Ratko Mladić and international criminal justice

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On the 26 June 2011, after 16 years in hiding, one of the most notorious alleged war criminals from the former Yugoslavia was captured in Serbia. He has been sent to the Netherlands to face charges (first issued in 1996) of genocide, crimes against humanity and war crimes before the International Criminal Tribunal for the former Yugoslavia (ICTY), an international tribunal set up by the UN Security Council in 1993. These charges include his alleged responsibility for the Srebrenica massacre in 1995, in which between seven and eight thousand Bosnian Muslim men and boys were taken from that town and shot by firing squads. Until his transferal to the ICTY Mladić was the most high-profile fugitive from that Tribunal.

Mladić's arrival in the Hague comes at a helpful time for the ICTY. After almost two decades, the ICTY, intended as an ad hoc measure, is reaching its twilight years. After many years of frustration with the pace of trials at the ICTY, and foreshadowing its winding-down, in December 2010 the Security Council provided for a 'residual mechanism' to replace the ICTY in the near future. It would have been politically embarrassing for the ICTY and the UN to have this occur prior to Mladić being tried. There is one other indictee who has not yet been transferred to the Hague, the Croatian General Göran Hadžić, but his case has not been such a cause celébre as Mladić's, and as such, his trial could be entrusted to a residual mechanism or a domestic court more easily.

The fact that the ICTY is coming to the end of its major operations is an important backdrop to the proceedings with respect to Mladić. He has been indicted for participating in a joint criminal enterprise to remove all Bosnian Muslims from parts of Bosnia. Only parts of the indictment relate to Srebrenica. He has also been indicted for the siege of Sarajevo, ethnic cleansing in parts of Bosnia and taking UN peacekeepers hostage.

This raises a dilemma for the prosecutor. Although it is important for a prosecution to convey all of the wrongdoing the defendant has been accused of, practicality may militate in favour of a more limited approach. The prosecutor in the Milošević case sought to implicate him in a large scale conspiracy to dominate all of former Yugoslavia. This led to an extremely lengthy trial which culminated in the death of the accused rather than a judgment; a situation which satisfied no one. Although the precise state of Mladić's health is not entirely clear as it stands, he is neither young nor especially fit.

The prosecutor thus has a choice, either cut down the indictment, or go 'for broke' on all of the charges. The former approach would keep the trial to a manageable size and timeframe, but at the expense of completeness. There would also be the risk of an acquittal on the more limited charges. If this were to come about, owing to the time the ICTY has left, it would likely mean that Mladić would not have to face many charges, and could walk free without having to answer for all of his alleged conduct.
One other possibility for economizing on time would be to join his trial to that of another alleged member of the same joint criminal enterprise, Radovan Karadžić, who is already on trial in the Hague. This option is unattractive. Karadžić has already been on trial before the ICTY for some years now, and would be likely to protest at the joining of another case to his at this stage. Mladić would also be unlikely to take such an approach lying down. A request for a lengthy delay of a joint trial would be an almost inevitable outcome of an attempt to join the cases.

Furthermore, neither Karadžić not Mladić are invested in giving the ICTY any leeway with respect to their trial. Karadžić is insisting on representing himself (although he has legal assistance behind the scenes) and engaging in both delaying tactics and grandstanding (as Milošević did before him). Similarly, Mladić has made clear at his initial appearance that he was not going to be co-operative, describing the charges as 'monstrous' and 'obnoxious', and (rather implausibly) claiming never to have heard of them before before. He has implied that his defence will be of his 'country and of his people', giving rise to a concern that he will use his trial as a soapbox from which to propagandise on the world stage. This may be the case, but it raises the question of what the alternative to trial would be. Towards the end of the Second World War Winston Churchill used the soapbox argument to support his suggestion that the leading Nazis be summarily shot rather than tried. To their credit, Roosevelt and Stalin managed to convince him otherwise.

As with all efforts to prosecute international crimes, allegations have been made that the prosecution of war criminals in the Balkans is selective, in that other war crimes go unpunished. This is, in some ways true. However, it is not, in law, a defence for anyone charged with such an offence any more than it is for a burglar in Birmingham to argue that burglars in Bournemouth have not been prosecuted. It does, on the other hand, impact upon the legitimacy of the international regime for the prosecution of international crimes. The extent to which it does so depends in many ways on whether the glass is seen as half-empty or half-full. Many war crimes are passed over in silence, but far more are now subject to criminal prosecution than were twenty years ago. The existence of the permanent International Criminal Court, whose statute has been ratified by 115 States, gives at least some grounds for cautious optimism, even though some claim its practice is also selective, in particular owing to its focus on African conflicts.

Professor Robert Cryer
Professor of International and Criminal Law in Birmingham Law School

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