ICTY: War Crimes Trials As an Important Element of Confronting the Past

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Confronting the past in the post-Yugoslav context can be understood as simple acceptance of the fact that, in my name, somebody committed a crime against somebody else who has a name and a surname, who had a family, friends, dreams and ambitions, only because she or he really was or was perceived to be a member of a different ethnic, religious, political or some other group.

Non-acceptance, negation or silencing of such a fact means that each one of us individually who still holds onto this or a similar view, has not distanced themselves from crimes as one of the direst manifestations of social pathology. Tacit challenging or open verbal denial of that fact indicates that the individual is trying to relativize, i.e. justify a certain crime. Justification of a crime, viewed from the perspective of an individual, in any context whatsoever, is fertile ground for the seeds of some future evil to grow. The problem becomes much more serious when this stance becomes predominant at the level of the entire society, and the executives in various institutions start to treat it as something acceptable.

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"Treatment" of this disease of the society, which we usually call "confronting the past", is achieved in several ways. As with many biological diseases that afflict the human body, the cure usually exists, but it often comes in the form of a bitter pill we have to swallow or a medical procedure that subjects us to all kinds of unpleasantness. In our case, the bitter pill are the judgments of the Tribunal for the former Yugoslavia in the Hague, but also the verdicts of the courts in Bosnia-Herzegovina; it is as bitter as the truth can be, but necessary.

Very rare are situations in legal practice, especially in criminal cases, when both the prosecution and the defence are pleased with the final judgment – they are the exception, rather than the rule.

In the national histories of all the three peoples in Bosnia-Herzegovina, particularly in writings about the latest armed conflict, it is an established understanding that "we were only defending ourselves". The use of the syntagm "confronting the past" inevitably refers us to the said histories, because confronting the past means a critical questioning of the same, whereas critical enquiry into the said historical narratives puts them under a question mark, just as the judgments of the International Tribunal for the former Yugoslavia in the Hague do.

The social, economic, political and intellectual day-to-day life and, generally, the personality development of a young person in Bosnia-Herzegovina take place in a monoethnic environment on which an elite has imposed a narrative whose essence boils down again to the same old: "we were defending ourselves and fighting for our biological existence while all the others were attacking us". The myth that rests on the belief that the entire nation descends from the same ancestor is presented as a scientific truth. From that myth derives the unwritten obligation for each individual, in order to be considered as a loyal member of his/her people, to give at least moral support - if they cannot give any physical and material one – to their fellow countryman who is accused of the gravest war crimes. National histories that are studied from primary school to university offer to pupils and students not facts, but interpretations thereof, whereby critical enquiry and confrontation with the past are

hamstrung, and this scientific discipline becomes an instrument of systematic indoctrination. This "scientific truth", such as it is, determine the whole historiography; generations grow up with it, and every individual who, led by the need to satisfy his own intellectual curiosity, comes to different realisations, at odds with the patriotic mainstream, is labelled and rejected. The community tries to keep its members in submission by using contempt as an instrument of nationalistic disciplining.

The importance of war crimes trials is the most prominent in this segment of confrontation with the past, but it is not the only aspect of its import. We will never be able to count all the tears shed by mothers shrouded in black, we won't see the torments and anguish suffered by the victims, nor will we hear the cries of the innocent carried away by the wind, which wandered and echoed in Bosnian hills and valleys. But one thing we can do: to all those who were injured, humiliated, scorned, battered and mistreated, we can give the opportunity to tell us their stories that we will never be able or dare to forget.

Just as the victims, the accused should also be given the opportunity, through multi-phased criminal proceedings in multiple instances, to present their defence, to tell us their stories, to consume all the legal remedies that are the standard of modern criminal justice, and finally, depending on the evidentiary procedure, to be acquitted or convicted.

