A Troubled Relationship: The ICTY and Post-Conflict Reconciliation

It will be argued in this article that the relationship between Retributive Justice as delivered by the ICTY and its impact on reconciliation processes has yet to be properly researched according to a novel methodology that would allow for comparison of different courts and different post-conflict states and societies.

First, the Mandate of the ICTY will be examined. Although the UN’s founding documents of the ICTY mention justice for victims, punishment of perpetrators and restoration and maintenance of peace as the mandates of the ICTY[[1]](#footnote-1), in a discussion surrounding its constitution the deterrence of crimes globally as well as of mass atrocities in the Balkans was considered; establishment of the truth about the conflict and reconciliation were mentioned in terms of a broader mandate.

Second, the term Reconciliation requires examination. The term is the subject of several very different definitions. Every definition is somewhat open ended and imprecise - just as there are no two exactly identical models or definitions of ‘federation’ or ‘Transitional Justice’ or ‘ideology’. All such terms, when adopted in research of a specific issue or a *casus,* are altered or expanded from how they might have first appeared. In public discourse on reconciliation every participant involved might apply a different understanding and interpretation of Reconciliation.

***Scholarly Debate on Reconciliation***

Before considering the relationship between the work of the ICTY and the process of reconciliation, it will be useful to introduce a theoretical framework of the term Reconciliation. In scholarly literature, Reconciliation is often identified as a pre-requisite for a stable peace and, thus, an essential part of peace building processes after settlement of a conflict.[[2]](#footnote-2)

*Is it Possible to Achieve a Stable Peace without Reconciliation?*

It should not be assumed that the end of every conflict will be followed by reconciliation. Some scholars argue that there are in history many examples of civil, intra-state and inter-state conflicts that ended without subsequent reconciliation processes but where former enemies were still able to live side-by-side in relative peace. One explanation for this is that in earlier times most wars around the world ended with a victor and a defeated party, which, having lost the military conflict, had no choice but to accept the terms of the peace.[[3]](#footnote-3) The history of Europe, however, shows that the *dictat* of a victor might - but did not necessarily - lead to a stable or lasting peace. Useful examples for comparison are provided by both ‘World Wars’. The treatment of Germany by the victorious states after the First World War, included a heavy reparation package that was imposed on Germany. This impoverished and humiliated the nation and paved the way to the rise of Hitler and the outbreak of the Second World War. After the Second World War the victor states included Germany in the Marshal Plan, which made Germany a prosperous democratic state and one of pillars of the EU.

*Should Reconciliation be addressed at the level of State or Society?*

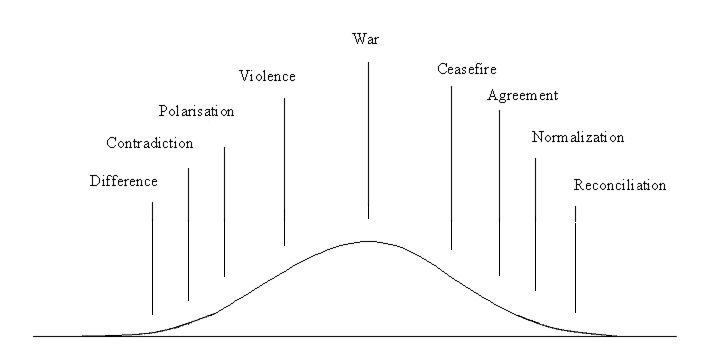
One of the issues raised in scholarly debate is whether Reconciliation is a spontaneous bottom-up process marked by emotional or psychological reconciliation, or a planned socio-political top-down strategy, with an important role to be fulfilled by national political leaderships?[[4]](#footnote-4) A related issue concerns target groups: does Reconciliation address states or societal groups or individuals? The so-called ‘Realists’ argue that sovereign states are the primary actors in international affairs and that reconciliation should be addressed at the level of states. Others, the so-called ‘Liberals’, argue that reconciliation concerns personal relations or religious experiences of individuals and of small ‘face-to-face’ groups and as such should be addressed at the level of society. According to this approach societal reconciliation is the only process that may bring people to internalise the meaning of peace and then support it.[[5]](#footnote-5)

