



International Criminal Tribunal for the Former Yugoslavia: An Instrument for Reconciliation, Peace and Security in the Western Balkans?

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Abstract:

This paper analyzes the role of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the context of peace building in the Western Balkans. The central question raised is whether the ICTY, which is the forefather of the permanent International Criminal Court (ICC), can be considered an institution that really plays a role in the reconciliation process of ex-Yugoslav states that were involved in the Yugoslav Wars and by doing so, does it provide peace and security in this turbulent region. Essentially the conclusion drawn is that the International Criminal Tribunal for the Former Yugoslavia is an ineffective tool in reconciling all parties involved in the Yugoslav Wars, and cannot instil a sense of peace and security through justice in the region. This is because of (1) the ICTY's seemingly bias approach to justice due to disproportional indictments and (2) the widespread scepticism of ex-Yugoslav states that justice will help in peace building and create sustainable security in the Western Balkans.

Résumé :

Cet essai analyse le rôle du Tribunal Pénal International pour l'ex-Yougoslavie (TPIY) dans le contexte du renforcement de la paix dans les Balkans occidentaux. La question centrale soulevée est à savoir si le TPIY, qui est l'ancêtre de la Cour Pénale Internationale permanente (CPI), peut être considérée comme une institution qui joue vraiment un rôle dans le processus de réconciliation des États ex-Yougoslaves qui ont été impliqués dans les Guerres Yougoslaves et ce faisant, s'il fournit la paix et la sécurité dans cette région turbulente. Essentiellement, la conclusion tirée est que le Tribunal Pénal International pour l'ex-Yougoslavie est un outil inefficace pour concilier toutes les parties impliquées dans les Guerres Yougoslaves et ne peut susciter par la justice un sentiment de paix et de sécurité dans la région. Cette conclusion est tirée des causes suivantes : (1) l'approche apparente de polarisation de la TPIY à la justice en raison de mises en accusation disproportionnés et (2) le scepticisme généralisé des États ex-Yougoslaves que la justice aidera grâce au renforcement de la paix et à la création d'une sécurité durable dans les Balkans occidentaux.

On November 16th, 2012, the International Criminal Tribunal for the Former Yugoslavia (ICTY) acquitted Ante Gotovina and Mladen Markač, two Croatian generals most responsible for *Operation Storm* that resulted in the slaughter of “at least 150 Serbs”¹ and the displacement of “about 250,000 Croatian Serbs”² from Croatia. Two weeks later, on November 28th, 2012, the same tribunal acquitted another war criminal by the name of Ramush Haradinaj who committed atrocities on the Serbian, Roma and Albanian populations in Kosovo.³ Most recently, on February 28th, 2013, Momčilo Perišić, a Serbian general from the late Yugoslav National Army was also acquitted by the ICTY despite his involvement in Srebrenica and Sarajevo.⁴ All of these releases by the tribunal have revived and intensified tensions between ex Yugoslavia which leads to the question: is the International Criminal Tribunal for the Former Yugoslavia really an instrument for reconciliation, peace and security in the Western Balkans? Since the ICTY is one of the so-called forefathers of the International Criminal Court (ICC), it is important to thoroughly analyze the implications of this specific international tribunal in relations to peace-building and reintroducing security in the region. By doing so, it will shed light on the future success of the ICC and similar institutions (International Criminal Tribunal for Rwanda for example) in maintaining international peace and security, as “the success of the [ICTY][will] ultimately become the basis for the debate over the need for a

¹ Victor Peskin, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” *Journal of Human Rights* 4(2005): 218, accessed March 15th, 2013, doi:10.1080/14754830590952152.

² Lilian A. Barria and Steven D. Roper, “How effective are international criminal tribunals? An analysis of the ICTY and the ICTR,” *Journal of Human Rights* 3(2005): 362, accessed March 21st, 2013, doi: 10.1080/13642980500170782.

