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Epilogue: Homecoming Kings, Queens, Jesters, and Nobodies

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Abstract

This epilogue unpacks the return of convicted war criminals as homecomings, with all the attendant rites, rituals, and expectations. Knotting together the various papers in this edited collection, this paper examines how the international community constructs an ideal homecoming and, in turn, how such a construction may simply be fanciful.

Keywords

other, law enforcement/security, courts/law

And did they get you to trade
Your heroes for ghosts?
Hot ashes for trees?
Hot air for a cool breeze?
Cold comfort for change?
And did you exchange
A walk on part in the war
For a leading role in a cage?

Pink Floyd, "Wish you were here," verse 2 (1975),
writers: David Gilmour, Roger Waters

"That's immortality," said Goethe [to Hemingway]. 'Immortality means eternal trial.'

"If it's eternal trial, there ought to be a decent judge. Not a narrow-minded school teacher with a rod in her hand" [replies Hemingway to Goethe].

Milan Kundera, *Immortality* (1991, p. 91)

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Ah, the homecoming: war criminals—International Criminal Tribunal for the former Yugoslavia (ICTY) convicts—coming back. War criminals who exchange a “part in the war” for a “leading role in a cage,” but then the cage opens and they flutter home. This edited collection unpacks how we—and by “we” I mean international lawyers and human rights activists—wish these homecomings to be like, to look like, to sound like, to smell like, and to feel like. What should *happen* at a model homecoming? What do we *expect*? What do we urge as appropriate behavior, manners, and etiquette?

Indeed, we can’t resist—we would like to script these homecomings to happen in a certain way. They are not supposed to be joyous, welcoming, or embracing. We intellectualize these homecomings and treat them as representational.¹ We take them very seriously. We probably take them more seriously than do the people who actually participate in them.

The war criminal is not to return like the Prodigal Son from the Gospel of Luke (Luke 15:11-32). In this parable, the younger son wanders back to the homestead, the farm, from the wasteland of delinquency. The father is thrilled. Of course, there is an older brother; and of course, he is the competent son. He is the son who stayed and worked and helped. He is the dutiful child. And (once again of course), the dutiful and faithful being who they generally are—namely, moralistic—that son rages. He becomes righteously rancid. He lacks empathy and refuses even to greet his little brother. The father pleads with him. The dependable son bellows:

Look! All these years I’ve been slaving for you and never disobeyed your orders. Yet you never gave me even a young goat so I could celebrate with my friends. But when this son of yours who has squandered your property with prostitutes comes home, you kill the fattened calf for him!

The father responds:

My son, . . . you are always with me, and everything I have is yours. But we have to celebrate and be glad, because this brother of yours was dead and is alive again; he was lost and is found.

So, we worry about the festive homecoming. We worry about ICTY convicts being treated like prodigal sons or daughters. Or, put differently, as homecoming kings or queens. We fret about them returning without penance and without shame. A prison sentence alone—doing one’s time—just is not enough for the ICTY convict to be reborn, drawing from Luke, to transcend from “dead” to “alive,” to become “found” instead of “lost,” all the more so in a case where early release has been granted. Jail time is a necessary but insufficient condition.

Feasting on fattened calves may have happened for some ICTY convicts. Not many, though: Mihajlović Trbovc explains that most convicts returned home with no public welcome. They returned as nobodies. Repatriation was utterly uneventful. But some convicts returned as kings or queens to large celebrations that received considerable media attention. Some played the part of jesters in these celebrations. Others remained more regal. These homecomings may have been sparse in number but remain rich in symbolism.

Why does this bother us so? Certain crime, after all, has been celebrated throughout the ages and certain criminals exalted. Robin Hood, pirates, Guy Fawkes, gangsters: We know the folklore here. We’ve seen the Halloween costumes.

