

Prosecuting War Criminals as the Basis for Reconciliation Policy

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The debate on whether international criminal courts can contribute to reconciliation should turn to how they best can do so. Contribute they certainly can, if not automatically and today, then at some point in the future. The rejections of international criminal justice – the denial, criticism, misunderstanding and disappointments, justified or not – were to be expected. But they are not definitive insofar as the international criminal courts represent a new practice and experience, and their effects, brewing below the surface, will become more visible over time. Those who wanted better results in crime-affected states may have underestimated the extraordinary post-conflict complexities (political turmoil, moral confusion, exigencies of daily existence and despair), the great differences in context, and the factor of time. Putting societies back together after mass atrocity, the biggest human-made disaster there is, takes a long time measured by an average life-span. Reconciliation takes even longer.

1. Reconciliation: What and Why?

What do we actually have in mind when discussing reconciliation after violent conflict? What vision for a post-conflict future is encapsulated in the notion of ‘reconciliation’? Is reconciliation really necessary, when the restoration of peace brings coexistence and, gradually, a somehow functioning society and normalization between former enemies?

If reconciliation is an aspiration for deeper individual and collective human ties, intended to form a sturdy pillar of lasting peace, it is inextricably linked to justice. The establishment of the various international and hybrid criminal courts seems to acknowledge that justice is a fundamental human need. After 20 years of experience, it is time to move on from the peace versus justice and criminal justice versus restorative justice argument.¹ This false dilem-

ma (extended also to reconciliation) has added to the extremely difficult international and local environment in which the ICTY, created first, was to be received. The either-or discourse – implying that international criminal prosecution was the wrong road to take – was heartily embraced, especially in the former Yugoslavia, as yet another distraction from the evidence of the magnitude of the crimes committed in the region emerging in The Hague courtrooms for everyone to see.

In a fair assessment, the achievements of the international criminal courts demonstrate that they were necessary and that, despite all manner of adversity, they, as well as restorative justice practices, can both contribute to peace and reconciliation. According to the literature, findings over a number of generations suggest that a process of redress and attainment of justice are critical to the healing of individual victims as well as their families, societies and nations. This process enables succeeding generations to break the inter-generational chain of transmission of hatred, rage, revenge and guilt.² Historical experience, from Germany to South Africa, accords with the indications of the past 20 years that credible international criminal prosecution is essential and irreplaceable in the process of reconciliation. The majority of contributors to the current CILRAP debate agree that it has a role to play.³ At a conference in Sarajevo in June 2015 organized by victim as-

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² In Zoran Pajić, ‘Reflections on the Record and Practices of the ICTY’, in James Gow, Rachel Kerr, Zoran Pajić (eds.), *Prosecuting War Crimes – Lessons and Legacies of the ICTY*, Routledge, 2014, p. 237.

³ For materials generated by the conference held by CILRAP and co-organizers in the Peace Palace on 29 May 2015, see <http://www.ficHL.org/activities/reconciliation-v-accountability-balancing-interests-of-peace-and-justice/>; for a series of publications on the conference theme, see *FICHL Policy Brief Series* Nos. 30-36, and 40-41 (2015) at <http://www.ficHL.org/policy-brief-series/>.

¹ See Carsten Stahn, ‘International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide’, *FICHL Policy*

sociations to mark 20 years of the Srebrenica genocide, it was concluded that despite all criticism the ICTY is the main truth and justice mechanism for the ex-Yugoslav conflict, with national prosecutions having the same role. Truth and justice, it was said, are crucial for reconciliation. A request was launched to all political leaders in the region to prioritize a *reconciliation strategy*, encompassing every social sphere.

After violent conflict, reconciliation of human groups, organized in one or more states, could be understood as a laborious process of establishing full co-operative, friendly relations at all levels, from individual to inter-state. Its attainment is manifested when oscillations in relations are no longer caused by issues of the violence, signalling that it has, in fact, become the past. At its deepest reconciliation enables a sense of community, an active interest in mutual well-being and progress. This is what we may call vision of a shared future. There is common agreement that trust is the most important element of reconciliation. In the wake of core international crimes, trust is not possible without establishing the facts and punishing the criminals, accepting and acknowledging responsibility for one's role in the conflict and harm done to others, stigmatization (not celebration or justification) of war criminals, and mutual respect in full awareness of the shared violent past.

2. The Connection Between Criminal Justice and Reconciliation

The truth and justice functions of international criminal prosecution provide an essential basis for trust, the main requirement for reconciliation. It has been observed that victims universally "believe that justice constitutes learning the truth about the crimes committed, seeing the punishment of perpetrators, hearing remorse from perpetrators, receiving an apology from the perpetrators and the state, receiving material assistance and having the harm suffered officially recognized by the government".⁴ In research done in Bosnia-Herzegovina "interviewees repeatedly underlined the importance of truth as a prerequisite of trust building".⁵ Most authors agree that truth and justice are central dimensions of reconciliation. Post-conflict identities, it has been stressed, need to be reconstructed on the basis of truth and acknowledgment of the injury parties inflicted on each other. The international criminal courts, as bodies with high legitimacy, have the ability to create an unbiased, informed and authentic record of events which is

capable of answering the need for truth and accountability. That historical record should be the foundation for dialogue about the causes and responsibility for the violence, as a step towards shared understanding in place of irreconcilable views.

