

Destroying the Legacy of the ICTY: Analysis of the Acquittals of Jovica Stanišić and Franko Simatović

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I. INTRODUCTION

In a 2005 press release by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), Chief Prosecutor Carla Del Ponte stated “[t]he debate on war crimes in the former Yugoslavia is not subsiding. It is present in the daily life and media, and always politicised . . . I am much more concerned about the victims of war crimes and their families, and I appeal to you to make the victim aspect of any legal process a priority.”¹ Despite this stated dedication to war crimes victims and their families, the ICTY’s Trial Chamber (“Chamber”) recently acquitted two state security officials who organized and executed many crimes in Croatia, and Bosnia-Herzegovina.²

The Chamber affirmed and detailed the crimes, named the victims and the perpetrators, and specified the connections between the accused and the perpetrators.³ Then, however, it declined to convict Jovica Stanišić and Franko Simatović, on the grounds that the evidence did not show that their support to criminals was “specifically directed towards the commission of the crimes[.]”⁴

The Chamber’s requirement that war criminals “specifically direct[] the commission of a crime” is an extremely narrow legal standard that threatens both the future of the ICTY as well as future ad hoc tribunals. With major war criminals indicted and awaiting trial, this decision threatens the ICTY’s legacy among international tribunals and brings into question the necessity of future ad hoc tribunals.

II. RESURGENCE OF THE SERBIAN EMPIRE UNDER SLOBODAN MILOSOVIC AND THE HISTORY OF THE BALKAN CONFLICT OF 1991-1995

Dramatic political and social change swept across Eastern Europe and the Soviet Union in the late 1980s and early 1990s. Longtime Yugoslav

1. Press Release, Office of the Prosecutor, Address of the Prosecutor at the Inauguration of the War Crimes Chamber of the Court of BH, U.N. Press Release CDP/P.I.S./944 (Mar. 9, 2005), *available at* <http://www.icty.org/sid/8633/en>.

2. *See* Int’l Crim. Trib. For the Former Yugoslavia, Case Information Sheet: Stanišić and Simatović, http://icty.org/x/cases/stanistic_simatovic/cis/en/cis_stanistic_simatovic_en.pdf.

3. *See* Judgement Summary for Jovica Stanišić and Franko Simatović, Trial Chamber, Int’l Tribunal for the Former Yugoslavia (May 30, 2013), *available at* http://icty.org/x/cases/stanistic_simatovic/tjug/en/130530_summary.pdf [hereinafter Judgment Summary]; *see generally* Prosecutor v. Stanišić & Simatović, Case No. IT-03-69, Judgement Volume II of II, (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013), http://www.icty.org/x/cases/stanistic_simatovic/tjug/en/130530_judgement_p2.pdf [hereinafter Judgment Part II].

4. Judgment Part II, *supra* note 3, ¶ 2360.

leader Josip Borz Tito died in 1980, and the region experienced the collapse of communist systems and the resurgence of nationalism in the decade that followed.⁵ Political and social crises in the Socialist Federal Republic of Yugoslavia ultimately led to a violent break up of Yugoslavia in 1991 and to atrocities in the region.⁶

SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA
AS OF JANUARI 1991⁷



5. *About the ICTY: Establishment*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/319> (last visited Jan. 8, 2014); *Bosnian Genocide*, HISTORY, <http://www.history.com/topics/bosnian-genocide> (last visited Jan. 8, 2014).

6. *Bosnian Genocide*, *supra* note 5; see also *About the ICTY: What is the Former Yugoslavia?*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/321> (last visited Jan. 8, 2014) (The Socialist Federalist Republic of Yugoslavia (Socialistička Federativna Republika Jugoslavija, or SFRJ) was composed of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two autonomous provinces (Kosovo and Vojvodina). It ceased to exist in 1991. In 1992, Serbia and Montenegro founded the Federalist Republic of Yugoslavia (Savezna Republika Jugoslavija, SRJ). In 2003, the Federal Republic of Yugoslavia was reconstituted and renamed as a State Union of Serbia and Montenegro (Državna Zajednica Srbiji i Crne Gore, SCG), which lasted until Montenegro declared independence in 2006).

7. *About the ICTY: What is the Former Yugoslavia*, *supra* note 6.

