

AN OVERVIEW OF JUSTICE IN THE FORMER YUGOSLAVIA AND REFLECTIONS FOR ACCOUNTABILITY IN SYRIA

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I. INTRODUCTION

This article provides an overview of justice for crimes perpetrated in the former Yugoslavia during the wars in the 1990s. It concludes with reflections about lessons learned for future accountability endeavors—particularly, the model of having a three-tiered approach to justice in Bosnia-Herzegovina, consisting of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY or Tribunal), the hybrid War Crimes Chamber of the State Court of Bosnia and Herzegovina (War Crimes Chamber), and local courts in Bosnia. It ends with reflections as to whether, if it someday becomes possible, such a three-tiered approach would be a good model to ensure justice for crimes being perpetrated in Syria or in any other situation of very large-scale atrocities.

II. REFLECTING ON THE ACCOMPLISHMENTS OF THE ICTY

Tremendous strides have been made over the past twenty years towards ensuring justice for crimes perpetrated in the former Yugoslavia during the 1990s. Looking back to the time when the Dayton Peace Accords were negotiated,¹ justice was still in its infancy. The ICTY had been created in

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1993 by the United Nations (U.N.) Security Council,² to sit in The Hague, Netherlands. The Tribunal could not be located in the former Yugoslavia, since, at the time of the Tribunal's creation, armed conflict was still ongoing in the region.

It took time for the Tribunal to commence prosecutions. It started with the prosecution of the relatively low-level case of Duško Tadić,³ because he was already in custody in Germany. In the early years, the Tribunal was not yet taken particularly seriously. For instance, despite its creation, in July 1995, Republika Srpska Armed Forces (VRS), under the command of General Ratko Mladić, committed the Srebrenica massacre⁴—subsequently adjudicated to constitute genocide.⁵ Clearly, they were not deterred by the Tribunal's early existence. Even when self-proclaimed President of Republika Srpska, Radovan Karadžić, and VRS military commander Ratko Mladić were indicted,⁶ they initially traveled around openly, with little fear of arrest.⁷ And, Serbian forces were not deterred in 1999 from commencing ethnic cleansing in Kosovo.⁸

Yet, eventually, the first international criminal tribunal since the International Military Tribunal at Nuremberg⁹ commenced trials and

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (HRW 2006). Research assistance for this article was provided by Erin Lovall.

1. General Framework Agreement for Peace in Bosnia and Herzegovina (“Dayton Peace Agreement”), Bosn. & Herz.-Croat.-Fed. Repub. Yugo., Dec. 14, 1995, 35 I.L.M. 75.

2. S.C. Res. 827 (May 25, 1993).

3. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), *aff'd*, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

4. Dan Bilefsky & Somini Sengupta, *Srebrenica Massacre, After 20 Years, Still Casts a Long Shadow in Bosnia*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/2015/07/09/world/europe/srebrenica-genocide-massacre.html?_r=1.

5. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 530–40 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), *aff'd*, Case No. IT-98-33-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

6. Prosecutor v. Karadžić & Mladić, Case No. IT-95-5-I, Initial Indictment “Bosnia and Herzegovina” (Int'l Crim. Trib. for the Former Yugoslavia July 24, 1995); Prosecutor v. Karadžić & Mladić, Case No. IT-95-18-I, Initial Indictment “Srebrenica” (Int'l Crim. Trib. for the Former Yugoslavia Nov. 14, 1995).

7. GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 249, 255 (2000).

8. *Ethnic Cleansing in Kosovo: An Accounting*, U.S. DEP'T STATE 1, 3 (1999), https://www.state.gov/www/global/human_rights/kosovooii/pdf/kosovooii.pdf.

9. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 (agreement creating the Charter of the International Military Tribunal to be first held at Nuremberg). The Tribunal tried a total of twenty-two defendants, of whom nineteen were convicted, twelve of whom were sentenced to death. For background on the Nuremberg Tribunal,

eventually became a full and well-functioning institution.¹⁰ Karadžić and Mladić were driven off the political and military stages, respectively, with Karadžić disguising himself under an assumed name¹¹ and Mladić in hiding¹² until their eventual arrests.¹³ The Tribunal eventually issued indictments all the way up to Serbian President Slobodan Milošević,¹⁴ although he died during the pendency of his ICTY trial.¹⁵ The Tribunal also succeeded in indicting on all sides of the conflict, including crimes perpetrated by Bosnian Muslims, Croats, and Kosovar Albanians.¹⁶

The Tribunal has made historic jurisprudential firsts. There have been prosecutions focused on the use of rape as a weapon of war—for instance the running of a notorious rape camp in Foča, in the *Kunarac* decision.¹⁷ Rape was eventually prosecuted as a crime against humanity,¹⁸ a war crime,¹⁹ and

see generally MICHAEL R. MARRUS, *THE NUREMBURG WAR CRIMES TRIAL 1945–46: A DOCUMENTARY HISTORY* (Katherine E. Kurzman et al. eds., 1997).

10. The ICTY indicted 161, resulting in 83 convictions, 19 acquittals, 7 ongoing proceedings, and 2 to be retried by the Mechanism for International Criminal Tribunals (MICT). *Infographic: ICTY Facts & Figures*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/content/infographic-icty-facts-figures> (last visited Mar. 3, 2017) [hereinafter *ICTY Infographic*].

11. Nicholas Kulish & Graham Bowley, *The Double Life of an Infamous Serbian Fugitive*, N.Y. TIMES (July 23, 2008), <http://www.nytimes.com/2008/07/23/world/europe/23karadzic.html?pagewanted=all>.

12. *How Ratko Mladic Stayed Hidden After Bosnia War*, BBC NEWS (May 26, 2011), <http://www.bbc.com/news/world-europe-13562118>.

13. Julian Borger, *Radovan Karadzic, Europe's Most Wanted Man, Arrested for War Crimes*, GUARDIAN (July 21, 2008, 7:01 PM), <http://www.theguardian.com/world/2008/jul/22/warcrimes.internationalcrime>; Colum Lynch, *Serbia Arrests Ratko Mladic on War Crimes Charges*, WASH. POST (May 26, 2011), https://www.washingtonpost.com/world/serbia-arrests-ratko-mladic-on-war-crimes-charges/2011/05/26/AGXID1BH_story.html?utm_term=.c6e4adcad9b1.

14. *Prosecutor v. Milošević*, Case No. IT-99-37, Initial Indictment “Kosovo” (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999).

15. Molly Moore & Daniel Williams, *Milosevic Found Dead in Prison*, WASH. POST (Mar. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100525.html>.

16. *See generally ICTY Case List*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4> (last visited Mar. 2, 2017).

17. *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1, Trial Chamber Judgment, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

18. *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1A, Appeals Chamber Judgment, ¶¶ 127–29 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Trial Chamber Judgment ¶¶ 175, 180–83 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) *aff'd*, Case No. IT-98-30/1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

19. *Prosecutor v. Kvočka*, Case No. IT-98-30/1A, Appeals Chamber Judgment, ¶ 395 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); *Kunarac*, Case No. IT-96-23 & 23/1A ¶¶ 127–29 (2002).

a form of torture.²⁰ It also was prosecuted as an underlying crime of genocide by the ICTY's sister tribunal, the International Criminal Tribunal for Rwanda (ICTR),²¹ created to sit in Arusha, Tanzania, and try top perpetrators of the 1994 Rwandan genocide.²²

The ICTY has issued judgments that the killing of more than 8300 Bosnian men and boys in and around Srebrenica starting on July 11, 1995 *was genocide*, in *Krstić*,²³ as well as other, decisions.²⁴ It charged a high-level female perpetrator, the President of Republika Srpska, Biljana Plavšić, who entered a guilty plea to persecution as a crime against humanity.²⁵

Ultimately, of the 161 indicted, the Tribunal achieved a 100% success rate on arrests, with no fugitives at large.²⁶ Of course, the Tribunal did not achieve this alone. None of the war crimes tribunals have arrest capabilities, but rely upon state cooperation to effectuate arrests.²⁷ In the former Yugoslavia, in the early years, the countries in the region showed no interest in cooperating, but that gradually changed with the policy of "conditionality," whereby the United States conditioned financial assistance to countries in the region, and the European Union (EU) conditioned progress

20. Kunarac, Case No. IT-96-23 & 23/1A ¶¶ 150–51 (2002).

21. Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (explaining rape and other acts of sexual violence constitute infliction of "serious bodily or mental harm" on members of the group.); see Jennifer Trahan, *Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda* (HRW 2010) (for a compilation of the case law of the ICTR).

