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Why was Momčilo Perišić Acquitted?

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The International Criminal Tribunal for the former Yugoslavia has acquitted on appeal Momcilo Perisic, former Chief of Staff of the Army of Yugoslavia (VJ), who had previously been sentenced to 27 years in prison for war-crimes in Croatia and Bosnia-Hercegovina. He was one of only six officials from Serbia-Montenegro ever indicted by the ICTY for war-crimes in Bosnia. He was the only member of the high command of the Yugoslav People's Army (JNA) or VJ ever indicted for war-crimes in Croatia or Bosnia, and the only former JNA officer from Serbia or Montenegro of any rank ever indicted over Bosnia. His acquittal means that, to date, no official or army officer of Serbia-Montenegro and no member of the JNA or VJ high command has been convicted by the ICTY for war-crimes in Bosnia. By any standards, this represents a monumental failure on the part of the Tribunal. Precisely what kind of failure, and whether it is a failure of the Prosecution or the judges or both, is open to debate.

Perisic's acquittal follows the ICTY's recent acquittals of Croatia's Ante Gotovina and Mladen Markac, and of Kosovo's Ramush Haradinaj. Those previous acquittals had provoked a veritable paroxysm of fury from Serbia'ss politicians such as President Tomislav Nikolic, Prime Minister Ivica Dacic and UN General Assembly president Vuk Jeremic, who condemned them as proving that the ICTY was an anti-Serb and/or a political court. Commentators in the West widely agreed; an ill-informed rant by David Harland, former head of UN Civil Affairs in Bosnia-Hercegovina in 1993-1995, upholding all the old Serb-nationalist stereotypes of the ICTY's and West's supposed anti-Serb bias, was published in the New York Times and received wide publicity even from reputable sources. People who had apparently been fairly satisfied with the ICTY's not entirely glorious performance over the past two decades now emerged from the woodwork to denounce it in bitter terms.

The acquittal of such a high-ranking Serbian official, following the acquittal of two high-ranking Croats and one high-ranking Kosovo Albanian, provides further proof–if any were needed–that the ICTY is not ,'anti-Serb.' Perisic is, in fact, neither the first nor the most high-ranking senior Serbian official to be acquitted by the Tribunal; former Serbian President Milan Milutinovic was acquitted back in 2009 of war crimes against Kosovo Albanians.

Consequently, the Serbian government has now made a rapid U-turn in its view of the Tribunal. Prime Minister Dacic (also leader of the Socialist Party of Serbia founded by

Slobodan Milosevic) had responded to the Gotovina and Markac acquittals by stating , 'This confirms the claims of those who say that the Hague Tribunal is not a court and that it completes political tasks that were set in advance.' Yet his reaction to the Perisic acquittal is that it 'negates accusations about the alleged aggression of the Army of Yugoslavia against Bosnia and Croatia.' The latter conclusion is echoed by the Sense News Agency, which provides detailed overage of the activities of the ICTY and which claims that 'Momcilo Perisic was the only senior official from Serbia and FR Yugoslavia convicted by the Tribunal and sentenced for crimes in Bosnia and Herzegovina. Slobodan Milosevic was charged with the same crimes, and the judgment can be considered as Milosevic's posthumous acquittal for Sarajevo and Srebrenica.'

In these circumstances, there is naturally a temptation for those on the other side of the front-lines from the Serb nationalists–those who wanted to see the Serbian perpetrators of war-crimes in Croatia and Bosnia punished, and the victims receive justice–to cry foul, and to carry out a Dacic-style U-turn of their own. A temptation, that is, to say that the supporters of Milosevic, Seselj and Tudjman were right after all, and the ICTY is really just a kangaroo court whose verdicts are political. But this temptation should be resisted, both for pragmatic reasons and, more importantly, for reasons of principle.