The tradition of extreme violence in Yugoslav lands, regardless of the historical era or century, is a constant in an uninterrupted continuity that reached its culmination at the end of the twentieth century. Morbid creativity in the perpetration of war crimes and crimes against humanity is one of the main features of both earlier wars and the latest one. This tradition of violence and creativity in the commission of crimes has created a culture of violence, and relativisation and justification of crimes are woven into the very essence of that culture. Our violence is better than theirs, i.e. our violence is a less dangerous violence and it is mainly a reaction to their violence, which is far more damaging, our violence is justified… At the root of the survival of this oxymoron, which we can call the culture of violence, lies uncritical understanding of the crime that was committed in our name, expressed as it is through the well-known formulas: "we were only defending ourselves" or "they were killing us", etc. Space for justifying evil was created precisely because, in previous periods of our tragic past, judicial institutions failed do their job and conduct criminal trials, and when some criminal trials were held, it was usually the victors trying the defeated, i.e. the criterion for indictment was not whether someone had committed a war crime or not; it depended instead on whether or not the person was prepared to identify with the new political ideology or a change of regime. Failure to punish crimes, hushing them up or tolerating them for whatever reason has led to a suppression of the past and gave rise to the thinking that crime can go unpunished, so it was eventually repeated.

The bringing of indictments, the submission of filings and writing of transcripts can seem to some people as ordinary procedural actions and purely bureaucratic techniques that can be of no use whatsoever to those who are no more. However, the indictments written on crimes committed yesterday are indictments threatening those whose evil spirits could as soon as tomorrow be pushed toward new moral downfalls; the evidence we have heard before the Hague Tribunal for the former Yugoslavia and our domestic courts are testimonies against those who might, in future, commit some

new crimes; the trials conducted today will always be a burning fire and a light in the demonic darkness of evil.

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A war crime trial is not only important it is perhaps *the* most important mechanism of confronting the past, even though in and of itself it cannot lead to the desired goal: by prosecuting the gravest types of violations of fundamental human rights they provoke a social articulation of traumatic experiences from the past. This social articulation takes place through televised and radio programmes, the press, the creation of electronic textual, audio and video content accessible 24/7 to broad masses on the internet. No-one can dispute this unquestionable influence on those who will be "compelled" to consume this content, and thus "forced" to face up to the said court-confirmed facts, regardless of whether they agree with them or not.

The Hague Tribunal for the former Yugoslavia has created an enormous legacy, hundreds of thousands of pages of written material, court transcripts, judgments and other documentation, accrued as a result of the cooperation of victims, witnesses, indictees, experts and forensics of various specialties, prosecutors, defence lawyers and judges, all coming from different cultures, states, different continents, longitudes and latitudes, that will remain as permanent reminders of our past. Every serious expert who will in future write their scientific paper on the said crimes, if he sets store by his moral integrity and scholarly credibility, whether she backs or not the currently prevailing concepts of the wartime past, will not be able to circumvent the abovementioned legacy and refer to its existence in their work. Regardless of the viewpoint of the scientific field from which we view this subject, no serious ambition to give a comprehensive scientific evaluation will be practicable without juxtaposing the said facts as a counter-thesis to the dominant narratives, and that is just one of the indicators that critical enquiry or confrontation with the past has already begun.

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The famous maxim says that “history is written by victors”. But is it even possible for any party to be the victor in a conflict that carried off more than 130,000 human lives, permanently displaced many times more people and caused inestimable material, mental and cultural loss to generations past and future?! It is also questionable whether Hannah Arendt’s theory on the “banality of evil” can apply to the Yugoslav tragedy, considering that the spark that later ignited the flames which swallowed an entire era had originated from the circles of none other than the academic and political elites, eternalised in the idea of “humane population transfer”.

