



8. The Arrest of Ratko Mladic and Its Impact on International Justice



At the memorial site for the victims of the 1995 genocide in Srebrenica, United Nations Secretary-General Ban Ki-moon (second from right) gives a joint press conference with Bakir Izetbegovic (right), Chairman of the Presidency of Bosnia and Herzegovina.

Photo Credit: UN Photo/Eskinder Debebe



UN Photo / Mark Garten

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Mr. Méndez has dedicated his legal career to the defence of human rights and has a long and distinguished record of advocacy throughout the Americas. As a result of his involvement in representing political prisoners, the Argentinean military dictatorship arrested him and subjected him to torture and administrative detention for more than a year. During this time, Amnesty International adopted him as a "Prisoner of Conscience". After his expulsion from his country in 1977, Mr. Méndez moved to the United States, where he continued his work in the field of human rights.

The Arrest of Ratko Mladic and Its Impact on International Justice and Prevention of Genocide and Other International Crimes

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I. Introduction¹

After nearly 16 years at large, former Bosnian Serb General Ratko Mladic was arrested by Serbia in May 2011 and extradited to The Hague where he faces trial for war crimes, crimes against humanity and genocide. The offenses for which he is accused arise from the worst events of the 1992-1995 Bosnian conflict, including the massacre at Srebrenica, the siege of Sarajevo and ethnic cleansing campaigns elsewhere in the country.

Mladic's arrest and extradition is the end of a long road of impunity. He was first indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) while the conflict was still ongoing; in grim fact, Srebrenica occurred just two days after the ICTY confirmed charges against Mladic and Bosnian Serb President Radovan

¹ The author gratefully acknowledges the invaluable assistance of Megan Chapman, JD 2011, and Andrew Maki, JD candidate 2012, both of the Washington College of Law.

Karadzic. Mladic continued to operate in Bosnian territory for two years after the Dayton Accords brought peace, before escaping in 1997 to sanctuary in Serbia and Montenegro. For most of the years since, it is generally believed that Mladic lived openly in Serbia, for example continuing to receive a military pension until about 2000. Only with more recent changes in the Serbian domestic political climate that evidence waning nationalism and a desire for Serbia to accede to the European Union (EU), was the threat of arrest in Serbia real enough to force Mladic into hiding.

The international community has over recent years kept a commendable level of sustained pressure on Serbia to surrender Mladic, most notably making the execution of outstanding ICTY warrants a precondition to EU accession. Particularly important has been the leading role of The Netherlands, which in 2008 blocked the ratification of Serbia's Stabilisation and Association Agreement, which was supported by a majority of EU member states, before this condition was met.

Mladic's arrest and extradition have been hailed, quite rightly, as a victory for international justice. His prosecution will hopefully offer one form of recompense to the victims of the crimes he allegedly committed during the Bosnian war and, if conducted in such a way as to give appropriate domestic effect in Serbia and Bosnia, may be part of bringing further closure to a tragic chapter in history.

Moreover, Mladic's arrest comes along side signs of genuine change in the region. While there were public demonstrations following Mladic's arrest and support for him among Bosnian Serbs, these were smaller and less mainstream than other recent manifestations of Serbian nationalism. Responding to statements from ICTY Prosecutor Serge Brammertz following Mladic's arrest, Serbia publicly agreed to investigate and hold accountable those who shielded Mladic from arrest. It also acted on a second demand within just two months, arresting Goran Hadzic, a Croatian Serb political leader who was the subject of the final outstanding ICTY warrant.

In the midst of these positives, I write the present article in order to look at the significance of the Mladic arrest through a different lens: what it means and does not mean for the goal of preventing the future commission of international crimes. In my capacity as the Special Advisor to the Prosecutor of the International Criminal Court (ICC) on the Prevention of International Crimes until November 2010, I worked to advance the elements of the international criminal justice framework that operate to prevent atrocities rather than reacting after they have already occurred. Within the theory of prevention that I outline and explore below, the arrest of Mladic, together with that of Karadzic and Hadzic, offer a lesson about the importance of sustained international pressure to enforce the warrants issued by international criminal tribunals such as the ICTY and the ICC.