One fervent promoter of nationalistic policies was Serb leader Slobodan Milosovic. Milosovic rose to power in Serbia in the mid-1980s.⁸ He emerged as a political force as president of the Serbian Community Party,⁹ and won a democratic election to become president of Serbia in 1990.¹⁰ As a leader with strong nationalist beliefs, Milosovic furthered the discontent between Serbians in Bosnia and Croatia and their non-Serb neighbors in Croatia, Bosnia, and Albania.¹¹ In 1991, Slovenia, Croatia, and Macedonia declared their independence from Yugoslavia.¹² During the subsequent war in Croatia, the Serb-dominated Yugoslav army supported Serbian separatists in their clashes with Croatian forces.¹³

Soon after Milosovic gained power, animosity built within Serbia and neighboring Bosnia. In Bosnia, Muslims had been the majority population since 1971, but political tensions ran high as more Serbs and Croats immigrated to the area.¹⁴ A 1990 election brought a Muslim president, Bosniak Alija Izetbegović, into office.¹⁵ After the election, the Bosnian-Serb-dominated Serbian Democratic Party withdrew from the government and established the “Serbia National Assembly.”¹⁶ On March 3, 1992, President Izetbegović officially declared Bosnia’s independence.¹⁷

This declaration of independence was opposed by Bosnian-Serbs, led by Serbian Democratic Party leader Radovan Karadžić¹⁸ and General

8. *Timeline: The Milosovic Years*, CNN.COM, Aug. 31, 2004, <http://edition.cnn.com/2004/WORLD/europe/08/31/milosevic.timeline/>.

9. Celestine Bohlen, *Ex-Communist Chief Takes The Lead in Serbia’s Election*, N.Y. TIMES, Dec. 10, 1990, available at <http://www.nytimes.com/1990/12/10/world/ex-communist-chief-takes-the-lead-in-serbia-s-election.html?ref=slobodanmilosevic>.

10. This was Serbia’s first democratically held election since 1938, before World War II. See Celestine Bohlen, *Ruling Party Wins Serbian Elections*, N.Y. TIMES, Dec. 11, 1990, <http://www.nytimes.com/1990/12/11/world/ruling-party-wins-serbian-elections.html?ref=slobodanmilosevic>; see also *Timeline: The Milosovic Years*, *supra* note 8.

11. *Bosnian Genocide*, *supra* note 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Press Release, ICTY Chambers, Tribunal dismisses Karadžić motion for acquittal on ten of one hundred counts of the indictment (June 28, 2012), <http://www.icty.org/sid/10994>; see also Int’l Crim. Trib. for the Former Yugoslavia, Case Information Sheet: Radovan Karadžić, http://icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf. Karadžić was a founding member of the Serbian Democratic Party (SDS) and the President of the SDS until his resignation on July 19, 1996. Int’l Crim. Trib. for the Former Yugoslavia, *supra*, at 2. He was initially indicted on July 25, 1995, arrested on July 21, 2008, and was charged on the basis of individual and superior criminal responsibility with 11 counts of genocide, crimes against humanity, and violations of the laws or customs of war. *Id.* at 2–4. The Trial Chamber initially granted Karadžić’s motion for acquittal of

Ratko Mladić,¹⁹ who wished to be part of a dominant Serbian state in the Balkans. After President Izetbegović claimed Bosnia's independence, Bosnian-Serb forces, backed by the Serbian-dominated Yugoslav army, bombarded Bosnia's capital, Sarajevo.²⁰ The Bosnian-Serb faction attacked Bosnian towns and both forcibly expelled and participated in ethnic cleansing Bosnian Muslim civilians.²¹ Many Bosnians Muslims were driven into concentration camps, where women and girls were gang raped and other civilians were tortured, starved, and murdered.²²

In 1993, the U.N. Security Council declared Sarajevo, Goradze, Srebrenica, and other Muslim enclaves in Bosnia safe areas, protected by U.N. peacekeepers.²³ Despite the peacekeeping effort, Bosnian-Serbs retained control of the area. By the end of 1993, Bosnian-Serbs controlled nearly three-quarters of the country and had displaced or killed most of the Bosnian Muslims who were present at the beginning of the conflict in 1991 when Slovenia, Croatia, and Macedonia declared their independence from Yugoslavia.²⁴ Several peace proposals between a Croatian-Bosniak federation and Bosnian Serbs failed because the Serbs refused to give up any territory. The United Nations refused to intervene in Bosnia, though a humanitarian effort spearheaded by the U.N. Commissioner for Refugees provided aid to the conflict's displaced, malnourished, and injured victims.²⁵

one count of genocide, but on July 11, 2013, the Appeals Chamber reversed the acquittal. *Id.* at 5. He currently awaits his trial. *See id.*

19. Int'l Crim. Trib. for the Former Yugoslavia, Case Information Sheet: Ratko Mladić http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf (Mladić was appointed Commander of the Main Staff of the Bosnian Serb Army (VRS) on May 12, 1992 and promoted to Colonel General in June 1992. He was initially indicted on July 25, 1995 on the same counts as Karadžić (genocide, crimes against humanity, and violations of the laws or customs of war). His trial commenced May 16, 2012).

20. *Bosnian Genocide*, *supra* note 5.

