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**Genocide in Bosnia and the failure of international justice**

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**Abstract**

The systematic mass murder that occurred in Bosnia in the first half of the 1990s has, perhaps, entered into the international consciousness more than any other case of systematic mass murder since the Holocaust. The Bosnian war has been described as the most reported war in history. Partly as a result of this, the mass murder in Bosnia has received an unprecedented level of attention in the international courts. Three different international courts – the International Criminal Tribunal for the former Yugoslavia, the International Court of Justice and the European Court of Human Rights – have resolved that genocide occurred in Bosnia. The paradox is that there has been virtually no punishment of this genocide. This paper aims to explore why international justice has failed over Bosnia.

## **Genocide in Bosnia and the failure of international justice**

The systematic mass murder that occurred in Bosnia in the first half of the 1990s has, perhaps, entered into the international consciousness more than any other case of systematic mass murder since the Holocaust. The Bosnian war has been described as the most reported war in history. Partly as a result of this, the mass murder in Bosnia has received an unprecedented level of attention in the international courts: In 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY), to prosecute individual war criminals. The ICTY has indicted over 150 political and military figures from the former Yugoslavia. So far, the ICTY has successfully prosecuted one individual, the Bosnian Serb officer Radislav Krstić, for genocide – a conviction subsequently reduced on appeal to the lesser charge of aiding and abetting genocide. A second Bosnian Serb officer, Vidoje Blagojević, was convicted of genocide but subsequently acquitted on appeal of all genocide-related charges. Also in 1993, Bosnia filed charges with the International Court of Justice (ICJ), accusing Serbia of genocide. The ICJ delivered its verdict in 2007, acquitting Serbia of genocide, but nevertheless finding Serbia guilty of failing to prevent the genocide at Srebrenica, and of failing to punish genocide by sheltering war criminals indicted by the ICTY. Finally, in 1997, a German court convicted Nikola Jorgić, a Bosnian Serb, for genocide in the north Bosnian region of Dobož. Jorgić challenged his conviction, and brought his case all the way to the European Court of Human Rights (ECHR), which nevertheless upheld the conviction. Two other Bosnian Serbs were also convicted of genocide by German courts.

Thus, three different international courts – the ICTY, the ICJ, and the ECHR – have resolved that genocide occurred in Bosnia. There is, however, some disagreement between the courts. The ICJ resolved that genocide in Bosnia occurred only in the Srebrenica massacre of 1995. The judges specifically stated that genocide did not occur at other times or places in Bosnia. The ECHR, by contrast, upheld the decision of the German court, that genocide did indeed occur outside of Srebrenica – in northern Bosnia in 1992. The ICTY prosecutors tried unsuccessfully to prosecute Bosnian Serb perpetrators for genocide in areas

other than Srebrenica. Momcilo Krajišnik, a member of the presidency of Bosnia's Serb Republic – Republika Srpska – was acquitted of genocide. But unlike in the case of the ICJ, the judges at the ICTY did not say genocide had not occurred, merely that it had not been proven beyond all reasonable doubt. Nevertheless, despite these differences, three different international courts agree that genocide occurred.

The paradox is that there has been virtually no punishment of this genocide. Serbia was convicted of nothing worse than a failure to prevent and punish genocide; Bosnia's claim for damages against Serbia was thrown out by the ICJ. Only one individual – a lowly deputy corps commander – has actually been convicted of a genocide-related charge by an international court (while Jorgić was a still more lowly figure, a local paramilitary leader, convicted by a national court). Only six people from Serbia or Montenegro were ever even indicted by the ICTY for any kind of war crime in Bosnia. Most of the principal organisers of war-crimes in Croatia and Bosnia were never indicted. Of the six indicted, one was killed before being arrested, one died during trial, and procedures against the other four are ongoing. So at the present time, not a single official, soldier or politician from Serbia has yet been convicted by the ICTY for war crimes in Bosnia – let alone for genocide. Yet it was the Milošević regime in Serbia, and the Yugoslav army controlled by Serbia, that established the Bosnian Serb army and that organised the mass killing in Bosnia – a fact not disputed by the ICJ in its acquittal of Serbia for genocide. Finally, up to this day, the two most notorious war-crimes indictees, apart from Slobodan Milošević, namely the Bosnian Serb leaders Radovan Karadžić and Ratko Mladić have still not been arrested. So the overwhelming international awareness that systematic mass murder took place in Bosnia, and the conclusive verdict of the courts that at least some of this involved genocide, has not translated into much in the way of conviction or punishment of the perpetrators. This paper aims to explore why it is that international justice has failed over Bosnia.

### **Rejecting conspiracy theories**

We may begin by rejecting the easy explanation: that international justice failed because the Great Powers wanted it to fail, and the international courts are simply the tools of

Great Power policy. A lot of the discourse about the war in the former Yugoslavia has revolved around theories of Western-imperialist conspiracies, and interested parties have posited a number of these conspiracies, most of them supposedly directed against the Serbs. There was, according to various accounts, an imperialist conspiracy to break up Yugoslavia; an imperialist conspiracy to demonise the Serbs by exaggerating their atrocities; an imperialist conspiracy to provoke the war between NATO and Serbia over Kosovo; and so on and so forth.<sup>1</sup> One of the most imaginative of these supposed conspiracies was the Jewish American conspiracy to appease the Muslim world at the expense of the Serbs, to compensate for American support for Israel.<sup>2</sup> On the other side, to a lesser extent, there has been talk of imperialist conspiracies directed against the Muslims.<sup>3</sup>

