International Criminal Tribunals as Actors of Domestic Change

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List of abbreviations

AAK	Alliance for the Future of Kosovo *(Aleanca për Ardhmërinë e Kosovës)*
ACHPR	African Charter on Human and People's Rights
AI	Amnesty International
ATO	Anti-Terrorist Operation (Ukraine) *(антитерористична операція)*
AU	African Union
AUHPD	African Union High Panel on Darfur (Sudan)
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
CC	Criminal Code
ICESCR	International Covenant of Economic, Social and Political Rights
CIPEV	Commission of Inquiry on Post-Election Violence (Kenya)
CPA	Comprehensive Peace Agreement (Sudan and South Sudan)
CPC	Criminal Procedure Code
CRC	Conventions on the Rights of the Child
DDPD	Doha Peace Document on Darfur (Sudan)
DORH	State Attorney's Office (Croatia) *(Državno odvjetništvno Republike Hrvatske)*
DOS	Democratic Opposition of Serbia (party alliance) (*Demokratska opozicija Srbije)*
DPA	Dayton Peace Agreement (former Yugoslavia)
DPP	Director of Public Prosecutions (Kenya)
ECFR	European Council of Foreign Relations
ECHR	European Court of Human Rights (Council of Europe)
EU	European Union
EU SITF	European Union Special Investigative Task Force (Kosovo)
EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
GNC	General National Congress (Libya)
GOSS	Government of Southern Sudan
HDZ	Croatian Democratic Union (*Hrvatska Demokratska Zajednica*)
HJPC	High Judicial and Prosecutorial Council (BiH)
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICID	International Commission of Inquiry into Darfur

ICJ	International Court of Justice
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IPA	Instrument for Pre-Accession Assistance (EU)
JEM	Justice and Equality Movement (Sudan)
JSO	Special Operations Unit (Serbia) (*Jedinica za specijalne operacije)*
KLA	Kosovo Liberation Army
KNDRC	Kenya National Dialogue and Reconciliation Committee
KWECC	Kosovo War and Ethnic Crimes Court
KWN	Kosovo Women's Movement
LDK	Democratic League of Kosovo (*Lidhja Demokratike e Kosovës)*
MKTJ	Serb abbreviation for ICTY
MPRI	Military Professional Resources Incorporated (Croatia)
NATO	North Atlantic Treaty Organization
NCCLHR	National Council for Civil Liberties and Human Rights (Libya)
NGO	Non-Governmental Organizations
NISS	National Intelligence Security Service Act (Sudan)
NRM	National Resistance Movement (Uganda, in connection with Rwanda)
NSDC	National Security and Defence Council (Ukraine)
NTC	National Transitional Council (Libya)
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OHR	Office of the High Representative (BiH)
OPCD	Office of Public Counsel for the Defence (ICC)
OPDAT	Office of Overseas Prosecutorial Development Assistance and Training (US in connection with BiH)
OSCE	Organization for Security and Cooperation in Europe
OTP	Office of the Tribunal Prosecutor (ICTY and ICTR)
PDK	Democratic League of Kosovo *(Partia Demokratike e Kosovës)*
PEV	Post-Election Violence (Kenya)
PNU	Party of National Unity (Kenya)
PSC	Peace and Security Council (AU)
RECOM	Regional Truth and Reconciliation Commission (former Yugoslavia)
RPF	Rwandan Patriotic Forces
RS	Republika Srpska (BiH)
SAA	Stabilization and Association Agreement (EU in connection with the former Yugoslavia)

SCBiH	Special Court (for war crimes) of Bosnia and Herzegovina
SCCED	Special Criminal Court on the Events in Darfur (Sudan)
SDG	Sudanese Pound (Sudan's currency)
SDP	Social-democrat Party (BiH)
SLMA	Sudan Liberation Movement / Army
SPLM	Sudan Peoples Liberation Movement
SRSG	Special Representative of the Secretary of the United Nations
SSHRC	South Sudan Human Rights Commission
SUNA	Sudan News Agency
SWPS	Szkoła Wyższa Psychologii Społecznej
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
TRC	Truth and Reconciliation Commission (South Africa)
TRIAL	Swiss NGO
UK	United Kingdom
UN	United Nations
UNAMID	United Nations Mission in Darfur (Sudan)
UNDP	United Nations Development Programme
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNMIK	United Nations Mission in Kosovo
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
US	United States
USA	United States of America
USAID	United States Agency for International Development
VWS	Victims and Witness Section (ICTY)
WCC	War Crimes Chamber (BiH)

Klaus Bachmann, Irena Ristić, Gerhard Kemp

Introduction

International Criminal Tribunals (ICTs) as actors in International Relations are a relatively recent field of research, which is predominantly occupied by legal, historical and, to a smaller extent, sociological research that mostly focuses on their internal functions, mechanisms, legal innovation and the judicial behaviour of prosecutors and judges. Former ICTs, like the Nuremberg Tribunal and the International Military Tribunal for the Far East, were never analyzed as actors in International Relations, since their existence was too short-lived, their legal acquis too limited, and their ability to influence other actors of International Relations too constrained. In the post-cold war era, the emergence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and finally the first permanent international criminal tribunal, the International Criminal Court (ICC), and their interference in domestic politics of states, their interaction with powerful non-state actors (Human Rights organizations, non-governmental organizations, international corporations and regional organizations) have given rise to a growing literature in IR, which now deals with ICTs' role in the international sphere, their ability to coerce states into compliance with their rules, their ability to engage in politics, in "games of cooperation" and "conditionality games", as well as their exposure to "hijacking" by defiant states.[1]

In order to fulfil the tasks given to them by their founders – the UN Security Council (UNSC) and the Assembly of States Parties (ASP) to the Rome Treaty – both tribunals have engaged in politics, making political decisions and political choices (for example, whom to prosecute, when and why, and whom not to prosecute), and their chief prosecutors – and to a lesser extent their judges – have become embroiled in the domestic politics of some of their tribunal's

1 A. Wendt, 'On constitution and causation in International Relations', *Review of International Studies* (1998), 24, 101–118; Y. Lapid, 'The Third Debate. On the Prospects of International Theory in a Post-Positivist Era.' *International Studies Quarterly* 1989, vol. 33, 235–254. D. A. Baldwin, *Neorealizm and Neoliberalizm. The Contemporary Debate*, New York 1993; J. Bendor, A. Glazer and T. Hammond, 'Theories of Delegation', *Annual Review of Political Science*. Vol. 4 (2001), 235–269. R. Waterman and K. Meier, 'Principal-Agent Models: An Expansion?' *Journal of Public Administration Research and Theory*. 8,2,1998, 173–202.

countries of reference. This alone would hardly make them full-fledged actors of International Relations. However, as several authors have shown, by using a specific "conditionality game" in interacting with the European Union (EU), the ICTY has managed to obtain agenda-setting power in the EU enlargement process, and certain features which had previously been specific to supranational institutions.[2] Nevertheless, it would be exaggerated to regard the ICTY, ICC or the ICTR as supranational institutions per se, as they were not created in order to solve delegation and compliance problems of their founders, but, instead, in order to extend the influence of the international community to countries, which were reluctant to comply with its norms.

From this perspective, ICTs are actors of International Relations sui generis – they enjoy a considerable amount of independence and autonomy from their creators as well as from their countries of reference, but at the same time lack certain features, which are constitutive for traditional actors of International Relations (like international organizations) and supranational entrepreneurs. In recent years, the question whether a polity can be regarded as an actor of International Relations was raised only with respect to the European Union and its foreign policy. It is unsurprising that most definitions of actorness were therefore tailored in a way that makes them applicable to the EU, but not necessarily to other entities. The older literature about International Relations, which is dominated by realist and neorealist approaches, attributes actorness only to states and defines it in a way, which again makes the definition applicable to a state-centric environment, but does not allow us to identify whether a polity is an international actor or not. Institutionalist, liberal and constructivist research focuses on the mediating and preference-changing mechanisms of international institutions, treating them de facto as actors, but also leaves the question unanswered whether an organ created by an international organization can acquire enough attributes of actorness to be regarded as a fully fledged actor on the international scene.[3]

As Andrew Moravcsik has pointed out, states may agree to sign and ratify treaties and adhere to institutions without exactly knowing how these institutions will affect their preferences at a later stage.[4] Governments may sign Human

2 A. De Vasconcelos, 'Preface', in J. Batt, J. Obradović-Wochnik (eds):, *War Crimes, Conditionality and EU Integration in the Western Balkans*. Paris 2009, 1–23.

3 A. Moravcsik, 'A New Statecraft? Supranational Entrepreneurs and International Cooperation', *International Organization* 53 (2), 1999, 267–306.

4 A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization*, Vol. 54, No. 2 (Spring, 2000), 217–252.

Rights treaties and ratify court statutes, and in the long run, this can force them into compliance with these statutes' provisions. This can be perfectly rational, since it reduces the likelihood of "free riding" by other contracting states and, by imposing legal regimes onto these governments, increases the credibility of these governments' Human Rights commitments toward their own constituencies. Even more: by signing and ratifying treaties, which constrain government action, a government may seek to limit the scope for retaliation by a future government with respect to its predecessor. The latter aspect is the more relevant, the more likely violent regime change is in a country. By adopting binding and enforceable Human Rights provisions which involve independent external actors, governments may accept a trade-off between their own autonomy (which will be restricted by these provisions) and the future security of their members and supporters. From this perspective, binding and enforceable Human Rights regimes with supranational features provide a solution for overcoming the "hostage dilemma" in (actual or expected) transitions of power.[5] Introducing "third party enforcement" as such is always a rational way of reducing transaction costs, irrespective of whether such an agreement involves commodities between traders or rights between political actors. The basic requirement for "third party enforcement" is the independence of such an institution from those who refer to it. This is true for Human Rights regimes and international courts, whose jurisdiction reaches out to the contracting states. But is this the case with ICTs?

1. The ICC as a Case of "Third Party Enforcement"

The ICC was created during the late 1990s and became operational in July 2002, from when it has wielded temporal jurisdiction over more than a hundred signatory states, which accepted the so-called Rome Statute. According to it, the member states agreed to grant the ICC complementarity, or in other words, the right to take over investigation, prosecution and trial from a member state, if the latter is either unable or unwilling to pursue it and if the crime in question fulfils the criteria of an international crime as enshrined in the Rome Statute. With regard to crimes other than genocide, crimes against humanity and war

5 The hostage dilemma (sometimes also named kidnapper's dilemma) is a game-theoretical approach to political transition, which describes the the opposition's problem during a negotiated transition to offer the leadership of the old regime a credible exit with security guaranties, which will protect them after they quit. M. Nalepa, *Skeletons in the Closet. Transitional Justice in Post-Communist Europe*, Cambridge 2010, 42–44.

crimes, and – with specific additional conditions – the crime of aggression, the respective signatory state still retains jurisdiction. If the ICC decided to take over a case under the above mentioned premises, the respective state can challenge its admissibility, but it will still be the ICC which decides whether the case should be investigated, prosecuted and judged at the ICC or by the state. In other words: the ICC is a court of last resort, and it is tailored for situations, in which a state's judiciary is either too weak and overburdened to deal with international crimes, or it is prevented by the government or other important stakeholders to address international crimes. If we define the public good, which the ICC delivers to member states as "justice for international crimes", it becomes clear that the ICC does not solve any free rider issue. Rather than trying to get the public good for free, states will try to pay for the good, but not use it. They may be expected to bolster their Human Rights commitment by paying their contribution to the ICC and by formally accepting its jurisdiction, but at the same time may refuse to have the Court involved in high-level criminal cases. Kenya is a good example of state party reluctance and obstructionism that could by some be viewed as de facto refusal to cooperate effectively with the ICC. Gerhard Kemp describes this in detail in his chapter on Kenya.

But the picture changes if the ICC gets involved in a case against opponents of a government that accepted ICC jurisdiction – either as a signatory or under art. 12 of the Rome Statute, lodging a self-referral. In these particular cases, the ICC constitutes a form of "third party enforcement" and even to some extent prevents free riding. This becomes obvious if we look at the picture from a counter-factual perspective: which other options does a government have when it wants to investigate, prosecute and judge crimes committed by people, over whom it does not wield effective control? It could issue an international arrest warrant and, once the suspects are arrested, demand their extradition. If the government is able and willing to judge them, it could do so after their surrender. However, armed opposition groups which commit crimes often enjoy the open or secret assistance of foreign governments, and what appears to be an illegitimate rebel movement in the eyes of one government may be seen as a legitimate freedom fighter army by another one. In many cases foreign governments committed to Human Rights may find it difficult to extradite even violent rebels to countries where they are likely to be tried with bias and face inhumane treatment and capital punishment. In such cases, constitutional constraints may even prevent them from extradition. All these obstacles disappear if a suspect is sought not for extradition by a government he or she opposes, but is sought for transfer by the ICC. In the latter case, institutional constraints against extradition are either weaker than in bilateral extradition cases or non-existent, because the ICC

does not apply any punishment that would violate Human Rights requirements and usually transfers convicts to countries other than were they come from and where they may be persecuted. In other words: ICC involvement deprives a government of control over the suspect and the case, but it increases the likelihood of having him arrested by other countries. Invoking the ICC may therefore be a viable option to weaken an armed domestic opposition at the price of losing control over the investigation, prosecution and trial against members of this opposition. By doing so, states confer a part of their sovereign rights to a supranational body, whose actions they cannot control, but at the same time solve a problem none of them would be able to solve on their own. Subsequently, the ICC enforces its jurisdiction over the signatory states even in cases when some of their governments might not like it and therefore curtails free riding: the public good of justice for international crimes (or, as Human Rights activists would say: the fight against impunity) is delivered even against the will of the receiver. He can no longer have the reward of a Human Rights reputation and defy its obligations. Here lies the difference between the consequences of Human Rights commitments and the institutional development of International Criminal Law (ICL) – the humanitarian obligations have become enforceable and they are being enforced by a supranational body.

2. The ICC as an Actor of Domestic Change

The ICC may be perceived as a supranational body for third party enforcement, by which member states reduce transaction costs (which they would incur if only traditional extradition were available) and prevent free riding, but they are more than just that. The Rome Statute also contains a specific provision, through which the UN Security Council may interfere with the judiciary of countries which have neither ratified the Rome Statute nor lodged a self-referral. According to art. 13, the UNSC can refer the case of a non-member state to the ICC and the ICC then enjoys jurisdiction over this case, sidelining the domestic judiciary. The only immediate remedy for such a country is an inadmissibility claim, which again can only be decided by the ICC. Another option – but a far more complex, time-consuming and less predictable one – would be to lobby for a UNSC deferral.[6]

6 According to art. 16 of the Rome Statute, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by

In such cases, the ICC can hardly be seen as providing third party enforcement for an agreement to which different actors made a commitment, because the country most affected by ICC jurisdiction under a UNSC referral never committed to the Rome Statute. The prevention of free riding is not an issue either, although the ICC may support the provision of justice for international crimes beyond the scope of ICC member states by reducing their transaction costs for spreading this public good beyond their own reach. But UNSC referral cases bear another element, which is absent (or likely to be absent) when governments invoke the ICC in order to investigate crimes committed on their territory by the opposition. In such cases the ICC is more likely to change domestic politics than in cases of self-referrals or full accession to the Rome Statute. Since ICC involvement under a UNSC referral is not – or much less – foreseeable for a government, it can neither tailor the referral to the design of its own laws and institutions, nor can it adopt institutions and domestic legal provisions to meet (or circumvent) the referral. This is therefore likely to happen after the referral. In such cases, we are able to observe whether judicial intervention by the ICC triggers domestic change – and if yes, what kind of change.

3. Ad Hoc ICTs as Actors of Domestic Change

The same mechanism was active with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both were created by the UNSC, but they are even much more likely to trigger domestic change than the ICC, because they worked under the primacy principle, which obliged the countries under their jurisdiction to transfer any case, suspect and evidence that the ICTY and the ICTR demanded. The ICTY statute does not allow for any admissibility test, but Vjeran Pavlaković's chapter on Croatia shows how politicians sometimes tried to create conditions for an inadmissibility challenge as if there were such a possibility. They supported domestic investigations in order to demonstrate the redundancy of ICTY interference. But under the ICTY (and the ICTR's) statute, every case of an international crime was per se regarded as admissible, and the ICTY and the ICTR were the only instances that could rule on this.

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the Council under the same conditions." In the case against Sudanese president Omar Al-Bashir, the African Union tried to obtain such a deferral (some AU countries feared retaliation from Sudan-backed rebels against their peacekeeping troops in Darfur), but to no avail.

This put the countries affected by ICTY and ICTR jurisdiction under a much severer pressure than the countries under ICC jurisdiction. Both tribunals could go much deeper into crimes than the ICC, whose limited resources and worldwide reach force it to focus on top suspects and the gravest crimes only. As cases of Serbia, Croatia, and BiH show, the ICTY actually did go very deep – indicting not only top-level commanders and politicians, but also soldiers and decision makers down the chain of command. The ICTY's early indictments often were directed against commanders and even guards of prison camps.[7] Indictments at the ICTR also sometimes targeted mayors of towns and priests, who were accused of surrendering victims to their perpetrators. There also was one additional aspect at the ICTY, which did not play a role at the ICTR: the support of the European Union and – in some specific cases, of which the transfer of Slobodan Milošević was the most prominent one – of the US, which gave the ICTY a leverage over the countries of the former Yugoslavia of which the ICTR could only dream. Time and again, the ICTY prosecutor's requests were bolstered by EU decisions, which sometimes went so far as to stall trade and accession negotiations with Serbia and Croatia as long as their governments did not deliver the requested documents or transfer the suspects the ICTY wanted to prosecute.[8]

Unlike the ICC, neither ad hoc tribunal exercised jurisdiction over the countries that founded them. Both tribunals were founded by the UNSC in order to judge, prosecute and try suspects from the conflict region for crimes committed there. As Bachmann and Fatić have shown, both tribunals had the necessary jurisdiction to investigate crimes and prosecute perpetrators from outside, but, with one exception, they never did.[9] It would therefore be difficult to argue that the ICTR and the ICTY helped their creators overcome a free riding problem or to overcome a collective action dilemma through third party enforcement.

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7 During the early days of the ICTY, this focus on low-level perpetrators was the result of the ICTY's lack of capabilities to apprehend high-ranking suspects.

8 K. Bachmann, T. Sparrow-Botero and P. Lambertz, *When Justice Meets Politics. Independence and Autonomy of Ad Hoc International Criminal Tribunals*, Peter Lang 2013, 23–96.

9 The ICTR tried a Belgian journalist for his collaboration with Rwandan hate media in the prosecutor vs. Ruggiu, but although its jurisdiction included the countries neighbouring Rwanda, the ICTR never indicted any suspect from a country other than Rwanda, neither did the ICTY try anyone from outside the former Yugoslavia. K. Bachmann, A. Fatić, *The UN International Criminal Tribunals, Transition Without Justice?* Abingdon, New York 2015, 116–133.

The tribunals might have only reduced transaction costs for its founders in so far as they helped them provide justice for international crimes and spread the rule of law, bolster accountability and fight impunity beyond the founders' own boundaries. This is what the huge bulk of literature on European Integration labels "Europeanization" – the proliferation of norms and values from the European centre to the periphery (and from the supranational level to the member states).

The notion does not fit well with Rwanda, where the EU only played a marginal role[10] and there was no political agenda for "Europeanization" on the table. Using instead "regionalization" as an African substitute for Europeanization would be even more misleading. "Europeanization" describes the impact of a regional block on its members states (and to some extent also beyond them) and – in the specific context of the ICTY – the coordinated efforts of the EU and the ICTY to link economic, financial and political concessions to compliance with ICTY demands. But there was no such coordinated effort between the ICTR, and the only organization that can be seen as an African counterpart of the EU – the Organization for African Unity (AOU) and its successor, the African Union (AU), respectively.[11] The OAU and later the AU supported the ICTR, but they did not launch any conditionality policy that could be compared to the one the EU and the ICTY introduced during the trade liberalization and EU membership negotiations with Serbia and Croatia.[12] The OAU and the AU's impact on member states was anyway much weaker than EU conditionality in the former Yugoslavia, because of the lower degree of inter-state integration and the weaker leverage of supranational bodies over member states in the African Union.[13]

The picture is even more complex with regard to the ICC, which came into being at the same time as the AU in 2002. Initially the ICC's basic commitment

10 The ICTR's outreach program, which started late, was partly financed by EU funds and support from some EU member states.

11 The time during which the ICTR operated (1994–) overlaps with the transformation from the OAU to the AU in 2002.

12 In some cases, there also was another third party conditionality policy in force – pressure by the US Congress (for example regarding the transfer of Slobodan Milošević to the ICTY. We do not regard the influence of the (Dayton) Peace Implementation Council and the Organization for Security and Cooperation in Europe as actors of domestic change, because these institutions lacked (opposite to the US) the means to apply coercion on reluctant states.

13 The African Union has called upon its member states to not cooperate with the ICC in apprehending Sudanese president Omar Al-Bashir. E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* 2011, 1–14.

to the fight against impunity for international crimes was shared by many African states which had also signed and ratified the Rome Statute. Until the time of writing this book, more than half of the states in Africa were signatories to the Rome Statute. The attitude of many changed after the indictments against Omar al-Bashir and other high-ranking Sudanese political and military leaders. Since then the African Union's influence was mostly directed against rather than in favour of compliance with international criminal justice. The ICC could not count on such support for its requests for cooperation. During an extraordinary AU summit in October 2013 in Addis Ababa, the AU stated that no sitting head of state should appear before the ICC. In June 2014, the Assembly of the African Union approved an amendment to the protocol on the statute of the African Court of Justice and Human Rights, which is to become an AU organ entrusted with jurisdiction over international crimes. The amendment grants immunity to sitting African leaders accused of committing serious Human Rights violations. There have also been discussions in the AU and its member states about a total withdrawal of African states from the Rome Statute.[14]

Against this background, it would hardly be comprehensible for readers if we tried to invoke a notion similar to "Europeanization" to the cases on the African continent, with which we deal with in this book. Therefore, we decided to apply an overarching notion, which measures the impact of the different kinds of external influence an ICT applies directly or indirectly on the legal system and related institutions of a country. We ask whether external influence linked to an ICT led to "domestic change" in a country under the respective ICT's jurisdiction. It is this impact this book focuses on: the transformation of internal politics as a result of pressure that was applied by an ICT or on behalf of it.

4. Domestic Change

Contrary to notions, which are closely linked to statehood and are often state-centric (like internal politics, home affairs and judicial policies etc), "domestic change" can also be applied to federal units or entities, which lack some features of statehood, independence and sovereignty because, for example, they are not (yet) fully internationally recognized, they do not control their entire territory, or struggle to impose the monopoly of the legitimate use of force on their citizens. And last but not least, the choice for "change", rather than reform,

14 N. J. Udumbana (ed), 'Who blinks first? The International Criminal Court, the Arican Union and the Problematic of International Criminal Justice', in T. Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asmal*, Leiden, Boston 2013, 113–114.

internationalization or compliance (which are notions frequently adopted in the the literature about so-called Europeanization) leaves it open whether changes were made in order to comply with the respective ICT pressure, or to evade or defy it.

The case studies in this publication illustrate the whole range of these categories. In her chapter about Sudan and the ICC, Amani Ejami demonstrates how the Sudanese government reformed the judiciary in order to defy the ICC's judicial intervention; Klaus Bachmann and Amani Ejami show how the Libyan post-revolutionary government(s) blatantly defied the ICC. Sudan neither ratified the Rome Statute, nor did it ever lodge a self-referral. The ICC investigation and the arrest warrants against Sudanese leaders were based on a referral from the United Nations Security Council. Subsequently, the Sudanese government created a number of institutions, whose aim was to demonstrate the inadmissibility of the ICC's interference, but Sudan – contrary to Libya – never lodged an admissibility challenge. Kenya did the same – it attempted to circumvent the ICC investigation by embarking on institutional reforms that remained inefficient. Kenya neither claimed inadmissibility, nor did it openly defy the ICC.[15] It acted similarly to the government of Kosovo: formally complying and even appearing in court, both countries' indicted leaders first showed respect for the proceedings. But behind the smokescreen of formal compliance, their supporters staged intimidation campaigns against prosecution witnesses. In both countries crucial witnesses suddenly changed their testimonies in court, disappeared without a trace, or died under suspicious circumstances.

There is no example of full compliance with an ICT's requirements in this book. Governments of successor states of Yugoslavia, pressured by the combined intervention of the EU and the ICTY, sometimes acquiesced in the surrender of key suspects, delivered documents and information to the prosecution, and initiated own investigations and prosecutions against minor perpetrators, but usually they did so after extensive negotiations and with endless reservations. Not always was this the result of ICT-related pressure. As Christian Garuka shows

15 It would have been very difficult for Kenya to lodge an inadmissibility challenge, because almost all of the domestic change, that took place subsequent to the ICC investigation, was non-retroactive, because the Rome Statute had been signed and ratified before the post-election violence, which gave rise to the ICC's judicial intervention, but had been enacted and entered into force afterwards, so that crimes as elements of a crime against humanity could only be prosecuted as ordinary crimes (f.e. murder) according to the laws of Keny, but not according to the Rome Statute. See Gerhard Kemp's chapter in this publication.

in his chapter about Rwanda, the reluctance of foreign countries to extradite suspects to the Rwandan judiciary (rather than judge them on their own) played an important role in the Rwandan government's (and its legislators') decision to abolish cruel punishment and reform the penal code. At both the ICTY and the ICT the Completion Strategy's impact was another important trigger of domestic change. If a government wanted to prosecute an accused under the Completion Strategy, it had to meet the criteria set out by the respective ICT. These included, among others, fair trial provisions, access to duty counsel, and the impartiality of judges. Christian Garuka demonstrates how these requirements and the influence of foreign countries, from which the Rwandan government wanted to have suspects extradited, led to the emergence of a two-tier system for genocide suspects in the Rwandan judiciary and the penitentiary system. But there were also cases of relatively strong formal compliance with ICT influence, as Jovana Mihajlović Trbovc describes in her chapter on Serbia. Especially under the rule of Prime Minister Zoran Đinđić, the Serbian government extradited high-ranking suspects and delivered evidence to the ICTY. But Serbia also created institutions in order to evade or even sabotage the cooperation with the ICTY, like the Truth and Reconciliation Commission, established by the president Vojislav Koštunica, who also supported the creation of the National Council for Cooperation with the ICTY, which later denied the ICTY direct access to some of the state archives. A similar evolution took place after the death of Croatian president Franjo Tuđman and the loss of power of his party, the Croatian Democratic Union (Hrvatska Demokratska Zajednicea, HDZ), when suspects were surrendered and evidence was released that could be used to incriminate high-ranking politicians and military leaders for crimes committed under Tuđman's rule.

This publication also includes some special cases, which make it clear why the choice for a more state-centric notion of domestic change would have been flawed: One of the countries that withstood ICTY pressure was Kosovo, which, for a part of the time during which it is analyzed here, was not yet independent. As Vjollca Krasniqi shows, the ICTY's judicial interventions were unsuccessful not only because of resistance by the self-governing institutions and political and military organizations in Kosovo, which defied the tribunal, but also because of the resistance of one UN branch (the UN administration for Kosovo) to the actions of another UN branch (the ICTY). Another specific case is Bosnia and Herzegovina, where – at a first glance – the ICTY triggered a lot of institutional change. But these changes were carried out by the international administration for BiH, which until today maintains veto power over the decisions of the country's legislative and executive authorities. As Jagoda Gregulska's, Aleksandra

Nędzi-Marek's and Irena Ristić's chapters[16] show, there was much less "domestic change" on the level of the entities of the Federation of BiH and Republika Srpska, where international leverage was weaker, and the resources committed by international actors were smaller.[17]

5. Measuring the Impact of ICTs on Domestic Change

In order to find out whether an ICT exercised influence upon a country of reference and drove domestic change, we apply a multifaceted and interdisciplinary model, which consists of sociological, historical, and legal methods. It combines a simple process-tracing model, which assumes influence, if the change which can be observed in a country can be attributed to a decision of the ICT or one of its organs (the Prosecutor, the Registrar, the President, a trial or appeals chamber) and if, at the same time, the impact follows the decision in time and if influence by other actors can be excluded.

