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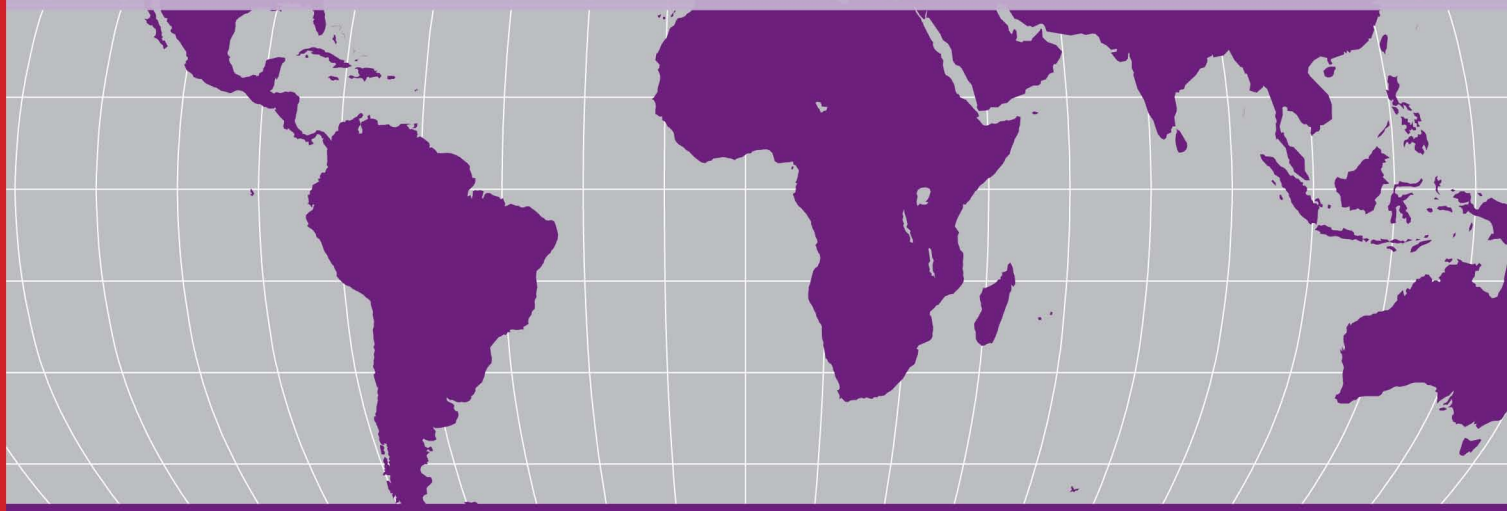
Law in Peace Negotiations

Morten Bergsmo and Pablo Kalmanovitz (editors)



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International Politics and International Criminal Justice

Florence Hartman*

Are justice and peace so difficult to combine? Is justice a hindrance to peace? Since international tribunals to prosecute persons accused of genocide and war crimes in the former Yugoslavia and Rwanda were established in 1993 and 1994 respectively, the response to these questions seems much more complex than it was usually perceived. The examples provided by the Balkan wars offer new avenues for such a discussion. The ICTY, the International Criminal Tribunal for the former Yugoslavia, was the first international criminal court ever established since Nuremberg and Tokyo. Moreover, the ICTY was the first international criminal court established prior to a peace agreement. In 1993, war was raging throughout Bosnia and Herzegovina.

10.1. The Creation of the ICTY

The ICTY was created by UN Security Council resolution 808 dated 22 February 1993 and established by resolution 827 of 25 May 1993. The ICTY is a body of the UN whose mandate is to prosecute serious crimes committed during the wars in the former Yugoslavia: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. It can try only individuals, not organizations or governments. A year later, the UN Security Council established a sister court for Rwanda (ICTR), created after the end of 100 days of genocide against the Tutsis and moderate Hutus.

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The war in the Balkans started in 1991 and lasted until 2001. The Yugoslav wars were a series of violent conflicts – bitter ethnic conflicts between different peoples of the multiethnic former Yugoslav State, mostly between Serbs on the one side and Croats, Bosniaks (Bosnian Muslims) or Albanians on the other, but also between Bosniaks and Croats in the Republic of Bosnia and Herzegovina, and Macedonians and Albanians in the Republic of Macedonia.

