similarly enthusiastic:

> *There's been more jurisprudence generated (by the ICTY) in the past 5 years than the previous 500.*[136]

The ICTY changed existing international humanitarian law by inventing new crimes such as Joint Criminal Enterprise or JCE. For one thing, this meant defendants found themselves being charged with crimes that were not yet 'crimes' at the time they were allegedly committed. In this and other ways, JCE effectively gave the Tribunal carte blanche to convict defendants. One internal critic claimed that JCE really stood for "just convict everyone."[137]

The prosecution turned to JCE in its attempt to convict Milošević of genocide. Since it failed to prove genocidal intent, it hoped to show that genocide was a foreseeable consequence of his other acts and convict him that way. There

[134] Balkan Conflicts Research Team. "Srebrenica: the Star Witness" by Germinal Čivikov. Available at: https://yugofile.org.uk/bcrtwp/wp-content/uploads/2019/06/Star-witness-copy.pdf.

[135] For a video clip of the current UN Secretary General at the ICTY conference closure, see https://youtu.be/Dm4F0lMH3VU.

[136] For a video of Patricia Sellers-Viseur on the ICTY, see https://youtu.be/JpJ0WCGyASU.

[137] Balkan Conflicts Research Team. Joint Criminal Enterprise at the ICTY – Nathan Dershowitz. Available at: https://yugofile.org.uk/bcrtwp/joint-criminal-enterprise-at-the-icty-nathan-dershowitz/.

may have been 'no smoking gun evidence against Milošević' as David Scheffer put it, but Joint Criminal Enterprise was certainly the magic bullet in the prosecution's armoury.

As it grew increasingly apparent that precise, hard evidence to convict was not readily forthcoming the court resorted to another tactic more akin to carpet bombing – blitzing the defence with a huge amount of hearsay and uncorroborated evidence. Prosecution counsel were allowed to call large numbers of people who claimed to have witnessed atrocities of one sort or another. The vast majority were so-called 'protected witnesses' who gave testimony anonymously and often by remote link. Invariably, there was no corroboration of their accounts. It was suggested by prosecutors that it was part of the court's role to enable victims to inform the court of their pain and that this could only be done adequately by calling large numbers of witnesses in this category. But victims have no special status in proper justice systems unless they bring hard factual evidence to support the case being brought against the defendants. The accumulation of so-called evidence generated overwhelming quantities of paperwork. It has been calculated that a researcher working a constant 35 hours a week would need seven years to read the entire transcript of the Milošević trial. One inevitable effect of this was to deter criticism. Few reasonable people would be inclined to attack a process which they did not have time to study in depth.

6.4. The Right to Self-Defence

The ICTY abandoned the previously inviolable principle of modern law that defendants should have the right to represent themselves in court. Steven Kay QC, one of three lawyers appointed by the court to represent Yugoslav president Slobodan Milošević against his wishes, argued powerfully but in vain against this injustice: stating that

> *… in the context of a trial and a defendant one cannot think of anything more fundamental, more going to the interests of justice, more going to the fairness of a trial than that that concerns the right to present your defence as you want it rather than how somebody else wants it to be presented.*

6.5. An Ad-hoc Court

The ICTY was an ad hoc court whose very existence was in violation of international law. It was not established by the normal process of a Treaty agreed by individual countries. Illegal conduct by the UN endangers all society as there is no ready means of restraining it.

On top of this, the ICTY was neither fair nor objective. It stands accused of being a political tool created to secure convictions. Its findings had no credibility as the Tribunal was always judge in its own cause.

The court's conflict of interests could not have been more stark. Sponsored and funded by the US and NATO, the Tribunal decided over a war in which the US and NATO were themselves active and direct participants. As US envoy Richard Holbrooke told the BBC:

> *The War Crimes Tribunal was a huge valuable tool. We used it to keep the two most wanted war criminals in Europe out of the Dayton process and we used it to justify everything that followed.*

Holbrooke confirmed in a separate interview that, as UN envoy, he 'was under initial instructions to sacrifice Srebrenica, Goražde and Žepa', thereby confirming that the US was directly interfering in the Bosnian conflict whilst still proclaiming its impartiality.[138]

And the Tribunal was a very willing tool. Its president Antonio Cassese hailed the exclusion of indicted Bosnian Serbs from Dayton:

> *A great political victory with diplomatic consequences.*

Another former President, Claude Jorda, called it

> *a major contribution to international peace.*

6.6. A Colossal Fraud

It seems the world has fallen prey to the greatest of propaganda weapons, the Big Lie. This was a lesson from the Nazis – if you are going to lie, the bigger

[138] For a video of Holbrooke on the matter, see https://www.youtube.com/watch?v=Tow3W6w7oiM.

the lie the better because more people will believe you. Hitler wrote of a lie so 'colossal' that no one would believe that 'someone would have the impudence to distort the truth so infamously.'

The concept of course of an international Tribunal fabricating evidence and inventing verdicts does beggar belief and the global scale of that deception is truly mind boggling: but, sadly, the ICTY stands condemned by its own conduct.

Canadian lawyer and former ICTY and Rwanda Tribunal amicus curiae Christopher Black has condemned all the Tribunals set up by the ICTY since 1993 in this way:

> *These Tribunals are not institutions of criminal justice as portrayed in the mass media or by the tribunals themselves but in fact are politically motivated courts whose purpose is one thing, propaganda. The trials, the people targeted for the charges, are carefully selected to represent certain segments of the regimes which have been overthrown in Yugoslavia and Rwanda for instance and they target certain leaders, political leaders, military personnel, intellectuals and so on and in my experience from all the trials I have been involved with and have knowledge of – all the charges are politically based, motivated and the purpose of the propaganda aspect of it is that they are used first of all to demonise the old regime so that it can't come back to power, to put out a false picture of what actually happened in those wars and to cover up the real role of the west in those wars.*[139]

The ICTY was a fraudulent court of law that set out not to reveal the truth but to promote a carefully constructed lie which it then relentlessly propagated for political purposes. It is clear that the scales of justice weighed not only the evidence of genocide but also the influence of geopolitics. The verdict on the Tribunal based on the evidence and beyond reasonable doubt is guilty as charged. The ICTY was not even victors' justice. It was no justice at all.

6.7. Legacy

A major legacy of the ICTY is that the standards of court procedure it applied now threaten to corrupt judicial standards around the world. Those with the military might to set up and control tribunals will find it easier in the future to

[139] Balkan Conflicts Research Team. An impartial tribunal, really? By Christopher Black. Available at: https://yugofile.org.uk/bcrtwp/an-impartial-tribunal-really-by-christopher-black/.

use the accusation of genocide to justify so-called humanitarian military aggression against nations merely defending their sovereignty. The ICTY's contempt for established legal principles and UN core values betrayed the best standards of civilisation and the trust of the world.

On the face of it no cause could have been more noble than the ICTY's mission to end impunity for the perpetrators of genocide, however powerful they may be. The humanitarian appeal was overwhelming. But there is no better cover for base ambition than a noble cause. It gave the United States the perfect pretext for international intervention with the full blessing of the UN.

Asked why the United States wanted to bring about the collapse of Yugoslavia, Robert Baer, former CIA agent in Bosnia and now intelligence correspondent for Time magazine, told the Serbian press:[140]

> *It's all very clear, the people who incited the war and dictated the terms of the peace now own the companies that exploit various mineral resources and the like! They simply made slaves of you, your people work for nothing and that product goes to Germany and America… they are the winners! You will eventually have to purchase and import what you have created yourself, and since you have no money, you have to borrow, that's the whole story with the whole of the Balkans! [...] Kosovo was taken for two reasons, first because of mineral and natural resources, and secondly, Kosovo is a military base of NATO! In the heart of Europe it is their largest military base*.[141]

Throughout its existence the Tribunal was used to protect American interests, promote American aims and project American power. The consequences were catastrophic, fanning the flames of ancient rivalries. Conflicts were intensified, igniting wars that need never have happened. The fighting in Bosnia and Croatia that could have ended in 1992 dragged on for a further three years. There was a war in Kosovo that could have been completely avoided. And all in the name of humanitarianism. At every turn, the ICTY aided and abetted the disastrous

[140] Balkan Conflicts Research Team. Confession of a CIA agent: they gave us millions to dismember Yugoslavia. Available at: https://yugofile.org.uk/bcrtwp/wp-content/uploads/2020/06/Confession-of-a-CIA-Agent-They-gave-us-millions-to-dismember-Yugoslavia.pdf.

[141] Balkan Conflicts Research Team. Camp Bondsteel – Paul Stuart, World Socialist website, 29 April 2002. Available at: https://yugofile.org.uk/bcrtwp/camp-bondsteel-paul-stuart-world-socialist-website-29-april-2002/.

policies of the New World Order, undermined confidence in international law and made a pariah of an entire people. Only the court of public opinion can begin to remedy such gross injustice.

7. A Critical Look at the ICTY – The Tribunal's Origins and Behaviour

Andy Wilcoxson

Abstract

Journalists and academics throughout the Western world view The International Criminal Tribunal for the Former Yugoslavia (ICTY) as a credible institution. In turn, the Tribunal's findings are presented to the public as if they were undisputed facts. As this paper will demonstrate, the faith that Western journalists and academics place in the ICTY is unwarranted. The Tribunal is an illegal institution that has been corrupted by politics.

1. An Illegal Tribunal

When former Yugoslav president Slobodan Milošević arrived in The Hague, the first words out of his mouth were, "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly."[142]

Officially, the ICTY was established by UN Security Council Resolutions 808/93 and 827/93. The UN Charter does not give the Security Council the authority to adjudicate international law which means the Security Council cannot establish a tribunal with that power.

[142] Prosecutor v. Slobodan Milošević, ICTY, 3 July 2001, p. 2 of the transcript.

The ICTY's obvious illegality was not lost on its first defendant, a low-level Bosnian-Serb commander named Duško Tadić who appealed the Tribunal's right to put him on trial at all.

Not surprisingly, the ICTY rejected Tadic's appeal ruling that "the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal" which led to the foregone conclusion "that the International Tribunal has subject-matter jurisdiction over the current case."[143]

2. A Politicized Tribunal

Although the ICTY was "officially" established by the UN Security Council, the impetus to create a war crimes tribunal came from the US Central Intelligence Agency (CIA).

On 1 February 1993, the Director of the CIA circulated a memo assessing how various countries would respond to "US policy options" in the former Yugoslavia.

One of the policy options was to "establish a war crimes tribunal." According to the memo, Western Europeans would be supportive of the Tribunal, Moscow would oppose it, and "Muslim states would approve a War Crimes Tribunal and publicizing Serbian atrocities. Even treatment of Bosnian transgressions, however, would be regarded as tilting in Belgrade's favour."[144]

In a speech at the US Supreme Court, former ICTY President Gabrielle Kirk McDonald was generous in her praise for then-US Secretary of State Madeline Albright. She said "we benefited from the strong support of concerned governments and dedicated individuals such as Secretary Albright. As the permanent representative to the United Nations, she had worked with unceasing resolve to establish the Tribunal. Indeed, we often refer to her as the 'mother of the Tribunal'."[145]

[143] Prosecutor v. Duško Tadić aka "Dule", ICTY Case No. IT-94-1-T, 2 October 1995.

[144] BTF Assessment, "Yugoslavia" Policy Options: Likely Responses, 1 February 1993. Available at https://bit.ly/3gashle.

[145] Remarks at the United States Supreme Court, Washington D.C., 5 April 1999.

Since its inception, the ICTY has been used for political purposes by the United States and its NATO allies. In an interview with BBC Radio, former US Assistant Secretary of State Richard Holbrooke said "the War Crimes Tribunal was a huge valuable tool. We used it to keep the two most wanted war criminals in Europe – Karadžić and Mladić – out of the Dayton peace process and we used it to justify everything that followed."[146]

Former NATO spokesman Jamie Shea boasted at a press conference that "NATO countries are those that have provided the finance to set up the Tribunal, we are amongst the majority financiers." According to Shea, "without NATO countries, there would be no International Court of Justice nor would there be any International Criminal Tribunal for the Former Yugoslavia, because NATO countries are in the forefront of those who have established these two tribunals, who fund these tribunals, and who support on a daily basis, their activities."[147]

Classified US diplomatic cables published by the anti-secrecy website *Wikileaks* show that ICTY personnel maintained inappropriate contacts with the United States and other NATO governments.

During Slobodan Milošević's trial, the ICTY chief prosecutor disclosed the contents of his confidential witness list to the US Embassy in The Hague despite the fact that it had been filed under seal with the Court.[148]

Tim McFadden, the head of the ICTY's UN Detention Unit, went to the American Embassy and disclosed details about Slobodan Milošević's medical condition, his mental state, his daily routine, and even details about his relationship with his wife and the contents of their personal telephone conversations.[149]

The cables also show that political considerations influenced the ICTY's findings regarding the Srebrenica massacre and the selection of the Tribunal's Chief Prosecutor.

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[146] Interview with Richard Holbrooke, "United Nations or Not? The Final Judgement: Searching for International Justice," BBC Radio, 9 September 2003. Available at http://www.bbc.co.uk/radio4/news/un/transcripts/transcript_programme3.shtml.

[147] M2 Presswire, NATO Transcript of press conference given by Mr. Jamie Shea and Major General Walter Jertz in Brussels, 28 May 1999. See also: M2 Presswire, Press Conference Conducted by NATO Spokesperson Jamie Shea and Major Gen. W. Jertz, 17 May 1999.

[148] Wikileaks Cable: 03THEHAGUE985. Available at https://www.wikileaks.org/plusd/cables/04THEHAGUE985_a.html.

[149] Wikileaks Cable: 03THEHAGUE2835. Available at https://www.wikileaks.org/plusd/cables/03THEHAGUE2835_a.html.

When the ICTY Appeals Chamber handed down its verdict in the Radislav Krstić trial, American embassy personnel in The Hague reported back to Washington that "there is a general sense among prosecutors that the Appeals Chamber first decided that Krstić did not merit conviction as a principal perpetrator of genocide but that, for 'political' reasons, it did not want to set aside the finding that the massacres around Srebrenica constituted genocide.