Pragmatically, conceding that the ICTY is a kangaroo court whose verdicts are political means handing an enormous victory to those extremists–Serb and Croat, right-wing and left-wing–who supported the elements that carried out the war-crimes and that have always resisted the efforts of the ICTY to punish them. It is not for nothing that–both in the former Yugoslavia and in the West–ethnic cleansers, fascists and extremists have consistently opposed the Tribunal, whereas liberals, democrats and progressives have supported it. To reject the legitimacy of the ICTY and its verdicts means negating not only those verdicts we don't like, but all the good that has been achieved by precisely this Tribunal, despite its undeniable numerous failures. The ICTY was the first international court to establish that the Srebrenica massacre was an act of genocide, paving the way for the confirmation of this fact by the International Court of Justice.

Immediately following the acquittals of Gotovina, Markac and Haradinaj, the ICTY in December of last year convicted Zdravko Tolimir, Assistant Commander of Intelligence and Security of the Army of Republika Srpska (VRS), for genocide, and in the process established that the group targeted for genocide by the VRS was the Muslim population of East Bosnia as a whole–not just of Srebrenica–and that the genocidal act extended to Zepa as well as Srebrenica. It is a tremendous breakthrough for the legal recognition of the Bosnian genocide beyond Srebrenica. If the Perisic acquittal is to be dismissed as a political verdict, it undermines the Tolimir verdict as well. You cannot have it both ways, and cheer the verdicts with which you agree while denouncing those you don't like. Either the ICTY is a legitimate court or it is not.

Which brings us to the matter of principle: a genuine, legitimate court must have the right and ability to acquit, as well as to convict. If the ICTY were really a kangaroo court, all those accused would be convicted. Instead of which, we have proof of genuine pluralism, with panels of judges dividing 2-1 and 3-2 over major cases, and

the Appeals Chamber reversing the decision of the Trial Chambers. Whatever his political views or personal inclinations, Judge Theodor Meron, presiding judge at both the Appeals Chamber that acquitted Gotovina and Markac and the one that acquitted Perisic, and currently under attack from critics for the acquittals, was in each case only one judge in a panel of five who came from different countries. He was the only judge who acquitted both Gotovina and Markac on the one hand and Perisic on the other, and was not even a member of the Trial Chamber that acquitted Haradinaj. The only other judge who was a member of the Appeals Chamber both for Gotovina-Markac and for Perisic was Carmel Agius, and he strongly opposed the acquittal of Gotovina and Markac but supported that of Perisic. Judge Bakone Justice Moloto was presiding judge both in the Trial Chamber that convicted Perisic and in the Trial Chamber that acquitted Haradinaj. In the first case, he dissented from the majority opinion but was outvoted–something that took place in September 2011, a mere year and a half ago. Hence, I must respectfully disagree with my colleague Eric Gordy, who argues that the acquittals all form part of a consistent policy on the part of the judges in this period.

The conspiracy theorists (among whom I do not include Eric) would either have us believe that the initial indictments of Gotovina/Perisic and their initial convictions were simply elaborate deceptions paving the way for the final, pre-determined acquittals. Or they would have us believe that whenever the ICTY convicts it is acting legitimately and whenever it acquits it is acting politically. But a court that only convicts and never acquits is not a genuine court. Even at the International Military Tribunal at Nuremberg that tried the leaders of Nazi Germany after World War II, three of the twenty-four defendants–i.e. one in eight of the high-ranking officials of Nazi Germany who were prosecuted–were acquitted. The whole point of a fair trial is that guilt is not assumed and defendants are assumed to be innocent until proven guilty.

The present author has, in the past, condemned the ICTY for retreating in the face of Serbian obstruction of its activities, citing such instances as the failure to indict most of the leading members of the Joint Criminal Enterprise from Serbia and Montenegro; the acquittal of Radovan Karadzic on one count of genocide; and the censoring of the minutes of the Supreme Defence Council. However, the acquittal of Perisic is not part of this pattern; he had already been arrested and convicted, so any Serbian resistance in his case had already been overcome.

It is one thing to accuse the Tribunal of shabby or unprincipled compromises and retreats, but quite another to accuse it of actually falsifying the guilt or innocence of suspects. Karadzic’s acquittal aside, the present author has never accused the Tribunal either of acquitting anyone guilty or of convicting anyone innocent. I did not, for example, condemn its initial conviction of Gotovina and Markac. Nor did I condemn its acquittal of Milutinovic or of Miroslav Radic (one of the three JNA officers indicted over the Vukovar hospital massacre). I am somewhat amazed that so many people, of all national backgrounds and political persuasions, have so little respect for the principle that it is ultimately for the court to decide who is innocent and who is guilty. Of course, it is entirely possible for a court to get things wrong and for a miscarriage of justice to occur. But a miscarriage of justice needs careful explaining as to how it was arrived at, not mere petulant denunciation.