These wars were the bloodiest conflicts on European soil since the end of World War II. From the beginning, they were characterized by widespread killings, ethnic cleansing, deportation, mass rapes, torture, inhuman detention and treatment, and campaigns of terror against civilians during the siege of cities such as Vukovar in Croatia or Sarajevo in Bosnia and Herzegovina. After a ten day war in Slovenia, and a few months of bloody war in Croatia in 1991, the conflict moved to Bosnia and Herzegovina in the spring of 1992. The ICTY was established as a response to the growing number of violations of international humanitarian law, but it had no impact on the field.

The widespread killings and deportation continued in Bosnia and Herzegovina with the same intensity. The political act establishing a tribunal in order to shift from impunity to accountability has proven to be an insufficient deterrent to stop the commission of war crimes. Justice cannot stop the war. It does not and cannot replace political actions in that respect, for the simple reason that the role of justice is not to act but to judge and punish crimes.

At the beginning, war criminals had good reasons not to fear justice. After being established, the ICTY was not much more than a Potemkin court. It had no budget to start functioning. It was mainly conceived as a public relations device and as a potentially useful policy tool that would deflect public criticism that the major powers did not do enough to halt the bloodshed there. The leading countries wanted to avoid military action and therefore they created the Tribunal. The thinking in Washington was that even if only low-level perpetrators in the Balkans were tried, the Tribunal's existence and its indictments would be sufficient to avoid criticism. Madeleine Albright, then the US Ambassador at the UN, admitted several years later (in December 2002, during her testimony at the ICTY in the case of Biljana Plavšić)

that, "it was easy enough to take the first vote at the UNSC in February 1993 to get the tribunal created but nobody believed that it would work. They said that there would never be indictees, and then they said that there would never be any trials, and then they said there would never be any convictions and there would never be any sentencing".

International political leaders miscalculated the importance of having created the first international law enforcement body. The first ICTY judges and prosecutors, appointed at the end of 1993 and early 1994, had no intention to wait and see. They succeeded to find donors who by mid-1994 gave the court the means to start its first investigations and cases. Despite several indictments already issued by the beginning of 1995, justice was still no deterrent and the crimes continued until the last days of war in Bosnia and Herzegovina.

In the meantime, the international community repeatedly but unsuccessfully attempted to stop the war by additional actions – mainly diplomatic, while deploying thousands of peacekeepers under the UN flag, heavily armed international soldiers with no mandate to use force. They quickly became powerless witnesses – from a distance – of a multitude of crimes. Numerous cease-fire agreements were signed – and breached again and again when one of the sides felt it was to its advantage. Various peace plans were drafted, but until 1995 all of them were rejected by the warring factions in Bosnia and Herzegovina.

10.2. Incentives for Peace in the Bosnian Context

During the first months of the war, the Serb forces had taken over and forcibly removed the non-Serb population from over 60% of the territory of Bosnia and Herzegovina. Their goal was to achieve the partitioning of Bosnia and Herzegovina, and to create out of it a new Serb State that would be linked to the neighbouring Republic of Serbia. International diplomats opposed their plan, but Serbs responded by refusing all peace initiatives. Two years later, the great powers agreed to have a loose Bosnian State within its international borders, but divided into two largely autonomous entities. In 1994, under US auspices, a peace agreement was signed between the warring Bosnian Croats and the Bosnian Muslims. Under this "Washington Agreement" a common entity was created on the combined territory held by the Croats and Bosniaks. The international community wanted the Bosniak-Croat entity to be established on 51% of the territory, as together the two ethnic groups were representing over 60% of the pre-war population of Bosnia and Herzegovina. Serbs were then offered to keep 49% of the territory although they represented 32% of the pre-war population.

The Serb side had committed most of the offences: over 60% of the crimes in the whole former Yugoslavia, including Bosnia and Herzegovina, the four other parties being responsible for the remaining 40%. Although most of the leaders due to join the peace negotiations were clearly and personally liable for planning, ordering or aiding and abetting the worst crimes perpetrated in Bosnia, the threat of justice represented by the ICTY did not keep the warring parties and their leaders from coming to the negotiation table. The reason was quite simple: the Serbs were winning the war but could not benefit from their victory if it was not confirmed by a peace settlement with the consent of the Western powers.