"The result, one prosecutor said, made it seem as if 'an eighteen-year-old law clerk' had written the judgment on the basis of a decision reached 'by academics and diplomats'. In fact, a law clerk involved in the drafting confirmed to embassy legal officers that the chamber had given the drafters general directions, 'the bottom line,' and that the law clerk drafters had to determine how to get there."[150]

When Naser Orić, the Bosnian Muslim commander of the 28th Infantry Division in Srebrenica, was acquitted by the ICTY Appeals Chamber for crimes against Serbs, Deyan Mihov of the ICTY Prosecutor's Liaison Office told American Embassy personnel that "it is becoming increasingly obvious that decisions in the chamber are being politically driven."[151]

In fact, the ICTY's first Chief Prosecutor, Richard Goldstone, freely admitted to the *San Francisco Chronicle* that "international criminal justice [is] all about politics."[152] And former ICTY spokeswoman Florence Hartmann has publicly alleged that the lead prosecutor in the Slobodan Milošević trial, a British attorney named Geoffrey Nice, was an MI6 agent.[153]

Judge Frederik Harhoff was removed from the Tribunal's bench in 2013 after he circulated a letter accusing the President of the ICTY of exerting pressure on the judges in their deliberations because of "pressure from 'the military establishments' in certain dominant countries" – particularly the United States.[154]

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[150] Wikileaks Cable: 03THEHAGUE1033. Available at https://www.wikileaks.org/plusd/cables/04THEHAGUE1033_a.html.

[151] Wikileaks Cable: 06BELGRADE1092. Available at https://www.wikileaks.org/plusd/cables/06BELGRADE1092_a.html

[152] Bob Egelko, "Renowned prosecutor says war criminals no longer heroes". *San Francisco Chronicle.* 2013. Available at http://blog.sfgate.com/crime/2013/11/12/renowned-prosecutor-says-war-criminals-%20no-longer-heroes/.

[153] Florence Hartmann's letter to the Croatian daily "Jutarnji list", 18 September 2007.

[154] ICTY Judge Frederik Harhoff's email to 56 contacts, 6 June 2013. Available at http://a.bimg.dk/node-files/511/6/6511917-letter-english.pdf.

Coincidentally, the ICTY's then-President, Theodor Meron, was described by American diplomats in classified correspondence with the State Department as "the Tribunal's preeminent supporter of US Government efforts."[155]

When Meron wanted Carla del Ponte fired as ICTY Chief Prosecutor, he did not take his concerns to the UN. He took his request to the US Embassy.

According to a classified American diplomatic cable, "Meron explained that Del Ponte is 'primarily a media person who is primarily interested in her own legacy.' She has 'absolutely no idea about management' and is 'not in control of her staff.' He described 'tremendous unrest' in the OTP, noting that a senior OTP official had met with him to convey a detailed litany of concerns about the poor management of the office and the threat it posed to achieving completion strategy targets. Meron provided a confidential memorandum of that conversation reporting the official's view that 'the current Prosecutor lacks the required vision, lacks the needed managerial competence, and lacks the commitment to the completion strategies that will be necessary to bring them about as promised'."[156]

Ms. Del Ponte was replaced by Serge Brammertz as ICTY Chief Prosecutor in 2008, and he continues in that capacity today as Chief Prosecutor of the ICTY's successor, the International Residual Mechanism for Criminal Tribunals (IRMCT).

A 2007 State Dept. cable published by *Wikileaks* tells us that Brammertz got his job for political reasons in spite of doubts about his competence.

The cable says, "France is backing Serge Brammertz to succeed Carla Del Ponte as ICTY Chief Prosecutor from a belief that Brammertz will otherwise refuse to extend his mandate at the UN International Investigative Commission (UNIIIC), an outcome the French characterize as disastrous."

The cable goes on to say that "the UK had raised doubts about whether Brammertz possessed the right profile and competence for the ICTY position."[157]

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[155] Wikileaks Cable: 03THEHAGUE2818. Available at https://www.wikileaks.org/plusd/cables/03THEHAGUE2818_a.html.

[156] Wikileaks Cable: 03THEHAGUE1827. Available at https://www.wikileaks.org/plusd/cables/03THEHAGUE1827_a.html.

[157] Wikileaks Cable: 07PARIS1882. Available at https://www.wikileaks.org/plusd/cables/07PARIS1882_a.html.

3. An Anti-Serb Tribunal

The politicized nature of the Tribunal and its inappropriate relationship with the United States and other NATO governments raise serious questions about the impartiality of its proceedings and the reliability of its findings.

NATO was a party to the conflicts in the former Yugoslavia. NATO warplanes bombed Serbian targets throughout the former Yugoslavia, which means NATO governments have a vested interest in the outcome of the ICTY's proceedings.

At a ceremony commemorating the 20th Anniversary of the ICTY's founding, Theodor Meron gave a self-serving speech about the Tribunal's "profound contributions to global efforts to battle impunity." Speaking with sanctimony so thick you could cut it with a knife, he praised the international community for its "resolve that there be no impunity for any individual, even the most senior political or military leader."[158]

When reporters asked Lester Munson, Communications Director for the US House of Representatives Committee on International Relations, if the Tribunal would prosecute NATO officials for bombing civilian targets in the former Yugoslavia he told them: "You are more likely to see the UN building dismantled brick-by-brick and thrown into the Atlantic than to see NATO pilots go before a UN tribunal."[159]

So much for Meron's "battle against impunity." The selective nature of the ICTY's prosecutions is plain for everyone to see.

Krajina Serb leader, Milan Martić was indicted by the ICTY for using cluster bombs against Zagreb in retaliation for Operation Flash. According to the indictment, the cluster bomb attacks killed seven people.[160]

On 7 May 1999, NATO warplanes dropped cluster bombs on the Serbian city of Niš. The bombs hit a hospital and a market killing 15 civilians.[161] Nobody from NATO was indicted by the ICTY.

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[158] ICTY's 20th Anniversary – Statement by President Judge Theodor Meron. Available at https://www.icty.org/sid/11319.

[159] UN Wire, *Arbour Draws US Ire Over Remarks About NATO Pilots*, 24 May 1999. Available at https://bit.ly/37Zirhz. See also: *We'll never hand pilots to Arbour: US official* in The National Post, 1999.

[160] ICTY Case Number IT-95-11, Initial Indictment of Milan Martić, 25 July 1995, paras. 7, 8, 15, and 17.

[161] Richard Norton-Taylor , "NATO cluster bombs 'kill 15' in hospital and crowded market". *The Guardian,* 1999. Available at https://bit.ly/37PgHaS.

If it is a war crime to drop cluster bombs on Zagreb, then why isn't it a war crime to drop cluster bombs on Niš?

The ICTY prosecuted Dragomir Milošević for shelling the TV Sarajevo building. According to the indictment, the attack left one person dead and 28 wounded.[162]

On 23 April 1999 NATO bombed Radio Television Serbia's main studio in Belgrade. According to the BBC, the attack killed 10 people and left another 18 wounded.[163] Again, nobody from NATO was prosecuted by the ICTY.

If it is a war crime to bomb a TV station in Sarajevo, then why is it not a war crime to bomb a TV station in Belgrade?

Gen. Milošević was also prosecuted for firing on buses and trams in Sarajevo. The indictment listed 10 people killed as a result of these attacks.[164] But when NATO bombed a commuter train near Grdelica on 12 April 1999 killing 9 civilians,[165] and a bus in Lužane on 3 May 1999 killing another 23 civilians,[166] no action was taken by the ICTY prosecutor.

Yet again, if it is a war crime to fire on buses and trams in Bosnia, then why is it not a war crime to bomb busses and commuter trains in Serbia?

The answer to these questions is obvious. The Tribunal is funded by NATO governments, and staffed by personnel who are connected to NATO governments. That is why NATO gets the impunity that Meron pretends to be fighting against.

In 2006, a survey of twenty-five forensic pathologists employed by the Tribunal was conducted. The results were published in the academic journal *Medicine, Science and the Law*.[167]

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[162] ICTY Case No. IT-98-29/1-PT, Amended Indictment of Dragomir Milošević, 12 December 2006, Schedule 2, p. 2.

[163] BBC News, *World: Europe; NATO defends TV bombing* in BBC News, 1999. Available at https://bbc.in/3k4bly3.

[164] ICTY Case No. IT-98-29/1-PT, Amended Indictment of Dragomir Milošević, 12 December 2006, Schedule 1 and 2.

[165] *NATO hits passenger train*, The Times, 1999.

[166] *War in the Balkans: Allies Admit Killing 23 Civilians in Bridge Bombing; Innocent Victims*, The Independent, 1999.

[167] Geoffroy Lorin De La Grandmaison, Michel Durigon, Grégoire Moutel, and Christian Hervé, "The international criminal tribunal for the former Yugoslavia (ICTY) and the forensic pathologist: ethical considerations," *Med Sci Law* 46(3), 2006, pp. 208-212. Available at https://bit.ly/3yY5Xmq.

The study found that "some of the forensic pathologists involved belonged to human rights organizations that were not neutral in the conflicts. Moreover, most of them belonged to countries which are NATO members."

In spite of the Tribunal's attempt to stack the deck with pathologists that would be sympathetic to the NATO cause, the study found that of the twenty-five pathologists surveyed: "Three forensic pathologists reported that they had been subject to pressures, one by the Croatian government, the other two by a human rights organization, a non-governmental organization which controlled the course of autopsies and also the writing of autopsy reports."

Moreover, "three forensic pathologists were aware of mass grave sites wittingly not investigated by the ICTY, especially mass graves of Serbian victims" and "four of them questioned the impartiality of the justice led by the ICTY."

The study noted disturbing irregularities concerning the ICTY's forensic investigations, including that the "financial independence of the forensic pathologists could be questioned as not all of them have been paid directly by the ICTY according to the comments of some of our respondents."

The study also noted what it called a "disturbing feature of the ICTY proceedings" where "not all forensic pathologists involved presented verbal evidence to the court in The Hague, but only the senior chief forensic pathologist of the team appeared to give evidence, in contradiction to the tradition that the responsibilities of an individual forensic scientist are personal and not corporate."

During the trial of former Bosnian Serb President Radovan Karadžić, the Judges and Prosecutors openly suppressed evidence of crimes against Serbs.

When a protected Bosnian Muslim witness, under questioning from Dr. Karadžić, began testifying about Serbs who had been beheaded by Naser Orić's fighters in Srebrenica, prosecutor Melissa Pack intervened to stop the testimony. She said, "I can see that we are going down the road of this witness testifying about crimes allegedly committed by the ABiH against Serbs. This is the second answer which purports to describe those sorts of events, and I just want to at this point caution Dr. Karadžić and raise this as a potential issue. In my submission, evidence of crimes against Serbs is not relevant."[168]

[168] Radovan Karadžić trial transcript, p. 12743

On many occasions, prosecutors objected to the admission of documents on the grounds that "they consist of detailed evidence of crimes against Serbs and do not satisfy the standard of relevance."[169]

The judges openly sided with the prosecutors and forced the witnesses testifying in the trial to redact their statements in order to prevent evidence of crimes against Serbs from going on the record.

Witness Goran Sikiras had his statement redacted by the chamber. The judge explained that "about half of Sikiras's statement is concerned with crimes committed against Bosnian Serbs in Vogošća and as such are not relevant to the charges in the indictment. I refer here to page 4, parts of page 5, as well as pages 6 and 7. The Chamber reminds the accused once again that it will not admit detailed tu quoque evidence under the guise of relevance to this trial."[170]

Witness Branislav Dukić's statement was rejected in its entirety on the grounds that "Dukić's proposed 92 ter statement is concerned, almost entirely, with detailed descriptions of crimes committed against the Serbs and against Dukić in particular. It also contains some references to previous meetings between Dukić and the Prosecution. As such, the Chamber considers that Dukić's evidence is not relevant to the charges in the indictment. While his statement does contain some remote references to the positions and military activity of the ABiH and the Bosnian Croat forces in and around Sarajevo, these are not only minimal but also general in nature and thus are not sufficient in and of themselves to warrant admitting parts of his statement. Accordingly, the Chamber decides, proprio motu, to exclude the evidence of Branislav Dukić in its entirety."[171]

The statement of witness Vidomir Banduka was redacted because "the Chamber finds paragraphs 59, 60, 62, 63, 72 to 75, 77, and 78 are not relevant in that they either refer to the detention facilities established by Bosnian Muslim authorities or to crimes committed against Bosnian Serbs. So these paragraphs should be redacted and will not admit associated exhibits referred to therein."[172]

The statement of witness Nenad Kecmanović was redacted because, "paragraphs 45 and 46 of Mr. Kecmanović's statement contain a detailed information about mistreatment of Bosnian Serbs, including the existence of detention

[169] *Ibid.* p. 8347.
[170] *Ibid.* pp. 30687-30688.
[171] *Ibid.* pp. 30518-30519.
[172] *Ibid.* pp. 33424-33425.

centres. The Chamber is of the view that this level of detail is not relevant to the charges against the accused, and accordingly orders the redaction of these paragraphs."[173]

When they ordered the redaction of Milovan Bjelica's witness statement, the judges explained that "the Chamber had an opportunity to skim through the statement. Para 44, the Chamber – we will keep the first and last sentence, but the other part should be redacted, as well as paragraph 45, 47, and paragraph 49 to 51. They do contain too much detailed evidence, including names, ages of victims on crimes against Bosnian Serbs that are not relevant or necessary."[174]

The judges were so keen to suppress evidence of crimes against Serbs that they would redact even a single sentence if the witness dared to mention that crimes had been committed against Serbs. When they ordered the redaction of Tomislav Savkić's witness statement, the judge explained that "the Chamber finds that the last sentence of paragraph 62 and the document referred to therein and the last sentence of paragraph 81 contain excessive detail about specific crimes committed against Bosnian Serbs which is not relevant to the charges against the accused in the indictment and orders that they be redacted."[175]

When the Trial Chamber ordered redactions to Srdjan Šehovac's witness statement they did so on the basis that "the statement, which the Prosecution seeks to exclude, falls within the category of detailed evidence pertaining to crimes committed against Bosnian Serbs which the Chamber has consistently excluded on the grounds that it is irrelevant tu quoque evidence."[176]

When Radojka Pandurević, a Serbian woman who was imprisoned in a camp run by the Bosnian Muslims where she and other Serbian prisoners were subjected to beatings and sexual violence, took the witness stand, the judges demanded that large swaths of her witness statement be redacted because "her statement is comprised of tu quoque or otherwise irrelevant evidence and will therefore not be admitted."[177]

When she took the witness stand, she objected to the redactions saying, "I read the statement, but it does not reflect accurately everything I said, as I can

[173] *Ibid.* pp. 7083-7084.
[174] *Ibid.* pp. 4386-4387
[175] *Ibid.* p. 1716.
[176] *Ibid.* pp. 32652-32653.
[177] *Ibid.* p. 30519.

see that some portions are marked which were unacceptable and redacted. Those paragraphs have to do with my stay in the Silos camp, which in turn would mean that I cannot convey the suffering I had undergone in the Silos camp."[178]

The judges made no secret of what they were doing. They said it clearly, they said it openly, and they said it explicitly: "We did not allow the accused to expand on the issue of crimes committed against the Serbs."[179]

In addition to suppressing evidence of crimes against Serbs, the Tribunal gives impunity to those who perpetrate crimes against Serbs.