All conspiracy theories should be rejected in principle, because they have nothing to do with reality. This does not mean that serious criticisms should not be made of Western policy. But the most powerful such critiques are made on the basis of empirical evidence; a prime example is Brendan Simms's damning study of British policy toward Bosnia in the first half of the 1990s.<sup>4</sup> One of the fiercest critiques of the failure of international justice has been made by Florence Hartmann, the former spokeswoman for Carla del Ponte, chief prosecutor at the ICTY. Hartmann's book *Peace and Punishment* catalogues a lot of the failures of the ICTY.<sup>5</sup> But although there are many things that are good about Hartmann's book, its principal weakness is that it attempts to portray many of the staff at the ICTY, in particular British and Americans, as being motivated by the policies of the Western, in particular British and American governments, which Hartmann portrays as being above all concerned with trying to cover up Western complicity with the Srebrenica massacre and with Serbian crimes in general. Having myself worked at the Office of the Prosecutor of the ICTY, I find the idea that most or many staff members were motivated by their governments' policies simply implausible. This applies equally to accusations that the ICTY was 'NATO's court', or a political instrument of the great powers.<sup>6</sup>

The ICTY was an institution in its own right, and its actions were determined by its relationship with other institutions and by its own internal structure. There were different bodies and individuals within the ICTY, and there were different currents of opinion. To imply that some of these currents simply reflected the policies of their governments, while

others did not, appears to me unserious. This paper will adopt a different approach, and examine the institutional, procedural and conceptual weaknesses and mistakes which have characterised the work of the international courts with regard to Bosnia. We shall begin with the ICTY, because the decisions of the ICTY themselves impacted upon those of the ICJ.

### **The ICTY's structural weaknesses vis-à-vis the outside world**

The ICTY was structurally flawed in two respects: in its relationship to the outside world, and in its internal organisation. It was established in 1993 on a shoestring budget, without even the goodwill of most members of the UN Security Council, other than the US. For example, Britain for years failed to donate any money to the ICTY's budget. The ICTY began as an apparently insignificant institution that appeared destined to go after only the small fish. The first person prosecuted was Dušan Tadić, a concentration camp guard who happened to be recognised by one of his former victims in Germany, where he was arrested. Although the two most senior Bosnian Serb figures, the political leader Radovan Karadžić and the military leader Ratko Mladić, were both indicted in 1995, the international forces made little or no effort to arrest them in the years immediately following the signing of the peace agreement.

Hartmann argues that the failure to arrest Karadžić and Mladić was deliberate, as these two could have incriminated Western politicians over the events in Srebrenica.<sup>7</sup> Although this remains to be proven it is safe to say that there was a lack of Western will to arrest them, a fact that former ICTY Deputy Chief Prosecutor Graham Blewitt confirmed in an interview following his departure from the Tribunal in 2004.<sup>8</sup> The lack of will was probably related, among other things, to an American fear of possible casualties that might have occurred during an attempt at arrest. The ICTY, from the start, therefore suffered from the fact that it had to rely on an unenthusiastic international community to deliver the indictees to it. Furthermore, the ICTY prosecutors had no means of collecting evidence except with the consent of the former Yugoslav states themselves. Both Serbia and, initially, Croatia were essentially hostile to the ICTY, and when they were not forthcoming with the documentary evidence, the ICTY prosecutors had to rely upon the international community to

apply the necessary pressure. This, too, was not always forthcoming or sufficient.

In the period after the fall of Milosevic in 2000, Chief Prosecutor Carla del Ponte made several trips to Belgrade to seek the cooperation of the new Serbian regime. But this led her into negotiations with Serbian leaders, which arguably resulted in the increasing politicisation of the ICTY. In order to prove to her Serbian interlocutors that the ICTY was not anti-Serb, del Ponte came under pressure to indict more non-Serbs. We do not know if her policy on indictments was influenced by this. But we do know that of 125 individuals indicted by the ICTY for war-crimes in Bosnia, 89 or 71% were Serb soldiers, politicians or officials (including at least two non-Serbs who held positions in Serb or Serb-controlled bodies), while 36 or 29% were Croats and Muslims.<sup>9</sup> Which, given that at least 86% of the killing of civilians during the Bosnian war was the work of Serb forces, amounts to a massive over-representation of non-Serbs among the indictees – non-Serbs carried out one seventh of the killing of civilians but made up two sevenths of indictees.<sup>10</sup> Serbia and the Bosnian Serb Republic – Republika Srpska – were the least cooperative of the former Yugoslav entities with regard to the ICTY – and this resistance may have paid dividends, with the ICTY prosecutors backing off.

### **Deficiencies in the ICTY's internal organisation**

#### **a) the national quota**

The ICTY has therefore been caught between Serbian and Bosnian Serb obstructionism on the one hand and inadequate support from the international community on the other. But its failures also stem from its own, internal organisation. The internal organisation of the ICTY's Office of the Prosecutor is not open to the public, but as I worked there myself, I can provide some inside information. Hartmann has also provided some insights in her book. I was working at the Office of the Prosecutor in 2001, when the ICTY seemed to be at the height of its success. It was in this period that Milosevic arrived at the Hague. At that time, the Office of the Prosecutor had eleven investigative teams. Of these,

seven teams were devoted to Serb war-crimes and four to non-Serb war-crimes.