Escape from Alcatraz is a film that features Clint Eastwood as Frank Morris, a bank robber. Together with three other inmates, Morris plans an escape, indeed from Alcatraz, and, indeed again, three of the four escape through burrows and tunnels and vents. Their bodies never are found on land or in water. It is unlikely they survived, but whether they actually did still remains a mystery. The film naturally embellishes a bit (Hollywood, after all), but the story is true. The film is from the 1960s. It remains an artifact of its time. Racist slurs are used even in acts of socially transgressive

racial bonding (like with Mark Twain's *Huckleberry Finn*); there are no women as women are invisible. The film is also an artifact in that Eastwood exudes sensuality without the frippery of sculpted bodies or the freneticism of incessant workouts. He is paraded naked before the prisoners on his first day, never having joined a gym nor run a mile (other than eventually to escape). Morris, incidentally, is fiendishly clever. In one scene, the warden reviews his file. It contains a typed warning that Morris has a very high IQ. The camera's gaze moves to the typescript while the musical score ominously flows. In the end, Morris' escape helped trigger the closing of Alcatraz as a site of incarceration. But Morris' escape helps maintain Alcatraz as a site of tourism. One can visit this penal colony today, just off the foggy piers of San Francisco. Morris—a criminal, a repeat offender—beguiles.

In high school, I read *Papillon*, another tall tale (slightly truthful in parts and, in any event, far too long) of escape, in this case from the French penal colonies of Guyane française, including Devil's Island, in the 1930s and 1940s. Exotic escapes carry the reader through jungles and estuaries, through death in quicksand, amid amities and intimacies among lepers and pearl divers and, ultimately, to renewal. Henri Charrière's supposedly autobiographical novel is titled after his nickname, derived as it is from the butterfly tattoo on his chest. And indeed he did ultimately escape, to Venezuela, where he became a *restaurateur* and *raconteur*.

ICTY war criminals, to be sure, do not escape in this dramatic sense. A few have committed suicide, including late in 2017—in that instance in court. Like Socrates with his hemlock, Slobodan Praljak stood tall, puffed his cheeks, and thundered: "I am not a war criminal, I oppose this conviction," and then drank the poison. Suicide assuredly is an escape. But the general reaction to Praljak's suicide is one of the anguish—the system has failed, the security was inadequate. So as it closes, the ICTY begins an investigation as to how the hemlock entered the sanctity of the courtroom in the first place (Deutsche Welle, 2017).

Many ICTY war criminals "escape" through the dullness of early release.² That is how they return. And they do not escape to a place of renewal, like *Papillon*, but instead return to a place of yore, to wit, the setting of the crime. On this note, ICTY convicts are fortunate. Their International Criminal Tribunal for Rwanda (ICTR) counterparts have nowhere to return to. They are not celebrities of any sort. If they returned to places of yore—namely, Rwanda—they would be prosecuted again. Even if they are initially acquitted, hence convicted of nothing, they would face (re)prosecution. And no one else really wants to let them renew or afford them room for renaissance. So the ICTR's acquitted, as with the convicted, have only the glitz and glitter of temporary housing in Arusha or in Mali. They live in a purgatory of sorts, a glamorless exile. So, it is important to recognize that what we are really talking about in this journal collection is celebrity status, to be sure, but also the deep *contingency* of that status—a status that depends on place and space and that hinges upon chime and rhyme. Not every criminal can be a celebrity. Nor can every war criminal be a star, paparazzi, a *vedette*. Or released, for that matter, or even able to go home.

I return now to where I began. What, exactly, do we *expect* of the homecoming for ICTY convicts? What is a "model" homecoming? What are "best practices" for such events?

Let us take stock. If the homecoming is one of the bravado, we are ashamed. If it is one of song and dance, interlocking arms and kisses, drinking, and fairy dust—well, we are appalled. If the convict expresses anger for having had to "do time," we shake our heads. If the convict moans that they sacrificed themselves for the benefit of the collectivity, we exclaim: "You narcissist!" If the homecoming is one in which the convict says they never meant it when they had apologized, well, we reproach them as deceitful. If the convict says the trial was illegitimate, conducted by Hemingway's smothering "narrow minded schoolteacher" brandishing a "rod," well, that is just plain disrespectful. If the returned convict pleads for forgiveness from victims, and does so repeatedly, well at some point that becomes badgering, harassing, and frustrating for those who may not (yet or ever) wish to forgive.