We defined impact as a policy shift in the country of reference[18] in a field where the ICT explicitly declared a change to be intended and desired. As a policy shift we see any change in the relevant field (law enforcement, the judiciary, the

16 Within the chapter on Bosnia and Herzegovina, Irena Ristić was responsible for the introduction, the part about state-level institutions and the Federation of Bosnia and Herzegovina was written by Jagoda Gregulska, and the part on Republika Srpska (together with a part of the state-level section) was elaborated by Aleksandra Nędzi-Marek.

17 After the conclusion of the Dayton Peace Agreement, BiH became an extremely decentralized federal state, whose construction aimed at reflecting the balance of power among the three constitutuent groups named by the Constitution: Bosnian Serbs, Bosniaks (Bosnian Muslims) and Bosnian Croats. The Federation consists of the "Republika Srpska", an autonomous entity, with a Serb majority and the "Federation of Bosnia and Herzegovina", also an autonomous entity, with a Croat and Bosniak majority. Each entity has its own parliament and government, which are overarched by a state-level parliament and a three-member presidency, whose composition reflects the balance between state's major ethnic groups. Additionally, there is an autonomous Brčko district, with a special status, not belonging to any of the two entities.

18 We use the notions "country of reference" in order to distinguish the countries under an ICT's jurisdiction from those, which were actually affected by it. For example, all EU and NATO countries were obliged to cooperate with the ICTY (with respect to the delivery of documents and witnesses), but only Serbia, Croatia, Kosovo, BiH and Macedonia were actually affected (and therefore a "country of reference") in the sense that the ICTY demanded them to surrender their nationals as suspects for trials.

penitentiary system) of a country of reference, which includes at least one of the following elements:

- A reallocation of resources within the national budget (or similar financial schemes);
- A change in law (a new bill, a new regulation on the federal / national level), including by-laws and other administrative decisions;
- Institutional change (the creation of a new ministry, government agency or other public body, the abolition of an existing one or entrusting an existing body with new tasks and duties).

The tracing back of such shifts (e.g. in the legislation) and the comparison between the justification of a bill, an institutional change or a budget reallocation and the respective documents, speeches and other sources from the respective ICT allow to conclude whether a shift was triggered by the ICT or should rather be attributed to another source of influence. In order to be able to eliminate factors other than ICT decisions, we will examine whether the respective policy shift coincided with other changes, for example with the ratification of an international agreement, external pressure beyond the scope of ICT influence, changes in the party system or the political system of the respective country.

We are aware of the non-normative basis of this methodology, which bears the risk of detecting reform which was not only not intended by the respective ICT, but even contrary to its aims and preferences. In order to grasp phenomena such as institutional reform, undertaken by a government in order to counter, challenge, circumvent or defy judicial intervention by an ICT, we introduce the notion of "adaptation", which, for the purpose of this publication, shall mean any kind of the above mentioned reforms conducted by an ICT-hostile government in order to achieve objectives which are not in line with the ICT's aims. When, for example, the Croatian government designated considerable amounts of money in order to support a Croatian accused before the ICTY, hiring external lawyers, and, for that purpose, reassigned a part of its budget to getting them free, we regard it as an institutional reform and as an element of adaptation. A similar type of adaptation is the mechanism of voluntary surrender, by which the Serbian government stimulated the transfer of the accused to The Hague by offering generous financial support to the accused and their families. The same kind of adaptation could be observed in Sudan, when the government created a whole plethora of facade institutions, whose sole aim was to prove the inadmissibility of the cases, which had come under ICC jurisdiction as the result of the UNSC referral. The introduction of adaptation into our analysis proved necessary for two reasons: in order to be able to distinguish between domestic

institutional change, which was consistent with an ICT intervention, and change, which was inconsistent or even contrary to it, and because it turned out in some cases (Sudan is one of them) that sometimes even adaptation to ICC decisions can lead to legal changes triggering unintended consequences. As Sikkink and Risse have shown, legal change in Human Rights regulations sometimes occurs because a hostile government pays lip service to certain rights, trying to accommodate pressure from international organizations, but then this lip service is taken seriously by Human Rights actors on the ground and endorsed by the judiciary. Later on norms, which were initially contested by the government, become part of the legislation.[19] One would assume that this mechanism is only at play in pluralistic democracies, where the rule of law is cherished and the judiciary independent, but Amani M. Ejami's chapter shows that such changes can also occur in non-democratic regimes.

6. Case Selection Criteria

Throughout the project on which this publication is based, we assumed that in cases where crimes had been referred to the ICC by the respective government (either due to the country's full adherence to the Rome Statute or due to a self-referral), domestic change as a result of ICC intervention would be unlikely, as governments tend to anticipate the consequences or their decisions and shape them in a way that reduces costs and risks, and prevents backlashes on their preferences in the future. There is some controversy in the International Relations literature about whether governments are actually fully capable of predicting and controlling the consequences of their decisions. We do not intend to give an authoritative answer to this controversy, all we do is assume that even if they don't, they are better prepared for collateral repercussions when they invite the ICC than in cases where international judicial intervention comes unexpected and against their will.

Such situations occurred in all countries and entities of the former Yugoslavia that were affected by ICTY decisions (Serbia, BiH, Croatia, Kosovo and Macedonia)[20], in Rwanda (with regard to the ICTR) and in Kenya (a proprio motu case), Libya and Sudan (both UNSC referrals). Since South Sudan was still

19 K. Sikkink, *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics*. London, New York 2011; T. Risse, K. Sikkink, S. C. Ropp (eds), *The Power of Human Rights. International Norms and Domestic Change*, New York 1999.

20 We leave aside Macedonia, which only had one trial before the ICTY (which ended with one conviction and one acquittal).

part of Sudan when the UNSC referral to the ICC took place, we also included South Sudan in our analysis.

In several cases, where institutional reform was almost non-existent or could not be connected to ICT decisions, our authors decided to include "soft" reforms, like schemes for knowledge transfer (training of lawyers, ICT outreach programs, acting as norm entrepreneurs) under a general umbrella of domestic institutional change. In the chapter about Serbia, Jovana Mihajlović Trbovc describes a case during the ICTY prosecutor's conduct during a trial inclined Serbian institutions to prosecute war crime suspects and to apply legislation, which they had hesitated to employ on their own. We tried our best to streamline all chapters according to the project's methodology. Every chapter has a short introduction into the underlying conflict, the relations between the country and the respective ICT and the kind of domestic change, which our authors observed in consequence of this ICT's judicial intervention. In some cases, where too many factors intervened in the relation between the country and the ICT, we deviated from this model and applied a chronological order to avoid confusion. Therefore, the reader will find a slightly different (more chronological than analytical) structure of the chapters on the case of Sudan, where peace negotiations and the partition of the country overlapped with UNSC and ICC decisions, the case of Kosovo (which during the ICTY's activities became independent) and the case of Libya, which fell apart into different regions under rivalling governments and parliaments (but keeping a unified judiciary under the same transitional constitution), while negotiating with the ICC. The cases dealt with in the subsequent chapters are grouped into four different categories. We start with countries in which our authors observed considerable domestic change that was triggered by ICTs and at least partly consistent with the aims and interests of international criminal justice. These chapters form part of the first volume of this publication and are followed in a second volume by cases in which governments formally adapted their policies and politics to the requirements of the respective ICT, but often in order to achieve aims that were contrary to the interest of justice and the aims the ICT wanted to achieve. Next, we study cases in which judicial intervention by an ICT was openly defied and no or almost no domestic change occurred. Finally, we identify two cases in which no change occurred (but could have been expected and actually was hypothesized by us): South Sudan, which could have taken over some of the legislative and institutional reforms Sudan undertook in order to challenge the ICC before South Sudan became independent, and the interconnected case of Ukraine and Russia, which is also a very special case for additional reasons.

Ukraine is the only case in this publication in which the ICC only has jurisdiction subsequent to self-referrals under art. 12.3 of the Rome Statute. Similarly to other self-referral cases, such as Georgia and Cote d'Ivoire, we would not have expected this to trigger domestic reform. Nevertheless, we included it in the project, because it appeared during our discussions that the Ukrainian self-referrals were unlikely to trigger domestic change in Ukraine, but they were likely to do so in Russia – due to the strong involvement of the latter in the events that triggered the Ukrainian self-referral, and resulting from the self-referral's possible collateral repercussions for Russian citizens. The specificity of the Ukrainian case is thus that it may trigger domestic change in a country that is not a party of the Rome Statute, did not lodge a self-referral, and is even a permanent member of the UNSC with veto power.[21] Igor Lyubashenko's chapter shows how this specific domestic change took place, albeit in a rather unusual way – it consisted in the creation of a new body and a counter-blaming campaign against international criminal law and against the government of Ukraine. Despite the emergence of (very moderate) domestic change there, we treated Russia as a case separate from the others, because the change that took place was neither the result of a propriu motu investigation of the ICC prosecutor (as in the case of Kenya), nor the consequence of a UNSC referral, and there is no evidence that the ICC ever wanted to trigger any reform in Russia, which never even ratified the Rome Statute.

For editorial reasons, this publication is divided into two volumes. The second volume will have a short foreword explaining the relation between the two volumes and it will contain an index of names at the end, which comprises the names mentioned in both volumes. The first volume includes only those cases, in which we were able to identify considerable domestic change in countries affected by an ICT's jurisdiction and where this change was more or less in line with the respective ICT's mission. The second volume contains all other cases, those where institutional reform did not take place at all, those, where domestic change happened, but in a way, that contradicted the ICT mission. The reader should also know about another result of the above mentioned NCN-project, a publication which is underway and which will show, in which cases and countries ICT-decisions affected the way, media interpreted and framed the conflict, which gave rise to the creation of the respective ICT.

21 The events which triggered the Ukrainian self-referrals (the sniper massacre on the Maidan Square in Kiev and the armed insurgence in Donbas) took place during our research project, between 2014 and 2015.

Table 1: The selection of countries and entities for research into domestic change

Country / entity	Relevant international criminal tribunal	Status according to the respective ICT
Rwanda	ICTR	Country / entity under primacy principle
Serbia	ICTY	Country / entity under primacy principle
Croatia	ICTY	Country / entity under primacy principle
Bosnia and Herzegovina	ICTY	Country / entity under primacy principle
Kosovo	ICTY	Country / entity under primacy principle
Ukraine / Russia	ICC	Self-referral according to art. 12.3 ICCSt
Kenya	ICC	Signatory state of the Rome Statute (ICC proprio motu investigation and trial)
Libya	ICC	UNSC referral to ICC
Sudan	ICC	UNSC referral to ICC (concerning Darfur)
South Sudan (at the time still part of Sudan)	ICC	UNSC referral to ICC (concerning Darfur)

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22 NCN grant no. UMO-2012/06/A/HS5/00249, *International Criminal Tribunals as Actors of Domestic Change, National Research Center 2013–2018.*

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23 One of the most advanced versions of this book's drafts was elaborated during Klaus Bachmann's Research Fellowship at the Robert Bosch Academy, an institution of the Robert Bosch Stiftung. The views expressed in this piece are those of the authors and should not be attributed to the staff, officers or trustees of the Robert Bosch Stiftung.

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8. Terminology and Political Disclaimer

This is an academic publication, but it touches upon many politically sensitive issues. It is the aim of the editors and authors of the different chapters to assess whether judicial intervention by an ICT triggered domestic change in a country that was affected by its jurisdiction (with the exception of Russia and South Sudan, where the ICC does not wield any jurisdiction) and if so, how this domestic change looked. It is neither our intention to judge the countries we are analyzing, nor do we want to judge the tribunal, which conducted its investigations and trials. The methodology and the way we proceed with our analysis were solely determined by scientific considerations and the intent to find an answer to our overarching research question. We subordinated the structure of this publication and the different chapters to this purpose, not to any

moral, political or ideological considerations. This is the reason why the editors decided to disentangle Republika Srpska from the Federation of BiH, why they analyzed domestic change with regard to the state level and the entity level. They did so because the institutional and legal order in these units are different and merit to be analyzed separately, not because they think they should be more or less different. For the same reason we do not deal with the issues of whether South Sudan should be a separate state from Sudan, or Kosovo was right or wrong to strive for independence from Serbia. We do analyze Kosovo separately from Serbia even before the declaration of independence because of the different ICTY policy towards Serbia and Kosovo and the different institutional and legal responses of the leaderships, public opinion and media to the ICTY's judicial intervention.

There are also some terminological issues, which may lead to confusion and should be explained at the beginning. The reader will frequently find the notion of "international crimes" in this publication. We use it in the same way as it has been firmly established in the literature about international criminal justice. It means the core crimes over which the ICTY, the ICTR and the ICC have jurisdiction: genocide, crimes against humanity, and war crimes (in international and internal armed conflicts). It does not mean any crimes of an international (that is transborder, transnational) character such as money laundering, human trafficking, terrorism, or tax fraud. Also the way, the notion of "situation" is used may confuse readers who are not international criminal lawyers. This is because of the legal meaning of a "situation", within the legal framework of the Rome Statute, where the prosecutor examines a situation as a first step and then proceeds (based on a pre-trial decision) to a formal investigation.

Readers not familiar with the history and constitutional structure of BiH may find our references concerning the different ethnic groups in this country confusing. In general, in this publication we use the term "Bosnian" as the adjective that stems from the country name "Bosnia and Herzegovina" (abbreviated BiH). In our understanding, BiH is inhabited by *Bosnians*, the citizens of BiH, independently of their ethnic background. Hence, to all three constituent people of BiH (Bosniaks, Croats, and Serbs) as well as members of the numerous smaller ethnic minorities and people who do not adhere to any of these groups we refer to as the *Bosnians*, if not indicated differently. Bosniaks representing the largest ethnic group are sometimes also called Bosnian Muslims, or just Muslims.[24]

24 They may or may not adhere to Islam, because the term "Muslim" was initially introduced in the Socialist Federation of Yugoslavia as a national rather than religious denomination.

Therefore, in the chapters about BiH, the terms "Bosnian Muslim" (when used so in sources) and "Bosniak" are terms referring to the same group.[25] The authors of this publication opt for using the latter unless referring to documents that employ the first term.[26] We use the terms "Serb" and "Serbian" synonymously and according to the wishes of the respective chapter author(s).

25 However, they should not be mixed up with the term *Bosnians*.

26 For a discussion of the replacement of the term Bosnian Muslim with the Bosniak, see for example B. Dimitrova, "Bosniak or Muslim? Dilemma of one Nation with two Names", *Southeast European Politics*, Vol. II, No. 2, October 2001, 94–108.

I) Domestic Change and at Least Partial Compliance With ICT Decisions

Christian Garuka

Institutional Reform in Rwanda

1. An Overview of the Rwandan Conflict

Rwanda's population is made of three ethnic groups namely the *Hutu, Tutsi* and *Twa*. These three groups share the same language and culture. Prior to the colonial era, *Tutsis* generally occupied the higher strata in the social system and the Hutus the lower. However, social mobility was possible, a *Hutu* who acquired a large number of cattle or other wealth could be assimilated into the *Tutsi* group, and impoverished *Tutsi* would be regarded as *Hutu*. A clan system also functioned, with the *Tutsi* clan known as the Nyinginya being the most powerful.[1] From the end of the 19th century until World War I, Rwanda was under German indirect rule as a part of German East Africa.[2] Germany lost the Rwandan (and Burundian) part of its East African colony to Belgium during World War II. Under Belgian colonial rule, which lasted until 1961, identity cards bearing ethnic affiliation were introduced and from there social mobility across ethnic boundaries came to an end.[3] Following independence, violence erupted which drove Tutsi into the neighbouring countries Zaire, Burundi, Uganda, and Tanzania, where a large Tutsi diaspora emerged.[4] In Uganda, Tutsi refugees helped Yowery Musevini's National Resistance Movement (NRM) to gain power during the 1980s, and many Tutsi officers were given Ugandan citizenship and advanced in the military and the state administration.[5] At the same time, the authoritarian one-party system in Rwanda developed into a competitive multiparty system,

1 J. Vansina, *Èvolution du royaume Rwanda des origines à 1900*, Bruxelles 1962, 32–65.

2 H. Strizek, *Geschenkte Kolonien. Ruanda und Burundi unter deutscher Herrschaft*. Berlin 2006; I. Kabagema, *Ruanda unter deutscher Kolonialherrschaft 1899–1916*, Frankfurt am Main, 1993.

3 J. Rumiya, *Le Rwanda sous le régime du mandat belge (1916–1931)*, Paris 1992; I. Vijgen, *Tussen mandaat en kolonie. Rwanda, Burundi en het Belgisch bestuur in opdracht van de Volkenbond (1916–1932)*, Leuven 2005.

4 A. Mugesera, *The Persecution of Rwandan Tutsi before the 1990–1994 Genocide*. Kigali 2014.

5 A. Guichaoua, *De la guerre au genocide. Des politiques criminelles au Rwanda*, Paris 2010, 55–63.

which threatened the preponderance of president Juvénal Habyarimana and his entourage (called "Akazu"), who had ruled the country since 1973.[6]

Beginning from 1990, the Tutsi dominated Rwandan Patriotic Front made incursions into Rwanda's North Eastern territories, which were both Habyarimana's stronghold and the regions that profited most from his politics. The border war with the Tutsi dominated Rwandan Patriotic Front (RPF) coincided with a deep economic crisis, triggered by a liberalization of the coffee market, which caused prices to plummet and farmers' incomes to shrink. Under the auspices of the United Nations, peace negotiations started, which led to the conclusion of the so-called Arusha Peace accord in 1993. It foresaw a power-sharing agreement between the government and the RPF and the reintegration of RPF combatants into the regular army. It ended suddenly when on 6 April 1994, a rocket hit the airplane of president Habyarimana during landing on Kigali airport. The president, his Burundian counterpart, and all staff members of the airplane died on the spot.

Immediately after the crash, attacks by the presidential guard against members of the opposition parties (Hutu and Tutsi) started in Kigali. One of the first victims of the killings was Prime Minister Agathe Uwilingiyimana, who, according to the constitution, would have replaced Habyarimana. Her death opened the door for the creation of an interim government, formed by a military junta under colonel Théoneste Bagosora. Already during the RPF insurgency, pro-governmental leaders of radical Hutu movements had flooded the country with hate propaganda, which demonized the Tutsi (equating all Tutsi with the RPF). After the plane crash and the formation of the junta, the hate campaign gained pace and strength, and the leading hate media called upon the Hutu population to embark on a killing spree, which started with the erection of road blocks in Kigali and then spread across the country.[7] During the following three months, several hundred thousand people were killed, mostly by a radical party militia, the so-called Interahamwe, the army and, to a lesser extent, by the gendarmerie and by popular violence.[8] It is disputed in the literature whether

6 Guichaoua, *De la guerre au genocide*, 40–44.

7 J.-P. Chrétien, *les médias du génocide*, Paris 1995.

8 Initially the UN estimated the number of casualties between April and August (when the RPF had consolidated power and created its own interim government, which controlled most of the country) at 500,000. Later this number was increased to 800,000 which is also the number quoted in most of the popular science and academic accounts of the genocide. Recently, estimations of up to 1,2 million have been put forward by Rwandan victims' organizations and publications. It is undisputed that the about 3/4 of the pre-war Tutsi population lost their lives during the genocide.

the genocide was planned beforehand (and for how long before April 1994) or whether it can also be seen as an initially unwanted escalation of violence, which went out of control under the conditions of a civil war.[9] However, the in-depth analysis of the root causes and the consequences of the genocide is beyond the scope of this research.

2. The Relations Between the International Criminal Tribunal for Rwanda and Rwanda

In the aftermath of the genocide, the Government of Rwanda made a request to the international community to establish an international tribunal to try those responsible for the genocide.[10] On 8 November 1994, the United Nations Security Council (UNSC) established the International Criminal Tribunal for Rwanda (ICTR) through its Resolution 955. This time Rwanda, holding a non-permanent seat in the council, voted against. One of the reasons was that the Statute did not provide for the death penalty, which at the time was still a common punishment in Rwanda. Rwanda also opposed the subsequent decision of the UNSC to locate the tribunal in Arusha (Tanzania) because the place was far from the crime scenes in Rwanda and the distance from Rwanda would likely prevent the tribunal from making any real impact in Rwanda.[11] Tensions between the ICTR

9 J. K. van Ginneken and M. Wiegers, 'Various Causes of the 1994 Genocide in Rwanda With Emphasis on the Role of Population Pressure', available at http://paa2005.princeton.edu/papers/51066/. On the conspiracy theory (which claims the genocide to have been planned beforehand) see also L. Melvern, *Conspiracy to Murder: The Rwandan Genocide*, London, 2006, 57–64, 93–100, 133–195. Read also K. Moghalu, *Rwanda's Genocide. The Politics of Global Justice*, New York, 2005, 11–17 and A. Des Forges, *Leave None to Tell the Story*, New York, 1999, 1–123.

10 Press conference by the Permanent Representative of Rwanda to the United Nations, available at http://reliefweb.int/report/rwanda/press-conference-permanent-representative-rwanda.

11 J. M. Kamatali, *From the ICTR to ICC: learning from the ICTR, Experience in Bringing Justice to Rwandans*, available at: http://www.nesl.edu/userfiles/file/nejicl/vol12/kamatali.pdf (accessed on 2 May 2014). Read also L. Barria and S. Roper, *How effective are the International Criminal Tribunals? An analysis of the ICTY and the ICTR*, available at: http://www.library.eiu.edu/ersvdocs/3800.pdf. The reader should bear in mind that the distance played out differently in Rwanda than for example in the former Yugoslavia, where trials were broadcast by satellite TV (and sometimes re-transmitted by local TV and radio stations). In Rwanda, the dominant medium at that time was radio, which made it more difficult even for a very intersted audience to follow the proceedings.

and Rwanda also arose because of their competition over the apprehension of fugitives: The ICTR had been given primacy by the UNSC, but often Rwanda had better relations and more leverage over third countries with respect to the extradition of suspects.[12] In 1999, these tensions peaked in a crisis over the trial of Jean-Bosco Barayagwiza, one of the main suspects at the ICTR, who was held accountable for his role in the hate campaign against Tutsi prior to and during the genocide. The ICTR appeals chamber had ordered his release, arguing that during his extended pre-trial detention his rights had been violated to such an extent that a fair trial was no longer possible.[13] The Rwandan government and victims' organizations reacted with outrage. Subsequently, Carla Del Ponte was denied a visa to Rwanda, which was a clear manifestation of a lack of cooperation and thus a violation of the Security Council resolution establishing the ICTR. But cooperation with Rwanda was vital for the ICTR, because almost all the evidence and almost all of the wintesses the ICTR could call were in Rwanda and would therefore be inaccessible without cooperation from the Rwandan government. Carla Del Ponte finally managed to convince the appeals chamber (whose composition had changed in the meantime) to reverse the decision to free Barayagwiza, who was tried, found guilty and sentenced to a long prison term. This did not end tensions with Rwanda. In January 2002, two genocide survivors' groups from Rwanda decided to no longer attend court proceedings at the ICTR subsequent to an incident which happened on 30 October 2001 in one of the courtrooms of the ICTR: A female genocide victim who appeared as a prosecution witness was allegedly humiliated by the defence attorney during the cross-examination and, moreover, judges laughed at her ordeal.[14] The suspension of cooperation from the genocide survivors' groups had an impact on the work of the ICTR in 2002 as the prosecution greatly relied on their participation in the court proceedings.[15]

In February 2004, subsequent to the acquittal of Emmanuel Bagambiki, the former *Préfet of Cyangugu,* the Government of Rwanda criticized the ICTR for failing to include charges of rape and sexual violence in Bagambiki's indictment,

12 V. Peskin, *International Justice in Rwanda and the Balkans. Virtual Trials and the Struggle for State Cooperation*, Cambridge 2008, 170–185.

13 IRIN News *Rwanda: Del Ponte denied visa*, (available at http://www.irinnews.org/report/10715/rwanda-del-ponte-denied-visa.

14 Peskin, *International Justice,* 200–206.

15 E. Ntaganda, 'Le TPIR a la croisée des chemins; bilans mitigé et défis de coopération avec le Rwanda' in: Anastase Shyaka (ed) la Résolution des Conflits en Afrique des Grands Lacs. Revue critique des Mécanismes Internationaux, Butare 2004, 154–155.

and demanded that he be referred to Rwanda to stand trial for these charges.[16] Two years later Rwanda protested against the appointment of Callixte Gakwaya as a defence counsel, alleging him to be a genocide suspect himself.[17] The protest led to the dismissal of Mr. Callixte Gakwaya by the ICTR. Relations between the ICTR and the Government of Rwanda have also been marred by acquittals of genocide suspects, the denial of case referrals from the ICTR, and the referral of some convicted persons to serve their sentences in other countries instead of Rwanda.[18] For example, in May 2008 a trial chamber of the ICTR denied the Prosecutor's request for a referral of Yussuf Munyakazi's and Gaspard Kanyarukiga's case to Rwanda.

3. Changes in Rwandan Legislation Triggered by the ICTR

As far as the colonial legacy is concerned, the Rwandan legal system has been heavily influenced by the Belgian legal system. The Rwandan legal system is a Romano-Dutch system or civil law system. However, one should not overlook the increasing influence of Common Law over the Rwandan legal system. Indeed, Rwanda initiated its judiciary reform in 2004 and included some practices from Common Law and in addition to the reform, Rwanda joined the East African Community in 2007 and the Commonwealth in 2009. The adherence to the East African Community, a sub-regional bloc made of former British colonies, is likely to influence the Rwandan legal system since Rwanda has to harmonize its legal system with other Member States of the East African Community.

Against this background it was of course more likely for Rwanda's legislation to be influenced by factors other than the ICTR, but there are some aspects of legislative change which can be traced back to the ICTR. One of them is linked to referral cases. The ICTR statute did not provide for the referral of cases from the ICTR to domestic courts. But after 2003, the ICTR was requested by the United Nations Security Council to develop a Completion Strategy, which *inter*

16 Hirondelles News Agency y, 'Acquittal of former government officials raises mixed reactions', available at: http://www.hirondellenews.com/ictr-rwanda/376-trials-ended/cyangugu-trial/19993-en-en-acquittal-of-former-government-officials-raises-mixed-reactions90449044

17 IRIN News, 'Rwanda: UN court to meet government ultimatum over genocide suspects', available at http://www.irinnews.org/printreport.aspx?reportid=61080.

18 E. Kagire, 'Kigali unhappy with ICTR over convicts', available at http://www.theeastafrican.co.ke/Rwanda/News/Kigali-unhappy-with-ICTR-over-convicts--/-/1433218/1453190/-/ahlafp/-/index.html

alia provided for referrals of cases from the ICTR to national courts, including Rwandan courts. The Office of the Prosecutor of the ICTR initiated discussions with the Government of Rwanda on the possibility of having cases referred from the ICTR and subsequently tried in Rwanda.[19] During these discussions, the abolition of the death penalty was taken into consideration. This required legislative reform.[20] In addition, it must be noted that *Rule 11 bis* requires the receiving state to refrain from the application of the death penalty to referral cases. Rwanda abolished the death penalty in 2007 and replaced it with life imprisonment with special provisions.[21] However, this was also challenged before the ICTR, which also required more fair trial guarantees in the Rwandan criminal trial system.[22]

While anticipating the referral of cases from the ICTR, Rwanda enacted a law to fill the legal vacuum, which existed concerning the referral of cases from the ICTR and foreign countries.[23] Indeed, it was argued that Rwanda lacked an appropriate legal framework for the prosecution of certain offences provided under the ICTR Statute.[24]

In 2007, Rwanda enacted a specific law on referral officially known as Organic Law N° 11/2007 of 16/03/2007 (further called the "Transfer Law") concerning the referral of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States. It must be noted that the preamble of the Transfer Law makes reference to the Statute of the ICTR and its Rules of

19 Christian Garuka's interviews with staff members of the office of the Prosecutor of the ICTR and of the Rwandan National Public Prosecution Authority. Notes with the author.