For the Serbs, the incentive for peace was therefore the recognition of most of the war results: they would be entitled to keep only 49%, as compared to the 60% of the territory they had seized in areas inhabited by a majority of non-Serbs prior to the serious ethnic cleansing conducted systematically and in a widespread manner for more than three years by various Serb forces. Let me quote Slobodan

Milošević, the head of neighbouring Serbia at the time, who masterminded these wars in order to create a large Serb State on the ruins of Tito's multiethnic Yugoslavia. During a meeting at the highest level in Belgrade in January 1995 he said,

> if there had not been military victory, the international community would have never proposed that the territory of Bosnia-Herzegovina be divided fifty-fifty, which in history has never been a territory on which there is a Serb state.

10.3. Amnesties and Indictments as Tools of Negotiation

Although the Serbs knew that they would have to give up around 10% of the territory they held, just a few months before joining the negotiation table they decided to take more land. They wanted to make sure that they would get at the peace talks a compact and homogenous territory. Instead of negotiating, they felt they would be much better off seizing the territory they wanted for strategic reasons. In July 1995, their army – led by general Mladić – overran the enclaves of Srebrenica and Žepa. Located in Eastern Bosnia, not far from the border with Serbia, the two enclaves were inhabited by Bosnian Muslims, local inhabitants but also survivors of the several waves of ethnic cleansing that took place in Eastern Bosnia since April 1992. In the spring of 1993, Srebrenica and Žepa were declared UN "Safe Areas", which meant that they should be free from any armed attack or any other hostile act. For the Serbs, the two enclaves looked misplaced in the middle of an ethnically cleansed area under their control. In the summer of 1995, the UN failed to deter decisive Serb attacks against Srebrenica and Žepa. After the fall of Srebrenica on 11 July 2005, Mladić's forces separated men from women and elderly. Eight thousand Muslim males, from 12 to over 60 years of age, were executed during the following three-four days. For the ICTY and the International Court of Justice, Srebrenica was qualified in several judgements as genocide.

Mladić, the Bosnian Serb political leader Radovan Karadžić, and their mentors in Belgrade – Slobodan Milošević in the first place – expected to be immune to justice in exchange for the forthcoming peace. Preliminary discussions between the Serb side and international

mediators were going on at the time of the Srebrenica massacre. It has therefore to be taken into account that those who ordered this horrendous, large-scale crime or shared the intent to commit it were convinced that they would not be held accountable, as they were the main actors in the peace process. Milošević and the Bosnian Serb leadership exploited to their own advantage the bargaining power of the international diplomats who used to offer impunity in exchange for peace. We may say that, on the eve of the negotiation, the usual incentive for peace turned to be an incentive for additional crimes.

In 1995, the international community had no experience in combining peace and justice. Impunity was still the main instrument for international diplomacy to push forward peace negotiations. Most of the Security Council's permanent members considered the Tribunal a potential impediment to a negotiated peace settlement. In principle, the leading powers assisting the peace building efforts in the Balkans – the United States, the United Kingdom, France, Germany and Russia – were not able to offer impunity for peace. The existence of the ICTY excluded theoretically such a bargaining option.

Shortly after the July 1995 Srebrenica massacre, Mladić and Karadžić were indicted for genocide and crimes against humanity with relation to offences committed earlier in the war. The ICTY Office of the Prosecutor immediately launched an investigation related to Srebrenica against both indictees. The United States and European governments initially thought an indictment of Mladić and Karadžić might interfere with the prospects for peace. They expressed concern at the possibility that a legal institution could decide with its indictments who would be able to join peace negotiations. They even contemplated bringing Karadžić and Mladić to the negotiation table despite the indictments. "I am certain that the international community would accept Mladić's signature on any peace plan", said Milošević to the Serb leadership a month after Srebrenica. At that time Milošević was right. Even the UN Secretary General, Boutros Boutros Ghali made a strong protest to the ICTY Prosecutor, Richard Goldstone, at a meeting in New York, saying that the indictment would jeopardize any chance for peace. But later on, it appeared to international mediators that the indictment would be a useful tool in their efforts to isolate offending

leaders diplomatically. Karadžić and Mladić were eventually not invited to the peace talks that took place in Dayton, Ohio, from 1-21 November 1995. Milošević represented them, and decided instead of them.

