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EDITED BY

PETRA BÁRD

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Edited by Petra Bárd

https://orcid.org/0000-0003-4992-5082

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THE FORA FOR JUSTICE: SOME REFLECTIONS ON PEACEBUILDING AND RECONCILIATION FROM THE PERSPECTIVE OF THE NUREMBERG AND THE ICTY TRIALS

Violeta Beširević[1]

> *The purpose of a trial is to render justice, and nothing else[...]Hence, to the question that is commonly asked about the Eichmann trial: What good does it do? There is but one possible answer: It will do justice.*[2]

This short essay, written to honor professor Károly Bárd, is aimed to shed light on the underlying questions related to listing peacebuilding and reconciliation in the mandate of ad hoc international criminal tribunals and hybrid courts. To argue against this practice, two different legacies, the Nuremberg's and the ICTY's, are brought into perspective.

Introductory remarks

Károly Bárd was my professor and, for a while, my dear colleague with whom I worked together at the Constitutional and Legislative Policy Institute, affiliated with the Open Society Institute and Central European University in Budapest. While we were working together back in the 1990s, the former Yugoslavia, where I came from, suffered from the tragic civil war, while Serbia, my domicile country, was exposed to the NATO intervention, which was not grounded in international law. This is an opportunity to thank Károly for knowing how to make me smile during that challenging time.

Among many tasks we accomplished together, Károly and I worked to promote the establishment of the International Criminal Court; therefore, to honor him, I have chosen the criminal justice topic, although constitutional and human rights law have been predominant fields of my teaching and research.

[1] Professor of Law, Union University Law School Belgrade; S.J.D. Central European University.

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York, Penguin Books, 1994, 253–254.

Accountability or Accountability in the Name of Peacebuilding and Reconciliation?

It has been a common understanding that the international justice system has its roots in the 1474 Breisach trial, conducted in the aftermath of the atrocities committed during the siege of the city of Breisach in the Upper Rhine region. The punishment for committing "crimes against the laws of nature and God" was imposed by the *ad hoc* tribunal composed of 26 judges from various regional city-states on Peter Von Hagenbach, Burgundy's Alsatian military commander.[3] This historical precedent signaled that bringing preparators of grave breaches amounting to international crimes to prosecution and punishment would become a key mandate of the modern, twenty-century established international courts and tribunals. Moreover, the unprecedented atrocities committed during World War II paved the way for establishing the duality of the state and individual responsibility for international crimes. The Nuremberg judgment and the Genocide Convention are cases at the point.[4]

However, the late1990s and the early 2000s attempts to connect international trials with restoring peace and achieving reconciliation between divided nations or ethnic groups have shown that the modern international criminal justice system has become more ambitious than the Nuremberg trial, on whose legacy it was built. Along with the legal, the non-legal purposes prominently figured in the missions of the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone. What was put in their mandates, now mostly over, was not retribution itself, but an aim of holding individuals to account in an effort to promote peacebuilding and reconciliation.[5]

There is a further twist here. Even though the ICTY and ICTR became revolutionary milestones of the international criminal justice, which speeded up the establishment of the International Criminal Court (ICC), the Rome Statute spells out that the ICC is established to secure the punishment for the most serious crimes of concern to the international community, to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such

[3] Gregory S. Gordon, The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law, in Kevin Heller – Gerry Simpson (ed.), *The Hidden Histories of War Crimes Trials*, Oxford, OUP, 2013, 13–49.

[4] The Judgment is rendered on 1 October 1946; The UN Convention on the Prevention and Punishment of the Crime of Genocide was approved by General Assembly Resolution 260 A (III) of 9 December 1948; it entered into force on 12 January 1951.

[5] Ruti Teitel, The Law and Politics of Contemporary Transitional Justice, *Cornell International Law Journal* 38 (2005), 837–862, 857.

crimes.[6] All other non-legal aspirations are notably missing. Was that the sign that lessons were learned and that associating non-legal purposes, like peacebuilding or reconciliation, with international justice mechanisms impeded international criminal justice rather than advanced it?

