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, 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, 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, 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 massacre—subsequently adjudicated to constitute genocide. 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, they initially traveled around openly, with little fear of arrest. And, Serbian forces were not deterred in 1999 from commencing ethnic cleansing in Kosovo.

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

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

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.\textsuperscript{10} Karadžić and Mladić were driven off the political and military stages, respectively, with Karadžić disguising himself under an assumed name\textsuperscript{13} and Mladić in hiding\textsuperscript{12} until their eventual arrests.\textsuperscript{13} The Tribunal eventually issued indictments all the way up to Serbian President Slobodan Milošević,\textsuperscript{14} although he died during the pendency of his ICTY trial.\textsuperscript{15} The Tribunal also succeeded in indicting on all sides of the conflict, including crimes perpetrated by Bosnian Muslims, Croats, and Kosovar Albanians.\textsuperscript{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.\textsuperscript{17} Rape was eventually prosecuted as a crime against humanity,\textsuperscript{18} a war crime,\textsuperscript{19} and

\begin{itemize}
\item \textsuperscript{10} See generally Michael R. Marrus, The Nuremberg War Crimes Trial 1945–46: A Documentary History (Katherine E. Kurzman et al. eds., 1997).
\item \textsuperscript{13} 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.
\item \textsuperscript{15} 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.
\item \textsuperscript{16} 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.
\item \textsuperscript{18} Prosecutor v. Kunarac, Case No. IT-96-23 & 23/1, Trial Chamber Judgment \textsuperscript{¶} 28 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
\item \textsuperscript{19} Prosecutor v. Kunarac, Case No. IT-96-23 & 23/1A, Appeals Chamber Judgment, \textsuperscript{¶} 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 \textsuperscript{¶} 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).
\item \textsuperscript{20} Prosecutor v. Kvočka, Case No. IT-98-30/1A, Appeals Chamber Judgment, \textsuperscript{¶} 395 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Kunarac, Case No. IT-96-23 & 23/1A \textsuperscript{¶} 127–29 (2002).
a form of torture. It also was prosecuted as an underlying crime of genocide by the ICTY’s sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), created to sit in Arusha, Tanzania, and try top perpetrators of the 1994 Rwandan genocide.

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, as well as other, decisions. 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.

Ultimately, of the 161 indicted, the Tribunal achieved a 100% success rate on arrests, with no fugitives at large. 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. 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.

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22. S.C. Res 955 (Nov. 8, 1994) (resolution created the ICTR).
26. See ICTY Infographic, supra note 10.
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


Nonetheless, there are some less successful moments at the ICTY. When Slobodan Milošević died mid-way through his trial, the Prosecutor was roundly criticized for trying him on too many counts—three separate indictments with a total of sixty-six counts, covering crimes in Croatia, Bosnia, and Kosovo. 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, 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.” Both acquittals seem less than well-reasoned, as does the recent acquittal in the Šešelj case. These I would suggest, are the jurisprudential low-points. Subsequent Appellate Chambers have since rejected the Perišić aiding and abetting standard, 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

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34. Moore & Williams, supra note 15.  
Yugoslavia. The program was created late, only in 1999, as the need for outreach was not originally envisioned when the Tribunal was created. Unfortunately, it has never been seen as particularly central to the Tribunal’s work, remaining over the years outside the Tribunal’s ordinary budget. But most of all, it has faced particular challenges given, first, Republika Srpska and Serbian denial of crimes, and then later, partial denial of crimes, which represents the current state of affairs. 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. 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 acknowledge the crimes as genocide.

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. A

43. Id.
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. Such prosecutions have been left to courts in the region.

Thus, for example in Bosnia, there is a three-tiered approach to justice. In addition, to the ICTY, there is the hybrid War Crimes Chamber, 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,” 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. Thus, it started as an internationalized institution and continues as a local war crimes—and organized crime—chamber. 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. The War Crimes Chamber, by contrast, is designed to continue

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51. Id.
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.
prosecuting war crimes cases long after the international staff has left.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{63} Observer reports suggest that local war crimes prosecutions vary significantly in quality.\textsuperscript{64} The author has


\textsuperscript{59} Justice in Motion, supra note 57, at 10.


\textsuperscript{62} National Strategy, supra note 61. This time-table is not being met.

\textsuperscript{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’”).

\textsuperscript{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 police\(^{71}\) 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.

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


\(^{67}\) 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. A similar three-tiered approach has also existed for crimes perpetrated during the Rwandan genocide. 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. 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...

[It] 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.


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

At present, the International Criminal Court (ICC) 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, and Russia and China have vetoed U.N. Security Council referral of the situation to the ICC. As a result, currently, the Court only has limited jurisdiction, over foreign fighters in Syria who hail from Rome Statute States Parties. But even if full ICC jurisdiction existed, the ICC usually prosecutes only a handful of persons in any one situation—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

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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.
capacity\textsuperscript{84} 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.

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