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Yet, we should not be under any illusion that these are perfect examples for either general international deterrence or for prevention of a return to violence in the former Yugoslavia. With continued international encouragement, Serbia can take further steps to demonstrate that it is now genuinely committed to justice for justice's sake and that this is part of a broader process aimed at bringing about public truth and societal reconciliation. Moreover, in its prosecutorial and outreach strategies, the ICTY may play a part in facilitating this process, allowing it to reconnect to its original mandate and leave a stronger legacy on prevention.

II. The Theory of Prevention in International Criminal Justice

The ultimate goal of the international criminal justice framework that has taken shape over recent decades should be the prevention of the worst atrocities before they occur. There are three aspects of this framework that are particularly essential to prevention through deterrence: prosecutions; state cooperation; and affirmative preventive action.

The prosecution of individuals most responsible for genocide and other international crimes is the linchpin of deterrence when it demonstrates that perpetrators, no matter their military rank or political position, will be held accountable for their actions and inactions that violate international law.² By contrast, the deterrent effect is undermined when perpetrators enjoy impunity, evading attempts

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to arrest and prosecute them at either the national or international level. However, not just any prosecution will suffice. For prosecutions to effectively prevent future international crimes, certain conditions must be met that illustrate that their genuine purpose is justice itself: they must not be politicised, due process and the rights of the accused must be strictly adhered to and they must be pursued with the same steadfast resolve and consistency no matter where in the world the

crimes occurred or the perpetrator is from. Moreover, for international prosecutions to be effective in preventing cycles of violence and revenge in the locality where crimes occurred or from which perpetrators originate, they should be paired with transitional justice mechanisms, including domestic prosecutions, truth telling, reparations for victims, reconciliation, restitution, or other forms of accountability that will have local significance.

State cooperation is the mechanism through which the swift prosecution of international crime should be made possible. The ICC framework outlined in the Rome Statute, which has been ratified by 116 States Parties to date, envisions overlapping spheres of national and international jurisdictional responsibility in which states are the key actors in investigating, executing arrest warrants, and prosecuting international crimes, as well as assisting other states and the ICC when either undertake these activities. The clear intent is to create an international network of state obligations that guarantee the

² Juan E Méndez, *The Importance of Justice in Securing Peace*, RC/ST/PJ/INF.3.

prosecution of international crime and a supranational institution that will step in when prosecution at the domestic level fails. Such intent becomes more of a reality with increasing numbers of States Parties, national implementing legislation, and the strengthening of domestic capacity through positive complementarity.

Finally, the international community has an arsenal of tools, from diplomacy to the deployment of peacekeeping forces, that it may use to prevent the commission of international crimes where conditions indicate they are likely to occur. What the international criminal justice framework adds to this is public monitoring of conflicts by the Office of the Prosecutor (OTP) of the ICC carrying the implicit threat of future prosecution that makes the deterrent effect more immediate. For example, as I noted in my paper for the ICC Review Conference in Kampala in 2010³, as soon as violence erupted in Georgia in August 2008, the OTP issued public statements affirming its jurisdiction over any crimes committed that rose to international level. Subsequently, both parties to the conflict turned to legal means to find resolution, invited a visit by the OTP and pledged their cooperation with the ICC. Similar public monitoring and assertions of jurisdiction over alleged crimes proved effective in Kenya in January 2008 and Guinea in October 2009. More recent examples include OTP preventive engagement in Cote d'Ivoire and Libya.

III. The Legacy of the ICTY on Prevention

Perhaps more than any other ad hoc international tribunal established to date, the ICTY had prevention at the core of its original mandate, making it in this way as in so many others the pioneering ancestor for the current international criminal justice framework. The Security Council established the ICTY in the midst of the conflict in Bosnia by Security Council Resolution 827 in order to “contribute to the restoration and maintenance of peace”. In 2003, the ICTY Trial Chamber in the case of Momir Nikolic asserted that the ICTY is “intended to send the message to all persons that any violations of international

³ Juan E Méndez, *The Importance of Justice in Securing Peace*, RC/ST/PJ/INF.3.

humanitarian law — and particularly the practice of “ethnic cleansing” — would not be tolerated and must stop”.

