Later Rather Than Sooner: Time and Its Effects on the Karadžić and Mladić Trials

Iva Vukušić
Centre for Conflict Studies, Department of History and Art History, Utrecht University, Utrecht, The Netherlands
I.Vukusic@uu.nl

Abstract

Radovan Karadžić and Ratko Mladić, the war-time Bosnian Serb leaders, were first indicted by the UN Hague-based International Criminal Tribunal for the former Yugoslavia in 1995. The two hid for many years, with their trials starting only in 2009 and 2012, respectively, after they were apprehended in headline-generating operations. Their continued evasion of trial was constantly critiqued. After all, thousands were killed, tortured, detained, raped, expelled, and robbed during the war in Bosnia and Herzegovina, and these two men were widely seen as responsible. Pleas were made by survivors and frustration expressed on behalf of the victims, as many said, ‘justice delayed is justice denied’. However, as this article shows, the many years the two high-ranking individuals spent hiding were well-used to collect evidence which led to their convictions and life sentences. Contrary to conventional wisdom, delay can actually be beneficial in prosecuting leaders for atrocity crimes.

Keywords
ICTY – Bosnia and Herzegovina – atrocity – justice – genocide – Srebrenica

1 Introduction

The maxim ‘justice delayed is justice denied’ is frequently invoked when discussing atrocity crimes and efforts to achieve some accountability for the most heinous acts of violence. Common sense tells us, naturally, after a horrible crime, justice should be swift. In the world of international criminal trials,
many of which take place in The Hague, this saying—while often spoken—is not always true. Delays, experienced as frustrating and infuriating even, by survivors, activists and observers, can have crucial benefits. In this article, I will present some of those benefits, and challenge conventional wisdom, by analyzing two important trials at the International Criminal Tribunal for the former Yugoslavia (ICTY).¹

The accused in both cases were high-ranking Bosnian Serb leaders, charged with a litany of crimes committed during the 1992–1995 war in Bosnia and Herzegovina, which resulted in the death and disappearance of around 100,000 citizens.² The first, the politician Radovan Karadžić and the second, his military counterpart, general Ratko Mladić. Karadžić was the war-time President of Republika Srpska, the Bosnian Serb entity, and the Supreme Commander of its armed forces. Mladić was the Commander of the Main Staff of the Army. Both held their positions throughout the war. Both were sentenced to life imprisonment.³

The men were found guilty for murders, beatings, arbitrary detention and torture, mass expulsion, from Prijedor in the west of the country, through the siege of Sarajevo, to Višegrad and Zvornik in the east. These were war crimes and crimes against humanity. They were also convicted for the mass executions after the fall of Srebrenica, legally qualified as genocide. The evidence judges reviewed when finding them guilty was painstakingly collected and verified over the years in a number of trials, as the two men evaded justice for over a decade.

During these fugitive years these men, their bodies at least, and how they presented to the world, changed. Karadžić, notable in the 1990s for his thick gray hair and square-shaped suits, fully adapted to his new persona. A new-age guru look he perfected, along wide a fake name, worked well as a disguise—a much thinner body and a thick mane worn in a bun along with a beard looked

¹ Much has been written about the Tribunal, closed since the end of 2017 (and with its final cases being completed by its daughter-institution, the International Residual Mechanism for Criminal Tribunals, IRMCT), but two books stand out. One is Diane Orentlicher’s Some Kind of Justice (Oxford University Press, Oxford, 2018) and the volume by C. Stahn, C. Agius, S. Brammertz and C. Rohan (eds.), Legacies of the International Criminal Tribunal for the former Yugoslavia (Oxford University Press, Oxford, 2020).
nothing like his previous self. The former poet and psychiatrist looked healthy, his new lifestyle clearly suited him. Once shaved, for his first Court appearance in The Hague, he stood proudly and looked thin but well. Mladić’s escape seems to have been harder on the general’s body. He was a stocky, arrogant-looking man while he commanded the Bosnian Serb Army (Vojska Republike Srpske, vrs). Once captured, he appeared in Court frail, showing obvious signs that medical problems have left deep marks. It was much clearer at the time that Mladić was the one for whom questions like ‘is he going to survive this’ and ‘how will this look’ were much more pressing. Time was then seen mostly as a challenge, as the Tribunal was also operating under pressure to finalize proceedings and close.

But time is not only a problem to overcome. One of the rare voices emphasizing the benefits of the passage of time is Alex Whiting, an American prosecutor with relevant experience in different (international) courts. Whiting described the consensus about the need for justice to be expeditious. After all, ‘delays in bringing perpetrators to justice can diminish the deterrent value of such prosecutions, undermine the quality of the evidence in the case, allow perpetrators to continue living in impunity (and continue committing crimes), discourage and marginalize victims, and lead to a squandering of the world’s interest and attention which will, in time, be diverted to other cases’. Long proceedings also threaten the rights of the defendants, particularly when they are detained. Therefore, there is always a pressure to prosecute quickly. But, as Whiting notes, ‘in international war crimes investigations and prosecutions, delay is frequently inescapable, and can even be essential and beneficial to the pursuit of justice’.