As noted above, at least 86% of the killing of civilians in the Bosnian war was the work of Serb or Serb-controlled forces. There are no comparably precise figures for civilians killed by Serb vis-à-vis non-Serb forces in the Croatian and Kosovo wars. Total Croatian war-losses, 1991-95, have been most scientifically estimated at 22,192; non-Serbs comprised 15,970, or 72% of the total; of these, 45% were civilians, while of the 6,222 Serbs killed or missing, the proportion of civilians is unknown.<sup>11</sup> Total Kosovo Albanian war-losses have been estimated at 10,356 for the period March-June 1999 according to one scientific study, and at 12,000 for the period February 1998 – June 1999 according to another.<sup>12</sup> There are no accurate figures for how many of these were civilians - something especially difficult to calculate, given that ‘Albanian military casualties’ in Kosovo would refer to losses sustained by an irregular, guerrilla army. Nor are there any accurate figures for Serb losses at the hands of the Kosovo Liberation Army. But by any reckoning, Serb forces were responsible for well over 80% of civilian casualties in all the former-Yugoslav wars combined.

However, at the time the present author was working at the ICTY, seven out of the eleven investigative teams (64%) at the Office of the Prosecutor were devoted to investigating Serb crimes, and four (36%) to investigating Croat, Muslim and Albanian crimes. This means that Serb indictees were under-represented in relation to their share of the war-crimes: less than two-thirds of the investigative teams were devoted to the side in the war that was responsible for over four-fifths of total civilian fatalities. Such an organisational structure appears to have been set up in order to guarantee a particular distribution of indictees between the nationalities, as each investigative team would work to achieve a certain number of ‘kills’. Indeed, the distribution of indictments between Serbs and non-Serbs broadly corresponds to the distribution of the investigative teams: of 159 total indictments, 108 or 68% were of Serbs (i.e. of soldiers, officials and politicians of Serb or Serb-controlled bodies) and 51 or 32% were of non-Serbs (i.e. of soldiers, officials and politicians of Croatian, Bosnian government, Albanian or Macedonian bodies). The motive may have been to refute accusations of ‘anti-Serb bias’ and to convince the international public that the Prosecution was even-handed.



There were some peculiarities that this resulted in. The top Yugoslav army commanders, who commanded the Yugoslav and Serb forces against Croatia in 1991-92, were not indicted. Only middle-ranking officers were indicted for the single worst war-crime, at the Vukovar hospital, while two other relatively junior officers and two somewhat more senior but not top-ranking ones were indicted over the JNA attack on Dubrovnik. By contrast, the most senior Croatian commander in the period 1992-95, Chief of Staff Janko Bobetko, was indicted for a crime occurring when Croatia attempted to recapture some territory in 1993, at the Medak Pocket. The top commander of the Croatian Interior Ministry forces, Mladen Markač, was indicted for crimes carried out during Operation Storm in 1995. Overall, more senior Croatian commanders were indicted over Operation Storm, than was the case for Yugoslav commanders indicted over the war against Croatia.

Similarly, the top Yugoslav army commanders who commanded Yugoslav and Serb forces during the assault on Bosnia in 1992 were not indicted. Only Momčilo Perišić, the Yugoslav Army commander from the period from 1993, after the direct Serbian aggression had already ended, was indicted. By contrast, the two most senior Bosnian Army commanders during the war, Sefer Halilović and Rasim Delić, were both indicted. So in terms of top commanders, Serbia was treated more leniently than either Croatia or Bosnia. This had nothing to do with lack of evidence. On the basis of the principle of command responsibility, the prosecutors only had to prove that the top Yugoslav commanders had formal command over more low-ranking officers they had already indicted – such as the Vukovar Three, for example – and they had a case. The prosecutors simply chose not to make these indictments.

#### **b) overemphasis on Bosnians**

There was, furthermore, an additional distortion, which was that the indictments of both Serbs and Croats disproportionately targeted Bosnian Serbs and Bosnian Croats. Thus, over three quarter of all Serb indictees were Bosnian Serbs, and over three quarters of all Croat indictees were Bosnian Croats. This can be explained in a number of ways. One possibility is that this policy of targeting Bosnians was related to low expectations: i.e. the

prosecutors avoided targeting Serbs from Serbia, because they did not believe they would ever be arrested, so they felt it would be a waste of time. Hartmann claims that until Milošević actually arrived at the Hague, even senior prosecutors did not believe he ever would.<sup>13</sup> This appears likely to me; when I was working at the Tribunal, I remember that staff would discuss among themselves whether Milošević or Karadžić would arrive first; we just did not know. Indeed, when Bosnian Serb Presidency member Biljana Plavšić, one of the most senior figures to be tried, arrived promptly at the Tribunal after being indicted in January 2001, she came as something of a surprise, and the case against her had not been properly prepared. She was allowed to plea-bargain her way to a sentence of only eleven years, and was not required to testify against others.

The ICTY began life as a Tribunal that targeted the little fish, and even as it gained strength and confidence, it was not able to change its structural character, and behave like a Tribunal that targeted the big fish. Thus, the ICTY has prosecuted numerous camp guards and middle-ranking officers, but has avoided indicting most of the principal organisers of the war in Bosnia. A second explanation is that the members of the Office of the Prosecutor who took the decisions on whom to indict did not include any actual experts on the war in the former Yugoslavia. There were academic specialists on the war, such as myself, who were working at the Tribunal, but we were researchers, not decision makers. This is a point that Hartmann stressed to me when we discussed this subject: that the lawyers and policemen who took the key decisions on indictments simply may not have understood the mechanisms of the conflict all that well.<sup>14</sup> They may really have believed that the conflict was a civil war, for which Serbia was not directly responsible.