The failure of state cooperation in full support of the ICTY’s preventive mandate during its early years of operation may well have contributed to the continuation of the Bosnian conflict for nearly two and a half years after the tribunal’s establishment. Tragically, it was

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only a few days after the ICTY Trial Chamber publicly confirmed the charges against Karadzic and Mladic that over 8,000 Muslim men and boys were slaughtered in Srebrenica, the worst massacre of the war and one masterminded by these same two men. Even after Srebrenica, the international forces in Bosnia after the Dayton Accords failed to execute ICTY warrants against key Bosnian Serb leaders such as Mladic, eventually allowing him to escape to sanctuary in Serbia. Some attribute this demonstration of the international community’s lukewarm attitude toward ICTY prosecutions as one factor that permitted the new outbreak of persecution of ethnic Albanians

and retaliation against ethnic Serbs in Kosovo in 1999.⁴ In this climate, the ongoing investigations and trials at the ICTY on their own seemed to have had little preventive effect, at least initially in Serbia. Rather they illustrated that their deterrent effect depends on the real support and resources they marshal.

On the other hand, the ICTY arrest warrants against Karadzic and Mladic are an example of justice aiding the cause of peace

⁴ See insider analysis by former United States Ambassador David Scheffer on post-Dayton perspective, expressing regret that the hesitation of United States-led IFOR allowed Mladic and Karadzic to escape from Bosnia, where they could have been easily arrested, to Serbia under Milosevic and successors’ protection “leaving a dark cloud over the Balkans”. See David Scheffer, “The Least Wanted Most Wanted Man”, *Foreign Policy*, 2 June 2011. Available at http://www.foreignpolicy.com/articles/2011/06/02_the_least_wanted_most_wanted_man?page=0,1.

instead of being an obstacle to it. In the days before the peace conference in Dayton several international actors wanted the ICTY to withdraw the warrants so that Karadzic and Mladic could attend and participate. Prosecutor Richard Goldstone and ICTY President Antonio Cassese resolutely refused to do that and defended their judicial and prosecutorial independence. In the end, the conference took place without Karadzic and Mladic and it did succeed in bringing the conflict over Bosnia to an end. The object lesson is that sometimes the true spoilers of a peace accord have to be removed from the negotiating table, and that removing them on the basis of an objective standard like a judicial indictment provides the whole peace process with credibility and likelihood of success.

IV. One Lesson from Mladic: The Importance of Continued International Pressure for Execution of Outstanding Arrest Warrants

Mladic's eventual arrest — like that of Karadzic before and Hadzic shortly after — demonstrates the important role that continuous international pressure can have in bringing about the execution of arrest warrants even by states that may be hesitant or unwilling to do so. This is an important lesson for the international community, as it has not always acted with such resolve in supporting the ICTY in the former Yugoslavia and does not always do so in support of the ICC elsewhere. As I have asserted before, “Firmness from State Parties and international organisations and from the [International Criminal] Court itself will determine [the Court's] long-term success.”⁵

In 1995 after the Dayton Accords, the multinational Implementation Force (IFOR) troops kept a tentative peace on the ground in Bosnia while both Mladic and Karadzic continued to operate in the territory. According to some involved in United States foreign policy at the time, the hesitation of United States and other IFOR forces to execute the Mladic and Karadzic warrants stemmed in large part from fears that arresting such high-profile leaders would trigger backlash

⁵ Juan E Méndez, *The Importance of Justice in Securing Peace*, RC/ST/PJ/INF.3.

in the Bosnian Serb community.⁶ It was not until July 1997, two years after their indictments, that the United States finally heeded the appeals by outspoken advocates including then United States Representative to the United Nations Madeleine Albright and then ICTY Prosecutor Louise Arbour, to provide authorisation for IFOR to enforce the arrest warrants. But by then it was too late. Mladic and Karadzic had escaped to sanctuary in Serbia and Montenegro where IFOR did not have authority to operate. Thus, rather than keeping the peace by ignoring the demands of justice, IFOR's choice to allow indicted war criminals to operate openly in Bosnia left "a dark cloud over the Balkans"⁷ and undermined any deterrent effect the ICTY prosecutions could have had immediately after the Bosnian conflict.

By contrast, the international pressures brought to bear on Serbia in more recent years that did lead to the eventual arrest of Mladic indicate, albeit belatedly, what is possible. Regular visits and public statements from ICTY Prosecutor Brammertz had the backing, most significantly, of the EU, which made Mladic's arrest a precondition on Serbia's road to EU membership. Such a powerful economic and political incentive worked not only on Serbia's political leaders but also on the voting public, as evidenced by the 2008 elections that have shifted the balance of power in the Serbian Parliament from the nationalist party to the pro-EU party.