The work of the International Tribunal for the former Yugoslavia (hereinafter referred to as: the Tribunal) has doubtlessly and enormously contributed to the development and strengthening of national judicial organs in the states created upon the break-up of Yugoslavia. Furthermore, the work of the Tribunal introduced into the case law, but also into the legal systems of the aforesaid states, new legal institutes (such as plea agreement, joint criminal enterprise, etc.). The direct impact of the Tribunal’s work is similarly reflected in the adoption of the National Strategy for the Prosecution of War Crimes and the consolidating capacities of war crimes prosecutors and courts. Equally important is the fact that the International Tribunal for the former Yugoslavia is the first international institution to deal with the criminal prosecution of massive human rights violations after the Nuremberg Tribunal completed its work in 1949, marking a new ascent of international criminal law.

Its judgments detail the political elite’s key role in creating the ideology of dehumanising members of other ethnicities, which enabled extermination and displacement to be accepted as legitimate methods to realise national interests, and crimes, genocide and rape to become part of everyday life. Adjudicated truth is the highest degree of truth (truth beyond any reasonable doubt) that can be achieved between politically opposed viewpoints. And it is precisely the adjudicated truth that says murders, extermination, imprisonment, mistreatment, rapes, expulsions, terror and violence were all part of the official policy; that Bosnian males were victims of a genocide conceived by the top leadership of a criminal regime and carried out by its hierarchically organised military and police structures in cahoots with criminal paramilitary formations. The trials held before the Hague Tribunal contributed to revealing the brutal methods used by the Milošević regime to cover up its crimes.

A successful process of confronting the past requires the establishment of strong institutions which will lead to a restoration of the citizens’ confidence in the legal order. Because institutions harbouring persons suspected of the most egregious crimes cannot be considered as guardians of democracy or human rights. An indicator of the attitude taken by the official institutions of the republics created on Yugoslavia’s ashes toward the policies of the nineties is also their systematic awarding of the highest state honours to persons indicted and convicted for war crimes, as well as the latter’s election to the highest public offices. Public denial of established facts on crimes is nothing less than fuelling of hatred, and its impact also makes impossible forgiveness by the victims. The media are just the right platform where a turn toward admitting the truth has to be demonstrated.

If we agree that lasting peace cannot be based on delusions and lies, then the ICTY’s legacy and documentation is of key significance in the process of peace-building and struggle against revisionism. The International Criminal Tribunal for the former

Yugoslavia has left behind it more than 1,600,000 documents. It is alarming that to this day, there are almost no young scholars writing their scientific papers or doctoral theses based on these documents. The evidence of those crimes, their systematic nature and their consequences must find its way into history textbooks and the schooling system.

Textbooks must be freed from the stereotyped language directed against members of other ethnicities. The curricula of the faculties of law and political sciences, today the bastion of radical nationalism and revisionism, should include study of the evidence of systematic crimes, their causes and effects. It is an appalling fact that the University, instead of encouraging constructive dialogue and critical thinking about the causes of the war, the war itself and its consequences, is becoming instead the stronghold of reactionary, conservative currents, where often the professors themselves deny the genocide and war crimes committed by members of "their" people, and it is not uncommon for them to even write books about convicted war criminals.

If we aspire to sincere reconciliation that would prevent future conflict, the facts have to be established, instead of being constantly swept under the rug. In the absence of an officially accepted memory, private memories will be created and later serve as a potential generator of reinterpretations and manipulations with the truth. Acceptance of the findings contained in the Hague judgments, acceptance of responsibility for the crimes and abandonment of constant revision of court-established facts could guarantee sustainability to the process of peace-building. A healthy, decent and progressive society living in peace with its neighbours, free from stereotypes and prejudice, cannot be built on lies and irresponsibility.

The work of the International Tribunal for the former Yugoslavia is also important if we do not wish to bring up new generations in a myth based on lies, historical revisionism, a society corrupted by collective responsibility and burdened with the ghosts of the (recent) past, all because that past has not been faced and dealt with. We must try to overcome many years' worth of misunderstandings, isolation and obstacles resulting from events that happened before we were born and were imposed on us as reality by the older generations. Awareness of the existence of parallel and conflicting narratives could create better mutual understanding among young people in the region. Although we are too young to feel responsible for the legacy we have inherited, we are responsible for the way we treat it.

