

Aleksandar FATIĆ,
*Aleksandra BULATOVIĆ*¹

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JUSTICE AND RECONCILIATION IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

ABSTRACT

By discussing the general philosophy of punishment in its contours, the authors attempt to establish conceptual connections between the philosophical roots of international criminal law for war crimes and reconciliation as an overarching goal of international criminal justice. Reconciliation is discussed in the paper both as a value and as a process, and the authors strive to practically underline the issue of the capability of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to actually serve the purpose of reconciliation. The authors conclude that the ITCY suffers from substantial deficiencies in its capability to effect reconciliation, not because it is politically biased, as is often remarked by analysts, but rather because of procedural and substantive legal problems encountered in its operation that shape it as less than an adequate criminal court generally speaking.

Key Words: justice, punishment, reconciliation, International Criminal Tribunal for the Former Yugoslavia, law

INTRODUCTION

Discussions of the International Criminal Tribunal for the Former Yugoslavia, since its inception in 1993, have revolved around the politics of it more than its legal purpose and its effectiveness in accomplishing this purpose. Accusations have been levied on all sides that

¹ Prof. Aleksandar Fatić, Research Professor, Institute of International Politics and Economics, Beograd, Aleksandra Bulatović, Research Fellow, Institute for Criminological and Sociological Research, Beograd.

ICTY is primarily a political weapon of the international community to enforce a lasting political peace in the region, and only secondarily a legal instrument designed to bring about justice and reconciliation. While the degree of politics in ICTY, and especially the politics of criminal charges by the Prosecutorial Office, may or may not be entirely in accordance with the legal purposes of this court, it is important to consider the legal side of it first, as understanding the degree of fulfilment of the legal purposes may allow one to fathom the politics of ICTY more accurately. We shall endeavour in this relatively brief paper to discuss roughly the general philosophy of punishment in its contours, to the extent that it applies to international criminal law, as well as the conceptual connections between the philosophical roots of international criminal law for war crimes in its purpose, and reconciliation as an overarching goal of international criminal justice.

The goals as stated above are not uncontroversial themselves, and their discussion remains an invitation for critique and debate over the goals of punishment generally. This is an eternal debate in applied philosophy, and the more controversial the proposals within it, the more interesting the debate itself becomes. We shall endeavour in this paper to keep the controversy to a practical minimum, while trying to expand somewhat more on the particularities of reconciliation, both as a value and as a process, and the capability of ICTY to actually serve the purposes of reconciliation.²

It is a generalised concept in the criminal justice academic and professional communities that a criminal court must first answer the demands of justice and social control, and only afterwards, possibly, also the demands of politics. Indeed, only basic practicality requires that one recognises the unavoidability of politics in the judicial work, even if such politics do not go beyond the limits of what is called “criminal policy“. In the case of ICTY, criminal policy is very much the policy of indictments, and they are *par excellence* political decisions with major political consequences in the

2 Aleksandar Fatić first addressed the issue of reconciliation at ICTY in his book *Reconciliation via the War Crimes Tribunal?*, Ashgate, Aldershot, 2000. The book was written in a particular intellectual situation, in Belgrade, during a NATO bombing of Serbia over Kosovo, yet it strove to be as objective and broad in view as possible. It has since received quite a passionate response by the international academic community, ranging from what seems as very warm acceptance to what could be labeled hostile rejection. Many things have happened since the publication of this book, and this article is in fact an elaboration of the principled, philosophical underpinnings of the book that may not have seemed so at the time.

countries concerned. Thus, the connection between policy and politics of ICTY makes particularly obvious the principled link between the two in the work of practically any criminal court.

Let us, however, get back to the basics of criminal law. A court is supposed to implement justice in this respect, and also allow for the fulfilment of purposes of social control. What this exactly means, and to what extent the two goals intertwine, is part of the discussion within the classical theories of criminal sanctions, or “philosophies of punishment“.