*Should Reconciliation be seen as a Final Objective or A Process?*

A further issue arising from the debate is whether Reconciliation should be seen as an objective to be achieved or as a process. Scholars who see Reconciliation as a socio-emotional phenomenon consider it as the end objective and see it as a final stage of the peace-making process.[[6]](#footnote-6) Some authors see the objective of reconciliation as something to aim towards - ‘an ideal state to hope for’.[[7]](#footnote-7) Those who see Reconciliation as a process stress that, in the process of reconciliation, changes of motivation, goals, beliefs, attitudes and emotions by most group members take place and that these changes have to be taken into account.[[8]](#footnote-8)

*A Model of Reconciliation*

Conflict studies offer useful analysis of the dynamics of pre-conflict, conflict and post-conflict processes. In the post-conflict period - the stage of Ceasefire - Agreement and Normalisation might be required as preconditions for Reconciliation. Yet there would need to be determined when and how reconciliation could and should take place on the individual emotional-psychological level and to distinguish that from group-to-group reconciliation and from state-to-state reconciliation. Besides, it is not always clear what exactly is the difference between Normalisation and Reconciliation.



**Model of Conflict escalation and de-escalation (Ramsbotham, Woodhouse and Miall** **2005, 9)**

This chart, helpful though it may be in some ways, does not deal with the concept of Transitional Justice. The realities of post-conflict societies all over the world show that there is no efficient prescription for how a society should deal with a past legacy of mass atrocities and political violence. Scholarship on Transitional Justice deals with the manner in which a state or a society addresses a legacy of mass atrocities or long-standing human rights abuses. The UN has adopted the following definition of the term:

The notion of transitional justice comprises...the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation**.**[[9]](#footnote-9)

Transitional Justice does not look exclusively to criminal justice or retributive justice, but identifies several other justice concepts, as for example restorative justice, historical justice, reparatory justice, administrative justice and constitutional justice.

In practice, it is not always easy to distinguish between the concepts of Reconciliation and Transitional Justice. Both involve mechanisms being applied at individual, collective or state levels to deal with personal trauma, peace, justice, truth and forgiveness and mercy.

A useful concept to consider is the deconstruction of Reconciliation into four constitutive elements, namely: Peace, Justice, Truth and Mercy.

**Source: Lederach, 1997, 30.**

Explaining the meaning of Peace, Lederach stresses that it is about the need for interdependence, well-being, and security, as in a post conflict environment both parties lack trust, so the establishment of mutually accepted, structural mechanisms is required to prevent recurrence of violence.[[10]](#footnote-10) Those measures are, for example, demobilisation of military forces, disarmament and demilitarisation, which should contribute to mutual trust and positive perceptions of each other, and to a general sense of security.[[11]](#footnote-11)

Democratisation is nowadays regarded as a condition for a stable peace and includes, *inter alia*, protection of human rights, the right to political organisation and expression, and the rule of law. In addition to democratisation, an improvement of the economic situation is considered as an important component for reconciliation. There is also an expectation that with economic prosperity, past discrimination and inequalities will disappear.[[12]](#footnote-12)

### *Reconciliation through Truth*

Groups on both sides of a conflict have different experiences, feelings, and understanding about the conflict. It is only to be expected that victims will try to disclose the truth about crimes known to them, while the perpetrators will try to deny or obscure it. Competing and sometimes very contradictory narratives might work against reconciliation and even fuel a new conflict. Yet in many post-conflict societies there would be at least two truths, which would find their way into collective memory and possibly in the history books.[[13]](#footnote-13) This is why, in some conflict societies attempts were made to establish truth commissions, as in El Salvador, Chile, Guatemala and in South Africa. Although criticised for their potential to keep old wounds open for too long, those commissions represent noble and novel attempts to work on reconciliation in post-conflict societies where the number of perpetrators is so large that no criminal system would be able to process them. It is certainly true for the members of the South African Apartheid state bureaucracy as well as for former Communist regimes. Truth commissions work only if they include the stories of victims and perpetrators. There is, of course, always a possibility that perpetrators would not tell their full stories given the risk - that existed in South Africa - of being their charged with crimes to which they had effectively confessed. Yet, even if incomplete, the stories of perpetrators – typically missing from historical or other accounts of conflicts - add substantially to conflict narratives.