In the case of Perisic, the essence of the disagreement between the Trial Chamber majority and the Appeals Chamber majority was that the first considered that 'under the VRS's strategy there was no clear distinction between military warfare against BiH forces and crimes against civilians/and or persons not taking active part in hostilities,' while the latter argued that , 'the VRS was not an organisation whose actions were criminal per se; instead, it was an army fighting a war,' albeit one that also engaged in criminal activities. Thus, the Trial Chamber considered that there was no clear distinction between the VRS's lawful and its criminal actions, while the Appeals Chamber considered that there was.

Furthermore, the Trial Chamber ruled that though it could not be proven that the military assistance provided by Perisic to the VRS was specifically intended by him to support its criminal as opposed to its legal activities, nevertheless, since he clearly knew that his assistance would be used for criminal activities at Sarajevo and Srebrenica, as well as for legal military purposes, he was therefore guilty of aiding and abetting its criminal activities. The Appeals Chamber, by contrast, ruled that since it could not be proven that that he intended his military assistance to be used for criminal as opposed to legal military purposes, he could not be held to have criminal intent and therefore be held culpable for aiding and abetting the VRS's crimes.

In other words, there is little disagreement between the two Chambers regarding facts of the case (so far as the Bosnian part of it is concerned) but principally over what conclusion should be drawn from them. The disagreement is not equivalent to that between the Trial Chamber and Appeals Chamber in the case of Gotovina and Markac, when the two chambers fundamentally disagreed over what the facts were; i.e. over whether the Croatian Army had deliberately shelled civilian targets with the intent of bringing about the removal of the Serb population from the so-called Krajina region. In the case of Perisic, the Appeals Chamber was not throwing out an unsafe conviction based upon a highly spurious interpretation of events, as was the case with the acquittal of Gotovina and Markac. Rather, it was expressing a different judgement on the nature of culpability to that of the Trial Chamber.

In this disagreement, my own sympathies are entirely with the Trial Chamber, and I applaud the dissent from the Appeals Chamber majority opinion of Judge Liu Daqun, who argued that by acquitting Perisic, the Appeals Chamber was setting the bar too high for convictions on grounds of aiding and abetting. However, personal sympathies aside and on the understanding that judges are supposed to be wholly impartial, the conclusions of either Chamber could legitimately be drawn from the facts. Unfortunately, the more conservative type of conclusion of the Appeals Chamber is the one I would have predicted judges at the ICTY usually to reach. My colleague Florian Bieber has made the reasonable point that , 'arguing that not all [the VRS's] activities were criminal is about as convincing as stating that the Mafia is not only involved in criminal activities and thus supporting it does not mean that one is ,'aiding and abetting,' criminal activities. Following that analogy, Perisic could be compared to a powerful businessman who donates money, vehicles and properties to a charity known to be acting as a front for Mafia activities. Even if he clearly knew the charity's true purpose, convicting him might not be so easy for the courts. Al Capone was, after all, only convicted for tax evasion.

This brings us to the ultimate reason for Perisic's acquittal: the Prosecution's case against him, resting as it did on a model of culpability that was judicially controversial, was not a strong one. The Prosecution was unable to prove his intent to commit crime, or that the assistance he provided to the VRS was intended to further its crimes. It was unable to link him directly to any specific crime. It could merely prove that he aided and abetted an army–the VRS–that he knew was engaging in criminal activities, but which was also engaging in lawful military activities.