When prosecution does not take place quickly, there is frustration and anger, and that is perfectly understandable. There is something almost visceral about the need for justice after atrocity, and the need for justice now. Survivors emphasize their expectations for convictions to be delivered soon. When they are not—they are disappointed. That is exactly what happened with the Karadžić and Mladić cases during their fugitive years. After all, the charges covered crimes committed during the widespread violent campaign to expel non-Serbs from numerous municipalities early in the war, in the spring and summer of 1992. Those included arbitrary arrests and mass detention, killings, rape, sexual abuse and torture in camps such as Omarska, Keraterm.

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4 These questions echo some of the issues raised by Shannon Fyfe in her piece in this Special Issue on prosecuting the ‘barely alive’. See S. Fyfe, ‘Negative Aesthetic Experiences of Prosecuting the Barely Alive’, in this issue, pp. 23–42.

and Trnopolje.\textsuperscript{6} Thousands were expelled. Stories about abuse were reported across the globe. Charges also included relentless shelling and sniping of civilians in Sarajevo, targeted while standing in line to get water or getting food. Those incidents, such as the attacks on the Markale market, resulted in hundreds being killed and many more injured, maimed and traumatized for life.\textsuperscript{7}

Srebrenica was a significant part of the indictment too, and the two leaders were charged with genocide in November 1995, just months after the first indictment was issued.\textsuperscript{8} Calls for justice began almost immediately, while the remains of many victims were still lying hidden in mass graves. The first public protests, mostly by women, began in early 1996 in Tuzla, where many survivors lived.\textsuperscript{9} These demands for justice were constant in the two leaders' fugitive years, and one of the reasons why they were apprehended was consistent pressure from civil society, from the region and further afield. Survivors and human rights activists did not allow the two to be forgotten.

Different prosecutors have expressed frustration about high-level fugitives escaping justice.\textsuperscript{10} The early prosecutions were mostly against small-fry defendants, the only ones the ICTY had the clout to get at the time, or who half-accidentally landed in its lap. Few have been as relentless about it as Carla Del Ponte whose mandate ran between 1999 and 2007. Del Ponte criticized the lack of arrests in UN Security Council reports, in meetings with heads of

\textsuperscript{6} These camps were made more widely known after a visit by journalists in the summer of 1992. The footage resulted in the Time magazine cover featuring the skeletal Fikret Alić standing next to the camp wire in Trnopolje (See T. John, 'The Story of This Shocking Image From a Prison Camp in Bosnia Continues 25 Years Later', Time (22 November 2017), available online at https://time.com/5034826/fikret-alic-time-cover-bosnia/). Journalists interviewed detainees in Omarska about the conditions inside. Džemal Paratušić calmly stated, thin and pale as he was, 'I don't want to tell lies, but I can't speak the truth. Thank you for coming.' Journalist Vulliamy testified in several cases (See, in the Karadžić trial, exhibit number P3777, and transcript, 9 November 2011, available online at https://www.icty.org/x/cases/karadzic/trans/en/110917IT.htm).


\textsuperscript{10} Louise Arbour, the Chief Prosecutor running the Office in the late 1990s was clear about the need to be persistent: ‘The indictments will be there forever, regardless of the Tribunals ‘expiry date.’ See: Sense News Agency interview (10 May 2004), available online at http://archive.sensecentar.org/vijesti.php?aid=8586.
states and media appearances. However, she remained hopeful, at least publicly, even as she was leaving her position: ‘It is not a failure...not for me or the tribunal...it is only a question of time’. She was right.

The delay Del Ponte was facing, and that was causing frustration among survivors, in putting the two Bosnian Serb leaders on trial was caused by a lack of political will to make the arrests. Serbian officials, in fact, helped hide the two. Delays can, of course, also be a result of factors that have little to do with arrests and can take place even when a suspect is in custody. They can be a result of the complexity of the case and investigations, challenges of disclosing vast amounts of material from the prosecution to the defense and other procedural issues, as well as with the health of the accused. Clearly, context matters, and issues will differ from case to case, from accused to accused, and from court to court. While this article limits itself to analyzing the cases of Karadžić and Mladić, some conclusions will be relevant for other situations, such as the Syrian conflict, to name but one example. Pressures to proceed quickly exist there too.

This article asks what would have happened if Karadžić and Mladić had been arrested in 1995, when first indicted, only months after some of the worst crimes were perpetrated? What was the evidence against them then? Would these have been winnable cases leading to conviction? To anyone following the work of the Tribunal, this question causes unease. In fact, very little solid evidence was available in those early years, and possibly, likely even, too modest to convict ‘beyond a reasonable doubt’. Even in 2001, when the trial judgment