### **c) Failure to pursue the ‘Joint Criminal Enterprise’**

We shall return later to the question of whether what happened in Bosnia outside of Srebrenica was genocide, or whether it was simply systematic mass murder. Leaving that question temporarily aside, the evidence is nevertheless conclusive that what happened in Bosnia was a centrally planned and directed programme of mass killings that originated with the Milošević regime in Belgrade. All Bosnian Serb forces were both *de jure* and *de facto*

under the command of the Yugoslav People's Army right up until 19 May 1992. The Yugoslav People's Army was under the control of the republics of Serbia and Montenegro. Mladić, the Bosnian Serb commander, was appointed to his position by the Yugoslav military command.<sup>15</sup> The largest phase of mass killings occurred during the spring and summer of 1992. Which means that it was the regime in Belgrade that was directly responsible for the largest phase of mass killings.

Indeed, the text of the indictment of Milošević for war-crimes in Bosnia claimed he was part of a 'Joint Criminal Enterprise', whose purpose it defined as 'the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina'. The 'Joint Criminal Enterprise' included the leaders of Serbia, Montenegro, the Yugoslav army, the Bosnian Serbs and the Croatian Serb rebels, with Milošević accused of exercising effective control or substantial influence over all of them.<sup>16</sup> The indictment thus affirmed a central direction and an overall plan to the programme of ethnic cleansing and mass murder. However, the prosecutors did not really follow this up. Of the seven other members of the Joint Criminal Enterprise from Serbia and Montenegro who were mentioned in the indictment and were still alive, only three were ever indicted and none of these has yet been convicted.

#### **d) The obsession with Milošević**

This brings us to the final reason for the ICTY's failure: the prosecutors' obsession with Milošević as an individual. When I was working at the Tribunal, I was attached to the investigative team (Team 5) that was responsible for drafting the indictment of Milošević for war-crimes in Bosnia. My team originally drafted a joint indictment of several members of the Joint Criminal Enterprise, including all the other members from Serbia and Montenegro. However, Carla del Ponte rejected this joint indictment, and insisted on indicting only Milošević. At the time, the rumour was that for egotistical reasons she wanted to have something like a personal duel with Milošević, as the most famous indictee, and did not want other indictees complicating the picture. Recently, Hartmann wrote to me to suggest a different reason for Milošević being indicted alone. She argues that the reason was that, as

Milošević had just arrived at the Hague, the prosecutors wanted rapidly to indict him for Bosnia and for Croatia, and the case against other senior figures from Serbia and Montenegro simply was not ready.<sup>17</sup>

Be this as it may, the decision was a mistake. Geoffrey Nice, former chief prosecutor in the Milošević trial, in a recent interview himself recognised this. The decision meant that when Milošević died, the trial came to an end. Had there been several indictees being tried together, the trial could have continued without him.<sup>18</sup> Milošević, as the former president of Serbia and of the Federal Republic of Yugoslavia, and as the genuine architect of the war, was certainly an important figure to prosecute. Had he been convicted and sentenced, justice might arguably have been at least partially satisfied. But this overemphasis on the internationally infamous figure of Milošević proved counter-productive when he died before being convicted.

### **Deficiencies in the ICJ**

#### **a) Restricted definition of genocide**

The ICJ was much older than the ICTY, and is a permanent, not an ad hoc body. Nevertheless, part of the reason why Bosnia lost its case against Serbia has its roots in the political origins of the 1948 UN Convention for the Prevention and Punishment of the Crime of Genocide. Rafael Lemkin, the man who coined the term genocide and who was responsible for its insertion into international law, had originally favoured a broader definition of genocide to the one that was ultimately adopted. According to the 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:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

As Mark Levene has written, Lemkin wanted to include forced exile and population displacement – i.e. ethnic cleansing – and the deliberate destruction of a cultural heritage – in the list of genocidal acts, but these were vetoed by some of the UN member states that were involved in the drafting process.<sup>19</sup> Since both ethnic cleansing and systematic cultural destruction were proved by Bosnia in its case against Serbia, there is no doubt that had Lemkin's original, broader definition of genocide been adopted, Bosnia would have won its case.

#### **b) The censoring of the Supreme Defence Council minutes**

A second political factor that negatively influenced Bosnia's chances was the result of decisions taken by the judges at both the ICTY and the ICJ. Serbia was required to submit to the ICTY judges in the Milošević case the minutes of the Supreme Defence Council of the Federal Republic of Yugoslavia – the body made up of the presidents of Serbia, Montenegro and Yugoslavia – i.e. of Milošević and two of his allies. This body initially had command over all Bosnian Serb forces, up until 19 May 1992, and subsequently remained in command of the Yugoslav Army up to and after the time of the Srebrenica massacre, during which it collaborated with the Bosnian Serb forces. The judges at the ICTY, however, allowed Serbia to withhold certain passages from this set of documents in the version seen by the public and by the ICJ.<sup>20</sup> Bosnia could not therefore use these crucial documents for its case against Serbia. Bosnia requested the ICJ to subpoena Serbia to hand over the uncensored minutes of the Supreme Defence Council, but the judges refused, claiming that there was already sufficient evidence in the public domain. Serbia's unwillingness to allow the uncensored minutes of the Supreme Defence Council to be made public arose precisely out of its fear that they would prejudice its case at the ICJ. Phon van den Biesen, a member of the Bosnian team, has gone on record to say that the full documents would probably have demonstrated that the

Bosnian Serb forces were under Serbia's control during the Srebrenica massacre..<sup>21</sup>

