

International JUSTICE TRIBUNE

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REPORT

International Criminal Tribunal for the former Yugoslavia (ICTY)

by *Radosa Mulitunovic, The Hague*

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Mladic: just another “false start”

The trial of former Bosnian Serb Army commander Ratko Mladic started before the International Criminal Tribunal for the former Yugoslavia (ICTY) last Wednesday – but not really. Immediately after the Prosecution’s two-day opening statement, presentation of the evidence was “suspended sine die”, as presiding judge Alphons Orie put it, or - indefinitely.

Caused by the prosecution’s failure to disclose its voluminous evidence to the defence on time, the early delay of Mladic’s trial was as preventable as it was foreseeable. Judges were certainly put on notice by defence counsel Branko Lukic as early as last autumn. Ever since, Lukic has been consistently complaining of late and incomplete disclosure, requesting an additional three to six months to receive all materials and fully prepare for the trial. All along, prosecutors maintained, with some caveats, that the defence request had no merit.

Judge Orie’s chamber seemingly opted to go with the flow and hope for the best, when it decided to start the trial on May 16 and to hear the first witness on May 29. By the time the prosecution sheepishly conceded its failure to disclose thousands of documents on May 14, it was already too late. Judges were left to assess the damage, give the defence additional time and reschedule the start of the evidence as soon as possible. What was eagerly expected as the Tribunal’s finest hour ended up in the headlines as a “fiasco” and “confusion”. ICTY insiders see all this as just another procedural glitch - more embarrassing, though, because of intense public scrutiny.

Suggestions about the court’s inefficiency and ineptitude have almost overshadowed the prosecution’s overview of evidence of Mladic’s alleged crucial role in the genocide at

Srebrenica, the shelling of Sarajevo, an ethnic cleansing campaign throughout Bosnia and the taking of UN soldiers as hostages, from 1992-95.

The evidence against Mladic, amassed through years of investigation and courtroom litigation, is “overwhelming and unassailable,” prosecutor Peter McCloskey said. Mladic was the chief implementer of Radovan Karadzic’s overarching criminal plan to forcibly create a new Serbian state by persecuting Muslims and Croats, claimed prosecutor Dermot Groome. For 44 months, Sarajevo was “in the palm of Mladic’s hand,” said Groome. Quoting Mladic’s recorded ultimatum to Muslims after the fall of Srebrenica (“You can either survive or disappear”), McCloskey said Mladic was “obsessed with the destruction of Muslims”. What happened at Srebrenica in 1995 “is genocide and always will be genocide,” he added.

Not the first time

For seasoned court observers, the “false start” to the Mladic trial indicates pressure from the UN Security Council. The court is in a hurry to finish most of its trials (eight in the first instance, with one more to start and six appeals) before the Residual Mechanism takes over in July 2013. At the same time, a shrinking staff, limited resources and smaller budget, combined with its congenital bureaucratic nature, have made the ICTY prone to succumb to pressure to “start the trial now and solve problems as we go.”

It’s not the first time such an approach has backfired. Karadzic’s genocide trial started in October 2009, only to be swiftly adjourned for six months. Proceedings have been interrupted four times since, once for two months because of belated evidence disclosure. For different reasons, the trials of Vojislav Seselj and Jovica Stanisic had to be re-started after successful defence appeals against judges’ decisions to start proceedings in 2006 and 2008 respectively.

ICC second case ends in the shadows of Lubanga’s trial

As the International Criminal Court (ICC) wraps up its second trial today, there are echoes of the prosecution of Thomas Lubanga, the first suspect to be convicted by the court in March. He was found guilty of using child soldiers in Eastern Congo. His former foes in war-torn Ituri, Germain Katanga and Mathieu Ngudjolo, were arrested four years ago on a more serious charge: having led an attack that killed 200 civilians in the city of Bogoro on 24 February 2003.