The second reason why the Prosecution's case was weak concerns the question of command responsibility. The Trial Chamber ruled that Perisic had no command responsibility over VRS forces, but that he did have such authority over the , 'Serb Army of Krajina,' (SVK , – so-called 'Croatian Serbs'), and in addition to aiding and abetting the VRS forces engaged in criminal acts as Sarajevo and Srebrenica, it convicted him for failing to punish the SVK perpetrators who shelled Zagreb in May 1995, killing and injuring civilians. But the Trial Chamber recognised that Perisic had ordered the SVK not to shell Zagreb and that it had disregarded his orders, choosing instead to obey the orders of Milan Martic, , 'President of the Republic of Serb Krajina,' to shell the city. This implicit recognition of Perisic's lack of effective command responsibility over the SVK forces formed the basis for the Appeal Chamber's overturning of his conviction for the war-crime at Zagreb — and even Judge Liu, who dissented from the majority over Perisic's acquittal for Sarajevo and Srebrenica, agreed with the majority on this count. In other words, the Prosecution chose to indict someone who had no command responsibility over the Bosnian Serb forces guilty of crimes in Bosnia (Sarajevo and Srebrenica) and only ambiguous command responsibility over the Croatian Serb forces guilty of crimes in Croatia (Zagreb).

Having myself worked as a war-crimes investigator at the ICTY, I am not at all surprised that four out of the five judges (and one out of three in the original Trial Chamber) were not convinced by the Prosecution's case. Generally speaking, cases involving high-ranking perpetrators far removed from the crime base are complicated to build unless their command responsibility is clear and unambiguous. Thus, it was relatively straightforward to build a case against Milosevic for war-crimes in Kosovo, where his command responsibility (as President of the Federal Republic of Yugoslavia) was clear. But more complicated to do so over Bosnia, where (as President of Serbia) it was not. In such cases where evidence of de jure responsibility is lacking, prosecutors need strong evidence of de facto responsibility.

But Perisic was not a Milosevic, Karadzic or Mladic. He was not a member of the top Serbian-Montenegrin-JNA leadership that planned and instigated the wars against Croatia and Bosnia, and his name is not listed among the principal members of the Joint Criminal Enterprise as laid down in the Milosevic indictments. He was commander of the Artillery School Centre in Zadar in Croatia, and in January 1992 became commander of the JNA,Äôs 13th Corps, based in Bileca in Hercegovina. In these roles of less than primary importance, he participated directly in the wars in Croatia and Bosnia. Had the Prosecution chosen to indict him for war-crimes committed by his forces in this period, he would in all likelihood have been convicted. However, it did not.

The three principal phases of mass killing by Serb forces in the Bosnian war were the initial Serbian blitzkrieg of spring, summer and autumn 1992, resulting in the Serbian conquest of about 70% of Bosnian territory; the siege of Sarajevo, lasting from spring 1992 until autumn 1995; and the Srebrenica massacre of July 1995. The first of these claimed by far the largest number of victims; according to the figures provided by Mirsad Tokaca's Research and Documentation Centre, more Bosniaks were killed in the Podrinje region (East Bosnia) in 1992 than in 1995, the year of the Srebrenica massacre. Moreover, the regular Serb army forces that undertook the initial blitzkrieg, until 19 May 1992, were formally part of the JNA and not only de facto but also de jure under the command and control of Serbia-Montenegro, in the form of the rump Yugoslav Federal presidency made up of members from Serbia and Montenegro, and of the high command of the JNA/VJ.

Had the ICTY Prosecution indicted the top JNA commanders and Yugoslav Presidency members (from Serbia and Montenegro) who commanded these Serb forces during the blitzkrieg, and prior to that the earlier assault on Croatia, they would no doubt have been successful and Serbia's direct responsibility for the war in Bosnia would have been judicially established. A successful outcome would have been particularly likely, given that a couple of these war-criminals have been obliging enough to publish their memoirs or diaries in which they admit their planning of the war.

