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The UN International Criminal Tribunals

Transition without justice?

Klaus Bachmann and
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Tables

Abbreviations

ADAD	Association of Defence Counsels (*Association des avocats de defense*)
ADC	Association of Defence Counsels (ICTY)
AVEGA	Agahozo, the Association of the Widows of Rwanda
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EULEX	European Union Rule of Law Mission in Kosovo
FAR	*Forces armées rwandaises*
GDR	German Democratic Republic
HDZ	Croatian Democratic Union (*Hrvatska demokratska zajednica*)
HRW	Human Rights Watch
ICC	International Criminal Court
ICPCR	International Covenant of Political and Civil Rights
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDEA	International Institute for Democracy and Electoral Assistance
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
JNA	Jugosław People's Army (*Jugoslavenska Narodna Armija*)
KLA	Kosovo Liberation Army
MRND	*Mouvement républicain national pour la démocratie et le développement*
NATO	North Atlantic Treaty Organization
NCN	*Narodowe Centrum Nauki* (National Research Center, Poland)
NGO	Non-governmental organization
NIOD	*Nederlands Instituut voor Oorloogsdocumentatie* (now *Instituut voor oorlogs-, holocaust- en genociestudies*)
NSDAP	*Nationalsozialistische Deutsche Arbeiterpartei*
OHR	Office of the High Representative (Bosnia-Herzegovina)
OMGUS	Office of the Military Government of the United States
OSCE	Organization for Security and Cooperation in Europe
OTP	Office of the Prosecutor

RPF	Rwandan Patriotic Forces
SAA	Stabilization and Association Agreements (EU)
SCSL	Special Court for Sierra Leone
SD	*Sicherheitsdienst*
SS	*Schutzstaffel* (of the NSDAP)
TRC	Truth and Reconciliation Commission (mainly South Africa)
UDF	United Democratic Forces
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNPROFOR	United Nations Protection Force (Bosnia-Herzegovina)
UNSC	United Nations Security Council
WVSS	Witness and Victims Support Section (ICTR)

Foreword

When the trial against Slobodan Milošević started on 12 February 2002, the drowsy Churchill Plain in the Netherland's informal capital The Hague suddenly turned into a vibrant anthill, populated by camera teams, reporters, security officers, demonstrators and NGO workers. The tribunal staff had to erect additional tents outside the court building to accommodate all the media, which had registered for Milošević's initial appearance. The atmosphere was serious, starchy and sometimes even solemn. The notion of the trial being an 'historical one' was repeated by almost everyone who had something to say about it. Critics were marginal at the beginning of the trial; they gathered in a committee for Milošević's defence, in which former GDR diplomats, alter-globalists, anti-American leftists and Serb nationalists found a common ground of understanding. The predominant strand of thinking and writing about the trial was positive for the International Criminal Tribunal for the former Yugoslavia and – specifically – for the prosecution. Mainstream media emphasized that the launch of the trial confirmed the validity and importance of international law and constituted a major victory in the fight against impunity. Now, finally, the despised and hated strongman of Serbia, who had been untouchable at home and abroad for such a long time, was to be judged. However, most of the media remained faithful to the presumption of innocence, and some even emphasized that Milošević could expect a fair trial and until a verdict was reached, had to be regarded as innocent.[1]

Four years later, a guard of the ICTY's detention facility in Scheveningen found Milošević's dead body in his cell and alarmed the administration. The news spread immediately around the world, but the atmosphere now changed entirely. Milošević's death brought the trial and the ICTY back onto the front pages of leading newspapers and into TV newsrooms, after having fallen into oblivion in the intervening years. The trial had gone out of the trial chamber's control with frequent interruptions and suspensions, which would be blamed on the death of the presiding judge, Richard May, Milošević's heart condition, his obstruction and over-extensive witness cross-examination. World opinion had lost interest in Courtroom No. 1. Milošević's death pulled the trial back into public opinion. But how different the opinion climate now was – disdain for the ICTY's bureaucratic, overly challenged machinery prevailed over hope and trust