21. *Id.* “[T]here are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’ . . . yet ‘[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.’” Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 123 (Feb. 26) (citing *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 562 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001)).

22. *Genocide in Bosnia (1992–1995)*, HOLOCAUST MUSEUM HOUSTON, http://www.hmh.org/la_Genocide_Bosnia.shtml (last visited Jan. 8, 2014).

23. *Id.*

24. *Bosnian Genocide*, *supra* note 5.

25. *Id.*

The international community was soon forced to develop a more effective response.²⁶ In 1994, the North Atlantic Treaty Organization (NATO) to stop the attacks.²⁷

In July 1995, the Bosnian town of Srebrenica became the scene of the worst massacre in the Bosnian war.²⁸ Bosnian Serb forces began shelling Srebrenica, and Bosnian Muslim fighters, who had surrendered their weapons to the U.N. peacekeepers, were defenseless.²⁹ Days later, buses arrived to transport over 20,000 women and children to Bosnian territory, while over 7,000 Muslim men were killed.³⁰

A month later, in August 1995, NATO joined Bosnian and Croatian forces for both a three week bombing campaign and for a ground offensive against Bosnian Serbs.³¹ The United Nations also implemented trade sanctions,³² which crippled the Serbian economy and depleted their military forces. After three years of warfare, Milosovic finally agreed to enter into negotiations.³³ Both Izetbegović and the Croatian president, Franjo Tudjman, participated in these U.S.-sponsored peace talks in Dayton, Ohio, in November 1995.³⁴ The Dayton Accords facilitated the creation of a federalized Bosnia comprised of a Croat-Bosniak federation and a Serbian republic.³⁵

Before the Dayton Accords, the United Nations sought to address the responsibility of those for the atrocities committed, which resulted in the U.N. Security Council's creation of the ICTY in The Hague, Netherlands.³⁶ The ICTY was the first international tribunal created since the post-World War II Nuremberg Trials ended in 1948, and the first ever to specifically prosecute the crime of genocide, together with charges involving war crimes, and crimes against humanity.

26. *Id.* (The U.N. declared the towns of Srebrenica, Zepa, and Gorazde "safe havens" in 1993, to be disarmed and protected by international peacekeeping forces. In July 1995, Bosnian Serb forces advanced on Srebrenica where the women were sent to Bosnian-held territory and the men were killed or bussed to mass killing sites. Later that month, Bosnian Serb forces captured Zepa and exploded a bomb in a Sarajevo market.)

27. *Id.*

28. *Timeline: Siege of Srebrenica*, BBC NEWS, <http://news.bbc.co.uk/2/hi/675945.stm> (last updated June 9, 2005).

29. *Id.*

30. *Id.*; see also *Genocide in Bosnia (1992–1995)*, *supra* note 22.

31. *Bosnian Genocide*, *supra* note 5.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); see also Fausto Pocar, *Introductory Note, Statutory of the International Criminal Tribunal for the Former Yugoslavia*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW.

III. FORMATION OF THE ICTY: CREATING THE FIRST AD HOC TRIBUNAL SINCE THE NUREMBURG TRIALS

Prosecution of international crimes and international war crimes in domestic courts raise significant difficulties. However, in an effort to reconcile the need for justice for victims with the difficulties of domestic prosecution, international criminal tribunals have been created to prosecute individuals directly for international war crimes.³⁷ These ad hoc tribunals are formed to address a particular international conflict.³⁸ The first such tribunal, the Nuremberg Trials, was established by the Four Powers (U.S., Great Britain, France and Russia) following World War II, and remains the most significant of these ad hoc tribunals today.³⁹ After the close of the Nuremberg Trials, no use of an international tribunal to prosecute a major war criminal was attempted until 1993, when the ICTY took action.⁴⁰ The U.N. Security Council has taken a limited approach and has only established two ad hoc tribunals: the ICTY and the International Criminal Tribunal for Rwanda (ICTR) in 1994.⁴¹

The United Nations gave the ICTY the authority to prosecute persons responsible for specific crimes committed in the territory of what is referred to as “the former Yugoslavia” since January 1991.⁴² It is a U.N. court of law prosecuting war crimes that took place in the Balkans in the 1990s and⁴³ represents several major steps in the enforcement of international criminal law.⁴⁴ The ICTY Statute requires the Tribunal to

37. STEVEN R. RATNER, ET AL., *ACCOUNTABILITY FOR HUMAN RIGHTS IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY* 209 (3d ed. 2009).

38. *Id.*

39. *Id.* at 210 (explaining that the Governments of the Allies tried and punished major war criminals at the Nuremberg Tribunal, which had jurisdiction “over individuals who, as individuals or as members of organizations, committed crimes against peace, war crimes, or crimes against humanity.”).

