

## **The Accomplishments of the Hague Tribunal**

*By Elizabeth Pond*

Chief Prosecutor Carla del Ponte may be frustrated at her failure to secure conviction of Serb strongman Slobodan Milosevic before he died—or to haul fugitives Radovan Karadzic and Ratko Mladic before the ad hoc International Criminal Tribunal for the Former Yugoslavia. But as the ICTY winds down its mandate and concludes its first-instance trials by 2008, it has proved its worth.

The mere fact of indictments—including the unprecedented charges against Milosevic when he was an incumbent head of state—helped to expel some of the worst thugs from Balkan politics. Verdicts of perpetrators have accorded at least symbolic justice to victims and pinned responsibility for torture and murder in the barbarous 1990s' wars of Yugoslav succession on individuals, not collective nations. The tribunal's concurrent jurisdiction (and superior jurisdiction in the case of Macedonia and Bosnia) has let passions cool somewhat and given local courts a breathing space of five or ten years before having to sort out legal rights and wrongs in the wake of the worst atrocities in Europe since World War II. The Hague tribunal's establishment of legal truth, even if it can never determine historical truth, makes it that much harder for apologists to deny the Srebrenica massacre of close to 8000 unarmed Bosniak boys and men in 1995, the concentration camps, and the brutal "ethnic cleansing." And not least, by its example, the ICTY has also tutored local prosecutors and judges in their grisly task of holding perpetrators to account. Since 2005 it has finally been entrusting Serbian, Croatian, and Bosnian courts with trying their own nationals for war crimes.

Thus, the tribunal's in-house expert on the Yugoslav and Serb military, James Gow, attributes Milosevic's abrupt surrender in Kosovo in May 1999 to the ICTY's public indictment of the Serbian leader the previous day for crimes against humanity. A year later voters rejected him in the 2000 presidential election and, when he would not accept the outcome, enforced their electoral choice with mass demonstrations. Similarly, the tribunal's earlier indictment of Radovan Karadzic, the Bosnian Serb president during and after the Srebrenica bloodbath, paved the way for his subsequent exclusion from public life.

The court further put on record the salient facts of the Serbs' violent attempt to create a Greater Serbia out of large swathes of neighboring Croatia and Bosnia in the early 1990s, and these facts now form the foundation of local prosecutions of war criminals, even in Serbia. Remarkably, the War Crimes Chamber of the Belgrade District Court last fall convicted former Serb paramilitary Sasa Radak of having killed 192 Croat prisoners in the early 1990s. This February, Bosnia's hybrid local-international War Crimes Chamber indicted a Muslim wartime commander for crimes against non-Muslims. And the Zagreb District Court, in the first case to be referred to it by the international Hague tribunal, is about to try two Croat commanders who are accused of having persecuted and killed Serb civilians during the "Homeland War" of the early 1990s. Such Serb-on-Serb, Bosniak-on-Bosniak, and Croat-on-Croat trials would have been unthinkable even a mere five years ago, so strong was the legacy of nationalist hatred and revenge.

The ICTY's current prominence was far from preordained. The ad hoc tribunal was summoned into existence in 1993 as a placebo by an unenthusiastic international community that neither funded the court adequately nor expected it to amass much authority. Given the court's paltry \$276,000 annual budget, the first judges had to rent their robes from a theatrical agency. No chief prosecutor was appointed until 16 months after the birth of the tribunal. The court lacked military analysts, trauma counsellors, and even the simple software to search

databases. It had to send its own investigators into the Srebrenica area to exhume bones as evidence before the Serb paramilitaries could secretly rebury all the remains on Serbian soil or dump them into the Danube—and then had to shame NATO peacekeepers into protecting their forensic archaeology in villages where well-armed Serbs had replaced the murdered Bosniaks and did not take kindly to curious outsiders. The tribunal had no enforcement arm and no subpoena power. It could not itself apprehend the accused, and for its first few years the United States and other United Nations sponsors of the court barred their peacekeeping forces in Bosnia and parts of Croatia from making arrests for extradition to The Hague or even sharing documentary intelligence with the tribunal to help reconstruct crimes. Long after the horror of the Bosnian Serb massacre of Muslim civilians at Srebrenica Karadzic drove freely throughout Bosnia as NATO-led international peacekeepers looked the other way. The court did not take custody of its first prisoner until 1995; unsurprisingly, it could not issue its first verdict in a contested trial until 1997

### **The Balance Sheet**

The tribunal's biggest fish, Slobodan Milosevic, did, of course, escape judgment by dying in his cell in The Hague almost five years after his trial began, some 50 court-hours short of a judgment. Prosecutors at the permanent new International Criminal Court have learned the lesson and vowed not to repeat the mistake of trying to prove every possible crime of those charged as the ICTY did with its 5000 exhibits and 3500 witnesses in the trial of the Serbs' mastermind. And Radovan Karadzic is still at large, as is his military commander at Srebrenica, Ratko Mladic. Yet in other trials in the past decade the ICTY, in tandem with its sister Rwanda tribunal, has accomplished a great deal in jailing the first war criminals ever convicted under the 1948 Genocide Convention. The Hague tribunal ruled for the first time that systematic wartime rape constitutes a war crime in its own right. It has so far sentenced 47 men and one woman to prison for specific atrocities and/or command responsibility, and has acquitted five. Moreover, as it phases out its own first-instance trials by 2008 and appeals by 2010, it has referred 11 defendants to national courts for Serb-on-Serb, Croat-on-Croat, and Bosniak-on-Bosniak justice that would have been unthinkable even five years ago.