22. S.C. Res 955 (Nov. 8, 1994) (resolution created the ICTR).

23. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 530–40 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), *aff'd*, Case No. IT-98-33-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

24. See, e.g., Prosecutor v. Popović, Case No. IT-05-88, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010) *aff'd*, Case No. IT-05-88-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); see also, e.g., Prosecutor v. Tolimir, Case No. IT-05-88/2, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012), *aff'd*, Case No. IT-05-88/2-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

25. Prosecutor v. Plavšić, Case No. IT-0039 & 40/1, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003). Cf. Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T (Int'l Crim. Trib. for Rwanda June 24, 2011), *app'l filed* (parallel ICTR case convicting Rwandan Minister for Family Welfare and the Advancement of Women Pauline Nyiramasuhuko, for genocide, conspiracy to commit genocide, and incitement to rape); see generally Sam Sasan Shoamanesh, *Nyiramasuhuko: The Mother Who Awarded Rape for Murder*, WORLD POST (Aug. 9, 2011), http://www.huffingtonpost.com/sam-sasan-shoamanesh/nyiramasuhuko-the-mother-_b_922216.html (explaining how Nyiramasuhuko was the first woman convicted by the ICTR, and first woman to be tried and convicted by an international criminal tribunal).

26. See *ICTY Infographic*, *supra* note 10.

27. Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT'L L.J. 621, 625 (2003).

towards EU accession, on cooperation with the ICTY, particularly arrests and surrenders.²⁸

The ICTY has also adjudicated cases covering key major crime scenes. For instance:

- a) the sniping and shelling of civilians in Sarajevo (the *Galić* and *Dragomir Milošević* cases);²⁹
- b) the decision that Srebrenica is genocide (the *Krstić* and other cases);³⁰
- c) atrocity crimes in camps in Prijedor, such as running of the notorious Omarska camp;³¹ and
- d) the Vukovar hospital massacre.³²

Additionally, the Tribunal has produced a wealth of generally well-reasoned jurisprudence. There is now abundant case law on the parameters of the crimes of genocide, war crimes, and crimes against humanity, as well as individual and command responsibility, and procedural and other substantive law.³³

28. See JULIE KIM, Cong. Research Serv., RS 22097, BALKAN COOPERATION ON WAR CRIMES ISSUES (2008); see also STEVEN WOEHREL, CONG. RESEARCH SERV., RS 21686, CONDITIONS ON U.S. AID TO SERBIA (2008).

29. Prosecutor v. Galić, Case No. IT-98-29-T, Trial Chamber Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2004), *aff'd*, Case No. IT-98-29-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 3, 2006); Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007), *aff'd*, Case No. IT-98-29/1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

30. See Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 530–40 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), *aff'd*, Case No. IT-98-33-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Popović, Case No. IT-05-88, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010) *aff'd*, Case No. IT-05-88-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015)

31. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), *aff'd*, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); see also Prosecutor v. Kvočka, Case No. IT-98-30/1, Trial Chamber Judgment ¶¶ 175, 180–183 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) *aff'd*, Case No. IT-98-30/1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

32. Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007), *aff'd*, Case No. IT-95-13/1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009).

33. For a compilation of the case law, see JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Human Rights Watch 2006).