in international justice. The 'butcher of the Balkans', as one journal labelled him, had evaded justice and died before a judgment could be issued, mocking judges and prosecutors. Now the ICTY was pilloried, not the accused. When, in 2008, one of the few high-ranking fugitives of the ICTY, the former president of Republika Srpska Radovan Karadžić, was arrested in Belgrade and sent to the ICTY, *The New York Times* did not praise it (as it did about Milošević's trial in 2002) as another victory for international justice, but as a chance for the tribunal to redeem itself from an inglorious past. As the ICTY started to phase out its activities and more and more former tribunal staff members and defence counsel moved to the newly created ICC, to the Special Court for Sierra Leone, the Cambodia Tribunal or to academic institutions and published their memoirs, academic books and articles about their past work, a cleavage in thinking about International Criminal Justice became visible. International NGOs and human rights organizations still would regard 'the fight against impunity' as their predominant objective and the international criminal tribunals as the best possible instrument to carry out this fight, but international lawyers, who had been embroiled in the battles over self-defence, witness protection, fair trial requirements and appeals procedures tended to view international criminal law with more and more scepticism.

This tendency was even stronger at the International Criminal Tribunal for Rwanda (ICTR), which had been working simultaneously with the ICTY, but somehow in its shadow, as tribunal president Gabrielle Kirk McDonald once put it.[2] Hope for justice and trust in international law had quickly been overshadowed by financial scandals, fraud, mismanagement and corruption allegations, which had let to a damaging UN audit. The ICTR had had the counterpart of the Milošević trial with the successful prosecution of the Rwandan interim Prime Minister, Jean Kambanda. But this high-profile case also ended in a quagmire, which made it difficult to promote as a success for international law. Kambanda had entered a guilty plea, in which he had described the details of the genocide from his perspective. He had done so in order to get a lesser verdict and protection for his family, but when both hopes were disappointed, he withdrew the plea. The appeals chamber did not order a retrial, but upheld the trial chamber's life sentence. Therefore, Kambanda was sentenced without the allegations against him having been tested in court.[3] But the Kambanda trial was not the main stone of contention for the ICTR. Most criticism against the ICTR is levelled by academics, intellectuals and sometimes also politicians, who accuse the ICTR of bias for not investigating and not prosecuting crimes committed by Tutsi, or, more precisely, the Rwandan Patriotic Front (RPF) during their struggle against the Hutu dominated government of 1994.

Much of the criticism against both tribunals is biased and partial by itself, or driven by the concretely vested interests of those who express the critique. When the US government withdrew from the ICC, its diplomats started to criticise the ICTY and the ICTR for being expensive and bureaucratic. When the ICTR prosecution attempted to investigate RPF crimes, the Rwandan government started to attack it as biased against victims. When the Office of the Prosecutor at the

ICTY initiated its first prosecutions against leaders of the Kosovo Liberation Army (KLA), the public in the then-autonomous Serb province was outraged.

But it is impossible to explain the critique of international criminal tribunals only by pointing to state interests. ICTY procedures were the root cause of the problems of the Milošević and Šešelj trials, which went so wrong, and its prosecutors' – not the states' – decisions were the reason why the RPF was never prosecuted and why some people were indicted and others were not.Trial and appeals chambers, not governments, decided to first convict Croatian general Ante Gotovina and then to acquit him. Judges, not governments, decided to retry Jean Bosco Bayaragwiza after he had been acquitted on procedural reasons by an appeals chamber.[4] It was the Rwandan government that pressured the ICTR not to let him go, but it was a chamber decision to submit to that pressure. This is the focal point of our book – what happened in the chambers, what happened in the prosecution and why and how it affected the ICTs' legitimacy, their perception, and public image among scholars, experts and the wider public.