The largest single instance of ethnic cleansing associated with the break-up of Yugoslavia was Operation Storm where some 250,000 Serbs were driven out of Croatia on 4-5 August 1995. Yet the ICTY Appeals Chamber has exonerated the perpetrators.

On 16 November 2012, the ICTY Appeals Chamber announced that it was "revers[ing] the Trial Chamber's finding that a Joint Criminal Enterprise existed to permanently remove the Serb civilian population from the Krajina by force or threat of force." And that "all of the Appellants' convictions are therefore reversed."[180]

The ICTY Appeals Chamber reversed the convictions in the face of smoking gun evidence of the defendants' guilt.

On 31 July 1995, Croatian President Franjo Tudjman met with his generals to plan Operation Storm, and the ICTY had the transcript of their meeting in evidence. It is exhibit P00461.E in the Gotovina trial. The transcript was furnished by the Croatian government and nobody denies its authenticity.

Tudjman tells his generals, "we have to inflict such blows that the Serbs will to all practical purposes disappear."

He explains that "it is important that those [Serbian] civilians set out, and then the army will follow them, and when the columns set out they will have a psychological impact on each other."

Croatian General Ante Gotovina says, "if we continue this pressure, probably for some time to come, there will not be so many civilians, just those who have to stay, who have no possibility of leaving."

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[178] *Ibid.* p. ???

[179] *Ibid.* p. 46536.

[180] Gotovina et al Appeal Judgment, 12 November 2012, para. 98.

Tudjman tells his generals that leaflets should be given to Serbian civilians saying, "we are appealing to you not to withdraw, we guarantee… This means giving them a way out, while *pretending* to guarantee civil rights etc."

Tudjman's use of the word "pretending" highlights the fact that the civil rights guarantees were not intended to be genuine.

Tudjman tells his generals that "every military operation must have its political justification" and he directs them to stage a false-flag "Serbian" attack to justify Operation Storm.

Tudjman's Chief of staff Zvonimir Červenko replies, "we should ask Markač to do that."

Mladen Markač, a high ranking official in Croatia's interior ministry, interjects "… and we accuse them of having launched a sabotage attack against us and of heading towards Maslenica, of intending to go over Mt. Velebit to the road from Karlobag to Starigrad, that they want to cut it off, and that is why we were forced to intervene."

General Davor Domazet disagrees, "I think it would be best to do it in the following way. They are using Udbina airport, we can organize an explosion as if they had struck with their air force and in this manner we can disguise all our axes."

Tudjman went on to explain how Croatia would send a delegation to the Z-4 peace negotiations in Geneva "as a mask." He told his generals, "I am going to Geneva to hide this and not to talk… I want to hide what we are preparing [so] we can rebut any argument in the world about how we did not want to talk."

The ICTY Appeals Chamber says this transcript describes, "a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction. Thus discussion of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts."[181]

This is not the only example of the Tribunal acquitting people who perpetrated crimes against Serbs in the face of overwhelming evidence of their guilt.

The ICTY Appeals Chamber also acquitted Naser Orić, the commander of Bosnian Muslim forces in Srebrenica.

[181] *Ibid.*12 November 2012, para. 93.

Orić showed videotaped evidence of his handiwork to at least two Western journalists who published contemporaneous reports of what they had seen in major Western newspapers.

John Pomfret reported in the *Washington Post* that "Naser Orić's war trophies do not line the wall of his comfortable apartment – one of the few with electricity in this besieged Muslim enclave stuck in the forbidding mountains of eastern Bosnia. They are on a videocassette tape: burned Serb houses and headless Serb men, their bodies crumpled in a pathetic heap.

"'We had to use cold weapons that night,' Orić explains as scenes of dead men sliced by knives roll over his 21-inch Sony. 'This is the house of a Serb named Ratso,' he offers as the camera cuts to a burned-out ruin. 'He killed two of my men, so we torched it. Tough luck."[182]

The second journalist was Bill Schiller. He reported on the front page of the Toronto Star that "Orić is a fearsome man, and proud of it.

"I met him in January 1994, in his own home in Serb-surrounded Srebrenica.

"On a cold and snowy night, I sat in his living room watching a shocking video version of what might have been called Naser Orić's Greatest Hits.

"There were burning houses, dead bodies, severed heads, and people fleeing.

"Orić grinned throughout, admiring his handiwork.

"'We ambushed them,' he said when a number of dead Serbs appeared on the screen.

"The next sequence of dead bodies had been done in by explosives: 'we launched those guys to the moon,' he boasted.

When footage of a bullet-marked ghost town appeared without any visible bodies, Orić hastened to announce: 'we killed 114 Serbs there."[183]

Here you have two Western journalists, an American and a Canadian, who were both shown videotaped evidence of Serbs literally butchered by Naser Orić's men while Orić himself bragged about what he had done, but the prosecutor did not put either of them on the witness stand.

Another high-profile witness that the Prosecution did not call was Gen. Philippe Morillon of France who served as the Commander of the UN Forces in Bosnia during part of the war.

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[182] John Pomfret, "Weapons, Cash and Chaos Lend Clout to Srebrenica's Tough Guy". *The Washington Post,* 1994, p. A14.

[183] Bill Schiller, "Fearsome Muslim warlord eludes Bosnian Serb forces". *The Toronto Star,* 1995, p. A1.

Although the Prosecution did not call Morillon to testify in the Orić trial, they did call him to testify in the Slobodan Milošević trial where Milošević questioned him about his dealings with Orić.

Morillon told the Milošević Trial Chamber that Orić was "a warlord who reigned by terror in his area and over the population itself." He said that Orić and his men, "engaged in attacks during Orthodox holidays and destroyed villages, massacring all the inhabitants."[184] According to Morillon's witness statement, Orić "admitted to killing Bosnian Serbs each night."[185]

When asked what Orić did with the Serbs he captured, Morillon explained that "he did not even look for an excuse. It was simply a statement: One cannot be bothered with prisoners." He said, "I was not surprised when the Serbs took me to a village to show me the evacuation of the bodies of the inhabitants that had been thrown into a hole, a village close to Bratunac."[186]

When the presiding judge in the Milošević trial asked him, "are you saying, then, General, that what happened in 1995 was a direct reaction to what Naser Orić did to the Serbs two years before?" he answered, "yes. Yes, Your Honour. I am convinced of that. This does not mean to pardon or diminish the responsibility of the people who committed that crime, but I am convinced of that, yes."[187]

The prosecution had all of this evidence at their disposal, but they chose not to use it and Naser Orić was acquitted.

An honest accounting of the crimes committed by Naser Orić and his men would undermine the political utility of the July 1995 Srebrenica massacre as a means of vilifying the Serbs. And NATO has an interest in vilifying the Serbs in order to justify bombing them.

The ICTY does not just suppress evidence of crimes against Serbs, and acquit their perpetrators. The Tribunal also convicts Serbs of serious crimes, like genocide, when it has little to no evidential basis for doing so.

[184] S. Milošević trial transcript, ICTY, Thursday, 12 February 2004, pp. 31965-31966.
[185] S. Milošević trial Prosecution exhibit P648.2, para. 45.
[186] S. Milošević trial transcript, ICTY, Thursday, 12 February 2004, p. 31966.
[187] *Ibid.* p. 31975.

In 2001, the ICTY handed down a verdict, which it has subsequently affirmed several times, stating that it had been "proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995."[188]

Although some Bosnian Muslim civilians from Srebrenica were killed, the vast majority were soldiers and military aged men. The Krstić Trial Chamber admitted that "only the men of military age were systematically massacred."[189]

The ICTY Prosecutor's own military expert testified that "people who did not qualify as military combatants or potential military combatants were not part of that plan [to execute the prisoners]. One of the unique things that I can use that helps me to support that theory is witness testimony that was brought before the Court earlier where on 13 July in the Sandići meadow, there was an awareness that they were looking to exclude out of the groups of people individuals who were not between the ages of 16 and 60. And that was an awareness by the soldiers at the lowest level."[190]

In 2005, the Office of the ICTY Prosecutor compiled a list of 7,661 Bosnian Muslims (military and civilian) who went missing or were confirmed dead after Srebrenica fell to Bosnian-Serb forces in July of 1995.[191]

6,847 out of the 7,661 people on the list were men between the ages of 16 and 60.[192] That age group is significant because a military draft was in effect in Srebrenica. The order for general mobilization issued by the Srebrenica War Presidency called for the immediate mobilization of "all able-bodied citizens aged between 16 and 60 years."[193]

Moreover, the demographic unit of the ICTY Prosecutor's office matched the Army of Bosnia and Herzegovina's military service records to 5,371 of the people on the Prosecutor's list of Srebrenica missing and dead.[194]

The overwhelming majority of Srebrenica massacre victims, for which the ICTY has convicted several Serbs of "genocide," were soldiers and military aged men – not civilians.

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[188] ICTY, Krstić Verdict, 2 August 2001, para. 598.
[189] *Ibid.* para. 595.
[190] Testimony of Richard Butler, ICTY R. Krstić transcript, 21 July 2000, p. 5511.
[191] ICTY, Z. Tolimir trial, Prosecution exhibit no. P01794.
[192] ICTY, Z. Tolimir trial, Prosecution exhibit no. P01802.
[193] ICTY, V. Popović trial, Defense exhibit no. 7D00057
[194] ICTY, Z. Tolimir trial, Prosecution exhibit no. P02082.

It is important to note that the Genocide Convention does not protect all human groups. It only protects national, ethnical, racial or religious groups. It does not protect military and paramilitary groups.

Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as follows:

> *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> *Killing members of the group;*
>
> *Causing serious bodily or mental harm to members of the group;*
>
> *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
>
> *Imposing measures intended to prevent births within the group;*
>
> *Forcibly transferring children of the group to another group*.

According to the ICTY, "the existence of a plan or policy is not a legal ingredient of the crime of genocide."[195] The Tribunal has ruled that "the perpetrator's genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide."[196] The Appeals Chamber in the Karadžić case held that "the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold."[197]

The Krstić defence argued before the ICTY Appeals Chamber that his genocide conviction should be overturned because "the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica." Without disputing the factual claim, the Appeals Chamber dismissed the argument on the grounds that "the absence of such statements is not determinative. Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime."[198]

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[195] Jelisić Appeal Judgment, ICTY, 5 July 2001, para. 48.
[196] Krstić Appeal Judgment, ICTY, 19 April 2004; para. 226.
[197] ICTY Appeals Chamber Judgment, Prosecutor v. Radovan Karadžić (98 bis), 11 July 2013, para. 22.
[198] Krstić Appeal Judgment, ICTY, 19 April 2004, para. 34.

The basis for the ICTY's Srebrenica genocide convictions rest entirely on questionable inferences the judges drew from circumstantial evidence.

The Popović Trial Chamber notes that "by its nature, [genocidal] intent is not usually susceptible to direct proof because '[o]nly the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent.' Absent direct evidence, the intent to destroy may be inferred [from other facts and circumstances]."[199]

The Krstić appeal judgment states that "the main evidence underlying the Trial Chamber's conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community… The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings, the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent."[200]

The reasoning employed by the Popović Trial Chamber is almost identical. They held that "it is clear from the evidence that the Bosnian Serb Forces intended to kill Bosnian Muslim able-bodied males from Srebrenica on a massive scale… The Trial Chamber finds that the killing of all of the male members of a population is a sufficient basis to infer the intent to biologically destroy the entire group."[201]

The Krstić Trial Chamber cited the fact that "only the men of military age were systematically massacred" and that "their death precluded any effective attempt by the Bosnian Muslims to recapture the territory"[202] to support its conclusion "that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group."[203]

A more likely inference is that the Bosnian Serbs killed the soldiers and military aged men from Srebrenica in order to destroy the 28th Infantry Division of the Army of Bosnia and Herzegovina whose commander (Naser Orić) boasted to anyone who would listen about all the Serbs he and his men had been killing.

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[199] Popović Judgment, ICTY, 10 June 2010, para. 823.
[200] Krstić Appeal Judgment, ICTY, 19 April 2004, para. 26, 27.
[201] Popović Judgment, ICTY, 10 June 2010, para. 805, 866.
[202] Krstić Judgment, ICTY, 2 August 2001, para. 595.
[203] *Ibid.* para. 598.

The women and children from Srebrenica were not targeted. The ICTY tells us that "the decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure."[204]

The most likely explanation is that the women and children were not targeted because they were not part of the military. The women and children were not the ones on Naser Orić's videotapes behaving like ISIS and butchering Serbs with knives and chopping their heads off.

When Serbs are on trial for genocide, the judges disregard exculpatory evidence and lower the evidentiary threshold needed to secure a conviction.

Compare that with the Tribunal's acquittal of the Croatian generals responsible for Operation Storm where the judges had direct smoking gun evidence, and the double-standard is obvious.

