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Florence Hartmann:
International politics and international criminal justice[*]

In the context of peace negotiations and war terminations, there is a well known tension between the objectives of peace and justice. The mandate to investigate, indict, and punish for serious war crimes is often seen as an obstacle to peace-making. The current growth of international criminal justice is likewise seen as a growing obstacle to the necessary maneuvering of peace brokers, and for this reason to the success of peace processes around the world. Hartmann discusses these issues by looking at the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Balkans, and shows how a more committed and politically stronger system of international justice could be conducive to robust peace settlements, rather than being an obstacle to peace-making.

Lessons to be learned from the ICTY

Established in 1993 by a resolution from the UN Security Council, the ICTY was the first international criminal court with a mandate to judge war crimes that existed prior to a peace agreement. For international mediators involved in the Balkans, the Tribunal represented a new challenge; there was no experience on how to promote justice and at the same time push peace forward. Did the Tribunal really threaten the war settlements in the Balkans? Or did it contribute to peace and reconciliation, in particular to diminishing atrocities, and, if so, could it have contributed more?

The ICTY, especially in its early stages, did not contribute to stop or diminish atrocities in the Balkans. As the atrocities committed in 1995 in Srebrenica and Žepa show, the war continued its course unmoved by the Tribunal. The negotiations were unmoved as well. Even though during the 1995 peace talks several peace negotiators were personally liable for the worst crimes perpetrated in Bosnia and Herzegovina, their criminal status did not impede in any way their participation at the negotiation table.

The Tribunal's lack of effectiveness may be seen in part as a consequence of the meager political will behind it. The ICTY was conceived originally as a public relations devise that would deflect the criticism of international inaction and indifference towards the Balkan wars. The Tribunal was seen as a way of saving face and avoiding military action.

The Srebrenica massacre in 1995, and in particular the indictment of Mladić and Karadžić, began to change the role of the ICTY in the conflict. Even though international actors initially saw the indictments as a threat to the ongoing peace negotiations, later on indictments came to be seen as a useful tool in the effort to isolate offending leaders diplomatically.

However, the ICTY and the issue of war criminals did not play a central role in the 1995 Dayton Agreement. Rather, criminal law was perceived as a deal breaker and the Tribunal was consequently excluded from the agenda. In the Agreement there was only nominal recognition of the ICTY and a demand of co-operation with the UN Security Council resolutions, but no mention of arrest warrants or transfers to The Hague. In the implementation of the Agreement the major peace actors circumvented the law and never took measures to switch from impunity to accountability. Up until mid-1998, NATO troops in Bosnia and Herzegovina refused to act on ICTY arrest warrants. The growing number of indictees were not brought to justice until much later. The legal process and the peace process were not combined properly, with the latter regularly trumping the former.

There was a second turn of events in 1998 with Milošević's war in Kosovo. With the NATO bombing campaign still under war, the ICTY issued an indictment against Milošević for crimes against humanity. The reactions of international actors to the indictment were mixed. On the one hand, some thought that the indictment was a useful way to demonize, isolate diplomatically, and strengthen the domestic rivals of Milošević. On the other hand, there was fear that it would interfere with the prospects of peace.

International actors attempted unsuccessfully to convince the ICTY Prosecutor, Louise Arbour, to delay the issuing of the indictment. They expected that without the indictment, Milošević would be ready to withdraw from Kosovo. They feared that the indictment would in effect eliminate their main interlocutor on the Serbian side. The dilemma between peace and justice could hardly be starker when the indictment was issued: two million Albanians were at risk, and the decision to continue the NATO military engagement was pending.

Milošević ordered crimes in Kosovo with the belief that he would not be held accountable. He thought that he could finish the job in Kosovo and then exchange peace for impunity, just as he had done earlier in Bosnia and Herzegovina. His main weakness was to be bypassed by the major powers in their way to a peace agreement. He would loose much power by ceasing to be the main interlocutor of the West, so he was in a hurry to agree to a peace settlement even if it meant loosing control over Kosovo. Shortly after the indictment, Milošević agreed to conditions he had previously rejected, but nonetheless diplomats were able to exclude him from the signing of the Kumanovo peace settlement. He progressively lost his grip of power and was arrested and sent to The Hague in 2001.

Justice's contributions to peace

- **Deterrence:** Justice applied resolutely will work as a deterrent to war criminals. If those fomenting wars and ordering or committing atrocities have no other possibility but to face justice, they will try to escape and hide rather than continue fighting; their subordinates will start weighing up the risk of committing crimes if they have no prospect of escaping justice and hide somewhere; others will think that peace is the only way to avoid spending life in prison.

  On the other hand, *if peace negotiations are driven solely by considerations of power, and the main tool of international diplomats is the offer of impunity, then those committing atrocities can anticipate impunity and therefore have less incentive to check their actions.* The main incentive of criminals would then be to accumulate power. Had the ICTY been given stronger teeth, the incentive structure of the leading fighters would have been different, and the war would have taken a different form.

- **Incapacitation:** Indictments for war crimes have an incapacitating effect. They can be used at appropriate moments as a tool to weaken politically and isolate prominent actors in armed conflicts.

- **Peace consolidation:** *Justice is one of the most efficient tools in peace consolidation processes.* By helping a community to confront its past and to purge it from the injustice which war crimes represent, criminal justice contributes to avoiding future cycles of violence. Unresolved past war crimes on a large scale can only lead to new wars. Reconciliation can not be based on oblivion, impunity and injustice. Justice is often misperceived as a threat to the stability of peace-building efforts, particularly when it subjects political leaders to prosecution for war crimes. Justice should really be seen as a worthy investment in a robust peace.

In the future, the work of the International Criminal Court will in all likelihood compel actors in peace processes to confront situations similar to those faced by peace negotiators in the Balkans. It is crucial that justice be perceived properly, that is, not as optional mechanisms, but as an imperative. The work of the ICTY in the Balkans shows some of the potential contributions of justice to peace.

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* Florence Hartmann is a French investigative journalist and a former Spokesperson and adviser at the ICTY. She is the author of *Milosevic, la diagonale du fou* (Gallimard, rev. ed. 2002) and was at the time of the presentation of this paper preparing the publication of *Paix et châtiment*. The seminar *Law in peace negotiations* took place in Bogotá on 15-16 June 2007, and was organized by PRIO, the Colombian Vice-Presidency, and the Colombian National Commission of Reparation and Reconciliation, with financial support by the Ministry of Foreign Affairs of Norway. This brief was prepared by Pablo Kalmanovitz, PhD candidate, Columbia University, and Researcher, PRIO, and edited by Morten Bergsmo, Senior Researcher, PRIO. The source paper, published in *Law in peace negotiations* (edited by Bergsmo and Kalmanovitz), FICJC Publications 2 (2007), and information about the conference are both available at http://new.prio.no/FICJC/Activities/Law-in-Negotiations.