The UN International Criminal Tribunals have already been scrutinized in terms of their roles as actors on the international scene[5], their role among states,[6] their internal autonomy and independence from NGOs, media and governments,[7] their internal procedures and relations,[8] their impact on societies on the ground[9] and with regard of the impact of domestic politics on the tribunals.[10] Of course, they have also led to the emergence of a huge legal literature either on specific trials,[11] legal novelties developed by their chambers[12] and landmark judgements.[13] But most of the literature either concentrates on one tribunal, neglecting or marginalizing the other one, or deals only with a limited time span, mostly the first part of both tribunals' existence, i.e. the 1990s. Most authors either apply theoretical (mostly legal) frameworks to generally known facts and decisions, asking whether those decisions were (in the light of otherwise accepted legal or moral criteria) right or wrong, or they apply social science methodologies in order to test certain hypotheses. Authors hardly ever combine both in order to evaluate the tribunals' record. When authors assess the tribunals' records, two approaches are predominant: the first compares ICTs to expectations the authors or an informed public would apply to a municipal court. This approach usually tends to argue that ICTs did badly because they deviated from these expectations.[14] The other popular approach, which is dominant in the media, compares ICT procedures and outcomes to the ones wished for by the respective critic. From that point of view, justice appears as what serves the expectations of the author.

This book takes a different position. We measure the ICTs' records against the tasks which their creators conferred upon them and which the tribunals and their organs accepted as theirs. We ask whether the basic documents produced by the ICTs are consistent with the international obligations which tribunal chambers accepted as binding; we ask whether the tribunals fulfilled the legal and political tasks with which they were charged by the United Nations Security Council (the founder of the tribunals) and the General Assembly; and we ask whether both tribunals were legitimate in the eyes of the academic community

dealing with International Criminal Law (we call this elite legitimacy) and the societies in the countries and entities,[15] which were affected by the ICTs' jurisdiction[16] (we call this popular legitimacy). We also investigate where the differences across countries and entities in popular and elite legitimacy may have come from. In order to do that, we apply methods from philosophy (in order to define the crucial notions used in the book), the social sciences (especially when it comes to the analyses of quantitative data from public opinion polls) and legal analysis (when scrutinizing the consistency of chamber and prosecution decisions).

But the aim of this book is twofold: we not only measure the tribunals' performance against the tasks conferred upon them by their creators, we also compare their outcomes to the ones achieved by the Tokyo and Nuremberg tribunals. By doing so, we avoid the pitfall which usually results from exaggerated expectations. This comparison not only shows that both tribunals did not live up to what often is called the 'Nuremberg Legacy',[17] but it also conveys a more complex picture. At one hand, ICTY and ICTR failed to achieve one of the crucial (and often neglected or downplayed) achievements of Nuremberg – they did not trigger any effects leading to a collective externalisation of guilt. Our comparison also shows what ICTs can and cannot achieve, not only from a theoretical perspective, but also from one that takes into account what a specific international war crimes tribunal actually did achieve and what others (in Tokyo, Arusha and The Hague) did not. Although the ICC is beyond the scope of this book, our conclusions clearly show what should and could be expected from the ICC and what is beyond its possibilities. This helps avoid exaggerated expectations and disappointment which led to a loss of trust and caused so much (justified and unjustified) criticism in the case of the Yugoslavia and Rwanda tribunals.

This book would not have been possible without the support of many people and institutions that contributed to our research. We would particularly like to thank all of our respondents, anonymous and otherwise, who agreed to be interviewed and share their knowledge and insights with us. A list of these respondents can be viewed in Appendix 1. Many thanks also go to our reviewers and colleagues who at various stages read and commented on parts of the book. We are grateful to many colleagues, who, during conferences and workshops, criticized draft versions of the chapters or discussed with us book outlines and ideas for chapters and subchapters. Some of them deserve to be presented here: Irena Ristić and Zoran Pavlović in Belgrade, who gave Klaus Bachmann access to archival SPSS files containing opinion polls (some of which included questions about the ICTY); Anastase Shyaka from Kigali, who, when still professor at Butare, shared with us his unpublished research material about the ICTY in Rwanda; Timothy Waters from Bloomington University in Indiana; Adam Bodnar from the Polish Helsinki Foundation; the numerous panellists of workshops, panels and book presentations dedicated to Transitional Justice, the Balkans and international justice at the annual conventions of the Association for the Study of Nationalities at Columbia University, New York during the