4. Suspicious Deaths of Prominent Serbs in the ICTY's Custody

On 5 March 2006, the Tribunal announced that former Krajina-Serb leader Milan Babić had hung himself with his belt in the UN Detention Unit.

During the autopsy, the Netherlands Forensic Institute said it was, "exceptionally uncommon" that the ligature mark left on Babić's neck was narrower than his belt but added, "it is not considered to be completely impossible."[205]

A report published by the SENSE agency notes that "the pathologists considered several possible theoretical explanations: the drying of the skin and the effects of substances that cause shrinkage, such as embalming fluid, alcohol or formalin, but could not provide a conclusive explanation for the difference that was observed. They did not find any similar cases in medical literature."[206]

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[204] Krstić Appeal Judgment, ICTY, 19 April 2004, para. 31.

[205] Mike Corder, "Prosecutors will not reopen investigation into death in UN custody of senior Croatian Serb". *Associated Press Worldstream,* 2006.

[206] SENSE, "Exceptionally Uncommon, But Not Completely Impossible", 2006. Available at https://bit.ly/3iUwICt.

Generally in a hanging, they would expect the mark to be roughly the same width or slightly wider than the belt.

Babić was not thought to be suicidal. According to the Tribunal's report on Babić's death "it was the impression of his immediate family that, during this period of detention at UNDU from 7 February 2006, Mr Babić was more at ease. The guards who were in contact with him during that time reported similar impressions. In particular, one of these guards, who had a particular past experience in another facility with the supervision of suicidal detainees, observed 'absolutely no indicator that anything was wrong, so far as suicidal tendencies, with Mr Babić'."

The report goes on to say that "Mr Müller who was in court on both days representing Mr Babić has noted nothing in his statement to the Inquiry that gave him any cause for concern about Mr Babić. The guards who had contact with Mr Babić on Saturday 4 March and Sunday 5 March 2006 did not notice any unusual behaviour by Mr Babić or any conduct which gave cause for concern."[207]

In spite of the fact that he did not appear to be suicidal to his family or the people around him, and that the marks on his neck did not match the belt he supposedly hung himself with, no criminal investigation was carried out. His death was declared a suicide and the books were closed.

Less than a week after Babić's death, former Serbian President Slobodan Milošević also died in the UN Detention Unit. On 11 March 2006 Slobodan Milošević had a heart attack and died.

Less than 72 hours before his death, Milošević wrote a letter to the Russian Ministry of Foreign Affairs stating that he had been poisoned with a powerful drug (rifampicin) that negated the effect of his high-blood pressure medication.

His letter said, "in order to verify my allegations, I am presenting you a simple example which you can find in the attachment. This document, which I received on March 7, shows that on January 12 (i.e. two months ago), an extremely strong drug was found in my blood… the fact that doctors needed 2 months to report to me, cannot have any other explanation than we are facing manipulation."[208]

In its report on Milošević's death, the Tribunal confirmed that Milošević was given a blood test on 12 January 2006 and that the suspicious drug was found.

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[207] Judge Kevin Parker, Report to the President: Death of Milan Babić, 2006. Available at https://bit.ly/2W8shvj.

[208] Slobodan Milošević's letter to the Russian Ministry of Foreign Affairs. Available at https://bit.ly/3szfXA7.

However, according to the Tribunal's report, "Mr. Milošević was not told of the results until 3 March 2006 because of the difficult legal position in which Dr Falke found himself by virtue of the Dutch legal provisions concerning medical confidentiality."[209]

Contrary to the ICTY's absurd claim, there is no provision in Dutch law that prohibits a doctor from telling their patient the results of his own blood test.

If the ICTY had been genuinely concerned about Slobodan Milošević's medical confidentiality, we would not have American diplomatic cables on Wikileaks outlining how ICTY personnel provided detailed information about his medical condition to the American Embassy in The Hague.[210]

According to the Milošević family, Dutch authorities denied them access to blood samples taken during his autopsy, and they refused to let the medical specialists chosen by his family attend the autopsy.[211]

Ten years after Milošević's suspicious death in the Tribunal's custody, the Tribunal quietly admitted that it lacked evidence linking him to the most serious crimes he was accused of.

Buried in paragraph 3,460 of the Karadžić judgment and in footnote 15,357 of the Mladić judgement came the admission that the judges lacked the evidence they needed to link Milošević to war crimes in Bosnia.

Slobodan Milošević's trial was going poorly for the Prosecution, but his death ended the trial and saved the prosecutors and the Tribunal itself from the humiliation of having to issue a verdict.

To get an idea of how bad the case was going for Prosecutors consider this 2002 observation from anti-Serb commentator, Tim Judah. He wrote that "the trial of former Yugoslav president Slobodan Milošević at The Hague is going horribly wrong, turning him in the eyes of the public from a villain charged with war crimes into a Serbian hero."[212]

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[209] Judge Kevin Parker, "Report to the President: Death of Slobodan Milošević," para 76, 2002. Available at https://bit.ly/3mbVsby.

[210] Wikileaks Cable: 03THEHAGUE2835. Available at https://bit.ly/3D0XbXo.

[211] Marko Milošević's Letter to the Organs of the ICTY and the United Nations Regarding Judge Parker's Investigation into the Death of Slobodan Milošević, 17 July 2006.

[212] Tim Judah. "Serbia Backs Milošević in Trial by TV – Alarm as Former President Gains the Upper Hand in War Crimes Tribunal". *The Observer*.

In 2003, the *London Times* was lamenting the fact that "one of the ironies of Slobodan's trial is that it has bolstered his popularity. Hours of airtime, courtesy of the televised trial, have made many Serbs fall in love with him again."[213]

By August 2004, the Milošević trial had been going on for about three years and the Tribunal's credibility was in tatters. The Serbian public had been watching the trial on TV and when the Serbian Human Rights Ministry conducted a public opinion poll it found that "three quarters of Serbian citizens believe that The Hague Tribunal is a political rather than a legal institution."[214]

By contrast, Milošević's own poll numbers were improving because of the trial. By the time he died, Milošević had better poll numbers than the people who overthrew him in the 5 October coup.[215]

By September 2005, Milošević's critics were complaining that the live wall-to-wall broadcasts of the trial were not having the desired political effect. His detractors urged Belgrade broadcaster B92 to take the US-sponsored broadcasts of his trial off the air. Political analyst Daniel Cvetićanin wrote, "it seems that the coverage benefits more those it was supposed to expose than the Serbian public. [The] freedom-loving and democratic intentions of the live coverage have not produced [the] planned effects."[216]

While Milošević's detractors wanted the trial hidden from public view, his supporters were even more emphatic that the daily trial broadcasts should continue.[217]

If Milošević were guilty of the crimes he was accused of, his detractors would have wanted the trial broadcast as widely as possible so that everyone could see how guilty he was, but that is not what happened.

Instead, it was Milošević's supporters who wanted the trial broadcast as widely as possible so that everyone could see how the ICTY was railroading an innocent man.

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213 "Listening to Lady Macbeth". *Sunday Times*, 2003.

214 "Public Opinion Firmly Against Hague". *B92 News,* 2004.

215 "Opinion Poll Shows Milošević More Popular in Serbia Than Premier". *BBC Monitoring International Reports*, 2005. Source: FoNet news agency, Belgrade, in Serbian 1320 gmt, 22 April 2005.

216 "Debate Opens in Serbia Over Live Coverage of Milošević War Crimes Trial". *Associated Press Worldstream*, 2005.

217 See also: "Serbian NGO Opposes Decision to Drop Live Broadcast of Milošević Trial". *BBC Monitoring International Reports*, 2003. Source: FoNet news agency, Belgrade, in Serbian 1300 gmt, 8 October 2003.

5. A Destructive Tribunal

The ICTY has made interethnic reconciliation in the former Yugoslavia more difficult. By exaggerating crimes committed by Serbs and excusing or minimizing crimes committed against Serbs, the Tribunal has done nothing but cause hard feelings and resentment among the peoples of the former Yugoslavia.

Thanks to the ICTY, nobody will take responsibility for their actions. Non-Serbs will not take responsibility for their crimes because the Tribunal tells them their leaders were blameless, and Serbs will not take responsibility for their crimes because the Tribunal is so clearly biased against them.

The wars ended more than two decades ago and the Tribunal has done nothing but rub salt in the wound since 1993.

27 years of the ICTY/IRMCT is 27 years too many. The Tribunal is an illegal politically-motivated farce and any journalism or academic research that uncritically relies upon its findings should be discounted.

8. The Hague Tribunal (ICTY): The Ultimate Propaganda and Foreign Policy Tool

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Abstract

Previous studies have demonstrated that The Hague Tribunal (ICTY) has made prosecutorial decisions and reached judgments based on ethnicity. Furthermore, some scholars argue that the workings of the Tribunal have aggravated tensions in the region and are the primary cause for the negative perceptions of the ICTY by many communities in the Balkans. In response, the Tribunal has largely blamed the regional media and 'nationalist politicians' for spreading 'gross distortions and blatant falsehoods' about its work. Subsequently, it created an outreach program to try change its image in the Balkans. Using thematic analysis, this study examined the way the Tribunal has framed the Yugoslav conflicts. The results show that the Tribunal's frame of the conflicts mirrors that of the US government and Western mainstream media, indicating bias by the Tribunal. Overall, this study supports findings of empirical and critical studies on the ICTY.

1. The International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created to try those who had allegedly committed war crimes during the conflicts in the country formerly known as the Socialist Federal Republic of Yugoslavia (SFRY). According to its founding 1993 United Nations Security Council (UNSC) Resolution, its fundamental goals were to help bring peace and justice to all the peoples of Yugoslavia. Some scholars (Boas 2007, Hagan 2010, Scharf 2002, Smith 2012) believe that it succeeded in its mandate while others do not (Bardos 2013, Black 2000, Dickson and Jokić 2006, Laughland 2007, Thomas 2003). The focal point of this debate has been the issue of bias. The former believe that the Tribunal was fair and impartial, while the latter argue that it was biased against certain (ethnic) groups, mainly Serbs. This controversy has followed the Tribunal since its inception, and it has contributed to the Court's negative image, at least within some communities, in the region. The ICTY denies any bias, whether political or based on ethnicity, and has created an outreach program to try combat this perspective. Since 1999, the ICTY's Outreach Program has worked diligently to spread the idea that the Tribunal is/was fair and impartial, and that its workings have positively contributed to bringing lasting peace and reconciliation to the region.

It has been relatively peaceful in the region since the conflicts ended – notwithstanding the (Albanian) National Liberation Army (NLA)[218] insurgency into Macedonia in 2001 and the pogroms against Serbs and other ethnic-minorities in Kosovo carried out by the Albanian majority that occurred on 17 and 18 March 2004. This much we know to be true. However, it would be specious to credit the ICTY, in whole or in part, for this outcome. First, an international *ad hoc* tribunal is not a necessary condition to end a conflict nor to maintain peace once it is achieved. Secondly, it is not a sufficient condition as there is not a single case in history where an *ad hoc* international court's workings have led to ending a conflict. Regarding this specific case, anyone with a basic understanding of the Yugoslav conflicts knows the violence and destruction escalated *after* the ICTY's creation, not before. The violence grew in intensity and spread across the region

[218] The National Liberation Army (also known as the Macedonian UCK) was closely associated with the Kosovo Liberation Army (also known as UCK/KLA).

from 1993 to 1999, and longer if the 2001 NLA/KLA incursion into Macedonia and 2004 Kosovo pogroms are included. This is not to minimize the violence that occurred between 1991-92, it is only to point out the dubiousness of the ICTY's claim. One could argue, and has argued (see Woodward, 1995), that the ICTY actually *contributed* to the escalation of violence rather than helping to abate it.

As far back as 1995, the negative impact of the ICTY's actions in the region could be seen. For instance, Woodward (1995) described how the threat of prosecution from the Court further backed the fighters into a corner and increased the incentives of finding sanctuary within their own sovereign states, making it unlikely to stop the fighting. As she stated, "by ignoring this counterproductive result – encouraging the conditions that led to violations – supporters of the War Crimes Tribunal appeared to give priority to defending the norms rather than to preventing conditions that would result in more victims" (324). Furthermore, she pointed out that because "the procedure was pushed largely by the United States, the accusations became a servant of American policy toward the conflict itself, which required a conspiracy of silence about the atrocities committed by parties who were not considered aggressors" (324).

In addition, the ICTY has never provided any evidence to support its claims. For instance, a study conducted by Potts and Kjær (2016, p. 552) found that the Tribunal's self-declared achievements were "stated rather than demonstrated" and that it ultimately failed to substantiate its claims with evidence. Notable scholar on the ICTY, Janine Natalya Clark (2009a, p. 124), argues that "the ICTY has had little success in realizing its objectives of delivering justice and contributing to the restoration and maintenance of peace." With regards to reconciliation between the various ethnic groups, Clark (2012, para. 4) claims that, based on the findings of her research in the former Yugoslavia, "there is little evidence of any positive nexus between ICTY trials and inter-ethnic reconciliation."