20 J. Karuhanga, *Rwanda: Compromise Key in Referral of Genocide Suspects – Attorney General*, available at http://allafrica.com/stories/201303230229.html. Christian Garuka's interview with staff from the Office of the Prosecutor of the ICTR. Notes with the author. The author also interviewed a government official from the National Public Prosecution Authority who also confirmed the abolition of death penalty was among the pre-requisites for any case referral from the ICTR. Notes with the author.

21 Organic Law n° 31/2007 of 25/07/2007 relating to the abolition of the death penalty. "Organic Law" is the inaccurate translation of *Loi Organique* in French. Though it is the official translation, it is suggested that it should be translated as Statute Act in English.

22 For further reading: J. D. Mujuzi, 'Steps taken in Rwanda's Efforts to qualify for the referral of accused from the ICTR', in *Journal of International Criminal Justice* 8 (2010), 237–248.

23 Fieldwork interview with a staff from the Rwanda National Public Prosecution Authority, Kigali, January 2014. Notes with the author.

24 G. Gahima, *Transitional Justice in Rwanda. Accountability for Atrocity*, London 2013, 151.

procedure as well as UN Security Council resolutions relating to the completion of the mandate of the International Criminal Tribunal for Rwanda and particularly the requirements to referral cases from the ICTR to national jurisdictions, including Rwanda. In addition, article 8 of the Transfer Law provides that ICTR evidence and established facts are to be admissible in Rwandan proceedings.

3.1. Amendment of the Penal Procedure Code

Article 59 of the previous criminal procedure code known as Law N° 13/2004 of 17/5/2004 relating to Criminal Procedure excluded suspects from being witnesses in criminal proceedings: "Persons against whom the prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses." To put it differently, the above provision meant that any individual for whom the prosecution had evidence that he committed a crime could not be heard as a witness in a case involving another suspect. Article 59 was criticially scrutinized in the case against Munyakazi. Under the Transfer Law, it became possible for the accused to call any witness, regardless of his status as a suspect in other cases.

3.2. Changes in State Agencies

In the case against Yusuf Munyakazi, the ICTR based its refusal to send the accused to Rwanda to stand trial there on the defence arguments that the defence witnesses would not get protection since the National Public Prosecution managed the witness protection for both the defence and the prosecution. Subsequently, the Supreme Court of Rwanda established a distinct witness protection unit for defence witnesses.[25]

Indeed, the Witness protection unit was previously under the National Public Prosecution Authority and this was raised by the defence in Munyakazi case whereby his counsel argued that the National Public Prosecution could not trust the kind of protection the National Public Prosecution would provide for the defence witnesses.[26] To address concerns raised by defence lawyers that some witnesses could not travel to Rwanda to give testimony for security reasons, in

25 The ICTR Appeals Chamber in The *Prosecutor v Yussuf Munyakazi* (Case N^{O} ICTR -97-36-R11 bis) upheld the previous decision of the Trial Chamber which ruled that defence witnesses would fear to seek protection from the Witness Protection Unit under the National Prosecution Authority. Fieldwork interview with an official from the National Public Prosecution Authority, Kigali, January 2014. Notes with the author.

26 *The Prosecutor v Yussuf Munyakazi* (Case N^{O} ICTR -97-36-R11 bis) paragraphs 40–42.

2008 the Supreme Court set up a video link facility in one of its courtrooms to allow witnesses to give testimony while abroad.[27]

3.3. Changes in Budget Allocations

While anticipating the referral of suspects from the ICTR as well as extradition from foreign countries, Rwanda upgraded one of its wings within the Kigali Main Prison, famously known as "1930", to ensure that it met international standards. The wing has been nicknamed "Arusha" a reference made to the seat of the ICTR.[28] The upgrading of the wing in Kigali Main Prison as well as the specific diet for people referred from the ICTR had a budgetary implication in the management of the Rwanda National Correctional Service. No specific data about the cost were available.[29]

4. The Efficiency of Reform

Governments can embark on reforms in order to fulfil requirements set by external actors such as ICTs, but they also may create institutions, change budget allocations or amend the laws without actually complying with the these requirements. In such cases, reform remains inefficient, the laws are not (or only selectively) applied in practice, and the newly created institutions remain understaffed and do not play the expected role. In the case of Rwanda, there are two perspectives from which the efficacy of reform can be evaluated: whether the reforms undertaken by the Rwandan government allowed it to achieve its aims, and whether the reforms were consistent with the ICTR's requirements.

With regard to the first criterion, it can be argued that the reforms undertaken by Rwanda were efficient because the Rwandan government managed to have genocide suspects abroad transferred to Rwanda for trial. The Uwinkindi case constitutes the first successful referral from the ICTR to Rwanda. This referral paved the way for other referrals from the ICTR as well as extraditions from

27 Fieldwork interview with an official from the National Public Prosecution Authority. Interview carried out in Kigali, January 2014. Notes with the author.

28 Interview with an official from Rwanda National Correctional Services. According to the official of the Rwanda National Correctional Services, unlike other detainees, people referred from the ICTR and foreign countries receive three meals of their choice per day. Interview carried out in Kigali, February 2014. Notes with the author.

29 An official from the Rwandan National Correctional Service admitted that there had been some budgetary increase. Fieldwork interview carried out in Kigali, February 2014. Notes with the author.

European Countries.[30] However, this has to be taken with a grain of salt. Save Uganda, none of the African Countries have yet extradited any Rwandan genocide suspects to Rwanda.

The subsequent amendments of the Transfer Law were criticized by some Members of Parliament (MPs), who saw them as an attempt by the Government to please the international community rather than to fulfil the expectations of the Rwandan citizens. Rwandan victims' organizations and the media tend to be quite punitive and, according to opinion polls, are critical of the alleged lenience of the ICTR toward suspects.[31] Subsequent to the ICTR ruling, which rejected the transfer of Munyakazi to Rwanda, the Transfer Law was amended in 2009.[32] The amended law known as "Organic Law no. 03/2009 of 26/05/2009 modifying and completing the Organic Law no. 11/2007 of 16/03/2007 concerning the referral of cases of the Republic of Rwanda and other states. Article 3 of the amended law expanded the possibilities of witnesses residing abroad to give testimony through videolink. Organic Law no. 11/2007 did not provide such a possibility.

Rwanda also enacted Organic Law no. 08/2013 of 16/06/2013 modifying and completing Organic Law no. 31/2007 of 25/07/2007 relating to the abolition of the death penalty as modified and complemented to date, which under article 5 *bis* prohibits solitary confinement for individuals transferred from the ICTR and foreign countries. In anticipating the completion of the ICTR and its replacement by the Mechanism for International Criminal Tribunals (MICT), Rwanda enacted a new law on the referral of cases from the ICTR and foreign states known as Law no. 47/2013 of 16/06/2013 relating to the transfer of cases to the Republic of Rwanda.

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30 Bernard Munyagishari was also referred from the ICTR to Rwanda. In 2013, Charles Bandora was extradited rom Norway to Rwanda. E. D. Karinganire, 'genocide suspect Bandora extradited to Rwanda', in *Focus* 11 March 2013, available at http://focus.rw/wp/2013/03/genocide-suspect-bandora-extradited-to-rwanda.

31 A. Shyaka, 'Justice and Reconciliation in Post-Genocide Rwanda. Assessing the Impact of the International Criminal Tribunal for Rwanda', in *The Review of International Affairs* (Belgrade), vol LIX, no. 1130–1131, April/September 2008, 15–25, K. Bachmann, A. Fatić, *The UN International Criminal Tribunals. Transition without Justice?* Abingdon, New York 2015, 92–115; see also: Senate of Rwanda, Rwanda. *Idéologie du génocide et stratégies de son eradication*, Kigali 2006.

32 The amended law is known as Organic Law n°03/2009 of 26/05/2009 modifying and complementing the organic law n°11/2007 of 16/03/2007 concerning the referral of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other states.

When it comes to the issue of efficiency – understood as compliance with ICT decisions – Rwanda has quite a good, albeit ambiguous record. This is best illustrated by the upgrading of the "1930" prison wing in Kigali to accommodate people referred from ICTR and extradited from other foreign country and the special diet for ICTR prisoners. The ICTR's requirements about the treatment of prisoners did not lead to a general overhaul of the penitentiary system and the criminal code, but to the emergence of a two-tier track justice, under which suspects transferred from the ICTR and foreign countries are better treated than suspects who were apprehended by the Rwandan judiciary alone. This can be perceived as a double standard treatment. For example, individuals extradited from foreign countries or transferred from the ICTR receive three meals per day, whereas other detainees and prisoners only receive one meal per day.[33] A similar scheme can be observed with regard to the treatment of prisoners transferred from the ICTR and from foreign countries on one hand and prisoners apprehended by the Rwandan judiciary on the other. Those transferred from abroad do not risk solitary confinement, whereas other prisoners are still subject to it.

5. Other Possible Causes of the Reform

Rwandan reforms were not only triggered by ICTR decisions. The denial by western countries' respective courts to extradite genocide suspects also played a crucial role in the reform as the judiciary of the sending countries often raised the issue of fair trial and humane treatment of prisoners and made reference to previous decisions of the ICTR.

The abolition of the death penalty cannot be attributed to the ICTR alone. Indeed, Rwanda hosted a meeting of the African Commission on Human and People's Rights in 1999 which adopted the first resolution on the death penalty, calling upon states to consider observing a moratorium on the death penalty. In 2009 Rwanda again hosted a regional meeting of the working group of the African Commission on Human and Peoples Rights, which supported the abolition of the death penalty in Central, Eastern and Southern Africa.[34] It could be argued that Rwanda signalled its intention to abolish the death penalty by accepting to host a regional conference on the abolition of the death penalty.

33 Interview notes with the author.

34 International Commission against Death Penalty, How states abolish death penalty, available at http://www.icomdp.org/cms/wp-content/uploads/2013/04/Report-How-States-abolition-the-death-penalty.pdf (accessed in July 2014)

Rwanda voted in favour of UN General Assembly resolution A/RES/62/149, which called for a moratorium on execution worldwide, with a perspective of abolishing the death penalty in 2007.[35]

In addition, in 2011, Paul Kagame, the President of Rwanda, was quoted saying that the Government could not become a mass executioner in order to correct mass murder. He went on to say that Rwanda chose to break with the past and abolish the death penalty in order to move forward. He further stressed that the death penalty could never serve as an instrument of governance.[36]

As far as the death penalty as a sentence for genocide is concerned, death sentences were carried out in April 1998 in Rwanda, when tens of thousands witnessed the deaths of those convicted as the executions were carried out in public by firing squads.[37] The legal reforms, which removed the obstacles to call witnesses suspected by the prosecution, permitted testimony per videolink, and introduced a double standard system for transfer cases can be traced back to ICTR decisions, but they were not the sole cause. Another important influence was the pressure of countries, in which genocide suspects, whom the Rwandan judiciary wanted to judge in Rwanda, had been apprehended. There, the impact of ICTR and the reluctance of other countries' courts to extradite suspects to Rwanda reinforced each other and it is impossible to disentangle both strands of impact from each other. But certainly, the Completion Strategy and rule 11 *bis* were the strongest triggers of reform, although the drafters of the ICTR Statute had never thought about the impact of the ICTR's decisions on institutional and legislative reforms in Rwanda. Despite the difficult relations between the ICTR and the Government of Rwanda in terms of cooperation, as evidenced by many incidents[38], it must be acknowledged that the previous ICTR decisions denying the referral of suspects from the ICTR to Rwandan courts played a crucial role in legislative and institutional reforms in Rwanda.

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35 Ibid.

36 P. Kagame, "Rwanda has never regretted decision to abolish death penalty – President Kagame, available at http://www.gov.rw/Rwanda-has-never-regretted-decision-to-abolish-death-penalty-President-Kagame?lang=rw (accessed on 9 June 2014).

37 H. Ball, *Prosecuting War Crimes and Genocide: The twentieth century experience*, Kansas 1999, 185.

38 In his book, Victor Peskin provides a detailed account on the troubled relations between the ICTR and the Government of Rwanda: Peskin *International,* 151–231.

Jovana Mihajlović Trbovc

Collateral Impact: The ICTY's Influence on Institutional Reform in Serbia

While focusing on Serbia, this chapter will inevitably tackle events, facts and institutions related to the Federal Republic of Yugoslavia (FRY), also referred to as "rump Yugoslavia", since it was established in 1992 out of Serbia and Montenegro, after all other former federal units of the Socialist Federative Republic of Yugoslavia declared independence. The distancing of Montenegro from Serbia, which started in 1997, became formalised as transformation of the FRY into the State Union of Serbia and Montenegro in February 2003, which lasted another three years until Montenegro declared independence.

Among the abundant and still growing literature on the ICTY and its target states, probably the most has been written about Serbia. The reason for this lays in the shared consensus among international scholars that the Serbian leadership, headed by Slobodan Milošević,[1] played a critical role in the instigation of the Yugoslav wars of succession, while the largest number of crimes were committed by the armed forces declaring themselves as "Serbian." Among the studies that focused on the impact of the ICTY on Serbia, the main focus was on the troubled process of acknowledging political responsibility for the committed crimes on part of the Serbian state.[2] Only few authors also dealt with the correlation between ICTY conduct and the institutional reforms in Serbia.[3] Relying on these studies as a starting point but based on autonomous, process-tracing

1 He was the president of Serbia, as a federal unit of the FRY, but effectively had control over the whole country, until 1997. Then he became the official President of the FRY, but effectively lost leverage over the Montenegrin regime.

2 J. N. Clark, 'Collective Guilt, Collective Responsibility and the Serbs', *East European Politics and Societies* (2008) 22, no. 3, 668–692; D. F. Orentlicher, Shrinking the Space for Denial: The Impact of the ICTY in Serbia. Belgrade 2008, available at: http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf. E. Gordy, *Guilt, Responsibility, and Denial: The Past at Stake in Post-Miloševic Serbia*, Philadelphia 2013.

3 J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Ithaca and London 2009. M. Ostojić, *Between Justice and Stability: The Politics of War Crimes Prosecutions in Post-Milošević Serbia*, Farnham and Burlington 2014.

research, this chapter adds to the debate a detailed analysis of the causal links between the ICTY and institution building in Serbia.

1. Early Relations Between the ICTY and Serbia

The regime of Slobodan Milošević in Serbia met the establishment of the ICTY with suspicion and disrespect, framing it as part of larger international conspiracy against Serbia and as a means to demonise Serbs.[4] Once the ICTY was established, the Federal Republic of Yugoslavia refused to comply with UN Security Council Resolution 827 (25 May 1993), which urged all states to cooperate fully with the ICTY. The refusal "violated Article 16 of the Constitution of the [FRY], which automatically incorporated international law into domestic legislation."[5]

Milošević was one of the signatories of the General Framework Agreement for Peace in BiH (further Dayton Peace Agreement), which confirmed the obligation of the states to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.[6] Under the ICTY Statute, all states are obliged to comply with any request for assistance, including the identification and location of persons, taking testimonies and the production of evidence, service of documents, the arrest or detention of persons and the surrender and transfer of the accused to the Tribunal.[7] Nevertheless, the Republic of Serbia practically avoided any substantial cooperation with the ICTY.[8] This was only a part of a larger foreign policy of self-inflicted isolation and alienation from compliance with international norms. At the height of the NATO airstrikes on Serbia, in May 1999, Milošević and four other senior political and military

4 V. Dimitrijević, *O pravu i nepravu*. Belgrade 2011, 176–177. For instance, the Minister of Justice of the Federal Republic of Yugoslavia wrote in May 2000 to the Chief ICTY Prosecutor, Carla del Ponte, calling her "a whore who sold herself to the Americans", see "Jugoslovenski ministar pisao Karli del Ponte", *B92*, 26.05.2000, http://www.b92.net/info/vesti/index.php?yyyy=2000&mm=05&dd=26&nav_category=1&nav_id=7110.

5 A. Fatić, `Međunarodni krivični tribunal za bivšu Jugoslaviju u savremenoj diplomatiji', *Međunarodni problemi* (2002) 54, no. 1-2, p. 67

6 Article IX. Available at: http://www.ohr.int/dpa/default.asp?content_id=379.

7 Article 29. ICTY Statute (as of September 2009). Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

8 While not participating in the investigation conducted by the ICTY Office of the Prosecutor, the authorities of the FRY handed over only 2 indictees during Milošević rule, "both of whom chose to surrender to the ICTY". Ostojić, M., *Between Justice and Stability: The Politics of War Crimes Prosecutions in Post-Milošević Serbia*, Farnham and Burlington 2014, 7 (fn 28) and 57.

officers were indicted by the ICTY for the persecution of Kosovo Albanians and war crimes in connection to it.[9]

Next year, after losing the federal presidential and parliamentary elections whose result he refused to acknowledge, Milošević was toppled by a way of mass civic protests, which culminated on 5 October 2000. After being abandoned by the security forces, Milošević admitted defeat. Though the quite heterogeneous political coalition – Democratic Opposition of Serbia (*Demokratska opozicija Srbije* – DOS) – that had overthrown the regime agreed that Milošević was an authoritarian who ruled Serbia through repression and violence, there was little consensus about his culpability in regard of the ICTY Indictment. Indeed, the Democratic Opposition of Serbia had no official stand on the issue of the role of Serbian state in the wars in Croatia (1991–1995), BiH (1992–1995) and Kosovo (1998–1999).[10]

As soon as the DOS coalition won the Serbian parliamentary elections in December 2000 and Zoran Đinđić was designated to become Prime Minister of Serbia, international pressure to cooperate with the ICTY ensued,[11] specifically the insistance that Slobodan Milošević be arrested and transferred to The Hague. Initially, the new FRY president Koštunica framed the Tribunal as being a "tool for achieving American influence and presence of the NATO in the Balkans,"[12] stating that sending suspects to The Hague would endanger the stability of the democratic regime and that extradition of own nationals is not allowed by the Constitution of the Federal Republic of Yugoslavia.[13] Indeed "the Yugoslav Code

9 ICTY Press Release, 'President Milošević and Four other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo', 27.05.1999, http://www.icty.org/sid/7765.

10 Gordy, *Guilt, Responsibility, and Denial*, 20–30.

11 For instance, the Council of Europe reminded the officials that full and comprehensive cooperation with the ICTY is one of the prerequisites for the acceptance of the Federal Republic of Yugoslavia into the Council's membership. Cf. "Švimer o uslovu za prijem SRJ u SE: Potpuna saradnja s Hagom je obavezna", Glas javnosti, 24.01.2001, available at: http://arhiva.glas-javnosti.rs/arhiva/2001/01/25/srpski/P01012404.shtml.

12 Original quote: "[Koštunica je] odbacio mogućnost da državljani SRJ budu izručeni Haškom tribunalu, koji je nazvao sredstvom za ostvarivanje američkog uticaja i prisustva NATO-a na Balkanu." 'Prvo obraćanje Koštunice preko RTS-a', *B92*, 6.10.2000,http://www.b92.net/info/vesti/index.php?yyyy=2000&mm=10&dd=06&nav_category=1&nav_id=13204.

13 V. Đorđević, "O čemu su razgovarali Koštunica i Del Ponteova? Predsednik održao predavanje Karli", Glas javnosti, 24.01.2001, available at: http://arhiva.glas-javnosti.rs/arhiva/2001/01/25/srpski/P01012412.shtml.

of Criminal Procedure made this prohibition even more explicit."[14] While the word "extradition" was widely used in public discourse, there was little understanding of its legal meaning. In the course of development of international law, a position prevailed which makes a distinction between the term *extradition* (to a foreign country) and *transfer* (to an international tribunal),[15] and it is the former that has been used in the Statute of the ICTY.[16] Therefore the term is considered inapplicable in the case of an international court whose jurisdiction is formally accepted by the state which should conduct the arrest, in the same manner as it would do in the case of a national court.

Though avoiding a negative portrayal of the Tribunal, Zoran Đinđić also initially expressed reluctance to send individuals to The Hague.[17] However, in the face of international pressure to cooperate with the ICTY, Prime Minister Đinđić navigated his position more tactfully. While he supported an exchange of information with the Tribunal, he agreed that there are neither procedures nor public bodies in charge of a handover (*izručenje*) of those accused by the ICTY.[18] There was a consensus in the DOS political coalition that a legislation that would regulate the cooperation with the ICTY is much needed,[19] invariably of the politicians' diverging opinions regarding the Tribunal. The federal Ministry of Justice prepared the draft law as a matter of priority, but it soon became clear that the Montenegrin representatives in the federal Parliament loyal to Milošević would block it.[20]

In the meantime, the Congress of the United States (US) adopted a system of annual evaluation of Serbia's cooperation with the ICTY. A positive certificate of cooperation, which was first to be issued on 31 March 2001, conditioned the delivery of US financial aid to Serbia and US support in international financial institutions.[21] The Government of Serbia demonstrated the intention to meet those

14 T. Várady, 'Ambiguous Choices in the Trials of Milošević's Serbia', in T. W. Waters (ed), *The Milošević Trial: An Autopsy*, Oxford and New York 2013, 460.

15 Várady, *Ambiguous Choices,* 459–462.

16 K. S. Gallannt, 'Securing the presence of defendants before the International Tribunal for the Former Yugoslavia: Breaking with extradition', *Criminal Law Forum*, (1994) Vol. 5, No. 2, 557–588.

17 S. Biserko, 'Zoran Đinđić i Haški Tribunal', in L. Perović (ed), *Zoran Đinđić: Etika Odgovornosti*, Belgrade 2006, 226–7, available at:, http://helsinki.org.rs/doc/Svedocanstva25.pdf.

18 "Đinđić-Del Ponte", B92, 25.01.2001, http://www.b92.net/info/vesti/index.php?yyyy=2001&mm=01&dd=25&nav_id=19983.

19 Ostojić, *Between Justice and Stability, 60.*

20 Várady, *Ambiguous Choices, 60.*

21 Subotić, *Hijacked Justice,* 45–6; Ostojić, *Between Justice and Stability,* 59.

demands by arresting and transferring Milomir Stakić (a citizen of BiH) within weeks after the Prime Minister's first official visit to Washington.[22] However, Đinđić still advocated local criminal prosecution,[23] while President Koštunica openly opposed what he referred to as 'extradition' of Yugoslav citizens to the ICTY.

On the eve of the approaching deadline set up by the US Congress, Slobodan Milošević was arrested in a controversial and intransparent fashion. On 30 March 2001 the representatives of Serbian police came to Milošević in order to deliver court summons based on charges of corruption and abuse of power. Milošević personal bodyguard prevented them from entering the former presidential residence where Milošević was still living. During the same day, the State Security Service attempted to take over responsibility for Milošević's security, in accordance with the newly enacted legislation, but was also prevented from entering the premises by Milošević's bodyguard.[24] After State Security forces besieged the residence and negotiations took place, Milošević surrendered and was taken into custody on 1 April 2001. While it was obvious to many that the Government organised the arrest in order to appease international donors, to the local public it was unclear what he was arrested for (crimes against humanity or corruption).[25] Though US Congress granted the certification of cooperation, "the US authorities conditioned their participation in an international donor conference for Yugoslavia scheduled for 29 June 2001 upon visible progress in the cooperation with the Tribunal."[26]

When it came to a stalemate regarding the legislation on cooperation, "the draft legislative act prepared by [the federal Ministry of Justice] was practically copied and submitted to the federal Government in the form of a government decree,"[27] which was enacted on 23 June 2001. Supporters of Milošević challenged the decree before the Constitutional Court of the Federal Republic of Yugoslavia (which was still staffed by the judges elected under the previous regime).

22 C.f. "Đinđić završio posetu SAD", B92, 4.02.2001, http://www.b92.net/info/vesti/index.php?yyyy=2001&mm=02&dd=04&nav_category=1&nav_id=20490; "Supruga Milomira Stakića, osumnjičenog za ratne zločine pred haškim Tribunalom: 'Nije očekivao hapšenje'", Blic, 24.03.2001, http://www.blic.rs/stara_arhiva/hronika/1709/Nije-ocekivao-hapsenje.

23 "Đinđić završio posetu SAD", B92, 4.02.2001, http://www.b92.net/info/vesti/index.php?yyyy=2001&mm=02&dd=04&nav_category=1&nav_id=20490.

24 Ostojić, *Between Justice and Stability,* 61.

25 Gordy, *Guilt, Responsibility, and Denial*, 31–36.

26 Ostojić, *Between Justice and Stability,* 61.

27 Várady, *Ambiguous Choices.* The title of the decree was "Uredba o postupku saradnje sa Međunarodnim krivičnim tribunalom u Hagu."

Since the Court needed time to render a final decision, it "issued an interim measure prohibiting the application of the Decree with regard to the transfer of Milošević."[28] Prime Minister of Serbia, Zoran Đinđić, decided to bypass the decision of the federal Constitutional Court by invoking a dubious article of Serbian Constitution (of 1990), which entitled Serbian authorities to take protective measures if federal authorities jeopardised interests of Serbia.[29] On these grounds, the Serbian Government disregarded the interim measure of the federal Court and invoked a direct application of the ICTY Statute as the legal basis for the transfer of Milošević on the eve of the donor conference.[30] While Đinđić framed such a conduct both as an international legal obligation and a matter of political pragmatism,[31] Yugoslav President Koštunica claimed Milošević was transferred illegally and unconstituionally.[32] As Tibor Várady pointed out, "if the transfer was supposed to achieve not only justice but renewed respect for the rule of law, its legacy for Serbia is ambiguous."[33]

Eventually, the Constitutional Court deemed the decree unconstitutional, while the apprehension of ICTY indictees became a matter of deep political strife, potentially destabilising for the state – as would become evident during the mutiny of the Special Operations Unit later that year (as described below).

2. Change in Legislation Related to the ICTY

2.1. The Law on Cooperation with the Tribunal

The President of the Federal Republic of Yugoslavia, Vojislav Koštunica, and his supporters saw the enactment of the legislation on cooperation as a prerequisite to any further activity in relation to the ICTY and the accused. In the light of previously expressed hostility towards the Tribunal and the reasonable expectation that enactment of such a law on the federal level would not to be feasible, the Chief Prosecutor Carla Del Ponte interpreted the standing as an obstruction of cooperation. However, it should be noted that even strong supporters of the ICTY considered it favourable for the rule of law, if there are precise norms and procedures in the domestic law present to fulfil international obligations in a

28 Várady, *Ambiguous Choices,* 460.
29 Várady, *Ambiguous Choices,* 461.
30 Ostojić, *Between Justice and Stability,* 64.
31 Subotić, *Hijacked Justice,* 46.
32 "Izručenje se ne može smatrati zakonitim", Blic, 29.06.2001, http://www.blic.rs/vesti/politika/izrucenje-se-ne-moze-smatrati-zakonitim/em58028.
33 Várady, *Ambiguous Choices,* 461.

predictable and orderly way.[34] Such implementing legislation had been enacted in range of countries.[35]

While persistently insisting on unmitigated fulfilment of the obligation of cooperation, the Office of the Prosecutor, together with the Office of the ICTY President and Registry, participated in reviewing the draft law on cooperation.[36] The Chief Prosecutor made clear that what they would actually deem progress was not a law but the actual cooperation. Nevertheless, over time, the Chief Prosecutor started viewing the enactment of this legislation as a positive sign, and so did the international donors.[37]

The pressure of another 'certification' deadline by US Congress as well as the fear of sanctions by the European Union were presented by the local media as decisive factors in pushing political stakeholders toward reaching a compromise regarding legislation on cooperation.[38] While the debate over the law led to a final division between the political forces led by Đinđić and Koštunica, both managed to achieve their goals: the former in pushing forward what could be considered 'progress' in cooperation with the ICTY, the latter in achieving a legal basis for it, which they perceived as its prerequisite. On the other hand, the Montenegrin partners in the federal coalition, simultaneously pushed by internal Montenegrin dynamics, conceded to the law on cooperation, but managed to push through a problematic provision: The law related only to indictments that had already been raised by the ICTY Prosecution, envisioning that any future indictments would be dealt with by the local judiciary. This provision was in direct opposition to the ICTY Statute.[39] It was later heavily criticised by Tribunal representatives and changed within a year.[40]

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34 V. Dimitrijević, V. Hadži-Vidanović, I. Jovanović, Ž. Marković, and M. Milanović, *Haške nedoumice: Poznato i nepoznato o Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju*. Belgrade 2010, 32, available at: http://www.acem.unicas.org.rs/wp-content/baza/haske-nedoumice.pdf.