### *Reconciliation through Mercy*

Mercy has been described as a combination of Acceptance, Forgiveness, Support, Compassion and Healing. It presupposes the willingness of victims to forgive and engage in a dialogue and for victims to tell the truth and repent. There are some interesting examples of how Mercy may work and yet it is difficult to prescribe how victims and perpetrators could reach that point of dialogue and communication.[[14]](#footnote-14) Many criminal justice systems allow for a guilty plea, where an alleged perpetrator has a chance to plead guilty and by that act alone to determine the verdict and influence the sentence to his or her advantage. It is a technical legal issue and does not require any proof that the guilty plea was a genuine admission of guilt and does not reflect repentance or humility of the perpetrator. Yet, at the ICTY, there were occasional cases of genuine expressions of guilt and remorse by those you pleaded guilty; they did not have quite as positive an effect as one might have hoped. There is an interesting comparison to be made between Biljana Plavšić and Milan Babić, two major politicians in war time BiH and Croatia, who both pleaded guilty. Plavšić did it for cynical reasons of reducing the sentence, which worked well for her. After being sentenced to 12 years in prison she was eventually freed after serving one third of her sentence. Milan Babić, the leader of the Croatian Serbs, first appeared as Prosecution Witness in Slobodan Milošević’s trial. He told everything he knew and genuinely tried to help the Prosecution. His testimony was of a great importance for proving Milošević’s criminal intent. After his testimony, he was indicted by the ICTY and after pleading guilty, sentenced to 13 years of prison. He was compelled by the Prosecution to testify in other ICTY cases and in the course of his testimony against his fellow Croatian Serb, Babić committed suicide in his prison cell.[[15]](#footnote-15) His remorse did not stimulate any response from those victims and perpetrators who might have been interested in reconciliation, or from UN ICTY officials. If the acts of a man like Babić cannot contribute to reconciliation through Mercy and Remorse, what can?

### *Reconciliation through Justice*

To many reconciliation theorists justice is one of the primary components of reconciliation. There is a consensus that any sense of injustice in post-conflict societies might lead to the rekindling of the fires of conflict, while a feeling of justice may constitute the basis for a stable and peaceful society.[[16]](#footnote-16) However, the literature on reconciliation does not define justice in clear terms. Does justice relate to retributive, restorative, transitional or historical justice?[[17]](#footnote-17)

**Ambitions and Realities of the ICTY Mandate, 1993-2013**

It could easily be argued that the four elements - Peace, Justice, Truth and Mercy - relating to Reconciliation respond to the definition of Restorative Justice, a victim-centred justice system that identifies as the essential needs for victims: the information, validation, vindication, restitution, testimony, safety and support.[[18]](#footnote-18)

All the above considerations only highlight and stimulate the question of why and how can Reconciliation be connected to Retributive Justice as delivered at the ICTY?

In strictly legal terms the normal criminal legal system, as a classical example of retributive justice, is perpetrator-oriented and as such pursues a mandate that deals with the investigation and punishment of individual offenders. Increasingly, especially in international criminal tribunals dealing with war crimes, a no less important legal mandate is the administration of justice for victims. Finally, there is a legal mandate of deterrence, i.e. there is an expectation that an efficient system of punishment would inevitably result in controlling the recurrence, and reducing the rate, of crime.

Crime – and the need to deal with it – is eternal. Regardless of the ideological foundations of a state and regardless of the level of civilisation achieved in any society, crime is here to stay. In no national jurisdiction do the police and justice systems state as goals the complete elimination of crime. And, properly, when the ICTY was founded in 1993, one of its stated objectives was deterrence of the commission of future crimes. The reality, unhappily, was that some of the gravest atrocities of the war were committed by Serbian armed forces years after the establishment of the ICTY, in 1995 in Eastern Bosnian and in 1998-1999 in Kosovo.