Bosnia's case against Serbia was a civil case, meaning that if Bosnia had won, Serbia would have been liable to pay damages to Bosnia. Nevertheless, Bosnia was required to prove genocide beyond all reasonable doubt, without having any means of obtaining confidential documents – no subpoena and no police force. So on the one hand, the ICJ expected the Bosnian legal team to prove beyond all reasonable doubt that Serbia was guilty, as if it were a criminal case, but on the other hand, it refused to make Serbia hand over key items of evidence and forced Bosnia to rely on the evidence it had available to it – a policy that would be more appropriate to a civil case.<sup>22</sup>

### **c) Genocidal intent**

The ICJ judges nevertheless accepted that Serb forces in 1992 were guilty of systematic massive killings and massive mistreatment of the Bosnian Muslims that bore all the characteristics of genocide – except that genocidal intent had not been proven. A pattern of killing across Bosnia was shown but was not considered proof of genocide; neither was the ethnic cleansing; neither was the cultural destruction. Still, the Bosnian legal team succeeded in proving to the judges' satisfaction that genocide had occurred at Srebrenica in 1995.<sup>23</sup> And this peculiarity – that genocide was proven to have occurred in one place and at one time in Bosnia, but not in any other place or at any other time, gives rise to some interesting paradoxes.

The Bosnian Serb armed forces were created by the regime in Belgrade and remained under its formal control up until 19 May 1992. Bosnian Serb commander Mladić was handpicked by Belgrade for the post. Bosnian Serb forces under Belgrade's control were found guilty of systematic mass killings and mistreatment of Bosnian Muslims across Bosnia, that nevertheless fell short of genocide in the eyes of the judges. However, after this Bosnian Serb commander and these Bosnian Serb armed forces became formally independent of Belgrade, they went on to commit genocide at Srebrenica. It is important to recall, at this point, the principle of command responsibility. Since Radislav Krstić was successfully

convicted of aiding and abetting genocide, Mladić, as his senior officer, was automatically guilty of the same crime – unless he could show that he had taken steps to prevent what Krstić was doing or to punish him afterwards, which he obviously did not. Furthermore, Mladić's direction of the events at Srebrenica was very public and prominent. So according to the ICJ's reasoning, Mladić acquired a genocidal intent at some point after he gained his independence from Belgrade. His forces continued to be armed and supplied from Belgrade; his officers' salaries continued to be paid by Belgrade; and the regular Yugoslav Army continued to provide his forces with logistical support. But, according to the ICJ, by the time of Srebrenica, there was apparently a split between Belgrade, which aimed to carry out the systematic massive killings, torture, rape and ethnic cleansing of Muslims, but without genocidal intent, and Mladić's Bosnian Serbs, who aimed to massacre the Muslims of Srebrenica, *with* genocidal intent.

The ICJ's conviction of Serbia for failing to prevent genocide rested on its argument that Belgrade should have been aware of the risk that Mladić would not simply carry out massive killings, torture and ethnic cleansing at Srebrenica, but that he had acquired a genocidal intent. The ICJ did not say that Belgrade should have been aware of this newly acquired genocidal intent on the basis of any documentary evidence, or of any past behaviour. The ICJ said that Belgrade should have been aware of the risk of genocide, purely on the basis of the supposed degree of popular hatred on the part of local Serbs toward local Muslims in the region around Srebrenica, and on the indications given by Mladić and by international observers that some sort of massacre was going to happen. The judges ruled:

*The Federal Republic of Yugoslavia leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that*

*the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide at Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.*<sup>24</sup>

So the judges are saying that it was the hatred that was the root cause of the genocide, and that Belgrade should have been aware of the hatred and of the risk that it might cause genocide at Srebrenica.

This is plainly nonsensical. Even if one were to accept the highly dubious proposition that it was the local Serb hatred of Muslims that gave rise to a genocidal intent, there is absolutely no way of showing that Serbs at Srebrenica hated Muslims more than Bosnian Serbs elsewhere hated Muslims. In other parts of Bosnia, there were mass killings, incredible acts of cruelty and torture and the mass rape and humiliation of women. There is no reason why such things should be evidence of a lesser degree of hatred than that shown by the Serbs of Srebrenica. If anything, the Srebrenica massacre indicates more cold-bloodedness than some other Bosnian Serb war-crimes. Furthermore, the systematic massacre of eight thousand people does not occur spontaneously, but requires a lot of planning and logistical support. It is difficult to see how Mladić, who presided over this process, and who was not even from Srebrenica, could have imbibed enough of this local hatred to have been moved to organise such a massacre. And it is doubly difficult to see how Belgrade could have been aware that Mladić's Bosnian Serbs hated the Srebrenica Muslims that bit more than they hated the Muslims they had murdered, tortured and raped in other parts of Bosnia. Which indicates that the ICJ's decision to acquit Serbia of genocide and other genocide-related charges, but to find it guilty of failing to prevent genocide at Srebrenica, is in the way of a practical compromise, rather than a decision based on strict legal principles.

#### **d) Greater Serbia as alibi**

There follows the question of precisely what was the intention of Serbia's leadership



when it presided over the mass killings in 1992, if it was not genocide. According to the judges:

*The Applicant's [i.e. Bosnia's] argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership – to create a larger Serb State, by a war of conquest if necessary – did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion.*<sup>25</sup>

This appears to be a case of honing the definition of genocide down so far, that it disappears altogether. The same argument could be used to argue that even the Nazi Holocaust, or at least large parts of it, were not genocide. The equivalent would be:

*...an essential motive of much of the Nazi leadership – to create a larger German State, by a war of conquest if necessary – did not necessarily require the destruction of the Jews and other communities, but their expulsion.*

Indeed, the Nazis initially tried to solve the Jewish problem, as they saw it, through forced emigration. The emigration of Jews from the Reich was not banned until October 1941, by which time the mass execution of Jewish men, women and children was already well underway. The ICJ's logic would seem to imply that the Jews murdered by the Nazis, at least up until October 1941, were not genocide victims.