35 Inter alia in BiH, Croatia, Australia, New Zealand, the UK, Ireland, the USA, Sweden, Finland, Norway, Denmark, Austria, the Netherlands, Germany, France, Hungary, Italy, Spain, Romania and Greece. Várady, *Ambiguous Choices,* 585.

36 Eighth annual report of the ICTY (13 August 2001), p. 34, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2001_en.pdf.

37 Ostojić, *Between Justice and Stability*, 65.

38 N. Stefanović, 'Zakon o saradnji sa Hagom: Ševeningen specijalis', Vreme, 11.04.2002, http://www.vreme.com/cms/view.php?id=311812.

39 Stefanović, *Zakon o saradnji sa Hagom*.

40 Cf. Ninth annual report of the ICTY (4 September 2002), pp. 39–40, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/

The *Law on cooperation with the ICTY*[41] was adopted by the Parliament of the Federal Republic of Yugoslavia on 10 April 2002. It specifies procedures for allowing investigations to be conducted on the territory of Serbia and Montenegro, delivering documents requested by the ICTY Office of the Prosecutor, cooperation between national and ICTY prosecutors, and arrest and transfer of the persons indicted by the Tribunal.[42]

Although the law was enacted on the federal level, it was to be implemented by the authorities of the federal unit, the Republic of Serbia. The most problematic proved to be the issue of arresting individuals indicted by the ICTY and transferring them to The Hague. The law stipulated that an ICTY indictment should be sent to the federal Ministry of Foreign Affairs, which would then send it to the District Court in Belgrade, which would order the arrest, to be carried out by the Ministry of Interior (of Serbia), while the transfer of the individual to the ICTY was to be managed by the federal Ministry for Human and Minority Rights. Even without the court order, according to the Law, the Ministry of Interior is obliged to find and arrest individuals indicted by the ICTY.[43] The Court should establish that the person before the court is the same one from the indictment, that the indictment has been confirmed by the ICTY and falls under its mandate, and that the acts from the indictment are also punishable under domestic law. The procedure was supposed to be expedient: the Court was to issue the decision on the transfer of the individual to The Hague within three days, and an appeals procedure would take an additional three days. However, the public institutions avoided taking action themselves.

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annual_report_2002_en.pdf; Tenth annual report of the ICTY (20 August 2003), p. 53, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf.

41 The whole title of the law is: *Law on cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (*Zakon o saradnji Srbije i Crne Gore sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije od 1991. godine*). However, in this chapter the colloquial and shorter title will be used. The Law is available at: http://www.paragraf.rs/propisi_download/zakon_o_saradnji_srbije_i_crne_gore_sa_medjunarodnim_tribunalom_za_krivicno_gonjenje_lica_odgovornih_za_teska_krsenja.pdf (in Serbian).

42 D. Popović and M. D. Janković, *Implementation of Transitional Law in Serbia*, Belgrade, 2005, 51, available at: http://www.hunsor.se/dosszie/translaws_in_serbia.pdf.

43 Popović, Janković, *Implementation of Transitional Law in Serbia,* 52–3.

Even though the Law stipulated that if the ICTY issues a warrant for arrest, the police should arrest the wanted individuals without having to need an order from the Court. While the police was reluctant to act proactively, the enactment of the Law prompted six indictees to turn themselves in (and one to commit suicide). At the same time, the most well known fugitives – Radovan Karadžić and Ratko Mladić[44] – were protected, at least by a less controllable part of the defence forces, while officially being "out of reach" of the Serbian police. There are many claims, not without foundation, that the Serbian security agency knew about Ratko Mladić's whereabouts, and that they even clandestinely helped him hide.[45] The level to which this was ordered and controlled by the highest state officials, and the level to which this was a matter of security forces gone astray, is still speculated. The fact remains that at the time army, police and state security were saturated with individuals who had neither the ideological conviction nor any personal interest to participate in the apprehension of those indicted. A banal proof of the extent to which Mladić was within reach of the authorities is the piece of information that he regularly collected his pension in Serbia until December 2005.[46]

The implementation of the law was never fully efficient and functioning, but certain progress was noted during the time of the government under Prime Minister Zoran Đinđić, and during the police action that ensued after his assassination in March 2003.[47]

The next elected Prime Minister (and former President of the FRY),[48] Vojislav Koštunica, a nationalist-conservative politician overt in his mistrust and

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44 Karadžić was wartime President of the Republika Srpska, i.e. chief political leader of Serbs in BiH, while Mladić was the chief commander of the Serbian army in BiH.

45 J. Borger, *The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt*, New York 2016.

46 Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005. Belgrade: Fond za humanitarno pravo, 2006, 9, http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

47 Tenth annual report of the ICTY (20 August 2003), p. 53, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf; Letters of the President of the ICTY, Theodor Meron, and Chief Prosecutor, Carla Del Ponte, to the UN Security Council, 23 November 2004, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23november2004_en.pdf.

48 As said before, he became President of the Federal Republic of Yugoslavia in October 2000, after winning over Slobodan Milošević, and held the position until the country was reorganized into the State Union of Serbia and Montenegro in February 2003.

suspicion towards "The Hague",[49] perpetuated discourse which led to a complete distortion of the Law's implementation. He insisted that there should be "two-way cooperation" (*dvosmerna saradnja*)[50] between the ICTY and the Republic of Serbia, in which the government would condition the fulfilment of its legal obligations with certain "compromises" (*ustupci*) on behalf of the Tribunal, such as allowing defendants to remain free until the beginning of the trial. Such discourse politicised the debate about pursuing justice, fortifying the public image of the ICTY as a "political institution".[51] In addition, it presented an international obligation as a matter that could be negotiated, and thus the implementation of the Law on cooperation with the ICTY as a matter of the government's goodwill. A local non-governmental organization rightfully noted that the "Law on Cooperation with the ICTY is gravely breached by the institutions responsible for its implementation: the Government of the Republic of Serbia".[52]

The law envisioned the possibility of voluntary surrender of those indicted by the ICTY, in which case the state would provide guarantees necessary for the individual to remain free before and during the trial. However, this provision did not provide enough of an incentive in itself to stimulate an easier apprehension of the fugitives. After the dramatic arrest of one of them,[116] even the proactive post-Djindjić government had to succumb to the momentum by adopting a measure that allowed for the provision of financial support to those indictees who surrendered to the authorities.[117] This policy, already applied in Croatia at the time, became prevalent under the next government led by Vojislav Koštunica. Instead of police arresting the inductees, the government encouraged the accused individuals to voluntarily surrender, which was then presented as a "heroic" and "patriotic" act through which these individuals "continued to defend the nation". Thus the indicted individuals were provided with symbolic esteem, legal help, and financial support for their families. This support was formalised by the *Law*

49 While the Dutch capital The Hague hosts many international courts and tribunals (including the ICC), when the public, the media and politicians in the former Yugoslavia refer to "The Hague" they usually mean the ICTY.

50 Inauguration speech of Vojislav Koštunica before the National Assembly of the Republic of Serbia, 2 March 2004, http://www.arhiva.srbija.gov.rs/vesti/2004-03/02/343974.html.

51 J. Mihajlović Trbovc and V. Petrović, 'Impact of the ICTY on Democratisation in Yugoslav Successor States,' in, S. P. Ramet, C. M. Hassenstab, and O. Listhaug (eds), Cambridge University Press, 2017, 154.

52 Popović and Janković, *Implementation of Transitional Law in Serbia,* 6.

on helping the Hague indictees,[53] which was enacted on 10 April 2004.[54] The law was fiercely opposed by the organizations advocating dealing with the past, such as *Women in Black* (*Žene u crnom*)[55] and the Humanitarian Law Centre (*Fond za humanitarno pravo*).[56] Soon enough, the Law was suspended by the Serbian Constitutional Court, but the policy of stimulating "voluntary surrender" remained.[57]

At the end of the day, the practice of "voluntarily surrender" did result in an increased number of the indictees transferred to the ICTY. Formally, the primary demand of the ICTY was being satisfied, however, the whole process completely distorted the idea of introducing the rule of law. Though institutional reform was formally was taking place, the normative shift that usually accompanies it, did not – the idea of justice was "hijacked" by the political pragmatism and nationalistic discourse of the local politicians.[58]

2.2. The Role of EU Conditionality

The system of "volunteer surrenders" was obviously not meant to be applied to the most wanted fugitives – Mladić and Karadžić – whose hiding was either supported or enabled by the elements within the security system. It became clear that their arrest was a matter of the so-called "political will". This becomes even more evident in the light of the relatively effortless arrests of Karadžić (in July 2008) and Mladić (in May 2011), and the banal circumstances of their hiding.[59]

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53 The official title: *Law on the rights of the indictees in the custody of the International Criminal Tribunal and members of his* [sic!] *family* (*Zakon o pravima optuženog u pritvoru Međunarodnog krivičnog tribunala i članova njegove porodice*). Available at: http://web.archive.org/web/20040520011733/ http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=128&t=Z# (in Serbian).

54 "Marković potpisao zakon o pomoći haškim optuženicima", B92, 10.04.2004. Available at: http://www.b92.net/info/vesti/index.php?yyyy=2004&mm=04&dd=10&nav_category=11&nav_id=137847.

55 "Žene u crnom protiv Zakona o pomoći haškim optuženicima", B92, 6.04.2004, http://www.b92.net/info/vesti/index.php?yyyy=2004&mm=04&dd=06&nav_category=12&nav_id=137489.

56 N. Kandić, 'Pismo advokatskoj komori Srbije' (28.05.2004)," in *Hag među nama*, ed. S. Kostić (ed), *Hag među nama*, Belgrade 2005, 66, http://www.hlc-rdc.org/images/stories/publikacije/06_hag_medju_nama.pdf.

57 Ostojić, *Between Justice and Stability,* 88–9.

58 Subotić, *Hijacked Justice*, passim.

59 C. Freeman, Colin, 'Radovan Karadzic got too complacent', The Telegraph, 26.07.2008, http://www.telegraph.co.uk/news/worldnews/europe/serbia/2462297/

In order to understand how this shift of "political will" took place, we should take into account the underlying consensus of the successive political elites in post-Milošević Serbia about the goal of joining the European Union (EU) as a member state. This ambition was generally acknowledged and supported by the European Union as well, being officially affirmed by the Zagreb Declaration of November 2000 and laid out as agenda by Thessaloniki Declaration of June 2003.[60] In the policy documents of the EU, cooperation with the ICTY was always considered as part of international obligations and presented as a general requirement put before the Western Balkans countries. However, in late 2004, in the face of the troubled progress in the cooperation, the EU adopted a policy by which each step in the pre-accession process was conditioned on the transfer of suspects to the ICTY.[61] Hence, the EU bodies consulted regular reports of the ICTY Prosecutor regarding cooperation of the reference countries.

In a way this policy development of the EU was miming the US mechanism of conditioning financial support to Serbia, which proved efficient in 2001 with the arrest and transfer of Slobodan Milošević to The Hague. On the other hand, it was welcomed by the ICTY Chief Prosecutor, Carla Del Ponte, who had a clear agenda to achieve the transfer of all the fugitives.

Such a conditionality policy was activated by the EU on number of occasions: in September 2004, when the EU announced it would not conduct the Feasibility Study for Serbia and Montenegro; or in May 2006, when it suspended negotiations for the Stability and Association Agreement. However, neither the EU nor the Chief Prosecutor applied the policy consistently at all times,[62] but used varying standards of what "full cooperation" actually means, usually mitigating requirements in the light of other political considerations.[63] Nevertheless,

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Radovan-Karadzic-got-too-complacent.html; J. Borger, "14 years a fugitive: the hunt for Ratko Mladić, the Butcher of BiH", The Guardian, 21.01.2016, http://www.theguardian.com/world/2016/jan/21/14-years-fugitive-hunt-for-ratko-mladic-butcher-of-BiH.

60 The Declaration of the Zagreb Summit, 24,11.2000, http://www.esiweb.org/pdf/bridges/BiH/ZagrebSummit24Nov2000.pdf. EU-Western Balkans Summit, Declaration, Thessaloniki, 21.6.2003, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/76291.pdf.

61 Ostojić, *Between Justice and Stability,* 89.

62 F. Hartmann, 'The ICTY and EU conditionality', in J. Batt and J. Obradović-Wochnik (eds), 'War crimes, conditionality and EU integration in the Western Balkans', *Challiot Paper* No. 116, (Paris: EU Institute for Security Studies), 72–76.

63 K. Bachmann, T. Sparrow-Botero and P. Lambertz, *When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals*, Frankfurt am Main and New York, 2013. 76–103.

most opinions concur that it had a decisive impact on the determination of the Serbian government under the Democratic Party to arrest Karadžić and Mladić.

2.3. New Legislation Relevant for War Crimes Prosecution

The evasion of Serbian authorities to fulfil complete cooperation with the ICTY and the lack of trust in the credibility of local judiciary were the main reason why the ICTY did not refer any of its cases to a domestic court in the first ten years of its existence. However, the announcement of the strategy for the closing down of the ICTY, which for the first time included the transfer of cases, brought a new dynamic in November 2001.[64] This strategy had been designed based on the assumption that the ICTY could not try all the accused, that democratic institutions in the Yugoslav successor states would be rebuilt, and that the fight against terrorism became a new priority of international community after the terrorist attack of 11 September 2001, which would require more attention and resources.[65] In the June 2002 Report, the ICTY outlined a plan to concentrate on the prosecution and trial of the highest-ranking political military and paramilitary leaders, and transfer cases involving mid-level accused to national courts.[66] At first, only BiH was considered as a state to which the cases would be transferred, because most crimes in question had been committed on the territory of that country, and practically because due to international supervision satisfactory judicial reform seemed most feasible there. Nevertheless, the Tribunal emphasized that it would refer cases to the post-Yugoslav states only

64 Such a strategy was first mentioned in the addresses of the President and Chief Prosecutor of the ICTY in their addresses to the UN Security Council on 27 November 2001. Cf. "Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council", ICTY Press Release, 27.11.2001, http://www.icty.org/en/press/address-his-excellency-judge-claude-jorda-president-international-criminal-tribunal-former; "Address by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia", Carla Del Ponte, to the UN Security Council", ICTY Press Release, 27.11.2001, http://www.icty.org/en/press/address-prosecutor-international-criminal-tribunal-former-yugoslavia-carla-del-ponte-un.

65 K. Bachmann and A. Fatić: *The UN International Criminal Tribunals. Transition without Justice?* Abingdon, New York 2015, 175.

66 Letter from the Secretary-General to the Security Council (S/2002/678), 19.06.2002, enclosing the Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf.

if it deemed that the local courts would be able to handle the cases according to international standards of Human Rights protection and due process, and in this regard the Tribunal urged the international community to support building appropriate legal institutions in the whole region. Contrary to the case of BiH, where the Tribunal envisioned very detailed guidelines for institutional reforms in the judiciary,[67] no such plan for Serbia was mentioned in the statements and reports of the ICTY at the time.[68]

Nevertheless, there is a tendency to see the development of new legislation (and institutions) relating to war crime prosecution in Serbia as a natural response to the ICTY Completion Strategy. A report issued by a non-governmental organization about transitional justice developments in Serbia states that such a "situation imposed the need to create conditions to prosecute these acts before judicial institutions in Serbia, which led to the adoption of the Law on prosecution of war crimes."[69] The Law[70] envisioned special institutions for the prosecution of war

67 On the ICTY's impact on institutional reform in BiH see the chapters by Aleksandra Nędzi-Marek, Irena Ristić and Jagoda Gregulska in this publication.

68 Cf. "Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council", ICTY Press Release, 27.11.2001, http://www.icty.org/en/press/address-his-excellency-judge-claude-jorda-president-international-criminal-tribunal-former; "Address by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia", Carla Del Ponte, to the UN Security Council", ICTY Press Release, 27.11.2001, http://www.icty.org/en/press/address-prosecutor-international-criminal-tribunal-former-yugoslavia-carla-del-ponte-un; Letter from the Secretary-General to the Security Council (S/2002/678), 19.06.2002, enclosing the Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf; Ninth annual report of the ICTY (4 September 2002), pp. 39–40, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf.

69 Popović and Janković, *Implementation of Transitional Law in Serbia,* 59. A similar causality is given in *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005,* Belgrade, 2006, 32, http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

70 While this chapter refers to the colloquial title of the law, the official one is: *Law on Organization and Competence of State Bodies in the Proceedings Against War Crimes Perpetrators* (*Zakon o organizaciji i nadležnosti državnih organa u postupku protiv učinilaca ratnih zločina*). Amended and updated law available (in Serbian) at: http://www.tuzilastvorz.org.rs/html_trz/PROPISI/zakon_o_org_i_nad_drz_organa_u_postupku_za_rat_zlocine_lat.pdf.

crimes – the War Crimes Chamber of the Belgrade District Court and the Office of the War Crimes Prosecutor – which will be discussed further below.

While some researchers also associate the ICTY Completion Strategy and the establishment of the War Crimes Chamber,[71] the others explain it as a matter of internal change and a newly found sense of urgency to prosecute war crimes after the assassination of the Prime Minister Zoran Đinđić in March 2003.[72] However, if one goes into the details of the decision-making process and wants to establish a causal relation between a particular decision (e.g. the ICTY closing strategy) and the institutional change in question, a different image emerges. Then the enactment of the law on war crimes prosecution should be seen in the context of institutional changes in connection with the battle against organized crime.

In 2002, the top priority of the Đinđić's government was the prosecution of organized crime, not of war crimes. Since the regime change in October 2000, a series of events had made clear that parts of the state security apparatus were occupied by the criminal networks, which were effectively outside of the control of the government. This became evident in November 2001, during the mutiny organized by the Special Operations Unit (*Jedinica za specijalne operacije – JSO*), formally under Serbian Ministry of Interior. This special police unit, which was part of the criminal milieu involved in drug dealing and money laundering, had its roots in Serbian paramilitary units notorious for their crimes in the wars of Yugoslav succession.[73] At the time of the mutiny, the JSO argued that they were protesting because they did not want to be involved in the arrests of those accused by the ICTY fugitives (especially without a Law on cooperation),[74] using a discourse of "patriotism" and "national pride". Since such a

71 Ostojić, *Between Justice and Stability,* 165, 171.

72 Subotić, *Hijacked Justice,* 57.

73 In early stages of the war in Croatia, the heads of the Serbian secret service merged different paramilitary units into the armed wing of the Serbian secret police, colloquially known as Red Berets (*Crvene beretke*). Cf. V. Petrović, 'A Crack in the Wall of Denial: The Scorpions Video in and out of the Courtroom,' in D. Žarkov and M. Glasius, *Narratives of Justice In and Out of the Courtroom: Former Yugoslavia and Beyond*, Cham 2014, 89–110.

74 This was, at least in their statement, prompted by the issue to arrest the Banović brothers. Cf. M.Vasić, "Patriotske igre Crvenih beretki: Ništa tu nije slučajno", *Vreme*, no. 567, 15.11.2001, http://www.vreme.com/cms/view.php?id=301595. Eventually, one of the brothers, Predrag Banović pleaded guilty for crimes he committed as a guard in a camp for non-Serbs "Keraterm" in Prijedor, while his brother Nenad was acquitted. See the media archive about the JSO mutiny at https://pobunajso.wordpress.com/.

discourse was supported and shared by President Koštunica and part of the public, it gave JSO an aura of legitimacy. After ending this episode in a pragmatic compromise, Đinđić's Government focused on dismantling the criminal network, part of which had infiltrated the state apparatus. To that purpose, the government prepared a *Law on suppressing organized crime*[75] in the summer of 2002. It stipulated the establishment of a special prosecutor for organized crime and set of new procedures that would enable more effective prosecution – such as the institution of protected witnesses. (The law did not come into actual effect until the end of the year, when the relevant federal law on criminal procedure was changed as well.)[76] Precisely during the first investigation, and around the time when the crucial witness was to give his statement, on 12 March 2003, the members of the JSO assassinated Prime Minister Đinđić after three unsuccessful attempts in previous weeks. (Obviously, the aim of an otherwise secret investigation had leaked to the members of the JSO.) Immediately after the assassination, the details of the ongoing (secret) investigations were publicised, shocking the domestic public and alarming the international community to help expedite the prosecution process. USAID provided 4.5 million dollars for the reconstruction and adaptation of the former Military Court, turning it into a modern, hi-tech equipped facility with the highest security standards.[77] It seems that amidst this cooperation, the idea of "enlarging" the ongoing process of establishing the special prosecution for organized crime grew, together with the idea of turning the new judicial facility into a so-called "special court" for war crimes.

Some authors attribute the legislative initiative for domestic war crimes prosecution to the change in political atmosphere after Prime Minister's assassination, which allowed reformist political elites to undertake institution building that was previously halted by old-regime spoilers (within the military, police and secret service)[78] or for the sake of political

75 The official title: *Law on organization and jurisdiction of public authorities for the suppression of the organised crime, corruption and other especially serious crimes* (*Zakon o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, korupcije i drugih posebno teških krivičnih dela*). Available at: http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/68333/102941/F-1554511374/SRB68333.pdf (in Serbian).

76 M. Vasić, 'Godinu dana od akcije Sablja: Sablja svilu ne seče', Vreme, 10.03.2003, http://www.vreme.com/cms/view.php?id=371324.

77 Interview with Vladan Batić, Minister of Justice of the Republic of Serbia, 11.04.2003, http://www.novine.ca/arhiva/2003/11_04_03/sr_cg.html.

78 Subotić, *Hijacked Justice,* 69–70.

stability.[79] However, inside sources and close onlookers provide insight for the claim that international pressure was key to the legislative initiative.[80] It seems that decisive guidance and support came from the Rule of Law Program in the US Embassy in Belgrade,[81] while the OSCE Mission in Serbia and Montenegro took an active role in formulating of the bill.[82] An expedient procedure ensued: in mid-April (one month after the assassination of Đinđić) the Ministry of Justice announced it had started drafting a law on the prosecution of war crimes,[83] while the government presented the law before Parliament in late June. It was enacted only 6 days later on 1 July 2003.[84]

Whatever was the true decision-making process behind the enactment of this law, there is no clear indication of a direct link between it and a specific ICTY decision. The Tribunal preconditioned any transfer of the cases to the post-Yugoslav countries with adequate judicial reform, except from Serbia. Therefore, the ICTY Completion Strategy (which included the transfer of cases to domestic judiciaries) was a backdrop rather than a cause of new legislation on war crimes prosecution in Serbia. Contrary to the Bosnian case, the ICTY did not proactively indulge into evaluating the existing legislation in Serbia, though the ICTY Office of the Prosecutor "participated in the establishment of adequate legislative and institutional frameworks in the Region, and has worked with other international and regional organizations, to ensure that the proceedings before domestic institutions can be completed in a professional way and can be internationally monitored."[85] Thus the ICTY Prosecutor "provided the relevant authorities in Croatia, in Serbia

79 Ostojić, *Between Justice and Stability,* 169–167.

80 Orentlicher, *Shrinking the Space for Denial*, 110.

81 D. Anastasijević, "Intervju – Sem Nazaro: Ne zanima me zakon ako se ne sprovodi", *Vreme*, no. 862, 12.07.2007.

82 Ratni zločini pred domaćim sudovima: Praćenje suđenja za ratne zločine i podrška domaćim sudovima za njihovo sprovođenje. Beograd: OSCE, Misija u Srbiji i Crnoj Gori, 2003, p. 42, http://www.osce.org/sr/serbia/13495?download=true.

83 "Ministar pravde Vladan Batić najavio: Uskoro suđenja za ratne zločine", *Glas javnosti*, 18.04.2003, http://arhiva.glas-javnosti.rs/arhiva/2003/04/18/srpski/P03041708.shtml.

84 'Skupština Srbije započela raspravu o Predlogu zakona o organizaciji i nadležnosti državnih organa u postupku protiv počinilaca ratnih zločina: Ratnim zločincima suditi u Srbiji', *Danas*, 25.06.2003, http://web.archive.org/web/20030701161006/ http://www.danas.co.yu/20030625/dogadjajdana1.html#1.

85 Eleventh annual report of the ICTY (16 August 2004), article 291 (p. 72), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2004_en.pdf.

and Montenegro, and in BiH ... with suggestions for reform of their laws and criminal procedure codes."[86] Unquestionably these evaluations of the existing legislation and suggestions for a new legislation informed the decisions of the key international stakeholders in Serbia, whose initiative seems decisive for this particular legislative reform. One could conclude that the post 9/11 shift in US foreign policy influenced a speeding up of the ICTY Completion Strategy, which then created an incentive for developing the legislation for domestic war crimes prosecution.

3. Change in Institutions Related to the ICTY

3.1. The Truth and Reconciliation Commission

Amidst the quarrel with Serbian Prime Minister Zoran Đinđić regarding the arrest and handing over of Slobodan Milošević to The Hague, the President of the FRY (i.e. Serbia and Montenegro), Vojislav Koštunica, initiated the creation of a *Truth and Reconciliation Commission* as his alternative response to the pressure to cooperate with the ICTY. The idea of such a commission had been discussed among NGO activists and some politicians already previously. President Koštunica issued the decree establishing the Commission on 29 March 2001.[87] It coincided with the closing of the deadline for the US certification of cooperation, which conditioned further financial assistance to the Federal Republic of Yugoslavia. The proof that this was not a coincidence is the abrupt and hasty manner in which the Commission was founded. After conducting unbinding consultations with Alex Boraine from the International Center for Transitional Justice (and former deputy chair of the South African Truth and Reconciliation Commission) and a diverse group of intellectuals, Koštunica simply announced these individuals as Commission members and Boraine as advisor, without informing them about it in advance.[88]

Though the Commission was presented to the public as a mechanism for dealing with the past that should provide better results than the trials before

86 Eleventh annual report of the ICTY (16 August 2004), article 291 (p. 72), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2004_en.pdf.

87 S. Ast, 'Komisija za istinu i pomirenje: Teško suočavanje', *Vreme*, 12.04.2001, http://www.vreme.com/cms/view.php?id=96154.

88 A. Boraine, *A Life in Transition*, Cape Town 2008, 237–8.

the ICTY,[89] such argument could easily be considered phony. The aim of the Commission was to "organize research work on the uncovering of evidence on the social, inter-ethnic and political conflicts which led to the war and to shed light on the causal links among these events."[90] It was given a very broad mandate to examine the roots of the Yugoslav conflicts, the reasons for humanitarian law violations, the psycho-social factors in the conflict as well as the role of religion, the media and, international factors in the conflicts.[91] Such a mandate was particularly suitable for the historical narrative promoted by Serbian nationalists, in which the wars of Yugoslav dissolution have longer historical "causes" that somehow justify the conduct of the Serbian side in the conflict (framing it as defensive), and in which "psycho-social factors" somehow "explain" the crimes. This was sensed by one of the appointed members of the Commission, prof. Vojin Dimitrijević, known to be a strong advocate of war crimes prosecutions. Less than a month later, he left the Commission precisely because he realised that it was founded with the aim of creating a historical narrative that would exculpate the Serbian state from responsibility for war crimes.[92] However, the Commission never actually worked, took no investigative actions nor organized public hearings, and issued no report. After the initial debate (in the media) about what its role and aim should be, it disappeared before coming into existence.[93] Officially the Commission ceased to exist with the constitutional change, and the transformation of the Federal Republic of Yugoslavia into the State Union of Serbia and Montenegro in February 2003, with which the institution of the President of the FRY (who was the Commission's founder) ceased to exist as well.