But there again, the investigation was not seriously conducted, Katanga’s defence counsel David Hooper said in his conclusions on Monday. “This is one of the very rare cases, indeed unique, where the judges dared to go to the crime scene before the prosecution,” he said, praising the chamber for its on-site visit in January. After a trial that lasted more than two years, Hooper pointed to “a system that already led to a disaster for the prosecution” and in this trial, “founded a case on four core witnesses”.

In Ituri [read IJT Lubanga Special Edition #147] “the prosecution should not have delegated its investigative responsibilities to the intermediaries, notwithstanding the extensive security difficulties it faced,” reads Lubanga’s judgement, which notes three local “intermediaries” who may have “persuaded, encouraged or assisted witnesses to give false evidence”. The “icing on the cake” for Katanga’s defence, who spread the poison of doubt on the reliability of key witnesses. “The four pillars of the prosecution case are lying,” states Hooper.

The 24 prosecution witnesses provided “such detail that it is impossible for intermediaries to have any influence on them”, exclaimed prosecutor Eric MacDonald, stressing the video and documentary evidence that was “independent of any investigation by the office of the prosecutor”. “To conclude, all of the evidence taken together is logical,” MacDonald informed the judges.

In or out - still no sense of justice

A day before their appeals hearing, people were praying for Generals Ante Gotovina and Mladen Markac in the local church in Pakostani, the town where Gotovina's family resides. The two contested their prison terms of 24 and 18 years respectively before the Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia (ICTY) on 14 May.

These people in church, just like most Croatians, believe the two Generals detained in The Hague are innocent and consider their sentences not only drastic, but unjust. If a referendum were to be held today in Croatia to decide whether Gotovina and Markac were heroes or criminals, one could safely predict that the percentage of the population that believes they were responsible for war crimes during "Operation Storm" would be a single digit.

If you would ask Croats why they believe Gotovina and Markac are heroes, given that an impartial tribunal convicted them of war crimes and there is sufficient evidence that these crimes had been committed, the answer would be, "They were just defending their country and their people. Is this a crime? And the ones who should be punished for war crimes are the ones who really committed them."

The Hague Tribunal seems to have failed in one of its most important functions when it comes to Gotovina and Markac. Their convictions did not generate a feeling among the Croatian public that justice had been done. On the contrary, they fuelled popular belief that the ICTY is deeply unjust.

Croatians reacted in a similar manner regarding the sentences against the Serb officers Mile Mrksic and Veselin Sljivancanin, sentenced to 20 and 10 years in prison respectively. They were found to be responsible for war crimes during the 1991 battle of Vukovar, when more than 200 civilians were killed. The only difference is that the Croatian public found the sentences against Gotovina and Markac draconian, but the sentences against the Serb officers undeservedly mild. Multiple crimes were committed following Operation Storm, directed by Gotovina, which marked the end of the self-proclaimed Croatian Serb Republic in 1995. The Croatian Helsinki Committee

for Human Rights gathered vast evidence showing that in August and September, during and after Operation Storm, more than 600 civilians were killed and more than 22,000 houses burnt in the newly-freed territory. At least 150,000 civilians, mostly Serbs fled the territory.

The murders of Serb civilians in the liberated territories continued for almost two months after. For example, in the village of Varivode on September 28, 1995, nine civilians were killed - the youngest was 60 and the oldest 85 years old. So far no one has been sentenced for this or many other similar crimes.

EU pressure on local trials

The Croatian tribunals have started only a few trials against individuals suspected of crimes during Operation Storm. These are not so much the result of true political will in Croatia that the culprits be punished, but rather the result of pressure by the international community that has been insisting on these trials. The Croatian judicial system had been placed under close surveillance until negotiations on joining the European Union were completed last year.

This provided the incentive behind several trials, such as the one over crimes in the village of Grubori where five people were killed. This crime had been systematically covered up for years, and only after pressure from the European Union did the prosecutor's office in Zagreb issue an indictment against three former members of the Croatian Army, found responsible for this crime.

In another trial against former politician and paramilitary Tomislav Mercep, who was indicted for war crimes unconnected with Operation Storm, the media mostly reported on witness testimonies that were favourable to him. These testimonies included those of the former President of Parliament, Prime Minister and the Minister of Internal Affairs. The testimonies of the families of victims, describing the horrors, tortures and murders were barely mentioned in the media.