14 We have witnessed substantial delays in other ICTY trials, from Slobodan Milošević, Jovica Stanišić, to Mladić and Goran Hadžić, that had to do with the (alleged) health issues of the accused.
15 This Special Issue includes discussions about some of those contexts. Caroline Davidson’s piece on the ‘pobres viejitos’ in Chile and Hikmet Karčić’s article about the struggles of the judiciary in Bosnia and Herzegovina show the effects time had on the dynamics, perceptions and even the viability of trials as tools in dealing with past human rights violations and mass violence. See C. Davidson, ‘Of Old Men, Country Clubs, and Atrocities: The Visualities and Externalities of Detaining Elderly Human Rights Violators in Chile’, in this issue, 142–165. See also H. Karčić, ‘The Court is Accommodating our Murderers’: Prosecuting Aged Defendants in Domestic Courts in Bosnia and Herzegovina,’ in this issue, pp. 209–224.
was delivered in the case of Radislav Krstić, which was the first ICTY genocide conviction, judge Rodrigues said ‘very few mortal remains have been found’ of Srebrenica victims. So, even six years after the initial indictments, the important forensic evidence which would be used to convict Karadžić and Mladić years later was still being collected.

In sum, while understandably frustrating, sometimes delays, even significant ones, have beneficial outcomes, and I will demonstrate this by first providing a snapshot of the evidence used to convict the two high-ranking accused and how it was collected and analyzed. Then, I will discuss the benefits and challenges that the passage of time creates for investigations and trials, before arguing that the maxim on justice delayed being justice denied should not be so frequently and uncritically repeated, especially not for leadership cases. But first, a few words about evidence.

2 Evidence in Atrocity Crime Trials

Prosecution evidence in trials concerning high-level accused and charges of genocide, crimes against humanity and war crimes can be divided into two main categories: crime base evidence and linkage. The former, in the simplest terms, proves a crime took place. Crime base evidence may include, for example, survivor testimonies. This kind of evidence tells us what happened. The latter, on the other hand, is evidence linking the (high-level) accused to the crime. This is particularly important in leadership cases because the accused are often nowhere near where the crime is being perpetrated. An example here may be a signed order to commit the crime, or the testimony of an insider witness, confirming the leader had ordered it. As a rule, crime base evidence is easier for investigators to access.

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ICTY Krstić, Trial Judgment, 2 August 2001. The judge went on to say so few remains were found because ‘in the fall of 1995 measures were taken in order to attempt to cover up the scale of the crimes.’ Summary available here: https://www.icty.org/en/press/radislav-krstic-becomes-first-person-be-convicted-genocide-icty-and-sentenced-46-years. Full judgment: https://www.icty.org/x/cases/krstic/tjug/en/krst-tj010802e.pdf.


Insider witness are witnesses who were ‘on the same side’ as the accused and moved in circles allowing them access to information which is unlikely to have been accessible to anyone else.
This also means that prosecuting hands-on perpetrators is easier than leaders because for the latter, linkage evidence is needed for conviction. That will not be the case for someone at the execution site killing people. Prosecuting lower-level perpetrators thus tends to be easier.21 Those indictments are also normally smaller in scope, covering more limited actions. Leadership cases tend to be much bigger, and the Karadžić and Mladić cases were huge, covering a range of acts, across the country, during the entire period of the war.

Evidence in complex criminal trials where the accused is a high-ranking civilian or military leader, as was the case with the two accused here, is often extremely voluminous and diverse, including witness statements (from survivors to UN staff and diplomats), military and intelligence reports, aerial images, intercepts and DNA profiles and death certificates. Early on, it was not something anyone really knew how to collect and analyze, given that the ICTY was the first international tribunal since the end of the Second World War.22 Through the years, the very process of investigation had come under scrutiny, following discussions about how to charge, how to prioritize, in order to conduct fair trials efficiently. The death of former Serbian President Slobodan Milošević in March 2006, before the judgment was issued, was undoubtedly a factor influencing the conversation.23 After a number of disappointments with the prosecution of high-profile cases at the International Criminal Court, quality-control was a frequent topic there too.24

Importantly, trials rarely include ‘smoking gun’ evidence.25 In leadership cases, there is rarely a single document that proves it all. More often than not, what we witness in courtrooms are puzzles being constructed by both the prosecution and the defense, and the weaving of evidence and legal arguments into a narrative about the case.26 Single exhibits are relevant, but they never carry the case alone. That narrative that is being constructed, depending on

21 As Karčić’s article in this volume shows, even these cases are often a struggle when done locally, where strong political influence exists. See supra, note 15.
26 Final Briefs by the parties are the best place to look for these broad case narratives and supporting evidence.
who is presenting it, has either the aim to convict, or to acquit. The judges at trial and appellate level decide which narrative is more convincing.

3 Key Evidence in the Karadžić and Mladić Trials

Mladić, located three years after Karadžić, evaded arrest for 5,785 days. This provided the opportunity for investigators and analysts to find and make sense of enormous amounts of material. Prosecutors had the time to present evidence in court, test the validity of their arguments, and adjust their approach. In the early days, there was very little solid evidence there. Former ICTY prosecutors Joanna Korner and Alan Tieger recalled that back then much of the material came from open sources. Up to 80% were media reports, and a few statements. Only later did seizures of documents from police stations and military barracks take place. The prosecutors also used the material collected by various experts and special rapporteurs.