The ICTY as a legal institution played no role in the war settlement in Bosnia and Herzegovina. During the Dayton peace negotiations, the issue of war criminals and their arrest was seen as a "deal breaker". Diplomats were afraid of the constraints the ICTY could impose on the peace settlement. They did not want to see their space of political manoeuvre limited by the international court, so they simply opposed putting on the agenda any issue related to the war crimes tribunal, including the arrest of war criminals after the end of the war. While both processes – legal and peace – were legitimate, international mediators failed to find a way to combine them and chose to give primacy to the peace process.

On 16 November 1995, while the peace negotiations were still under way, the ICTY issued a second indictment against Karadžić and Mladić for genocide in Srebrenica. Major powers present in Dayton reacted negatively. Russia sent immediately an envoy to the ICTY Chief Prosecutor, the South African Richard Goldstone, in order to request the withdrawal of the indictment. Goldstone refused. A few days later that same month, a peace agreement was concluded in Dayton.

On paper, the parties were offered no legal incentives to push the peace negotiations forward or to guarantee peace implementation. The Dayton Peace Agreement did recognize the ICTY and requested full cooperation in accordance with the ICTY Statute and the UN Security Council resolutions that made such cooperation an international legal obligation. But there was no additional reference to justice in the final document. Many observers feared therefore that this would be a peace settlement to the detriment of justice, particularly because the final document provides that persons indicted for war crimes are excluded from political life. The capture of war criminals under ICTY arrest warrants was not mentioned as an absolute necessity.

While Slobodan Milošević was largely perceived by the major powers as responsible for the crimes committed by his Bosnian Serbs

allies – described since the beginning of the war by many Western leaders as a war criminal. By signing the Dayton Peace Agreement he suddenly became a peace maker. Some 60,000 NATO soldiers were to be deployed in Bosnia and Herzegovina to secure peace, at that time the largest NATO operation ever put in place. The United States and the Europeans did not want to put their personnel at risk. Milošević was therefore asked to use his influence on the Bosnian Serbs to get the peace accord implemented and to ensure the security of NATO troops.

The ICTY was excluded from the peace negotiations as the "law" could not be instrumental in facilitating negotiations, absent a legal basis to offer impunity to the main peace actors. In order to push the peace settlement, the major powers circumvented discretely the law and its constraints with regard to the major peace actors. After the end of the war, the major powers refused – in the name of security and stability – to take all necessary measures to ensure a full shift from impunity to accountability. Until mid-1998, NATO troops in Bosnia and Herzegovina refused to act upon ICTY arrest warrants, and the growing numbers of indictees where not brought to justice for some time. Moreover, several mediations took place in order to get Karadžić and Mladić out of politics and influence, rather than to have them surrender to The Hague. Until 1997, both *génocidaires* were walking freely in Bosnia and Herzegovina in front of the nose of NATO troops without being captured, despite the repeated requests for justice by numerous actors such as the ICTY leadership, movements of victims, and local and international human rights organizations. In the following years, Mladić and Karadžić became less visible, but Mladić has not yet been brought to justice.

Officially, no impunity was offered in Dayton to the leaders of the negotiating parties. But Milošević was not even considered as a potential suspect by the Tribunal's leadership until he started a new war in 1999, in the predominantly Albanian province of Kosovo. Out of a total of 161 ICTY accused, a majority was indicted for crimes in Bosnia and Herzegovina. Most of them were Serbs, but there were also a number of Croats and Bosniaks. Apart from Mladić, they were all eventually transferred to The Hague. Nevertheless, in Dayton, and be-

hind closed doors, some arrangements and deals contrary to the law were obviously discussed with those on whom the success of peace depended.