40. *Id.* at 212.

41. *See generally* THE SECURITY COUNCIL, <http://www.un.org/en/sc/> (last visited Dec. 20, 2014). A few other special tribunals are currently operating; however, these tribunals have had very mixed results. *See, e.g.,* *Special Tribunal for Lebanon*, UN.ORG, <http://www.un.org/apps/news/infocus/lebanon/tribunal/> (last visited Feb. 12, 2014) (stating that the Special Tribunal for Lebanon was established on June 10, 2007 to prosecute persons responsible for the death of former Prime Minister Rafiq Hariri and other persons).

42. *See About the ICTY: What is the former Yugoslavia?*, *supra* note 6.

43. *About the ICTY: Establishment*, *supra* note 5.

44. RATNER, *supra* note 37, at 211.

investigate and prosecute offenses of war crimes, crimes against humanity,⁴⁵ and genocide.⁴⁶

The principal goal of U.N. Security Council Resolution 827, which established the Tribunal, is “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them” and to “contribute to the restoration and maintenance of peace.”⁴⁷ Resolution 827 proposes a standard to restore and maintain peace and security while effectively redressing crimes.⁴⁸ Since its establishment, the ICTY has indicted 161 people for violations of humanitarian law, and has sentenced sixty-nine individuals to date.⁴⁹

The ICTY aims to establish precedent for indicting war criminals by locating and charging individuals associated with the crimes committed in the Balkans. On its website, the ICTY claims to have “irreversibly changed the landscape of international criminal and humanitarian law.”⁵⁰ But while the Tribunal began with an impressive list of indictments and some early convictions, recent acquittals of key perpetrators of war crimes bring the future of the ICTY into question.⁵¹ The decision in the case discussed herein is representative of the current threat to the legacy of the ICTY and the future of international tribunals that aim to bring justice to victims of similar atrocities.

IV. THE CASE AGAINST JOVICA STANIŠIĆ AND FRANKO SIMATOVIĆ

Jovica Stanišić and Franko Simatović were the former Chief of the Serbian State Security Service (“DB”)⁵² and former employee of the

45. S.C. Res. 827, *supra* note 36, paras. 5–6.

46. *Id.* para. 7 (“Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.”).

47. *Id.*, paras. 5–6.

48. *Id.* para. 7.

49. *About the ICTY: Infographic: ICTY Facts & Figures*, ICTY, <http://www.icty.org/sid/11186> (last visited Jan. 8, 2014) (Eighteen individuals have been acquitted, 13 have been transferred to countries in the former Yugoslavia for trial, and 46 proceedings were terminated or had the indictments withdrawn.).

50. *Id.*

51. *See id.*

52. The abbreviation DB comes from the Serbian name of the State Security Service, Državne Bezbednosti, *see* Prosecutor v. Stanišić & Simatović, Case No. IT-03-69, Judgment Part I, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013), http://www.icty.org/x/cases/stanistic_simatovic/tjug/en/130530_judgement_p1.pdf [hereinafter Judgment Part I].

Serbian State Security Service, respectively.⁵³ Stanišić and Simatović had directed, equipped, trained, and financed the DB, which consisted of twenty-five to thirty people.⁵⁴ According to an anonymous witness at trial, the DB was tasked with “protecting the legal and social order, doing intelligence work, and dealing with political crimes, terrorism, and extremism.”⁵⁵ According to the Rules of the Internal Organisation of the DB of January 1992, “the Chief of the DB was responsible for, *inter alia*, organizing the performance of DB tasks, directing and coordinating the work of all organizational units, deciding how to employ assets and methods, and providing recommendations for staffing.”⁵⁶

The ICTY charged Stanišić and Simatović with directing, organizing, equipping, training, arming, and financing units of the Serbian State Security Service, which murdered, deported, and persecuted non-Serb civilians from Bosnia-Herzegovina and Croatia in the 1990s.⁵⁷ They were allegedly involved in a joint criminal enterprise whose objective was the forcible and permanent removal of the majority of non-Serbs⁵⁸ from large areas of Croatia and Bosnia-Herzegovina.⁵⁹ The prosecution claimed Stanišić and Simatović commissioned crimes against humanity and “shared the intent to further the common criminal purpose.”⁶⁰ Stanišić and Simatović were each charged with “individual criminal responsibility under Article 7(1)⁶¹ of the Statute for committing crimes as part of a joint criminal enterprise” and “having planned, ordered, and/or otherwise aided and abetted in the planning, preparation, and/or execution of the crimes described in the Indictment.”⁶²

53. Press Release, Chambers, Jovica Stanišić and Franko Simatović Acquitted of All Charges, U.N. Press Release MS/CS/PR1567e (May 30, 2013), *available at* <http://www.icty.org/sid/11329> [hereinafter Stanišić and Simatović Acquitted].