In terms of legal precedent, the Hague Tribunal "in one decade [was] able to create and maintain the appearance, as well as the reality, of justice. This is not an inconsiderable achievement for the first international criminal tribunal since Nuremberg," concluded ICTY judge (1999 to 2001) Patricia M. Wald in an article in the *Journal of International Criminal Justice* in 2004. Its "premier accomplishment" could be described as "the development of a corpus juris of international humanitarian law, the fleshing out of what had been, up to that time, relatively bare-boned definitions of war crimes, providing for the first time a coherent concept of crimes against humanity, integrating universal elements of criminal law such as general and specific intent and defences of duress and mental disability into the law of war, and elucidating the criteria for customary international law and its sources." The Tribunal "applied Geneva Convention principles to ethnic cleansing, built on Nuremberg concepts of criminal enterprise and command responsibility to...hold leaders legitimately responsible for the actions of their subordinates."

Concretely, as the official court website puts it, the tribunal "expanded upon the legal elements of the crime of grave breaches of the Geneva Conventions of 1949 by further defining the test of overall control, identifying the existence of an international armed conflict, and also the extended and exact definition of protected persons under the Conventions"; "identified a general prohibition of torture in international law which cannot be derogated from by a treaty, internal law or otherwise"; "specified the definitions of

enslavement and persecution as parts of crimes against humanity, resulting in the first convictions after World War II for enslavement on the basis of a broadened definition"; "identified and applied the modern doctrine of criminal responsibility of superiors, so-called command responsibility, clarifying that a formal superior-subordinate relationship is not necessarily required for criminal responsibility"; "created an independent system of law, comprising of elements from adversarial and inquisitory criminal procedure traditions"; "developed and maintained an effective victims and witnesses programme"; and "established a unique legal aid system, and groomed a group of defence attorneys highly qualified to represent accused in war crimes proceedings."

Popular acceptance of court authority over men who once enjoyed adulation as nationalist heroes is attested to by the diminishing protests against their extradition and jailing. In Croatia the 100,000 to 150,000 demonstrators who erupted onto the streets when General Mirko Norac was arrested in 2001 all but ignored the arrest of the much more famous General Ante Gotovina a short four years later. In Serbia the evidence of Serb savagery that accumulated at The Hague prepared the ground even for significant numbers of deniers of the Srebrenica massacre to admit finally—when confronted two years ago with the Scorpions' own video of torture and murder of unarmed Bosniaks by this Serb special police unit—that Serbs had in fact executed thousands of Bosniak civilians. This, commented one Serb observer, caused "the first real moral consternation here since the end of the war." There was an initial wave of Serb solidarity with Milosevic and his early browbeating of prosecution witnesses at The Hague in 2001 and 2002, but popular interest waned as the trial dragged on and ordinary people tired of fighting the 14th-century war of Blackbird Field over and over. By the time Milosevic's coffin was put on display in front of parliament in early 2006, the million ecstatic, aggrieved Serbs who once cheered their new savior as he talked of war in Kosovo in 1989 had shrunk to only 60 to 80 thousand.

### **Peace and Reconciliation**

The more fundamental issue of whether special international courts promote or deter peace and reconciliation in post-conflict situations is of necessity more controversial. Successive ICTY prosecutors made the conscious decision to subordinate peace to justice, at least in the short term, in racing to indict the principals in the Bosnia and Kosovo wars before Western diplomats might be tempted to grant them immunity in return for peace settlements. In a later echo, Serb centrists complained that Chief Prosecutor Carla del Ponte's single-minded focus on justice led her to ignore political reality and sabotage moderate democrats by indicting four Serbian generals just before the Serbian presidential election in November 2003. And advocates of truth and reconciliation processes on the South African model—one official Serb attempt at this was aborted—often contend that this more informal and personal approach fosters reconciliation far better than do adversarial court trials, which tend to polarize communities and reinforce enmity.

On the contrary, Haris Silajdzic, Bosnia's foreign minister during the war, told journalist Tim Judah that in the longer term the Tribunal "helps a cathartic process in societies on all sides. The message is that there is responsibility. There is crime and punishment, so the message is that you cannot murder, kill, or dislocate people without punishment." Similarly, ICTY Judge Gabrielle Kirk McDonald argued in the *Journal of International Criminal Justice* in 2004 that the Tribunal "removed a 'criminal element' from the region—political and military leaders, the rank and file, and common criminals—thereby beginning to lay the foundation for a lasting peace and, ultimately, reconciliation." And mid-1990s' ICTY President Antonio Cassese contends on the tribunal's website that "Justice is an indispensable ingredient of the

process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand."

More unexpectedly, although most of those convicted by the ICTY remain unrepentant, a few of the convicted war criminals have themselves been moved to express remorse for their bestial conduct. Dragan Obrenovic, a Bosnian Serb sentenced to 17 years in jail for crimes against humanity in Srebrenica, told the Tribunal: "In Bosnia, a neighbor means more than a relative. In Bosnia, having coffee with your neighbor is a ritual, and this is what we trampled on and forgot. We lost ourselves in hatred and brutality. And in this vortex of terrible misfortune and horror, the horror of Srebrenica happened. . . .I will be happy if my testimony helps the families of the victims, if I can spare them having to testify again and relive the horrors and the pain during their testimony. It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world."

To be sure, a judicial process can never replace a political process in healing the scars of torture and war. But in the Balkans, after a decade of experience, it can be said the Hague Tribunal has helped shape discourse in a way that ultimately promotes political healing.

**Elizabeth Pond is a CTR Fellow and the author of *Endgame in the Balkans: Regime Change, European Style* (Brookings, 2006)**