

*“I was not interested in going after the little soldier who commits the individual crime. I was after building a case against the leaders who make the decisions. So I was going to establish that there was ethnic cleansing as a policy, that there was systematic rape as a policy, that there was destruction of cultural property as a policy, that the destruction of Sarajevo was a systematic process. What I didn't realize was that this was precisely what the British, and to some extent the French and Russians, did not want.”*

Professor Mahmoud Cherif Bassiouni in an interview with the Chicago Reader in 1999. In 1993/1994, Bassiouni was in charge of the Commission of Experts on the investigation of human rights crimes in the former Yugoslavia – and he was a member of the Preparatory Committee for the International Criminal Court in 1995.

### **Following the closure of the War Crimes Tribunal in The Hague, the judiciary in Bosnia and Herzegovina needs to be reformed**

On November 22, the judges of the International Criminal Tribunal for the former Yugoslavia (hereinafter “the Tribunal”) in The Hague passed the sentence against Ratko Mladić, the former General of the Yugoslav People’s Army. Seven days later, the tribunal will only have to pass a second-instance verdict against a group of Bosnian Croat leaders, including the former head of government of the then self-proclaimed state of Hrvatska Republika Herzeg-Bosna, Jadranko Prlić. In 2013, he had been sentenced to 15 years in prison.

The Tribunal closes at the end of 2017, after almost 24 years. What significance does its work have for the many victims of the genocide crimes that took place in Europe in the 20th century – and what did it contribute to the process of reconciliation? More importantly, how will the perpetrators be prosecuted in the countries of the former Yugoslavia in future? Not all perpetrators have been convicted yet, and impunity remains a serious problem, as it obstructs the process of reconciliation and of coming to terms with past in Bosnia and Herzegovina.

Since 1993, the Tribunal issued charges against 161 people. Of these, 83 were convicted and 19 acquitted. 20 charges were withdrawn, and 17 defendants died during or before the trial. Proceedings against 13 alleged perpetrators were handed over to the national courts of the respective countries. Two defendants are awaiting retrial. Seven people, including Mladić and Prlić, will receive their verdict later this year.

In 2003, the so-called “Completion Strategy” came into force. Its purpose is to ensure that the Tribunal will manage to complete its tasks on time. Proceedings against mid- and lower-ranked individuals are to be continued in the countries of the former Yugoslavia. In July 2012, the International Mechanism for Criminal Tribunals (MICT) was put into force based on a resolution of the UN Security Council. The MICT is an international tribunal that will continue the activities of the Tribunal after its closure. It has the same powers, rights, and obligations as the Tribunal, but can only prosecute and convict persons who have already been charged before the Tribunal. It will also be responsible for second-instance cases against Radovan Karadžić, Vojislav Šešelj, and Ratko Mladić (provided that he will object to the verdict, which is considered likely). New cases are forwarded to the national courts.

### **Proceedings against war criminals in Bosnia and Herzegovina are inefficient**

The fact that Bosnia and Herzegovina (BiH) is divided into two entities with considerable powers (the federation of Bosnia and Herzegovina and the Republika Srpska) also affects the judiciary. For example, there are 17 separate courts throughout Bosnia and Herzegovina that are responsible for

the prosecution and conviction of war criminals (the Court of Bosnia and Herzegovina, the ten cantonal courts in the Federation of Bosnia and Herzegovina, the five district courts in the Republika Srpska, and the Basic Court of Brčko district). It is not always clear which of the courts is responsible for which case, especially since there is no clear hierarchy between the courts at state and sub-state level.

So far, more than 600 people have been charged with war crimes before the Court of Bosnia and Herzegovina. In total, 111 Serbs, 32 Bosniaks, and 22 Croats were convicted. To date, 478 individuals have been indicted by the courts in the two entities, about 55 percent of them Serbs. Many of these defendants, despite clear evidence, were released – or sentenced to the lowest possible, more symbolic sentences. For example, it was a scandal that (in the spring of 2017) the Constitutional Court of Bosnia and Herzegovina subsequently reduced the prison sentences of the convicted perpetrators Jevic and Djuric by ten years, because their lawyers had demanded that the criminal code of former Yugoslavia should be applied in their cases. The two perpetrators were found guilty of genocide crimes in Srebrenica. However, as there was no specific reference to genocide crimes in the penal code of former Yugoslavia, the maximum sentence was 20 years in prison. Hundreds of perpetrators had participated in the genocide crimes of Srebrenica. So far, however, only 38 people have been convicted by local courts, and many of them received very low sentences and were meanwhile released again.

In 2016, the Organization for Security and Co-operation in Europe (OSCE) stated that cooperation and coordination between judges and prosecutors in Bosnia and Herzegovina is very poor. The judges argued that the prosecutors were trying to be involved in as many cases as possible, thus preferring less significant and less complex cases. As a result, almost all the lower-ranking perpetrators were tried and convicted, while the leaders went unpunished. In addition, there are no constructive initiatives to improve the effectiveness of the courts or to limit the duration of the proceedings. Instead, the judges and prosecutors often haggle over responsibility.

Overall, strategic planning within the Court of Bosnia and Herzegovina is quite poor – and there isn't much cooperation with other courts across the country. This is also one of the reasons for the very low success rate of trials against alleged war criminals. Although, according to a strategy adopted by the BiH Council of Ministers in 2008, all known offenders are supposed to be prosecuted by 2018, this is far from being achieved. None of the country's courts has enough prosecutors, investigators, or employees (i.e. lawyers, translators, or administrative assistants) – and most of the prosecutors and investigators are completely inexperienced regarding war crimes. They would have to be trained and/or accompanied by experienced mentors to be able to lead proper cases against the perpetrators. Thus, it can happen that perpetrators have to be released because the indictment was not worded precisely enough.