It should be noted that on the account of the first discussions on creating truth commissions in the Yugoslav successor states (in the year 2000), ICTY

89 Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005. Belgrade: Fond za humanitarno pravo, 2006, p. 1, http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

90 Quote of the *Decision on the Establishment of the Truth and Reconciliation Commission* in J. Pejić, 'The Yugoslav Truth and Reconciliation Commission: A Shaky Start', *Fordham International Law Journal* 25, no. 1 (2001), 9.

91 Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005, Belgrade 2006, 11, http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

92 S. Ast, 'Komisija za istinu: Ostavke', Vreme, no. 537, 19.04.2001, http://www.vreme.com/cms/view.php?id=113915.

93 Cf. Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005, Belgrade 2006, 11, http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

representatives strongly opposed such idea since they feared it would interfere with the work of the Tribunal.[94] This kind of precaution was characteristic of the Tribunal's representatives even when they later gave support to the initives for truth commissions in the Federal Republic of Yugoslavia (and in BiH) as potential supplements to the reconciliatory function of the Tribunal.[95] Therefore, the Serbian Truth and Reconciliation Commission should be viewed as a case of unintended impact of the ICTY, leading to the creation of a new domestic institution. However, due to the manner in which it was created in the given political context, this initiative was designed precisely in opposition to the overall mission of the ICTY.

3.2. Institutions in Charge of Cooperation with the ICTY

The *Law on the cooperation with the ICTY*, enacted in April 2002, envisioned the establishment of the National Council for Cooperation with the ICTY (*Nacionalni savet za saradnju sa MKTJ*)[96] that would be tasked with managing certain segments of cooperation with the ICTY, such as access to public institutions' archives, status of the witnesses and the accused. In practice, it also became the institutional vehicle for managing and financing the so-called "voluntary surrender" of individuals accused by the ICTY. As mentioned before, in order to transfer the fugitives to The Hague and secure a positive evaluation of the cooperation (required by the US and the EU), while at the same time avoiding conducting arrests, Serbian government led by Vojislav Koštunica encouraged voluntary surrenders, framing it as a patriotic sacrifice for the Serbian nation. The surrenders were "voluntary" to the extent that they were often accompanied by "generous financial assistance, which was mostly concealed from the public."[97] The accused were treated as heroes and defenders of the nation. The moral and financial backing given by the government fed into

94 Boraine, *A Life in Transition*, 235.

95 Cf. »The ICTY and the Truth and Reconciliation Commission in BiH«, ICTY Press Release, 17.05.2001, http://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-BiH; »Address by the Registrar of the ICTY, Mr. Hans Holthuis, at the Conference "In Search of Truth and Responsibility: Towards a Democratic Future"«, ICTY Press Release, 22.05.2001, http://www.icty.org/en/press/address-registrar-icty-mr-hans-hothuis-conference-search-truth-and-responsibility-towards.

96 After the State Union of Serbia and Montenegro ceased to exist in June 2006, the National Council for Cooperation with the ICTY became an institution of the Republic of Serbia.

97 Ostojić, *Between Justice and Stability,* 92.

the already existing impression of the public that the Serbian nation was accused by the ICTY. This contradicted one of the ICTY's aims – to individualise guilt. The whole Law on cooperation with the ICTY was not specifically required by the ICTY, nor was the National Council for Cooperation. However, once it was in place it became a point of reference and the main communication channel between the ICTY Office of the Prosecutor and Serbia. Though it was created to manage access to the archives requested by the ICTY Prosecutor, the Council acted as a gatekeeper rather than a bookkeeper – it could not only enable but also disable a smooth cooperation, and it did both. The most evident example is the case of the minutes of the wartime Supreme Defence Council (*Vrhovni savet odbrane*) of the Federal Republic of Yugoslavia, which was composed of the highest-ranking political and military officials.[98] The transcripts of those meetings were considered to be vital for the Prosecution case in the trial against Slobodan Milošević, since they could establish that Belgrade had financed, controlled and ordered the crimes committed by the Army of Republika Srpska in BiH, including genocide. Precisely because of this, and in light of the lawsuit of BiH against the FRY (i.e. Serbia and Montenegro) before the International Court of Justice (ICJ), the National Council for Cooperation with the ICTY refused to hand over the full transcripts, claiming that "state secrets" could be revealed.[99] In order to access these documents, the Prosecutor requested the Trial Chamber to issue a binding order to the Serbian authorities. In response, the FRY legal representatives requested "protective measures" that "would keep out of the public view – and out of the reach of the BiH legal team [before the ICJ] portions of the document whose publication would allegedly compromise national security."[100] The Prosecution agreed to support the FRY motion, but found that the protective measures approved by the Trial Chamber (in 2003) were too broad, exceeding "national security interests".[101] Eventually, in its ruling the ICJ relied on a redacted document to be used as evidence in the *Milošević* trial when reaching decision in the case *BiH v. Serbia* in 2007, which found that Serbia had not committed genocide in BiH, but had failed to prevent it. While it is a matter of dispute to what extent the disclosure of the full transcripts would have

98 Ostojić, *Between Justice and Stability,* 141.

99 Y. Shany, 'Two Sides of the Same Coin? Judging Milošević and Serbia before the ICTY and ICJ,' in T. W. Waters (ed), *The Milošević Trial: An Autopsy*, Oxford and New York, 2013, 451.

100 Shany, *Two Sides of the Same Coin,* 451.

101 C. Del Ponte, C. Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, New York, 2009, 172–176.

altered the ICJ judgment,[102] such a conduct of the Serbian authorities (including the National Council for the Cooperation with the ICTY) unquestionably ran against the aim placed upon the ICTY – to establish the truth about the past that would be a base for reconciliation in the region.

3.3. Specialised Institutions for War Crimes Prosecution

During the regime of Slobodan Milošević, only one war crime case was concluded with a final verdict in 1998 on the domestic level in Serbia.[103] Another two trials started in this period and finished in the years 2002 and 2003.[104] However, these trials were evaluated as a legal farce by the local civil-society advocates of war crimes prosecution, such as the Humanitarian Law Centre.[105] Though all of these trials ended with a conviction, the sentences were mild and the judgments were worded in a tone that was apologetic towards the defendants.[106]

The trials that started in post-Milošević Serbia – the *Sjeverin*[107] and *Podujevo*[108] cases – though based on the same criminal law as the previous trials, were

102 Y. Shany, *Two Sides of the Same Coin?,* 441–458; Várady, *Ambiguous Choices,* 459–464.

103 This is the trial of Dušan and Vojin Vučković before the Šabac Dictrict Court. At the trial, which lasted for four years, the Vučković brothers, as members of voluntary paramilitary group *Yellow Wasps* (*Žute ose*), were convicted for killing, wounding and raping Bosnian Muslims in the Municiaplity of Zvornik (situated in BiH on the border with Serbia). Cf. *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005*, Belgrade 2006, 31, available at: http://www.hlc-rdc.org/images/stories/publikacije/03-tranzicija-srpski.pdf.

104 Both of them dealt with reserve officers of the Yugoslav Army and Serbian police forces, for the crimes against Kosovo Albanians during the 1999 NATO intervention against the FRY.

105 *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu*, 31.

106 For instance, the judgment of Dušan Vučković stated as a mitigating factor that the accused was "participating in the fighting for the liberation of the territory of Zvornik municipality, thus voluntarily risking his life in order to help the just fight of a part of his nation for liberation." *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu,* 31.

107 The *Sjeverin* case deals with the abduction of 16 Muslim civilians (from the town of Sjeverin, Serbia) from the train that was passing through the border region between Serbia and Bosnian territory held by the Serb forces, by the Serb paramilitary forces "the Avengers" (*Osvetnici*) led by Milan Lukić. After torture the civilians were killed in the Bosnian town Višegrad in October 1992.

108 This was the trial against Saša Cvjetan, member of the *Scorpions* – a paramilitary unit of the Serbian State Security – who participated in killing of 14 Albanian civilians

conducted in a much more professional manner.[109] For instance, these were the first trials to invite victims and their families into the process as witnesses, and the first trials to end with maximum sentences (20 years). However, they contained certain procedural weaknesses[110] and lacked witness protection mechanisms.[111]

Such a low record of war crimes prosecution was noted by international actors and undoubtedly a factor in the internationally driven initiative to establish a specialised institution dedicated to prosecuting war crimes. I have described above the context in which the Law on prosecution of war crimes was enacted in July 2003, from which one could conclude that the initiative to add to the emerging *Special court* (for organized crime) a department for war crime prosecution came from international donors and organizations, not domestic actors.

Legal scholar Diane F. Orentlicher rightly points out that "in contrast to the War Crimes Chamber of BiH, which was created with the direct involvement of the ICTY, the ICTY did not play a formal role in establishing the Serbian [War Crimes Chamber] or the Office of the War Crimes Prosecutor."[112] The appointed War Crimes Prosecutor, Vladimir Vukčević, also stated that the Tribunal had nothing to do with the establishment of his office.[113] However, as explained above, the ICTY Office of the Prosecutor participated in the legislative process by providing opinions relevant for international organizations (primarily OSCE), which were deeply involved in the creation of the Law on prosecution of war crimes.

On the basis of the Law on prosecution of war crimes, the Office of the War Crimes Prosecutor (*Tužilaštvo za ratne zločine*) and the War Crimes Chamber (*Veće za ratne zločine*) within the Belgrade District Court[114] were established, as

(including children and elderly) in Kosovo town of Podujevo, at the begining of NATO intervention in the FRY in March 1999.

109 *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu,* 31–32.

110 OSCE Misja u Srbij i Crnoj Gori, *Ratni zločini pred domaćim sudovima: Praćenje suđenja za ratne zločine i podrška domaćim sudovima za njihovo sprovođenje*, Beograd, 2003, 23–26 and 34–36, available at: http://www.osce.org/sr/serbia/13495?download=true.

111 Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, BiH, and Serbia and Montenegro,* HRW report vol. 16, No. 7(D), 21–22, available at: https://www.hrw.org/reports/2004/icty1004/icty1004.pdf.

112 Orentlicher, *Shrinking the Space for Denial,* 70.

113 Orentlicher, *Shrinking the Space for Denial,* 70.

114 It should be noted that after the reform of 2009 the judicial system was significantly reshaped, hence the War Crimes Chamber within the Belgrade District Court became War Crimes Department of the Higher Court in Belgrade. However this did not significantly change operation of this judicial unit.

well as a special War Crimes Investigation Service (*Služba za otkrivanje ratnih zločina*) within the Ministry of Interior. The law gave the War Crimes Chamber exclusive jurisdiction over war crimes, crimes against humanity, and genocide, though it stipulated that war crime trials, which had already begun, should be concluded before other courts.[115]

3.4. Procedural Novelties

The Law on prosecution of war crimes enabled the implementation of the ICTY Statute in domestic courts and adopted certain procedures previously unknown in the local jurisprudence. One of the most important was the status of witness collaborator (*svedok saradnik*) – a member of a unit/group who participated in the crime, but who is not charged because he or she provides essential information about the criminal conduct of other group members. The new legislation's aim was the suppression of organized crime.[116] The Law introduced a range of technical novelties as well: witnesses and victims could give testimony via video-link or before a court in one of the neighbouring countries through institutionalised cooperation; and the court proceedings are audio-taped and transcribed (this was already introduced by the Law on suppressing organized crime). Both these practices were applied by the ICTY,[117] and furthermore, even the renovated premises of the Belgrade District Court dedicated to war crimes proceedings visually resembled the look of the ICTY courtrooms (e.g. glass barrier between the audience and the defendants). Therefore, one could jump to the conclusion that such institutional changes were somehow directed by the ICTY. However, a wider audience learnt about such procedures due to media coverage about the ICTY, but the ICTY had not invented them. Such procedural novelties, enabled by contemporary technology, were introduced by the international organizations and donors who facilitated the legislative process and provided training to the judiciary. Therefore, it seems that both the ICTY and local war crimes judiciary were crafted under the influence of the same international donors (e.g. the US Department of Justice) rather than that the former institution dictated the design of the latter.

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115 Orentlicher, *Shrinking the Space for Denial,* 69.

116 S. G. Nazaro, 'Istine i zablude o zaštiti svedoka', *Pravda u tranziciji* No. 1 (2005), available at: http://www.tuzilastvorz.org.rs/html_trz/(CASOPIS)/SRP/SRP01/49.pdf.

117 ICTY, Rules of Procedure and Evidence (IT/32/Rev. 49), 2013, http://www.icty.org/sid/136.

However, the very establishment of the War Crimes Chamber and the Office of the War Crimes Prosecutor did not lead to the transfer of cases from the ICTY, since the ICTY Prosecutor noted obstacles in the use of ICTY indictments and evidence. Thus it provided suggestions on the admissibility of ICTY evidence and for reform of the law and code of criminal procedure.[118] With these provisions, the amendments to the Law were enacted in December 2004, enabling the use of the evidence collected by the ICTY Office of the Prosecutor, stipulating that witness protection measures ordered by the Tribunal should remain in force and allow Tribunal representatives to attend all phases of the legal process before the local court.[119] Only after these amendments was the first case transferred from The Hague to Belgrade.

Even if the ICTY did not play a role in the establishment of the *Special court* for war crimes, it definitely helped in increasing the capacities and competencies of this institution. The ICTY participated in the transfer of knowledge and expertise about war crime prosecution and of capacities in handling new technical tools to the local judiciaries, which was aimed at enhancing the sustainability of local judicial institutions. For instance, within the War Crimes Justice Project.[120] trainings (and educational materials) were created for local prosecutors, judges, and defence lawyers in BiH, Croatia and Serbia. In fact, the creation of specialised institutions for war crime prosecution eased the transfer of knowledge and material from the ICTY, which would have been less viable had there been no central hub of emerging expertise.[121]

3.5. Problems in the Conduct of the Trials

The issue of the first indictment by the War Crimes Prosecutor coincided with the formation of the new Serbian government under Vojislav Koštunica, which looked unfavourably on new institutions for war crime prosecution. This was reflected in budgetary cuts, hostile comments by the cabinet and an overall lack of political support.[122] In this early period, international support and funding proved

118 Eleventh annual report of the ICTY (16 August 2004), article 291 (p. 72), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2004_en.pdf.

119 Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu 1999–2005, 28.

120 Funded by the EU (4 million euro) and implemented jointly by the OSCE's Office for Democratic Institutions and Human Rights, the ICTY and the UN's Interregional Crime and Justice Research Institute from May 2010 to October 2011. Project presentation available at: http://www.osce.org/odihr/84406?download=true.

121 Ostojić, *Between Justice and Stability,* 170.

122 Subotić, *Hijacked Justice*. 58–59; Ostojić, *Between Justice and Stability,* 172.

indispensible for the operation of the Office of the War Crimes Prosecutor.[123] Even after the later change in attitude by subsequent governments, the largest obstacle in war crime prosecution persisted – the unsatisfactory cooperation of the police.

The War Crimes Investigation Service within the Ministry of Interior, envisioned by the Law on war crimes prosecution, was established with a delay of two years, which signalled early on that the relations between the Prosecutor and police would not be easy.[124] The Investigation Service was to take actions upon request of the War Crimes Prosecutor, but in early years he admitted to having no means of influencing the work of the Service.[125] In subsequent years, the cooperation somewhat improved, but the Office of the Prosecutor to this day complains that this police department avoids acting proactively and fails to initiate investigations on its own.[126]

Though the Law on war crimes prosecution established basic witness protection measures (protection of private data, testimony via video-link), the international organizations and donors evaluated them as insufficient and pushed for a specialised law.[127] Witness testimonies are especially important for war crime cases where there is usually scarce documentary and/or forensic evidence. Often, witness testimonies may be the only evidence available. The previous war crime proceedings were reportedly obstructed by the lack of witness protection, which also hindered new trials before the War Crimes Chamber.[128] In addition, many non-Serb victims and potential witnesses mistrusted Serbian institutions, so prosecutors and judges had problems in ensuring their participation in the trials. Hence (internationally funded) non-governmental organizations, especially the Humanitarian Law Centre, stepped in, providing moral and legal support and ensuring the physical safety of victims-witnesses, where prosecutor, court, and police proved inept or reluctant to act.

123 Orentlicher, *Shrinking the Space for Denial,* 48.

124 Ostojić, *Between Justice and Stability,* 178.

125 *Izveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosovu*, 26.

126 Humanitarian Law Center, *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice: Analysis of the Prosecution of War Crimes in Serbia 2004–2013*. Belgrade 2014, 35.

127 OSCE, *Ratni zločini pred domaćim sudovima*, 43; S. G. Nazaro, 'Istine i zablude o zaštiti svedoka', *Pravda u tranziciji* No. 1, 2005, available at: http://www.tuzilastvorz.org.rs/html_trz/(CASOPIS)/SRP/SRP01/49.pdf.

128 I*zveštaj o tranzicionoj pravdi u Srbiji, Crnoj Gori i na Kosov*u, 27–28.

With a three-year delay, the Witness and Victim Support Unit (*Služba za pomoć i podršku oštećenima i svedocima*) envisioned by the Law establishing the War Crimes Chamber was created.[129] A substantial improvement was expected from the Law on the Programme to Protect Parties to Criminal Proceedings (*Zakon o programu zaštite učesnika u krivičnom postupku*) enacted in late 2005, which regulated the Witness Protection Unit (Jedinica za zaštitu svedoka) within the Ministry of Interior. It is in charge of protecting the identity and security of witnesses testifying in war crimes trials as well as cooperating witnesses and their families. Such an institutional development enabled a smoother participation of injured parties as witnesses, and even encouraged victims' families to follow the trials in Belgrade.[130] However, over the years, non-governmental and international organizations increasingly started reporting mistreatment of protected witnesses, especially cooperating witnesses. It has been also reported that several officers of the Witness Protection Unit were former members of the notorious *Red Berets* special police unit,[131] which participated in a range of war crimes as well as the assassination of Prime Minister Zoran Đinđić. Therefore, those in charge of protecting witnesses-insiders were precisely those who could be incriminated by due process. Some witnesses claimed that members of this Unit were intimidating them and their families, instead of providing support.[132] As a result, some protected witnesses grew reluctant to provide information, abruptly changed or withdrew their testimonies.

While the Office of the War Crimes Prosecutor faced serious obstacles, over time it was criticised even by the strongest supporters of domestic war crimes prosecution. The most important point of criticism was that the Prosecutor avoided indicting middle or high-ranking military and police commanders, focusing on direct perpetrators. This is especially apparent in case of crimes committed by Serbian forces against Kosovo Albanians, where indictments were

129 B. Ivanišević, 'Uprkos okolnostima – Krivični postupci za ratne zločine u Srbiji,' Belgrade 2007, 21.

130 *Tranziciona pravda u postjugoslovenskim zemljama: Izveštaj za 2009*. godinu, Beograd, Zagreb (Fond za humanitarno pravo, BIRN, Documenta), 13, available at: http://www.hlc-rdc.org/?p=13826.

131 J.-C. Gardetto, *Report to the Council of Europe: The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, 23–4, available at: http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf.

132 *Tranziciona pravda u post-jugoslovenskim zemljama*: *Izveštaj za 2010–2011. godinu*, 58, available at: http://www.hlc-rdc.org/wp-content/uploads/2013/03/Tranziciona-pravda-u-postjugoslovenskim-zemljama-izve%C5%A1taj-za-2010-2011.pdf.

"exclusively aimed at direct perpetrators and their immediate superiors, leaving out senior officials who, in the chain of command, stood between these indictees [...] and those persons who occupied senior positions in the government of Serbia, whom the ICTY has already convicted for crimes [...] committed as part of a joint criminal enterprise."[133] It is indicative that the Prosecutor is reluctant in applying the principle of command responsibility, which is still a hotly debated issue among local jurists.[134]

In cases relating to crimes committed in BiH, the War Crimes Prosecutor and the War Crimes Chamber/Department of the Higher Court have been criticised for taking the position that a civil war had taken place,[135] which contradicts all ICTY judgments that found that the conflict was international in nature, due to the hostile involvement of the Federal Republic of Yugoslavia.[136]

4. The Impact of the Scorpions Video

Besides the indirect influence on the establishment and work of War Crimes Chamber, the ICTY instigated one of the key war crime trials held before the domestic court – the so called *Scorpions* case.

In the course of the trial of Slobodan Milošević, there was a cross-examination of a defence witness who claimed that the authorities of the Republic of Serbia would not allow paramilitary units to freely enter BiH (from Serbia), especially if they were about to commit war crimes in BiH.[137] In order to refute the claims of Milošević and the defence witness, the ICTY Prosecutor presented a video during this questioning on 1 June 2005. The amateur VHS recording was made by a member of a semi-paramilitary unit named *Scorpions* (*Škorpioni*), which was operating under the control of the State Security Service of the Republic of Serbia. The video shows members of the unit taking a group of six males captive and executing them in a secluded thicket. As was later established, the men were Bosniak civilians (two of them underage) who were trying to flee from the

133 Humanitarian Law Center, *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice: Analysis of the Prosecution of War Crimes in Serbia 2004–2013*, Belgrade 2014, 21. The ICTY Judgment mentioned here is the case *Šainović et al.* (IT-05-87).

134 *Ten Years of War Crimes Prosecutions in Serbia,* 54–56.

135 *Ten Years of War Crimes Prosecutions in Serbia,* 50.

136 J. Mihajlović Trbovc, *Public Narratives of the Past in the Framework of Transitional Justice Processes: The Case of BiH*, PhD Thesis, University of Ljubljana 2014, 139–145.

137 V. Petrović, 'A Crack in the Wall of Denial: The Scorpions Video in and out of the Courtroom', in D. Žarkov and M. Glasius (eds), *Narratives of Justice In and Out of the Courtroom: Former Yugoslavia and Beyond*, Cham 2014, 93–94.

region of Srebrenica taken over by the Army of Republika Srpska in July 1995.[138] Eventually, the video was not admitted as an exhibit in the *Milošević* trial, but it stirred public debates in Serbia regarding the responsibility for war crimes and made a strong impression on the public imagination, at least for some time.[139] Some have speculated that it was the Prosecutor's intention in the *Milošević* trial to provoke public reactions in Serbia rather than to support his case with tangible evidence.[140]

The Belgrade-based non-governmental organisation "Humanitarian Law Center" had obtained the same video months before its public screening.[141] In February 2005, the president of the Humanitarian Law Centre, Nataša Kandić, first showed the tape to the Serbian war crimes prosecutor, Vladimir Vukčević, and then officially handed it over in May 2005[142] in the presence of the head of the police war crimes investigation in Serbia and the legal advisor to the US embassy.[143] Ms. Kandić also handed over information about *Scorpions* members she had collected thus far, and requested the police to start an investigation. She stated that she expected police and prosecution to arrest the members of the *Scorpions* unit within 10 days, after which she would make the video public.[144] However, the institutions failed to act, and Kandić grew impatient.

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138 The systematic execution of Bosniak male population in the region of Srebrenica conducted by the forces of Bosnian Serbs in July 1995 was esteemed as act of genocide by the ICTY. See ICTY, Press Release: Radislav Krstic Becomes the First Person to Be Convicted of Genocide at the ICTY and Is Sentenced to 46 Years Imprisonment (2 August 2001), http://www.icty.org/sid/7964. ICTY, Press Release: Appeals Chamber Judgement in the Case the Prosecutor v. Radislav Krstić (19 April 2004), http://www.icty.org/sid/8434.

139 Gordy, *Guilt, Responsibility, and Denial,* 124–144.

140 See emphases in quotations of the prosecutor Geoffrey Nice, in Petrović, *A Crack in the Wall of Denial,* 94, 97.

141 The war-time member of the *Scorpions*, who filmed the activities of the unit, wanted to barter the original videotape in order to get protection for himself and his family. He handed over the tape to the Humanitarian Law Centre knowing their close cooperation with the ICTY. See N. Kandić, 'Uvod', in Fond za humanitarno pravo, *Škorpioni od zločina do pravde*, Beograd 2007, 7.

142 Kandić handed over the videotape only after the tape owner was guaranteed protected status. See Kandić, *Uvod,* 7.

143 Petrović, *A Crack in the Wall of Denial,* 98.

144 Kandić, *Uvod,* 8.

About the same time when Kandić was planning to publicise the video, it was presented at the ICTY. She immediately sent the integral video to the local television station B92, and that evening it was broadcast on televisions across Serbia and in the region. Straight away, a rapid police action ensued in which several former members of the *Scorpions* were arrested.[145] Later that year, in December 2005, the trial against the *Scorpions* started before the special War Crimes Chamber of the Belgrade court.[146]

Therefore, though the Office of the War Crimes Prosecutor had insight into the so-called *Scorpions video* almost four months prior to its public broadcasting, and though the Humanitarian Law Centre provided the Police with ample evidence about individuals three weeks before, the arrests came only *after* the video was screened at the ICTY (which immediately made it public). One might speculate about the extent to which actions of the ICTY Prosecutor were informed by the interaction of Nataša Kandić with the heads of war crime investigation and prosecution in Serbia. Nevertheless, unintentionally or not, the acts of the ICTY Prosecutor triggered Serbian institutions to act towards sanctioning war crime perpetrators at a time when they were not ready to dutifully act on their own.

5. Domestic Change in Serbia

The aim of this chapter was to examine institutional reforms in Serbia that took place under the influence of the Tribunal. The first task was to map the institutional changes that would not have taken place had the Tribunal never been founded. The second task was to evaluate to what extent the Tribunal as an institution had triggered those reforms. One could note that none of the institutional changes were explicitly demanded by the ICTY or its Chief Prosecutor. However, two laws implicitly resulted from the Tribunal's expectations from the reference countries – to cooperate and to be able to take over cases transferred from the ICTY. On the basis of these two laws – the Law on cooperation with the ICTY and the Law on prosecution of war crimes – new institutions were established. Most of them were intended by the ICTY, but some of the institutional mechanisms

145 D. Anastasijević, "Šokantni snimak iz Trnova samo je deo tužne priče o ulozi Srbije u ratu u kome nije učestvovala", *Vreme*, 9.06.2005, http://www.vreme.com/cms/view.php?id=418240.

146 The important transcripts of the trial, as well as the indictment and judgment are published in *Škorpioni od zločina do pravde*.

(and budgetary allocations) were unintended or even unwanted. Specifically, one institution was created to counteract the work of Tribunal – the failed Truth and Reconciliation Commission.

The ICTY surely expected cooperation, but it did not require the adoption of a specific lawto regulate cooperation and regarded local politicians' insistence on such a law as an obstruction. It was international pressure that actually pushed local politicians to enact such a law. Though the law did create intended institutional changes that formally enabled the arrest and transfer of those indicted, the responsible institutions proved idle in acting on their own. It was the stick-and-carrot mechanism of US and EU conditionality which pushed them to arrest and transfer fugitives to The Hague. Along the way, the process of achieving compliance became distorted and started producing effects unwanted by the ICTY and the international community. Those who voluntary surrendered were given financial support and were deemed martyrs for national interests – precisely the opposite of the ICTY's intention to individualise guilt. By the same token, though the law on cooperation allowed the ICTY Prosecution to investigate and attain documents in Serbia, the institution created to enable access to the archives – the National Council for the Cooperation with the ICTY – often disabled smooth cooperation.