Also significant is the consistency of the international community's – most significantly, the EU's – demand for complete compliance with the ICTY's outstanding warrants. It did not say "good enough" after the 2009 arrest of Karadzic or even after the 2011 arrest of Mladic, despite some rumblings that it might do so. Instead, it demanded full compliance, which meant that Mladic's arrest has been followed in short order by that of Croatian Serb politician Goran Hadzic, the last fugitive of the 161 individuals indicted by the ICTY.

⁶ See Scheffer, *supra* note 4.

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Part of understanding why it took 16 years to bring about these final arrests of those most responsible for the crimes under the ICTY's jurisdiction requires recognising the international community's ambivalence about the idea of justice for heads of state and others in the highest positions of power, even after they have left office. It is comparatively easy to arrest and prosecute non-state actors or lower-level state actors, for whom national jurisdictions are often willing and able to marshal the necessary resources to arrest and prosecute. Those of high rank or those currently in power pose many additional challenges because of longstanding norms of international law that defer to state sovereignty and official immunity.⁸ While these norms have been shifting in recent decades, the international community has not yet demonstrated its full commitment to ending this form of impunity. The arrest of Mladic, like that of Karadzic and Hadzic, came after he had left power and after significant erosion of his popular support. Yet, still regarded by some ethnic Serbs as a war hero, Serbia would not likely have volunteered his arrest without significant international pressure and powerful economic and political incentives.

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The clearest example of the international community's ambivalence toward the arrest of political leaders is the outstanding ICC warrant for the arrest of current President Omar Al Bashir of Sudan, which the international community has acted with inconsistent resolve to execute. Since the issuance of his initial arrest warrant in March 2009, amended in 2010, for crimes against humanity, war crimes, and genocide, Al Bashir has continued to operate with impunity both within

⁸ See William A. Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (London: Minority Rights Group, 2006) (pointing out that until 2006 the ICC had largely focused on the prosecution of non-state actors and arguing that that amounted to pursuing the course of least resistance).

Sudan and beyond its borders. In addition to visiting a growing list of non-ICC States Parties, most recently attending a summit in China, Al Bashir has openly travelled to Chad and Kenya, two states that have ratified the Rome Statute and are thereby legally bound to arrest him. However, the picture is not entirely bleak. Both Chad and Kenya have rescinded subsequent invitations for visits by Al Bashir, South Africa disinvited him to the inauguration of its President, and the international community has successfully pressured the Central African Republic and Malaysia to state that they would arrest Al Bashir if he completed scheduled travel to either state.

In this context, the use of economic and political incentives to encourage the arrests of Mladic may provide a lesson to the international community about the forms of pressure it must muster to achieve greater accountability. While the lure of EU accession is limited by the geographic bounds of Europe, other economic and political carrots and sticks can and should be used to encourage Sudan to arrest Al Bashir and to discourage other states from allowing him to visit or compelling them to arrest him if he does. The effectiveness of particular incentives and sanctions no doubt varies from state to state, but the lesson from Serbia's arrest of Mladic, like that of Karadzic and Hadzic, is clear: that the right combination of pressures may eventually change the political balance within states that harbour indicted war criminals and that the international community should accordingly be steadfast in demanding nothing less than full compliance with the mechanisms of international justice. By contrast, the more it waivers or offers its support inconsistently, opening itself to criticisms that justice is politicised, the more it undermines the deterrent effect of prosecutions and compromises the ultimate goal of prevention.

V. A Second Lesson: Mladic's Arrest and Prosecution Can Still Be Made a Better Example of Justice for Prevention Purposes

As I have stated elsewhere, "For justice to have an impact, the most important condition is that justice follows its own rules, without interference and without being subject to political considerations. Justice contributes to peace and prevention when it is not conceived

as an instrument of either and on condition that it is pursued for its own sake".⁹ Without denying the significance of Serbia's recent arrests and extraditions, it is possible to see how they might yet offer a lesson that is not entirely about justice for justice's sake. Serbia's choice to execute the final ICTY arrest warrants appears to be primarily motivated by the economic and political gains that come with EU accession. While these gains may in fact play a very important role in their own right in bringing long-term stability to the region, Serbia and the other former Yugoslav states could do more to demonstrate that they are now genuinely committed to a full transitional justice process. For its part, the ICTY may facilitate this process by localising the impact of prosecutions.