TRADITIONAL CONCEPTIONS OF THE PURPOSE OF CRIMINAL LAW (“PURPOSE OF PUNISHMENT”)

The two dominant philosophical ways of conceptualising the ethics of criminal law, or of punishment more specifically, are based on the two methodological possibilities of constructing justifications of punishment. The first one is the so-called deontological, or “deontic“ ethics, which is based on certain categorical, substantive moral principles, such as the need to mete out a morally deserved sanction. Deontic theories imply that the purpose of punishment, and of criminal law more generally, is to fulfil the moral principles of justice that arise from a moral nature in all human beings. Such deep deontic convictions can be in sharp contradiction with the practicalities of the implementation of criminal sanctions and the circumstances that surround criminal cases, and it is exactly such convictions that have once led perhaps the most consistent deontic ethicist in intellectual history, Immanuel Kant, to conclude that, should such an unfortunate set of circumstances occur that the civilisation as we know it faces an imminent collapse, prior to the end of it the moral duty of those in power would dictate them to first execute all those serving prison sentences, so that the moral principles of justice may not be avoided by the collapse of the state.³ This type of theory of criminal sanctions is known as the philosophy of *retributivism*.

The other methodology in approaching the purpose of the criminal law is the so-called consequentialist way of reasoning, which implies that an action

3 Kant’s *Metaphysics of Morals* is a particularly rich source of insights into his metaphysical conception of morality, that of the “substance” of humanity. An exegetic approach to Kant’s ethics, with all the controversies that it would inevitably provoke, is not part of our aim in this paper. See more in: Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, translated by Thomas Kingsmill Abbott, eBooks@Adelaide, 2004, <http://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/>.

is justified insofar as its ultimate consequences conduce to the achievement of a greater good for a maximum number of people. In short, an action is justified by its foreseeable consequences. This method of arguing about criminal law has proven more applicable in both normative texts, and in academic jurisprudence of it. Perhaps the most direct philosophical doctrinary form of consequentialism is the well-known ethics of utilitarianism, which entails that actions are justified insofar as they produce greater utility, or benefit, in as general and comprehensive terms as possible. Obviously, then, actions, including criminal sanctions, that produce the greatest utility, even if they are not in accordance with the deontic intuitions of justice *per se*, will be preferable to those arising from the requirements of justice alone. Some of the classic utilitarian theorists, perhaps starting with Jeremy Bentham, have perceived the relevant type of utility as “generalised benevolence“, which is a far more appealing term for moral theory than the crude notion of “benefit“.⁴

One of the more broadly adopted consequentialist ways of conceptualising the aims of punishment is that based on the so-called *general and special prevention*, where general prevention entails the supposed effect of punishment that, once an offender is penalised, this serves to deter many other potential offenders, who identify themselves with the exemplary case being penalised, while special prevention entails that the offender who is penalised will, supposedly, be disinclined to repeat the offence once sanctioned. According to the explanation based on prevention, the mechanism of deterrence is key to accomplishing the goals of social control.

There are many problems with the deterrence model of the aim of punishment, but perhaps the most obvious one is that experience does not confirm the preventionists’ assumption, as it is well known that the rate of reoffending among members of the prison populations is excessively high (which would seem to refute the assumption that there is much special prevention in the most ordinary forms of punishment, to say the least), as well as that even in countries with the harshest penal systems there are periods of rather significant rises in crime rates, which would seem to cast a shadow over the unconditional validity of the assumption of general prevention.⁵

4 Jeremy Bentham, *Principles of Penal Law*, in: Jeremy Bentham, *Works*, ed. by J. Bowing, Russell & Russell, New York, 1962, particularly pp. 396–7.

5 In fact, there is much to be said about the fundamental validity of the very assumption that punishment has any significant preventative effect in the first place, but such a discussion would require far too much space and detail than it is possible to devote it in this paper.

Another particular aspect of the consequentialist reasoning about crime and punishment is the so-called “*reformation goal of punishment*”, which suggests that criminal sanctions have a particular therapeutic effect on those subjected to them, so that they play a role in resocialising the offender. This argument, particularly frequently applied to prison sanctions, has proven profoundly difficult to justify, because of the already mentioned high rates of recidivism among the prison populations in most countries. In fact, it is sometimes argued to the contrary, namely that prisons, rather than being institutions of reconciliation, are more “schools of crime” that make the likelihood of reoffending higher than it would be otherwise.