Nonetheless, there are some less successful moments at the ICTY. When Slobodan Milošević died mid-way through his trial,³⁴ the Prosecutor was roundly criticized for trying him on too many counts³⁵—three separate indictments with a total of sixty-six counts, covering crimes in Croatia, Bosnia, and Kosovo.³⁶ That of course is an easy criticism to make in hindsight, and a counter-argument for broad charging can also be made for the sake of establishing a comprehensive and accurate historical record for future generations, and ensuring justice for the most significant crimes. There are high-level acquittals in the cases of Momčilo Perišić, chief of the general staff of the Yugoslav Army, VJ,³⁷ and Croatian General Ante Gotovina, who was the operational commander of the southern portion of the Krajina region during the Croatian military offensive known as “Operation Storm.”³⁸ Both acquittals seem less than well-reasoned,³⁹ as does the recent acquittal in the *Šešelj* case.⁴⁰ These I would suggest, are the jurisprudential low-points. Subsequent Appellate Chambers have since rejected the *Perišić* aiding and abetting standard,⁴¹ and the *Šešelj* case is on appeal, so may still be reversed.

Additionally, the ICTY’s Outreach Program has faced difficulties in conveying the achievements of the ICTY to the public in the former

34. Moore & Williams, *supra* note 15.

35. Molly Moore, *Trial of Milosevic Holds Lessons for Iraqi Prosecutors*, WASH. POST (Oct. 18, 2005), <http://www.washingtonpost.com/wpdyn/content/article/2005/10/17/AR2005101701496.html>.

36. Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment “Croatia” (Int’l Crim. Trib. for the Former Yugoslavia July 28, 2004); Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment “Bosnia and Herzegovina” (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2002); Prosecutor v. Milošević, Case No. IT-99-37-PT, Second Amended Indictment “Kosovo” (Int’l Crim. Trib. for the Former Yugoslavia Oct. 16, 2001).

37. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

38. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

39. For a critical discussion of the Perišić case, see Jennifer Trahan & Erin Lovall, *The ICTY Appellate Chamber’s Acquittal of Momčilo Perišić: The Specific Direction Element of Aiding and Abetting Should be Rejected or Modified to Explicitly Include a ‘Reasonable Person’ Due Diligence Standard*, 40 BROOK. J. INT’L L. 171 (2015). For a critical discussion of the Gotovina case, see Janine Natalya Clark, *Courting Controversy: The ICTY’s Acquittal of Croatian Generals Gotovina and Markač*, 11 J. INT’L CRIM. JUST. 399 (2013).

40. Prosecutor v. Šešelj, Case No. IT-03-67-T, Trial Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016).

41. See Prosecutor v. Stanišić, Case No. IT-03-69-A, Appeals Chamber Judgment, ¶¶ 106–08 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 9, 2015) (“the Trial Chamber erred in law by requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime”); Prosecutor v. Popović, Case No. IT-05-88-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

Yugoslavia.⁴² The program was created late, only in 1999, as the need for outreach was not originally envisioned when the Tribunal was created.⁴³ Unfortunately, it has never been seen as particularly central to the Tribunal's work, remaining over the years outside the Tribunal's ordinary budget.⁴⁴ But most of all, it has faced particular challenges given, first, Republika Srpska and Serbian denial of crimes,⁴⁵ and then later, partial denial of crimes, which represents the current state of affairs.⁴⁶ For instance, authorities from Republika Srpska and Serbia now admit crimes happened at Srebrenica, which they originally did not, but deny that the crimes constitute genocide, despite that determination having been adjudicated multiple times.⁴⁷ This denial was repeated at the international level when Russia vetoed the United Kingdom's (UK) draft resolution before the U.N. Security Council that, on the twentieth anniversary of the Srebrenica genocide, would have acknowledged the crimes as genocide.⁴⁸

Thus, despite the ICTY's existence and all its accomplishments, unfortunately, we still see alarmingly nationalistic narratives coming from some political figures and others in the region. Perhaps it is unrealistic to think that any one tribunal, no matter how successful, could change that dynamic. Overall, however, the work of the ICTY has been a success.

III. DOMESTIC PROSECUTIONS IN THE FORMER YUGOSLAVIA

The victims of crimes perpetrated in the former Yugoslavia no doubt would not fully share this optimistic assessment of the ICTY's work.⁴⁹ A

42. David Tolbert, *Reflections on the ICTY Registry*, 2 J. INT'L CRIM. JUST. 480, 482 (2004).

43. *Id.*

44. *ICTY Outreach Programme Annual Report*, UNITED NATIONS, 37 (2013), http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2013_en.pdf.