Much of this can be attributed to the lack of trust in the ICTY by some of the communities in the region (mainly Serbian and Croatian). There are many contributing factors for the lack of trust in the Tribunal, such as its distant location (from the peoples it is ruling over), that was established and funded by foreign powers (particularly the United States), the manner in which it was created, its refusal to prosecute NATO officials for war crimes, and its selective justice. Regarding the latter, critical studies on the ICTY (Bardos 2013, Black 2000, Dickson and Jokić 2006, Hayden 1999, Laughland 2007, Milojevich 2018a, 2019, Thomas

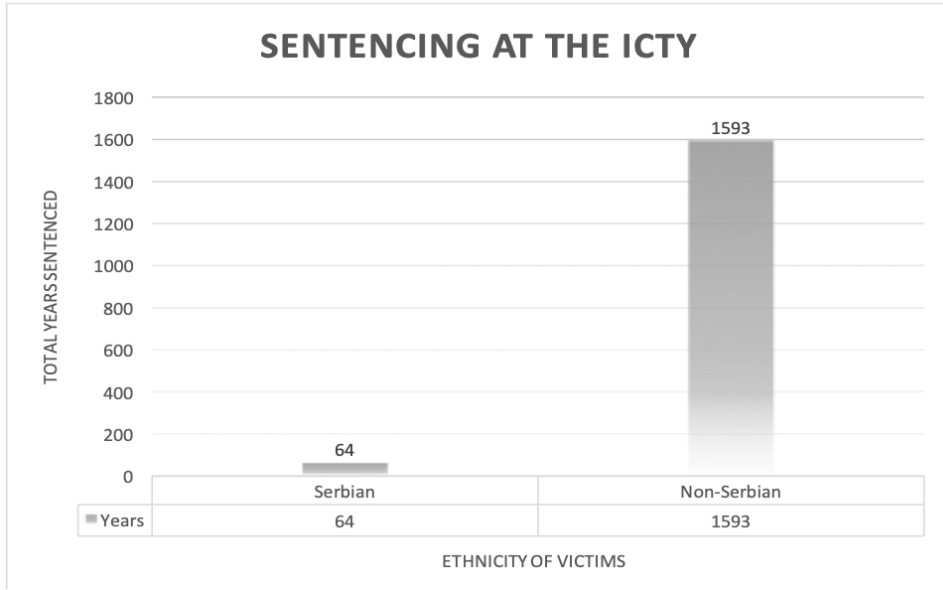


Fig. 1 Sentencing at the ICTY based on the ethnicity of the victims. This figure illustrates the lack of representation os Serb victims compared to non-Serb victims in the total years of sentencing at the ICTY.

2003) have shown that the claims of bias are mainly due to trial proceedings and outcomes, which significantly favor certain sides, in particular Bosnian Muslims (or "Bosniaks"), and discriminate against others, most notably against Serbs – and, to a lesser extent, Bosnian Croats (Milojevich 2019).

Nevertheless, Clark (2013) argues that this claim of bias is founded on certain communities' lack of understanding of the Tribunal's judgements. She states that this lack of understanding "nourish[es] claims, prevalent among Serbs and Croats, that the ICTY [was] an unjust, biased and political court." Clark (2009, 2013) claims that the "lack of understanding" is due, in large part, to the ICTY's outreach strategy, which, she argues, did not do enough to educate people in the region. It should be noted, though, that Clark mainly attributes this problem to a lack of funding, somewhat softening her critique. Her argument, nevertheless, is not that the communication is in any way a problem (how/what the Tribunal communicates), but that its messages have simply not been communicated *enough*.

This is a major problem with the majority of scholars who study the ICTY. It seems as though they automatically begin from the premise that the Court was fair

and impartial. Although they occasionally offer some criticism, they often find a way to shift the blame. For instance, if they criticize the Court for *failing to indict an alleged (high profile) war criminal*, they might then accuse the international community of *lacking the will to gather the necessary evidence*. They seem to always have a ready excuse to soften any criticism. In the case of Clark, she argues that if only the communities in the region knew "the truth" about the ICTY's workings they would be more inclined to accept its version of events and begin to trust it. Accordingly, they would then accept their side's role in the conflicts, thus leading to effective and sustained peacebuilding and reconciliation in the region.

It seems that Clark's "truth" is not based on evidence but on conventional wisdom, which, as Aleksandar Jokić (2013) points out, is a big problem when it comes to scholarship on Yugoslavia. He argues that resorting to conventional wisdom can "corrupt scholarship when it is simply presupposed by those engaged in what should be an academic polemic" (Jokić 2013, p. 1) and he uses Yugoslavia and Rwanda as case studies to show how the use of conventional wisdom has corrupted academic scholarship on these historical cases. In sum, instead of asking and trying to answer difficult questions about what happened with regards to Yugoslavia, including the role of the ICTY, most Western scholars generally resort to repeating conventional wisdom about Yugoslavia that was shaped by the media, politicians, and the ICTY, which, in turn, has only further perpetuated anti-Serbian tropes and propaganda. Jokić (2013, p. 29) concludes that "once recognized that conventional wisdom (be it on Yugoslavia or Rwanda or anything else) is incorrect on significant counts, it becomes imperative that it is methodologically and morally objectionable to espouse conventional wisdom in one's scholarship given that contrary and compelling evidence is readily available." This has yet to occur vis-à-vis the general scholarship on Yugoslavia. Although there is ample evidence available that debunks much of the conventional wisdom about Yugoslavia, many of these scholars – whether out of fear of being ostracized, for self-preservation, loyalty to the cause, as a result of cognitive dissonance, and/or for any number of reasons – refuse to break from the official narrative of the Yugoslav conflicts. The following figure (Milojevich 2019), for example, provides real evidence of the Tribunal's workings, which these scholars ignore.

As shown in Figure 1, only 64 years (out of the 1,657 total years of sentencing at the ICTY) were handed down as punishment for crimes committed against Serbs, which is 3.86% of the total. On the contrary, 1,593 years were given for

crimes against non-Serbs (96.14% of the total), which means that non-Serbs received almost 2,400% more years of sentencing for their victims than the Serbs did for theirs.

It is not just the Serbs who felt the biased justice of the Tribunal, the Croats did as well. The Tribunal needed some convictions of non-Serbs to at least appear to be fair, yet, since it wanted to avoid recognizing Serbs as victims as much as it could, the Court targeted Bosnian Croats as they were involved in a brief conflict with Bosnian Muslims. Therefore, by going after the Bosnian Croats the Tribunal was, in actuality, targeting Serbs once again (by continuing to disavow Serbian victims). Bosnian Croats were sentenced to 273 years in prison for crimes committed against Bosnian Muslims – compared to only 9 years for crimes committed against Serbs – while no Croatians (involved in the Croatian conflict and whose victims were Serbs) were convicted for war crimes. Therefore, Bosnian Croatians whose victims were Muslims were sentenced to almost 3,000% more years in prison than Croats from both Bosnia and Herzegovina[219] and Croatia whose victims were Serbs. This is an incredibly disproportionate outcome that cannot be justified, which is probably the reason it is ignored by Clark and other pro-ICTY scholars.

Croats and Muslims were allies for the entirety of the conflicts in Bosnia and Croatia, fighting side by side against the Serbs. They only fought each other within a small geographical area of Bosnia and for a short duration – just over a year. During this time, however, they still fought as allies against Serbs in the rest of Bosnia. It would be ludicrous to conclude that there were more Muslim than Serb victims of Croat crimes; it is not even a close comparison. Yet, the ICTY managed to do just this, sentencing Croats whose victims were Muslims to 3,000% more years in prison than Croats whose victims were Serbs. What is perhaps even more unjust, is that the ICTY handed out 327% more years of sentencing for Muslim victims of the Croat/Muslim conflict (which, again, lasted around one year) than it did for Serb victims of all of the conflicts *combined* – Bosnia, Croatia, and Kosovo – which spanned almost a decade. How can this be justified and what kind of message do Clark and other pro-ICTY scholars think this sends to these communities? Apparently, they believe it sends a positive message of fairness and impartiality, but that Serbs and Croats have simply been propagandized by their

[219] Bosnia and Herzegovina will be referred to simply as "Bosnia" within the remainder of this chapter.

own media and politicians who led a smear campaign against the Tribunal (see Clark 2009b and Tolbert 2002), and it is due to this propaganda that Serbs and Croats do not trust it.

What seems to be orbiting outside of Clark's worldview is even the slightest possibility that the "truth" she and other (pro-ICTY) scholars hold so dearly is nothing more than conventional wisdom that came about due to the many lies that were repeated with incredible frequency and zeal by Western political elites (politicians, journalists/media, and these very scholars). As psychology professor Tom Stafford (2016) states, "repetition makes a fact seem more true, regardless of whether it is or not." Repeating a lie often enough that it becomes the truth is a principle of propaganda that is often attributed to the infamous Nazi, Joseph Goebbels.[220] It is somewhat ironic that for all their clamoring about knowing and accepting "the truth" about the ICTY, these scholars have become completely immobilized by their own biases to search for the actual truth about the ICTY – at least some of them. Other instead, they know better and are simply following Goebbels' rule of propaganda.

Propaganda comes in many forms. For instance, the ICTY relied on the Western mainstream media, scholars, politicians, human rights activists, and NGOs (such as Human Rights Watch and Amnesty International) to spread a positive image of the Court and to inform the world of its case outcomes (i.e., that the Serbs were found guilty of Nazi-equivalent crimes and the other groups, especially the Bosnian Muslims, were simply innocent victims of Serbian expansionism and aggression). As I will discuss in detail in the next section, the demonization of Serbs was conducted and achieved in a manner that has never before, or since, been seen. However, the effects of the demonization did not fully take hold in the region itself. Therefore, the Tribunal took matters into its own hands and began directly spreading its messages in the region. All of the groups were targeted, however, it mainly focused on Serbian communities in Serbia (including Kosovo), Montenegro, Bosnia, and Croatia.

[220] "If you tell a lie big enough and keep repeating it, people will eventually come to believe it. The lie can be maintained only for such time as the State can shield the people from the political, economic and/or military consequences of the lie. It thus becomes vitally important for the State to use all of its powers to repress dissent, for the truth is the mortal enemy of the lie, and thus by extension, the truth is the greatest enemy of the State." – Joseph Goebbels (see https://www.jewishvirtuallibrary.org/joseph-goebbels-on-the-quot-big-lie-quot).

Pro-ICTY scholars, as well as the ICTY itself, ardently stand by their claim that the Tribunal was fair and sought justice equally for all sides. Yet, if this is the case, then an indubitable way for the Tribunal to demonstrate its self-declared fairness and impartiality, would be through how and what it communicates to the communities in the region. The reason for this is because the ICTY has complete control over what it chooses to say. There is no reliance on witnesses, evidence, procedures, politics, or anything else it, and its many supporters, previously used as an excuse for its shortcomings. In sum, there cannot be any excuses for showing any bias.

To date, the communication of the ICTY's Outreach Program – the way it frames events, cases, perpetrators, victims, etc. – has been ignored by scholars. Therefore, the goal of this study was to analyze the messages the Tribunal has disseminated through its Outreach Program. If the Outreach Program's messages are, more or less, neutral in tone and use the same or similar themes and patterns when discussing and describing crimes that were committed (regardless of who committed them), as well as when describing the perpetrators and victims of the crimes (regardless of their ethnicity), then the results of the analysis will point towards fairness. On the other hand, if the themes and patterns used by the Outreach Program *differ significantly* based on the ethnicity of the perpetrators and/or the victims of the crimes, then the results will point towards bias.

To be clear, if the results of the analysis show that the Tribunal's framing is relatively fair, it would not "prove" that the Court carried out justice fairly and impartially; it would be a logical fallacy to come to such a conclusion. It would only mean that the Court is showing fairness in this regard, which could, at the very least, help combat its negative image in the region. In contrast, if the Tribunal does not describe the conflicts and/or discuss the cases in a neutral and fair way, then it would provide an additional reason for communities to distrust it, and believe it was an unjust and biased court.

2. Background on the Debate

Situated in The Hague, Netherlands, the ICTY indicted a total of 161 individuals, representing all of the territory's ethnic groups. Nevertheless, the Tribunal has been shrouded in controversy since its inception. Scholars have accused the Court of bias and have exposed disconcerting actions of the Court, some of which include

indicting individuals without evidence, redacting testimony, censoring defendants, trying defendants *in absentia*, allowing hearsay evidence, allowing and admitting evidence obtained through torture, accepting testimony from perjured witnesses, and not allowing defendants to confront their accusers or to analyze evidence being used against them (Black 2000, Hayden 1999, Laughland 2007, Thomas 2003). As a result of these actions, some communities in the region have negative perceptions of the Court (Clark 2011, Saxon 2005).

In addition, some scholars attribute the manner in which the ICTY was created, as well as its location, to the negative perceptions of the Tribunal in the region (see Burke-White 2003, Higonnet 2005). To further elaborate, the establishment of the ICTY "was a decision made by the international community and not requested at the national level by the countries of the former Yugoslavia" (Potts and Kjær 2016, p. 526). Although the Security Council created the Tribunal, the UN Charter does not grant it the power to do so, nor does it have the legal jurisdiction to try anyone for war crimes in the former Yugoslavia (Laughland 2007). As Johnstone (2000, p. 164) notes, "the Security Council's ICTY went over the heads of the states concerned and simply imposed its authority on them, without their consent."

Finally, some scholars blame the negative perceptions of the Tribunal on the "local media and nationalist politicians in the former Yugoslavia" (Clark 2009b). Tolbert (2002, p. 11) states that "prior to the creation of the Outreach Program, the Tribunal's work was subject to gross distortions and disinformation in many areas in the former Yugoslavia."[221] Similarly, the ICTY claims that the regional media and governments had "deliberately advanced hostile misinformation about the Tribunal" and it responded by creating an outreach program to try to change its image in the Balkans and beyond.[222]

The ICTY's Outreach Program was created in 1998-1999 under the leadership of the American judge, and then President of the Tribunal, Gabrielle Kirk McDonald. With its central office located in The Hague, Outreach "planned and organized many conferences, seminars and other events and visits for audiences from the former Yugoslavia. Thousands of people – victims and members of their families, legal professionals, government representatives, students, journalists and others – have had a chance to communicate directly with Tribunal

[221] Taken from Clark 2009b: 104-105.

[222] ICTY. Read More on the Outreach Programme. Available at https://www.icty.org/en/content/read-more-outreach-programme.

representatives. Access to accurate information has served to dispel myths and prejudices about the Court."[223] The "myths and prejudices" to which the Court refers, are the claims of bias as well as the allegation that it was a tool used by Western powers (mainly the United States) to further their political interests in the region and beyond.

For instance, Thomas (2003, p. 171) claims that the international justice system has become a means of conducting US foreign policy, and the ICTY "is an illustration of such a system of biased justice where the main goal [was] to indict Serbs while preventing any indictment of NATO leaders and minimizing those against Croats and Muslims." Black (2000, p. 29-30) describes the ICTY as an "effective propaganda weapon," which the "public will accept as a neutral instrument of justice but which is controlled for political ends." Former justice at the ICTY, Frederik Harhoff, alleged that the American presiding judge at the Tribunal, Theodor Meron, pressured his colleagues to overturn decisions related to cases involving war crimes in Croatia and Serbia (Bardos 2013). Furthermore, Hayden (1999) argues that the ICTY delivered a "biased justice", with prosecutorial decisions based on the national characteristics (ethnic background) of the accused rather than on solid and compelling evidence. Finally, recent empirical studies conducted by this author (Milojevich 2018a, 2019) found that the only two predictors of outcome (verdicts at the Tribunal) were 'defendant ethnicity' and 'victim ethnicity,' indicating bias at the Tribunal.