Uncontroversially, the goals of punishment and criminal justice as a whole appear to be ultimately rooted in prevention. This applies to national, as well as international criminal justice, and by the lights of prevention, through its various mechanisms, it is possible to best evaluate particular criminal justice institutions and their social value. While retribution remains a distant goal on the horizon, a philosophical underpinning of the discourse of just deserts and the proportional treatment of offenders, the ultimate social use of courts, prisons and repressive agencies such as the police derive from their capacity to achieve a degree of prevention that the society considers acceptable. These considerations also apply to the International Criminal Tribunal for the Former Yugoslavia at the Hague.

Experience has shown, relatively uncontroversially, that the theories of reformation of the offender do not correspond to reality, as most those sanctioned by prison sentences return to a life of crime, and many of the criminal careers actually become more serious after the prison experience. There are also those who question the preventative value of deterrence as well, arguing that the countries with the most severe prescribed sentences for crime typically experience the most persistently high, or even rising, crime rates, which, at least *prima facie*, seems to suggest that there is something very wrong with the supposition of deterrence.⁶

One way of approaching this seeming impasse in arguing for a *preventative role of punishment* is to try to see the crime, for which the punishment is meted out, as an inherently conflictual situation. If a crime is a

Thus, we shall contend here with some very general and *prima facie* reasonable reservations with regard to the validity of the assumption of deterrence, which is sufficient for the present purposes.

6 For an overview see: Aleksandar Fatić, *Punishment and Restorative Crime-Handling: A Social Theory of Trust*, Ashgate, UK, 1995.

conflict, then it has at least three pairs of actors within it. Firstly, and most obviously, a crime is some kind of conflict between the offender and the victim of the offence, whether or not there is a direct personal victim, or the victim is the society at large. Secondly, a crime must surely be a conflict between the offender and the society understood as a set of norms that govern social life. Most trivially, this type of conflict is one between the offender and the law as one set of social norms governing behaviour. Thirdly, the moral dimension of a crime must also play a role in the structure of the conflict, and in this regard a crime is certainly a conflict between the offender (or, perhaps more precisely, *the offence* as an act) and a moral order to which the offence is an affront.

The three dimensions of conflict enumerated above should, then, be somehow solved, or at least managed, by criminal policy, and specifically by the punishments meted out for particular crimes. The criminal policy, and penal policy as a part of it, should, in this light, be understood as a mediating mechanism between the sides in conflict, which serve the re-establishment of a social equilibrium.

There are reasons to assume that a social equilibrium is fundamentally determined by the level of trust between the relevant parties, as social functionality in principle depends on the social capital of trust. The more trust there is between the interested parties in any social interaction, the fewer transaction costs, the less risk and waste of energy and resources, including time. As Niklas Luhmann put it, trust is a value and a capital that we always count on, even in the most trivial ways, in any society. Without trust, even the simplest actions in society, walking in the street included, would require extensive and demanding preparations, the taking of precautionary measures to evade antagonistic behaviour by others. The assumption of basic benevolence between the interlocutors and inter-actors in any social dynamics makes life not just easier, but possible in the true social sense.⁷ Thus, if international criminal justice is to serve the re-establishment of an equilibrium supposedly disturbed by the crime, it must somehow serve the achievement of a greater trust between the relevant parties, those parties being the participants in the conflict that conceptually underlies the offence.

The parties in conflict, in any case, whether they are the victim and the offender, or the society and the offender, or the offence and the moral order against which the offence is committed, require that justice as the mediating

7 Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie*, Suhrkamp, 1987, reprint 1991.

mechanism satisfies certain criteria that will allow not just the ability of the victim or the society to re-accept the offender, but also the offender to accept the society or the victim. This, in fact, is a crucial element, because justice that only serves as the soothing mechanism for the wounds suffered by the victim or the society at the hands of the offender would obviously not be good enough. There is something unavoidable, though perhaps, on occasions at least, dislikeable, even repulsive, in the requirement that justice must satisfy the criminal as well as the victim or the society. Yet, the two-sided nature of justice is broadly perceived as a part of the very essence of it, and something to start from in any discussion of a sustainable system of justice.