45. Koen S. Kluessien, *A Conspiracy of Denial: Serbian Politicians and their Unwillingness to Deal with the Troubled Past of the Srebrenica Genocide*, CLARK U. CLARK DIGITAL COMMONS (Apr. 10, 2015), <http://commons.clarku.edu/chgspapers/15>.

46. Mersiha Gadzo, *Time to Identify Srebrenica Massacre as Genocide*, AL JAZEERA AM. (July 8, 2015, 2:45 AM), <http://america.aljazeera.com/opinions/2015/7/20-years-later-it-is-time-to-identify-srebrenica-massacre-as-genocide.html>.

47. *Id.*; see also Tolimir, Case No. IT-05-88/2 (2012); Prosecutor v. Popović, Case No. IT-05-88, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010), *aff'd*, Case No. IT-05-88-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 530–40 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), *aff'd*, Case No. IT-98-33-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

48. *Russia Vetoes UN Move to Call Srebrenica 'Genocide'*, BBC NEWS (July 8, 2015), <http://www.bbc.com/news/world-europe-33445772>.

49. Organization for Security and Cooperation in Europe, *Views on War Crimes, the ICTY, and the National War Crimes Judiciary*, Survey 30 (Dec. 8, 2009), <http://www.academia.edu/10883773/>

focus on higher-level perpetrators at the ICTY has meant that most first-hand trigger-pullers—those who murdered the person “down the street”—would not be prosecuted in The Hague.⁵⁰ Such prosecutions have been left to courts in the region.⁵¹

Thus, for example in Bosnia, there is a three-tiered approach to justice.⁵² In addition, to the ICTY, there is the hybrid War Crimes Chamber,⁵³ as well as local courts. The War Crimes Chamber, which was developed in part to handle ICTY transfer cases as the ICTY was implementing its “completion strategy,”⁵⁴ is based on an interesting model of a hybrid tribunal that converts to a national court. It started with panels of international judges in the majority, then converted to international judges in the minority after a certain period of years, and finally converted to fully national panels, which is where it stands today.⁵⁵ Thus, it started as an internationalized institution and continues as a local war crimes—and organized crime—chamber.⁵⁶ This aspect of the War Crimes Chamber is a merit-worthy model, as opposed to other hybrid tribunals that, despite other significant accomplishments, have simply closed after a period of years, such as the Special Court for Sierra Leone.⁵⁷ The War Crimes Chamber, by contrast, is designed to continue

Why_testify_Witnesses_motivations_for_giving_evidence_in_a_war_crimes_tribunal_in_Sierra_Leone (e.g., question: “How do you think that the trials before ICTY affect the victims of war crimes and their families?” 45% of respondents chose the response: “The victims and their families do not see the ICTY as just, because those who made them victims are not tried or are tried too slowly and they are much too leniently punished.”).

50. *Understanding the International Criminal Court*, ICC, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited Mar. 25, 2017).

51. *Id.*

52. See generally *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, OSCE 1, 43 (2011), <http://www.osce.org/bih/108103?download=true>.

53. *The Case Law of the Court of Bosnia and Herzegovina*, COURT OF BOSNIA & HERZEGOVINA, <http://www.sudbih.gov.ba/?jezik=e> (last visited Mar. 13, 2017).

54. Pipina T. Katsaris, *The Domestic Side of the ICTY Completion Strategy: Focus on Bosnia and Herzegovina*, 78 REVUE INTERNATIONALE DE DROIT PÉNALE 348 (2007).

55. Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INT’L CTR. FOR TRANSITIONAL JUST. 1, 943 (2008) (regarding the inclusion and eventual phase-out of international personnel).