So what would make a successful homecoming? What would get it right; where would the “sweet spot” lie? Is it one in which the war criminal endlessly flagellates himself yet asks nothing of the victims? Shames herself and is shamed, like in the medieval period in the stockade or the dunking stool? Is it one in which the war criminal is ostracized, on the margins, alone, lost, digging ditches and quarrying rocks? Is it one in which the war criminal asserts his or her intention to work for the common good, to insist that the past was putrid, to disclaim her history, to make reparations, and to commit to positive group relations? To trade “heroes for ghosts,” as Pink Floyd intones, and to lance the “hot air” of dated hatred for the “cool breeze” of hip millennial harmony? Perhaps it is that last intonation which captures what would be the best practice, the ideal for which to strive.

So, how to promote this optimal outcome? At present, the incarceration practices of international criminal tribunals are thoughtless, careless, and scattered (Mulgrew, 2013). There is no rehabilitation strategy. There is no plan. There is only “warehousing” and delivery (Mulgrew, 2013, p. 216). So, we expect the sort of homecoming for which we fail to lay any groundwork. That doesn’t seem right; or even if it seems right enough, it certainly is not a wise strategy. We hesitate to throw resources at convicted war criminals. We balk at affording them rehabilitation programs. We shy away from education and training. Rehabilitation is the lowliest priority for those convicted of ethnic cleansing, genocide, or crimes against humanity.

Would a path forward be to inflate the importance of rehabilitation as a penological goal? As Holá et al. demonstrate, only 19% of ICTY early released prisoners acknowledged their personal responsibility and expressed remorse for the crimes they committed. These are the star students, the role models, “the ideal prototype” for the number crunchers among us (Holá, van Wijk, Constantini and Korhonen). What could we do to increase that percentage? One option is carrots—better programs and greater investment in those who commit mass atrocity through rape, torture, and massacre. Another is transparency—making early release decisions much more rigorous and vigorous, requiring plenty of evidence to be adduced and inviting considerable public input. A third option is sticks—more punishment for those convicts who refuse rehabilitation or are incapable thereof—to sentence those deemed irredeemable to longer terms. Judges could divide “good” convicts from “bad convicts.” Interestingly, in Rwanda, a higher percentage of genocide convicts acknowledge responsibility and officially buy into the narratives of the “new” postethnic Rwanda than in the former Yugoslavia. Paul Kagame’s “reeducation programs” instruct and socialize a common template of what happened and how to speak in the present and what never to say about the past. Yet these policies make international lawyers and human rights activists a bit nervous, if not downright queasy, even though they may have manufactured appropriate homecomings.

Thomas Lubanga, sentenced by the International Criminal Court (ICC) to 14 years for child soldiering crimes, implored again and again that he wished to obtain early release so that he could pursue ethnic reconciliation in his PhD, which he would undertake back home in the Democratic Republic of the Congo (DRC). Ironically, the judges hesitated. They denied Lubanga’s early release application in 2015. Lubanga unsuccessfully reapplied in 2017. In response to that second application, the judges excluded all possibilities of early release. The ICC Prosecutor opposed Lubanga’s early release application (Wakabi, 2017). She did so because the child soldiering crimes for which Lubanga was convicted are too grave and too serious to warrant any early release. Lubanga, moreover, was not really to be believed in terms of the genuineness of his dissociation from the crimes. Lubanga also owes \$US10 million in reparations to his victims!³ Quite a contrast to the context of the ICTY, in which 93% of all applications for commutation and early release were granted and no restitution ordered. The ICC did grant early release in the case of Germain Katanga. Katanga’s application was granted because he withdrew his appeal against conviction, filmed an apology which was distributed in the DRC, and accepted the judge’s findings (Wakabi, 2017). Katanga is currently in the DRC. He may be face further prosecution there. For him, the homecoming was quite stark.

With regard to warehousing, should there be one international prison for all war criminals as opposed to the diaspora of national enforcement agreements? Should perpetrators of “extraordinary”

international crimes be jailed separately from “ordinary” common criminals? Perhaps such a strategy could nurture better practices and policies. We learn from Petrović that when ICTY defendants were housed together awaiting and during trial, they became friends, comrades, and brothers-in-arms feting birthdays. Interestingly, former ethnic opponents got along better than former colleagues that had been united in ethnic enmity.⁴ Petrović notes that, despite their “wartime animosities,” former executioners got along so well so as to “border surrealism.” From a penological point of view, what to be said of this? On the one hand, it seems positive, but instinctually on the other, it seems “utterly confusing” and “puzzling.” But, as Petrović adds, they all shared a “new enemy” in common, that is, the ICTY Prosecutor. That may explain things.

