

The ICTY Verdict and Its Illogicalities

(first published, in Croatian, in *Jutarnji list*, on December 24, 2011)

Neven Sesardić

In this article I criticized the 2011 verdict of the ICTY (International Criminal Tribunal for the former Yugoslavia), which found two Croatian generals guilty of war crimes and sentenced them to 24 and 18 years of imprisonment, respectively. Less than a year after the appearance of my article the Appeal Chamber of the ICTY overturned the verdict and acquitted the two generals.

Many people in Croatia feel that the recent verdict of The Hague Tribunal (ICTY) in the trial against the Croatian generals Ante Gotovina and Mladen Markač is unjust and untenable. Are you, my unknown reader, of the same opinion? If yes, I'll venture a bet that you haven't carefully read the entire verdict of the Tribunal (1,377 pages). But no worries, I won't criticize you for that. I'm actually on your side and I want to show that you're right even more than you think. Namely, if you formed a negative opinion about the verdict on the basis of information from the media, a more detailed insight into its basic argument will just strengthen your first impression.

Beyond a reasonable doubt?

Let's look at one of the main charges brought by the Tribunal: ethnic cleansing, i.e. the alleged expulsion of many Serbs from Croatia in 1995. This specific charge entails the presence of the following three elements: (1) that the expulsion of the Serb population was planned by the Croatian authorities, (2) that this plan was carried out, and (3) that the Serbs left Croatia because of the implementation of that plan, and not for some other reason.

Before analyzing the Tribunal's decision in more detail, it is important to explain why proving this kind of charge is an extremely difficult task. The basic reason is that the Tribunal set an extremely demanding standard of proof, which many countries do not have in their criminal law: proof beyond any reasonable doubt. This standard of proof means that a guilty verdict must not be delivered as long as there remains any reasonable doubt about the guilt of the accused. In other words, it is not enough to prove that it is more likely than not that the

accused committed the crime. It is not enough even to prove that it is highly likely that the accused is guilty. Much more is needed. The evidence presented to the court must be so strong as not to leave room for any doubt in the mind of a reasonable person about the guilt of the accused.

Such a burden of proof already makes it very difficult to justify a decision about someone's guilt. But things get even tougher when we recall that, as mentioned earlier, the charge of ethnic cleansing consists of three elements. Consequently, in order for the charge to be proved, it is obvious that each of these three elements must be proved separately. Furthermore, for the charge to be proved beyond any reasonable doubt, each of these three separate elements must be proved beyond any reasonable doubt. For if there happened to be even the slightest reasonable doubt about the presence of any of the three elements, then a reasonable doubt would also exist about whether the alleged crime of ethnic cleansing was committed (because the crime logically implies the presence of each of the three elements). All of this follows from a fundamental principle of the probability calculus, according to which the probability of a joint event (ABC) can never be higher than the probability of any of the component events (A, B, or C).

When we look at the prosecution's case from this point of view, the rules of the game are much clearer and it becomes more evident how this standard of proof complicates the justification of a guilty verdict. But the devil being in the details, let's delve into them.

1. Planning the "crime"

Both the indictment and the consequent verdict about the expulsion of the Serbian population revolve around the transcripts of the Brioni meeting held at the end of July 1995. Oddly, in the part of the verdict in which this document is analyzed in detail, it is difficult to find anything that could be seen as proof (let alone proof beyond any reasonable doubt) that the forcible displacement of Serbs from Croatia was really planned at the Brioni meeting. The best indication of how little evidence there is for such a serious charge is the fact that in its search for justification the Trial Chamber even had to engage in a semantic discussion of the possible interpretations of a single statement that President Tuđman made in the meeting.

Moreover, the judges went out of their way to analyze the meaning of the Croatian word *tobože* (translated as “ostensibly”), trying to fathom what Tuđman had in mind when he said that the Croatian Army should “...give [the Serbs] a way out, while ostensibly guaranteeing their civil rights...”

It took the Court just two short steps to conclude that there was indeed a plan for ethnic cleansing. In the first step they concluded (a) that this particular statement by Tuđman was in fact “an expression of the true intent to show the Serbs a way out but at the same time to give them the impression that they could stay,” and based on this they further concluded (b) that the references at the meeting to civilians being given a way out “were not about the protection of civilians but about civilians being forced out.” Both steps are very problematic.

First, with respect to claim (a), even though it may appear that the use of the word *tobože* could suggest doubts about the sincerity of the intention to guarantee Serbs their civil rights, isn't it a bit extreme to rely on such meager evidence to draw this momentous conclusion that clears the path for long imprisonment sentences, and all this just on the basis of a single word casually spoken out in a discussion?