56. *Id.*

57. *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, HUM. RTS. WATCH (Nov. 2, 2005), <https://www.hrw.org/report/2005/11/02/justice-motion/trial-phase-special-court-sierra-leone> [hereinafter *Justice in Motion*]. The Special Court for Sierra Leone adjudicated cases against the three key warring factions during Sierra Leone’s 1991–2002 civil war. *Id.* The Special Court is currently in its residual mechanisms phase. *Special Court for Sierra Leone Residual Special Court for Sierra Leone*, RSCSL, <http://www.rscsl.org/> (last visited Mar. 25, 2017) (discussing details of SCSL residual mechanism).

prosecuting war crimes cases long after the international staff has left.⁵⁸ However, the work of the War Crimes Chamber has slowed in the last few years, with criticism that they are prosecuting only simple cases, and not coming even close to delivering on the goals set for the court in the National Strategy for the Processing of War Crimes Cases—National War Crimes Strategy.⁵⁹

Even the War Crime Chamber in Sarajevo, however, cannot conduct all the prosecutions in Bosnia, where the National War Crimes Strategy has estimated the existence of tens of thousands of perpetrators.⁶⁰ The goal of the War Crimes Strategy is to prioritize the more complex cases so that they are tried before the War Crimes Chamber, which has stronger witness protection mechanisms.⁶¹ The War Crimes Strategy emphasizes the need to process the most complex and highest priority war crimes cases within seven years, and other war crimes cases within fifteen years.⁶²

The third level of prosecutions in Bosnia-Herzegovina is occurring before Cantonal Courts in the Federation, District Courts in Republika Srpska, and one court in the Brčko District.⁶³ Observer reports suggest that local war crimes prosecutions vary significantly in quality.⁶⁴ The author has

58. *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, HUM. RTS. WATCH 6 (Feb. 7, 2006), <https://www.hrw.org/report/2006/02/07/looking-justice/war-crimes-chamber-bosnia-and-herzegovina>.

59. *Justice in Motion*, *supra* note 57, at 10.

60. *Bosnia-Herzegovina, Shelving Justice-War Crimes Prosecutions in Paralysis*, AMNESTY INT'L, EUR 63/018/2003 (Nov. 12, 2003), <https://www.amnesty.org/en/documents/eur63/018/2003/en/.pdf>.

61. *National Strategy for Processing of War Crimes Cases Adopted*, MINISTRY JUST. BOSNIA & HERZEGOVINA (Dec. 30, 2008, 2:09 PM), <http://www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US> [hereinafter *National Strategy*]; see *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, *supra* note 58, at 16.

62. *National Strategy*, *supra* note 61. This time-table is not being met.

63. *Bosnia and Herzegovina: Local Courts Face Obstacles in War Crimes Trials*, HUM. RTS. WATCH (July 10, 2008, 8:00 PM), <https://www.hrw.org/news/2008/07/10/bosnia-and-herzegovina-local-courts-face-obstacles-war-crimes-trials> (“It is estimated that several thousand unresolved case files involving very serious crimes committed during the 1992–95 war remain that may be tried before the cantonal courts in the Federation of Bosnia and Herzegovina and district courts in Republika Srpska (‘the two entities that make up Bosnia and Herzegovina’”).

64. According to Human Rights Watch:

personally met with a rape survivor who was supposed to be a “protected witness” in a prosecution in Republika Srpska, until her face was shown on the evening news.⁶⁵ Clearly, not all local courts are successfully accomplishing their work.

In Croatia, there have been war crimes prosecutions in the largest district courts.⁶⁶ Yet, Croatia, overall, has done the fewest number of war crimes prosecutions.⁶⁷ On the other hand, there were also the smallest number of crimes committed in Croatia, certainly compared to Bosnia, so Croatia had less to prosecute.⁶⁸

In Serbia, war crimes prosecutions have occurred at the Belgrade Higher Court’s War Crimes Department.⁶⁹ However, to date, prosecutions have mainly focused on lower-level and paramilitary perpetrators, rather than prosecuting up the chain of command, or focusing on regular or police forces in Serbia.⁷⁰ That witness protection is run by the police⁷¹ is distinctly unhelpful, making it hard to imagine how any “insider” police witness could be effectively protected. The “glass half-full” evaluation is that at least Serbia is conducting war crimes prosecutions; the “glass half-empty” evaluation is that it is doing a partial approach. Even the prosecutions that the War Crimes Prosecutor has accomplished seem deeply unpopular with the majority population in Serbia, which is still unfortunately strongly nationalistic in outlook.⁷²