In the end, then, perhaps what we want, riffing of Kundera, is a homecoming of eternal punishment, a living hell: the immortality not of the convict but the immortality of condemnation. Yet here, we should be careful. At least in the United States, “law and order” discourse increasingly attaches a long laundry list of civil consequences to penal sanction such that the requirements and limitations placed on a convict who has served time are so onerous that the convict may simply never be able to reintegrate into civilian life *at all*. It used to be that the domestic looked to the international for enlightenment, progressivity, and distance from our punitive impulses. Engle (2015) dissects how the international in its treatment of human rights abuses now turns so fully toward criminal law. The anti-impunity movement hugs courtroom and jailhouses so tightly (too tightly) so that we see more and more of the penal law including penal consequences even after the penal sanction has ended.

Petrović notes that least 118 books have been written by 20 ICTY convicts. Karstedt, another contributor, compares one of these books (Plavšić’s), to that of Albert Speer, Hitler’s architect. That is a neat comparison. But I thought of someone else, Höss (1992), the former *Kommandant* of Auschwitz whose ugly memoir, *Death Dealer*, was authored as he awaited trial in a Polish prison before the Supreme National Tribunal of Poland.⁵ Höss’ is a garish book. He said “sorry,” like Speer, but only to the Poles, never to the Jews for Höss remained virulently anti-Semitic to the very end.⁶ Like some of the ICTY literature, *Death Dealer* was written as part of Höss’ defense strategy, encouraged by the prosecuting attorney (Jan Sehn) so as to recollect events.

In her contribution to this collection, Ristic uses the label “ego documents” to describe these kinds of books (specifically those authored by Plavšić, Šljivančanin, and Lukić). That is an interesting moniker. An “ego document,” plumbed from the depths of Ristic’s footnotes, is any source “providing an account of, or revealing privileged information about, the ‘self’ who produced it.” Well, in that instance, an awful lot of activity would fall within the rubric of ego documents. That said, beyond definitions in footnotes, the term ego document (for me at least) implies a sense and spirit of ridiculousness, selfishness, and hurtfulness—a risible *apologia*.

Ristic’s research is fascinating. She notes how these three authors in their ego documents recognize the moral unacceptability of a notional person sentenced by the ICTY but simultaneously cast themselves as not identifiable with such a notional person. Simić’s poignant interview with Plavšić tilts in a similar direction. The Simić–Plavšić conversations are among the most significant recent research contributions to perpetrator studies. We learn from Plavšić that she denies the remorse others had heard in her sentencing speech at the ICTY. Those others may have been listening wishfully instead of really listening. We also learn that reconciliation and reintegration may be two different things. One may repose on contrition, the other on silence.

Ego documents are not necessarily historically revisionist. Nor do they necessarily seek to upend the morality of punishing war crimes. Höss’ memoirs constitute one of the first accurate estimates of just how many individuals were murdered at Auschwitz. Höss wrote that 1,130,000 people were killed at Auschwitz; the United States Holocaust Memorial Museum has accepted the figure of 1,100,000, as have other experts.⁷ *Death Dealer* traces Höss’ path to power and at the same time unpacks many wretched details of the Final Solution.

ICTY convict books are not collectively denialist. Instead, as Rauschenbach hints at in her piece, they seem personally exculpatory, defensive, self-centered; in a sense they call for more law by ensuring that more “sides” become prosecuted more exhaustively; they exhort more due process; they call for law to be depoliticized. Simić excerpts Plavšić’s comment that the very few ICTY trials involving Muslims simply served a “decorative purpose.” Simić juxtaposes the apparent crassness of this comment with the actual data, which when presented make the comment seem less crass. These data reveal that Serbs comprised 68% of ICTY indictees, with 21% being Croat, 4% Bosniak, 4% Albanians, 1% Macedonian, and 2% unknown.⁸

These ego documents carry the defense case outside of the courtroom. Is that really so troubling? Let’s go back to expectations. What is it we expect of war criminals? Do we wish them to have no space to mount a defense? Are only certain types of defenses appropriate (on that note, one can never deny a defense of mistake of fact, or *alibi*, and still adhere to due process)? Do we expect war criminals to confess immediately to everything? Do we really believe that those who commit the worst crimes against all humanity also are the kinds of people who would never defend themselves? Never lie? That they are the kinds of people who always tell the truth and accept as objective “truth” something presented by the “other”? That they are people who crumble when someone cries *j’accuse*? This just does not seem realistic to me.

