THE TOPIC OF THE ISSUE

WAR CRIMES AND THEIR DENIAL IN THE 20th CENTURY: BETWEEN INTERNATIONAL COURTS AND NATIONAL JURISDICTIONS

When the Myths are Falling

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The last century was, not without good reasons, dubbed by a British historian Eric Hobsbawm as "the age of extremes." Marked by both visible progress and unprecedented destruction, this century of contradictions is remembered as a time in which the concept of universal human rights came forth simultaneously with their horrendous breaches. The first half of the century was characterized with international agreements: The Hague and Geneva Conventions strived to regulate the laws and customs of war and therefore protect the combatants, and the signatories of the 1927 Briand-Kellogg pact attempted even to outlaw the war as a mean of settlement of international disputes. As an irony of history, after each of those efforts a global conflict escalated – First, and then a Second World War. This cycle of destruction came to an end only after the two winning superpowers, the USA and the USSR, acquired weapons of such strength that the direct confrontation between them would lead into the devastation of the entire planet. Nonetheless, in a competition during the Cold War, millions of people died in conflicts of low intensity, but high mortality.

Although the war was neither outlawed nor made more human, the developments in international humanitarian law and human rights law contributed to the definition of the notion of war crimes and to the instruments for their detection, punishment and prevention. The old sensibility that not everything is allowed even in the wartime got codified. It provided a basis for different fact-finding commissions to document war crimes committed during the Balkan wars and the First World War. To be sure, those instruments were difficult to implement in practice. The states were not prepared to renounce crime as the mean of their policies, and were particularly reluctant to punish war criminal from their own ranks. On the other hand, they were neither ready to embrace war crimes as the aspect of their strategy. Hence the pattern of committing and denying crimes appeared as an organized state project, which was hard to debunk from the outside. A commission formed in 1913 by the Carnegie Endowment with the goal to investigate into the crimes committed during the Balkan wars is a good example of such development. The Commission found that all the belligerent parties committed grave atrocities over prisoners and civilians, and had documented those claims in a voluminous report. The states, on their side, made the work of the Commission as difficult as possible, questioned and muted down their findings, to the degree that the original report is even hard to find in the region. One of the copies in French can be found in the University Library of Belgrade. It was not even translated into local languages, except in Bulgaria, where its translation and publishing in the 90's provoked a bitter polemic that proved the strength of the denial of war crimes, even those committed more than eight decades ago.
Yet another paradox of the 20th century was to follow - the ink on the 1914 Carnegie Commission report, describing the barbaric conduct of uncivilized Balkan people was still wet, and the "civilized" Europe entered in the First World War, waged with more advanced technological means, but not with much more humane principles of warfare. Hence war crimes and their denial seized to be a Balkan topic and acquired the European dimension. Mutual accusations for aggression and inhuman treatment of civilians and prisoners of war became a commonplace, but the best documents were the findings on the crimes of the troops of the Central Powers – Austro-Hungary and Germany. Their loss of war opened up a possibility of establishing their accountability. One of the clauses of the peace treaty in Versailles (article 231) held Germany responsible for the outbreak of war, punished it consequently through the high contributions and hinting the possibility of prosecuting its political and military leadership for war crimes. In Germany, this development was received with the apparent denial of any responsibility. Politicians, intellectuals and public figures were eagerly participating in the so-called debate on the war guilt (Kriegsschuldfrage), denying or diminishing the responsibility of Germany for the outbreak of war.