For such a system to be effective as a reconciliation instrument, it needs to satisfy certain more or less obvious criteria, such as *impartiality*, *explicit recognition of the goal of reconciliation*, *emphasis on perceptions, rather than a deontic* and largely metaphysical nature of *justice* described briefly above under the retributive theoretical heading, and – in the case of international justice, an *explicit recognition of the political dimension of the judicial process* – specific for international criminal law. Clearly, more needs to be said about these criteria, as they are the substance of the controversies that surround the work of ICTY today.⁸

PERCEPTIONS, POLITICS, AND JUSTICE AND THE CASE OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

International justice is importantly different from national justice, because the enforcement mechanisms that are on its disposal are more far fetched, thus less immediate and less effective than those available to national courts. For international courts, in most cases, there is no police force, no repressive mechanism, and no strict observance of warrants that would allow for a speedy apprehension of the accused. Thus, international courts depend on international law, namely on its observance by all parties concerned, and in order to ensure this type of observance, they must command authority as impartial. In short, they must take care of the perceptions of the court within the countries concerned, and especially with

⁸ For an early discussion of the issues of crime and responsibility in a civil war, legal inconsistencies within ICTY and possible policy directions see Aleksandar Fatić & Dragan Prlja, *The Hague International War Crimes Tribunal*, Association for the Study of Foreign Policy, Kotor, 1998 (CD edition).

the governments concerned, if they wish these governments to fully cooperate. In other words, international courts, unlike national ones, are unavoidably political. There is a definite politics of international courts, and it is not aided by denials of its existence, which persists as a kind of knee-jerk reaction by the existing courts, including ICTY.⁹

If management of perceptions is crucial for the very existence of international justice, then clearly a key part of that politics is the policy of indictments, which must be carefully gagged time wise to make sure that a perception of impartiality and of care in the development of judicial policy are not shattered. The prosecutorial service, in this context, appears as a key actor and as a par excellence political organ within the courts; the role of the prosecution in international criminal courts is radically different from the role of prosecution in the national justice system – the difference is so dramatic that the two cannot even be compared. Any attempt to shed the political role by international prosecutors and to see themselves in the same light as national prosecutors is fatal for the perception of the international court and for the very mission of the international prosecution, because it will then unavoidably appear as one-sidedly vindictive and even fanatical at certain stages in its work. This is what has happened to the prosecution within ICTY, whose Chief Prosecutors, both Louise Arbour, and to an even greater extent Karla del Ponte, have managed to almost completely destroy any credibility ICTY might have had in the countries concerned at the time of commencement of its first processes. At the time of writing of this paper, which comes six years after the publication of the mentioned book of A. Fatić, in which warnings were sounded that the ICTY was going along a fatally mistaken path in the oblivious self-denial of its own political side, a warning that was but an echo within a whole chorus of similar academic warnings all along, ICTY is at rockbottom of its popularity in Southeastern Europe. It is regarded as an incompetent and inadequate institution, and its prosecution is seen as one of those defaults of the international institutional system that must be accepted as a freak of bad luck in the otherwise desirable system of evolution of a global society.

9 For a more academically rigorous discussion of ICTY as an instrument of modern diplomacy, see: Aleksandar Fatić, „Mesto međunarodnog krivičnog tribunala za bivšu Jugoslaviju u savremenoj diplomatiji“ (“The place of the International Criminal Tribunal for the Former Yugoslavia in contemporary diplomacy“), *Međunarodni problemi (International Problems)*, Institute of International Politics and Economics, Belgrade, vol. LIV, no. 1–2, 2002, pp. 48–72.