Mihajlović Trbovc teaches us that contemporary nationalist politicians may instrumentalize ICTY convicts and deploy their homecomings as spectacle. The convict’s symbolic capital becomes massaged for ulterior political purposes. Yet the liberal, progressive “memory activists” discussed by Fridman also instrumentalize the past. They may do so on the “right” side of the facts, and thereby fight the scourge of “fake news,” but they weaponize nonetheless. Theirs are no less exercises in ego. Fridman writes about the slogans carried by (youthful) activists—for example, “Too Young to Remember, Determined Not to Forget” and “Not in My Name.” Theirs are powerful words. Yet, their slogans also are a bit fatuous and a touch indulgent. The fact remains: It is much easier not to forget when one cannot have any implication in remembered wrongdoing because one was too young at the time. This is recollection without consequence; memory built upon on the guilt of others; the young facilely blaming the old as they always do. The old, however, may do well to recall David Bowie:

And these children that you spit on
As they try to change their worlds
Are immune to your consultations.⁹

Perhaps even bad books and poor prose, the selfish dissident stories told (and sold) by ego documents, teach and inform about something. Fridman observes that among the greatest challenges in Serbia today is lack of knowledge about the work of the ICTY—60% of respondents reporting that they are not familiar with that work or only familiar to a limited extent. Yet, according to Fridman, among the most “prominent mnemonic dynamics” in Serbia today is that “lack of knowledge is often coupled with very strong opinions.” The work product of the ICTY may offer some counterbalance, but the legacy of the ICTY in solidifying one “acceptable” narrative of the past is significantly less than what would have been hoped and what had initially been hyped. The outcome of an ICTY trial itself does not seem to matter much back home in terms of public perception. After all, the ICTY convicted is treated no differently than the ICTY acquitted (see Mihajlović Trbovc).

In the end, yet once again, we may simply expect too much. To end at the beginning, namely, with celebrities, perhaps the fault also lies in reifying all that hope in the earthly form of the ICTY, the courtroom, the trial, judges, wigs, and other accoutrements of the law.

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Notes

1. Mihajlović Trbovc encapsulates this sentiment in her article: “[C]elebratory welcomes of the convicted individuals should be viewed as a litmus test for the success/failure of the ICTY in changing values and conflicting historical interpretations, and arriving at a commonly accepted ‘truth’ about what happened during the Yugoslav wars and who is responsible for the crimes.”
2. Holá, van Wijk, Constantini, and Korhonen determine that 57 individuals (70% of ICTY convicts) have already been released and that 53 of these 57 (93%) saw their sentences commuted and were released early.
3. The reparations decision was issued on December 14, 2017.
4. Playšić’s own literary efforts involve critique of Karadžić and Krajišnik, both of whom she felt sidelined her and tainted Serbia with corruption and nepotism.
5. For further discussion, see Drumbl (2015).
6. Höss (1992) wrote: “Today I realize that the extermination of the Jews was wrong, absolutely wrong. It was exactly because of this mass extermination that Germany earned itself the hatred of the entire world. The cause of anti-Semitism was not served by this act at all, in fact, just the opposite. The Jews have come much closer to their final goal” (p. 183).
7. Höss testified at the International Military Tribunal in Nuremberg that 2.5 million people were murdered at Auschwitz. He later repudiated this figure in favor of the figure stated in *Death Dealer*.
8. Simić cites the research of Klarin (2009) who indicates that in 2007 only 7% of Serbian citizens thought that the ICTY was unbiased (p. 92).
9. David Bowie, “Changes” (1971, released on the album *Hunky Dory*).

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