In such a context it was easy to slide from the denial of responsibility for the war into the cover up of the crimes committed in its course, or into the minimizing their widespread and systematic nature. The Entente has in the meanwhile abandoned the plan to hold international trials to the wrongdoers, delivering instead the list of the assumed war criminals to the German government, with the request for them to be punished by the national legal system. The fate of this list is a good reminder that the problems which Serbia faces today are not unique. The first list that the Allies drafted contained 3000 names, only to be cut by themselves onto 854 suspects, including the wartime German Chancellor Bethmann-Hollweg and the military commanders Ludendorff and Hindenburg. After the new protests in Germany this list dwindled onto 45 persons of lower rank, which were indeed processed in front of the

German Supreme Court in Leipzig in 1921. However, the actual trials were held only to the 12 persons, 6 of which were convicted on the shorter prison terms, 2 of which even escaped from prison with the help of the guards and on the delight of the German public. Such development not only confirmed the interwar joke that the German justice "is blind in the right eye only", but also showed that the human rights guaranteed by international instruments are not necessarily achievable in the obstructive context of the national legal systems.

This legal debacle was very much in the memory of the people who were thinking about a legal follow-up after yet another German defeat in the Second World War, and has probably influenced decisively the establishment of the International Military Tribunal in Nuremberg. The Nazi elite was tried in the Nuremberg courtroom for the conspiracy that lead to the crimes against the peace, crimes against humanity, and the breaches of laws and customs of warfare. Headed by Reich Marshall Goering, the indictment was raised by the 24 officials of the Nazi military, navy, police, diplomacy, economy and propaganda. Twelve were convicted to death by hanging, seven got prison terms. In the shadow of this mega process, less visible but not less important sequence of trials were held in Nuremberg from 1946 until 1948 against the groups of German doctors, high officers, lawyers and industrials, that had shed much light on the criminal essence of Hitler's state. However, the gravity of those revelations was not felt with the same force in international and German public. On the international level, the outcome of those processes has but confirmed the already shaped opinions on the nature of the Nazi regime, whereas the Germans by and large showed little attention and little trust to this judicial aftermath of the Second World War. Many have simply written off the judgments as the "victor's justice", or shied away from the criminal past by turning to the hardships of the everyday life..

It took almost fifteen years for German judiciary to take interests in crimes of the Nazi past. With the exception of a number of sporadic cases, it was only during the 1958 Ulm trial to the so-called Einsatzgruppen, that performed mass executions in the Eastern front, that the interest reappeared. In the beginning, it was stirred by the enthusiasm of a number of persistent prosecutors, such as Fritz Bauer, but was soon followed by the formation of specialized institutions, such as the Central station for research of Nazi crimes in Ludwigsburg. Aided with the emerging historical, sociological and politicological studies on the Third Reich, the prosecutors started amassing the new evidence which was in turn stimulating new scholarship. Induced with the trial to Adolph Eichmann in Jerusalem, new cases started shaking the German public. In 1963 in Frankfurt am Mein, the trial to the 16 prison guards of Auschwitz camp was opened, confronting the Germans with the bestialities committed by ordinary people, their neighbors and fellow citizens. One after another, the myths which served to deny or justify crimes, such as "I was just following orders", "the others committed crimes as well", "I had no idea what was happening", were transformed into empty phrases that lost credibility. With the student protests of 1968, this turnover got its definite shape, and the German process of dealing with the past (Vergangenhetisbevältigung, Aufarbeitung der Geschichte) was shaped into an almost complete social consensus proved in an almost unbroken chain of the processes for war crimes of the Nazi past which stretch until nowadays. The strength of this consensus is also reflected in the German criminal code, criminalizing even the denial of the Nazi crimes.