Indictments are particularly important in the early stages of an international criminal court's involvement in a regional crisis or a conflict, because the grouping and timing of indictments in this early phase of the defining of the conflict shapes the reputation of the court in the relevant region and establishes the perception of its impartiality. Specifically, this means that an international prosecutor should not just go along the same road as a national prosecutor, charging all those against whom there is evidence at a particular point in time, without taking account of the proportions of those charged who come from different parties in conflict. Initially, a proportion, even if a very rough one, must be observed, otherwise the court's entire mission will fail. If a proportion is observed in the initial phase, time will come for the international prosecutors when they will be able to charge all those suspected of crimes without worrying too much about their nationality or group affiliation, but if they make a mistake at the beginning and do not observe the principles of establishing credibility, the failure of the court in its reconciliation-guided mission will primarily be their fault. Any accusations levied against others in such a case will simply demonstrate the impotence of those entrusted with the demanding and very specific jobs of international prosecutors. This is exactly what has happened to ICTY – its failed reconciliation mission, which at the outset had great potential, is the victim of an arrogant prosecution. One prosecutor, Louise Arbour, left her office for a position in the Supreme Court of Canada immediately after charging the late Slobodan Milošević, leaving the cracked construction of ICTY prosecution to Karla del Ponte who, with her aggressive interference in local politics in the Balkans, managed to shatter it to the end by mid-2006. With the death of Slobodan Milošević in the ICTY detention unit, amid a meandering and at times ineffective prosecution case, and under highly problematic circumstances (including a denial of specifically requested medical assistance), ICTY has lost any real support even among the most pro-ICTY politicians in Serbia, which is the most unfortunate scenario imaginable.

The example of ICTY, in fact, is a perfect illustration of what the prosecutorial policy of a international criminal court should *not* be like, and in this sense it is a valuable textbook experience for the future international prosecutors and judicial policy makers. With the establishment of a permanent International Criminal Court, which is slowly coming to life, this is a particularly important negative experience, which will hopefully lead to a more constructive definition of prosecutorial and related policies at the Hague that will command international authority and voluntary obedience.

Even in a national criminal justice system, a priority in fighting crime is the development of a national criminal policy, which includes prioritising indictments and police work, the respective allocation of resources to various parts of the criminal justice system, creation of appropriate conditions for and organisation of criminal courts, and even the policy of criminal sanctions and their execution. In other words, even in a national criminal justice system, which by nature is necessarily less political than any international criminal court, the goal of controlling crime requires the development of a strategy, called criminal policy. Even in such a system the work of the prosecution is not simply reduced to charging all those for whom there seems to exist evidence that they have committed a crime; there is always more than just that ideal principle of enforcing justice. In fact, justice is rarely the goal, and that needs to be understood very clearly – the goal of a criminal justice system is to control crime, and the goal of an international criminal court is to contribute to the creation of conditions, including reconciliation of the parties in conflict, which will lead to a greater control of international crime. Justice may or may not be a part of this goal, and in cases where it is not, justice is not the task of the international court.

Perhaps it is the lack of this realisation that hampers the work of ICTY, because the self-righteousness of the prosecution constantly fluctuates between sensible criminal policy and a self-ascribed God-like role of enforcers of deontic justice. The question appropriate to be asked in this context is in fact whether or not there is actually an ICTY criminal policy, and the obvious answer is that there is not. The confusion of the goals of international criminal justice, which is aided by the use of the term “justice” – inappropriate as it is for criminal policy – simply does not allow for a coherent policy, and this is the conceptual reason why ICTY has failed. Whatever its advocates might say, it has failed utterly and disreputably, and will remain a beacon in the path of development of the international criminal judiciary as a negative example, its didactic value hardly justifying the amount of energy, resources and, most of all, hopes, invested in its establishment and initial years of work.

The stated goal of ICTY is to punish the crimes against humanity and war crimes and prevent the commission of such crimes in the future, as well as contribute to reconciliation in the region affected by the wars of the former Yugoslavia, and allow for the assigning of blame for atrocities to individuals, rather than to national collectives. The achievement of these goals, which in their pro-active dimension come down to the goal of reconciliation and stabilisation in the region, requires a particular criminal policy.

Already at the outset of consideration of any criminal policy by ICTY, one runs into problems, as it is unclear who in fact decides on criminal policy

within ICTY. The prosecution has one policy which, as has been mentioned, is highly destructive for reconciliation. The judicial chambers have a policy that fluctuates, and this fluctuation is reflected in differing decisions made on similar cases, such as the decisions on requests for release until commencement of trial. Some defendants have been released, and others, who have fulfilled exactly the same criteria, have not been released, even though they had guarantees by the governments of their home countries that they would be delivered back to the Hague for trial, and even though they had actually surrendered themselves voluntarily as soon as they had found out that they had been indicted. Similar inconsistencies in the decisions made by the chambers are easily observable elsewhere, too.