Retributive Justice systems serve the delivery of justice to victims by punishing perpetrators, but only by verdicts and sentences of those found guilty. Such systems rarely offer more to victims. It is true that victims at the permanent International Criminal Court (ICC) are accorded some rights of appearance with the prospect of recovery of compensation and that this approach is finding some favour elsewhere in national justice systems. At the ICTY victims had no such expectations. They appeared as witnesses leaving a record by their testimonies. Yet those testimonies, as much as they are important, have been given under strict rules and the rigor of the adversarial legal system. Many details - maybe of emotional and social relevance for a victim - would not be included in the testimony as court procedures are primarily concerned with the probative value of evidence and not with the stories witnesses wanted and needed to tell. For some victims, testifying at the ICTY was their first experience of a court. Some of them had never left their villages before, only to find themselves in a court using a foreign language and being cross-examined by an Accused. Slobodan Milošević, Vojislav Šešelj, and Radovan Karadžić, who were representing themselves in court, were allowed to cross-examine the victims. The experience left few victims unmoved and some were left traumatised. They experienced no reconciliation and they found no reason to be merciful; instead they suffered trauma heaped on trauma.

Yet there has been an implicit expectation that the ICTY would facilitate reconciliation. Some lawyers have expressed scepticism about that particular expectation, asking if there is any national court where a court claims - or the public expects - that (say) in a rape case the trial and eventual verdict would lead to reconciliation of the perpetrator(s) with the victim(s)? Or that a bank robber once tried and sentenced should – by reason of the trial itself - become reconciled with the bank clerks he threatened, or with the bank management, or even with the bank clients whose accounts he effectively robbed?

***Conclusions***

When the ICTY was established in 1993 to deal with political violence and crimes of mass atrocities it was assumed that facilitating reconciliation would and should be possible, just as it has been since with the creation of the permanent ICC at its creation by the Rome Statute in 2002. Yet nobody with decision-making authority within the ICTY and the UN - or now at the ICC - has explained how this might happen. At the ICTY no mechanisms were developed to make a link between the work done by the courts and the regional constituencies where the victims and perpetrators – expected to reconcile in some magical way - still live.

There is no doubt that reconciliation processes in post-conflict societies following a peace settlement and in the absence of violent conflict are of utmost importance. The question of relevance is - can reconciliation be facilitated by a criminal court, national or international?

There are several possible answers to this question?

First, legal procedures, legal discourse, and the legal narrative are not readily understood by the lay public generally or the local communities, for whom the ICTY administers justice. The international criminal justice system is a normative system with strict rules and procedures, specific legal theories, lengthy court sessions, and language barriers that make many aspects of it inaccessible for local communities. The fact that proceedings have been held abroad and through interpretation makes accessibility and appreciation of The Hague’s justice additionally complicated. Regional media coverage has not been adequate and there is no real reason why it should be. The fact that, so far, topics covered by the regional media were episodic and reactive to events - such as the capturing of the fugitives or pronouncing of judgments - reveals basic shortcomings of the functioning of the ICTY’s Outreach Office. The ICTY is a legal institution serving a region with a specific legal culture - or lack of legal culture. In consequence the ICTY should have been involved through its own information dissemination office – the ICTY Outreach Program - in informing and educating public in the region with no previous knowledge or understanding of the adversarial legal system. The ICTY Outreach Office was formed in 1999, but has never been financed from the ICTY’s annual budget, only by external donations. It remained a small office with a small staff and a huge mandate to fulfil. Even 15 years later, ICTY Outreach is not expanding proportionately with demands from beyond the Tribunal for more information. This is not merely a question of a budget, but a demonstration of the UN’s general, and the ICTY’s particular, propensity to control the public narrative, often achieved by minimising contacts with the outside world and identifying as topics of public interest those which were perceived as not-controversial for the image of the institution.