By acquitting Serbia of genocide on the grounds that its motive was merely to create an ethnically pure, enlarged state through mass killings and ethnic cleansing, the ICJ has made mass killings and ethnic cleansing into an alibi for those committing genocide. Indeed, by arguing that genocide ceases to be genocide when the killers have additional or higher motives for their killings – such as creating a larger state – the ICJ judges have opened up whole new vistas for the acquittal of states and individuals accused of genocide. If the creation of a larger state through killings and expulsions is not genocide, because the goal is the larger state rather than the killings as an end in itself, then what is genocide ? Was the Nazi mass murder of Jewish hostages in reprisal for guerrilla actions in occupied Eastern Europe genocide ? Was the working to death of Jewish slave-labourers to produce armaments for the Wehrmacht genocide ? Or the killing of Jews in Dr Mengele's scientific experiments ? After all, in all these cases, the killings were for the purpose of goals that could technically have been achieved without them. If you want to be sufficiently pedantic, then you can make genocide disappear altogether. And this is effectively what the ICJ judges did.

Indeed, some of the judges themselves did not accept the acquittal. Two of the fifteen judges, including the ICJ's vice-president, felt that Serbia was guilty of genocide. Four of the fifteen judges felt that Serbia was guilty of the lesser charge of complicity in genocide. In the words of Vice-President al-Khasawneh:

*The Court further notes that the motive of creating a Greater Serbia “did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion”. The Court essentially ignores the facts and substitutes its own assessment of how the Bosnian Serbs could have hypothetically best achieved their macabre Strategic Goals... Coupled with population transfers, what other inference is there to draw from the overwhelming evidence of massive killings systematically targeting the Bosnian Muslims than genocidal intent ? If the only objective was to move the Muslim population, and the Court is willing to assume that the Bosnian Serbs did only that which is strictly necessary in order to achieve this objective, then what to make of the mass murder ? If the Court cannot ignore that population transfer was one way of achieving the Strategic Goals, then why should it ignore that, in fact, the Bosnian Serbs used this method as one of many – including massive killings of members of the protected group.<sup>26</sup>*

Summing up, al-Khasawneh said,

*The Court has absolved Serbia from responsibility for genocide in Bosnia and Herzegovina – save for responsibility for failure to prevent genocide in Srebrenica. It achieved this extraordinary result in the face of vast and compelling evidence to the contrary.<sup>27</sup>*

I am not going to speculate on the motives of the judges. But it does appear that to acquit Serbia of genocide, while finding the Bosnian Serbs guilty of genocide at Srebrenica, is more in the nature of a compromise than a genuinely principled verdict.

This may reflect a structural flaw in the ICJ as an instrument of justice. If each judge that makes up the panel in a particular case comes from a different nation, then there may be pressure on them to uphold their particular national viewpoint when they deal with a case. So a verdict will reflect, to some extent, a compromise between different national viewpoints, rather than a genuinely objective legal decision. Five out of the fifteen judges believed that the ICJ did not even have any

jurisdiction to try Serbia for genocide in the first place. Which makes the final verdict seem even more like a compromise representing the middle ground.<sup>28</sup>

### **Do the people of the former Yugoslavia feel justice has been done ?**

For these reasons and others, there is a widespread perception among many experts and commentators on the former Yugoslavia and the international courts that justice has not been done. The next question is how the working of the international courts is perceived among the former Yugoslav peoples. The work of the ICTY has been justified by its supporters as a necessary part of the process of reconciliation among the nations of the former Yugoslavia. The argument is that it is necessary to show that particular individuals are responsible for the war-crimes, and to punish them legally and publicly, in order to absolve the nations as a whole of blame. There is, however, no evidence that this has actually happened. According to a recent study by an international team of scholars led by Vojin Dimitrijević and Julie Mertus: ‘The hope that it [the ICTY] might promote reconciliation between the peoples of the region does not appear to have been realised.’<sup>29</sup> The scholars reached this verdict on the basis of an extensive study of opinion polls carried out in the former Yugoslavia.

This conclusion appears valid. The reasons why ordinary people in Serbia, Croatia, Bosnia and Kosovo tend to feel that justice has not been done are, on the one hand, a tendency to see the indictment of ‘their own’ war-criminals as evidence of bias against ‘their own’ nations, and on the other hand, a disappointment at the failure of the Tribunal to indict or convict certain notorious individuals. Such a sense of injustice is, of course, encouraged by nationalists among the former Yugoslavs, and often by the governments themselves. Thus, for example, the indictment of prominent Croats and Serbs by the Tribunal has widely been presented as evidence of anti-Croat or anti-Serb bias. Conversely, the sense of hostile bias has been strengthened by prominent acquittals. Among Serbs, the effective acquittal of the Bosnian Army commander in Srebrenica, Naser Orić, for crimes carried out against Serb civilians at Bratunac, is frequently cited as evidence of the Tribunal’s anti-Serb bias.<sup>30</sup> Among Croats, the acquittal of one member of the Vukovar Three, and the sentencing of a second member to only a short prison term, is likewise widely viewed as evidence of anti-Croat bias, and has even provoked a complaint from the Croatian parliament itself.<sup>31</sup> Finally, Muslims are widely dissatisfied by the failure to arrest Mladić and Karadžić. Their sense of injustice was, of course, increased by the ICJ’s acquittal of Serbia for genocide. But the ICJ’s affirmation that genocide occurred at Srebrenica was immediately rejected by Bosnian Serb Prime Minister Milorad Dodik, who claimed that the Srebrenica massacre ‘was not a genocide, although it was a terrible crime.’<sup>32</sup> In

Serbia, the ICJ's ruling is widely viewed as a vindication of Serbia's role in the war. The fact that the ICJ presented Serbia as guilty of systematic, massive killings of Bosnian Muslims has generally been overlooked.