On 19 May 1992, however, the newly proclaimed Federal Republic of Yugoslavia (FRY), comprising Serbia and Montenegro, formally withdrew its forces from Bosnia, and a Bosnia Serb army – the VRS – formally came into being. Serbia's political and military leadership thereby ceased to have de jure command and control over the Bosnian Serb forces. Furthermore, the Trial Chamber that convicted Perisic ruled that, in fact, the Serbian leadership in this period did not have even de facto control over the Bosnian Serb forces either, – as did the International Court of Justice, in its own 2007 verdict in the case of Bosnia vs Serbia. The arrangement whereby the Bosnian Serb war-effort would be formally independent of Belgrade was put in place with the deliberate intention by Serbia's leadership of avoiding accusations of aggression and involvement in the Bosnian war. Of course, Serbia continued to provide extensive financial and military support to the Bosnian Serb forces. But it should have been clear to any war-crimes investigator worth their salt that convicting FRY military commanders of war-crimes in Bosnia after 19 May 1992 would be a much more difficult task.

Momcilo Perisic became Chief of Staff of FRY's army, the VJ, only in August 1993, and his indictment by the ICTY only covers his activities from this period. The policy of supporting the VRS had been put in place under his predecessors, and though he was a strong supporter of the policy and apparently institutionalised it, he was scarcely its architect. Even as regards the siege of Sarajevo – one of the two crimes in Bosnia for which Perisic was indicted – the Serb killings of civilians peaked in the spring and summer of 1992 and dropped considerably thereafter, dropping particularly from around the time that Perisic took over (according to Tokaca's figures). Chief of Staff Perisic was therefore a singularly bad choice of individual to indict for war-crimes in the period from August 1993: though he was not a simple figurehead equivalent to President Milutinovic, and enjoyed real authority in a post of considerable importance, he was ultimately just one of Milosevic's interchangeable officers; little more than a

cog, albeit a large one, in the military machine, and moreover in a part of the machine whose culpability for actual war-crimes was secondary at the time, since the Milosevic regime had devolved most of the killing to a different part – the VRS.

Had the ICTY prosecutors ever really understood the chronology and organisation of the Serb aggression against Bosnia, they could have avoided such a poor decision. But it is clear from reading Carla del Ponte's memoirs that she, at least, never had more than a muddled understanding of it. She nebulously attributes primary and equal responsibility to the war as a whole to two individuals, Slobodan Milosevic and Franjo Tudjman, but is unable to explain how that responsibility translated into the form that the war took. Although she deserves credit for eschewing a narrowly legalistic and lawyerly approach to war-crimes prosecutions and for attempting to view the big picture of the war – and therefore for insisting on genocide indictments in the face of conservative resistance from some of her colleagues – the big picture that she viewed was an erroneous one. Her starting point was not a global systemic analysis of the aggression, but apparently the big crimes with which she herself, as a non-expert on the war, was familiar – the siege of Sarajevo and the Srebrenica massacre.

In her own memoirs, del Ponte's former spokeswoman Florence Hartmann recalls that del Ponte insisted, among other things, that Milosevic himself be indicted for Srebrenica and Sarajevo, in the face of resistance from Geoffrey Nice and others, who feared that they would not be able to convince the judges of the validity of the charge. Del Ponte was thus motivated by the commendable desire to ensure that Serbia's leadership would not escape responsibility for the killing in Bosnia, but her analytical confusion ensured her plan would not go well. In light of Perisic's acquittal, Nice's caution, as recalled by Hartmann, appears entirely vindicated. That said, it is worth restating that Perisic's indictment covered only the period from August 1993, when he was Chief of Staff, not the period when the Serbian aggression was actually launched and the largest part of the killings occurred. Thus, the claims made by Dacic and by the Sense News Agency, that the verdict exonerates Milosevic and Serbia of aggression against Bosnia and Croatia and of culpability in the siege of Sarajevo, are unfounded. Furthermore, as noted above, the Appeals Chamber has not actually changed the facts as established by the Trial Chamber: that the VRS was engaged in criminal activity, at Sarajevo and Srebrenica, and that Serbia's army was aiding and abetting it while it was doing so.

On Twitter, Luka Misetic, the lawyer who successfully represented Gotovina, has succinctly referred to ‚- Carla Del Ponte – dark legacy: Perisic, Haradinaj, Oric, Gotovina, Cermak, Markac, Boskoski, Halilovic all indicted by CDP, all acquitted.' The failure at the ICTY is that of a Prosecution that has repeatedly failed to secure the convictions of those it has indicted, not of the judges who were unconvinced by its cases.

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