Indictments unveil what kind of evidence the Prosecution had at which point in time, and what they charged (which of course, does not necessarily mean that is what they would be able to prove ‘beyond a reasonable doubt’). The first indictment against both accused was issued soon after the fall of Srebrenica. That indictment made no reference to those executions, and was focused on other crimes, such as the abuse and killings in the detention camps, sniping and shelling of civilians in Sarajevo, the destruction and plunder of property and cultural and religious sites. For some of these crimes, the Prosecution charged genocide.

The indictment covering Srebrenica was issued on 14 November 1995, only four months after it became clear that thousands of men were missing after the fall of the enclave, and the first rumors began surfacing about mass executions. Jean-René Ruez, the ICTY lead investigator on Srebrenica, was in the field collecting statements already in late July. He was interviewing civilians, many of

28 Joanna Korner, speaking at the panel ‘Open Source Investigations,’ Hillary Rodham Clinton School of Law, Swansea University, 18 December 2020, online (via Zoom, https://events.swansea.ac.uk/talk/index/1762/).
29 Alan Tieger, speaking at the panel ‘Open Source Investigations’.
30 First (joint) indictment, 24 July 1995.
them surviving women, who managed to reach Bosnian government-held territory around Tuzla.\textsuperscript{31}

Subsequent investigations provided a clear time-line, showing what was going on, almost hour-per-hour.\textsuperscript{32} This second indictment, on Srebrenica, was focused on Mladić. He was there, he was the commander of the Bosnian Serb Army, surrounded by subordinates.\textsuperscript{33} Mladić was also filmed in Srebrenica, making inflammatory statements and participating in meetings where he was meting out ultimatums to petrified civilians.\textsuperscript{34} For Karadžić, it is unclear what the Prosecution had, in November 1995, to link him with the mass executions. He was, in his position of Bosnian Serb president, a ‘superior authority’, but that seems to have been it.\textsuperscript{35}

A few years later, documents started trickling in. Archives were being raided and documents seized, especially in Bosnia and Herzegovina, and investigators were knocking on more doors. They were also looking for insiders—perpetrators themselves, or eye witnesses. Insiders are particularly sensitive witnesses, because they need to testify (albeit sometimes with a concealed identity, for their protection, or without the presence of the public, in closed or private session), about what their comrades and commanders did. Often, these insiders live in the same communities as their former unit-members. That means that when insiders testify against ‘their own’, they risk not only danger to themselves and their families, but also ostracism.

A particular kind of insider testimony comes from defendants who pleaded guilty. Three individuals provided, at different times, important insights into how the structures of violence operated in committing genocide. Dražen Erdemović was the first to tell the story of Srebrenica-related executions that

\textsuperscript{31} I. Delpla, X. Bougarel and J.L. Fournel (eds.), \textit{Investigating Srebrenica: Institutions, Facts, Responsibilities} (Berghan Books, New York, NY, 2012). Initial interviews were also being conducted with Dutch peacekeepers who were in Srebrenica as it fell to Bosnian Serb forces.

\textsuperscript{32} Peter McCloskey, Senior Trial Attorney for the Prosecution, presented this time-line in a number of trials at the ICTY, most recently in the two trials of Karadžić and Mladić.

\textsuperscript{33} Krstić, the first to be imprisoned for genocide, soon became only one of the high-ranking VRS officers to be convicted for that crime relating to Srebrenica (See, for example, the Popović et al. case).

\textsuperscript{34} Much of this footage (and other evidence from the Srebrenica trials) can be seen at the Sense News Agency website ‘Genocide in eight acts’, no date, available online at https://srebrenica.sense-agency.com/en/.

\textsuperscript{35} The indictments were later amended, and the level of detail was significantly increased, reflected also in the number of pages. Karadžić’s indictment was last amended and made public on 19 October 2009, and Mladić’s Fourth Amended Indictment was made public on 16 December 2011.
he took part in as a member of the 10th Sabotage Detachment of the VRS.\textsuperscript{36} His was an early and important testimony, and he has been back at the Tribunal to answer questions in every single Srebrenica-related trial.\textsuperscript{37} In 2003 two important guilty pleas opened the possibility of more insider testimony relating to Srebrenica. Momir Nikolić, assistant commander for security and intelligence of the Bratunac Brigade\textsuperscript{38} and Dragan Obrenović, chief of staff and deputy commander of the 1st Zvornik Infantry Brigade of the Drina Corps of the VRS accepted responsibility\textsuperscript{39}. Their testimony, repeated over the years, detailed how orders and reports flowed up and down the chain of command. They made it possible to understand who knew what, who was where at the relevant time, and who put in place the system that was tasked with murdering thousands.