The Tribunal denies these allegations, claiming that its "judgements demonstrate that all parties in the conflicts committed crimes," and that it "regards its fairness and impartiality to be of paramount importance." Furthermore, it stresses that it has "contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied."[224] Some scholars have echoed the Tribunal's claims of fairness and impartiality. For instance, Scharf (2002, p. 394) argues that the "message of the International Tribunal's indictments, prosecutions, and convictions to date of Muslims and Croats, as well as Serbs, has been that a war crime is a war crime, whoever it is committed by. The Tribunal has taken no sides." Furthermore, Smith (2012, p. 166) asserts that the "effective

[223] Ibid. 5.
[224] ICTY. About. Available at http://www.icty.org/en/about.

prosecution of those accused of war crimes regardless of the side of the conflict the defendant was on is a critical progression here that cannot be understated." This argument, however, is a logical fallacy. As previously pointed out (Milojevich 2018a, p. 6), the argument is "a *non sequitur*, as a few convictions of non-Serbs do not necessarily lead to the conclusion 'the Tribunal has taken no sides', which could either be true or false." Although the perception of the Tribunal as fair and impartial is arguably the most prevailing in the general scholarship on the ICTY, it is clearly not universally shared.

To date, only one study (Potts and Kjær 2016) has examined the discourse of the ICTY – or how it projects its image to society through its website. Using critical discourse analysis (CDA), the authors (2016, p. 549) analyzed the judgments from the Trials and Appeals Chambers as well as the Tribunal's Annual Reports in order to explore how the ICTY's own stated 'achievements' are discursively manifested and constructed. They found that the Tribunal's self-declared achievements were "stated rather than demonstrated" and, therefore, "dubiously portrayed" (552). The authors also found that "the Court was seen to deviate from phrases of accountability, resulting in confusion, appeal, and general erosion of the contribution to international law" (552). Although the present study had similar goals, the principal focus was to examine the key 'themes' the ICTY has disseminated regarding the conflicts to test for bias, although how it framed its achievements was also considered. The broader, or over-arching goal, was to ascertain whether or not the Tribunal's frame of the Yugoslav conflicts falls in line with the way Western governments (particularly the US) and the mainstream media framed the conflicts. The reason for this is due to the critical scholarship that has linked the ICTY to powerful Western governments and their media. Accordingly, it was necessary to draw on academic literature on various topics, particularly those on (media) framing, foreign policy, propaganda, and dehumanization.

3. Media Frames and US Foreign Policy in Former Yugoslavia

In order to gain support for the breakaway republics and ultimately to sway public opinion in favor of US foreign policy, the mainstream media and government

officials targeted the Serbs for dehumanization (Hammond and Herman 2000, Hammond 2000a). This was done by demonizing Serbs as well as disavowing Serbian victims. Crimes committed against Serbs were systematically ignored by the mainstream media, which predominately described the conflicts in Yugoslavia using the 'good versus evil' binary opposition that is frequently used in media frames (Boyd-Barrett 2016, Hammond 2000b). The one-sided (pro-government stance) reporting supports findings of framing studies that suggest the media 1) tend to report and stay close to the government's official version of events (Herman and Chomsky 2002, Lawrence 2010) while ignoring opinions on foreign policy that do not receive support among political elites (Powlick and Katz 1998), and 2) consistently favor one side over another (Entman 2004) – especially when it comes to US foreign policy (Entman 2004, 2007). Consequently, few perspectives of the crises in Yugoslavia were presented to the general public by the mainstream media.

Phillip Corwin (1999), the United Nations (UN) chief political officer during the Bosnian conflict, observed the demonization of Serbs first-hand. He described Western journalists reporting in Sarajevo as "very, very biased in favor of the Bosnian government," and that they deemed the Bosnian Serbs "the unofficially convicted demons in the Bosnian drama" (Corwin 1999, p. 8). Generally, the demonization process consists of associating the enemy leader with a former, ruthless dictator (e.g., the "new Hitler") and using highly emotive adjectives to describe him, such as "a mass murderer" or "genocidal" (Milojevich and Beattie 2018). The demonization of the targeted leader "is in keeping with the narrative formula of casting the combatants in the roles of 'good' and 'evil.' The extension of the leader figure's persona as the personification of evil, or simply as 'the bad guy,' is aided by the identification with established historical figures that are clearly recognizable as undesirable" (Willcox 2005). The mainstream media referred to Serbs as the 'new Nazis' from the very beginning of the conflicts. As Hume (2000, p. 77) points out,

> *from the summer of 1992, the media's thoroughgoing demonization of the Serbs helped to set in motion a dynamic of increasing Western intervention in the civil wars in the former Yugoslavia. The Serbs = Nazis stories published and broadcast through the 1990's were to play a significant part in paving the way for NATO's 'just war' in the spring of 1999.*

In addition, crimes committed against Serbs were systematically ignored by the mainstream media. Through this omission, the media avoided convoluting the official narrative with different perpetrators, victims, and perspectives, thus helping the in-groups maintain their status as the unequivocal 'good guys' and the official victims of the Yugoslav conflicts. As studies have shown, framing can manipulate public opinion by omission – failing to provide interpretations that citizens would find relevant – and it is through omission that media framing sets the ideological boundaries for public discourse on political issues (Entman 2007). Omission is conducted through the process of "indexing," which presents only those frames of issues that match the views of political elites – leaving opinions that do not enjoy elite support at a considerable disadvantage (Bennett 1990). The case of Operation Storm, where "some 250,000 ethnic Serbs [were driven] out of the Krajina [Croatia]… killing several thousand, including several hundred women and children" (Herman and Peterson 2010, p. 82), offers a pertinent example of omission vis-à-vis media/government framing of the Yugoslav conflicts.

The "ethnic cleansing of 250,000 Serbs" has been described as "the single largest event of its kind in the Balkan wars" (Herman and Peterson 2010, p. 82), yet US officials and mainstream media have avoided depicting it this way. A study by Herman and Peterson (2010, p. 83) shows that this ethnic cleansing was "minimally newsworthy and has been treated neither as a massacre nor as genocide." They also note that Peter Galbraith, former US ambassador to Croatia, denied that what had occurred was ethnic cleansing and went as far as to claim that it was a practice committed only by Serbs. The authors (2010, p. 83) conclude that according to Galbraith's logic it is only ethnic cleansing "*if* carried out by ethnic Serbs against Muslims and Croats, but *not if* carried out by their forces against ethnic Serbs" and that the US media and humanitarian intervention intellectuals used and continue to use the phrase "ethnic cleansing" in lockstep with Galbraith's view.

In addition, Parenti (2000, p. 70) notes that "when thousands of Serb civilians in eastern Herzegovina were expelled from their homes in February 1993, the Western media carried not a word about it. Every Serbian home between Metković and Konjic in the Neretva valley was burned to the ground." Furthermore, the massacre of 181 mainly Serbian civilians in the Bosnian town of Mrkonjić Grad (near the border with Croatia) in the autumn of 1995, "went

almost completely unreported" (72).[225] Ignoring atrocities committed against Serbs was, and continues to be, common practice by Western governments and the mainstream media (Brock 2005, Hammond and Herman 2000, Johnstone 2002, Parenti 2000, Szamuely 2013). This omission has been carried out as part of the dehumanization process, which is a "psychological process of demonizing the enemy, making them seem less than human and hence not worthy of humane treatment" (Maiese 2003).

Dehumanization is also an "extension of a less intense process of developing an 'enemy image' of the opponent… [which] is a negative stereotype through which the opposing group is viewed as evil, in contrast to one's own side, which is seen as good" (Maiese 2003). Dehumanization generally leads to a process known as 'moral exclusion', by which targeted groups are placed "outside the boundary in which moral values, rules, and considerations of fairness apply… [they] are perceived as nonentities, expendable, or undeserving" (Opotow 1990, p. 1). Consequently, and as Opotow (1) describes, "harming or exploiting them appears to be appropriate, acceptable, or just." As recent empirical research has shown, those who view the outgroup as 'less than' are less likely to feel guilty about wrongs perpetrated by their group against the targeted group (Vasiljevic and Viki 2008) and are less likely to punish the perpetrators (Leidner et al. 2010; Vasiljevic and Viki 2008).

Both the former and the latter were evident during the Kosovo war. FAIR (2000), the national media watch group, protested the Committee to Protect Journalists' (CPJ) exclusion of the 16 Radio-Television Serbia (RTS) employees killed by NATO from its annual list of journalists murdered because of their work, and condemned Western mainstream media outlets for engaging in "crude race-hatred and war-crime agitation," singling out the New York Times' Thomas Friedman and Fox's Bill O'Reilly for particularly egregious offences. Western mainstream media reporting on the conflicts in Yugoslavia was perhaps best summed up by renowned scholar on the media (who also wrote prolifically on Yugoslavia), the late Edward Herman (2009, p. 1), who described it in the following way: "The successful demonization of the Serbs, making them largely responsible for the Yugoslav wars, and as unique and genocidal killers, was one

[225] See also: "Serbs unearth 181 bodies in mass grave", 1996.

of the great propaganda triumphs of our era. It was done so quickly, with such uniformity and uncritical zeal in the mainstream Western media, that disinformation had (and still has, after almost two decades) a field day."

4. Method and Data

The data utilized for this study were collected on the ICTY website in the section titled 'Outreach'. The following are the articles, summaries, and reports that were collected and included in the data set: 1) "Bridging the Gap Series" conference reports and the online summaries of each conference, 2) Outreach activities summaries from 1999-2017, and 3) Outreach articles. Thematic analysis (TA), a qualitative content analytical method, was used to examine the data.

4.1. Thematic Analysis

Thematic analysis allows the researcher to identify, analyze, and report patterns (or 'themes') within data (Braun and Clarke 2006, p. 79), much like that of qualitative content analysis as developed by Mayring (2000). Both approaches allow for a qualitative analysis of data and share the same aim of analytically examining narrative materials (Vaismoradi et al. 2013), however, thematic analysis provides a purely qualitative, detailed, and nuanced account of data whereas content analysis uses a descriptive approach in both coding of the data and its interpretation of quantitative counts of the codes (Braun and Clarke 2006; Vaismoradi et al. 2013).

In addition, there are two main types of thematic analyses, *inductive* or *theoretical* (deductive), which, depending on the one utilized, will dictate "how and why you code the data" (Braun and Clarke 2006, p. 84). Thus, the researcher "can either code for a quite specific research question (which maps onto the more theoretical approach) or the specific research question can evolve through the coding process (which maps onto the inductive approach)" (Braun and Clarke 2006, p. 84). Inductive thematic analysis is rather comparable to framing analysis – which is mainly used in communications research – as both

use the inductive approach and are strictly qualitative. When necessary, a 'hybrid' approach of coding inductively *and* deductively can also be used (Fereday and Muir-Cochrane 2006).

4.2. Coding

Since the aim of this study was to answer a specific question (how the conflicts were framed), the deductive approach for coding and theme development was used. Coding and data analysis were conducted following the general guidelines as developed by Braun and Clarke (2006). Their approach to thematic analysis is performed through the process of coding to look for themes, with the "reporting of the content and meaning of patterns (themes) in the data" as the end goal (2006, p. 86). There are six phases to this approach, which are listed as follows: 1) familiarization with data, 2) generating initial codes, 3) searching for themes/patterns (by analyzing codes), 4) reviewing themes, 5) defining and naming themes, and 6) producing the final report (2006, p. 87).

5. Data

5.1. Conferences: "Bridging the Gap Series"

Summary reports of the Outreach Program's "Bridging the Gap Between the ICTY and Communities in Bosnia and Herzegovina" conferences were analyzed. The following are the five locations and number of pages of each report: 1) Brčko: 75 pages, 2) Foča: 81 pages, 3) Konjic: 75 pages, 4) Srebrenica: 79 pages, and 5) Prijedor: 83 pages. Each conference has a dedicated page on the ICTY website contained within the Outreach Program section. Also analyzed were the descriptions of the conferences that are posted on each location's corresponding webpage. The following are the number of words contained on each page: Brčko (315), Foča (398), Konjic (354), Srebrenica (437), and Prijedor (593).

5.2. Outreach Activities Summaries

Outreach provided summaries of all of its activities from 1999-2017 (19 years in total). The following is the year and the number of activities as reported by

the Outreach Program: 2017 (13), 2016 (46), 2015 (54), 2014 (91), 2013 (83), 2012 (98), 2011 (90), 2010 (49), 2009 (54), 2008 (57), 2007 (86), 2006 (43), 2005 (84), 2004 (51), 2003 (50), 2002 (62), 2001 (77), 2000 (18), and 1999 (2); for a total of 1,109 entries and roughly 166,000 words.

5.3. Outreach Newspaper and Journal Articles

A total of 62 Outreach articles (over 75,000 total words) were published in two outlets (8 article contributions to *Justice in Transition* and 54 to *Balkan*). From 2005 to 2007 Outreach contributed 8 articles to *Justice in Transition*, a "bi-monthly journal published by the Serbian War Crimes Prosecutor's Office. The journal was distributed to members of the Serbian judiciary, government representatives, NGOs, international organizations, and the diplomatic community and supported by the OSCE, the Open Society Fund and the US Department of Justice."[226] From "late 2003 to early 2005, the Outreach Program contributed a weekly commentary to *Balkan*, a Belgrade daily newspaper. The articles focused on Tribunal-related issues of particular relevance in Serbia and Montenegro, aiming to contribute to ongoing discussions and debates about the ICTY and broader initiatives concerning facing the past, justice and truth."[227]

5.4. Analysis and Discussion

The results from the analysis indicate that the main themes of the ICTY frame of the Yugoslav conflicts fall into the two main categories of themes that have been the most prevalent in the mainstream media and government's frame of the Yugoslav conflicts: 1) describing Serbs mainly as perpetrators and uniquely evil/genocidal, and 2) ignoring (omission) or minimizing crimes committed by the in-groups/disavowing Serbian victims. Furthermore, two other themes – 'a war crime is a war crime no matter who commits it' and 'the Tribunal has individualized guilt in order to protect entire communities from being labelled as collectively responsible' – also emerged and are included as part of the third category – *fairness and impartiality*.