54. *Id.*

55. Judgment Part II, *supra* note 3, ¶ 1273.

56. *Id.*

57. Marlise Simons, *U.N. Court Acquits 2 Serbs of War Crimes*, N.Y. TIMES, May 30, 2013, http://www.nytimes.com/2013/05/31/world/europe/un-court-acquits-2-serbs-of-crimes-in-balkan-wars.html?_r=1&.

58. *I.e.*, Croats, Bosnian Muslims, and Bosnian Croats.

59. Judgment Part I, *supra* note 52, ¶ 5.

60. *Id.*

61. “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

62. Judgment Part I, *supra* note 52, ¶ 51.

An initial indictment against Stanišić and Simatović was filed on May 1, 2003, and Serbian authorities arrested both on May 13, 2003.⁶³ A few months later, both were transferred to the custody of the ICTY and at their initial appearances each pled not guilty to all charges at their initial appearances.⁶⁴

V. THE TRIAL OF STANIŠIĆ AND SIMATOVIĆ

The lengthy trial of Stanišić and Simatović lasted multiple years, in part because of Stanišić's poor health, which repeatedly postponed the trial until June 9, 2009, and in part because of the magnitude of the evidence proffered by both parties.⁶⁵ During the trial, ninety-five expert witnesses and over one hundred lay witnesses to the crimes appeared before the Chamber.⁶⁶ In total, almost 5,000 exhibits were admitted into evidence.⁶⁷ The prosecution rested on April 5, 2011 and the defense's presentation lasted from June 15, 2011 to September 17, 2012.⁶⁸ Closing arguments were held from January 29–30, 2013, and the three-judge panel released their decision acquitting Stanišić and Simatović on May 30, 2013.⁶⁹ Ultimately, the tribunal concluded that an actual conflict and war crimes occurred, yet acquitted both Stanišić and Simatović.⁷⁰

As a threshold matter, the Chamber concluded that an armed conflict existed in the territories of Croatia, Bosnia, and Herzegovina and that the victims of the crimes committed in the indictment area were predominately non-Serb civilians.⁷¹ Then the Chamber received evidence regarding multiple incidents overseen by Stanišić and Simatović as well as crimes committed by the secret police in Croatia and Bosnia-Herzegovina under their direction⁷² Specifically, the Chamber found that the secret police committed the crimes of deportation and forcible transfer in Croatia and Bosnia-Herzegovina.⁷³

The Chamber found that Stanišić and Simatović “directed the [DB] Unit in particular operations in Croatia and Bosnia-Herzegovina; organized, supplied, financed, and supported the involvement of the Unit in particular

63. Stanišić and Simatović Acquitted, *supra* note 53.

64. *Id.*

65. *Id.*

66. *See generally* Judgment Part I, *supra* note 52, ¶¶ 8, 16.

67. Stanišić and Simatović Acquitted, *supra* note 53.

68. *Id.*

69. *Id.*

70. *Id.*

71. Judgment Summary, *supra* note 3.

72. *See id.*

73. *Id.*

operations; and directed and organized the financing, training, logistical support, and other substantial assistance or support for the Unit.”⁷⁴

During Stanišić’s and Simatović’s trial, the Chamber also considered specific incidents of detention and forcible transfer by the secret police. The Chamber heard eyewitness testimony for a specific incident that occurred on April 9, 1992.⁷⁵ The witnesses stated that members of the SDG, an entity subordinate to the DB that Stanišić and Simatović also controlled,⁷⁶ and other armed men gathered at least ninety Croats and Hungarians from Erdut and put them on buses to Sarvaš.⁷⁷ Once they were in Sarvaš, according to the witnesses, the SDG told some of the Croats and Hungarians to walk toward Croat-controlled Osijek, while others were bused to other locations.⁷⁸ Thus, the Chamber found beyond a reasonable doubt that these SDG committed the crime of deportation as a crime against humanity.⁷⁹ In addition to the incident on April 9, 1992, the Chamber also found the SDG committed numerous other incidents of deportation and forcible transfer at numerous locations in Croatia and Bosnia-Herzegovina in the 1990s.⁸⁰ Further, the Chamber concluded that the secret police and other Serbian forces committed mass murders against non-Serbs, including Croats and Muslims in Croatia and Bosnia-Herzegovina.⁸¹ The Chamber found these crimes had been executed with discriminatory intent, and thus qualified as crimes against humanity.⁸²

After determining the existence of these crimes, the Chamber determined whether it could attribute these crimes to Stanišić and Simatović. The Chamber found “the Accused directed and organized its formation; organized its involvement in a number of operations in Croatia and Bosnia-Herzegovina; and directed and organized its financing, logistical support, and other substantial assistance or support, throughout the Indictment period.”⁸³ Further, the Chamber found that Stanišić and Simatović directed, organized, and funded the formation of the DB, and

74. Judgment Part II, *supra* note 3, ¶ 1287.

75. Judgment Part I, *supra* note 52, ¶ 511.

76. “Srpska Dobrovoljačka Garda,” is Serbian for “Serbian Volunteer Guard,” an entity which is subordinate to DB.