Secondly, the claim (a) that the Croatian authorities intended (with dubious sincerity) to make the departing Serbs believe that they could stay by no means justifies the claim (b) that there was a plan to force out those civilians from their homes. Moreover, it is completely unclear how people could be forced out merely by being shown a way out, and by being verbally reassured that they could stay. Everyone knows that the claim of expulsion necessarily implies the presence of force or the threat of force. And a proof of that absolutely necessary element (the planned use of force or the threat of force) was completely absent from the Chamber's analysis of the alleged plan of the “joint criminal enterprise.”

But didn't the Croatian political leadership expect that many Serb civilians would leave Croatia during and after Operation Storm? And didn't the participants of the Brioni Meeting in fact wish for this kind of outcome? This is possible. However, that subjective moment is neither easy to prove nor was it, for that matter, an object of proof. Besides, even if it had been proved, this subjective moment in itself would neither be criminal nor could it constitute a

crime of expulsion of civilians. By way of analogy, if I wanted to get rid of my noisy neighbor and even if I took certain (successful) steps in accomplishing that goal, no one could accuse me of expelling him from his home, unless I used force, a threat of force or some other illegal action.

It seems to me that, when thinking about the Tribunal's verdict, many people commit the same fallacy. They ascribe an extremely negative attitude toward the Croatian Serbs to the then Croatian leadership and particularly to Tuđman (an attitude they themselves strongly condemn), and on this basis, they conclude that the military operation Storm must have also been to a certain degree contaminated with this "chauvinism from the top". This reasoning makes some people think that the Hague verdict has certain validity after all.

But this is wrong. Whatever Tuđman's position toward the local Serb population may have been, his actions are not on this ground automatically subject to legal condemnation, even if they were motivated by such morally questionable attitudes. How easy it is to fall into this kind of trap and make an inferential leap is best shown in the case of my old acquaintance Slavko Goldstein, a man who usually tries to give reasoned opinions and avoid taking extreme viewpoints. He recently expressed his agreement with the Tribunal's verdict and also said that the Croatian generals Gotovina and Markač could have received a significantly lower sentence had their lawyers defended them as mere executors of the "joint criminal enterprise" and denied their role as "organizers." This strategy would have basically come down to shouldering most of the guilt on Tuđman as the "mastermind" of the criminal enterprise.

But what exactly is Tuđman guilty of, according to Goldstein? The only thing he [mentions](#) is that Tuđman "passionately wanted to have as few Serbs as possible in Croatia" and that "when decisions were being made about Operation Storm, I can imagine, knowing him personally, that Tuđman was very pleased with the fact that many Serbs were already leaving." Even if all of this were true, there would still not be a shred of any criminal liability there, and surely not for such a serious charge as ethnic cleansing. Goldstein's speculations about what Tuđman "passionately wanted" or what he was "very pleased with"

are completely irrelevant in the discussion on the Tribunal's verdict, at least as long as that kind of analysis of Tuđman's psyche is not credibly connected with some of his alleged criminal actions or plans. And Goldstein has provided no such connection.

The moral to be drawn from this and many similar examples is that we should not take our political or personal aversion toward someone (however morally justified that aversion might be) as a sufficient reason to support severe criminal sanctions against that person, and particularly not when these sanctions would have no legal justification.

For those Croatians who believe that the Croatian generals are innocent but that Tuđman deserved to be convicted in The Hague, I propose the following test. Imagine that in those crucial moments for Croatia in the 1990s it was not Tuđman who planned the liberation of the occupied territories, but some other Croatian politician whom you personally like better. Imagine further that the Tribunal's verdict had completely the same content as now, but with the sole difference that Tuđman's name was everywhere replaced by the name of your favorite politician (and similarly with Šušak and other potential "bad guys"). Of course, in this kind of scenario certain statements by your favorite politician would sound strange and even shocking. But times were hard, people often crack under challenging circumstances, or maybe it is precisely then that they show their true nature. Obviously, you have to be prepared for unpleasant surprises. Well, casting aside these peripheral issues, the point of this entire thought experiment is the following question: would you still believe in such an altered scenario (and only on the basis of the evidence presented before the Tribunal!) that the President of the Republic of Croatia should be considered guilty of crimes against humanity? I hope that this test of imagination will lead at least some of you to re-examine your opinion.

All in all, this analysis suggests that, with respect to the first of the three mentioned elements of the charge (i.e. the planning of the crime), the Tribunal's verdict has offered nothing that would come remotely close to the level of proof "beyond any reasonable doubt."