The ICTY Completion Strategy required adequate legislation on domestic war crimes prosecution. While the ICTY Office of the Prosecution estimated that the existing legislation and case law were beneath the satisfactory standards, it had no leverage on previous or future war crime judiciary in Serbia. Involvement of the US and international organizations was decisive for the enactment of the Law on war crimes prosecution. If there had been no such foreign initiative, a likely scenario could have been that the ICTY would have simply transferred all the lower level cases to BiH, where it was involved hands-on in local institution building. Where the ICTY directly intervened were amendments to the law, which fully enabled the transfer of cases to the domestic judiciary. Furthermore, the Tribunal significantly helped in raising capacities and competencies of the newly established institutions – the Office of the War Crimes Prosecutor and the so-called Special Court for war crimes – making them more sustainable. Finally, the case of the *Scorpions* video may be an example of the ICTY prosecutor triggering Serbian institutions to apply legislation they were reluctant to employ as of themselves.

There are many reasons why the impact of the Tribunal on institutional change in Serbia was so limited. Compared to other ex-Yugoslav countries, the ICTY was consistently the least popular in Serbia, where it was largely perceived as a political court with strong anti-Serb bias. Congruently with such

popular opinion, none of the dominant political parties expressed open support for the Tribunal. Therefore, there was neither a bottom-up nor a top-down incentive to carry out reforms according to the ICTY's expectations. The crucial incentives were financial and political gains offered through the mechanism of conditionality.

Vjeran Pavlaković

The ICTY and Institutional Reform in Croatia

1. The Croatian War of Independence and War Crimes (1991–1995)

The decision to establish a war crimes tribunal for the conflict in the former Yugoslavia was made while the war in BiH was still raging and a third of Croatia was under occupation by Serbian forces. The causes of socialist Yugoslavia's dissolution are far too complex and beyond the scope of this chapter, even though many victims and individuals involved in dealing with the past in the region have expected international tribunals to provide answers as to why the country spiraled into such horrific violence.[1] A complex balance of power between ethnic groups and the political leaderships of the country's six republics and two autonomous regions was achieved by Josip Broz Tito, the former leader of the Partisan resistance movement during the Second World War and subsequently president for life. The collective memory of the mutual atrocities committed during that war, in particular between Serbs, Croats, and Bosnian Muslims, was suppressed by the communist regime's official narrative of "brotherhood and unity." Yet the so-called national question was never truly resolved, and ethnic tensions simmered below the surface of what appeared to be a successful multiethnic state balanced between both the West and the East during the Cold War.

The decade after Tito's death in 1980 was characterized by economic crises and the rise of nationalist politicians who challenged the stagnant communist establishment. Serbian leader Slobodan Milošević's rise to power on a nationalist wave in the late 1980s (precipitated by growing Serb-Albanian tensions in Kosovo) provoked reactions in Yugoslavia's most developed republics, Croatia and Slovenia, which wanted to draw closer to the Western European democracies and establish a looser federation. While other East European countries

1 Numerous books have been published in English about the wars in the former Yugoslavia over the last two decades, and some of the most relevant to the events in Croatia include M. Tanner, *Croatia: A Nation Forged in War*, 3rd ed., New Haven 2010; I. Goldstein, *Croatia: A History*, Montreal 1999); S. P. Ramet, K. Clewing, and R. Lukić (eds.), *Croatia since Independence: War, Politics, Society, Foreign Relations*, Munich 2008; and J. Glaurdić, *The Hour of Europe: Western Powers and the Breakup of Yugoslavia*, New Haven 2011.

transitioned to democracy through a generally peaceful process (with the exception of Romania), Yugoslavia's first multiparty elections since the 1940s pushed it to the brink of war. Nationalists on all sides harnessed the mobilizing powers of suppressed memories from the Second World War as a way to demonize the "Other" and to justify creating paramilitary defence units. Milošević's propaganda machine instilled fear into Croatian Serbs that an independent Croatia would result in a new genocide akin to that of the Second World War, while Croatia's newly elected president, Franjo Tuđman, did little to assuage those fears in the fervent nationalist atmosphere taking hold in the country. Although the situation between Serbs and Croats had become tense in Croatia during the so-called "Log Revolution" (*balvan revolucija*)[2] in August 1990, full-scale violence erupted in the spring of 1991, escalated during the summer after Croatia declared independence on 25 June, and culminated in November with the siege and eventual fall of the town of Vukovar in Eastern Slavonia. Rebel Croatian Serbs, backed by paramilitaries from Serbia and BiH and openly supported by the Serb-dominated Yugoslav People's Army, created the Republika Srpska Krajina (RSK) carved from about 30 % of Croatia's internationally recognized territory. In addition to attacks against Croatian police and fledging military forces, Serb units expelled tens of thousands of non-Serbs from the territories they controlled and committed numerous atrocities against the civilian population. According to the judgment by the International Court of Justice on Croatia's case against Serbia, genocidal acts had been committed against non-Serbs in the regions of Eastern Slavonia, Banija/Banovina, Lika, Western Slavonia, Kordun, and Dalmatia, even though the court rejected Croatia's claim (and Serbia's counter-claim) that there had existed the intent to commit genocide.[3] Croatia's War of Independence (referred to as the Homeland War, *Domovinski rat*, in

2 The notion of "log revolution" comes from wooden logs, which the authorities of the self-proclaimed Serb Entity "Kninska Krajina" ordered to be placed on roads, in order to cut off Dalmatia from the rest of Croatia.

3 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February 2015, available at http://www.icj-cij.org/docket/files/118/18422.pdf. Furthermore, the ICTY Trial Chamber in the case of Milan Martić, the former president of the RSK, concluded that the leaders of the RSK constituted a joint criminal enterprise that had as its goal "the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population." Trial Judgment of Milan Martić (IT-95-11-T), 12 June 2007, p. 160, available at http://www.icty.org/x/cases/martic/tjug/en/070612.pdf.

Croatia) would last another four years and result in approximately 20,000 deaths and hundreds of thousands of displaced persons.

In addition to the nearly complete destruction of Vukovar (and the murder of around 260 wounded soldiers and civilians at the Ovčara farm) and the shelling of Dubrovnik (images which shocked the European public), Serb forces launched artillery strikes on many other Croatian towns and cities, and committed atrocities against civilians in the second half of 1991 in places such as Baćin, Škabrnja, Široka Kula, Saborsko, Lovas, Dalj, and Voćin. Although not undertaken in such a systematic manner, Croatian armed forces and police were involved in disappearances and revenge killings of Serb civilians in Sisak, Osijek, Pakrac, Paulin Dvor, Gospić, and even in Zagreb, the most notorious being the murder of 12-year old Aleksandra Zec and her family. The fact that the crimes committed by the Serbian side greatly outweighed those perpetrated by Croatian units enabled Croatia to gain the support of the international community in its successful bid for recognition, but the failure of the government to adequately address these crimes tarnished Croatia's image for many years. In fact, it was only due to the courage of independent reporters and human rights activists that many of the Croatian crimes were even reported or eventually investigated.

The early strategy of the EU and the UN in dealing with the conflict had been based on accommodation of the warring factions, rather than one which had justice at its core. Indeed, apparently some members of the international community were even prepared to give amnesty to those suspected of crimes against humanity in return for a cessation of hostilities.[4] The Croatian government, seeking to portray Croatia as the victim of Serbian aggression, appealed to the United Nations already in the fall of 1991 to establish an international tribunal. Although this initial call did not yield any concrete results regarding a tribunal, the victimization strategy did contribute to Croatia's international recognition in early 1992. It was the neighbouring war in BiH (1992–1995) that prompted the UN to actually establish an ad hoc international tribunal. On 25 May 1993, the Security Council adopted the Statute of the Yugoslav Tribunal (UN Resolution 827), although due to an initial lack of funding, the International Criminal Tribunal for the former Yugoslavia (ICTY) did little to either stop the fighting

4 For example, see the critique of David Owen and Cyrus Vance's proposal in R. Williams and M. P. Scharf, *Peace with Justice: War Crimes and Accountability in the former Yugoslavia*, Lanham 2002, 96–98. Peskin also discusses the fears that Milošević, Karadžić, and Mladić might be offered amnesties in the years prior to the Dayton Accords. V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge 2008, 39, 42–43.

or punish the perpetrators of various war crimes. While an uneasy peace monitored by UN peacekeepers was implemented in Croatia in the course of 1992, Croatian forces increasingly became involved in the fighting which exploded in BiH despite Tuđman's official statements denying support for the separatist Herceg-Bosna project by certain factions of BiH's Croat population. Eventually Croatian and Bosnian Muslim forces united to bring the Serbs to the negotiating table at Dayton, but the atrocities committed during the course of the Croat-Muslim conflict severely tarnished Croatia's international image exclusively as a victim.

In September 1993, Croatia launched an attack on the Medak Pocket near Gospić, resulting in the death of several dozen Serb civilians and a scorched earth policy after Croatian forces were pressured to pull back by international peace keepers. This operation resulted in an ICTY indictment against Mirko Norac and Rahim Ademi, but the case was the first (and only) one to be transferred to Croatian courts in November 2005 under Rule 11bis (the trial lasted from June 2007 until May 2008).[5] After media coverage of the destruction in the Medak Pocket brought criticism against Croatia for using "ethnic cleansing," Tuđman failed to use the opportunity to condemn attacks against Serb civilians. Despite the evidence of atrocities, he did little to punish those involved in the Medak Pocket operation beyond dismissing or reassigning several officers. Concerning Tuđman's accountability for the war crimes committed around Gospić, lawyer Ante Nobilo stated

> that we are never going to find any of his orders to commit war crimes. Nor are we going to find political proclamations in that sense. But when Tuđman did not punish the first war crimes…it was a signal to everyone who wanted to behave in that fashion. Unpunished crimes stimulate new crimes.[6]

Throughout 1994 and early 1995, Croatian armed forces carried out several smaller operations in Croatia and Western Herzegovina, and received training from retired U.S. officers working for Military Professional Resources Incorporated (MPRI).[7] As it became increasingly clear that the Croatian Serb

5 See Ademi and Norac (IT-04-78), http://www.icty.org/case/ademi/4. General Janko Bobetko was also indicted for the Medak Pocket operation in 2002, but the case was terminated after his death in 2003. Bobetko (IT-02-62), http://www.icty.org/case/bobetko/4.

6 *Jutarnji list*, 28 September 2002.

7 The exact role of MPRI, which received Pentagon approval to begin working with the HV in early 1995, remains subject to debate. Its spokesmen have denied any "role in planning, monitoring, or assisting in Operation Storm," in order to distance themselves from any possible association with the war crimes committed in the course of that

leadership was unwilling to accept any kind of negotiated settlement that would reincorporate the Republika Srpska Krajina back into Croatia, even with the guarantees of broad autonomy under the so-called Z-4 plan,[8] Tuđman decided that the military option was the only way to reassert control over Croatia's internationally recognized territory. In May 1995, Operation Flash (*Bljesak*) recaptured Western Slavonia, followed by the much bigger Operation Storm (*Oluja*) in August 1995. Militarily both offensives were complete successes, breaking rebel Serb resistance in only a few days. Croatia's victories were sullied by the subsequent expulsion of the Krajina Serbs (estimated at 150,000–200,000 people), widespread looting, the destruction of housing stock and other buildings, and the murder of several hundred civilians in the four months after hostilities ended.[9] Operation Storm thus became the keystone of the heroic narrative of Croatia's War of Independence as well as the country's greatest obstacle to Euro-Atlantic integration. Even though the Croatian government had prepared plans for a military operation in Eastern Slavonia, the overwhelming success of the Croatian Army, Milošević's indifference to the situation of Serbs in Croatia, and the changing international balance of power convinced both sides to negotiate a peaceful reintegration of the remaining occupied territories (the Erdut Agreement), which was completed in 1998.

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action. *New York Times*, 13 October 2002. Sociologist Ozren Žunec, who has written extensively on the Homeland War, however, argues that MPRI had been present for years in Croatia (the organization had initially sent its employees as border monitors to Croatia as early as 1991) and that "in one way or another, MPRI was involved in many functions of the structure of the Croatian Army." O. Žunec, "Rasprava," in B. Magaš and I. Žanić (eds.), *Rat u Hrvatskoj i Bosni i Hercegovini, 1991–1995*, Zagreb 1999, 143.

8 The Z-4 plan was conceived in late 1994 by the American and Russian ambassadors in Zagreb, Peter Galbraith and Leonid Kerestedjiants, as a way to reincorporate the RSK into Croatia but guaranteeing broad autonomy to the Croatian Serb population. Although Tuđman grudgingly accepted it as the basis for negotiations with the RSK leadership, the latter rejected it even in the summer of 1995 when it was clear that Croatia was preparing a vast military operation to retake Serbian occupied parts of the country.

9 For a detailed report on the violations of Human Rights in the first 100 days after Operation Storm, see *Military Operation "Storm" and Its Aftermath* (Zagreb: Hrvatski helsinški odbor za ljudska prava, 2001). A pdf of the report is available at http://snv.hr/oluja-u-haagu/media/sg1/sg1-04-vojna-operacija-oluja-en.pdf. The various estimates of killed Serb civilians include 410 (Human Rights Watch), 681 (Croatian Helsinki Committee), and 1,205 (Veritas). *Večernji list*, 6 August 2015.

2. The ICTY and Croatia: A Troubled Relationship

With the end of the war in 1995 and the successful implementation of the Erdut Agreement in 1998, Croatia achieved its strategic goals of independence and complete control over its territory. The legacy of the war would determine Croatia's international position for the next two decades. Croatia's ambitions of membership in NATO and the European Union were subject not only to the political and economic criteria applied to earlier candidates, but included the rigorous monitoring of the Human Rights situation, judicial reform, protection of minority rights, and especially full cooperation with the international tribunal the country itself had lobbied to create. Although subsequent developments in Croatian politics have shown that de facto the war is not yet over (but merely conducted through other means), and that interpretations of the conflict remain incredibly polarizing and divisive, Croatia's often difficult relations with the ICTY did come to a close as far as indictees from Croatia are concerned.[10] The case against General Ante Gotovina for alleged crimes committed during Operation Storm overshadowed Croatia's bid for membership in the European Union (accession took place on 1 July 2013) and dominated domestic politics for over a decade.

While there is little doubt that the ICTY deeply affected Croatian domestic and international politics for nearly twenty years, did the criminal tribunal truly affect the country's institutions? After sifting through the vast amounts of material written about the ICTY in the Croatian media and looking beyond the political balancing act between displaying patriotism and complying with the demands of the ICTY's prosecution, what remains of the tribunal's lofty goals? In addition to establishing the historical record, contributing to reconciliation, deterring future violence, and holding political and military leaders accountable, one of the goals was strengthening the rule of law in the former Yugoslavia, perhaps the most palpable intent to affect institutional change. The acquittal of high-ranking suspects from Croatia and Serbia (Momčilo Perišić, Franko Simatović, and Jovica Stanišić), the debacle surrounding the early release of Vojislav Šešelj, and a general increase in nationalist tensions in the region has resulted in considerable criticism of the ICTY in Yugoslav successor states as well as from scholars working on transitional justice issues.[11] Nevertheless,

10 Six Croats from BiH are still awaiting the appeals judgment after they were initially sentenced cumulatively to over 100 years in prison. For information on the Prlić et al case, see: http://www.icty.org/cases/party/770/4.

11 For an assessment of the ICTY's record see, among others: K. Bachmann, A. Fatić, *The UN international criminal tribunals. Transition without Justice?*, New York, London

part of the legacy of the ICTY is certainly the impressive amount of material collected in the tribunal's archive and its contribution to international criminal justice, particularly the International Criminal Court (ICC). The direct institutional impact on Croatia is more difficult to identify and probably much less than many supporters of the tribunal hoped for, even though generally speaking the outcomes of the completed trials can be considered to have been favourable for Croatia.

Three important factors influence how the ICTY has impacted Croatia over the last twenty years, which differentiate it from the countries being studied in this publication. Firstly, Croatia definitely emerged victorious from the wars of the 1990s with all of its territory intact after the military operations in 1995 and peaceful reintegration of the remaining occupied areas in 1998. Serbia, BiH, and Kosovo all continue to have ongoing territorial and status issues, which affect domestic politics as well as relations with their neighbours. Secondly, after a long accession process in which cooperation with the ICTY and reform of the judiciary were key criteria, Croatia became a member of the European Union. While many Croatian supporters of the ICTY had long argued that cooperation with the tribunal was necessary to be recognized as truly European, after accession many of the mechanisms previously used to enforce compliance on war crimes issues disappeared, and further judicial reforms or investigation of perpetrators in numerous cases are no longer on the agenda.[12] Furthermore, after Croatia became an EU member, a broad spectrum of international NGOs, civil society organizations, transitional justice associations, and similar groups which had long been monitoring the country's willingness to fulfil its obligations closed their offices and refocused on other ex-Yugoslav countries or left the region completely. Finally, no Croats from Croatia were found guilty by the ICTY. Ante Gotovina, Mladen Markač, and Ivan Čermak (Operation Storm) were acquitted, Rahim Ademi and Mirko Norac (Medak Pocket) were tried in Croatia, and Janko Bobetko (Medak Pocket) died before a trial could begin. Nevertheless, there was for many years a sentiment that the ICTY was anti-Croat, and thus each government found cooperation with the tribunal needed to be balanced with occasional resistance.

2015 and B. Swart, A. Zahar, G. Sluiter (eds), *The legacy of the International Criminal Tribunal for the former Yugoslavia*, Oxford, New York 2011.

12 J. Subotić, "Europe is a State of Mind: Identity and Europeanization in the Balkans,", *International Studies Quarterly*, vol. 55 (2011), 309–330; C. K. Lamont, *International Criminal Justice and the Politics of Compliance* Farnham and Burlington 2010; and Peskin, *International Justice,* passim.

Ultimately, this chapter argues that the potential for institutional impact far outweighed the actual impact in Croatia. The politicization of the Gotovina case, especially when he was in hiding from the tribunal from 2001–2005, drained the resources of the state, damaged international relations, radicalized domestic politics, and hampered the implementation of the institutional changes which could have enabled a more systematic prosecution of the actual perpetrators rather than obsession about the spectacle of Gotovina. The ICTY did affect Croatian institutions, but there are numerous examples of where the impact could have had an even greater potential to, as Gotovina stated upon his release, let "the war become part of history and turn the country towards the future."[13] The ongoing stagnation regarding the establishment of a regional truth and reconciliation commission (the RECOM initiative) reveals that the potential of the ICTY's institutional impact is still hampered by both domestic politics and shifting relations between the various Yugoslav successor states.

3. The Tuđman Era (1996–1999)

As seen above, Croatia had emerged from the war as both an internationally recognized victim as well as a victor on the battlefield. The prevalent perception of the War of Independence as an exclusively defensive war with only Croats as victims, combined with the post-war victory euphoria, made it particularly difficult to openly recognize the crimes committed by Croatian forces. It is within this context that there was strong Croatian support for an international court that would investigate crimes against humanity and breaches of the laws of war. At the time of the tribunal's creation, Tuđman and his associates believed that it would be used to pursue the Serbian side exclusively, or at most Croatian-backed forces in BiH, and not crimes that were committed by the Croatian Army.[14] On 19 April 1996, following international pressure, the Croatian *Sabor* (parliament) enacted the Constitutional Law for Cooperation of the Republic of Croatia with the ICTY, recognizing the court's jurisdiction over crimes committed in

13 Novi List, 17.11.2012, 6.

14 The HDZ has justified its decision to pass the law of cooperation with The Hague by claiming that it expected the tribunal to punish the "aggressors" and not become "politicized in order to find some kind of balance of guilt among the countries of the former Yugoslavia." *Vjesnik*, 22 May 2003, p. 12. Sanader admitted that in the 1990s "no one thought that The Hague would issue indictments against Croats." *Vjesnik*, 10 March 2004. For a summary of the Tuđman regime's position on The Hague in 1996, see also *Vjesnik*, 14 March 2004 and *Vjesnik*, 16 March 2004.

the former Yugoslavia since 1991.[15] According to Victor Peskin, Tuđman's party, the Croatian Democratic Union (HDZ – *Hrvatska Demokratska Zajednica*), was internally divided between those who pushed for greater cooperation and hard-liners who wanted to challenge the tribunal's investigation of Croats.[16] Right-wing critics of the ICTY still cite this law as a big mistake because it

> opened a huge hole in the sovereignty of the Croatian state. Jurisdiction for determining the legal aspects of the truth about Serbian armed aggression and the Croatian Homeland War, as well as the Croatian state, was ceded to an international court.[17]

This law would form the foundation for all future relations between the tribunal and Croatian authorities, whose degree of cooperation varied over the following years depending on the domestic political situation. It obligated Croatian officials to provide complete access to documents and regulated witness testimony, such as former president Stjepan Mesić's statements on Croatian involvement in BiH given in 1998, but Tuđman's defiance of the tribunal exposed the limits of what the ICTY could wrest out of Croatia even with a domestic cooperation law.

Croatia's implementation of this law established the framework for all future legislation dealing with cooperation with the International Criminal Court (Croatia signed the Rome Statute in 1998 and ratified it in 2001). As former President Ivo Josipović noted in his analysis of the implementation of international criminal law in Croatia, the Constitutional Law enabled full cooperation of the Republic of Croatia with the ICTY at the legal level. On the basis of this Law, the Republic of Croatia has realized all forms of cooperation. The problems that have arisen in this cooperation have not been of a legal but rather

15 The Constitutional Law on the Cooperation of the Republic of Croatia with the International Criminal Tribunal, in *Narodne novine* no. 32/96, available at http://narodne-novine.nn.hr/clanci/sluzbeni/264344.html. There were several associated legislative acts, including: Decree on the Office for the Cooperation with the International Court of Justice and the International Criminal Tribunal (*Narodne novine*, nos. 61/1996, 131/1997, 89/1999, and 29/2000); the Decision on the Establishment of the War Crime Committee (*Narodne novine* no. 103/96); and the Decision on the Monitoring of Croatia with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committee on the Territory of the Former Yugoslavia since 1991 (*Narodne novine* no. 28/1995).

16 Peskin, *International Justice*, 108–109.

17 Josip Jurčević, "Zašto nam treba registrar agresora," *Vijenac* 9 July 2015.

of a political nature. When they were eliminated at the political level, the cooperation continued smoothly.[18]

While the ICTY initially focused most of its attention on the war crimes committed in BiH, its investigators soon began looking into incidents involving Croatian forces. Although Tuđman was reluctant to have the ICTY investigating any crimes committed by the Croatian side, he was particularly opposed to the Tribunal's probe into Operation Storm. Prior to 2000, Croatia facilitated the transfer Bosnian Croats to the Tribunal (twelve of them), and even prevented officers such as General Ante Gotovina (who was indicted in 2001) from meeting with ICTY investigators. According to an interview with Gotovina published by the magazine *Nacional* in June 2003 (while he was still in hiding), he had never been informed of the requests from the Prosecutor's Office sent to the Croatian government on 9 April and 6 May 1998.[19] The foreign minister at the time, Mate Granić, claims that the resistance to full cooperation with The Hague came from the intelligence community, the ministry of defence, and from Tuđman's close advisers, who refused to let ICTY investigators communicate with Gotovina, even though Granić himself believed that it was impossible to deny the ICTY's jurisdiction over Operation Storm.[20]

Tuđman's defiance of the tribunal was embodied in the "Resolution on Cooperation with the International Criminal Court in The Hague" passed by the *Sabor* on 5 March 1999. Although on the surface this resolution appears to emphasize Croatia's commitment to cooperate with the ICTY, it contains one passage declaring that Operations Flash and Storm were outside of the jurisdiction of the international tribunal. Article 5 of this resolution stated that

> the Croatian Parliament condemns the politicization of the ICTY's activities and rejects the uncontrolled public declarations by the representatives of the Prosecution regarding

18 I. Josipović, 'Implementation of the International Criminal Law in the National Legal System and the Liability for War Crimes,' in: Ivo Josipović (ed.), *Responsibility for War Crimes: Croatian Perspective – Selected Issues*, Zagreb 2005, 189.

19 *Nacional*, 10 June 1998. The Croatian government also ignored a request from 25 August 1998 to send documents to the ICTY related to Operations Flash and Storm, which Račan finally did on 13 September 2000.

20 *Nacional*, 10 June 1998. According to Granić's report to the parliament, the individuals who sought to challenge the Tribunal's jurisdiction included Gojko Šušak (minister of defence), Ljerka Mintas Hodak (minister of European integration), Ivić Pašalić (Tuđman's main adviser for internal affairs), Markica Rebić (Tuđman's adviser for national security), Miroslav Tuđman (head of national security), and Zvonimir Šeparović (minister of justice).

> the military-police actions Flash and Storm. Based on the indisputable legitimacy of the counter-terrorist actions on its own territory, the Croatian Parliament considers that any individual criminal acts that had possibly been committed are exclusively a matter for the Croatian judiciary.[21]

Thus, despite the 1996 constitutional law, which recognized the principle of primacy of the ICTY over domestic courts, the Tuđman administration repeatedly violated this law by attempting to deny that Operations Flash and Storm were part of an international conflict. Tuđman and his advisers were clearly aware that the accountability for the massive exodus of Croatian Serb and the murders of Serb civilians who remained in Croatia would go up the chain of command to the very top political and military echelons, including Tuđman himself.

The Croatian public, meanwhile, had been presented with a narrative of the war depicting a pure Croatian Army defeating a diabolical enemy and the civilian Serb population that had supported its criminal acts. The purity of the Croatian side was epitomized by Milan Vuković, Croatia's Chief Justice under Tuđman, who stated in an interview in *Slobodna Dalmacija* on 28 March 1995 that it was impossible for the Croatian side to have committed war crimes in a defensive war.[22] In its annual report in 1999, the ICTY castigated Croatia for its non-compliance, and even though Croatia did not suffer any direct consequences from the UN Security Council, the Tuđman regime's international image was at an all-time low.[23] The Croatian government challenged accusations that it was not punishing criminal acts by Croats, arguing that it had in fact held several thousand trials for violations committed by members of the Croatian Army. The Croatian Helsinki Committee was skeptical about the government's figures in its 1999 report on Operation Storm:

> In January 1998, the Special Envoy of the UN Secretary General, from facts obtained by the Croatian authorities, stated that "in total 5,580 cases were processed in relation to events in former Sectors North and South, of which 359 were still being investigated,

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21 The text of this resolution is at http://narodne-novine.nn.hr/clanci/sluzbeni/270239.html. The resolution lists numerous other war crimes committed against Croats and alleged perpetrators that Croatia expected the ICTY to investigate, suggesting that The Hague was mistaken in pursuing Croat military figures.

22 Quoted in *Vjesnik*, 15 March 2004 In a 2011 survey conducted by IPSOS Puls as part of the Strategies of Symbolic Nation-building in Southeastern Europe project, 44.9 % out of 1,500 respondents still agreed with this statement regarding war crimes and a defensive war. The results are accessible online at https://www.ffri.hr/cultstud/index.php/istrazivanje/projekti/118-symbolic-strategies.

23 Peskin, *International Justice*, 116–117.

> 3,785 were in the initial processing stage, and rulings have been reached for 1,236 of them." These, however, are only statistics that say nothing…The superficial analysis in the aforementioned reports shows the lack of logic employed by the Croatian authorities in their failed attempt to justify their sympathy for these crimes and their perpetrators. These statistics, which are obviously fabricated in some instances, can therefore not be trusted.[24]

Subsequent analysis of the statistics supplied by the State Attorney's Office (DORH – *Državno odvjetništvno Republike Hrvatske*) indicates that over 3,700 individuals were prosecuted, of which approximately 2,400 were sentenced, mostly for arson and looting offences.[25] Fourteen individuals were found guilty of murder, but only one was convicted of war crime. In contrast, Croatian courts handed out approximately 400 guilty verdicts for war crimes committed by ethnic Serbs, with many of the defendants having been tried in absentia.[26] Throughout the 1990s, Amnesty International and Human Rights Watch issued numerous critical reports regarding the Croatian government's ambiguous position on fully investigating all war crimes.[27]

The pressure on Croatia increased in the summer of 1999 when the Tuđman administration not only refused to hand over documents and information related to Operation Storm, but delayed the transfer of two Bosnian Croats (Vinko Martinović "Štela" and Mladen Naletilić "Tuta") who were being held in Zagreb. At this stage, the stick available to the Prosecutor's Office was in the form of sanctions, which would potentially be imposed by the UN Security Council if Croatia was found to be non-compliant. On 19 July 1999, Chief Prosecutor Louise Arbour visited Zagreb and insisted that Croatia needed to hand over documents related to the Medak Pocket as well as Operation Storm otherwise she would report Croatia's non-compliance to the UN. According to her, the Croatian Minister of Justice Zvonimir Šeparović had referred to the 5 March Resolution as proof of the Croatian government 's cooperation. But she added:

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24 *Military Operation "Storm"*, p. 235.