To explore the issue, I will pit the Nurnberg "International" Military Tribunal (IMT) mandate against the ICTY mandate. I have deliberately decided to compare the two legacies, not only because I am emotionally attached to the region of the former Yugoslavia, but also because the ICTY was the first modern tribunal established after the Nuremberg. An additional reason also urges parallel assessment of their mandates – the criticisms leveled against the IMT and the ICTY were to some extent the same, in the sense that they were *ad hoc* bodies designed to administer justice selectively.[7]

Accomplished Missions: International Criminalization of Atrocities

Much ink has been spilled in regards to the Nuremberg trail. On many occasions, the Nuremberg legacy has been subjected to methodical evaluation that resulted in divided opinions on almost every aspect of the trial.[8] For some, Nuremberg was a great success, a milestone in international criminal law. To its critics, Nuremberg was a failure, a mere victor's justice in which *ex post facto* substantive rules were applied under novel jurisdictional theories.[9] There are conflicting views on whether the trial was procedurally fair.[10] There is much to be said about the Nuremberg trial, but this chapter's space and purpose do not allow me to assess all aspects of the trial deeply. Instead, I will focus on the predominant concern of this chapter – the IMT mandate and the issue of what Nuremberg was about.

[6] See the Preamble of the Rome Statute.

[7] Claus Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, 143-159.

[8] The scholarship on the Nuremberg trial and the IMT is immense. I would like to draw attention to the 1995 New York Law School Journal of Human Rights symposium: Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, *New York Law School Journal of Human Rights* 12 (1995), 453–544; Donna E. Arzt, Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal, *New York Law School Journal of Human Rights* 12 (1995), 689–758.

[9] See discussion of Jonathan Bush in Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, 461.

[10] Arzt, Nuremberg, Denazification and Democracy, 702.

An extract from the opening statement of Justice Robert Jackson, then Chief Prosecutor for the United States, is quite telling:

"The privilege of opening the first trial in the history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[11]

Put simply, the IMT mandate was reduced to retribution and punishment of Nazi leaders. With the impressive record, the Nuremberg judgment is "the defining moment in international criminal law."[12]

Now, in the legal sense, Nuremberg's legacy was of major significance for doing justice in the region of the former Yugoslavia. The establishment of ICTY would have hardly be possible without the Nuremberg precedent: despite some obvious differences between the IMT and the ICTY, taking into account the legal purposes of international criminal proceedings, there is no doubt that the ICTY was a Nuremberg-like tribunal. The ICTY was built on the fundamental principles of international criminal law set up in Nuremberg: individual criminal responsibility for committed crimes, no immunity for state representatives, and denial of any possibility to rely on official position or superior orders as defenses. Nuremberg Charter also served as a normative basis for the ICTY Statute regarding the definition of crimes and, in particular, for crimes against humanity, which after Nuremberg, gained both in clarity and number. The rudiments of fair trial standards followed in Nuremberg have been accepted, further developed, and applied in the proceedings run before the ICTY.[13]

Although both the IMT and the ICTY suffered from certain legal imperfections, one can confidently say that both tribunals successfully served a fundamental legal purpose of the international criminal proceedings – determination upon proof of individual criminal responsibility for committed crimes. Generally, the worst nightmare closely connected to conducting any criminal proceedings is a fear of punishing an innocent person. Neither of the tribunals, either the IMT or the

[11] The Opening Statement is available at https://www.nationalww2museum.org/war/articles/robert-jackson-opening-statement-nuremberg. For more see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Boston, MA, Back Bay Book, 1992.

[12] Robert Cryer, Nuremberg International Military Tribunal, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, OUP, 2009, 441-443.

[13] For more see, e.g., Gerhard Werle, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, 16–17; Vladimir Đ. Degan – Berislav Pavišić – Violeta Beširević, *Međunarodno i transnacionalno krivično pravo*, Beograd, Službeni glasnik & PFUUB, 2011, 165–166.

ICTY, can be blamed for making such a mistake. Acquittals did happen both in Nuremberg and in The Hague.[14]