The relevance of German experience for prosecuting war crimes committed at the territory of the former Yugoslavia is multifold. Although the Yugoslav examples is characterized by many local specificities, the pattern of denial is both recognizable and comparable, and some general inferences could safely be drawn. Facing the criminal aspects of the recent past is neither spontaneous nor simple process. It is obstructed by the people in positions of power who were implicated on different levels, or by the people who were supported the policies that led those crimes. Such situation is tolerated by the silent majority, whose empathy is damaged by the harsh experiences of bad times. Therefore revelations in different contexts come with some delay. During the Second World War, the entire continental Europe was a gruesome theatre of the project of extinction of the Jewish communities, in which the Nazis everywhere found larger or smaller number of local accomplices. However, such aspect of collaboration and its widespread character came to light in these countries only recently. It was frequently met with the disbelief and denial, as in France, in which the belated Second World War related trials of the 90s triggered a set of scandals. Similarly divided were reactions to the equally belated commission composed by the Swiss government in order to establish the conduct of Swiss banks with the Jewish deposits during and after the war. Only in the last years the issue of the criminality of colonial governance in Congo is getting into the public debate in belgium, whereas in the US legal battles regarding the grabbing of the American Indian land is lasting for decades. Additionally, there is a number of historical crimes for which, one must fear, there will be no adequate legal showdown.

However, the German example bears particular importance for the former Yugoslavia, as it reveals, clearer than elsewhere, the depth of the interrelation between the international and national aspect of processing the war crimes: Nuremberg represented an important incentive for legal facing with the crimes of Nazism; The Hague, as the first international criminal tribunal after the Nuremberg, stands for the beginning of the legal showdown with the crimes committed in the territory of the former Yugoslavia. As Nuremberg opened a chapter of fighting with Nazism legally, The Hague put in motion the process of punishing of war criminals. Without Nuremberg, the legal reaction after the Second World War in Germany would perhaps be equally lukewarm as after the First World War. Without The Hague, war criminals would probably not only walk freely in the region of the former Yugoslavia, but would also govern it. Reaching, in some regard, even further than the Nuremberg, The Hague processed the indicted from all the sides and of very different positions and levels of responsibility – from the ordinary soldier to the head of the state.

Hence one ought not to be surprised with the avalanche of the criticism from the region directed against the International Criminal Tribunal for the former Yugoslavia. Brining its legality and legitimacy into question, emphasizing the political character of the trials, problematization of the choice of defendants, doubt in the just process and the denial of the findings of the judgments belong to the arsenal of disbelief faced initially by the Nuremberg Tribunal as well. As Germany was occupied at the time of the trial, dissent was not so obvious and loud, as but it grew much more visible with each new piece of sovereignty gained by Germany in the postwar period. It took quite some time to delineate between legitimate and illegitimate, constructive and destructive, benevolent and malevolent criticism. Historically, the most meaningful criticism of the Nuremberg is related to the specific view on this period it generated. By brining the Nazi leadership from the different spheres in front of the Tribunal, the prosecutors hoped that their appearance would indirectly show the depths of the criminality of the system. However, it seems that there was a counter effect. Instead of catharsis, a sort of an alienation appeared - some maintained that the Nuremberg proceedings have nothing to do with them, and the others claimed that through the Nuremberg German society has repaid its wartime guilt and has closed that chapter of its history. "It seems that only Hitler and Himler were the Nazis in Germany", observed bitterly one of the contemporaries. Only with the beginning of the national trials for war crimes was this detachment dispelled and the true abyss of the state criminality of unseen depth was opened.

This complex relation between the national and international aspect of processing war crimes is of crucial importance for the formerly Yugoslav space. Namely, one of the regrettable realities related to the war crimes is that their scope and depth very often spites the capacities of legal systems. Contrary to the declarative position that all the perpetrators of the war crimes would be held accountable, many escape justice due to the practical reasons, and sadly due to the political obstacles as well. In such an imperfect world, post-Yugoslav space is no exception. As many evade responsibility, one ought to rejoice that both national and international institutions are vested into dealing with the war crimes, securing some more justice for the region which badly needs it. In vain do the malicious critics attempt to misuse the differences in the approaches between those levels of justice rendering. In the postgencidal context, each step towards its legal remedy is precious, but their coordination as well, as it would maximize the effect of the proceedings. Hence the process of the transfer of responsibility for processing crimes from international to national level, which proved to be so crucial for the normalization of German society, would be a true measure of the transformation of the countries we are living in.