10.4. The Milošević Case: Indicting an Incumbent Head of State

Having an international criminal court that, at the time of the peace settlement, had a mandate to prosecute those responsible for the most horrendous violations of international law, was no impediment to peace despite the fears of diplomacy. The existence of this legal institution prevented any formal amnesty. For international mediators involved in the peace process, it was a completely new situation. They had no experience with how to promote justice while pressing for peace, and they were very sceptical of the extent to which peace and justice could work together. With the Rome Statute establishing the International Criminal Court, international actors engaged in peace processes are now often confronted with similar situations to that faced in 1995 in Dayton. However, they still feel quite uneasy with regard to the potential impact of ICC arrest warrants against local warlords on the peace process in Sudan and Uganda.

We can learn and draw inspiration from another case study from the Balkans. In 1998, Milošević – the "1995-peacemaker" who had already fomented two wars – started a new war in Kosovo. Following an unsuccessful attempt to halt the war and push a peace settlement, Western powers decided to use force. NATO's bombings against Serbia started on 23 March 1999, with no effect on the massive atrocities committed by the troops of Milošević against Kosovo's Albanians. Two months later, while NATO's bombing campaign was still ongoing, Louise Arbour from Canada, then ICTY Prosecutor, issued an indictment against Milošević for crimes against humanity in Kosovo, mainly for systematically emptying towns and villages of their Albanian inhabitants, either by forcing them to flee or through executions. Milošević became the first head of state to be indicted by an international tribunal.

While the United States and the European governments initially thought an indictment against Milošević might be a useful tool in their efforts to demonize the Serbian leader, to isolate him diplomatically, to

strengthen the hand of his domestic rivals, and to fortify the international political will to use force, they later feared that it might interfere with the prospects of peace. Moscow and Washington tried but failed to convince Louise Arbour to wait before handing down the indictment. Their thinking was that the indictment came at the worst possible moment, when Milošević was about to step back and agree to the withdrawal of his forces from Kosovo and to the deployment of NATO peace forces to secure the area. They were particularly afraid of not having an interlocutor with whom to negotiate peace, but also of having Milošević defying NATO in such a way that they would need to send troops and force him to capitulate – something they wanted to avoid at almost any cost. They were furious that justice was blind to the extent that it risked prolonging the suffering of two million Albanians, in addition to the 10,000 who had already been executed.

Shortly after being indicted, Milošević decided to agree to all conditions he had previously rejected. Diplomats found a simple way to avoid signing with an accused head of state. Instead of Milošević, the Kumanovo war settlement was signed between NATO representatives and the Serbian military leadership. On the day she made public the indictment against Milošević and four other senior Serbian officials, Louise Arbour said that, "no credible, lasting peace can be built upon impunity and injustice. The refusal to bring war criminals to account would be an affront to those who obey the law, and a betrayal of those who rely on it for their life and security". She was right. Milošević was ordering crimes in Kosovo with the belief that he would never be held accountable, that he could finish the job in Kosovo and negotiate his impunity in exchange for peace, as he did earlier in Bosnia and Herzegovina. In the fall of 2001, Carla Del Ponte of Switzerland, the new ICTY Prosecutor, handed down Milošević's indictment for genocide and crimes against humanity in Bosnia and Herzegovina and in Croatia, just a few months after he had been arrested and transferred to The Hague.

The indictment of a head of state was no impediment to peace. It was quite the opposite. Milošević was not afraid to be isolated diplomatically, but to be bypassed by the major powers in their way to a peace agreement. Milošević would lose much of his power by not be-

ing the main interlocutor of the West any more. He was therefore in a hurry to agree to a peace settlement even if that meant losing control over Kosovo. After the war, Kosovo was formally still a part of Serbia, but in practice the Serbian government had no say or practical influence over the affairs of the province that later became independent. Milošević had no interest in continuing the war and being defeated by NATO in Belgrade. His main goal was to stay in power and to escape justice. Sixteen months later, in October 2000, he was defeated by his own people and had to step down from power after thirteen years. Then Milošević made a deal with his successor, Vojislav Koštunica, and his army to be immune from justice. The Serbian Prime minister, Zoran Djindjic, had other plans. On 28 June 2001, he ordered the arrest of the former Serbian president and handed him over to the ICTY.