25 M. Sjekavica, 'Procesuiranje zločina počinjena tijekom VRA Oluja I nakon nje,' in: M. Dubljević,(ed.), *Procesuiranje ratnih zlocina – Jamstvo procesa suočavanja s prošlošću u Hrvatskoj*, Zagreb 2014), 212.

26 *Jutarnji list*, 27 March 2003, 17.

27 See "Impunity for Killings After Storm" (1 August 1998) available at: web.amnesty.org/library/index/ENGEUR640041998; and "Impunity for Abuses Committed During Operation Storm" (August 1996) at www.hrw.org/reports/pdfs/c/croatia/croatia968.pdf. In March 1999, the *New York Times* published an article describing Tuđman's growing authoritarianism and suspicions that he was going to be indicted by the Tribunal. *New York Times*, 3 March 1999.

> The Government re-stated its position that my Office does not have jurisdiction to investigate crimes related to Operation Storm – on the basis that the Operation Storm action did not amount to an armed conflict. In legal terms, this argument is identical to the one presented by the FRY [Federal Republic of Yugoslavia] over Kosovo this year…It cannot be simply asserted unilaterally by Croatia as an argument to defeat my investigative requests. This has been made clear by the decision of the President of the Tribunal to report to the Security Council the non-compliance of the FRY in relation to my Kosovo investigations. With respect to Operation Storm, I want to make clear that the legality, the legitimacy of the Operation itself is not the issue. Even in a just war, or in a fully justified military operation, the laws of war must be respected.[28]

Arbour also demanded the immediate transfer of Martinović and Naletilić to The Hague. Responding to questions about possible sanctions, Šeparović told the media that "we are the only country fully cooperating with The Hague, we changed our Constitution so we could extradite our citizens, our people are testifying at the ICTY (…)."[29] Regarding Operation Storm, he briefly mentioned that "if crimes were committed, and we know there were, after [Operation] Storm, those are not for The Hague."[30] A week later Šeparović again rejected sending "any documents which could endanger national security," emphasizing again that "Operation Storm was not an international conflict, but, as is well-known and recognized, a military-police action of liberation which restored sovereignty over Croatian territory…we will not allow that to be delegitimized."[31] Despite the unwillingness to budge on Operation Storm, Croatia did transfer Martinović on 9 August and promised to send Naletilić as soon as his health improved (he was eventually sent to The Hague on 21 March 2000).

Tuđman's tactics of claiming that Croatia was cooperating with the ICTY as prescribed by the Constitutional Law by handing over lower-level Bosnian Croats while obstructing investigation into the Homeland War worked, since Croatia was able to avoid economic sanctions. The ICTY was hesitant in pressuring Croatia too much since it had transferred a dozen Bosnian Croat suspects at a time when the Tribunal was not having much success arresting war criminals,

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28 Statement by Justice Louise Arbour, 20 July 1999, available at http://www.icty.org/sid/7748.

29 *Slobodna Dalmacija*, 20 July 1999, http://arhiv.slobodnadalmacija.hr/19990720/bih.htm.

30 *Slobodna Dalmacija*, 20 July 1999, http://arhiv.slobodnadalmacija.hr/19990720/bih.htm.

31 Croatian television station HRT, 29 July 1999, www.hrt.hr/arhiv/99/07/29/HRT0040.html.

and it was known that Tuđman was dying from stomach cancer.[32] Nevertheless, on 25 August 1999, the President of the Tribunal, Gabrielle Kirk McDonald, reported to the UN Security Council that Croatia was not cooperating with the ICTY, specifically noting "the refusal of the Republic of Croatia to accept the Tribunal's jurisdiction over crimes allegedly committed during and in the aftermath of Operation Storm and Operation Flash, and its subsequent refusal to provide the Prosecutor with information in relation to these operations."[33]

Immediately after the report to the Security Council, the Croatian government held a meeting and issued a response to the accusations that it was not complying with sending documents, transferring suspects, and denying the Tribunal's jurisdiction over Operations Flash and Storm. The Croatian government's statement began by citing the Constitutional Law on Cooperation with the ICTY as the basis of its relationship with the Tribunal, and claimed that accusations of non-compliance "were not based on facts" due to the politicization of the Tribunal.[34] It also repeated the argument that "the Croatian government strongly believes in the just nature of these military-police operations [Flash and Storm], which were legally carried out in accordance with international law…and therefore not under the jurisdiction of The Hague Tribunal."[35] The statement mentions the Croatian strategy of continuing to legally challenge this jurisdiction by offering changes to the Tribunal's Rules of Procedure and Evidence, which was brought up in another letter by McDonald to the UN Security Council in late September when she flatly rejected this maneuver by Minister of Justice Šeparović.[36] As previously mentioned, the report on Croatia's non-compliance did not result in

32 Peskin, *International Justice,* 117–118.

33 President of the Tribunal Reports to the Security Council, 25 August 1999, available at http://www.icty.org/sid/7737.

34 The full text of the government's statement was printed in *Slobodna Dalamacija*, 27 August 1999, available at http://arhiv.slobodnadalmacija.hr/19990827/novosti.htm. Additionally, the Ministry of Justice prepared a lengthy "white paper" on The Republic of Croatia's Cooperation with the International Criminal Tribunal, which repeatedly cited the Constitutional Law as proof of Croatia's willingness to work with the ICTY. The entire document is available at http://digured.srce.hr/arhiva/1584/106779/bijela_knjiga_1999.pdf.

35 Ibid.

36 Letter from Judge McDonald to the President of the UN Security Council, 29 September 1999, available at http://www.icty.org/sid/7732. The Croatian government wanted the Chamber to come to a decision on the jurisdiction over Operations Flash and Storm, believing that the Prosecution was going beyond its mandate in demanding documents from Croatia.

actual sanctions against Croatia, but instead represented what Peskin refers to as international "shaming" to keep up the pressure without completely isolating the Tuđman regime. Compared to Serbia and BiH at this stage, Croatia was generally cooperating, and the ICTY realized that it needed some degree of assistance in the region if the Tribunal was going to be able to continue operating and processing suspects.

4. The Post-Tuđman Era and EU conditionality (2000–2013)

Tuđman's death from cancer in December 1999 resulted in a wave of change in the political landscape of Croatia. Not only did a center-left coalition led by the Social Democratic Party (*Socijaldemokratska partija Hrvatske* - SDP) take power, but voters elected a former close associate of Tuđman, Stjepan Mesić, as president, who proved to be resolute regarding the prosecution of all war crimes in addition to emphasizing Croatia's antifascist heritage after a decade of pro-fascist rehabilitation. The new government's strong commitment to Euro-Atlantic integration after years of isolation as well as a greater willingness to cooperate with the ICTY resulted in a situation where the tribunal could truly begin having an impact on Croatian institutions which had previously been lacking. By demanding full cooperation with the ICTY as one of the key conditions for EU membership, the tribunal gained unprecedented leverage over Croatia and forced reluctant elites to comply with requests considered unpopular by a majority of the population. As Christopher Lamont notes in his extensive study of international justice and compliance, "an elite consensus that favored rapid integration into Euro-Atlantic institutions allowed the EU, on the principle of conditionality, to secure Croatian compliance with ICTY orders only after internal divisions between member states were overcome, and the EU clearly articulated the linkage between cooperation with the ICTY and EU membership."[37] In 2000, Croatia opened negotiations for the Stabilization and Association Agreement (SAA), which were signed a year later and represented the first contractual relations with the EU. Croatia applied for membership in February 2003, and gained candidate status in June 2004. These developments in the accession process came at the same time as the pressure for arresting Gotovina increased, as described in more detail below.

Vesna Teršelič, the director of *Documenta* and a longtime activist monitoring war crimes trials in Croatia, confirmed in an interview that it was only through combined EU and ICTY pressure that Croatia's judiciary and other institutions

37 Lamont, *International Criminal Justice*, 57.

underwent the necessary reforms to truly deal with the legacy of war crimes committed during the 1990s.[38] Some of the main issues included the numerous trials of Serb suspects in absentia, an ethnic bias in the cases which were investigated by the State Attorney's Office, and a general atmosphere of impunity for crimes committed by Croatian forces.

Less than three months after winning elections, the new coalition government led by Ivica Račan initiated a number of policies geared towards ending Croatia's international isolation due to Tuđman's authoritarian tendencies and refusal to fully cooperate with the ICTY. The new Chief Prosecutor, Carla Del Ponte, visited Zagreb on 5 April and immediately reported that the Croatian government was much more open to cooperation, citing the transfer of Naletilić and documents related to Operation Storm.[39] A week later, on 14 April 2000, the government issued a declaration reaffirming Croatia's commitment to fulfil its obligations to the Tribunal, with one notable change from all previous declarations: Operations Flash and Storm were no longer declared to be under the exclusive jurisdiction of Croatia. Račan's government recognized the right of the Tribunal to "begin proceedings determining the responsibility of war crimes committed during and immediately after the end of the Homeland War."[40] This did not result in dramatic legal consequences since this declaration basically overturned the 1999 Declaration and merely reaffirmed the government's readiness to fully implement the 1996 Cooperation Law. The willingness of the new government to cooperate more fully gave ICTY investigators the green light to begin preparing indictments against Croatian generals for crimes committed in Croatia. Furthermore, Račan allowed the ICTY to open a liaison office in Zagreb, which also housed a branch of the Tribunal's recently formed outreach program.

Even though one of the main goals of the ICTY was to foster reconciliation and contribute to stabilization in the Yugoslav successor states, it took six years for the tribunal to establish an outreach programme, which would facilitate better communication with the target societies.[41] The Tribunal's officials had

38 The authors interview with Vesna Teršelič, Zagreb, Croatia, 29 May 2015. *Documenta* is a large Croatian NGO with a focus on transitional justice and accountability in Croatia, at the same time advocating reconciliation with societies from other former Yugoslav republics.

39 Press Statement by Carla Del Ponte, 6 April 2000, available at http://www.icty.org/sid7876.

40 The full text is available at http://narodne-novine.nn.hr/clanci/sluzbeni/2000_04_41_957.html.

41 In her statement in April 2000, Carla Del Ponte referred to "the important role being played by The Hague Tribunal in providing a basis for reconciliation" and "the healing

long operated with the belief that the trials and verdicts would speak for themselves, without taking into account that in each of the successor states reigned a perception that they were unfairly being punished by the ICTY, while the other conflict side was evading justice. The fact that the trials were held in the distant Netherlands, gave little voice to victims, that trials took years to finish, and dealt with only a select number of actual suspects meant that the people in the region were subject to media interpretations of the complex legal maneuverings taking place in the court room. Moreover, regional politicians framed cooperation (either negatively or positively, depending on the domestic political situation) with The Hague while challenging their opponents, which added to the distortion of the Tribunal's goals and accomplishments. The Zagreb field office began its outreach activities in 2000,[42] but the efforts of the staff did little to mitigate the anti-ICTY wave sparked by indictments against Croatian officers and perceptions that the center-left administration was betraying national interests and sullying the dignity of the War of Independence.

Račan's government quickly began facing numerous challenges due to the arrival of indictments for Croatian generals from The Hague. Rumours in February 2001 that Mirko Norac, a former bartender turned military hero, was to be indicted by the ICTY sparked massive protests after the government issued an arrest warrant for him after he failed to appear in court. Norac was suspected of crimes against civilians and war crimes committed in Gospić in 1991 and the Medak Pocket offensive in 1993. The public protests culminated on 11 February, when over 100,000 people (*Slobodna Dalmacija* estimated between 150,000 and 200,000)[43] gathered in Split for a demonstration under the slogan "We are all Mirko Norac,"[44] implying that the accusation against one Croatian general was in

process [that] will contribute to a lasting peace in the Balkans." Press Statement by Carla Del Ponte, 6 April 2000, available at http://www.icty.org/sid7876.

42 The law on cooperation with the ICTY was amended to include the financing of the liaison office in Zagreb, online at http://narodne-novine.nn.hr/clanci/sluzbeni/272605.html.

43 See *Slobodna Dalmacija*, 12 February 2001, online version at www.slobodnadalmacija.hr/20010212/novosti.htm; and *Vjesnik*, 12 February 2001, online version at www.vjesnik.hr/html/2001/02/12, for descriptions of the event and various estimates of the crowd size. Among the anti-government banners seen at the demonstrations was one featuring a chariot driven by Del Ponte and pulled by Račan and Mesić, under the words "Yee-hah, red rats", implying that the "communists" were being controlled by foreign interests (The Hague).

44 Zagreb graffiti artists responded with witty phrases such as "We are all Carla Del Ponte" and "I am not Mirko Norac."

fact accusing all Croats of war crimes. Although Račan was able to calm tensions by convincing the ICTY Prosecutor's Office (at the time headed by Carla Del Ponte) that Croatian courts were competent enough to prosecute the Norac case, the mobilization of the right-wing against the ICTY rattled the government and revealed the destabilizing potential of cooperation with the Tribunal. After hiding from the authorities for two weeks, Norac turned himself in, convinced that his arrest warrant was not a trick to send him to The Hague. The trial against Norac and four other defenders, known as the "Gospić group," began after numerous delays in January 2002 in Rijeka. That city was considered to be a politically neutral location after the court in Gospić had concluded that it could not guarantee a fair trial.[45] On 24 March 2003, Judge Ilka Šarić sentenced Tihomir Orešković to fifteen years in prison, Norac to twelve years, and Stjepan Grandić to ten years, the first time Croats in Croatia were given prison sentences for war crimes.[46] As mentioned earlier, the ICTY's case against Norac for the Medak Pocket operation (along with co-defendant Rahim Ademi)[47] was also transferred to Croatia in 2005. The details of that trial will be discussed below.

The remaining time of Račan's office term was characterized by indictments against two other Croatian generals: Ante Gotovina for alleged war crimes committed during Operation Storm, and Janko Bobetko for the Medak Pocket. Gotovina fled before his indictment was unsealed in June 2001, and remained in hiding until his arrest on the Canary Islands in December 2005. There is speculation that Račan allowed Gotovina to be tipped off about his imminent arrest, and his government did little to track him down since it was clear it would provoke a backlash even greater than that surrounding Norac's indictment. This strategy initially seemed to work, since the international community did not apply any significant pressure on Croatia apart from occasionally calling on the government to intensify its search for Gotovina. Most of the pressure on Croatia came from demands to hand over Bobetko, who at the time of his indictment in September 2002 was in his eighties and in poor health. As the right-wing opposition vowed

45 *Slobodna Dalmacija*, 25 March 2003, online version at www.slobodnadalmacija.hr/20030325/novosti.htm. Milan Levar, a Croat from Gospić who had spoken out about the murders of local Serbs, was assassinated by unknown individuals in August 2000 for his willingness to serve as a witness.

46 *Jutarnji list*, 25 March 2003, pp. 2–3. The two other defendants, Ivica Rožić and Milan Čanić, were found not guilty, although Rožić remained under investigation for setting mines that killed a number elderly Serb returnees.

47 Ademi voluntarily surrendered to The Hague in July 2001 and was released pending trial in early 2002.

to prevent any attempt to arrest the old general, the Račan government stalled by filing two legal briefs to the appeals chamber challenging the legality of the indictment, and then called on the ICTY to suspend the indictment because of Bobetko's health.[48] Carla Del Ponte argued there was no basis for questioning the indictments, and the appeals chamber rejected Croatia's objections. Despite the government's insistence that it was cooperating with The Hague, it was clear that the Croatian authorities were doing everything they could in order to avoid sending Bobetko to the Tribunal. The crisis came to an end on 29 April 2003 when Bobetko died without ever seeing his indictment.

Bobetko's death once again drew attention to Gotovina, and in the years 2003–2005 he was the greatest obstacle to Croatia's EU membership. The prosecution accused Gotovina, Čermak, and Markač (the proceedings were consolidated into one case) of persecutions on political, racial, and religious grounds; the deportation and forcible transfer of the Serb population in the RSK; plunder of private and public property; wanton destruction; murder; and inhuman acts and cruel treatment.[49] What was most problematic in the eyes of many Croatian opponents of the ICTY was the assumption that the three generals had formed part of a "joint criminal enterprise" (including Tuđman, Šušak, Bobetko, Zvonimir Červenko, and many other Croatian political and military leaders). The notion seemed to indicate a kind of collective responsibility for the atrocities that had taken place, which, as nationalists argued, threatened the foundation of Croatia's independence. During the trial, EU pressure continued, for example when Croatia was accused of not handing over certain documents (the so-called "artillery notebooks").[50] In the end all three generals were acquitted and Croatia became the EU's twenty-eighth member on 1 July 2013.

5. Institutional Changes and Domestic Trials

Whereas the previous sections traced Croatia's relations with the ICTY and the domestic legislation which regulated those relations, the following analysis focuses on the more permanent institutional changes affecting long-term

48 Peskin, *International Justice*, 131–135.

49 Amended joint indictment of Gotovina, Čermak, and Markač issued 17 May 2007, available at www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf.

50 The case of the artillery logbooks and the Dutch pressure on Croatia is extensively described by K. and T. Sparrow-Botero in K. Bachmann, T. Sparrow-Botero, P. Lambertz, *When Justice Meets Politics. Independence and Autonomy of Ad Hoc International Criminal Tribunals*, Frankfurt/M. Peter Lang 2013, 74.

legacies of the Tribunal, namely the impact on domestic trials for war crimes. The 1996 Law on Cooperation with the ICTY and the Declaration reaffirming the Tribunal's jurisdiction over all events in the War of Independence represented the foundation for sending suspects to The Hague, but the true impact of the ICTY would be on how Croatian society would deal with the dark legacy of war crimes after the Tribunal closed its doors.

Like the other Yugoslav successor states, Croatia initially relied upon a modified Criminal Law (*Krivični zakon Socijalističke Republike Hrvatske*) from 1977. A modified and amended version of this law code functioned during the war in Croatia, which included a maximum sentence of twenty years for war crimes.[51] This law proscribed a penalty of five to twenty years for three kinds of war crimes: crimes against civilians (Article 120), crimes against wounded and sick enemies (Article 121), and crimes against prisoners (Article 122). In 1997, the Croatian Parliament passed a new criminal law which came into effect on 1 January 1998.[52] Although new legislation was also passed in 2012 and 2015, the 1997 law and its various amendments provided the foundation for the prosecution of war crimes as well as implemented the first modifications based on international law practiced at the ICTY.

The key changes in the Croatian judiciary that enabled the investigation and prosecution of war crimes suspects after 2000 included the use of testimony and evidence from the ICTY, incorporated the concept of command responsibility into the domestic law code, and the decision to remove immunity from members of parliament (a key decision in the case against Branimir Glavaš for crimes committed in Osijek). The use of ICTY witness testimony and evidence in domestic trials was enabled through the Law on Implementing the Statute of the International Criminal Court and the Prosecution of Crimes against Humanitarian Law passed in October 2003.[53] Even though the law is intended

51 The law was renamed the Basic Criminal Law Code of the Republic of Croatia (*Osnovni krivični zakon Republike Hrvatske* – OKZ RH) in 1993. *Narodne novine* no. 31/93, http://narodne-novine.nn.hr/clanci/sluzbeni/258460.html. A list of the various criminal law codes and amendments can be found at the website of the Supreme Court of the Republic of Croatia, http://www.vsrh.hr/EasyWeb.asp?pcpid=366.

52 Kazneni zakon, *Narodne novine* no. 110/93, http://narodne-novine.nn.hr/clanci/sluzbeni/267325.html. The change in terminology from *krivično* (referring to criminal acts) to *kazneno* (referring to the punishment) reflects the language politics in Croatia after 1990 and the adoption of a Croatian variant over the Serbian one.

53 *Narodne novine* no. 175/03, http://narodne-novine.nn.hr/clanci/sluzbeni/307142.html. Article 28 states that domestic courts can draw upon established facts from international courts.

to regulate relations with the International Criminal Court (ICC),[54] Article 49 states that the use of ICC testimony in domestic trials also applies to evidence from the ICTY. One of the most important cases in which evidence gathered by the ICTY was used in a domestic trial was against Ademi and Norac, since investigators had collected a large number of testimonies of survivors from the Medak Pocket operation in anticipation of the trial being held in The Hague. After the transfer of the case to Croatia, many of these testimonies were used in the courtroom. They were often challenged not only by the defence lawyers but also the presiding judge, Marin Mrčela.[55] Other trials in which evidence was used from earlier investigations include the cases of Grubori (Gotovina trial), Baćin (Milan Martić and Milan Babić trials), Pakračka poljana, and Prokljan/Mandić (Gotovina trial). Without access to this evidence, many of these cases would have never reached the trial phase, or would have taken considerably longer to establish the facts.

An even more important change to Croatian law was with regard to command responsibility, a category which had previously been vaguely defined in the OKZ RH under Article 28 as accountability for inaction in stopping a war crime, and not just directly committing one.[56] In 2003 the Račan government attempted to push through some ambitious amendments to the KZ, including the addition of command responsibility, but the HDZ-led opposition blocked the passing of these amendments during parliamentary debate.[57] A new version of the amendments was finally passed in 2004, and included command responsibility in Article 167a (Article 167b was in relation to mercenaries), as well as the addition of crimes against humanity as a category which had previously been absent.[58] However, all of the trials dealing with crimes committed in the 1990s

54 The ICC was established in 1998 with the signing of the Rome Statute, although the court went into force in 2002. Croatia ratified the Rome Statute in May 2001.

55 In earlier testimony witnesses often referred to Croatian soldiers as "Ustashas dressed in black uniforms", while during subsequent questioning the trial witnesses spoke of the Croatian Army and admitted they were wearing standard camouflage uniforms.

56 The earlier criminal code regarding command responsibility was not clear in defining who was legally bound to prevent the consequences of violating the law, i.e. whether it was just a military commander or whether civilian superiors could also be held accountable. P. Novoselec, 'Substantive International Criminal Law in the Amendments of the Croatian Criminal Code of 15 July 2004,' in Josipović, ed., *Responsibility for War Crimes*, pp. 257–258.

57 I. Josipović, *Ratni zločini: priručnik za praćenje suđenja*, Osijek 2007, 37.

58 *Narodne novine*, 28 July 2004.

relied on the concepts of OKZ RH, because the perpetrators cannot be prosecuted retroactively on the basis of the amendments passed in 2004.[59]

It should be emphasized that these changes were implemented during a period of increased pressure from both the EU and the ICTY's Office of the Prosecutor, which was responsible for writing annual reports on the level of Croatia's cooperation. All annual EU reports included detailed assessment of Croatia's cooperation with the Tribunal, clearly showing how the two processes were intimately connected.[60] Račan's successor, Ivo Sanader, continued to provide documents to the ICTY and even facilitated the transfer of two suspects from the Gotovina case, generals Mladen Markač and Ivan Čermak, despite his earlier anti-ICTY rhetoric. In 2005, however, Croatia's path to the EU became seriously endangered since Gotovina remained on the lam and the government seemed unwilling to make an effort in tracking him down. The adoption of laws on cooperation with the ICTY and changes to the judiciary were a good first step, but full implementation and political will were necessary to actually yield results. In spring 2005, Sanader and former president Stjepan Mesić convened a meeting of all Croatian intelligence and security services in order to create a smaller team dedicated to tracking down Gotovina and implementing the government's "Action Plan," which included breaking up Gotovina's support network, a coordinated shift in the ruling party's rhetoric on the Gotovina issue, and direct communication with the ICTY about Gotovina's possible whereabouts.[61] Sanader also authorized Mladen Bajić, Croatia's chief public prosecutor, to pursue information leading to Gotovina more aggressively than the previous year. The Action Plan also included provisions to freeze Gotovina's assets and pension, place his wife Dunja under surveillance (which eventually allowed the authorities to track Gotovina's cell phone conversations), and investigate his support network that had financed his years of hiding.

Gotovina's arrest and the positive report by the ICTY in December 2005 allowed Croatia to move forward towards EU accession, but the country faced many challenges regarding the legacy of war crimes. Gotovina's transfer to The Hague represented just the beginning of the long trial process (the trial began in March 2008 and ended in September 2010, with the final acquittals delivered by

59 For a detailed analysis of the changes in legislation concerning command responsibility, see Josipović, *Ratni zločini*, 45–54.

60 For example, see the EU's 2010 report, available at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf.

61 *Novi list*, 5 February 2005; *Jutarnji list*, 4 June 2005; *International Herald Tribune*, 27 December 2005.

the Appeals Chamber in November 2012) and considerable funds spent by the Croatian government for the defence counsel (see below). Promises to prosecute Gotovina's supporters went unfulfilled as it became clear that uncovering the network of abettors would certainly reveal some unpleasant connections to the ruling HDZ party. And finally, Gotovina remained a powerful symbol for right-wing groups who sought to use his trial for political mobilization.[62] Gotovina's arrest improved Croatia's relations with the EU in many respects, but the true test would be Croatia's capacity to properly conduct the Ademi-Norac case that had been transferred from the ICTY.

A direct impact on the Croatian state budget was the decision to pay for the defence teams of Croatian officers indicted by the ICTY. Since the Ademi-Norac case was transferred to Croatia, and Bobetko had died prior to the beginning of his trial, the funding was related to the three generals indicted in the Operation Storm case: Gotovina, Markač, and Čermak. According to an investigation conducted by the Balkan Investigative Network (BIRN), between 2006 and 2012, the Croatian government spent over 28 million euros on the defendants, all of whom were finally acquitted.[63] Private initiatives raised an additional 1.1 million euros, which helped finance Gotovina's high profile defence team led by Chicago-based lawyer Luka Mišetić. The Croatian government significantly outspent every neighbouring country which also had suspects in The Hague. Macedonia spent 9.5 million euros on two defendants, while Serbia spent only 1.7 million on the twenty-six defendants it is supporting (primarily on medical care and family visits), eighteen of whom are Bosnian Serbs.[64] Republika Srpska sent an additional 640,000 euros to help Bosnian Serb indictees, along with privately raised funds. The Croatian government's decision to spend such vast sums on the defence of its three generals indicates how important it was to ensure that Operation Storm was not declared a joint criminal enterprise, which could have seriously compromised Croatia's position in International Relations.

The trial of Ademi and Norac lasted from 2007 to 2008 in the Zagreb county court, resulting in Ademi's acquittal and Norac's conviction for failing to control the soldiers under his command in killing civilians and captured enemy

62 See Vjeran Pavlaković, "Croatia, the International Criminal Tribunal for the former Yugoslavia, and General Gotovina as a Political Symbol," *Europe-Asia Studies*, Vol. 62, No. 10 (2010), 1707–1740.

63 *Balkan Insight* 23 December 2013) available at: http://www.balkaninsight.com/en/article/croatia-backing-homeland-war-generals.