This failure of the international courts to achieve general acceptance and legitimacy in the eyes of the former Yugoslav peoples is not entirely their fault. So far as the ICTY is concerned, to have overcome all accusations of bias, it would have had to operate on a much larger scale, and to have indicted and sentenced much larger numbers of war criminals, to have countered the bad impression created by the failure to indict certain notorious individuals and by the failure to convict some of those who were indicted. More importantly, however, the actions of the international courts, and particularly of the ICTY, were unlikely to promote reconciliation given the low level of public consciousness in the former Yugoslavia about their own sides' responsibility for the bloodshed, and the unwillingness of the governments to raise this consciousness, for example by public statements of responsibility or campaigns in the media. For example, with a widespread belief in Serbia that Serbs were the least guilty for the war, and that the international community is biased against them, and with nationalist politicians such as Prime Minister Vojislav Koštunica unwilling to challenge this perception, any indictment or conviction of Serbs for war-crimes is readily perceived as evidence of this alleged anti-Serb bias. The irony is that, as shown here, Serbia and Serb war-criminals have been treated extremely leniently. Yet the ICTY is nevertheless widely perceived as anti-Serb by the Serbian public.

### **Liberating Bosnia of war-criminals**

There are some partial qualifications that can be made to this largely negative evaluation of the record of the international courts. Firstly, the ICTY has at least succeeded in ridding Bosnia of some of the worst war-criminals, who might otherwise have seriously obstructed the reform and reconstruction of the country that has occurred since Dayton. In this respect, it does not matter so much that Karadžić and Mladić have not been arrested, because they have at least been driven underground and removed from the political scene. Among the Bosnian Croats, for example, Mladen Naletilić and Ivica Rajić have been convicted and sentenced. Had this not occurred, these two former warlords would in all likelihood have become criminal chiefs in post-war Bosnia, and would have terrorised local Muslims and moderate Croat politicians and corrupted or intimidated state officials. The fact that a vastly disproportionate number of Bosnian Serbs and Bosnian Croats have been indicted – as opposed to Serbs from Serbia and Croats from Croatia – has worked to the advantage of democracy and reform in Bosnia. Simply removing from power those with blood on their hands

counts for something. Nevertheless, if today's Bosnian political leaders are less murderous and overtly criminal, this does not mean that they are less nationalistic or more favourable to the spirit of reconciliation. The recent threats by the current Bosnian Serb Prime Minister, Milorad Dodik, to respond to Kosovo's independence by taking the Bosnian Serb republic out of Bosnia, and his attendance at the nationalist anti-Western rally in Belgrade on 21 February 2008, is evidence of this.

The second partial achievement of the ICTY is in forcing the more moderate elements in Serbian and Croatian politics to confront the hard-line nationalists and to challenge the nationalist taboos. This has undoubtedly catalysed the development of a more healthy pluralism and post-nationalist governing ethos in Croatia, although less so in Serbia. Overall, therefore, the international courts have made a positive contribution to regional progress. But if one ignores pragmatic political factors and evaluates the international courts simply by the extent to which they have delivered justice, then they must be judged a failure.

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<sup>1</sup> Examples of works in this genre are Susan Woodward, Balkan Tragedy: Chaos and Dissolution after the Cold War, The Brookings Institution, Washington D.C., 1994; Diana Johnstone, Fools' Crusade: Yugoslavia, NATO and Western Delusions, Pluto Press, London, 2002; Michael Parenti, To Kill a Nation: The Attack on Yugoslavia, Verso, London, 2001; Kate Hudson, Breaking the South Slav Dream: The Rise and Fall of Yugoslavia, Pluto Press, London, 2003.

<sup>2</sup> Thomas Fleming, 'The crime of the Serbs: US foreign policy in the Balkan War', speech delivered at Symposium on the Balkan War, Chicago, 1 September 1995, <http://www.srpska-mreza.com/nwo/TFleming-95.html>, downloaded 5 April 2008.

<sup>3</sup> See for example Evan F. Kohlmann, Al Qaida's Jihad in Europe: The Afghan-Bosnian Network, Berg, Oxford and New York, 2004, p. 73, on the Islamist perception that the Western powers were behind the Serb campaign in Bosnia.

<sup>4</sup> Brendan Simms, Unfinest Hour: Britain and the Destruction of Bosnia, Allen Lane, London, 2001.

<sup>5</sup> Florence Hartmann, Paix et châtement: Les guerres secrètes de la politique et de la justice internationales, Flammarion, Paris, 2007.

<sup>6</sup> Johnstone, Fools' Crusade, pp. 91-109, 118-123; Parenti, To Kill a Nation, p. 127-128; Hudson, Breaking the South Slav Dream, pp. 162-164. These unserious books are not, it should be made clear, on a par with Hartmann's important and well informed, if sometimes problematic book.