10.5. Justice as an Instrument of Peace Consolidation

Justice cannot replace the diplomatic, economic, and military tools that are key instruments to stop wars. But justice can be one additional instrument in the hands of international or local actors engaged in peace processes because it is one of the most efficient tools in peace consolidation. Justice indeed contributes to overcoming the terrible past and to assist post-conflict societies in envisaging the future and benefiting fully from economic incentives, reconstruction, reintegration, etc.

There is no lasting peace without justice. Reconciliation cannot be based on injustice and impunity, on lies and denial. Seeing justice done is not only in the interest of victims and domestic and international human rights activists, it is not only for idealists, but is the best investment in the future. For that reason justice should be seen by realists and pragmatics as in their best interest. An unresolved past, a past that has not been purged from injustice, can only lead to new cycles of violence, to new wars.

While this may seem obvious to many, justice is however still perceived by some as a hindrance to political action and as an obstacle that makes the job of diplomats more difficult. The difficulty is not only to bring the belligerent parties to the negotiation table, but also in the post-conflict period when justice may prosecute actors still influential on the political scene for war crimes. Justice is then seen as a cause

of instability in the fragile post-war stages. It may be so in some cases, but primarily because we often observe a lack of political support for the processes of justice. Post-conflict actions or mechanisms for the implementation of peace agreements often neglect the fundamental role of justice in building peace, trust and reconciliation. After a civil war or an ethnic conflict, political actors, domestic and international, often believe that to forget is to forgive, and are keen to pass over the past in silence with the pretext that doing otherwise is painful or too difficult. This is often the case because persons involved in war crimes are still holding political positions. Nevertheless, it is very important to educate and explain to the public the role of justice in establishing the facts, in acknowledging the suffering of the victims, and in uncovering individual responsibility rather than holding a group collectively responsible for mass murders.

10.6. Removing Impunity from the Negotiation Toolbox

To put it simply and rather abruptly, there are two ways to solve the so-called dichotomy between the constraints of law and the constraints of peace: either you drop the law, which was the case for centuries, or you combine the two, which is the new and extraordinarily exciting challenge ahead of us. I would rather suggest combining both. Justice in general – whether international or domestic, in its retributive and non-retributive forms – will not be perceived as an impediment to peace settlements and peace implementation if it is not an option any longer or when there is no alternative to accountability.

Many would say that this is idealistic or naïve. It is first of all a question of political will, as it was when the Geneva Conventions were drafted. After the terrible slaughter of World War I and the Holocaust during World War II, our predecessors were wise enough to establish and subscribe to legal principles in order to protect humanity from barbarity. The Cold War prevented their implementation. Despite the "never again" commitment there were further terrible slaughters in the Soviet Union, Cambodia, China and elsewhere, that were left unpunished. And despite the body of international humanitarian law that is binding on all parties worldwide; the establishment of the first international law enforcement bodies; the ICC that henceforth should safe-

guard and enforce the world legal heritage; and new initiatives to protect vulnerable populations, such as the instrument for the protection of all persons from enforced disappearance – despite all these steps, amnesties are still not prohibited. They still appear in peace processes as we saw in Afghanistan and Ivory Coast.

Obviously time is needed to change people's mentality and to reach the point when there will be no alternative to justice. Some will say that warlords will then continue war without an end, extending the suffering of civilian populations. Diplomats have been using this argument since the 1990's, since the ICTY – conceived primarily as a threat – became a difficult reality for them to handle. But has anyone demonstrated up until now that impunity for warlords makes wars shorter and less inhuman?

Alternatively, one can argue that by having no alternative but to face justice, those fomenting wars and ordering or committing atrocities will try to escape and hide rather than continuing the fighting. Their subordinates may start weighing the risks of committing crimes if they have no prospect to escape justice. And others may estimate that peace is the only way to avoid spending the rest of life in prison. In many cases, especially in ethnic conflicts, crimes are not the consequences of war, but its primary goal. While such widespread violations of law would not be tolerated or could not be justified in time of peace, war changes the values and the rules, and somehow makes mass killings possible. If it were universally admitted that war is no excuse for massive violations of the law, domestic and international, then war would probably not be used so often as a pretext for achieving illegal goals. I deeply believe that changing people's mentality regarding impunity can pay off. When impunity is no longer a key to peace, *then* justice will start to operate as a deterrent to crimes and war.

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