According to research in Bosnia-Herzegovina, 58.2% of respondents agreed that documentation by international courts represents the best basis for discussing what happened during the wars in the 1990s (only 26.5% of Bosnian Serbs, but 59.4% of Bosnian Croats and 83.4% Bosnian Muslims).⁶ My review of all ICTY judgments conducted for the Legacy Project of the Tribunal's Office of the Prosecutor, finalized in April 2015, shows that on the basis of incontrovertible documentary and witness evidence the ICTY has established why there was war in ex-Yugoslavia and how it was waged, more precisely, the goals of the warring parties and the resulting nature of the conflict. There exists no other or better basis for initiating the necessary public discussion, and reflection, about the crimes against humanity and genocide committed in the former Yugoslavia.

Violent conflict involving core international crimes destroys directly and indirectly involved societies, interpersonal ties, emotional bonds, and sense of belonging to a previously shared political, cultural and social framework. Post-conflict, the state faces a changed population with large numbers of traumatized victims and survivors of the gravest crimes and large numbers of perpetrators. According to the Srebrenica Commission of the Bosnian Serb entity (*Republika Srpska*), no less than 25,000 people participated in various ways in the events in Srebrenica from 10 to 19 July 1995. The war criminals may also be in neighbouring countries that were involved in the conflict, as is the case in the former Yugoslavia.

Without understanding the causes of the devastation and regaining a moral compass by separating from the criminal wrongdoers, there is a danger that individuals, communities, societies and states remain trapped by the enormity of the harm done, without finding the direction to the future. In order to establish society anew, criminals need to be stigmatized and brought to justice, reasserting the collective ability to distinguish right from wrong, apply fairness, and protect the basic values around which community can emerge. Arguments that prosecuting war criminals reopens wounds, destabilizes society and deepens divides, impeding prospects for peace and reconciliation, are in contradiction with the prosecution of thieves, fraudsters and murderers as standard procedure of main-

⁴ *Ibid.*, *supra* note 2.

⁵ Janine Natalye Clark, *International Trials and Reconciliation: Assessing the Impact of the ICTY*, Routledge, 2014, p. 121. Clark's position is that international courts are not well equipped to promote reconciliation. Based on 2008-2013 empirical research of inter-personal and inter-communal reconciliation she found that the ICTY has not contributed to reconciliation in Bosnia-Herzegovina, Croatia and Kosovo.

⁶ Janine Natalye Clark, *International Trials and Reconciliation: Assessing the Impact of the ICTY*, *op. cit.*, p. 85, citing from Zoran Pajić and Dragan Popović, "Facing the Past and Access to Justice from a Public Perspective", UNDP Sarajevo *Special Report*, 2011, p. 23.

taining social order and cohesion. When a cigarette smuggler is prosecuted, but the war criminals are walking free, or one of the mothers of Srebrenica is standing in line at a store with one of the killers behind her waiting to buy bread, where lies the real threat to social stability and moral order?

War crimes prosecutions are inherently highly emotional, but not socially destabilizing, unless politicized in the service of divisive interests, most often those of the guilty party. An informed public debate about the difficult issues, highlighted in war crimes prosecutions, is to be welcomed, no matter how stormy. Silence about the bloody past is the obstacle to reconciliation, illustrated, for example, by Branko Laušević, from Teslić in Bosnia-Herzegovina:

My view is that people have no clue whether they believe or do not believe in reconciliation [...] A nice conversation starts, we are all for reconciliation, and the moment a painful point is brought up there is a switch to the second half, going for hatred. It's very strange, there is very little sincerity, but it's not only an issue of sincerity [...] it's a sort of being lost in time and space. You start a nice conversation thinking you've found a collocutor with whom you can open up a dialogue, and he starts about reconciliation and certain mistakes of our side, regardless of which side, are mentioned, the moment the essence is delved into, a curtain is drawn, rage begins, the dialogue is cut, shouting and arguments start. My experience with those issues is that it is best not to talk about that in cafes because you can only get beaten up. I have friends with whom I thought, because we are really on good terms and have friendly relations, that a deeper story was possible, but when it reaches that deeper story, it is not possible.⁷

3. Bringing the Courts 'Home'

Much importance is attached to the international criminal tribunals' outreach activities for reconciliation. Judging by what has been said and written one would conclude that outreach is *the* main highway to reconciliation. This kind of view is simplistic and misleading in the reconciliation enquiry. Methods of informing the public, such as outreach projects, are just *one* source of information about what is being adjudicated and how, even if most authoritative. Information in itself produces nothing. *If* and *how* it is used and how widely disseminated will be determinative. This necessarily goes beyond outreach.