<sup>7</sup> Hartmann, Paix et châtement, pp. 165-246.

<sup>8</sup> Cees Banning and Petra de Koning, 'Karadžić still free because of politics', NRC-Handelsblad, 20 June 2004, reproduced in English translation on International Justice Watch Discussion List, 4 April 2005.

<sup>9</sup> Author's calculation based on examination of the indictments on the ICTY website, <http://www.un.org/icty/cases-e/index-e.htm>, 10 April 2008.

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<sup>10</sup> Marko Attila Hoare, 'What do the figures for the Bosnian war-dead tell us?', *Greater Surbiton* blog, 4 January 2008, <http://greatersurbiton.wordpress.com/2008/01/04/what-do-the-figures-for-the-bosnian-war-dead-tell-us/>, downloaded 10 April 2008 (author's calculation based on data provided by Mirsad Tokača's Research and Documentation Centre, Sarajevo ('Human losses in Bosnia-Herzegovina, 1991-1995: Research results and project evaluation'), <http://www.idc.org.ba/aboutus.html>).

<sup>11</sup> Dražen Živić and Nenad Pokos, 'Demografski gubitci tijekom Domovinskog rata kao odrednica depopulacije Hrvatske (1991.-2000.)', Institut društvenih znanosti Ivo Pilar, Zagreb, 2004, pp. 737-738.

<sup>12</sup> Batrick Ball et al, 'Killings and refugee flow in Kosovo, March – June 1999 – A report to the International Criminal Tribunal for the former Yugoslavia', American Association for the Advancement of Science, 3 January 2002, pp. 5-6; Paul B. Spiegel and Peter Salama, 'War and mortality in Kosovo, 1998-99: An epidemiological testimony', *The Lancet*, no. 355, 2000.

<sup>13</sup> Hartmann, *Paix et châtime*, pp. 81-82.

<sup>14</sup> Email from Florence Hartmann to the author, 13 January 2008.

<sup>15</sup> See Norman Cigar and Paul Williams, *Indictment in the Hague: The Milošević Regime and the Crimes of the Balkan Wars*, New York University Press, New York and London, 2002; Marko Attila Hoare, *How Bosnia Armed*, Saqi Books, London, 2004, pp. 31-42, 70-71; Hannes Tretter et al, 'Ethnic-cleansing operations in the northeast Bosnian city of Zvornik from April through June 1992', Ludwig Boltzmann Institute of Human Rights, Vienna, 1994, 1998.

<sup>16</sup> 'The International Criminal Tribunal for the former Yugoslavia: The Prosecutor of the Tribunal against Slobodan Milošević – Amended Indictment, 21 April 2004', ICTY website, <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>, downloaded 8 April 2004.

<sup>17</sup> Email from Florence Hartmann to the author, 12 January 2008.

<sup>18</sup> Merdijana Sadović, 'Nice assesses ICTY prosecution record', *Institute for War and Peace Reporting*, 11 January 2008.

<sup>19</sup> Mark Levene, *Genocide in the Age of the Nation State: The Meaning of Genocide*, vol. 1, I.B. Tauris, London, 2005, p. 45.

<sup>20</sup> Slobodan Kostić, 'How Belgrade escaped genocide charge', *Institute for War and Peace Reporting*, 15 February 2008.

<sup>21</sup> Marlise Simons, 'Serbia's darkest pages hidden from genocide court', *International Herald Tribune*, 8 April 2007.

<sup>22</sup> See Ruth Wedgwood, 'Bad day for international justice', *International Herald Tribune*, 8 March 2007.

<sup>23</sup> >Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Judgement, 26 February 2007=, International Court of Justice website, downloaded 27 February 2007, [www.icj.cij.org/ictjwww/idocket/ibhy/ibhyjudgment/ibhy\\_ijudgment\\_20070226\\_frame.htm](http://www.icj.cij.org/ictjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm).

<sup>24</sup> *Ibid.*, pp. 157-158.

<sup>25</sup> *Ibid.*, p. 133.

<sup>26</sup> *Ibid.*, 'Appendix: Dissenting opinion of Vice-President Al-Khasawneh', pp. 11-12.

<sup>27</sup> *Ibid.*, p. 17.

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<sup>28</sup> See Wedgwood, op. cit.

<sup>29</sup> Vojin Dimitrijević, Julie Mertus, et. al, 'The Hague Tribunal (ICTY)', Scholars' Initiative website, downloaded 10 April 2008, [http://www.salzburgseminar.org/ihjr/si/si/Team\\_10\\_Full\\_Text\\_Report.pdf](http://www.salzburgseminar.org/ihjr/si/si/Team_10_Full_Text_Report.pdf), p. 86.

<sup>30</sup> For example, 'No justice for Serbs', Byzantine Blog, 3 July 2006, [http://byzantinesacredart.com/blog/2006/07/no\\_justice\\_for\\_serbs.html](http://byzantinesacredart.com/blog/2006/07/no_justice_for_serbs.html), downloaded 10 April 2006; 'Hague Tribunal confirms its anti-Serb bias', Serbo Journal blog, 30 September 2006, <http://serbo.blogspot.com/2006/09/hague-tribunal-confirms-its-anti-serb.html>, downloaded 10 April 2006.

<sup>31</sup> Goran Jungvirth, 'Vukovar judgement slammed', *Balkan Investigative Reporting Network*, 4 October 2007.

<sup>32</sup> Dejan Anastasijević, 'Defining genocide down in Bosnia', *Time*, 27 February 2007.