Because of the lack of judicial cooperation, lack of staff, and lack of experience in trials against war criminals, it is taking much too long to prosecute and sentence everyone who is responsible for the war crimes. In the meantime, some of the potential witnesses have left the country or passed away, and important information gets lost.

### **Republika Srpska blocks proceedings**

To make matters worse, the courts in the Republika Srpska are still refusing to take care of crimes against the non-Serb population. The courts in Banja Luka, Bijeljina, Trebinje, and East Sarajevo have only prosecuted a few Serb perpetrators. In addition, the Republika Srpska does not recognize the jurisdiction of the state courts. The population of the Republika Srpska doesn't consider rulings by these courts legitimate, which obstructs the process of coming to terms with the war.

It is high time for the international community to implement a reform of the judiciary. This would have to include background checks on judges and prosecutors. Especially in the Republika Srpska, there are still many of them who either committed war crimes themselves or who deliberately kept others from being punished. Today, they should not be in the position to cover up the crimes any more. The Republika Srpska must not serve as a refuge for a majority of the war criminals.

### **The heritage of the Tribunal**

After 24 years, the Tribunal leaves a great historical legacy. The proceedings resulted in an archive of over 400,000 documents, including testimonies, expert opinions, and other important documents. This archive will be stored in the city hall of Sarajevo. Thus, courts in the region, lawyers, historians, and other scientists will always be able to refer to the documentation of the ICTY. This large number of documents, the evidence and testimonies that could be obtained in the course of the proceedings, may be the greatest success of the Tribunal. Many of the crimes are very well documented, so they can no longer be denied. It is thanks to the good documentation of the events that the crimes committed in Srebrenica are now internationally recognized as genocide crimes.

### **There are different assessments of the efficiency of the Tribunal's work.**

Very often, the surviving victims are deeply disappointed with the mild sentences or even the release of defendants. For them, it was especially painful that Vojislav Šešelj, the nationalist politician and founder of several irregular troops, and Momcilo Perišić, chief of the General Staff of the Army of Serbia, were released. In addition, many of the victims felt that the prosecutors and judges had “negotiated” (dishonest) confessions with several defendants, resulting in lower sentences – and there is deep disappointment regarding the fact that the judges can't do much to keep defendants from insulting or intimidating witnesses and surviving victims in court. Moreover, the Tribunal did not manage to bring about the establishment of a sufficient witness protection program on the national level. It is not uncommon that surviving victims are dissatisfied with the Tribunal's achievements regarding peace, justice, and reconciliation. In addition, many of the surviving victims are accusing the ICTY of not having initiated any new proceedings against alleged perpetrators for years. Instead, the cases are often remanded back to the courts in Bosnia and Herzegovina. For example, the Tribunal returned a total number of 5,900 war crimes trials since 2005, stating that subordinate courts should be responsible for the investigations and possible indictments.

Regardless of the victims' allegations, some critics of the Tribunal claim that – while the Tribunal was initially supposed to convict war criminals and to create justice and peace in the region – it failed to make use of its competences. Further, it is criticized for being too hesitant and for preferring pragmatic and “politically straightforward” solutions, especially when it comes to sentences against people who are accused of genocide crimes. Also, the Tribunal is said to have made too many compromises to obtain documents and evidence from the Serbian authorities (for example, minutes of the Supreme Defense Council proving that Serbia was involved in the aggression against Bosnia and Herzegovina). According to the critics, no compromises should be made in connection with the prosecution and conviction of perpetrators who systematically violated human rights or who committed serious crimes against the civilian population, such as genocide crimes. Otherwise, the perpetrators would not be sufficiently punished – and this would not be just in the eyes of the victims.

Despite all criticism, however, it must be remembered that without the Criminal Court in The Hague, there would have been no justice for the victims of war crimes, and many of the perpetrators might not have been held accountable at all. Without the Tribunal, it would not have been possible to

further develop international humanitarian law. Thus, the Tribunal served to promote international criminal law and to emphasize the important of the basic human rights.

The Tribunal had to deal with great pressure – also from the great powers. But despite the fact that several states had tried to subvert its work, several perpetrators were held accountable. Also, the influence of the Tribunal on the work of the courts in Bosnia and Herzegovina should not be underestimated.

However, not enough justice has been done. The process of coming to terms with the past must be continued, even if the Tribunal closes at the end of 2017. For example, no one has yet been held accountable for burning down the Bosnian National Library in Sarajevo in August 1992.

To ensure that perpetrators will not go unpunished in Bosnia and Herzegovina, it is necessary to reform the country's judiciary. In its present form, the national and regional courts are unable to successfully prosecute and convict all of the war criminals. The EU and the international community must make their contribution!

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Sources:

Official website of the International Criminal Tribunal for the former Yugoslavia in the Hague (ICTY), <http://www.icty.org/>

OSCE Report "Delivering Justice in Bosnia and Herzegovina: An Overview of Warcrime Processing from 2005 to 2010", OSCE Mission to Bosnia and Herzegovina (2011), <http://www.osce.org/bih/108103?download=true>

Progress report of the Prosecutor of the International Resident Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2016 to 15 May 2017, Annex II, S, 24-39.

<http://www.unmict.org/sites/default/files/documents/170517-progress-report-en.pdf>