Secondly, in seeking to establish truth – or at least a more reliable narrative - through criminal proceedings that might lead to mutual acceptance of what had happened in the past, it has to be keep in mind that the courtroom narrative in every trial consists of at least two ‘truths’: a Prosecution and a Defence ‘Truth(s)’ – neither (none) of which may be accurate. This has been reinforced by the nature of the adversarial legal where the parties are not interested in truth but in proving their case beyond reasonable doubt, or ‘disproving’ it by creating doubt about the other side’s narrative, and eventually winning the case.

Finally, the ICTY, despite all this, could be seen as an institution creating and providing components of Truth and Justice as discussed earlier. In its 20-year long tenure it produced probably the most comprehensive record ever of any conflict. It is hard now to imagine any historical account of the period without inclusion of evidence from the ICTY record. This record, vast as it is consisting of evidence from more than one hundred individual trials, is not easily or readily accessible for outside users. One of the biggest immediate tasks is how to make this record more accessible to the general public.

There is also a debate on the topic why the ICTY could not be seen as the institution to advance reconciliation by contributing to Truth and Justice. One argument is that the ICTY has been exposed to all sorts of internal and external political influences and as such has been used by individual states for their particular political ends. The most obvious goal of the outside parties has been to control conflict and trial narratives through influencing the scope of trials, indictments policies, (non)production of evidence, access to witnesses and by influencing Judgments. This was not done only by SFRY successor states, Serbia as prime example, but also by the UN and individual states involved in the war. The Srebrenica genocide is a good example of how different parties had overlapping interests in obscuring the truth. Individual UN states with advanced intelligence capabilities, which had a presence on the ground prior to the take over of Srebrenica, might hold evidence revealing pre-knowledge of the crimes being committed. They could, in consequence, have found themselves being held responsible under international law for inactivity given the duty of all states to prevent any genocide, such as was to unfold in Srebrenica in 1995. The same applies to the UN peacekeepers who did nothing to prevent the Serb forces taking away boys and men from Srebrenica in the summer of 1995. Serbia’s more obvious interest was in obscuring its role in planning and executing crimes in BiH, calculating that a form of internationally acceptable justice could be done if all responsibility for all political and military crimes in BiH should remain with the Republika Srpska (RS) and its army (VRS).

In the aftermath of the Srebrenica genocide, in 1995, the ICTY indicted the RS political leader Radovan Karadžić and the Chief of Staff of its army, the VRS, General Ratko Mladić with atrocities committed in the war in BiH, including crimes of genocide.[[19]](#footnote-19) Other indictments followed, including of the VRS General Radislav Krstić, General Zdravko Tolimir, General Vujadin Popović and others.[[20]](#footnote-20) The trials were held at the ICTY and subsequent convictions of some of the indictees to life imprisonment for crimes of genocide, or for aiding and abetting genocide, have left an important record about individual criminal responsibility and about the nature of the crimes committed in BiH against Bosnian Muslims. What is remarkable from the perspective of the ICTY record of mass atrocities in BiH is that, save for Milošević who died in 2006 before his trial finished, no other individual from the Federal Republic of Yugoslavia (FRY) or from Serbia has been indicted for the crime of genocide.[[21]](#footnote-21) Two ICTY cases conducted against former highly placed officials in the federal and republican state bureaucracies, *Prosecutor v. Momčilo Perišić* and *Prosecutor v. Jovica Stanišić and Franko Simatović*, did include Srebrenica in the indictments - not for the crime of genocide but for crimes against humanity.[[22]](#footnote-22) Eventually, the ICTY Appeals Chamber Judgment acquitted General Momčilo Perišić, the Chief of Staff of the Army of Yugoslavia from 1993 to 1998, of all charges on 28 February 2013.[[23]](#footnote-23) This very significant judgement, received in Serbia with cheers, allows his acquittal to be seen as exoneration not only for him personally but more generally for Serbia.[[24]](#footnote-24)

Another important judgment for Serbia was the judgment in the *Stanišić&Simatović* case, that was pronounced in May 2013. To the disbelief of many, and to the great disappointment of the victims, Jovica Stanišić, the long-term Head of the Serbian State Security Department (the DB) and Franko Simatović, the Commander of the Units for Special Operaitons of the DB (JSO), were acquitted in a first instance judgment of all criminal resonibility for crimes the JSO unit committed in the wars in Croatia and BiH. This Judgment, although not necessarily final because the Prosecution may appeal the decision, together with Perišić’s acquittal will influence in a major way the narrative left of the nature of the involvement of FRY and Republic of Serbia in the wars in BiH and Croatia.