Crucial evidence, complementary to the statements made by those who pleaded guilty, is evidence coming from mass graves. A good example are graves related to Srebrenica—in different trials, we heard about the victims’ bodies and the DNA identification process; about the skeletons and the bullet wounds, about decomposition of human tissue in different kinds of soil; about bullet casings being found next to the bodies. We heard about the age and physical health of the victims, about the clothes they were wearing when they were murdered, and the personal belongings they carried: watches, family photos and toothbrushes. Investigators and experts testified about how the bodies sometimes had blindfolds covering their eyes and how their hands were tied with wire or cloth.\textsuperscript{40} It was meticulously researched, and it presented the incredible achievements of the broader search for human remains in the former Yugoslavia where up to 70\% of those missing were identified.\textsuperscript{41}

\begin{thebibliography}{9}
\item[37] Case information sheet for Dražen Erdemović available online at https://www.icty.org/x/cases/eredemovic/cis/en/cis_eredemovic_en.pdf.
\item[38] Case information sheet for Momir Nikolić available online at https://www.icty.org/x/cases/nikolic/cis/en/cis_nikolic_momir_1.pdf.
\item[40] Dean Manning was the investigations team leader at the ICTY, and he testified in a number of trials, from Milošević, to Mladić. Here is the transcript of part of his testimony in the Mladić trial, 11 July 2013, available online at https://www.icty.org/x/cases/mladic/trans/en/130711ED.htm.
\item[41] At the opening of the Hague offices of the International Commission for Missing Persons, the then-Foreign Minister of the Netherlands, Bert Koenders, speaking on behalf of an important donor country, confirmed this number. See: https://www.gov
impressive result, in stark contrast to conflicts where thousands die, and are dumped in pits, never to be returned to families for a proper burial.

One important part of the case which was included in the Mladić trial but not the Karadžić proceedings was the evidence about the Tomašica mass grave in western Bosnia. After considerable litigation, in 2014, the Prosecution was allowed to reopen its case and present evidence on one of the biggest mass graves in the country. This evidence was unavailable before, given that the grave was discovered only in 2013. The Prosecution had attempted to include it in the Karadžić case, but the judges thought the case had advanced too far, so they rejected it. This important evidence, made available so late in the process, 18 years after the first indictments, is remarkable, and its importance cannot be overstated.

What is really interesting is that Tomašica was suspected, for a long time, to hold many bodies, but this being a large area of a former mine made it difficult to actually find them—only 56 were found by 2006. It was also important as one of the biggest graves in the country, yet unrelated to Srebrenica. These were bodies of those killed early on in the war, as the expulsions of civilians swept across western Bosnia, the region made notorious by the camps. The grave appears in a notebook Mladić used during a meeting, when he wrote on 27 May 1993, that there were questions being raised about the number of bodies in the mine. A police chief in Prijedor, Simo Drljaća, later indicted by the ICTY and then killed while resisting arrest, made the point that the bodies needed to be destroyed ‘by burning, grinding or some other way’. Mladić said to the local officials that ‘they killed them, so they should get rid of them’. Had the two accused been tried earlier, the details of the Tomašica-related deaths would never have been included.

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44 C. Fournet, ‘Face to face with horror’: The Tomašica mass grave and the trial of Ratko Mladić, 6(2) Human Remains and Violence (2020) 23–41.
From the approximately 10,000 exhibits in the Mladić trial, and a comparable amount in Karadžić, there is space now to note merely another few examples. One is the so-called Kravica footage, made by Zoran Petrović Piroćanac, a Belgrade-based journalist embedded with Serb forces after the fall of Srebrenica. Then there is the large set of documents belonging to the military, covering areas where many crimes, including the Srebrenica genocide, were perpetrated. Finally, the execution video made by the Scorpions paramilitary unit, and Mladić’s own notebooks. All of these were recovered years after the initial indictments from 1995.

The mid-2000s were incredibly fruitful for evidence-collection. One important video, created by Piroćanac, made its way to the ICTY Prosecution then. The footage was crucial, and there was much controversy surrounding the attempts of the author to remove the most incriminating parts. That were a few seconds of shaky video, filmed from a moving car, showing a pile of dead bodies in front of the warehouse in the Kravica village near Srebrenica, where the first mass execution took place, on 13 July, after the fall of the enclave. This was a rare glimpse into what the perpetration of genocide looked like. It was this kind of evidence being linked with military and intelligence documents and witness testimony and DNA identifications, providing a detailed picture of what was taking place in the field, as crimes were being committed. One of those important document collections was the Drina Corps Collection, described by ICTY investigator Blaszczyk, as he stated in court, in the Karadžić trial, that it was handed over to the Prosecution in early 2005. It was 350,000 pages of documents, 360 maps and about 3500 photographs.

The year 2005 brought another important exhibit to the judges, but also to public attention. In the Milošević trial, a video was played. The tape came to be known as the ‘Scorpions video’ and it has been played in Srebrenica-related trials since. It shows members of the Scorpions unit deployed around Trnovo, Bosnia and Herzegovina, escorting six men and boys captured after the fall

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49 The video was exhibit P1540, and P1541 and P1542 (different edits of the same original tape) in the Mladić trial. Tomasz Blaszczyk, an ICTY investigator, testified about this video on 7 June 2013, available online at https://www.icty.org/x/cases/mladic/trans/en/130607ED.htm. This video is also discussed in other Srebrenica-related trials.

of Srebrenica, by now bloody and dirty, scared and exhausted, to a field and shooting them. It is the only video of executions, filmed by perpetrators, we have from the former Yugoslavia. A few years later other crucial material was recovered—the notebooks Ratko Mladić wrote during his service. In 2008 and 2010, these notebooks were recovered in Belgrade. The material was found behind a fake wall in the Mladić family home. It contained a set of notebooks and audio recordings from the war, with one notable part missing—the period when Srebrenica was captured.