77. Judgment Part I, *supra* note 52, ¶¶ 1025–1030.

78. *Id.*

79. Judgment Part I, *supra* note 52, ¶ 1030.

80. Judgment Summary, *supra* note 3.

81. *Id.*

82. Judgment Part I, *supra* note 52, ¶ 1245.

83. *Id.* ¶ 2318.

supported it with weapons and communications equipment.⁸⁴ Yet, despite the Chamber's finding of Stanišić and Simatović's facilitation of and complicity in the crimes, the majority did not find that the accused provided "channels of communication" between the core members of the joint criminal enterprise.⁸⁵ Oddly, the Chamber justified its decision with citations to evidence that seemingly proved that the accused did, indeed, provide channels of communication.⁸⁶

Lastly, the Chamber considered whether Stanišić and Simatović had the intent to forcibly remove the majority of Serbs from large areas through murder, forcible transfer, and persecution.⁸⁷ Despite reviewing direct evidence demonstrating the defendants' intent,⁸⁸ the majority found that Stanišić and Simatović did not possess the requisite intent.⁸⁹ The majority decided that it could not reasonably infer that Stanišić and Simatović shared the intent to further the alleged joint criminal enterprise.⁹⁰ The Chamber's decision specifically states that they consider "Stanišić's reference to killings and his remark that 'we'll exterminate them completely' to be too vague to support for the allegation that Stanišić shared the intent to further the alleged common criminal purpose."⁹¹ Even though the Chamber considered evidence and testimony that implicated Stanišić and Simatović in the crimes executed during the Bosnian conflict in the 1990s, the majority declined to convict two of its main perpetrators.

VI. CONTRASTING STANIŠIĆ AND SIMATOVIĆ ACQUITTAL WITH THE CONVICTIONS OF DUŠKO TADIĆ AND ANTO FURUNDŽIJA

Prior to Stanišić's and Simatović's case, the ICTY convicted other war criminals on similar, if not less, evidence. Duško Tadić was the first person tried by the ICTY and his trial was the first international war crimes trial to involve charges of sexual violence.⁹² Tadić was President of the Local Board of the Serb Democratic Party in the Bosnian town of Kozarac,⁹³ and was involved in the killing and deportation of non-Serb citizens there. On May 24, 1992, Bosnian-Serb forces in Kozarac began an

84. *Id.* ¶ 2108.

85. *Id.* ¶ 2304.

86. *See id.* ¶¶ 2290–2304.

87. *Id.* ¶¶ 2305–06.

88. *See id.* ¶¶ 2305–10.

89. *See id.* ¶¶ 2305–10.

90. *Id.*

91. *Id.* ¶ 2309.

92. *Landmark Cases*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://itcy.org/sid/10314> (last visited Jan. 8, 2014); *see also Tadić, Duško*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=6077>. (last visited Jan. 8, 2014).

93. *Tadić, Duško*, *supra* note 92; *see also Landmark Cases, supra* note 92.

artillery barrage that killed 800 citizens.⁹⁴ After they captured the town, Bosnian-Serb forces, aided by Tadić, forcibly removed the entire non-Serb population from the area.⁹⁵ After indictment, trial, and appeal, Tadić was ultimately convicted of willful killing, torture or inhuman treatment, and murder.⁹⁶

In its analysis of both the prosecution and defense arguments, the Chamber stated “the crimes consisted of killings, beatings, and forced transfer by Duško Tadić as principal or as an accessory, as well as his participation in the attack on the town of Kozarac in Opština Prijedor.”⁹⁷ The Chamber found that, “the beating was severe and contained the common factors of humiliation, ethnic persecution and physical violence.”⁹⁸ Lastly, the Chamber stated that “Duško Tadić was aware that his acts were part of, and contributed to, the crime against humanity committed by Bosnian Serb forces against the non-Serb population of Opština Prijedor.”⁹⁹

In the Tadić appeals judgment, the Appeals Chamber announced the “specific direction” standard. A different panel of judges in the appeals hearing explained this standard, stating, that “[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.”¹⁰⁰ The Chamber applied the specific direction standard to Tadić and found him guilty of aiding and abetting. Yet, in the trial of Stanišić and Simaović, the Chamber refused to employ this same approach despite this established precedent.