Serbia has already committed itself, in response to demands from ICTY Prosecutor Brammertz, to undertaking domestic investigations and prosecutions of those individuals who shielded Mladic from arrest during the past sixteen years.¹⁰ Following through on these promises, more than any far-flung prosecution of a former military or political leader, is likely to demonstrate at a local level the Serbian state's genuine commitment to rule of law in the absence of substantial political and economic benefits. Yet, to make such pursuit of justice legitimate and genuine, the Serbian government will have to wrestle publicly with its own complicity in failing for so long to arrest Mladic, implicating both state and non-state actors.

The conditions for justice to serve a preventive purpose, as explained above, are that it is not politicised and that it is pursued for its own sake. In a post-conflict situation, such as the former

So long as proceedings remain distant from the communities most affected by Mladic's alleged crimes, the local impact of any conviction will be shallow.

⁹ Juan E Méndez, *The Importance of Justice in Securing Peace*, RC/ST/PJ/INF.3

¹⁰ Serge Brammertz comments at United Nations Security Council Meeting No. 6545, S/PV.6545, (6 June 2011). Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20SPV%206545.pdf>.

Yugoslavia, criminal prosecutions may also need to be paired with other transitional justice mechanisms. Even as the former Yugoslav states experience political change and move toward EU accession, there are plentiful indications that historical, ethnic, and nationalist tensions are still alive. The recent violence and tit-for-tat blockade of imports on the border between Serbia and Kosovo, like the fervent though smaller numbers who did protest Mladic's arrest in Bosnian Serb territory, should speak volumes in support of the need for some form of regional as well as national truth and reconciliation commission or other transitional justice process.

The manner in which the final ICTY prosecutions are given local effect in Serbia and throughout the rest of the Balkans, likewise, is critical to their preventive effect in the region. So long as proceedings remain distant from the communities most affected by Mladic's alleged crimes, the local impact of any conviction will be shallow. Therefore, to the greatest extent possible, states in the Balkans must embrace the process of bringing Mladic to justice as a step toward national reconciliation and the creation of a balanced historical narrative. This process is not easy, and much like the trial of Serbian President Slobodan Milosevic, which was met with nationalist sentiment of rejection while it was ongoing, the effect of Mladic's trial on Serbia's legal and political culture should be judged over the long term. The prosecutorial strategy pursued before the ICTY should also consider the potential role of Mladic's trial in the process of reconciliation in the Balkans. In this regard, the Office of the Prosecutor may take warnings from earlier trials of the savviest of political leaders, from Milosevic to Karadzic, to find ways of ensuring expedient proceedings and avoiding attempts to manipulate and control the narrative of trial, even while offering full protections for the rights of the accused.

VI. Conclusion

The arrest and pending prosecution of Mladic provides the international community a unique opportunity for reflection on the best means of realising the full potential of international criminal justice

to the prevention of genocide and other international crimes. The arrest of Mladic alone is insufficient. The international community should take lessons from its initial failure to execute ICTY arrest warrants and the success of using political and economic leverage to encourage Mladic's eventual arrest. However, it is only when justice is pursued for its own sake, as evidenced by the prosecutions as part of a broader transitional justice process, that deterrence will be strongest.

Please see page 103 for discussion questions



Ratko Mladic, following his arrest, at the International Criminal Tribunal for the former Yugoslavia (ICTY) in 2011.

Photo Credit: ICTY



United Nations soldiers from the British battalion on patrol in Vitez. May 1994.

Photo Credit: UN Photo/John Isaac

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Discussion questions

1. What are the functions of the International Criminal Tribunal for the former Yugoslavia (ICTY)? For which crimes has the ICTY indicted Ratko Mladic?
2. What are the goals of the international criminal justice framework today? In addition to the International Criminal Court (ICC), which tools and mechanisms can the international community use to investigate, prosecute and prevent international crimes?
3. History shows that the prosecution of a former head of state or a high level state official is not an easy process. How can the international community put pressure to bring perpetrators to justice when states are unable or unwilling to do so?
4. Should criminal prosecutions be paired with other transitional justice mechanisms in post-conflict situations? If so, why and what should those mechanisms be?
5. What lessons can the international community learn from the arrest and prosecution of Ratko Mladic?