All of this material slowly began unearthing details about the perpetrators. For Srebrenica, it became clear that it was mostly the army, and in particular, its intelligence and security circles, responsible for organizing the executions. Some special police units participated too, as did paramilitary units like the Scorpions. The perpetrators were almost exclusively men, both locals and men from Serbia proper, and they were not some spontaneous mob. It was the army and the police killing people. They were killing, as Erdemović said, until ‘their fingers hurt’.

4 Benefits and Challenges of the Passage of Time

There is nothing inherently good about time passing, unless it is well used to collect and analyze evidence. Therefore, this article is not an invitation to waste time. However, if time is passing and justice efforts are impeded as politics stand in the way, this article shows what can be accomplished, if the circumstances allow it. In this particular case, Karadžić and Mladić hid for many years, with their trials starting only in 2009 and 2012. After they were apprehended, it became clear what some of the key benefits and challenges of the passage of time were in these two leadership cases.

When these two high-level accused landed in the dock, the Prosecution was ready, and the result—two convictions to life—prove it. The flagship trials were long and expensive, but they were completed with a satisfying

53 The Chief Prosecutor Brummitt called these notebooks ‘one of the most important sets of documents we ever received at the tribunal’, see M. Simons, ‘Data on Balkan Wars Found in Home of Suspect,’ New York Times (10 July 2010), available online at https://www.nytimes.com/2010/07/11/world/europe/1umladic.html.
result. Important witnesses that the Prosecutor put on the stand were largely known—there were few surprises. It was clear that the Prosecution was presenting witnesses who have proved reliable in previous trials. An important factor was that witnesses who testified before had experience—they had been through it before and were better prepared.55 Knowing what to expect matters.56 Key witnesses like Jean-René Ruez testified in five different trials before appearing in Mladić.57

Expert testimony is further example of this quality of testimony, which improves as experts (military, police and intelligence analysts, anthropologists, archeologists, demographers and pathologists, to name a few) better understand the process and what to expect in terms of questions from the parties and the judges. These experts wrote reports, meticulously analyzed data, explained how it was generated and interpreted, and what it ultimately meant for the judges’ findings.58 It is important to note that access to documents that experts analyzed was difficult and became possible only, in the Serbian case, after the fall of Milošević.59

One expert witness was historian Robert Donia, possibly the record-holder in courtroom appearances—he testified in 15 trials. Donia researched the political structures of the Bosnian Serb entity, Republika Srpska, and key evidence defining the Bosnian Serb war-time objectives.60 He was also the author of reports on the Bosnian Serb policy and strategy on the siege of Sarajevo and the analysis of the Bosnian Serb Assembly during the war. He testified in

55 In the Mladić trial, for example, we heard from RM 314, RM 297, and RM 313, all survivors of the Srebrenica-related mass executions who testified before.
56 The defense teams through the years, across different cases, often presented the same arguments.
58 There are a number of relevant expert reports, alongside those already mentioned, coming from the Prosecution, e.g., by military analysts Reynaud Theunens, Richard Butler and Ewan Brown; Christian Axboe Nielsen on the police, Andras Riedlmayer on the destruction of sites of religious and cultural relevance in Bosnia and Herzegovina.
59 Delpla et al., supra note 31, section on ‘Temporalities’.
60 The crucial Six Strategic Goals document is on record in the Mladić trial, exhibit number P00781.
both the Karadžić and Mladić trials.\textsuperscript{61} Time gave the opportunity to experts like Teufika Ibrahimefendić, a psychotherapist, to work with Srebrenica survivors, and develop important insights into their state of mind. She spoke about the ‘Srebrenica syndrome’ and the profound grief the survivors felt. This grief was suffocating and made it impossible for many to carry on with much hope. Ibrahimefendić was clear when describing survivors’ inability to look forward to things in life: ‘I keep offering life, and they keep coming back with death’.\textsuperscript{62}

Another benefit of the passage of time is that the grip the conflict has on people seems to subside over time. Whiting touched upon this, saying that sometimes people are more open to speaking up after feelings stirred up in the conflict lessen in intensity.\textsuperscript{63} This can also bring a softening in attitudes towards witnesses in their communities, when they have something critical to say about ‘their own side’. It may be possible for witnesses to distance themselves from these voices, carve out independent social and economic lives, where they are able to speak up. Furthermore, witnesses who observed events in their professional capacity may feel more comfortable to testify as they move to other jobs or retire.

