

# Disagreement in The Hague

## President of the Court dismisses Judgment against Mladić

As expected, on June 8, the verdict against Ratko Mladić was upheld by the *International Residual Mechanism for Criminal Tribunals* in the Hague. The news is not that Mladić was convicted of genocide, but that the president of the court, Prisca Matimba Nyambe, expressed her dissenting opinion, and accepted the defense's appeal on all counts but one. Discussing in detail a number of examples, Judge Nyambe pointed out that the court on several occasions had erred, violating legal principles and the rules of the Tribunal. Well-founded objections from the defense, or observations by UN personnel and international military, had not been considered. Instead, the court relied on witnesses who had themselves escaped a genocide indictment by testifying for the prosecution. Further, the court had disregarded the fact that the UN had advocated the evacuation of women and children from Srebrenica, and that according to the demographic expert of the Tribunal, 70% of the men were registered as soldiers. Nyambe concluded that a new trial should be carried out.<sup>1</sup>

Of equal interest are the grounds on which the court rejects the prosecutor's claim that genocide, except in Srebrenica, took place in six municipalities during the beginning of the war. The court emphasizes that only between 0.5 and 2.4 percent of Bosnia's Muslim population lived in these areas, which does not constitute a 'substantial' proportion of the population. The prosecutor, in turn, points out that the Muslims of Srebrenica made up 2 percent of all Muslims in the country, a comparison which, unintentionally, questions the labelling of the Srebrenica massacre as genocide. Incidentally, both prosecutors and judges refer to the proportion of the Muslim population in the municipalities, not the percentage of killed Muslims, which according to the Genocide Convention would have been relevant.

During the Bosnian war, 3.4 percent of the Muslims lost their lives.<sup>2</sup> This may be compared to the Bosnian death toll in World War II: Croats 6%, Muslims 9%, Serbs 17%, and Jews 77%.<sup>3</sup> The figures illustrate that the Hague Tribunal has

---

<sup>1</sup> [MLADIC A J REDACTED SIGNED \(irmct.org\)](https://www.irmct.org/en/press-releases/2017/06/08-06-17-01)

<sup>2</sup> Cf. Tokača, M. (2012). *Bosanska knjiga mrtvih: ljudski gubici u Bosni i Hercegovini 1991-1995. The Bosnian Book of the Dead : human losses in Bosnia and Herzegovina 1991-1995* Sarajevo, Istraživačko-Dokumentacioni Centar, and the Census 1991. [https://bs.wikipedia.org/wiki/Po-pis\\_stanovni%C5%A1tva\\_u\\_Bosni\\_i\\_Hercegovini\\_1991](https://bs.wikipedia.org/wiki/Po-pis_stanovni%C5%A1tva_u_Bosni_i_Hercegovini_1991).

<sup>3</sup> [https://www.kjellmag.se/wp-content/uploads/Texter\\_folkmod/Genocide-as-a-Concept-in-Law-and-Scholarship.-2008.pdf](https://www.kjellmag.se/wp-content/uploads/Texter_folkmod/Genocide-as-a-Concept-in-Law-and-Scholarship.-2008.pdf) p. 165

contributed to a devaluation of the Holocaust and other genocides (the Armenian in 1915, Rwanda in 1994). In these cases, we are talking about total death rates of 50-60 percent, or more. In some European countries, 90% of the Jews were murdered. What happened in Bosnia in 1992-1995 does not come close to this and is, therefore, not the same phenomenon.

Prior to the trials in The Hague, neither scholars nor lawyers could have imagined that individual massacres would be defined as genocide. The idea was formulated by Mahmoud Sherif Bassiouni, an American law professor, who conducted the study on violence in Bosnia, which formed the basis of the Tribunal's work. Bassiouni told the US Congress that, according to the genocide convention, no genocide had been committed in Bosnia, but that the situation might change if a "progressive" position is taken, allowing for "local" genocides.<sup>4</sup> Without the influence of the United States, this kind of reasoning would not have appeared in The Hague, where, in addition, an Anglo - Saxon legal tradition, foreign to European law, has been applied (e.g. negotiations on type of indictment and reduction of punishment in return for testimony). If one examines the judgments, it is clear that the verdicts on genocide are not based on the wording and meaning of the Convention: "destruction of a group... in whole or in part." Srebrenica is defined as a case of extermination (i.e. mass murder in ordinary language)<sup>5</sup> which together with deportation constitutes genocide. The current judgement only mentions that "thousands" of men were murdered.

Genocide is generally perceived as the worst of crimes, and we intuitively concentrate on the violence perpetrated and the suffering of the victims. However, it is not the nature of the acts that determines whether a genocide has been committed, but their purpose. What is specific about genocide is that the crime is directed at collectives, not individuals. The focus is not on the suffering of human beings, but on the destruction of an ethnic or religious group. This is what happened to the Jews in Europe 1941– 1945 but did not occur in the Balkans 1991–1999. To argue that stating historical facts represents a lack of respect for the victims and their families is untenable. There is no doubt that the wars in former Yugoslavia were fought with great cruelty and that the Muslims in Bosnia were hit harder than their Serb and Croat countrymen. Of the 39,000 civilian casualties during nearly four

---

<sup>4</sup> [https://www.kjellmag.se/wp-content/uploads/Texter\\_folk\\_mord/Genocide-as-a-Concept-in-Law-and-Scholarship.-2008.pdf](https://www.kjellmag.se/wp-content/uploads/Texter_folk_mord/Genocide-as-a-Concept-in-Law-and-Scholarship.-2008.pdf) p 166

<sup>5</sup> This is important since *extermination* belongs to the category of *crimes against humanity*, which do not constitute *genocide*. For a discussion based on documents of the Tribunal cf. <https://www.kjellmag.se/wp-content/uploads/The-Hague-Tribunal-and-Srebrenica.pdf>

years of war, 33,000 , or 84 percent were Bosniaks.<sup>6</sup> What happened is terrible, but the Bosniak people, unlike the Jews, were not threatened with extinction. If we abandon the wording and meaning of the Genocide Convention, we will inevitably end up in a situation where the murder of the European Jews is relativized, which is contrary to morality and intellectual honesty. For all its tragedy, Srebrenica is not the same as Auschwitz.

The EU Commissioner Didier Reynders wants to punish those who "deny genocide".<sup>7</sup> In Sweden, it was assumed (in April 2021) that he meant the Holocaust,<sup>8</sup> which is not the case. The EU *Framework Decision*<sup>9</sup> certainly applies to cases like Srebrenica, and a law would be contrary to free research and democratic principles.

Kjell Magnusson

Uppsala, June 2021

---

<sup>6</sup> Cf. note 2

<sup>7</sup> <https://www.brusselstimes.com/news/eu-affairs/155829/member-states-fail-to-transpose-eu-law-criminalising-hate-speech-and-hate-crimes/>

<sup>8</sup> <https://www.dn.se/varlden/eu-pressar-sverige-att-gora-det-straffbart-att-forneka-forintelsen/>

<sup>9</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33178>