"Unfortunately, neither the trials in The Hague nor the ones held in domestic courts produced helpful outcomes," says Vesna Terselic, head of the Zagreb-based NGO Dokumenta, which monitors the war crimes trials.

ICTY: Gotovina's attack on Knin was "legal" (defence)

by Radosa Milutinovic, The Hague

Croatian general Ante Gotovina and his lawyer performed a high-wire act before the ICTY's Appeals Chamber last Tuesday, in an effort to overturn Gotovina's sentence of 24 years in prison. He was convicted last year as commander of Operation Storm, for the persecution of Serbs in the self-proclaimed Republic of Krajina and its capital Knin in 1995.

The goal was achieved under orders from Gotovina, the judgement said, through "indiscriminate" shelling of Knin and three other towns in Krajina which constituted "illegal attacks" on civilians, forcing tens of thousands to flee. Those attacks were the "primary and direct" cause of the population's displacement, the judgement added. In his appeal last week, Gotovina focused entirely on this conclusion, branding it "erroneous", unsubstantiated and based on "arbitrary" assessment of the impact of 900 artillery shells fired at Knin. The attack on Knin was "legal" and "highly professional" with artillery aimed at legitimate military targets, not civilian ones, argued lawyer Gregory Kehoe. Not a single civilian death was reported as result of shelling, he added. Furthermore, the mass exodus of Serbs was ordered by their leaders and not caused by shelling. If the finding on illegality of the artillery attacks falls, the judgement as a whole must fall, he said.

But prosecutor Douglas Stringer argued that the attack on Knin was illegal because the town was targeted, under orders from Gotovina, to "put four towns under artillery fire." Shelling was also criminal because it was a tool to achieve the permanent removal of Serbs, the main goal of then President Franjo Tudjman's joint criminal enterprise, claimed the prosecution. It also relied heavily on the so-called "Brioni transcripts" of conversations between Tudjman and Gotovina, recorded two days before Operation Storm, while they were outlining a plan of attack. Stringer said Tudjman viewed Serbs as a "strategic threat to Croatia" and spoke of the necessity to move them towards the "exit". Gotovina pointed out that, once under pressure from his troops, only civilians unable to leave would stay behind. After the shelling of Knin and other towns at least 20,000 Serbs fled the area. Tudjman's government introduced discriminatory measures to prevent their return, the prosecution pointed out.

The smaller the fish, the bigger the rap

The lowest ranking officer of the Rwandan Armed Forces (Forces armées rwandaises, or FAR) ever convicted by the International Criminal Tribunal for Rwanda (ICTR) is Lieutenant Ildephonse Hategekimana. The former commander of a small military camp in southern Rwanda, he is also the only officer to receive the maximum sentence for his crimes.

In two separate rulings, the ICTR Appeals Chamber on May 9 upheld the Trial Chamber's sentence of life imprisonment for Hategekimana, while commuting that of Major Aloys Ntabakuze to 35 years. Both had previously been given maximum sentences. During the Tutsi genocide in 1994, Hategekimana headed the small military camp of Ngoma in Butare. Ntabakuze on the other hand, commanded the Para-Commando Battalion, a large elite unit within the vast military camp of Kanombe, near Kigali International Airport.

The Appeals Chamber dismissed all seven of Hategekimana's grounds for appeal and upheld his sentence of life imprisonment for genocide and crimes against humanity. In its verdict, the Chamber noted that the Lieutenant had ordered the selection, abduction and mass murder of Tutsis in a convent near the Ngoma camp on 30 April 1994. The judges concluded that he had authorised and encouraged rape as well. Ntabakuze got off with a much lighter sentence. The Appeals Chamber rejected two findings - that he was responsible as a superior for crimes committed by militia members, and for executions perpetrated by certain Para-Commandos on a hill in the Kabeza area near the airport. In the end, Hategekimana will pay much more dearly for his crimes than any of the high-ranking officers convicted by the ICTR so far - including Colonel Théoneste Bagosora, long dubbed "the brains" of the genocide by the Office of The Prosecutor (OTP).