Alongside benefits, there are also important challenges which emerge or are complicated by the passage of time. They include witnesses’ memory deteriorating and witnesses (as well as suspects) dying. Survivors perish too, without seeing their tormentors punished. Survivors and witnesses expect learning facts about what happened to their loved ones during criminal proceedings. When this process of investigation lasts decades, and does not result in a trial, witnesses are disillusioned and frustrated, and may disengage from the legal process. Predictably, evidence material may deteriorate, be removed or destroyed.\textsuperscript{64}

Another issue is the inconsistency that creates problems as witnesses give multiple statements to different organizations, such as national authorities, international NGOs, etc. Some of these inconsistencies may be the result of sloppy note-taking. Others, and we have witnessed numerous instances of this in the ICTY courtrooms, come from differences in testimony from one statement to another and from one trial to another. The challenge appears, for example, when details are added in later statements, when witnesses have to

\textsuperscript{61} Sense News Agency, Drina river was not to be the border (22 August 2013), available online at http://archive.sensecentar.org/vijesti.php?aid=15247.


\textsuperscript{63} Whiting, supra note 5, pp. 343–344.

\textsuperscript{64} Whiting, supra note 5, p. 332.
explain why they did not mention something before. Often the answer is that ‘no one had asked’. Some inconsistencies are about details and can be attributed to the frailty of human memory, or for some other benevolent reason. After all, witnesses often return to the stand every few years, to talk about the same events in different trials. All this clearly challenges judges in determining the truthfulness, and ultimately value, of testimony.

Other inconsistencies are due to dramatic changes in testimony, where motives are harder to ascertain. These are witnesses who were somehow involved or close to the crimes (e.g. part of the military unit present or fellow political party-members), and the changing testimony aims to either protect themselves (from prosecution domestically) or soothe whomever is in the dock or even the public watching at home. For example, a number of witnesses gave different accounts in the Karadžić and Mladić trials. A good example of this was the testimony of Boško Mandić, a former commander in the VRS, and member of the Crisis Staff in Prijedor. His evidence was, from the statement to the in-court testimony, to put it mildly, all over the place.

Vojislav Kuprešanin, another defense witness, provided one story to the investigators of the Prosecution when interviewed, but then changed evidence in court. For men like Kuprešanin, this dramatic change seems to come from his affinity with the accused—in 2001, when he gave a statement, the two were fugitives and there was little reason to protect or fear them. Now that they were in the dock, and still considered heroes by nationalists back home, it made sense to change course. It was not an accident that the witness stated, about

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65 See, for example, the testimony of Momir Nikolić in the Mladić trial, 5 June 2013, available online at https://www.icty.org/x/cases/mladic/trans/en/130605IT.htm.


68 The Prijedor Crisis Staff was discussed extensively in numerous trials, e.g., in the trial of Milomir Stakić, its President (See: https://www.icty.org/x/cases/stakic/cis/en/cis_stakic.pdf). Stakić was sentenced to 40 years imprisonment. To know more about Crisis Staffs, read Dorothea Hanson’s expert reports.

69 The testimony was summarized in the Sense News Agency report, No need to list crimes against non-Serbs because they were ‘general knowledge’ (26 November 2014), available online at http://archive.sensecentar.org/vijesti.php?aid=16299.

70 The testimony was summarized in the Sense News Agency report, Full picture of the truth in Mladic’s defense (15 December 2014), available online at http://archive.sensecentar.org/vijesti.php?aid=16337.
Mladić, that ‘the Serbian people has [sic] reason to be grateful to the general’. Mladić was of course pleased with that. In the end, a big question remains: what do these inconsistencies mean for the study of history?

Finally, no matter the struggles while waiting, some survivors who testified were determined to continue speaking publicly about their experiences. They would come again, undeterred, no matter how long it takes. Ismet Svraka, who survived the Markale market shelling on 28 August 1995, but was severely wounded, said while testifying in the Karadžić trial: ‘I would kindly ask you to invite me again when Mladić is here’. He continued: ‘It that’s the last thing I do, I would like to come here and see him in court, brought before justice’. A woman who was raped in the Sarajevo neighborhood of Grbavica, at the hands of one of the most notorious perpetrators in the early days of the war, Veselin Vlahović Batko, was also clear. Calmly, from the witness stand, she said: ‘I’m going to wait for justice with patience, and it might come eventually.’

5 Conclusion

On 1 June 2011, after the arrest or Ratko Mladić, the ICTY Chief Prosecutor Brammertz stated:

Of course, Ratko Mladic should have been arrested sooner! He should have been arrested 16 years ago and that would have been the only good solution. So this is taking place very late, but not too late.

Had that however been the case, had he been arrested and tried in 1995, with the evidence available then, what would have been the outcome? It would probably not have been favorable to the Prosecution, and importantly, all the

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73 Batko was convicted by the State Court of Bosnia and Herzegovina, to 42 years in prison (for killing around 35 people, and raping 11 women), in 2014. See: M. Buljugić, ‘Smanjena kazna Veselinu Vlahoviću’, Detektor (18 June 2014), available online at https://detektor. ba/2014/06/18/smanjena-kazna-veselinu-vlahovicu/.
evidence would not have been collected, analyzed and much of it made available publicly in ICTY archives.\textsuperscript{76} That would have negatively impacted research and understanding about what had taken place during the bloody wars of the 1990s. We know what we know about the war, and we know a lot, mostly because of the trials.