years between 2008 and 2014; the participants of the NCN-sponsored research project 'Tribunal Impact' including the tireless coordinator of the team dealing with the former Yugoslavia, Irena Ristić, and Gerhard Kemp, the second coordinator, from Stellenbosch University's Law Faculty, who gave Klaus Bachmann access to many sources which would have been unavailable otherwise. Special thanks also go to an eye-opening workshop on the politicization of ICTs at Capetown's Institute for Justice and Reconciliation and to Tim Murithi, who led the debate; to Dorota Heidrich from Warsaw University, who organized a conference on a similar topic in May 2014. Work on this book benefitted from the support received from the Serbian Ministry for Education, Research and Technological Development by the Institute for Philosophy and Social Theory, University of Belgrade. Research pursued within the Centre for Security Studies in Belgrade has been the foundation of a part of the argument in the book.[18]

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Notes

1 For more details on the Milošević trial and its public perception see Waters, T. (ed.) (2013), *The Milošević Trial. An Autopsy*, Oxford University Press, especially the chapters written by Bachmann, K. 'Framing the Trial of the Century. Influence of, and on, International Media', pp. 260–280; Armatta, J. 'The Court and Public Opinion: Negotiating Tensions between Trial Process and Public Interest in Milošević'; Trix, F. 'Underwhelmed: Kosovar Albanians' Reactions to the Milošević Trial', pp. 229–248.

2 Klaus Bachmann's interview with Gabrielle Kirk McDonald in May 2012.

3 When a plea agreement is reached and accepted by the trial chamber, neither the ICTY nor the ICTR investigate the events alleged in court. Procedures are then reduced to a so-called 'sentencing hearing', during which the gravity of the crimes to which the accused has confessed and aggravating and mitigating circumstances for the accused are discussed.

4 Moghalu, K. (2005). *The Politics of Global Justice*. New York, Houndmills: Palgrave Macmillan, pp. 101–124.

5 Peskin, V. (2008). *International Justice in Rwanda and the Balkans. Virtual Trials and the Struggle for State Cooperation*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi: Cambridge University Press.

6 Bass, G. J. (2000). *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals*. Princeton: Princeton University Press.

7 Bachmann, K., Sparrow-Botero, T. and Lambertz, P. (2013). *When Justice Meets Politics. Independence and Autonomy of* Ad hoc *International Criminal Tribunals*. Frankfurt/Main: Peter Lang International.

8 Hagan, J. (2003). *Justice in the Balkans*. Chicago: University of Chicago Press.

9 Nettelfield, L. J. (2010). *Courting Democracy in Bosnia and Herzegovina. The Hague Tribunal's Impact in a Postwar State*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Dubai, Tokyo: Cambridge University Press.

10 Subotić, J. (2009). *Hijacked Justice. Dealing with the Past in the Balkans*. Ithaca and London: Cornell University Press.
11 Waters, T. (ed.) (2013). *The Milošević Trial. An Autopsy*. Oxford University Press and Boas, G. (2007). *The Milošević Trial. Lessons for the Conduct of Complex International Criminal Proceedings*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Dubai, Tokyo: Cambridge University Press.
12 Danner, A. M. (2006). 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', *Vanderbuilt Law Review*, 1, pp. 2–59
13 Magnarella, P. J. (1994). 'Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda', (1994), *Florida Journal for International Law*, 9, pp. 421–440.
14 This approach can be found in Subotić, J. (2009).
15 The notion 'entity' points to the fact that for most of the existence of the ICTY, Kosovo was legally part of Serbia and can therefore not be treated as a country. Nevertheless, we analyse the ICTY's popular legitimacy separately from Serbia, because public opinion on trials and judgments differed very much from the reactions in Serbia. The same is true with regard to the different parts of Bosnia-Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska, which are two separate entities in one country (and therefore Republika Srpska also cannot be regarded as a country, but because its public sphere is so different from the one in the Federation, we treat it as a separate entity).
16 It is worth underlining that we do not deal with countries that were formally under ICTY jurisdiction, but not really affected by it. The ICTY had territorial jurisdiction over the whole territory of the former Yugoslavia, but it only investigated and prosecuted two cases from Macedonia (which we neglect, except for the statistical part) and none from Slovenia.
17 On the 'Nuremberg Legacy' see Ehrenfreund, N. (2007). *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History*. New York: Palgrave Macmillan; and Futamura, M. (ed.) (2007). *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremburg Legacy*. New York: Routledge.
18 Project no. 179049, 'Policies of collective memory and national identity: A regional and European context'.
19 Grant no. 2011/01/B/HS3/00801 (International Criminal Tribunals in a Comparative Perspective).