Another leader who was convicted for crimes by his subordinates was Anto Furundžija. Anto Furundžija was the local commander of the “Jokers,” a unit of the Croatian Defence Council (HVO), in central Bosnia and

94. *Tadić, Duško, supra* note 92.

95. *Id.*

96. Press Release, Trial Chambers, Duško Tadić Sentenced to 20 Years’ Imprisonment, U.N. Press Release CC/PIO/226-E (July 14, 1997) available at http://www.icty.org/x/cases/tadic/tjug/en/970714_Tadic_summary_en.pdf.

97. *Id.* at 1.

98. *Id.* at 5.

99. *Id.* at 7.

100. Prosecutor v. Tadić, Case No. IT-94-1, Judgment, ¶ 229 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

Herzegovina.¹⁰¹ The ICTY convicted Furundžija of violations of the laws of customs of war for torture and outrages upon personal dignity, including rape, even though he did not personally rape anyone.¹⁰² According to the prosecution, during Furundžija's interrogations he would allow subordinate soldiers to threaten, rape, and beat Muslim women.¹⁰³ Furundžija did nothing to stop or curtail these actions, and instead continued to interrogate the woman, which, according to the Chamber substantially contributed to the criminal acts inflicted upon the victims.¹⁰⁴ The Chamber found him to have aided and abetted these outrages upon personal dignity and sentenced him to ten years imprisonment.¹⁰⁵

These initial convictions stand in sharp contrast to the Chamber's recent acquittals of Stanišić and Simatović. In all three trials, the prosecution presented comparable evidence tying the crimes to the perpetrators, yet the Chamber reached a significantly different result in the Stanišić and Simatović case.

VII. EARLY RESULTS OF THE ICTY: ESTABLISHING A LEGACY BASED ON EARLY CONVICTIONS OF WAR CRIMINALS

Initially, the ICTY built a credible legacy¹⁰⁶ by indicting several low-level defendants early in its tenure.¹⁰⁷ As of fall 2008, the ICTY had indicted approximately 160 people and concluded proceedings against 113, resulting in fifty-five convictions, nine acquittals, and thirteen defendants referred to national courts.¹⁰⁸ Early on, there was debate over whether too many "little fish"¹⁰⁹ had been indicted.¹¹⁰ As one former ICTY judge responded, no "big fish" had been apprehended and "it was necessary to show the world that the newly created Tribunal was not a mere paper shell, but a functioning court, ready to try any war criminal it could legitimately get its hands on."¹¹¹ However, when the ICTY was

101. Int'l Crim. Trib. For the Former Yugoslavia, Case Information Sheet: Anto Furundžija, http://icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf.

102. *Id.* at 1, 3–4.

103. *Id.* at 1.

104. *Id.*

105. *Id.* at 4.

106. RATNER, *supra* note 37, at 220; Wald, Patricia, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT'L CRIM. L. 466 (2004).

107. Wald, *supra* note 106, at 468–69.

108. RATNER, *supra* note 37, at 220 (explaining that the remaining individuals either had their indictments withdrawn by the prosecutor or died during proceedings).

109. "I.e., middle and lower level functionaries in larger operations, designed to perpetrate war crimes, crimes against humanity, and genocide, which were instigated and planned by the 'big fish.'" Wald, *supra* note 106, at 468.

110. *Id.*

111. *Id.*

able to access more serious perpetrators, the courts were consumed with smaller trials, which often took up to a year to complete.¹¹²

Though the trials were extremely time consuming, the United Nations established the ICTY to try and convict war criminals that committed the atrocities in Yugoslavia. The ICTY's goal was to set precedential decisions regarding genocide, war crimes, and crimes against humanity, and to attempt to prove that "[g]uilt should be individualized" and that "an individual's senior position can no longer protect them from prosecution."¹¹³ The initial indictment of Milosovic brought excitement and the appearance of justice to the international stage, and early convictions of leaders indicated major success for the tribunal. These early successes, however, are being tainted by recent acquittals.

VIII. LASTING LEGACY OF THE ICTY: THREATS TO THE EARLY SUCCESS OF THE ICTY

Decisions like the one in the Stanišić and Simatović case threaten the legacy and permanent record of the ICTY. The Chamber's decision fluctuates between two polar opposites: it affirms the commission of crimes against humanity and describes them with excruciatingly detailed witness accounts, but it refuses to convict the defendants of such crimes. In fact, the decision even names the perpetrators, the victims, and connects the accused (Stanišić and Simatović) to the perpetrators. Then, ultimately, the Chamber fails to convict Stanišić and Simatović because the support they provided was not "specifically directed towards the commission of the crimes of murder, deportation, forcible transfer, or persecution,"¹¹⁴ but rather was "directed toward establishing and maintaining Serb control over these areas."¹¹⁵ The Chamber seems to adopt a new standard of "specific direction," which was previously used to acquit Ante Gotovina and Mladen Markac, two Croatian generals accused of using military force to compel Serbian civilians to flee Croatia.¹¹⁶ Just as the ICTY seemed

112. *Id.* at 468-69.