³ Thomas Escritt and Fatos Bytyci, “Kosovo ex-premier Haradinaj cleared of war crimes again,” *Reuters*, November 29th, 2012, accessed March 18th, 2013, <http://www.reuters.com/article/2012/11/29/us-kosovo-tribunal-haradinaj-idUSBRE8AS0B820121129>.

⁴ De Launey, Guy. “Momcilo Perisic Hage Acquittal Leavers Little Sense of Justice.” *BBC*, February 28th, 2013, accessed March 5th, 2013, <http://www.bbc.co.uk/news/world-europe-21621695>.

permanent international criminal institution which resulted in the International Criminal Court (ICC).”⁵

In the academic literature examined, there is a general sentiment among scholars that the International Criminal Tribunal for the Former Yugoslavia is an ineffective tool in reconciling all parties involved in the Yugoslav Wars, and cannot instil a sense of peace and security through justice in the region. As Dominic Raab simply puts it, “the ICTY’s results had not been spectacular.”⁶ Two principal reasons for this are (1) the ICTY’s seemingly biased approach to justice due to disproportional indictments of all sides in the war, leading to strained cooperation between the ICTY and the ex-Yugoslav states, and (2) the widespread scepticism of ex-Yugoslav states that justice will help in peace-building and create sustainable security in the Western Balkans.

Yugoslav Wars and the Creation the ICTY

The Yugoslav Wars, which started on March 31st, 1991 with the War in Croatia and lasted until the end of the NATO bombing of Yugoslavia in June 1999, are commonly referred to as being the four armed conflicts (the War in Slovenia, the Croatian War of Independence, the Bosnian War and the Kosovo War including the NATO bombing of Yugoslavia) that brought about the breakup (or dissolution) of the Socialist Federal Republic of Yugoslavia. Numerous war crimes, crimes against humanity and grave violations of international humanitarian law were committed during this period by all parties, involving: “murder, torture, rape, enslavement, destruction of property and other

⁵ Barria and Roper, “How effective are international criminal tribunals,” 349.

⁶ Dominic Raab, “Evaluating the ICTY and its Completion Strategy,” *Journal of International Criminal Justice* 3(2005): 84, accessed March 4th, 2013, doi: 10.1093/jicj/mqi004.

violent crimes”⁷ that shocked the international community and brought about the introduction of the ICTY.

The ICTY was created by the United Nations Security Council, through resolution 827⁸, in 1993 “in response to the atrocities that engulfed the former Yugoslavia” and was considered “the world’s first truly international criminal court.”⁹ It was established as an “ad hoc, territorially specific, international criminal tribunal”¹⁰ to put “those most responsible for violations of the most heinous crimes known to the international community – war crimes, crimes against humanity and genocide”¹¹ on trial. Essentially, by putting the main perpetrators on trial, the ICTY’s aim was to “render justice to thousands of victims and their families, thus contributing to a lasting peace in the area”¹² or simply “restore international peace and security.”¹³ Furthermore, this institution “would send the message both to potential aggressors and vulnerable minorities that the international community will not allow brute force to become the arbiter of disputes.”¹⁴

What made this tribunal different from the post-World War II tribunals, (namely, the Nuremberg Trials and the International Military Tribunal for the Far East) was that “this court would be open to membership from all over the globe and would draw on

⁷ United Nations, *United Nations at a Glance* (New York: United Nations Publications, 2012), 226.

⁸ Robert M. Hayden, “What’s Reconciliation Got to do With It? The International Criminal Tribunal for the Former Yugoslavia (ICTY) as Antiwar Profiteer,” *Journal of Intervention and Statebuilding* 3(2011): 313, accessed March 21st, 2013, doi: 10.1080/17502977.2011.595597.

⁹ John Hocking, “Legal Aid and defence support at the UN International Criminal Tribunal for the former Yugoslavia,” *Commonwealth Law Bulletin* 3(2010): 529, accessed March 17th 2013, doi: 10.1080/03050718.2010.500849.

¹⁰ United Nations, *United Nations at a Glance*, 226.

¹¹ John Hocking, “Legal Aid,” 529.