Indeed, Ntabakuze's fate closely resembles Bagosora's. The former Director of the Cabinet in Rwanda's Ministry of Defence was also sentenced to life imprisonment by the Trial Chamber and

also saw his sentence commuted to 35 years by the Appeals Chamber.

No direct responsibility

In both cases, the Appeals Chamber ruled that the defendants' responsibility was minimal - they had merely failed to prevent or halt the crimes and had not disciplined the perpetrators. Lieutenant-Colonel Anatole Nsengiyumva, who commanded operations in the Gisenyi sector (northern Rwanda) and was tried alongside Bagosora, was released the day the Chamber handed down its decision (14 December 2011), sentencing him to 15 years' imprisonment - just a bit longer than the time he had spent in detention. "These cases differ from the Lieutenant's in that the superior officers had no direct responsibility. In Hategekimana's case, it was he who gave the orders," surmised a senior officer at the OTP.

Major General Augustin Nindiliyimana, who was chief of staff of the Gendarmerie nationale in April 1994, was released on 17 May 2011, following a conviction that is now under appeal (see article). The term of his sentence happened to be exactly the same as the length of time he had spent in detention. In the same decision, former army chief of staff Major General Augustin Bizimungu was sentenced to 30 years in prison. Major François-Xavier Nzuwonemeye, Commander of the Reconnaissance Battalion of the Rwandan Army, and his second-in-command, Innocent Sagahutu, each received 20-year sentences.

Kigali complains

In Kigali, these decisions are seen as an exoneration of former high-ranking military officers. On 18 January, the Rwandan group Ibuka and the British NGO Survivors' Fund filed a joint petition to testify before the Appeals Chamber. "The crimes committed by Major General Augustin Nindiliyimana, Major General Augustin Bizimungu, Major François-Xavier Nzuwonemeye and Captain Innocent Sagahutu shock the conscience. But the sentences the Trial Chamber imposed are grossly inadequate in redressing the horrors those military leaders unleashed against thousands of innocent victims," states the petition.

Charles Taylor says war crimes courts are tools of the West

Witnesses were threatened and paid to testify against him, former Liberian President Charles Taylor said at his sentencing hearing in The Hague last Wednesday. Judges are scheduled to sentence Taylor on May 30, after which both the prosecution and defence are likely to lodge appeals. Taylor was convicted of aiding and abetting 11 counts of murder, rape, conscripting child soldiers and sexual slavery during wars in Liberia and Sierra Leone. His defence has asked for a 64-year jail term, while the prosecution is demanding 80 years in prison. Prosecutor Brenda Hollis said an 80-year sentence would reflect the essential role Taylor played in crimes of such extreme scope and gravity. Taylor said the international court system was a tool of the West. He told the court that Washington had used his case to achieve regime change rather than justice. He said the US and other powers involved in military actions in Africa and the Middle East were using the Special Court for Sierra Leone to pursue colonial aims against smaller countries. "Regime change in Liberia became a policy of the US government," he said. "I never stood a chance."

ICC prosecutor asks for two new warrants on DRC

International Criminal Court (ICC) chief prosecutor Luis Moreno Ocampo asked for additional charges to be filed against DRC general Bosco Ntaganda, who is wanted for war crimes, on 14 May. Ocampo also requested an arrest warrant for Sylvestre Mudacumura, leader of the FDLR militia. "Both arrests would be instrumental to making peace in the Great Lakes area. The two men are leaders of the two groups fighting there so their arrest would have a huge impact," Ocampo said. The ICC has sought Ntaganda's arrest for six years on charges he conscripted children to fight in a bloody ethnic conflict in northeastern Congo that grew out of a broader civil war. Ntaganda denies involvement in war crimes. Ocampo said he would press additional charges of crimes against humanity of murder, persecution and rape or sexual slavery as well as war crimes, including attacks against civilians. DRC authorities said last month they intend to arrest Ntaganda and consider prosecuting him in Congo.