It is a different issue whether all the responsible for grave crimes were brought to justice, either before the IMT or the ICTY. As to Nuremberg, particular attention is often drawn to the fact that war crimes committed by the Allies were not subject to trial. The slogan "victor's justice" associated with the IMT well explains this flaw. Whether "victors' justice" could be true and complete justice is an enduring question which, in my opinion, should be answered negatively. But leaving this question for some other discussion, important here to emphasize is that neither moving from the victor's justice to *ad hoc* justice before the ICTY did bring *all* responsible for international crimes to justice, although the ICTY had jurisdiction over all parties included in the conflict. Thus, the guilt of none of the leading state representatives involved in the conflict at the territory of the former Yugoslavia has not been determined in the Hague. True is, unfortunate developments, mostly connected with their death either during the trial or before the indictment was confirmed, prevented the establishment of the guilt. Thus, death prevented the proceeding against Slobodan Milosevic, the former president of Serbia, from being closed with a judgment, while Franjo Tudjman, the former Croatian president, died right before the indictment against him was to be issued.[15] Nevertheless, one cannot resist the impression that the Hague Prosecutor too quickly and too easily decided not to press charges against those most responsible for crimes committed during NATO intervention in Serbia, such as the bombing of the major TV station in Belgrade, which resulted in civilian casualties.

All things considered, it can be argued that selective justice, however incomprehensively pursued, did not manage to blur the fact that the trials before the IMT and ICTY succussed in the international criminalization of internal atrocities. On this point, lessons from Nuremberg were crucial for international prosecutions in The Hague. But in early 1990s it was perceived that it was time to do justice differently from what was done in 1946: retributive justice, that included trials, punishment and reparations was not enough. When doing justice in the region of the former Yugoslavia became urgent, the politics of international criminal justice was enriched with relational approaches to justice, *i.e.* combined with peacebuilding and reconciliation.[16]

[14] For the acquittals in Nuremberg, see Cryer, Nuremberg, 442; for the persons acquitted of all charges before the ICTY, see https://www.icty.org/en/about/chambers/acquittals.

[15] AFP, UN Court Exposes Uneasy Legacy of Croatia's 'father' Tudjman, *France 24* (17 December 2017), https://www.france24.com/en/20171217-un-court-exposes-uneasy-legacy-croatias-father-tudjman.

[16] For more on relational approaches to justice, see Jennifer J. Llewellyn – Daniel Philpott (eds.), *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford, OUP, 2014.

Doing Justice Outside the Orthodoxy: What Good the ICTY Did?

As was initially noted, the establishment of the ICTY, besides legal, also had non-legal aspirations – the restoration of peace and reconciliation – being the two most important. While the restoration of peace is often seen to be achieved by the tribunal's adherence to the rule of law, justice, and human rights promotion, it is not well-defined what the tribunals should do to impact reconciliation. The term reconciliation has been exploited in many ways as it means a different thing for different people. Most often, reconciliation in the context of international criminal justice is reduced to the belief that the truth-seeking and promotion of individual rather than collective guilt will end an intense polarization between the parties in the war.[17]

Aspirations like peacebuilding and reconciliation were notably missing in the IMT mandate. Thus, there is no record of the IMT contribution to peace for an apparent reason – World War II ended, and the peace was established before the trial commenced in Nuremberg. Regrettably, the unprecedented emphasis on peacebuilding in the ICTY's mission did not add much to further clarification of international criminal justice raison d'être. Here I am not alluding to ineffectiveness of the different peacebuilding strategies to address massive injustice, but to the failure to prevent the massive atrocities and stop the war, in the first place. Immediately in the founding document, the 827 UN Security Council Resolution, the Tribunal was closely connected with the restoration of peace – the link served as a legal justification for the UN intervention.[18] At that time, it was perceived that the ICTY would contribute to the peace process by creating conditions for a less difficult return to normality. It is well known that it did not happen: the ICTY failed to achieve this objective on any account. Recall here that in Bosnia and Herzegovina, the war's worst massacre at Srebrenica, the genocide, took place at the time when the ICTY Trial Chamber confirmed its initial indictment against Radovan Karadžić and Ratko Mladić.[19] Furthermore, although the ICTY was fully operational by 1999, it was equally incapable of preventing armed conflict in Kosovo that exploded that year.

[17] For more see, e.g., David Mendeloff, Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?, *International Studies Review* 6 (2004), 355–380.

[18] See the Preamble of the Resolution, http://www.ohr.int/other-doc/un-res-bih/pdf/827e.pdf.