¹² United Nations, *United Nations at a Glance*, 226.

¹³ Oliver Shuett, “The International War Crimes Tribunal for Former Yugoslavia and the Dayton Peace Agreement: Peace versus Justice?,” *International Peacekeeping* 2(1997): 93, accessed March 9th, 2013, doi: 10.1080/13533319708413668.

¹⁴ *ibid*, 94.

experiences from the different legal systems of the world.”¹⁵ The ICTY “combined common law/civil law procedures and legal environments”¹⁶ and encompasses “the Judges and staff of...over 80 countries.”¹⁷ In addition, the ICTY was established during the Yugoslav Wars in a “sense of emergence” and “sought to strengthen the procedural safeguards of the accused and thereby dispel the spectre of ‘victor’s justice’”, which were not the cases with the Nuremburg and Tokyo trials.¹⁸ It was the first such tribunal in many ways and carved the path for the creation of a permanent International Criminal Court in 2002 whose scope is similar to that of the ICTY. Nevertheless, “the attitude of the international community to war crimes tribunals is currently characterized by a degree of ambivalence”¹⁹ because of reasons which will now be outlined in the context of the ICTY.

ICTY as a Biased Instrument

The Security Council bases the success of the ICTY on the level of cooperation between the ex-Yugoslav states involved in the Yugoslav wars and this institution. Essentially “the states of former Yugoslavia...have a binding legal obligation to provide the tribunals full and immediate cooperation”²⁰ and with it, allow “entities authorized by the Security Council to investigate or prosecute war crimes and other violations of international humanitarian law.”²¹ However, one of the reasons why full and consistent cooperation

¹⁵ John Hocking, “Legal Aid,” 529.

¹⁶ Carla Del Ponte, “Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY,” *Journal of International Criminal Justice* 4(2006): 540, accessed February 17th, 2013, doi: 10.1093/jicj/mq1032.

¹⁷ John Hocking, “Legal Aid,” 530.

¹⁸ Dominic Raab, “Evaluating the ICTY,” 83.

¹⁹ *ibid*, 82.

²⁰ Victor Peskin, “Beyond Victor’s Justice,” 214.

²¹ Oliver Shuett, “Peace versus Justice,” 99.

was not achieved is because Serbia and Croatia both deem the ICTY as being anti-Serb and anti-Croat respectively with its seemingly selective and disproportionate indictments and, at first, severe prosecutions against their so-called ‘heroes’. Because of this strained cooperation, the tribunal cannot be seen as a successful instrument in maintaining peace and security in the region, but, rather an instigator for the revitalizing of tensions in the region.

For Serbia, the ICTY is deemed an institution that executes ‘victor’s justice’ instead of proportionally indicting all relevant actors. In relation to this, Oliver Shuett mentions: “the argument could be made that the tribunal has become biased as the majority of the 70 or so indicted persons are Bosnian Serbs...the tribunal’s attentions could be seen to reflect an imbalance in the international community’s tendency to lay blame almost exclusively on the Bosnian Serbs.”²² What makes Serbia “against the tribunal for its supposed anti-Serb bias”²³ is that the Prosecutor’s Office has not investigated and pressed charges against a number of atrocities that were committed against Serbs, Roma and other minority groups by the Muslim forces, such as the “shelling of friendly targets”²⁴ in Sarajevo, or by NATO forces “in connection with civilian casualties in Serbia.”²⁵ If analyzing it from this perspective, it should not be surprising that during Slobodan Milošević’s reign, the Federal Republic of Yugoslavia rejected cooperating with the ICTY. Furthermore, it is not surprising that after Milošević’s reign, the Serbian government had great difficulties in tracking down Radovan Karadžić and Ratko Mladić (the last two Serbian indictments) due to the

²² *ibid*, 99.

²³ Victor Peskin, “Beyond Victor’s Justice,” 218.

²⁴ Oliver Shuett, “Peace versus Justice,” 98.

²⁵ Victor Peskin, “Beyond Victor’s Justice,” 228.

obstructions brought about by a number of people who tried to hide them because of ICTY's 'injustice'.