2. From plan to implementation

The second element of the alleged crime is the implementation of the plan to forcibly displace Serb civilians. In support of that charge, the Tribunal claims that the excessive

shelling of Knin and certain other areas caused fear and panic among the local civilian population, and subsequently led to their mass departure from Croatia.

Let's leave aside the explanation of the mass departure of Serbs for a moment because this is the third element of the alleged crime. The focus here should be on the explanation of the excessive shelling. According to the assessment of the Tribunal itself, of all the projectiles that fell on Knin during the operation Storm, only fifty or so hit the locations that were not legitimate military targets (which amounts to around 5 percent of the total number of projectiles).

Why did this happen? One possible explanation would be that the Croatian military commanders estimated that firing fifty projectiles on non-military targets would be sufficient to achieve the "set goal" of intimidating Serb civilians and that this was how they tried to implement the plan of ethnic cleansing entrusted to them. This scenario is certainly logically possible, but not much more than that. It was certainly not proved, and especially not beyond any reasonable doubt.

Some of the alternative, and initially no less plausible, scenarios include the following: (i) that these fifty projectiles may have simply missed their intended target due to a technical malfunction or human error, or (ii) that the Croatian military commanders (taking into account the official doctrine of the Krajina Serbs about the so-called "armed people" and their proclaimed obliteration of the distinction between soldiers and civilians) wanted to preemptively discourage any idea of armed resistance from ostensibly civilian areas, or (iii) that non-military locations were targeted intentionally, but only in order to crush resistance as quickly as possible, and not with the aim of causing an exodus, etc. With all these open possibilities the door to reasonable doubt remains wide open.

The court examined scenario (i) very superficially and dismissed it without adequate analysis, whereas scenarios (ii) and (iii) were not considered at all. Naturally, the truth of some of these alternative scenarios could still have brought with it a certain degree of guilt of the military commanders for some of their actions, but it would certainly exclude the

possibility of accusing them of the intentional expulsion of civilians through excessive shelling.

Many commentators found some justification for the Tribunal's verdict in the fact that after the operation Storm certain crimes that were committed against the Serb civilian population were left unpunished. However, that would justify the verdict only if the absence of punishment indicated that these crimes were planned or at least that it was somehow communicated to Croatian soldiers that these actions would be tolerated. There is no evidence of this, though. On the contrary, the Tribunal's verdict itself mentions explicit instructions from the Ministry of Defense as well as the generals' orders strictly forbidding burning, looting, harassment of civilians, etc. Even more important is the following general observation: if an officer under whose command a crime occurred does not afterward make sufficient efforts to punish the perpetrators, this fact alone does not mean that he wanted the crime to be committed or that he enabled it or in some way authorized it. He may be held liable for the fact that no one was punished, but he cannot, on this basis alone, be held to any degree responsible for the crime itself.

3. Why did they leave?

We see that the Tribunal was unable to prove either the existence of a plan to expel the Serbs or the implementation of that plan. But, even if both those things had been proved beyond a reasonable doubt, this still wouldn't have been enough to justify the verdict, because then it would have been necessary to prove the existence of the remaining, third element of the crime: that the departure of Serbs was really *caused* by the actions of the Croatian army, and not by some other factor.

But a potential alternative cause not only existed but had been screamingly present all those years during the Serb insurgency. I remember that just before the beginning of the war an acquaintance of mine, a Croatian Serb, went with a delegation to the then occupied areas to see if there was any way of finding a compromise through negotiations. Upon his return to Zagreb, he said that despite its repeated efforts the delegation wasn't able to get any list of specific demands from the other side, as a precondition for their agreement to a peaceful

reintegration into Croatia. He reported: "We asked them what they really want, but they didn't make any demands. They simply don't want to live in Croatia."

And this was the same clear message that the insurgent Serbs would continuously send later on, through their numerous other actions. Well, if this kind of unrelenting attitude and resolute refusal of any form of the Croatian state were characteristic of the mentality of the local Serb population, then it really seems that the following possibility should be seriously considered: that after Croatia eventually managed to establish its jurisdiction over its occupied territory many of those people who "simply didn't want to live in Croatia" concluded that the best solution for them would be to leave. This kind of reaction would be perfectly rational (from their point of view), given their at-the-time radically negative attitude toward Croatia and their ongoing and consistently manifested unwillingness to accept any kind of compromise.

Since this exceptionally strong and important psychological factor was not considered in the Tribunal's verdict, and particularly because it was not refuted as a possible rival explanation for the exodus, it is impossible to agree with the Tribunal's statement that the "primary and direct cause" of the Serb departure was the fear caused by artillery attacks.