[19] The initial indictment was announced on July 24, 1995. In the ICTY Karadžić judgment, it is established that "the Prosecution characterizes the killing of Bosnian Muslims from Srebrenica during July and August 1995 as an underlying act of genocide under Count 2." The judgment is available at https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

At first sight, there is not much in the IMT legacy that could have advanced the ICTY contribution to reconciliation either. Not only that such word never figured during the Nuremberg trial, but also the idea was at odds with the circumstances. Reconciliation between Germans and Jews was not a chief concern of the Allies because of the massiveness of the crimes that offended everyone's conscience. Given the large scale of atrocities, to list reconciliation among the goals of the Nuremberg trials were morally absolutely unacceptable. Reconciliation between the victorious powers and Germany was neither a priority because the Allies' focus was to punish those responsible for crimes and not to restore broken relations with Germany. Moreover, if the Nuremberg trial had been about reconciliation between Germans and the victors, the victors would have not excluded from the IMT's jurisdiction their own grave wrongdoings, such as the massive bombing of cities with extremely high civilian casualties. Reconciliation between them did happen, but it was mainly achieved with the help of the Marshall Plan, the European integrations based on political messianism, and moving individual gestures, like Willey Brand's in Warsaw at the Ghetto memorial, and the Duke of Kent's in the Lutheran Cathedral in Dresden in the year of 2000.

However, if reconciliation is associated with the truth-seeking and promotion of individual rather than collective guilt within the course of international criminal proceedings, then in that sense, the IMT, without having been explicitly mandated to contribute to reconciliation, served this aspiration well, much better than the ICTY.

The IMT's legacy related to establishing the truth is impressive. In the words of Justice Jackson, the Tribunal managed to establish "a well-documented history of what we are convinced was a grand, concerted pattern to incite the aggressions and barbarities which have shocked the world."[20] Despite being perceived as an extension of military victory, the Nuremberg model was a perfect, ideal setting for clarifying historical record. Thus, a total victory enabled the Allies to have direct access to the secret archives of the defeated enemy, while the Nazi obsession of keeping records of everything enabled the IMT to establish historical facts beyond those necessary to clarify the guilt of the defenders.[21] For example, a documentary film entitled *Nazi Concentration Camps*, which explicitly illustrated the results of the horrifying crimes with which the defenders were charged, although of little help in establishing individual guilt of the defenders, contributed a lot to creating a full record of Nazi atrocities and secured that no one ever doubts the meaning of 'the crimes against humanity.'

Note that the trials organized by Allies in their occupational zones in post-war Germany rendered a strong historical record of horrifying Nazi policy, too. The

[20] Taylor, *The Anatomy of the Nuremberg Trial*, 54.

[21] See discussion of Robert Wolfe in Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, 472.

Americans particularly insisted on clarifying circumstances in which the crimes were committed. Those who have not yet watched it, should see a brilliant Istvan Sabo's movie *Taking Sides*, based on the actual interrogation in the US occupation zone of Wilhelm Furtwangler, then-conductor of the Berlin Philharmonic charged with serving the Nazi regime, as it includes fascinating scenes of the fact-finding during the interrogation.

Now, it is often perceived that the ICTY had a similar mission and that reconciliation in the region of the former Yugoslavia could not be possible without setting a clear historical record. Note that the ICTY founding document was silent on reconciliation, but it was soon recognized in the ICTY annual report of 1994: "Far from being a vehicle for revenge, it [ICTY] is a tool for promoting reconciliation and restoring true peace."[22] Reconciliation later prominently figured in the ICTY practice, as well.

Despite difficulties in measuring, one cannot but to conclude that the ICTY failed to facilitate reconciliation among divided nations in the region of the former Yugoslavia partly because it failed to establish historical facts beyond those necessary to determine the defenders' guilt. A lack of clear victor in the ex-Yugoslav case, which made the ICTY completely dependable of conflicting parties in providing evidence of any kind, was a major source of frustration. On each occasion when the prosecution introduced evidence to establish historical facts beyond those proving the charges against the defendant, the trial went on a wrong track. This was the case, for example, when the Milošević trial commenced by the testimony of Mahmud Bakali, a politician from Kosovo that came from the same ex-Yugoslav communist milieu as Milošević. At the trial, Bakali (like Milošević) used the opportunity to build a political case, which damaged the ICTY's credibility in Serbia by all accounts. Unlike Bakali's testimony (which anyhow had little to add to Milošević's potential guilt for the crimes committed in Kosovo), a videotape, used in the course of a prosecutor's cross-examination of a witness, showing the members of paramilitary formation Scorpions killing 6 Muslims from Srebrenica, chilled Serbia.[23] Although for procedural reasons it was not formally admitted into the evidence in the Milošević trial, in Serbia, the wall of denial began to crack with this videotape. What I want to say is that legalist approach to truth-establishing had broader impact on the conflicting parties than other truth-establishing strategies in building the case against Milošević.