It falls to the interested societies, especially the media, to develop optimal ways of benefitting from the vast amount of invaluable information accumulated in these courts. But if the societies and/or their states have no in-

tention of relying on the courts, no amount of outreach will be effective. The best-calibrated outreach programme stands little chance against a disinterested or malicious national broadcaster and leading newspapers. If it has a hostile state against it, it will at best remain marginal, catering to the few seeking the truth about a conflict whose antagonists are being prosecuted.

The following observation is representative of a current mantra: The ICTY's "failure early on to engage in effective outreach meant that it lost the initiative in communicating its work and establishing its legitimacy".⁸ This does not reflect reality in Serbia and Croatia at the time, nor has much changed after the active ICTY-outreach was launched. Perceptions of the ICTY in Serbia and Croatia were always at the hands of fierce opposition forces that no outreach can match. That does not diminish the importance of outreach activities. It just calls for precise understanding of their limits that depend on the post-conflict context, which is particularly tough and complex in the former Yugoslavia. The role of outreach is important but relatively small and subsidiary compared with that of the state and society in post-conflict reconciliation.

Importantly, the heightened focus on outreach seems to be a consequence of the failure of most other relevant actors, including the local media, in their indispensable role of promoters of the tribunals' work and of fact-based acceptance of the violent past and reconciliation. The resulting frustration has led to placing an impossible and unwarranted burden on the courts' shoulders, asking outreach, figuratively speaking, to be the teacher who prepares, presents, does the homework and the learning.

The high expectations reflect awareness of the great importance of accurate and comprehensive information about the criminal justice process. What is critical is access of the public in the conflict areas to the court proceedings themselves; mediated content, including outreach, is secondary. The public should be able to follow the trials and other court events (such as press conferences) at all times via direct radio or television broadcasts. The now common online possibilities also have great potential. There is no better way to bring the international courts 'home'. The national radio and television broadcasters in the affected states should be required to designate one national channel to permanent coverage of international war crimes prosecutions, or UN TV could be used. Financial considerations or size of audience issues should not play a role because of the paramount importance of allowing the public direct, real time access to witness testimony, other evidence, its testing, and decisions of the court. Outreach

⁷ Transcript made by the author of statement made available on YouTube on 22 January 2015.

⁸ Rachel Kerr, 'Lost in Translation? Perceptions of the ICTY in the former Yugoslavia', in *Prosecuting War Crimes – Lessons and Legacies of the ICTY*, *supra* note 2, p. 112.

content could be aired on the same channels making it available to everyone, along with projects with specific audiences. In receptive environments, outreach partnerships with civil society initiatives and/or the state could make a considerable contribution to public knowledge about the major court findings, the type of available evidence, and to informed public debate on the 'difficult themes'. Through the debate about the difficult issues understanding evolves, trust is forged, and reconciliation becomes possible.

International criminal courts are still so new that we do not know how to make the best use of them. Their benefits to post-conflict societies and the global community, as well as optimal ways of putting them at public disposal, have yet to be fully explored.

4. Towards Reconciliation as Policy

The pace of reconciliation, its depth and forms vary with the nature of the conflict, the magnitude of the consequences, and the local culture. Based on the international criminal justice experience to date – the promise and problems, and the reconciliation activities it has ignited – it seems that reconciliation should be a policy tailored to each particular post-conflict situation in order to achieve more.

Reconciliation discourse mentions *strategy*, and there are references to reconciliation as a powerful strategy. The June 2015 Sarajevo conference referred to earlier in the brief asked for a comprehensive reconciliation strategy. A deputy prime minister of Serbia has stated that reconciliation in the Balkans was possible through the implementation of a *concrete plan*.⁹ Rwanda has a national reconciliation plan, noted here for the approach, not as a model to be followed. Research in Bosnia-Herzegovina has established high levels of support for reconciliation and for state-funded reconciliation activities, including for facing the past, although not as a top priority.

A set of reconciliation goals and measures, grounded in the full use of international criminal justice mechanisms, and incorporating other processes and procedures, could serve to focus and sustain existing and initiate future ac-

tivities, in particular at state level. This can create a favourable overall social context for reconciliation. Without such a context, the traumatic past may remain a taboo or a constant source of manipulation and division. The painful issues will continue to stop conversations.

A reconciliation policy presupposes political will and leadership, exactly what is often lacking. In Bosnia-Herzegovina, for example, politicians are rightly perceived as a major obstacle to reconciliation, but their importance to the process is fully recognized. Convergence of demand from local actors and external support can make a difference. The formulation of a reconciliation policy would be an important signal domestically and at the regional and international stage, and could ignite a positive dynamic, however slow and tortuous.

Prosecuting war criminals should be at the centre of such a reconciliation policy, as one of its elements. Prosecutions, international and domestic, can contribute to peace and reconciliation only if they serve justice, not political interests. To be credible and fulfil their role, international criminal courts *must* perform to the highest professional and ethical standards, dispensing justice as expeditiously as possible. If their credibility erodes and were to become questionable – as is, sadly, the case with the ICTY because of a number of judgments in recent years – they will complicate the reconciliation process and cause far-reaching damage.

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⁹ Deputy Prime Minister Nebojša Čović, in domestic media, 2002 (on file with the author).