Croatian General Tihomir Blaškić, accused of crimes against the Muslim population in the Lašva river valley, although he had surrendered to ICTY voluntarily, was kept in prison and sentenced to the harshest prison sentence up to that moment, which was 40 years. Pending appeal, the sentence was overturned, and, rather than being found innocent, Blaškić was conveniently found guilty of lesser crimes amounting to the prison sentence that exactly conformed to the time he had already served in detention until final verdict, and was then released.

Despite the fact that the indicted in the detention unit of the Tribunal are not typical criminals, but politicians and soldiers, and that none of them had any previous prison experience, as well as the fact that there were relatively few inmates at the detention unit, at least two Serbs committed suicide in that unit by hanging themselves, even though the supervision allegedly involved visual controls of the inmates every 20 minutes, and at least one of them, Slavko Dokmanović, had shown clear signs of depression that had been conveyed to the ICTY authorities by his attorney, prior to his suicide. Yet, the director of the detention unit has not been replaced, and even today he happily continues to act in this capacity.

A particularly dangerous aspect of this pervasive lack of criminal policy is the perceived partiality in the bringing forward of indictments, and this was particularly obvious with regard to NATO's bombing of Serbia over Kosovo, in the Spring of 1999, during which campaign civilian targets were hit deliberately and forbidden weapons were used, including the internationally banned cluster bombs that were dropped on densely populated areas in the second-biggest Serbian city of Niš, and the double bombing of a civilian-packed train on a bridge in Grdelička klisura, in the South of Serbia, which resulted in hundreds of civilian deaths. Despite flagrant violations of the rules

of war and deliberate targeting of civilian installations and infrastructure, the ICTY prosecution missed the opportunity to use the clear mandate that it had to prosecute those responsible for these actions.

All of the above are merely illustrations that show just what type of carelessness and partiality is involved in the internal organisation and management of ICTY. These shortcomings are not political, nor are they a result of particular ethnic or group prejudice. Instead, they merely reflect the dire straits in which international justice at ICTY really is, and fully justify the reluctance by some of the powerful countries, including the US, to recognise the jurisdiction of international criminal justice for their nationals under the auspices of the permanent International Criminal Court. Clearly, the example of ICTY is anything but a good reference for the establishment and acceptance of that court worldwide.

SPECIFICITIES OF CRIMINAL POLICY FOR CRIMES OF WAR

In his excellent study of the Law of War, historian Geoffrey Best states:

“The law of war has never functioned as well as has, for much of the time, the law of peace. The reasonable civilized man, knowing what war means, could never have expected it to; he would be content with it as the lesser of a choice of evils; or at least, better than nothing. Its history contains ups as well as downs. In course of the ups—in certain relatively happy times, places, and episodes—it has achieved more than the sceptic allows. It has shown that it can approximate to the civilized idea of it. But whether or not the ups can be judged collectively to outweigh the downs, and whether the downs can be so prolonged and terrible as effectually to discredit the whole idea and to signify that belief in the law of war is *not* better than nothing—these are questions the sceptic remains free to pose because neither the historian nor any other scholar can pretend to answer them. The best that any of us can do is to learn from the historians and social scientists who study the causes of armed conflicts and what goes on in them; attempt to distinguish the cultural and political circumstances which minimize rather than maximize the risks and evils of armed conflicts; consequently to promote and support such policies in our own and other reachable States as are calculated to create those circumstances; and to be ready to bear the unpopularity of them, for they are likely to be strong-minded and forceful.”¹⁰

10 Geoffrey Best, *War & Law since 1945*, Clarendon Press, Oxford, 1994, reprint 2002, pp. 9–10.

This unusually lengthy quote summarises basically all important facets of ICTY's account of performance in the 13 years since its inception in 1993.

The quote can roughly be divided into several separate thesis that are espoused in it. First is that war of law can never be as precise and effective as the law of peace, which means that in the chaotic circumstances of warfare, where not only events, but also moral judgements are less clear-cut than in peacetime, and chains of actual control of particular actions and, thus, automatically, chains of responsibility as well, are more clouded than in the commission of ordinary peacetime crimes, one cannot reasonably hope to achieve the same standard of justice as one might strive to do in a national, peacetime-based system of justice. History, as Best says, has shown that the actual approximations to peacetime precision and effectiveness of the law by the war of law have varied wildly, from almost perfect fits, to those that allow the posing of the question of whether the war of law makes any difference at all.