The obstacles include that prosecutors’ offices lack sufficient staff and generally do not specialize in one type of crime. Cooperation between prosecutors and police and between police across entity lines continues to be problematic. Witness protection measures are rarely, if ever, employed, and witness support services are generally not available. Prosecutors often fail to make use of available sources of evidence and do not take steps necessary to secure suspect attendance at trial. Defense attorneys generally lack access to training in relevant areas of law and are often inadequately, or not at all, compensated for their work.

Id.

65. Interview with “Protected Witness”, in Sarajevo, Bosnia (June–July 2013).

66. *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, AMNESTY INT’L (Dec. 9, 2010), <https://www.amnesty.org/en/documents/eur64/003/2010/en/.pdf>.

67. *Id.*

68. *Id.* at 20–30.

69. BOGDAN IVANIŠEVIĆ, *AGAINST THE CURRENT: WAR CRIMES PROSECUTIONS IN SERBIA* 15 (2007).

70. *Id.* at 16.

71. *Id.* at 25.

72. According to Bogdan Ivanišević:

Thus, there is both tremendous progress in war crimes prosecutions in the former Yugoslavia, yet, much work remains to be done.

IV. THE THREE-TIERED LEVELS OF PROSECUTIONS AS A MODEL FOR THE FUTURE & REFLECTIONS ON JUSTICE FOR CRIMES IN SYRIA

What the ICTY and local war crime prosecutions have provided, in addition to their specific prosecutorial accomplishments, is also a potential model for the future. Namely, for crimes perpetrated in Bosnia, as discussed above, there have been three tiers of justice—the ICTY, the hybrid War Crimes Chamber in Sarajevo, and local courts.⁷³ A similar three-tiered approach has also existed for crimes perpetrated during the Rwandan genocide.⁷⁴ There, the ICTR prosecuted top-level perpetrators in Arusha, Tanzania; mid-level perpetrators were tried in domestic court trials in Rwanda; and the remainder were tried before the Gacaca courts in Rwanda.⁷⁵ This multi-tiered approach could be a useful model when considering potential future justice options for any country that has suffered from large-scale atrocity crimes.

While it is currently impossible to predict whether the war in Syria will end with a political solution that leaves a government, or creates a coalition government, willing to engage in pursuing accountability, such an outcome should be a goal of the international community and people of Syria, so that justice for the mass atrocity crimes that have been perpetrated and are being

[I]t seems that the contribution of the trials to increasing public acceptance of the facts of war crimes is still limited. For example, although one in three respondents was familiar with the allegations that Kosovo Albanians were victims of expulsion during the NATO bombing campaign, only [fifteen] percent of the respondents believed them.

Id. at 36. Troublingly, the post of War Crimes Prosecutor is now vacant.

73. *About the ICTY*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Mar. 3, 2017); *Bosnia and Herzegovina: Local Courts Face Obstacles in War Crimes Trials*, HUM. RTS. WATCH (July 10, 2008, 8:00 PM), <https://www.hrw.org/news/2008/07/10/bosnia-and-herzegovina-local-courts-face-obstacles-war-crimes-trials>; *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, HUM. RTS. WATCH (Oct. 13, 2004), <https://www.hrw.org/reports/2004/icty1004/icty1004.pdf>.

74. *The ICTR in Brief*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Mar. 3, 2017).

75. *Rwanda: Justice After Genocide—20 Years on*, HUM. RTS. WATCH (Mar. 28, 2014, 6:02 AM), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years> (discussing the different levels of justice—ICTR, domestic trials, and gacaca).

perpetrated there by multiple sides⁷⁶ may be systematically addressed through a credible tribunal or set of tribunals.