Needless to say, those two judgments were received very differently among those bereaved by the Srebrenica genocide or who were survivors of that and other mass atrocities, demonstrating that legal justice – for whatever reasons - might not tell the full story about a conflict and its human suffering. It would be difficult to claim that simply by the ICTY’s pronouncing judgments the mandate of Justice would be met thus contributing to Reconciliation. If a criminal legal system does not deliver judgments that attract acceptance and approval of victims and survivors, it does not achieve anything but leaving trial records to be studied for generations to come. The risk being that – if a different truth emerges than the one produced by the judgments, narratives coming from studying the trial records might give a different truth, but not necessarily on time to help correct the damage process of reconciliation.

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16. Kriesberg, 2004,83-84. [↑](#footnote-ref-16)
17. Bloomfield, 2003,97. [↑](#footnote-ref-17)
18. Lawrence Kershen, QC states that those elements should be starting point of justice. Quoted in Sir Geoffrey Nice’s Lecture, ‘War Crimes Courts that Reconcile: Oxymoron or Possibility?’, 18 April 2013, Gresham College, London, Available at: http://www.gresham.ac.uk/lectures-and-events/war-crimes-courts-that-reconcile-oxymoron-or-possibility [↑](#footnote-ref-18)
19. See ICTY Indictments: *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-PT), 19 October 2009. Fourth Amended Indictment *Prosecutor v. Ratko Mladić* (Case No. IT-09-92-PT), 1 December 201.

    Available online: <http://www.icty.org/x/cases/karadzic/ind/en/markedup_indictment_091019.pdf>

    and http://www.icty.org/x/cases/mladic/ind/en/111216.pdf [↑](#footnote-ref-19)
20. See ICTY Indictments: *Prosecution v. Radislav Krstić* (Case No. IT-98-33), *Prosecution v. Popović et. al*. (Case No. IT-05-88-T), *Prosecutor v. Zdravko Tolimir (Case No.* IT-05-88/2-PT).

    Available online: http://www.icty.org/x/cases/krstic/ind/en/krs-1ai991027e.pdf

    <http://www.icty.org/x/cases/popovic/ind/en/popovic-060804.pdf>

    http://www.icty.org/x/cases/tolimir/ind/en/091104.pdf [↑](#footnote-ref-20)
21. See ICTY Indictment against Milosević, consisting of three different documents: a Croatia, a BiH and a Kosovo indictment. For the point made in this chapter only the BiH indictment is of relevance. *Prosecutor v. Slobodan Milosevic*, (Case No. IT-02-54)

    Availabel online: <http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-2ai020728e.htm>

    <http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.htm>

    http://www.icty.org/x/cases/slobodan\_milosevic/ind/en/mil-2ai011029e.htm [↑](#footnote-ref-21)
22. See ICTY Indictments: *Prosecution v. Stanišić-Simatović* (Case No. IT-03-69-PT); *Prosecutor v. Momčilo Perišić* (Case No. IT-04-81-PT).

    Available online: <http://www.icty.org/x/cases/stanisic_simatovic/ind/en/staj-in3rdamd080710.pdf>

    http://www.icty.org/x/cases/perisic/ind/en/per-sai080205e.pdf [↑](#footnote-ref-22)
23. See ICTY Judgment Summary in the *Prosecutor v. Momčilo Perišić* (Case No. IT-04-81-PT).

    Available online: http://www.icty.org/x/cases/perisic/acjug/en/130228\_summary.pdf [↑](#footnote-ref-23)
24. See for example: Lakić Đorović, *Zaslužili ste orden od Pavkovića Miloševića*, E-NOVINE, 15 March 2013.

    Available online: http://www.e-novine.com/stav/80744-Zasluili-ste-orden-Pavkovia-Miloevia.html [↑](#footnote-ref-24)