In the case of Croatia, many Croatians felt that the ICTY was "anti-Croat"²⁶ because it pursued the indictment of Ante Gotovina and other generals who were deemed heroes in their country because of the Homeland Wars. Because of this negative sentiment, Franjo Tudjman "refus[ed] to countenance investigations of the Homeland War"²⁷ and "refused to recognize the tribunal's legal rights to trump state sovereignty and probe the Homeland War atrocities."²⁸ This, in hand, led "tribunal officials [to] press Tudjman for cooperation and frequently criticize his conduct."²⁹ Nevertheless, what made the ICTY seem illegitimate and biased, from the Serbian perspective, was that "from September 1996 through August 1999 the ICTY did not issue a formal complaint to the UN Security Council regarding Croatia's non-compliance in the Homeland War investigations"³⁰ because "the Security Council was reluctant to apply sanctions or seriously punish Croatia."³¹ This was not the case for the Federal Republic of Yugoslavia who was put under economic and political sanctions during Milošević's later reign. Because of Croatia's non-compliance with the ICTY for a period of time, it seemed that "the best hope of bringing victors [supposedly the Croatians] to justice lay in domestic political change and the emergence of a more cooperative government in Zagreb."³²

Yet another aspect that hindered the ICTY's cooperation with ex-Yugoslav states, and its instilment of reconciliation, peace and security in the region, was the fact that

²⁶ Victor Peskin, "Beyond Victor's Justice," 220.

²⁷ *ibid*, 221.

²⁸ *ibid*, 219.

²⁹ *ibid*, 218.

³⁰ *ibid*, 218.

³¹ *ibid*, 219.

³² *ibid*, 219.

politicians in ex-Yugoslavia deemed the ICTY as being “inherently selective because some countries [were] targeted for international prosecution [like the Former Yugoslavia] whereas other countries [were] not (e.g. Angola).”³³ All of these different examples manifest that because ex-Yugoslav countries had negative perceptions of the ICTY, and decided not to fully cooperate with it (where full cooperation would lead to ICTY fulfilling its mandate and bringing about reconciliation, peace and security) This institution could not have been viewed as a force that could reintroduce peace in the region. This is in part because “the truths established by the ICTY are not universally accepted truths, but rather partially contested truths, which compete with each side’s own victim-centred narrative.”³⁴

Miscorrelation Between Justice and Peace

The first President of the ICTY as well as the first Prosecutor both stated that in essence “...Peace and Justice go hand-in-hand” and that the tribunal “would contribute to the restoration and maintenance of peace...and contribute to ensuring that such violations [of international humanitarian law] are halted and effectively redressed.” The relationship between the two notions is discussed quite frequently in the literature, yet there is much contention between scholars whether justice brings about peace. By looking at the ICTY as an example, there is a plethora of evidence that suggests the presence of a sheer gap between justice and peace.

The lack of interconnectedness between the two vast concepts can be understood from the following example. When two individuals that do not get along go to court to

³³ Victor Peskin, “Beyond Victor’s Justice,” 228.

³⁴ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 320.

seek justice over a contentious matter, this does not mean that after the jury's decision they will reconcile and make peace. Essentially, the same scenario applies to the former Yugoslavia. Whatever the ICTY decides to do with the indictments will not contribute to peace building and security; rather it will intensify the tensions between the ex-Yugoslav states if the ICTY keeps making scandalous decisions. This is why "the actions and activities of the ICTY have not been beneficial to achieving reconciliation or stability in the Balkans" and have kept the region "unstable."³⁵ As Hayden puts it, "the ICTY's actions are among the major causes of mutual recrimination within most successor republics and between them."³⁶ In retrospect, it was the Dayton Agreement that ended the war in Bosnia and Herzegovina, not the justice of the ICTY. All of these points show that the correlation between justice and peace is relatively weak, as in general, "judicial institutions are not viewed as organs of peace and security."³⁷ Therefore, the ICTY's mandate to reintroduce peace in the Balkans through justice is only applicable merely in theory. The question that needs to be asked is: what is more important –peace through reconciliation or justice?