[22] See the first ICTY Annual Report, A/49/342 S/1994/1007, para.16.

[23] See Coalition for International Justice, Chilling Video Footage Shown of Purported Execution of Srebrenica Muslims By 'Scorpions' Paramilitary Unit – Allegedly Under Serbian MUP Command, *Institute for War & Peace Reporting* (31 May 2005), https://iwpr.net/global-voices/chilling-video-footage-shown-purported-execution-srebrenica-muslims-scorpions.

Finally, the ICTY had neither managed to contribute to reconciliation by blaming specific individuals rather than nations or ethnic groups.[24] Among many reasons causing this failure, plea barging practice figures prominently. Before the ICTY, many guilty pleas, induced through plea bargains, were accepted on the ground, inter alia, that they could aid reconciliation by helping truth-establishing.[25] However, plea agreements do not bring truth – they are traded compromises that might obscure rather than reveal the truth and freeze the healing process. Besides, for promoting reconciliation, it is not enough that defendants only express remorse, but also they should show effectively, through their actions, that they are genuinely sorry for what they have done.[26] That pure acknowledgment of guilt is not enough, testifies the plea agreement between the ICTY Prosecutor and Biljana Plavšić, charged with crimes against humanity. After being released from prison (without serving a complete sentence), she did nothing to demonstrate her willingness to help reconciliation in the region.

The "why" question attached to the ICTY's little effect on reconciliation between the divided nations in the ex-Yugoslav region has many additional answers.[27] However, the bottom line here is that all conflicting parties in the region of the former Yugoslavia still see themselves as victims of crimes for which the members of other nations or ethnic groups are collectively responsible. Virtually, each judgment rendered by ICTY was comprehended as an attack on the whole nation rather than as a product of justice. In other words, the ICTY did not manage to contribute to reconciliation by breaking down what Stuart Ford termed "inaccurate and self-serving narratives of victimization."[28]

Larger Lessons

In a normative sense, Nuremberg's legacy was crucial for doing justice in the region of the former Yugoslavia. Beyond the promotion of justice, the Nuremberg model may or may not apply to the conflict in the former Yugoslavia, as the trial

[24] For a detailed discussion see Marko Milanović, The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem, *American Journal of International Law* 110 (2016), 233–259.

[25] For more see, Janine Natalya Clark, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, *The European Journal of International Law* 20 (2009), 415–436.

[26] Clark, Plea Bargaining, 433.

[27] For a detailed discussion see Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*. Oxford, OUP, 2018.

[28] Stuart K. Ford, A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, *Vanderbilt Journal of Transnational Law* 45 (2012), 405–476, 476.

in Nuremberg were neither about the restoration and maintenance of peace nor about reconciliation, enthusiastically assigned to the ICTY mandate.

Although not associated with restorative justice and reconciliation, the IMT served some non-legal purposes, the most important being the truth-seeking and establishing a valid historical record, which later did help in achieving reconciliation. On the other hand, the ICTY legacy on peacebuilding and reconciliation adds little to the prospect of international criminal justice. Nevertheless, if it made little steps in promoting restorative justice and reconciliation in the region of the former Yugoslavia, it does not mean that the ICTY has not made any step at all. By determining the guilt of a defender in each particular judgment, the ICTY, to borrow from Diane Orentlicher, has shrunk the space for denial of crimes, which, together with other tools, can move closer towards reconciliation.[29] But, unlike the IMT, which due to its imperfections, smashed the space for denial, the ICTY, due to its imperfections, has only managed to shrink it.

What is then to learn from the ICTY legacy regarding the relational approaches to international criminal justice? The former ICTY president Justice Fausto Pocar sent a strong message: "[...]when judging a particular defendant, the Tribunal's imperative is to apply and be guided by neutral principles of justice. We shouldn't have a second agenda, such as considering how or whether this judgment 'may help or not help reconciliation.'"[30] However, this is not to deny that restorative justice and reconciliation are more than extended tool box in building post-war societies. On the contrary, restorative justice and reconciliation are important implications of justice claims, but how to frame them is an issue for a new discussion.

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