This first point of insight is not just the position of a sceptic, but rather a viewpoint that any international prosecutor and judge must take as the point of departure when setting out to address crimes committed in wars, especially if these are civil wars. The lenses through which an international agent of justice looks at the reasonable standards of achievement of justice in civil war will determine the realism, or lack of it, with which the process will start, and end. The lenses usually require tact, proportionality and sensitivity for politics as long as there are any debates in the States concerned over the authority of the tribunal. If the lenses of care are taken off, the process starts as an antagonistic imposition, and ends as an antagonistic failure that everybody concerned will disown.

Secondly, Best rightly points out that, instead of looking at justice in times of war through the pink glass of the standards of national peacetime justice, one needs to study the cultural, societal and circumstantial information that will allow one to glean the best ways to construct criminal policy not in order to achieve deontic justice, but to promote and support policies that will minimise suffering and prevent repeated warfare. In short, he argues for the development of a criminal policy guided by consequentialist criteria, oriented by forward-looking considerations, and sensitive to any destructive consequences that might arise from an uncritical pursuit of a self-ascribed God-like role of a detached agent of justice as it comes.

Thirdly, those involved in the implementation of the law of war must be prepared to bear the unpopularity arising from the hard decisions taken on the basis of the considerations described in the previous paragraph. Those seeking

metaphysical justice will perhaps be offended by the optimising criteria used. At the same time, those seeking uncritical reconciliation with no justice whatsoever being meted out will likely be equally frustrated. Only a small minority of those looking at war and the law of war without stars in their eyes, with a keen sense of the impact of judicial decisions on realities on the ground in the States concerned, will greet the consequentialist prosecutor or judge.

The second and third realities have been equally dismissed by the prosecutors and judges of ICTY. The prosecutors have been seen seeking glory on every possible occasion, while disregarding the need for political tact and looking at the tiresome analyses of consequences of their actions on the ground in Bosnia, Croatia and Serbia with deprecation. In sum, all of the principles quoted above have been thoroughly neglected or openly rejected. It is thus not a wonder that the results are depressing and the level of confidence in ICTY so low.

CONCLUSION

The establishment of ICTY in 1993, in the midst of the grave atrocities committed in the civil wars of the former Yugoslavia, was perceived as a major inroad into the problem of international mediation and adjudication of war crimes and civil conflicts, but soon after the commencement of its operation ICTY has shown a major structural failure – a lack of coherent criminal policy arising from a clear recognition of the aims and a firm grasp of the criteria required for its work to be able to reach these aims. The successive teams in the prosecutorial office, and the shifting perceptions of the judges of their role and goals, have led to the court to start being perceived in Southeastern Europe as a confused, ill-guided and increasingly frustrated institution, unable to command authority and support from the States concerned, namely the states that have suffered in the civil conflicts in the former Yugoslavia.

The reason ICTY can be described as a failure is not political. It is not based on any particular ethnic or group prejudice against the countries of the Balkans. Rather it is the result of the fact that ICTY has been shaped as a bad court, both in its self-perception and in its perception by others. It has consistently been seen as a child of international politics that has tried to disown the politics that created and guided it, while at the same time failing to develop a sensible internal criminal policy that could have, and should have, replaced the founding politics instead of turning it into the only refuge for the tribunal in times of crises of identity.

The mistakes of ICTY must be elaborated very openly and in detail, primarily with a view of making sure that they are in no way repeated in the organisation and work of the permanent International Criminal Court at the Hague, which is to follow in ICTY's footsteps. There are already serious problems with the acceptance and recognition of this court by the most influential countries, primarily the US, and there are serious reasons for the reluctance to admit ICC's jurisdiction given ICTY's record so far. It is for the academic community involved in both legal and policy analyses of international criminal justice to make sure that the theoretical and practical foundations of ICC's work are laid in ways fundamentally different from the legacy created by ICTY, for the sake of the future of international justice, the need for which has perhaps never been greater in history than in our times.