Regional initiatives such as RECOM that base their work and programs on the facts established in the judgments of the International Tribunal for the former Yugoslavia provide hope that the Western Balkan societies are capable, after all, to transfer justice from the international legal terrain to the real (co-)existence of ordinary people. It is precisely with our attitude to the culture of remembering (through joint commemorations, honouring the victims, condemning every bullet and every shell fired, but most importantly – every word uttered) that we prevent the rise of some new Karadžić, Mladić, Milošević…

The ICTY made it impossible for those who, with their decisions, ethnically redrew borders, to participate in the reality shaped by their crimes; it is up to us to undo and transform that reality. What still causes concern is the restoration of the value system based on a lack of understanding and hatred, which enjoys particularly strong support

among the new generations, and frequently goes hand-in-hand with flirtings with nationalism. Views on institutions dealing with war crimes are formed on the basis of the politicians' discourse, and denial is still a widespread phenomenon in the territory of the former Yugoslavia where the majority simply does not admit to crimes committed against members of the other side. The political pressure that (still) accompanies trials of war crimes indictees before domestic courts is partly responsible for the relatively small number of adjudicated cases in Serbia and in Croatia. An encouraging efficiency has been displayed by the judiciary of Bosnia-Herzegovina, which has so far prosecuted and resolved the largest number of cases, compared with the neighbouring countries.

The duty of my generation, but also of all those to follow in the Balkans, is precisely the moral imperative to build relations of mutual trust and co-existence in the region, so that the fruits of the bloody work of those who had selfishly sold out our future should not become a new reality reigned by divisions, mistrust and hatred. Once and for all we must stop the spiral of violence that has brought our home region to the precipice of misery and despair. That is still beyond our reach precisely because we remain disunited and encumbered with mutual accusations. This state of affairs is untenable and the irresponsibility of the political elite unforgivable.

For all these reasons it is important for every young man and woman from these parts to know what happened in Srebrenica, Meja, Suva Reka, Lovas, Čelebići, Štrpci, Omarska, at Markale, Tuzlanska kapija, Ovčara, Korićanske stene and other sites of bloody crimes. The question how we will confront the legacy of genocidal policies is directly conditioned by the question: what kind of society do we want to live in - in value systems built on lies and denial, or a mature, modern society aware of its own responsibility?

Our only chance lies with new generations. We can only hope that they will read the judgments before a new war breaks out. It is precisely that demand, for people to remember people, that stands as a dam against the advance of new fratricidal ideas.

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The period of over twenty years of existence of the International Criminal Tribunal for the former Yugoslavia and the Tribunal's extensive case law provide sufficient basis for making an objective judgement on the Tribunal's contribution to achieving the goals of transitional justice. Without attaining the goals of transitional justice, there can be no talk of society's confrontation with its past. By analysing the contribution the Tribunal made to each of the goals of transitional justice we can grasp the overall significance of the Tribunal for the confrontation of the societies in the states created in the territory of the former Yugoslavia with their own respective pasts.

The first goal of transitional justice is to establish the truth. When humanitarian law and human rights are violated on a massive scale, the existence of these violations is known to the victims, on one hand, and to the perpetrators, on the other hand. What is very important for post-conflict societies is for their public at large to become aware of these crimes. Without establishing the truth, i.e. without providing an answer to the question: what exactly happened in that crisis period? - We cannot move toward achieving the other goals of transitional justice. In that sense, the Tribunal's contribution is great: by 2011, over 4,000 persons had had the opportunity – by testifying or in some other way – to tell their story. A large number of victims, regrettably, did not live to testify, but the Tribunal has made it possible for their fates to be revealed, too, as in the cases of missing persons. In keeping with the žbeyond any reasonable doubt' standard, the Tribunal has succeeded in exposing nearly all the crimes committed during the war in the territory of ex-Yugoslavia, thereby creating the prerequisites for locating and conducting criminal proceedings against the persons suspected of having committed these crimes, i.e. for bringing justice.