One year after the Arab Spring, IJT looks at the state of justice in four key countries touched by the revolution. After Morocco and ahead of the presidential election in Egypt, we turned to Bahrain and conclude our series with Tunisia, where the movement started.

Interview with Habib Nassar, director of the Middle East and North Africa program at the International Centre for Transitional Justice

by Franck Petit, Paris

4. "Dialogue is launched in Tunisia"

Six months after the first free elections held in Tunisia, does the government – led by the Islamic party Ennahda – have a comprehensive policy on transitional justice?

It's too early to speak about a clear comprehensive policy. However, what we have been witnessing since December are many indicators that there is serious political will to deal with the past. A Ministry for Human Rights and specifically, for Transitional Justice has been established. The National Constituent Assembly is expected to adopt a law on transitional justice by the end of the year.

A national conference was convened to launch a "national dialogue" to help draft the law last month. The "troika" – presidents of the Republic, the National Assembly and the Prime Minister – called for a comprehensive strategy. Once all the participants to this dialogue, aimed at civil society, victims and the population outside Tunis have been consulted, we may have a clearer idea of what the transitional justice policies to be adopted will look like.

Could this be a way to delay things?

Many Tunisians are frustrated about the length of the process. However this dialogue is progressing at a reasonable rate, compared to other aspects of transition. The national dialogue has to take place, the government has to understand expectations, the needs of the victims and civil society - and it cannot be sacrificed under the pretext of hastening or making the process move faster.

Trials have already started, notably against former president Ben Ali and other powerful individuals. Are they satisfactory?

Some trials have already started before civilian and military courts, but in some torture cases the sentences were deemed too low by many Tunisians. This is mainly due to the fact that Tunisian legislation needs to be revised. On the other hand, there is also a need for measures to restore trust in the ju-

diary – through the process of judicial vetting for example.

Are those who remain in power still protected?

The previous regime has collapsed. However, there are still complaints about security officers involved in past abuse who cannot be touched. A former Interior Minister had to resign last year after he was physically attacked by security officers in retaliation for measures adopted by the Interior Ministry to exclude former perpetrators. This is worrying, and this is going to be the hardest part of the transition.

Many measures were put in place right after the revolution, even if in an erratic manner. Can they be useful to a possible truth commission?

Two commissions of inquiry were established last year, one on corruption, which published a report in November, and the other one on the violations that took place during the revolution, which published its report a few weeks ago. They did very important work that should really be taken into account and incorporated in the work of any future mechanism to be established such as a truth commission.

How do Tunisians see that?

We did hear some complaints in Tunisia that there has been a lack of communication and outreach on what is being done in the area of transitional justice. There was not enough explanation for example of criminal procedures and trial - that suspects have rights that should be respected, that it takes time, etc...

This is partly the reason why there is frustration among the public. Now that a dialogue has been launched, it is an important opportunity to communicate and inform the public about transitional justice especially outside Tunis in the inland areas.

Can transitional justice bring political gains?

No one has told Tunisians they need it. The demand came from civil

society and the political parties. Even if they can take political advantage of it, this is not necessarily problematic. Of course, transitional justice should not be a pretext to delay other aspects of transition. It should be done in harmony with all aspects such as constitutional drafting or economic and social policies.

Is Tunisia a model for its neighbours?

It's certainly inspiring for others in the region, as much as the revolution was inspiring. Despite all the problems and challenges facing the transitional process, a dialogue has been launched. This is very important. None of the transitioning countries in the region have initiated such a dialogue yet.

Transitions are very messy, fragile periods during which you have to restore trust between the institutions and so on. In Egypt for example, there is a mixture of a lack of political will and of political tensions that has delayed transitional justice.. You can see Moroccans talking to their counterparts in Tunisia and Egypt.

The Moroccan experience has had an impact in the region despite the fact that the Moroccan context is very different from the current transitions in the region. I am sure Tunisia itself will have an important impact in the area of transitional justice on other societies in the regions.

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