At present, the International Criminal Court (ICC)⁷⁷ has no jurisdiction to prosecute the bulk of the crimes occurring in Syria, as Syria is not a State Party to the ICC's Rome Statute,⁷⁸ and Russia and China have vetoed U.N. Security Council referral of the situation to the ICC.⁷⁹ As a result, currently, the Court only has limited jurisdiction, over foreign fighters in Syria who hail from Rome Statute States Parties.⁸⁰ But even if full ICC jurisdiction existed, the ICC usually prosecutes only a handful of persons in any one situation country.⁸¹ That simply would not suffice for the kind of crime scenes occurring in Syria—for instance, where up to an estimated 1400 died in one chemical weapons attack alone in 2013.⁸² Thus, when there is a different political outcome in Syria that will allow the pursuit of justice,⁸³ there will be a need for a tribunal, or multiple levels of tribunals, to adjudicate mass atrocity crimes committed on all sides, and, ideally, the top level tribunal—whether fully international or a hybrid tribunal—should resemble the ICTY in terms of capacity. This should be our model from which to draw upon for crimes committed in Syria, or any other country in the future that faces mass atrocity crimes where a combination of ICC prosecutions and local court

76. For findings on atrocity crimes perpetrated in Syria, *see, e.g.*, Rep. of the U.N. Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Thirtieth Session, U.N. Doc A/HRC/30/48 (2015).

77. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

78. For a listing of the States Parties to the ICC, *see The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Mar. 2, 2017).

79. *UN Bid to Refer Syria to ICC Vetoed*, AL JAZEERA (May 23, 2014, 10:05 AM), <http://www.aljazeera.com/news/middleeast/2014/05/un-bid-refer-syria-icc-vetoed-2014522142710574665.html>.

80. *See, e.g.*, Jennifer Trahan, *New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)*, JUST SECURITY (Nov. 12, 2014, 8:59 AM), <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/>.

81. There are currently twenty-three cases at the ICC, involving nine situation countries. *See Situations Under Investigation*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Mar. 2, 2017); *23 Cases*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/cases.aspx> (last visited Mar. 2, 2017).

82. Joby Warrick, *More than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, WASH. POST (Aug. 30, 2013), https://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html?utm_term=.ed9abab98303.

83. Voluntary accession to the Rome Statute by Syria, or consent to the creation of an international or hybrid tribunal, or a specialized war crimes chamber in Syria, would all require a different Syrian government than the present one.

capacity⁸⁴ cannot reasonably be expected to credibly handle the bulk of prosecutions.

V. CONCLUSION

The ICTY has made significant accomplishments in the justice it has rendered and in its jurisprudence, but, overall, has also left us with a three-tiered model for international justice, with the existence of: the ICTY, the War Crimes Chamber in Sarajevo, and local courts in Bosnia-Herzegovina. While not all have functioned perfectly, this vision of three-tiers of justice can serve as a model for the future. As we someday, hopefully, contemplate how to achieve justice for crimes occurring in Syria, it is a useful model from which the international community should draw. While the ICTY's existence has not transformed society in Bosnia, it was never reasonable to think a tribunal could do so. Twenty-one years after the Srebrenica massacre, there may be an unhappy peace that exists between the two entities in Bosnia, and also between Bosnian Muslims and Bosnian Croats in the Cantons within the Federation, but it should now be for the people of the region to own this legacy and create a more enduring solution themselves. Ultimately, it is hard to imagine any prosecutions occurring in the region, but for the creation of the ICTY.

84. Local prosecutions can include use of a specialized chamber such as the International Crimes Division of the High Court in Uganda. See Janet Anderson, *Harriet Ssali Lule: "What Matters is That There Are Victims"*, JUST. HUB (Jan. 23, 2015, 11:10), <https://justicehub.org/article/harriet-ssali-lule-what-matters-there-are-victims>; *International Crimes Division*, JUDICIARY: REPUBLIC OF UGANDA, <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html> (last visited Mar. 13, 2017). In July 2008, the Government of Uganda established the International Crimes Division to try individuals alleged to have committed international crimes during the 20-year insurgency in northern Uganda. Anderson, *supra*; see also *Justice for Serious Crimes Before National Courts Uganda's International Crimes Division*, HUM. RTS. WATCH, Jan. 2012, at 1.