Justice is the second goal of transitional justice and at the same time the principal mission of Tribunal, as it would be for every court of law. The Tribunal was established with the idea of being a mechanism that would directly contribute to the achievement of justice in the region of the former Yugoslavia. At first blush, such a reaction on the part of the international community as represented by the UN Security Council constitutes the right step toward laying the groundwork for the process of confronting the past. The international community reacted to the humanitarian law violations by opposing the crimes in a legally grounded way. Great effort has been invested in shaping the substantive and procedural law to be applied by the Tribunal. The substantive law contained in the Tribunal's Statute is based first of all on the already existing international criminal law, but the Tribunal's practice also contributed to developing international criminal law. Namely, since the crimes in the Čelebić camp[1], rape has been treated in the Tribunal's practice as a war crime, although the Geneva Conventions do not envisage the possibility of committing a war crime through the act of rape.[2] The criminal procedure law contained in the Rules of Procedure and Evidence is based on a combination of elements from adversarial and

[1] http://www.icty.org/case/mucic/4
[2] V. Dimitrijević, V. Hadži-Vidanović, I. Jovanović, Ž. Marković, M. Milanović, *Haške nedoumice Poznato i nepoznato o Međunarodnom krivičnom tribunal za bivšu Jugoslaviju /The Hague Puzzle/,* The Belgrade Human Rights Centre, Belgrade, 2011, page 164 in the original

inquisitorial procedures and as the convergence of elements of these two types of procedure is becoming a general trend in procedural law,[3] considering that the Rules of Procedure and Evidence were adopted in 1993, one can conclude that the Tribunal has contributed to establishing this trend. All this goes to show that the Tribunal was established based on legal principles, thereby creating a mechanism that can contribute to the achievement of justice.

And yet, the question whether the Tribunal contributed to achieving justice in each specific case is a divisive one. Public reactions to the ICTY's judgments in the countries of the former Yugoslavia varied, depending on the nationality of the accused. Furthermore, reactions to convictions were never so divided as the reactions to acquittals. The reason is probably that the public views an acquittal as a denial that the crimes in question happened. This, however, is a misperception, because an acquittal does not mean that a crime has not been committed; it means only that the Tribunal has not succeeded in proving beyond any reasonable doubt that the accused is guilty.[4] This, in turn, should not be interpreted as a sign of the Tribunal's weakness in terms of a lack of a mechanism for establishing responsibility.

Thus, for example, in the case *Gotovina et al.*[5], Serbia's public opinion met the acquittal with embitterment, while Croatia's rejoiced. This outcome obtained not because the rules of procedure before the Tribunal or the law it applies are bad, but because these rules were not honoured. Namely, the Trial Chamber had established Gotovina's and Markač's responsibility for the crimes committed in the Operation Storm, but the Appeals Chamber acquitted them. The Appeals Chamber, however, is not competent to establish facts *de novo*, but only to examine whether law was correctly applied in the first-instance proceedings. And yet, in this case the Appeals Chamber set out to establish facts all over again, doing so, moreover, only from the viewpoint of command responsibility, completely neglecting all the other evidence established by the Trial Chamber. The controversy of this situation was additionally exacerbated by the fact that two of the five judges on the Appeals Chamber openly criticised the Appeal Judgment in their dissenting opinions.[6] Such overt censure of co-members of the Chamber has not been common in the work of the Tribunal.

Another controversial and noteworthy case is the trial of Ramush Haradinaj, Idriz Baljaj and Lahi Brahimaj.[7] Despite the existence of indices that they were responsible for serious violations of humanitarian law, they were acquitted for lack of evidence. The reason for this lack of evidence was that numerous witnesses had been intimidated from testifying. Still, even in this case the decision was not due to any bad regulation in the Tribunal, but to the fact that the ICTY as a supra-national body does not have any means of coercion. It is simply not within its jurisdiction to guarantee safety to witnesses – this lies within the jurisdiction of states.