[226] ICTY. Outreach Articles Archive. Available at https://www.icty.org/en/outreach/outreach-articles-archive.
[227] Ibid. 9.

6. Serbs as the Perpetrators

When describing crimes committed (or allegedly committed) by Serbs the Tribunal used emotionally charged terms and terms that might evoke images of the Holocaust, such as 'appalling,' 'horrendous,' 'horrifying,' 'ruthless,' and 'heinous.' Crimes committed by non-Serbs against Serbs were generally described simply as 'crimes' or 'war crimes,' without the use of emotive adjectives. However, the most dominant theme in this category began with the word 'campaign,' such as campaign of terror/ethnic cleansing/persecutions. 'Campaign' was also used at the end of the phrase, such as the 'ethnic cleansing campaign,' the 'shelling campaign,' and the 'Serb campaign.'

The word 'campaign' can give an impression of a pre-determined and systemic policy of persecution against the 'other,' which evokes Nazism and implicitly accuses the Serbian nation (as a whole) of being complicit in the 'campaign.' Using the word 'campaign' to describe a specific case of persecution or ethnic cleansing de-individualizes the case, thus collectivizing guilt and even criminalizing the group's legitimate objectives, such as seeking self-determination – the primary aim of all of the ethnic groups in former Yugoslavia (Szamuely 2013). This theme, therefore, contradicts the ICTY's claim that it has ensured that guilt remained individualized, which will be discussed further in the section on the 'fairness and impartiality' themes.

The article entitled, *Facts About Foča*, offers a prime example of the utilization of this theme. Various forms were used in this article, such as 1) "the Serb forces conducted a *campaign of persecution*," 2) the trial against "[Bosnian Serbs] Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković established that one target of this *campaign of terror*…," 3) "two cases dealt specifically with the *campaign of widespread persecution*…," and 4) the "purpose of the *Serb campaign* in Foča was, among others, 'to cleanse the Foča area of Muslims.'" As previously mentioned, describing these acts as a 'campaign' elicits the Nazi image and collectivizes guilt, however the fourth example is perhaps the most effective as the name of the ethnic group is coupled with the word 'campaign' (i.e. 'the Serb campaign'). For instance, by simply changing a few words (the groups and the area involved) the statement can easily transform into something written about the Holocaust such as 'the Nazi campaign in Berlin was, among others, to cleanse the Berlin area of Jews.' This is not in any way meant to minimize the

severity of the crimes that occurred, but rather to highlight the discrepancies in the use of this term – that it was a dominant theme used only to describe crimes committed by Serbs – as well as to discuss the potential impact this theme could have on readers of the article.

7. Ignoring/Minimizing In-Group Crimes

The theme or pattern of ignoring or minimizing crimes that were committed by non-Serbs against Serbs was the most prevailing theme that emerged from the analysis and it demonstrates a bias (by *omission*) by the Tribunal. A prime example of this theme is the omission of the massacre of 181 Serbian civilians in Mrkonjić Grad in Bosnia, which (as previously discussed) was also ignored by the mainstream media. Other examples of this theme include the omission of non-Serb war crimes that occurred in and around Sarajevo, Srebrenica, and Bratunac in Bosnia; Gospić, Vukovar, and Lika in Croatia; and Prizren, Staro Gracko, and Goraždevac in Kosovo.[228] Ignoring war crimes committed by non-Serbs, correspondingly, disavows the victims, which contributes to the dehumanization of Serbians.

In addition, certain terms or phrasing were also omitted when describing crimes committed against Serbs. Non-Serb war crimes were described in plain, technical terms and the term 'ethnic cleansing' was not used in instances where Serbs were the victims, whereas it was used unfailingly to describe this crime when committed by Serbs against non-Serbs. Therefore, 'ethnic cleansing' was used in lockstep with Galbraith's view that only Serbs conduct ethnic cleansing (Herman and Peterson 2010). For example, the article "Indictments Against Generals Čermak and Markač" states that Serbs "fled the area as their houses and property were destroyed." This was a clear case of ethnic cleansing yet, instead of using the term 'ethnic cleansing,' Serbs are described simply as having 'fled the area,' which lacks any recognition that they were *forced* to flee. That the destruction of Serbian houses and property was intentional is omitted, which reduces the ethnic cleansing of Serbians from the Krajina region of Croatia to an

[228] For details of the war crimes committed against Serbs in these and other areas of former Yugoslavia see, for example, the works of Brock (2005), Johnstone (2002), Parenti (2000), and Szamuely (2013).

unintended consequence (collateral damage) and, thereby, minimizes the crime. In addition, the ethnic cleansing of Serbs from Croatia occurred throughout the country and included hundreds of thousands of victims, yet these facts were also omitted, which minimizes the scope of the crime. This pattern of omission mirrors that of the mainstream media and government when it comes to Serbian victims and the use of the term 'ethnic cleansing' vis-à-vis Croatia.

Another example of this omission occurred in the article "No Excuse for Killing and Torturing Civilians." This article is about the war crimes committed by Naser Orić, a Bosnian Muslim Commander in the Srebrenica area. What is omitted from the article is the extent of the killings committed by Orić and his men. Orić's exploits are well-known as he openly and publicly boasted about them, including the time he "entertained a Washington Post reporter by showing him a videotape of his soldiers decapitating Serbs" (Schindler 2007, p. 229). Schindler (2007: 229) describes that Orić's "tenure as Srebrenica's commander was marked by horrifying atrocities against those he took a disliking to. Orić's crimes against Serb civilians were among the worst perpetrated by anyone in the Bosnian civil war, including much wanton butchery against innocent victims." Indisputable evidence has shown that Serbs, including women and children, "had been tortured and mutilated and others were burned alive when their houses were torched [by Orić and his men]" (Szamuely 2013, p. 278). Similarly, Johnstone (2002, p. 111) concludes that Orić had a propensity to attack Serbs on Serbian holidays, as well as to brag to Western reporters about his exploits.

The extent and scope of Orić's crimes were not discussed in the article, nor in the entire data set. What the article does mention, however, is that the indictment "alleges that one Serb was beaten to death, and six others were killed." This is the extent to which the article discusses the killings that Orić was allegedly involved in. Instead, the article focuses on the destruction of property, including, of all things, television sets. It states that "Orić's forces plundered cattle, furniture and *television sets*, and destroyed buildings and dwellings."[229] The article further states that, "as a result of these actions, thousands of Serbs fled the area." Again, there is no use of the term 'ethnic cleansing,' even though this is a clear case of it.

Finally, another dominant theme emerged as part of this category. This theme uses the technical name of the group when describing non-Serb crimes, while

[229] Emphasis added.

the ethnicity of the group is used when describing Serb crimes. For example, non-Serb crimes are described as 'HVO forces attacked…', 'KLA forces attacked,' and 'government forces attacked,' instead of 'Croatian forces attacked', 'Kosovo Albanian forces attacked,' and 'Bosnian Muslim forces attacked.' Or names are used, such as 'Orić's forces attacked.' However, when it comes to Serb crimes, they are described as 'rebel Serbs attacked', 'Serb forces attacked', and 'Bosnian Serb forces attacked.' Therefore, the Serbian ethnic group/nation is associated with crimes committed by members of its group, whereas the non-Serb ethnic groups are not associated, in whole or in part, with crimes committed by members of their group. As such, this theme collectivizes crimes committed by Serbs, while keeping crimes committed by non-Serbs individualized.

8. Fairness and Impartiality Themes

The theme 'a war crime is a war crime no matter who commits it' emerged as the central theme to the claim made by the ICTY that it "regards its fairness and impartiality to be of paramount importance" and that it "takes no side in the conflict."[230] Another dominant theme, 'the Tribunal has individualized guilt in order to protect entire communities from being labelled as collectively responsible,' also emerged as part of this category. These themes are vital to the ICTY strategy of trying to convince the public that it is fair and impartial, which, if accepted, would mean that its proceedings, case facts and outcomes, and the messages it disseminates should, subsequently, be accepted. Therefore, these themes fit cohesively into, and are an integral part of, the Tribunal's overarching frame of the Yugoslav conflicts. However, the results of the analysis show that, instead of supporting the 'fairness and impartiality' claims with substantiating evidence, the Tribunal mostly contradicted them.

The article titled 'Who Kills on Behalf of the Citizens of Serbia' in no uncertain terms *explicitly* implicates the Serbian people as co-conspirators of war crimes, and contradicts the theme 'the Tribunal has individualized guilt.' The use of the term 'citizens' suggests that the Serbian community, at large, is (at least partially) responsible for the alleged crimes because they were the ones

[230] ICTY. About. Available at http://www.icty.org/en/about.

who *chose* (voted for) their leaders. The Tribunal has made clear that its primary concern has been to prosecute the main political and military leaders of (former) Yugoslavia for the most serious war crimes, so there is no mistaking that when the Tribunal uses the word 'killers' in the article, it is referring to Serbia's political and military leaders.

Furthermore, the article states that "all citizens of Serbia are entitled to know who took it upon themselves to kill innocent civilians in their name," which, again, implicates the citizens of Serbia in the alleged killings. By implicating the citizens of Serbia in the alleged war crimes, the Tribunal makes them collectively responsible for the crimes, which contradicts its claim that it has ensured that guilt has remained 'individualized in order to protect groups from being labelled collectively responsible.'

The evidence provided by the Tribunal to support the theme, 'a war crime is a war crime no matter who commits it,' is also contradictory. The Outreach Activities Summary "A Crime is Always a Crime – Regardless of Who the Perpetrators Are" offers a prime example of this contradiction. The summary states that "special attention was paid to cases which deal specifically with Croatia, namely the trials of Babić, Martić, Jokić, Strugar, Gotovina et al., Blaškić and Norac," which were presented as supporting evidence that 'a crime is a crime no matter who commits it,' with the intended goal of helping the Croatian community come to terms with its role in the war. However, these cases hardly support this claim.

Babić, Martić, Jokić, and Strugar are Serbs (from Croatia) and were found guilty of committing crimes against Croats. They were sentenced to 13, 35, 7, and 7.5 years in prison. Gotovina et al. (Gotovina, Čermak, and Markač – ethnic Croats) was arguably one of the most important trials held at the ICTY. For one, it was extremely important to Serbs from Croatia who wanted justice for their victims, and, secondly, it was important to the Croatian government as a guilty verdict would have tarnished its victim image and possibly even challenged Croatia's narrative that it fought a strictly defensive war – known in Croatia as the 'War of Independence' – against 'Serbian aggressors.' Most importantly, if the accused were convicted it would have shown that Croatians were also guilty of committing war crimes on a large scale, which is something the Croatian government has difficulty accepting to this day (Bacic 2017). Initially, the accused were found guilty, which caused an uproar in Croatia by the political elite and media, who condemned the Tribunal and claimed it was 'biased.' However, the

guilty verdict was overturned, as the three accused were acquitted of all charges for the alleged crimes committed against Serbs upon appeal, and were received as heroes back home.

With regards to the two remaining accused (both Croats) listed by the ICTY, Blaškić was convicted and sentenced to 9 years for crimes against Bosnian Muslims, while Norac was not even tried at the Tribunal. The ICTY deemed that his case did not warrant a trial in The Hague so it transferred his case to Croatia, where he was prosecuted in two different courts for separate crimes. Both courts found him guilty and he was sentenced to a total of 15 years in prison. Therefore, the Tribunal provided examples of mainly convicted Serbs (who were found guilty of committing crimes against Croats) and vindicated Croats (who were found innocent of having committed crimes against Serbs) to demonstrate its claim that 'a war crime is always a war crime, no matter who commits it.' These presentations, therefore, most likely did not assist the Croats in attendance to come to terms with their role in the Croatian conflict with Croatian-Serbs. On the contrary, the presentations most likely perpetuated the theme of Serbs as evil aggressors and, therefore, adversely affected the students' perceptions of their (ethnic) group's role in the conflict – a conclusion evident in the summary itself as it mentions how one of the Croatian students in attendance was curious as to why no charges were pressed (against Serbs) for committing genocide in Croatia. Furthermore, Serbian victims of the conflict would also most likely (continue to) be disavowed in Croatia as a result of these presentations.

9. Conclusion

This study adds a unique dimension to the debate about the Tribunal's impartiality, supports previous studies that have demonstrated bias by the ICTY, and provides an important qualitative analysis on how this Court communicates political messages. It shows that an international institute is capable of engaging in strategic communication to, not only advance its own image, but to also advance the interests of Western powers (by disseminating their 'official' narrative of the conflicts). Furthermore, I conclude that the results of this study offer strong evidence that this Court was established primarily for the purpose of spreading propaganda and to demonize Serbs.