113. *About the ICTY*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Jan. 8, 2014).

114. Judgment Part II, *supra* note 3, ¶ 2360.

115. *Id.*

116. *Id.* ¶ 1264 ("Proof of specific direction in such circumstances requires evidence establishing a direct link between the aid provided by an accused and the relevant crimes committed by principal perpetrators. Specific direction may involve considerations that are closely related to questions of mens rea and evidence regarding

close to setting a groundbreaking precedent, it almost immediately backed off.

The ICTY has had access to more prominent suspects and an opportunity to set a precedent of prosecution of large-scale war crimes. The Chamber had succeeded in convicting heads of state, senior generals, and other perpetrators. These prior cases may set precedents for future trials for genocide and other crimes against humanity. However, the recent acquittals rejecting the earlier standards of a leader's culpability threaten the legacy and impact of the ICTY. The implication set by these cases may affect conflict-ridden governments like Syria and Afghanistan in the future.

Further, despite the ICTY's achievements, the creation of similar ad hoc tribunals is unlikely.¹¹⁷ There is hesitation among international actors to establish another large and expensive U.N. bureaucracy funded by mandatory contributions of U.N. members.¹¹⁸ Some states are wary of the U.N. Security Council creating tribunals for political reasons rather than principle.¹¹⁹ Much of the hesitation stems from the flaws in these tribunals that have been highlighted in the ICTY's execution. The proceedings are extremely lengthy, lasting several years, and, as one scholar suggested, may "possibly violat[e] the defendant's right to a speedy trial and the victims' right to see justice done quickly."¹²⁰ The tribunals have only a minor effect on reconciliation and national justice, and have had little deterrent effect.¹²¹ Moreover, as demonstrated by the ICTY, these tribunals are only able to try a small percentage of offenders, with erratic sentencing practices that result in sentences that are far too lenient given the seriousness of the offenses.¹²²

an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes. The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the principal perpetrator. The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind. This includes the specific intent of the principal perpetrator, if the crime requires such intent. The aider and abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.").

117. RATNER, *supra* note 37, at 252.

118. *Id.*; Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 543-44 (2004) (arguing that tribunals' results may not justify their consumption of 10 percent of annual UN budget).

119. RATNER, *supra* note 37, at 252.

120. *Id.*

121. *Id.*

122. *Id.*

IX. CONCLUSION

Professor Jenia Iontcheva Turner wrote “[a] perception exists, perhaps fueled by the politicized nature of the recent high-profile trials of Saddam Hussein and Slobodan Milosevic, that international criminal trials are essentially political events cloaked as judicial proceedings.”¹²³ The ICTY has the opportunity to prove that international criminal trials can be more than political events and thus the ability to impact the future of international criminal law.

The formation of and initial indictments by the ICTY provided early hope of prosecuting those responsible for atrocities that occurred only a decade earlier. While the ICTY was founded in hopes of healing victims and bringing peace to the region, recent decisions—in particular the acquittal of Stanišić and Simatović—threaten the future of the ICTY and raise concerns about the effectiveness of criminal tribunals throughout the world. As former Chief Prosecutor of the ICTY Carla del Ponte has said,

The ICTY has confirmed that it tends to abolish the concept of command responsibility in international criminal law as well as the concept of complicity of military and civilian leaders in systemic violence. This has rewarded the masterminds of the system who managed, through deception, to plan and organise violence on a mass scale . . . , making sure that they did not write a direct order.¹²⁴

The Stanišić and Simatović judgment leaves the international law of facilitation in a state of disarray. The ICTY’s decision could have repercussions across the global stage and in future trials of war criminals. In order to retain the legacy of the ICTY and significantly impact future ad hoc tribunals and criminal trials, the ICTY must repudiate aspects of the Stanišić and Simatović judgment on appeal or correct its reasoning in future cases regarding complicity. With the upcoming trials of the leaders Radovan Karadžić and Ratko Mladić, the ICTY must return to the principle that an individual’s senior position can no longer protect them from prosecution if so clearly accepted in earlier cases.

123. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT’L L. 529, 531 (2008).

124. *Acquittal of Stanišić and Simatović yet another blow to ICTY’s credibility*, DALJE.COM (June 1, 2013, 6:22 PM), <http://dalje.com/en-world/acquittal-of-stanistic-and-simatovic-yet-another-blow-to-ictys-credibility/470412>.