Based on the above, we may conclude that the controversial judgments did not result from any poorly regulated work of the Tribunal or any poorly defined law that it applies, but from failures to adhere to the Tribunal's Statute and its Rules of

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[3] M. Škulić, *Krivično procesno pravo /Criminal Procedure Law/,* Law Faculty of the University of Belgrade, 2013, page 13.

[4] http://www.vox-populi.rs/hronika/9354/tribunal_doprineo_vladavini_prava.html / Tribunal Contributed to Rule of Law/

[5] http://www.icty.org/case/gotovina/4

[6] Judges Agius and Pocar

[7] http://www.icty.org/cases/party/698/4

Procedure and Evidence. This shows that the Tribunal provides a good mechanism for attaining justice, although whether justice will be attained or not does not depend on the mechanism itself, but on the will to apply it correctly.

The next goal of transitional justice necessary for the process of confronting the past is the restoration of peace. The Tribunal's critics like to underline that it has failed in achieving this goal. The facts are that the Tribunal was established in 1993, that the wars in Croatia and Bosnia-Herzegovina ended in 1995, that the war in KM /Kosovo and Metohija/ lasted from 1998 to 1999, and that in 2001, there was a war in Macedonia. From that point of view, the Tribunal did not contribute to creating peace – on the contrary, new wars broke out during its existence.

But we can also ask a different question, namely: would the war have lasted longer if there had been no ICTY? Without launching into a discussion on a hypothetical question, what we can say with certainty is that the perpetrators of crimes were aware of the Tribunal's existence and could have reasonably expected to be held accountable before it.[8]

As regards the Tribunal's contribution to reconciliation (as a goal of transitional justice), if we take into account that those indicted before the Tribunal are welcomed in their communities as heroes and the Tribunal continues to be criticised for trying only one nation, it is clear that the ICTY has not attained this goal. However, the Tribunal cannot be expected to reach the goal of reconciliation because its achievement requires the engagement of many more factors and mechanisms, the key one among them being education. The Tribunal's contribution to reconciliation consists in exposing crimes and establishing individual responsibility for them. As a result, there can be no talk of any guilt on the part of a state or a nation, which is the fundamental prerequisite for the crimes not to be repeated.[9]

In conclusion, we must point out the Tribunal's significance for realising democracy and the rule of law as two intertwined and most complex goals of transitional justice which inherently generate the above mentioned goals. The Tribunal has assisted in the creation and reinforcement of institutions in the states created on the soil of the former Yugoslavia, so that a large number of trials for violations of humanitarian law, mainly of direct perpetrators, were held before national courts. That would not have been possible without the support supplied by the mechanism personified by the Tribunal which established, in a legally substantiated way and beyond a reasonable doubt, the truth and responsibility in cases involving the most egregious crimes committed in the war. This is attested by the case law of almost 160 judgments delivered by the Tribunal.

The conclusion is that the Tribunal, in view of its legal and technical organisation[10], constitutes an important element for confronting the past, and primarily a good mechanism for achieving justice. The affirmation of the Tribunal is all the stronger if we stop to think what the alternative to establishing the ICTY might have been. If the

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[8] In May 1999 Chief Prosecutor Louse Arbour issued an indictment against Slobodan Milošević, thereby creating a precedent, as it was the first time in history that an acting head of state was indicted before an international court of law.

[9] B. Krivokapić, *Aktuelni problemi međunarodnog prava /Current Issues of International Law/, Official Gazette*, Belgrade, 2011, page 515.

[10] V. Vasilijević, *Zločin i odgovornost /Crime and Responsibility/, Prometej,* Belgrade, 1995, page 214

United Nations had not set up the Tribunal and it had been left to the new countries in the former Yugoslavia to pursue the goals of transitional justice on their own, the process of confronting the past would certainly have been slower and maybe not possible at all.