What is particularly odd is that no attention at all was paid to this alternative explanation even after the Defense explicitly pointed out a very revealing fact that Serbs had also left the area of Eastern Slavonia en masse during its peaceful reintegration in the territory of the Republic of Croatia, and that they also left Kosovo as well as some parts of Bosnia after the international community took control over those territories. Note that in none of those situations was there excessive or non-excessive shelling.

Let's compare the Serb exodus from Eastern Slavonia and from Knin. It is obvious that in the case of Eastern Slavonia the fear due to artillery attacks could not have been the "primary and direct cause" for the Serbs' departure from Croatia. It must have been something else. But then isn't it quite reasonable to conclude, given the many similarities between these two situations, that the cause of the exodus from Knin might have been the same?

This type of inference relies on one of the principles of basic common sense, which is nowadays regularly mentioned in textbooks on critical thinking and which was codified by John Stuart Mill in the mid-19th century as the so-called “method of agreement”. It says: “If two or more instances of the phenomenon under investigation have only one (antecedent) circumstance in common, the circumstance in which alone all the instances agree, is the cause of the given phenomenon.” The phenomenon under investigation, in this case, is the departure of Serbs from Croatia, and the two instances of the phenomenon are Eastern Slavonia and Knin. The only relevant circumstance in common in these two instances is the intense aversion toward life in the independent state of Croatia. Therefore...

I am not implying, of course, that this causal scenario is necessarily true. What I am trying to say is that it is highly plausible, that elementary logic suggests it as the first causal hypothesis to be examined, and that anyone who defends a different explanation while completely ignoring this scenario, cannot pretend to have proved anything convincingly (and certainly not beyond any reasonable doubt).

So although each of the three elements of the Tribunal’s argument needs to be proved if the responsibility of the Croatian authorities and the Croatian army for ethnic cleansing is to be established, we see that none of them withstands critical analysis and that the verdict hence loses its rational support on all three counts, particularly in the light of its exceptionally demanding standard of proof.

Double standards

The authority of the Tribunal to issue a verdict cannot be disputed because Croatia has accepted the jurisdiction of the Tribunal. Nevertheless, the verdict itself is difficult to accept, and not only because it is legally unfounded and profoundly unjust. There is something else here that jars the mind: double standards. While the key military commanders of the Croatian war of liberation are ending up in jail as criminals even though their guilt was never proved, leaders of another recent war of liberation are being celebrated as great statesmen and source of inspiration, even though they were undoubtedly involved in crimes of horrific proportions.

Let's look at just one example, the massive expulsion of civilians during WWII and its aftermath. At the Tehran Conference in 1943 Churchill, Stalin and Roosevelt discussed many thorny issues, one of them being how to deal with Stalin's wish to keep a large portion of Poland after the end of the war, the very part that he annexed to the Soviet Union when he and Hitler, his then ally, attacked and dismembered that country in 1939. Churchill came to the rescue and suggested that Poland be "moved" westwards and thereby be compensated, at the expense of Germany, for the tremendous loss of its territories in the east.

In Churchill's own words from his memoirs: "I then demonstrated with the help of three matches my idea of moving Poland westward. Stalin was pleased." Of course, it must have been absolutely clear to everyone that implementing his matchstick trick would, in reality, involve the expulsion of millions of German civilians, an act which was a direct violation of the proclamation from the Atlantic Charter from 1941, according to which there were not going to be any territorial changes that would not accord with the freely expressed wishes of the peoples concerned.

Here is how Churchill openly advocated such a mass expulsion of Germans from areas in which they had been living for centuries: "Expulsion is a method which, insofar as we have been able to see, will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble. A clean sweep will be made. I am not alarmed by these transferences, which are more possible in modern conditions." (Churchill's speech in the British Parliament in 1944)

And indeed, things went according to plan and soon the "clean sweep" was made. According to unbiased sources, somewhere between 12 and 14 million Germans were forced to leave forever their homes in a movement that a historian of that period [called](#) "the largest forced population transfer in human history." At least half a million people lost their lives in the process.

No one was ever held accountable for those crimes and no politician (except Vaclav Havel) has ever expressed regret on behalf of his country for these crimes of mass ethnic cleansing in which a number of politicians were demonstrably involved.

On the other hand, we have The Hague Tribunal, which attributed to the Croatian political leadership and the Croatian army the responsibility for the same kind of crime even though this charge is in fact nothing but an unproved and arbitrary accusation.