Contents

Introduction

The starting points: the Nuremberg and Tokyo Tribunals

In 1946, the Allied Powers imposed the Nuremberg Tribunal upon occupied and divided Germany. In Tokyo, the International Military Tribunal for the Far East was created. Both were short-lived institutions, created for swift and expeditious justice, through which the victorious powers tried to hold accountable the political and military leaders of the defeated nations for atrocities committed during the Second World War.[1] Both tribunals were empowered to apply capital punishment, and both did so in many cases. The defendants were given counsel, but no higher judicial body controlled the decisions of the trial chamber.

Both tribunals based their jurisprudence on existing customary international law, but they also applied retrospective justice. Both tribunals referred to the Hague Conventions, which had been ratified earlier by Germany and Japan, and – in the case of the Nuremberg Tribunal – to the Kellogg–Briand Pact, which forbade waging war and had been ratified by Germany. The more cloudy and controversial concept of 'conspiracy to war' had only some partial support in international treaties. The concept of 'crimes against humanity' was a total novelty and penalized atrocities which, at the time they were committed, had not yet been codified in international law.

The International Military Tribunal for the trial of the major war criminals of the European Axis

The Nuremberg Trial conducted its proceedings between November 1945 and October 1946. As the result of political and juridical considerations between the Allies, only 24 top figures of the Nazi political establishment were accused. Three indictments were dropped.[2] In the end, the judges handed down 11 death sentences (Martin Bormann was accused and sentenced to death in absentia), seven prison sentences ranging from 10 years to life imprisonment), and three acquittals. The procedures took less than a year. There was no appeal and all suspects sentenced to death were swiftly executed. In contrast to later ICTs, the IMT had no problem with state cooperation; since Germany was occupied there was no resistance to court decisions. As the proceedings were not directed

against the interests of states other than Germany, even inter-allied cooperation in securing evidence, testimonies and police cooperation was no problem. There were conflicts among the Allies about whom to prosecute and for what, but they did not affect the proceedings against those who finally were put on trial. A major bone of contention was the Soviet attempt to include in the indictment the murder of several thousand Polish officers, who had been executed and buried in a forest near Smolensk. The British and the US prosecutors were well aware that it could cause major problems for the Soviet delegation and impede the legitimacy of the whole tribunal if the defence managed to undermine the Soviet version of the Katyń massacre, which was widely (and, as it later turned out, rightly) believed to be a crime committed by Soviet special forces.[3] The judges even conducted hearings of defence and prosecution witnesses, which gave rise to serious doubts about the Soviet allegations, but then refrained from mentioning Katyń in the judgment, let alone convicting anyone for the massacre.

In contrast to the ICTY, the IMT did not need to balance indictments between antagonized groups, since it was clear from the beginning that only Germans would be prosecuted, although, as the name of the IMT already suggested, it could also have investigated and prosecuted crimes committed by perpetrators linked to other Axis countries. Nevertheless, the fact that the IMT's jurisdiction excluded the investigation and prosecution of crimes committed by Allied forces gave rise to criticism and accusations of bias from the very start. While critics could point to the fact that indictments were only drafted for crimes committed by Germans and German organizations, supporters of the IMT could emphasize the fact that some of the accused were acquitted of all charges.