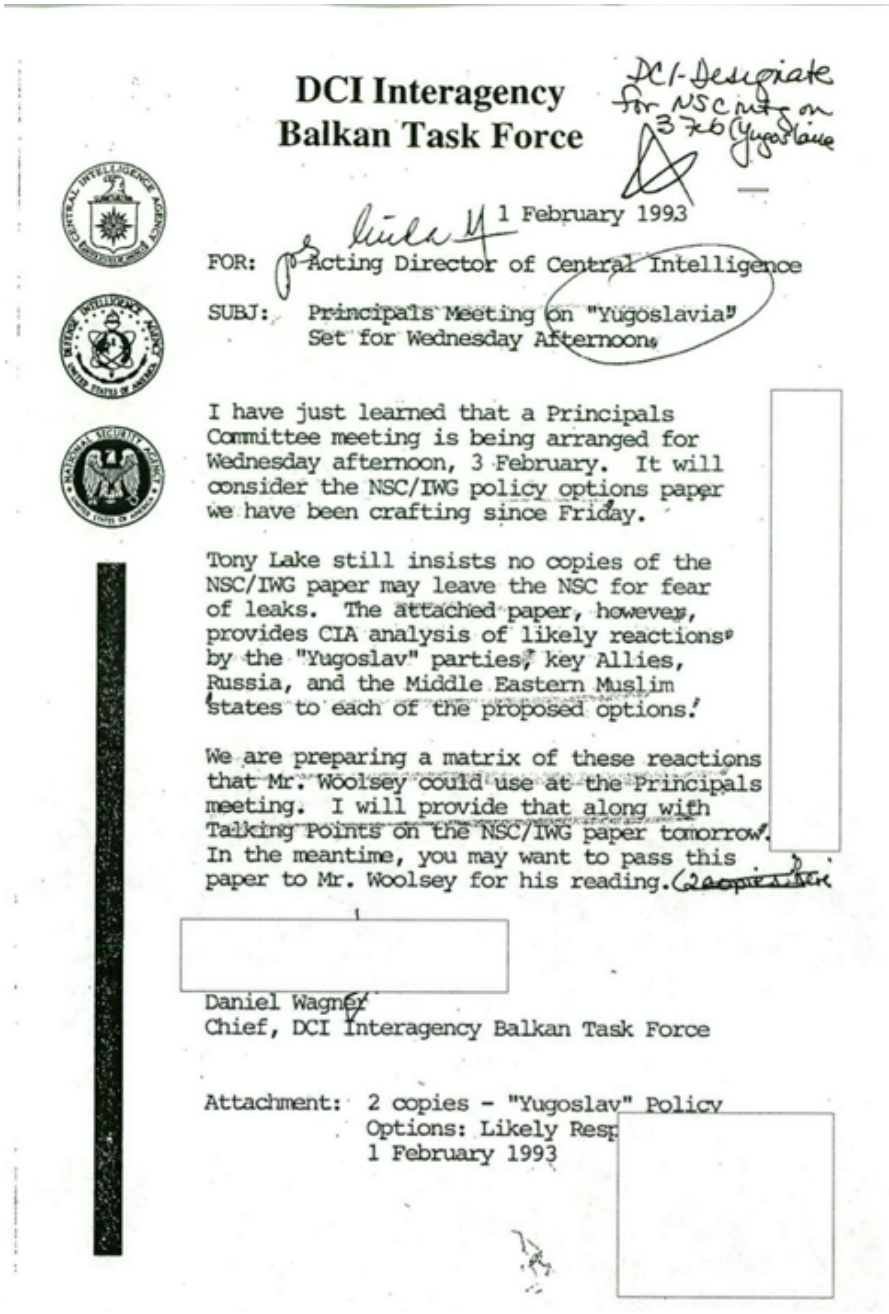
To offer further supporting evidence that the ICTY was created mainly to disseminate propaganda, a recently declassified Central Intelligence Agency (CIA) report from 1 February 1993 shows that the ICTY was originally a policy option developed by the CIA. To note, the UN Security Council resolution that decided "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[231] came on 22 February 1993, three weeks after the CIA report.

The following images are of pages 1, 7, and 8 of the report.

As can be seen, the policy option is listed as "11. Establish a War Crimes Tribunal" and is included in the group titled "Atrocities." Also included in the "Atrocities" group is the section titled "10. Publicize the Camps." The section just below these is titled "12. Dramatize Kosovo," all three of which were meant to "publicize Serbian atrocities." The most telling statement from the report is the following: "Muslim states would approve a War Crimes Tribunal and publicizing Serbian atrocities. Even treatment of Bosnian transgressions, however, would be regarded as tilting in Belgrade's favor." First, this statement admits it should be created to publicize Serbian atrocities. Secondly, it warns that an even-handed approach that exposes Muslim atrocities should not be considered as it would then give an edge to Serbs. Essentially, being fair to all sides would, according to the CIA, actually favor Serbs (so better not do it). This is exactly how the Court proceeded. Evidence shows that Muslim atrocities were ignored (or minimized) by the ICTY, which overwhelmingly prosecuted and imprisoned Serbs. This report is damning to those who have unmitigatedly supported the ICTY.

Although the ICTY was a propaganda machine, it was also a multifaceted political tool created and utilized by the United States. It should be noted, however, that other Western powers – most notably Britain, Germany, France, and the Netherlands – also played a significant role in its creation. Former judge and President of the ICTY, American Gabrielle Kirk McDonald, even lovingly referred to former Secretary of State Madeleine Albright as the 'mother of the Tribunal' (Johnstone 2002) and Albright's State Department used the Court as an instrument to carry out its foreign policy in the region on many occasions. For instance, the Tribunal acted on a direct order from the US government when

[231] United Nations Security Council Resolution 808.



DCI Interagency
Balkan Task Force

DCI-Designate for NSC mtg on 3 Feb Yugoslavia

1 February 1993

FOR: Acting Director of Central Intelligence

SUBJ: Principals Meeting on "Yugoslavia" Set for Wednesday Afternoon

I have just learned that a Principals Committee meeting is being arranged for Wednesday afternoon, 3 February. It will consider the NSC/IWG policy options paper we have been crafting since Friday.

Tony Lake still insists no copies of the NSC/IWG paper may leave the NSC for fear of leaks. The attached paper, however, provides CIA analysis of likely reactions by the "Yugoslav" parties, key Allies, Russia, and the Middle Eastern Muslim states to each of the proposed options.

We are preparing a matrix of these reactions that Mr. Woolsey could use at the Principals meeting. I will provide that along with Talking Points on the NSC/IWG paper tomorrow. In the meantime, you may want to pass this paper to Mr. Woolsey for his reading. (2 copies attached)

[redacted]

Daniel Wagner
Chief, DCI Interagency Balkan Task Force

Attachment: 2 copies - "Yugoslav" Policy Options: Likely Resp
1 February 1993

[redacted]

Fig. 2a Central Intelligence Agency (CIA) report from 1 February 1993, p. 1.

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The Europeans are already studying this option. Greece, however, would try to maintain its communication links with Serbia.

Much like efforts to expel Serbia from international organizations, Russia would oppose cutting Serbia's international communications. The Russians would argue that such steps have had no impact to date.

Atrocities

10. Publicize the Camps. Serbia probably would press the Bosnian Serbs to be cooperative in closing the detention camps and reining in local warlords still engaging in ethnic cleansing operations in order to avoid further damage to the Serbs' image. Serbia would move to ensure that publicity is given to atrocities committed and camps run by Bosnian Croats and Muslims.

The three Bosnian factions probably would increase efforts toward bilateral prisoner exchanges. They might also consent to greater access to camps and more ICRC-brokered prisoner releases. At the same time, however, Serbs, Croats, and Muslims probably would take additional measures to disguise any detention facilities they did not intend to close, disperse prisoners, and clean up atrocity sites before they could be investigated.

The West Europeans strongly favor publicizing atrocities.

Russia has no objection to publicizing the presence of detention camps. If, however, the West publicized only the Bosnian and Serb camps, Moscow would itself publicize the existence of Croat and Muslim camps.

11. Establish a War Crimes Tribunal. Serb paramilitary leaders charged with war crimes might attempt terrorist operations in the West. The Serbian, Croatian, and Bosnian Governments might harbor some high-ranking war criminals while turning over those considered expendable. They may even rid themselves of war criminals to cover up war crimes.

Most West Europeans--with the exception of Greece--probably would support this option.

Muslim states would approve a War Crimes Tribunal and publicizing Serbian atrocities. Even treatment of Bosnian transgressions, however, would be regarded as tilting in Belgrade's favor.

Moscow opposes convening a tribunal at this time on the grounds that it would undercut the peace negotiations. Moscow would lobby the European states and the US to prevent this step and likely would veto convocation if it were to come before the Security Council. The Russian leadership probably is extremely

7

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Fig. 2b Central Intelligence Agency (CIA) report from 1 February 1993, p. 7.

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uneasy about the precedent of such a tribunal. Kiev might give cautious support but probably would harbor many of the same concerns as Moscow.

Spillover

12. Dramatize Kosovo. Serbia probably would take no significant steps to loosen its grip in Kosovo in response to a US campaign, but it might try to rein-in Serbian paramilitary groups now active there to avoid further escalating tensions.

-- Vocal denunciation of Serb actions in Kosovo, however, could embolden ethnic-Albanian radicals into provoking a violent Serbian crackdown in order to encourage a Western military response.

The West Europeans would prefer quiet diplomacy over dramatizing the situation in Kosovo because of a fear that it could help spur an Albanian rebellion. Athens also would oppose dramatizing Kosovo for fear that such efforts could incite rebellion among ethnic Albanians and trigger a wider Balkan War. And Ankara probably would be uneasy over any initiative that might encourage Kosovo's Albanians to rebel or fan popular pressure in Turkey to provide military assistance to the Kosovars.

Moscow and Kiev are both concerned about potential spillover and would welcome raising the profile of dangers in Kosovo.

13. Establish/Increase International Presence in Macedonia and Albania. Albania and Macedonia would welcome further moves in this direction as tangible signs of Western commitment to their stability and defense. Croatia and the Bosnian Government would favor such indirect pressure on Serbia. Bulgaria also would welcome greater international presence as a means to prevent the spread of the conflict and Macedonia's collapse.

The West Europeans support this. They are concerned, however, that the military and financial burden be evenly distributed and would look to the US to supply at least financial support. Greece would support a UN presence in Albania or Macedonia but would seek assurances that current borders would be maintained.

Ankara would strongly support such action as an important contribution to heading off any broader Balkan conflict. Most Muslim states would give pro-forma approval.

Because Russia has recognized Macedonia and Albania as sovereign states, it would support any requests made by these governments for monitors or peacekeepers on their own territory. Moscow almost certainly would put pressure on Serbia to accept an international presence in Kosovo--an expansion of the CSCE

8

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Fig. 2c Central Intelligence Agency (CIA) report from 1 February 1993, p. 8.

it indicted Slobodan Milošević. As the US was beginning to lose public support for its war (NATO's 1999 bombing campaign against Yugoslavia) the Tribunal indicted Milošević, which helped spread the image of Milošević as a war criminal and the 'new Hitler.' The "Butcher of Balkans Indicted by International Court for War Crimes" headlined newspapers and television news broadcasts around the world. Yet, these news outlets never reported that, since the indictment came in the middle of the war, it was impossible for authorities to conduct an investigation to collect enough evidence that was necessary for an indictment. Perhaps they simply overlooked this fact, but most likely they knowingly ignored it. For the Tribunal, however, needing evidence for an indictment was simply a minor technicality that it was willing to overlook; it certainly was not something that would hinder it from carrying out its master's orders. This was not the first, nor the last, time the ICTY was used by the US State Department to carry out its foreign policy.

Richard Holbrooke, Assistant Secretary of State for European and Eurasian Affairs from 1994-1996, used the Tribunal to make deals with leaders in the Balkans – offering immunity and/or threating prosecution. For instance, Radovan Karadžić, then President of Republika Srpska (the Serbian portion of Bosnia) was offered a deal by Holbrooke that involved the Tribunal. Karadžić had already been indicted by the Tribunal for committing alleged war crimes, yet he continued to be involved in Bosnian politics. Holbrooke, keen to get Karadžić out of Bosnian politics, offered Karadžić immunity from prosecution – the Tribunal would drop its indictment against him – if he retired from politics. Holbrooke denied he ever made this offer, and the Tribunal did ultimately prosecute Karadžić. However, there is evidence that Holbrooke did make this deal and the only reason it fell through was because Karadžić did not leave politics in a timely enough manner. The New York Times quoted a senior State Department official explaining what had occurred. The following is from the Times:

> *Holbrooke was angry; he was ranting," the American [official] recalled. He quoted Mr. Holbrooke as saying: "That son of a bitch Karadžić. I made a deal with him that if he'd pull out of politics, we wouldn't go after him. He's broken that deal and now we're going to get him."*[232]

[232] Marlise Simons, *Study Backs Bosnian Serbs' Claim of Immunity* in New York Times, 2009. Available at https://www.nytimes.com/2009/03/22/world/europe/22hague.html

Holbrooke stated that "we wouldn't go after him" but now "we are going to get him;" we meaning the US and the Tribunal. He spoke as if the Tribunal was simply an extension of the State Department.

There is no doubt that the Tribunal was a useful foreign policy tool of the State Department and the CIA. Offering "carrots" and "sticks" has long been a part of the US foreign policy strategy known as coercive diplomacy, and it was the only strategy it used in the Balkans.[233] US officials managed just fine without the ICTY in carrying out this policy just before and at the beginning of the conflicts, however in the later stages of the conflicts the Court became an invaluable asset – especially once the US stopped its façade of neutrality and went all out in its attack against Yugoslavia and the Serbs. The main purpose for creating the Court was to destroy the Serbs, and it did just that. The impact of this destruction spread far and wide as the mainstream media, academics, and politicians use the outcomes of the Court's cases to "prove" the US chose the "right" side (or the "just" side) and argue that the US had no other choice than to stop the Serbs from "committing mass atrocities," just like it had to stop the Nazis during World War II. As mentioned in an earlier section, the US created an 'enemy image' of the Serbs and the ICTY was the ultimate tool in legitimizing and then disseminating this image of Serbs as the 'new Nazis' and Milošević as the 'new Hitler.' This template is now being used to push for other so-called "humanitarian interventions" around the world. The principles of sovereignty, which the UN Charter is founded on, have been trampled on and will continue to be trampled on by the world's superpowers (but mainly by the US).

The evidence we now possess that unveils the truth about the ICTY is staggering, and this study has added to it. As time goes on and as more researchers take on the task of exposing the Tribunal for what it truly is, the conventional wisdom about Yugoslavia will, hopefully, follow the ICTY and disappear from this world for good. Perhaps the world will also then be more willing to stand together against US imperialism (as well British imperialism and those of other Western powers), its fake "humanitarian" wars, its violations of human rights, and its destruction of sovereignty. The peoples of Yugoslavia and other countries

[233] See Milojevich (2018b), for an analysis of US coercive diplomacy in Yugoslavia.

that have met the same fate as Yugoslavia have suffered greatly from the world's silence of this tyranny. For the sake of future generations, it is time the world ended its silence.

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