Putting the ICTY in the limelight and war criminals in centre stage has greatly marginalized the victims of war. As previously mentioned, the tribunal was essentially created for them to get their justice and consequently seek peace. "National reconciliation [was] a precondition to a permanent peace"³⁸ in which the main actors were supposed to be the victims; however after the creation of the tribunal, they disappeared from the picture. Instead of concentrating on the victims and helping with reconciliation and peace

³⁵ Robert M. Hayden, "What's Reconciliation Got to do With It," 313.

³⁶ Robert M. Hayden, "What's Reconciliation Got to do With It," 316.

³⁷ Barria and Roper, "How effective are international criminal tribunals?," 357.

³⁸ *ibid*, 362.

building initiatives on the field, the UN Security Council established a very costly tribunal (“it is estimated that by the time it shuts down, the ICTY will have spent \$2.3 billion”³⁹) that provides the accused with many benefits, all in hopes of bringing ‘justice’ and ‘peace’ in the Western Balkans. The situation is bizarre as “it is immoral to spend large amounts of money on them [war criminals] instead of actions that actually do help the victims of war.”⁴⁰

By looking at the ICTY in more depth, there are clear indications that the beneficiaries of this institution are not the victims “in whose name the enterprise claims to operate”⁴¹, but instead nationalist political parties in former Yugoslavia who “oppose the ICTY...in public” as well as the people who work for ICTY and receive “an extensive medical and pension plan, 30 days of annual leave and 10 official holidays a year” as well as salaries that go up to “150,000 Euros”⁴² a year. This is in part why ex-Yugoslav states have begun to strategically comply with the ICTY as a way to “forestall the transfer of an accused or to secure a preferred outcome within a given trial process” and avoid “third party enforcements in the form of military, financial and diplomatic sanctions”⁴³ in order for them to fulfil their national agendas. Because of the ICTY’s institutional and conceptual flaws, the reasons states cooperate with it are not the right ones. States strategically comply with the tribunal not for the purpose of seeking justice, and through it peace, but for “pragmatic reasons rather than moral ones.”⁴⁴ Namely, they seek political truth rather than judicial truth. By cooperating or complying with the ICTY,

³⁹ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 322.

⁴⁰ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 325.

⁴¹ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 324.

⁴² *ibid*, 321.

⁴³ Christopher K. Lamont, “Defiance or Strategic Compliance? The Post-Tudjman Croatian Democratic Union and the International Criminal Tribunal for the former Yugoslavia,” *Europe-Asia Studies* 10(2010): 1684, accessed March 21st, 2013, doi: 10.1080/09668136.2010.522425.

⁴⁴ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 321.

ex-Yugoslav states have more opportunities to receive financial aid from the West and to join the European Union. In essence, this is their motivation, not peace and security through reconciliation and justice. This shows, once again, that justice in the political sense is important for ex-Yugoslav states in order for them to develop economically and successfully join the EU.

Conclusion

Peace and security in the Western Balkans cannot be achieved through justice, at least not the justice the ICTY promotes, primarily because of its biasness that results in states not cooperating fully with the tribunal and because of its conjecture that justice will result in peace and security through reconciliation. Because of these reasons, the ICTY does not fulfil its expected mandate, which is not surprising as there were no cases “in which externally-imposed criminal trials” brought about “transnational justice”, and in hand, peace through reconciliation.⁴⁵ The general ambivalence towards the ICTY leaves room for scepticism with regards to the success of the ICC whose creation can be partially attributed to the International Criminal Tribunal for the Former Yugoslavia. This case study manifests the need for an innovative 21st century peace-building strategy in post-conflict regions that diverges from traditional norms wherein justice will bring peace. In theory, the interdependence of justice and peace seems logical; however, in practice, imposing justice is counterproductive.

⁴⁵ Robert M. Hayden, “What’s Reconciliation Got to do With It,” 316.

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