Nevertheless, one can hardly speak of equality of arms: the judges were sent from and selected among the victorious powers and their task was to do justice – according to the notion of justice which prevailed in their home countries. From today's perspective, the mere socialisation and education of the Soviet judges would already discredit them, since in the legal system of the Soviet Union, judges were supposed to eliminate enemies of the Soviet system who had already been identified as such by the government. The IMT's creation had been preceded by an inter-allied debate about how to eliminate the Nazi leadership, with Churchill favouring summary executions. The IMT was established as a kind of compromise between Soviet wishes for show trials and US concerns about public opinion if show trials or summary executions were to be carried out. All this could hardly be interpreted as facilitating an unbiased administration of justice. Additionally, the court administration was strongly dominated by the US, which also left an imprint on the rules of procedure. The US delegation to the IMT comprised 2,000 people, while Great Britain sent only 170 officers. French and Soviet personnel at the IMT were marginal with less than two dozen officers. All were paid and supported by their governments, while the defence counsel of the accused struggled with getting their remuneration in time and had to be given hot meals on the court premises in order to be able to participate in the trial. They hardly stood a chance of conducting their own investigations and calling defence witnesses if these did not contact them first. All that remained

for the defence counsel to do was to translate the arguments of their clients into legal notions, to undermine the credibility of the prosecution evidence, and to attack the legal foundations of the tribunals, which, under the given geopolitical circumstances, could hardly be regarded as a promising strategy. Compared to later statutes, the IMT statute was relatively short and simple. It was based on the adversarial approach of the US criminal system, which entailed cross-examination, but at the same time equipped the judges with a large number of instruments that facilitated a smooth and swift trial administration. They could hear witnesses, but they could also rely on expert reports and decide almost arbitrarily about the admission of evidence.[4]

The IMT had jurisdiction over three categories of crimes, which reflected the political interests of the Allied powers and had legal foundations whose quality differed considerably. One of the consensual points among the British, US and the Soviets was the aim of holding the German political and military leadership accountable for starting the war. At the same time, they were to be judged for crimes committed during that war against members of the Allied armed forces and civilians. These two overlapping goals converged in the notion of 'crimes against peace', which, de facto, became the most important charge of 'conspiracy to war'.[5] Since war as such – regardless of whether it had been initiated with expansive of defensive intentions – had not yet been codified as a crime, the IMT based the jurisdiction *ad materiae* on Germany's ratification of the Kellogg–Briand Pact and the notion of war crimes on the Hague Conventions and the Geneva Conventions.[6] The latter construction did not cause major difficulties – certain actions during a war had already been delegalized before 1939, although neither a punishment, nor a body empowered to judge them had been established. The last category of crimes according to which defendants in Nuremberg could be judged was a new one: crimes against humanity. It enabled the IMT judges to convict defendants for committing atrocities against their own country's civilian population, which until then had not been defined as crime by any international treaty. The theoretical basis of this new crime, which, at the same time justified the violation of the *nullum crimen sine lege* principle, was the assumption that certain deeds are so heinous that they are per se illegal no matter whether codified in written law or not, and that their perpetrators did know about the illegality of their crimes when committing them.

According to its statute, the purpose of the IMT was the 'just and prompt trial and punishment of the major war criminals of the European Axis' and nothing else.[7] But since bias and the influence of geopolitical interests and power politics were enshrined in the IMT's creation from the very beginning, one might wonder what the real function and deeper sense of the IMT might have been. As the debate about summary executions already suggests, one of the IMT's functions was the elimination and delegitimization of the political elite of Nazi Germany, in so far as the members of this elite had not yet eliminated themselves.[8] Next, the trial was expected to influence the German public and to uproot the Nazi ideology in the populace, contributing to the democratization of the country. While the French, British, US and Soviet governments shared the former goal,