LITERATURE

1. Aleksandar Fatić & Aleksandra Đorđević, „Razlozi za osnivanje Haškog tribunala za zločine počinjene na teritoriji bivše Jugoslavije” (“Reasons for the establishment of the Hague Tribunal for crimes committed in the territory of the former Yugoslavia”), *Pravni život (Legal Life)*, vol. IV, no. 12, Belgrade, 1998, pp. 471–81.
2. Aleksandar Fatić & Dragan Prlja, *The Hague International War Crimes Tribunal*, Association for the Study of Foreign Policy, Kotor, 1998 (CD edition).
3. Aleksandar Fatić, *Punishment and Restorative Crime-Handling: A Social Theory of Trust*, Ashgate, UK, 1995.
4. Aleksandar Fatić, „Mesto međunarodnog krivičnog tribunala za bivšu Jugoslaviju u savremenoj diplomatiji“ (“The place of the International Criminal Tribunal for the Former Yugoslavia in contemporary diplomacy”), *Međunarodni problemi (International Problems)*, Institute of International Politics and Economics, Belgrade, vol. LIV, no. 1–2, 2002, pp. 48–72.
5. Aleksandra Đorđević, „Krivična odgovornost države u međunarodnom pravu: za i protiv” (“Criminal responsibility of a state in international law: pro et contra”), *Pravni život (Legal Life)*, vol. IV, no. 12, Belgrade, 2002, pp. 331–47.
6. Benjamin Ferencz, “Getting aggressive about preventing aggression”, *The Brown Journal of World Affairs, Brown University*, Spring 1999, pp. 87–96.
7. David J. Scheffer, “International judicial intervention”, *Foreign Policy*, No. 102, p. 34.

8. Douglas Cassel, “Why We need the International Criminal Court”, *The Christian Century*, May 12, 1999, pp. 532-6.
9. Geoffrey Best, *War & Law since 1945*, Clarendon Press, Oxford, 1994, reprint 2002, pp. 9–10.
10. Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, translated by Thomas Kingsmill Abbott, Books@Adelaide, 2004, <http://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/>.
11. Jeremy Bentham, *Principles of Penal Law*, in: Jeremy Bentham, *Works*, ed. by J. Bowing, Russell & Russell, New York, 1962, pp. 396–7.
12. Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie*, Suhrkamp, 1987, reprint 1991.
13. Theodor Meron, “The Normative Impact on International Law of the International Tribunal for former Yugoslavia“, in: *War Crimes in International Law*, ed. by Yoram Dinstein & Mala Tabory, Martinus Nijhoff, The Hague, 1996, pp. 211-33.

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Prof. Aleksandar FATIĆ, Aleksandra BULATOVIĆ

**PRAVEDNOST I POMIRENJE U RADU MEĐUNARODNOG
KRIVIČNOG SUDA ZA BIVŠU JUGOSLAVIJU**

APSTRAKT

Razmatrajući crte opšteg filozofskog okvira za određivanje kazne, autori nastoje da uspostave konceptualnu vezu između filozofskih korena međunarodnog krivičnog prava u domenu ratnih zločina i pomirenja, kao konačnog cilja međunarodne krivične pravde. Pomirenje se u tekstu razmatra i kao vrednosno pitanje i kao proces, a autori nastoje da na praktičan način ukažu na pitanje o sposobnosti Međunarodnog krivičnog suda za bivšu Jugoslaviju (MKSJ) da doprinesu uspostavljanju poverenja u regionu. U zaključku autori iznose stav da MKSJ ima značajne nedostatke, usled kojih nije u stanju da dovoljno doprinese pomirenju. Poreklo tih nedostataka nije politička pristrasnost, što je argument koji analitičari često navode, već su oni zasnovani na proceduralnim i suštinskim pravnim pitanjima koja su se ispoljavala tokom rada MKSJ. Te manjkavosti su i odredile MKSJ kao, u celini posmatrano, neadekvatan krivični sud u najširem smislu te reči.

Ključne reči: pravednost, sankcija, pomirenje, Međunarodni krivični sud za bivšu Jugoslaviju, pravo