Delays are thus sometimes beneficial, even crucial, both for achieving justice through punishment, and for the collection of sources for historical research. This is particularly so in leadership cases, where it is not sufficient to establish crimes had been perpetrated, but where there is a need to link the high-level accused with violations in the field. That is something cases against lower-level perpetrators, those actually doing the killing, do not normally require. It is the leadership cases that require this painstaking, years-long groundwork, and if done well, it leads to convictions.

Looking back, now that both trials have been finalized and appeals judgments delivered, it is clear that there was luck involved. Both men survived the lengthy proceedings. Both actually looked quite well on the day of the judgment—better than when they were captured. The medical staff in whose care the two prize defendants were placed clearly did their best to keep them alive, and healthy. Karadžić is now plump and has more color in his cheeks, and Mladić seems to have benefited from some physical therapy while in detention. The long duration of the proceedings was risky, especially for Mladić who was frailer, even when being combative in court. But ultimately, it worked. After a quarter of a century, this story ends. The two go to serve their life-long sentences.

The lessons then from these two trials in The Hague do not serve as mere warnings to question the validity of the often-repeated ‘justice delayed is justice denied’. They have implications for other conflicts, other crimes, and other potential accused. One obvious example is the conflict in Syria. A number of reports through the years argued that while crimes have been committed by all parties in the various conflicts which were playing out across the country, the violations perpetrated by Syrian government forces outweighed others. From the UN Commission of Inquiry, academic research to non-governmental organizations, film-makers and journalists, there is sufficient evidence to conclude \textit{prima facie} that the regime’s forces could be held

\textsuperscript{76} The ICTY/IRMCT was/is the only international tribunal providing access to much of the evidence material through an online database, open to everyone. This is not an easy database to navigate, and one needs to know much about the cases to use it, but this is indeed an important step forward, and one which should be encouraged in other institutions. See: http://ucr.irmct.org/.
accountable for a number of crimes, from using chemical weapons against civilians, attacks on hospitals and widespread disappearances and torture in government prisons.\textsuperscript{77}

All this indicates that there could be a case made against the president, Bashar al-Assad, who has repeatedly rejected any accusations as enemy propaganda. Political deadlocks and the interests and involvement of permanent UN Security Council members have made it impossible to conduct extensive investigations in Syria and mount a case against al-Assad and his intelligence, military and paramilitary associates in an international tribunal. The International Criminal Court has no jurisdiction, and no international tribunal like the ICTY has been established to investigate and prosecute those most responsible.

But the years have not been wasted. An unprecedented effort has been made by non-governmental organizations, by Syrians and others, to document, and make sure evidence of abuses is not lost. Given the Security Council deadlock, a new institutional experiment has been launched with the establishment of the International, Impartial and Independent Mechanism (IIIM), tasked with collecting, systematizing and analyzing the vast amount of information, preparing it for a future when, hopefully, more trials will be possible.\textsuperscript{78}

Important work is done by states, not only NGOs and international bodies. Germany is, in many ways, leading the charge. The only trial against Syrian government officials anywhere in the world is unfolding in Koblenz and it concerns torture and executions.\textsuperscript{79} This trial, which is clearly important in and of itself, is also a way to test evidence in court, albeit within the German legal framework, and focused on charges against the two defendants, former intelligence officials. While the Syrian regime principals, and al-Assad himself, are not likely to be arrested soon, this trial, and potentially others like it, can be a step in the right direction, to ‘test’ evidence in court in smaller-stakes cases.

There are no statutory limitations on these crimes, so trials can take place decades later, as they do for aged Nazis in Germany.\textsuperscript{80} Trials can take place as

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\textsuperscript{80} Moritz Vormbaum’s article in this Special Issue discusses one unusual example. See M. Vormbaum, ‘The ‘Unusual’ Trial of Former Concentration Camp Guard Bruno Dey’, in this issue, pp. 225–243.
long as defendants are alive, and able to follow proceedings. That, of course, raises additional issues: is it useful and ethical to prosecute 90-year-olds? Is it ethical not to? So, there is some time, but this time is not limitless. Truth commissions can be useful alongside trials but can be even more important in the absence of defendants to prosecute. Then, we speak of fact-finding, and not punishment, but at least a record of events is rescued from being completely forgotten, or purposefully mis-remembered. In any case, what this article advocates for is not purposeless delay—it is patience and using time constructively.

By the time Karadžić and Mladić were arrested, most people had given up on hope they would ever be caught. And then they were. Their trials provided the unique opportunity to present publicly, day in and day out, for years, evidence proving crimes they committed. A historical record now exists, of hundreds and hundreds of statements detailing purposefully-inflicted human suffering and the structures behind it. As part of a legal process, evidence was presented, and witnesses spoke about what happened—about patterns of violence and perpetrators. What ICTY trials gave us, beyond any punishment, were valuable insights about a truly horrible period in the lives of countless people. That took time, and it was worth the wait. In these two leadership cases at least, and likely in others to come, later rather than sooner is when justice will not be denied.

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81 In total, the ICTY/IRMCT collected testimony of around 5,000 witnesses. See: https://www.icty.org/en/about/registry/witnesses/echoes-of-testimonies—a-unique-research-project.