64 *Balkan Insight* 23 December 2013, aailable at: http://www.balkaninsight.com/en/article/how-ex-yugoslav-states-funded-war-crimes-defendants.

troops.[65] The two defendants were accused of violations according to Articles 120 and 122 of the OKZ RH, although it also represented a turning point in domestic trials because of its interpretation of command responsibility in Article 28 (OKZ RH) and international law. Namely, instead of "effective control", the court relied on a concept of "formal and actual control" in coming to a verdict regarding Ademi, who was found to have been excluded from decision making due to the existence of a parallel chain of command.[66] It also invoked Article 28 of the Law on Implementing the Statute of the International Criminal Court and the Prosecution of Crimes against Humanitarian Law, such as the provision for using evidence obtained by the ICTY in domestic criminal proceedings. Norac was sentenced to seven years in prison for failing to punish his subordinates who had committed the crimes, which was combined with his previous sentence in the Gospić killings. On the one hand, the trial was handled professionally by Mrčela, the media properly covered the trial, and various monitors (such as OSCE and various local NGOs) concluded that the Croatian judiciary was capable of dealing with crimes committed by its own forces. On the other hand, the trial exposed the many ongoing weaknesses in the judiciary. For example, the Ademi and Norac trial revealed the existence of a parallel chain of command from Zagreb to the commanders in the field, but the State Prosecutor's Office did not open any further investigations into suspects identified during the trial.

A major requirement of the EU accession process was Chapter 23 (judiciary and fundamental rights), and therefore domestic war crimes trials were under particular scrutiny to ensure that they were impartial and effective. An analysis showed that apart from a greater number of Serbs being tried for war crimes (many in absentia), the average sentence for Serbs was 9.88 years in prison, while the average for Croat perpetrators was 7.95 years.[67] Furthermore, many local courts employed judges who were not competent in impartially conducting war crimes trials, such as the notorious case of judge Branko Milanović from Gospić whose sentencing of a local Serb for war crimes included the opinion that

65 For a report on the trial, see R. Adrić, M. Stojanović, and K. Kruhonj (eds)., *Monitoring of War Crime Trials: A Report for 2008*, Zagreb 2009, 42–48, available at http://www.documenta.hr/assets/files/Izvjestaji%20sudjenja/Annual%20Report%202008.pdf.

66 J. Đokić Jović and M. Sjekavica, "Usporedba pravnih instituta u suđenjima za ratne zločine na međunarodnim sudovima i u Hrvatskoj," in *Procesuiranje ratnih zločina*, 414, 417.

67 V. Teršelič, "Praćenje suđenja za ratne zločine i reforma pravosuđa u kontekstu pregovora o integraciji u Europsku uniju," in *Procesuiranje ratnih zločina*, p. 49.

"the accused and his ancestors had been committing genocide against the Croats along with the Ottomans for the last 500 years."[68] A positive development during this period was the signing of an agreement between the State Attorney's Office in Croatia and the Prosecutor for War Crimes in Serbia in 2006. Both of these institutions had undergone changes triggered by the ICTY, so it was a natural step that they strengthened cooperation with each other in resolving domestic war crimes trials.[69] This cooperation was jeopardized in 2011 when the Croatian government (at the time led by the HDZ) passed the so-alled Nullity Law in order to void indictments issued by the Yugoslav People's Army in 1992, which included Veljko Marić (who had been arrested by Serbian authorities) and HDZ veteran politician Vladimir Šeks.[70]

The positive assessment of the Ademi-Norac trial in contrast to the general situation convinced the Croatian authorities to establish special courts which would specifically deal with war crimes. The 2003 Law of Implementing the Statute of the ICC had included a provision for establishing four county courts (in Zagreb, Split, Rijeka, and Osijek) to handle such cases, but an amendment in 2011 altered Article 12 to indicate that these four courts had exclusive competence to try these cases.[71] Special departments were set up to handle war crimes investigations, sixteen investigative and thirty-eight trial judges were assigned to these cases, and the court rooms were equipped with technical capabilities to handle video testimonies.[72] Judges participated in programs funded by the ICTY to familiarize themselves with international law and procedures at The Hague. During 2013, all war crimes trials were transferred to these special courts. Although the prevailing opinion of NGOs monitoring the trials is that the quality has improved, the judges tend to be overloaded with other criminal

68 *Jutarnji list*, 24 September 2009, available at: http://www.jutarnji.hr/branko-milanovic-od-danas-vise-nije-sudac/312796/.

69 Sporazum o suradnji u progonu počinitelja kaznenih djela ratnih zločina, zločina protiv čovječanstvo i genocida, available at http://www.dorh.hr/Default.aspx?sec=649.

70 M. Stojanović and M. Sjekavica, (eds.), *Monitoring War Crime Trials: A Report for 2011*, Osijek 2012, 20–21. Marić was transferred to a Croatian prison in 2015 after negotiations between the Croatian and Serbian governments.

71 *Narodne novine* 18 Maz 2011, no. 55/11, available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2011_05_55_1193.html. The NGO Documenta had proposed creating a specialized court exclusively dealing with war crimes, but supported the 2011 amendments regarding the four county courts. Stojanović and Sjekavica, *Monitoring War Crime Trials 2011*, 18–19.

72 V. Teršelič, 'Praćenje suđenja,' in *Procesuiranje ratnih zločina*, 48.

cases, and not enough funding has been allocated to make them function as effectively as possible.[73]

Another weakness of domestic trials during this period and a direct institutional impact of the ICTY was the issue of witness protection. As legal activist Miren Špek argues, the protection of witnesses in the ICTY was not initially regulated by its statute but was implemented through practice during trials in The Hague and later implemented in domestic trials, which "best illustrates the influence of the ICTY on future judicial reform of criminal law in the Republic of Croatia."[74] Because of the threats and potential danger of those testifying in the Netherlands, the ICTY established a Victims and Witness Section (VWS) which assigned pseudonyms, distorted the voices, erased personal details, hid the faces, and enabled video testimony to witnesses.[75] Unlike the protection of witnesses at the ICTY, witnesses at domestic trials of Croats suspected of war crimes were often threatened or even killed, like in the case of Milan Levar in 2000, who had spoken to ICTY investigators but was murdered by an explosive device in Gospić. Based on the good practices in the ICTY, two pilot projects were initiated in 2006 at the county courts in Sisak and Vukovar for witnesses in war crimes trial.[76] The following year, the United Nations Development Program (UNDP) began the first phase of establishing a permanent witness protection and support program that started operating in the county courts of Osijek, Vukovar, Zadar, and Zagreb. Although initially intended for war crimes trials and modeled after the ICTY, the offices provide support to witnesses and victims involved in a broad range of cases, such as domestic abuse and corruption, and currently operate in seven county courts. In 2010, the Croatian government created a National Committee for Witness and Victim Support in the Ministry of Justice, which has the task of developing a national strategy on this issue. In the period

73 M. Stojanović, M. Čalić Jelić, and M. Sjekavica (eds.), *Ensuring the Right to "Effective Remedy" for War Crime Victims: Monitoring War Crime Trials Report for 2012*, Zagreb 2013, 12–13; M. Stojanović and M. Čalić Jelić (eds), *Monitoring War Crime Trials Report for 2013*, Zagreb 2014, 13.

74 M. Špek, "Sustav podrške žrtvama i svjedocima u suđenjima za ratne zločine," in *Procesuiranje ratnih zločina*, 216.

75 The activities of the VWS are described on the Tribunal's website at http://www.icty.org/sid/158.

76 A Special Department for Support to the Witnesses and Other Participants in War Crime Trials was set up in the Ministry of Justice, but the offices did not begin functioning at the county courts until 2008. S. Vasiljević, *Development of a Victim and Witness Support System. Croatian Experience: good practices and lessons learned*, UNDP 2014, 16.

2008–2012, over 12,000 witnesses and victims were supported across Croatia.[77] Despite the positive impact on Croatian judicial institutions, the program needs to be expanded to a greater number of courts in the country, and should be applied in cooperation with trials taking place throughout the region.

The most recent institutional impact has to do with one of the ICTY's groundbreaking accomplishments in the realm of international law: the prosecution of wartime sexual violence. Both the ICTY and its sister tribunal for the crimes committed in Rwanda have included sexual crimes among the charges brought against suspects indicted by these institutions. Although investigations into sexual violence in BiH go back to the very early days of the ICTY, similar cases in Croatia have received considerably less attention. It is only in the past few years that statistics about rapes in Vukovar have surfaced and are regularly used as part of the discourse in talking about the crimes committed by Serbian forces in taking over the city. According to the NGO *Documenta*, only seventeen cases of sexual violence in Croatia were investigated, although the number of victims is certainly considerably greater. In response to the ICTY's contributions to defining sexual violence as a war crime, the Ministry of Veteran Affairs in Croatia drafted a Law of the Rights of Victims of Sexual Violence in March 2015.[78] During the discussions on the plan for the new law, the Minister of Veterans Affairs, Predrag "Fred" Matić, admitted that he himself had been sexually abused while spending nine months in Serbian prison camps after the fall of Vukovar in November 1991. The ICTY's rulings also inspired the creation of a regional Women's Court, which has gathered a number of NGOs from the former Yugoslavia to enable women's voices to be heard and to address the ongoing injustices faced by the victims of sexual violence.[79]

6. Domestic Change in Croatia

From the beginning of the ICTY's investigations, there was considerable pressure exerted upon the Croatian government and the judiciary to cooperate

77 Vasiljević, *Development of a Victim and Witness Support System*, 46. The number of 12,000 also includes witnesses from trials which did not deal with war crimes, but for example with organized crime.

78 Konačni prijedlog Zakona o pravama žrtava seksualnog nasilja u Domovinskom ratu, available at: https://vlada.gov.hr/UserDocsImages/Sjednice/2015/222%20sjednica%20Vlade/222%20-%203.pdf.

79 Women's Court – Feminist Approach to Injustice, available at: http://www.zenskisud.org/en/index.html.

with the ICTY. During the Tuđman period, this pressure was mostly exerted by the UN and it was hardly effective. Croatia adopted legislation, which laid the legal ground for cooperation with the ICTY, but the cooperation consisted mostly of sidelining the ICTY, shirking and trying to delay or prevent transfers of suspects. There was legal change triggered by ICTY decisions, but this change was at best ambiguous: biased domestic investigations, which mostly ended with verdicts for Serb suspects and acquittals for Croatian ones, a parliamentary resolution which tried (ineffectively) to exclude the Homeland War from the ICTY's jurisdiction. This changed after Tuđman's death and the emergence of a social democrat government. Although Croatia's situation as a winner of the war that had managed to keep its territorial integrity was different from Serbia's, the consequences of the 2000 transition were similar. After the shift from an authoritarian government to more liberal and pro-western one, cooperation with the ICTY was no longer an annoying duty imposed by the international community, but a necessity, which enabled the new government to weaken and legitimize its predecessors. From that moment on, cooperation improved, but still remained ambiguous. The Croatian government carried out a restructuring of its bureaucracy in order to help capture Gotovina (who was finally arrested in Spain, but with the Croatian security services contributing to his apprehension). As other governments had done before (and would do later) cooperation with the ICTY was promoted to the wider public as the fulfilment of a tedious duty, and the suspects were presented as patriots, who sacrificed themselves in order to facilitate Croatia's EU-membership rather than as perpetrators of heinous crimes. Still, even the leftist Croatian government remained ambiguous in its cooperation with the Hague Tribunal: it refused to hand over documents for the trial against Gotovina et al. and it decided to hire a high-level team of international criminal lawyers and pay them from the state budget, rather than rely on ICTY resources.

The most far reaching change occurred with the ICTY's Completion Strategy, which opened the door for domestic trials against suspects that had been under the ICTY's jurisdiction. Croatian lawmakers introduced modern notions of war crimes, crimes against humanity and the concept of command responsibility into the criminal code[80], enabled domestic courts to use evidence produced by the ICTY, created four specialized courts for addressing war crimes and took

80 It is difficult to decide whether this was a result of EU pressure, connected to the membership negotiations or a consequence of the ICTY Completion Strategy, as these events took place at the intersection of both developments.

over the ICTY standards for witness protection. They also criminalized sexual violence.

In retrospect, Croatia can be regarded as a case of relative compliance, at least after 2000. But in Croatia's case the most important influence on domestic change came neither from the UN, nor the EU, but from the ICTY's Completion Strategy and the perspective of judging Croatian suspects in Croatian courts and by Croatian judges.

Aleksandra Nędzi-Marek, Jagoda Gregulska, Irena Ristić

The ICTY's Impact on Institutional Changes in Bosnia and Herzegovina

1. The Conflict in BiH

When in 1991, at the beginning of the dissolution of socialist Yugoslavia, Slovenia and Croatia declared their independence and were shortly after recognized as such by the international community, many observers and experts warned that the recognition could easily lead to a violent breakup of the republic, which was next on the road to independence – BiH.[1] In Slovenia, there were no significant ethnic minorities that could have challenged the separation of the country from the Yugoslav centre. This had already been different in Croatia, where leaders of the Serbian minority had opposed the establishment of an ethnically defined nation state, in which the Serbs would no longer be a constitutional nation, but a national minority that would naturally be disfavoured compared to the dominant ethnic Croatian majority.[2] In BiH, the situation was even more complicated, because there was no clear absolute ethnic majority – compared to the overall population, every ethnic group there was a minority,[3] and as pre-war opinion polls show, nowhere in the former Yugoslavia did so many people stick to either overlapping ethnic identities or identify with their republic rather than with a specific ethnicity as much as in BiH.[4]

The causes of the conflict in BiH are numerous and extensively elaborated in the existing literature. Presenting and discussing them in detail would certainly go beyond the scope of this chapter. The at first sight compelling, but at

1 Like already noted in the introduction Bosnia and Herzegovina will sometimes be abbreviated as BiH.

2 See Vjeran Pavlaković's chapter on Croatia in this volume.

3 In the overall Yugoslav perspective the three major ethnic groups of BiH could build their identities upon the belonging to the overarching Socialist Federal Republic of Yugoslavia, the Republic they had lived in – the Socialist Republic of BiH, and finally – at least the ethnic Croats and Serbs – could identify with another constituent republic of SFRY, normally Croatia or Serbia.

4 In polls and censuses the citizens often declared themselves as "Yugoslavs" and also the percentage of inter-ethnic marriages was higher than elsewhere in the Yugoslav Federation. V. P. Gagnon, *The Myth of Ethnic War. Serbia and Croatia in the 1990s*, Ithaka and London 2006, 40–42.

second certainly very weak argument that the origins of the conflict are to be found in already existing ethnic hatred or tensions between the different groups inhabiting the country has been overcome. The conflict was rather the outcome of a political conflict about the procedures, according to which the institutions of the republic were to decide about the future status of BiH (staying in or leaving the Yugoslav federation). With increasing escalation and the descent into violence, all conflict parties became more and more ethnically intransigent. This process often led external observers to the conclusion that the conflict was one between Serbs, Bosniaks and Croats fighting against each other.[5] The violence indeed facilitated mobilization along ethnic lines (replacing the political cleavages that had dominated during the late 1980s), but the hostile camps never were ethnically pure and the "ethnic argument" was certainly more exploited by the elites of the given ethnic group and the warlords than among the population.[6]

Therefore it did not come as a surprise that already the question of a referendum led to a major political conflict, during which first the leadership of the Bosnian Serbs announced a referendum on autonomy for the Serb dominated territories in BiH. This referendum, however, was declared unconstitutional by the government in Sarajevo, while this government itself called for a referendum on the independence of BiH, which was largely boycotted by the Serbian population. Those who voted (63,4 %) showed a clear preference for independence (99,7 %). However, in legal terms the referendum had failed since it did not reach the two-third majority required by the constitution. Shortly afterwards, the new state was admitted to the UN and recognized by most states in Europe. As a reaction to it, the Bosnian Serbs declared their own independence and started the siege of the capital Sarajevo, which was claimed by both conflicting parties. The following violent war that broke out throughout BiH shortly after lasted for more than three years, during which distinct cases of crimes and violations of international law took place, which later were adjudicated by the ICTY. Among these were:

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5 As already mentioned in the introduction, 'Bosnian Muslim' and 'Bosniak' are terms referring to the same group of people. The authors of this chapter opt for using the latter unless referring to documents that employ the first term. On a discussion of the replacement of the Bosnian Muslim term with the Bosniak, see for example B. Dimitrova, 'Bosniak or Muslim? Dilemma of one Nation with two Names', *Southeast European Politics*, Vol. II, No. 2, October 2001, 94–108.

6 About this aspect see Caspersen, Nina, Contested Nationalism – Serb Elite Rivalry in Croatia and BiH in the 1990s. New York/Oxford: Berghahn Books 2010.

- The creation and maintenance of camps, with the purpose of detaining mostly men and boys, who had allegedly fought or could have done so. In these camps prisoners were abused in a sadistic manner; this included torture, random killings, starvation and sexual violence. Due to the extensive media coverage, these camps (together with the destruction of Vukovar and the attack on Dubrovnik) started to change the Western perception of the conflict from a civil war between ethnic groups to the picture of Serb aggression against outgunned Bosniaks. This shift increased the pressure on the US government and West European governments (mainly Britain and France) to intervene and support the weaker conflict party;
- The siege of Sarajevo by the military forces of Republika Srpska and the frequent sniping against civilians from the surrounding hills;
- The systematic and widespread expulsion and killing of Bosniaks by members of armed paramilitary units from Republika Srpska and Serbia. This became known as "ethnic cleansing". Such cases had already taken place during the conflict in Croatia[7] (Croats were chased from municipalities inhabited by a Serb majority, while Serbs were expelled when these municipalities were taken back by the Croatian army), and they became much more frequent and widespread during the Bosnian conflict, due to the intermingling of the different ethnic groups, the lack of clear delimitations between them and the existence of enclaves (settlements of one group surrounded by settlements of another group);
- The siege and takeover of the enclave Srebrenica by the army of Bosnian Serbs. Subsequent to the takeover, men and boys were separated from women and girls (the latter were brought to Bosniak-held territory) and later killed in mass executions on abandoned farms outside the town. Fighters and civilians, who decided to escape through the surrounding hills, were shot by the beleaguerers or died from mines. These events after the fall of the town were later adjudicated by the ICTY trial chamber as genocide.

The armed conflict that ensued after 1991 confirmed the initial attempt of the Bosnian Serb leadership: the Bosnian Serb army, supported first by the Yugoslav Army and – after the latter's dissolution – by the military, secret services, and paramilitaries of the Republic of Serbia, managed to capture a large part of the country. Its advance triggered an US-sponsored alliance between the Bosniak and the Croat forces, while the atrocities by the Bosnian Serbs committed against

7 Vjeran Pavlaković describes the cases of ethnic cleansing in Croatia in the chapter about institutional reform in Croatia.

mostly Bosniak civilians inclined the international community to consider intervening in the conflict resolutely both with diplomatic and military means in the year of 1995. Parallel to this, in the spring and summer of that year two Croat military operations against Serb-held territories in the so-called Republika Srpska Krajina and Western Slavonia took place. Together with the NATO air strikes against Serb positions in BiH, this all changed the balance of power on the ground and eventually led to a peace conference in Dayton/USA. During these negotiations, the Bosnian Serbs, on behalf of whom Slobodan Milošević was negotiating, agreed to withdraw from large swaths of territory and acquiesced to the creation of a complex political system of mutual checks and balances.

However, while the Dayton Peace Agreement (hereinafter DPA)[8] of December 1995 brought an end to the war, it also legalized the wartime fragmentation of the country. The three major ethnic groups, Bosniaks, (Bosnian) Serbs and (Bosnian) Croats, were left to re-build their coexistence and – under the supervision of an UN plenipotentiary and an international force that was deployed throughout the country – to co-administer a postwar state which was not only shattered by horrific violence, but divided into ethnically organized territorial "entities": the Federation of BiH (hereinafter Federation BiH), with 51 percent of the territory, Republika Srpska (hereinafter RS), with 49 percent of the territory, and the internationally administered area of the Brčko District. This division was not merely a territorial one as the entities retained most of the classical state competences, each having a government, parliament and judiciary.[9] The complexity of this internal division of competences was further increased by the role played by the Office of the High Representative (hereinafter OHR), an international body designed to oversee the implementation of the DPA, civil

8 The peace agreement is formally titled "General Framework Agreement". Complete text available at http://www.ohr.int/dpa/default.asp?content_id=380 For more information about the process that led to the signing of the DPA see R. Holbrooke, *To End a War*', New York 1998, passim.

9 Article III.3.1 of Annex 4 of the DPA lists the reduced state level competences, what is not being listed falls into the domain of the entity governments. Annex 4 is the de facto constitution of BiH. According to the power-sharing model established by the DPA, the political life in BiH remains dominated and shaped by the ethnic belonging. A three-person joint presidency includes one member from each of the major ethnic groups, while the Second chamber of the State parliament (House of Peoples) is reserved for members of the three so called constituent nationalities only. This rule was successfully challenged in front of the European Court of Human Rights, among others in the Sejdić-Finci case. However, until 2016 the ruling remained unimplemented. See http://www.balkaninsight.com/en/article/another-human-rights-ruling-pressures-BiH.

aspects of the post-war reconstruction and the democratization of BiH. As part of its function, the OHR was granted the "Bonn powers", which allow the High Representative to override any decisions made by any government level in BiH and pass the laws independently.[10] Due to these powers, media and academia until today label BiH an "international protectorate". Considering in addition to this the complicated system of mutual checks and balances based on an ethnic key which in the postwar Bosnian society proves to be dysfunctional, some authors have even gone so far as to state that "the Bosnian state effectively does not exist".[11]

These complex territorial and political divisions have been mirrored, among others, in a high degree of fragmentation of the criminal justice jurisdiction of BiH, which is shared between the State of BiH, the entities (The Federation of BiH and the RS), and the Brčko District. Only in 2002 did the efforts of the international community[12] result in the establishment of the state Court of BiH (with a special War Crimes Chamber), operating in accordance with a new procedural

10 The so-called "Bonn powers" were conferred onto the Office of the High Representative in 1997 by the Peace Implementation Council (international body in charge of the implementation of the DPA), in order to avoid a deadlock in its implementation. These powers in practice empower the OHR to make decisions and enact laws if the Bosnian institutions are not able to reach a compromise on one side, and to remove public officials who violate or obstruct the implementation of the DPA on the other side. The OHR can replace the legislative but it can also co-decide with the Bosnian legislative. The legal ground of the Bonn powers is somehow ambiguous and challenged, but nevertheless they were often used by the OHR, either directly by imposing a law, which did not need any further approval by another body before entering into force, or by enacting a law, which then needed to be approved by the Bosnian parliament (that again can propose changes, that need the approval of the OHR), or by empowering certain institutions with competences. For a discussion of OHR's legitimacy see B. M.J. Szewczyk, 'The EU in BiH: powers, decisions and legitimacy', *EUISS Occasional Paper*, available at: http://www.iss.europa.eu/uploads/media/OccasionalPaper83.pdf. For a discussion about the legal ground of the so-called Bonn Powers see: T. Banning, 'The "Bonn Powers" of the High Representative in Bosnia and Herzegovina: Tracing a Legal Figment', in: *Goettingen Journal of International Law* 6 (2014) 2, 259–302, pp. 289–301. (http://www.gojil.eu/issues/62/62_article_banning.pdf)

11 J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Philadelphia 2009, 32. For other voices in the discussion on BiH's weak statehood see Chandler, David, *Faking Democracy after Dayton*, Chicago 2000.

12 For the purpose of this chapter, the term international community stands for a plethora of the OHR, international organizations (governmental and nongovernmental) as well as donors and independent experts active in BiH.

and criminal code and having jurisdiction over the most severe or strategic for prosecution crimes committed in the entire state. Regardless of that, the entities and the Brčko District have retained a great part of the juridical powers, which had been exercised with various degrees of intensity since mid the 1990s. Further, the criminal jurisdiction of the Federation of BiH is divided territorially among ten cantonal courts, in the Republika Srpska among five district courts, while Brčko has one District Basic Court. Moreover, while both of the entities and Brčko District have their own Supreme Courts, the state does not have one (with the Constitutional Court filling this gap at times), yet the Court of BiH has its own Appellate Section. The situation is additionally complicated by the fact that the Criminal Code designed and pushed for by the OHR on the state level applies only to the trials before the Court of BiH, while the entities and Brčko District have their own criminal codes, which often do not overlap with the state one.

Furthermore, the state, the entities, and the Brčko District enjoy their separate ministries of justice, the Federation having ten of them – one for every canton. Moreover, the judicial institutions of BiH are often affected by the international administration of the country.

In this web of competing institutions, parallel laws and regulations weakened by a lack of definite hierarchy, trials of some of the most barbarous war crimes and crimes against humanity committed during the 1992–1995 war in BiH were and are still being conducted.

2. The ICTY and BiH

Ever since its establishment in 1993[13], the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY) has shaped justice related to war crimes[14] in BiH. As BiH has occupied a central point in the ICTY's work, various aspects of the Tribunal's impact on the Bosnian society and the state have already been subject to scholarly publications.[15] From sentencing some of the most notorious war criminals responsible for atrocities committed in former Yugoslavia,

13 UN Secretary-General, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.

14 For the purpose of this chapter, the term "war crimes" refers to violations of international humanitarian law committed during the armed conflict, including genocide, crimes against humanity and war crimes.

15 While research has been done as well on the relationship and impact of the ICTY on the other countries in the region, certainly the vast majority of studies was devoted to BiH, given the peculiarity of wartime BiH, and especially of the post-war period.

through classifying the massacre in Srebrenica as the first act of genocide[16] committed in Europe since the Second World War, to the creation of vast documentation and legal-historical accounts of the war, the ICTY has (among others) defined how the Bosnian war is perceived and talked about.[17] It has been further argued that the Tribunal's legacy[18] is greater than that, and that it can be credited not only with stirring the standards of war crimes trials in BiH and dramatically re-shaping the local capacities for transitional justice but, in a broader perspective, with strengthening civil society.[19] Although the ICTY was not formally a part of the international administration in BiH, it did play a significant role, among other things by shaping 'how Bosnians understand justice'[20]. And while the Tribunal's less tangible effects on Bosnian society remain a point of debate, its impact on the Bosnian judiciary is beyond question. A number of authors credits the ICTY with significantly transforming country's legal standards and

16 Prosecutor vs Radoslav Kristić http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf

17 Diane F. Orentlicher offers a nuanced analysis of the Bosnian's perceptions of the Tribunal's impact, concluding that it contributed to the society's ability to deal with its violent past in a number of ways: its path-breaking jurisprudence brought crimes of sexual violence out of the shadows, the genocide verdict helped Bosniak victims in the process of coming to terms with the July 1995 massacre, space for denial has been somewhat reduced. Diane F. Orentlicher, *That Somebody Guilty Be Punished – The Impact of the ICTY in BiH*, New York, 2010. Akhavan looks specifically at the ICTY verdicts' impact on reconciliation and inter-ethnic relations, while Meernik on the other hand finds little impact on societal peace at one- and six-month intervals following relevant judicial actions. Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' American Journal of International Law 95(1) (2001): 7–31. James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in BiH,' Journal of Peace Research 42(3) (2005): 271–289.

18 For the Tribunal's legacy beyond BiH see ICTY Global Legacy: Conference Proceedings. The Hague, 15–16 November 2011

19 Lara Nettelfield landmark study claims that the ICTY played a positive, albeit imperfect role in the processes of democratization and strengthening civil society. See Lara J. Nettelfied *Courting Democracy in BiH: The Hague Tribunal's Impact in Postwar State*. Cambridge University Press, 2010.

20 This notion came up during one of the interviews with a high-ranking justice expert in Sarajevo. It will be discussed later in the text. A similar argument is put forward by Jelena Subotić who claims that war crime trials have overtaken the BiH's post-war arena, making it difficult for other forms of tranistional justice to flourish. J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Philadelphia 2009. P. 147

capacities, be that in form of norm transfer between legal professionals working in The Hague and local Bosnian judiciary[21], fuelling OHR sponsored transit from Bosnia's former model of criminal procedure[22] to a more adversarial criminal procedure,[23] often inspired by the ICTY or, broadly speaking, contributing to 'capacity building' in the form of trainings and the acquisition of skills.[24] Others claim, and findings presented in this chapter support this opinion, that the ICTY's interest and consequent impact were for the most part focused on the state-level judiciary institutions, overlooking entity courts.[25]

Due to field research conducted by Jagoda Gregulska in the Federation of BiH and Aleksandra Nędzi-Marek in the RS in 2015, this study adds to the pool of empirical studies[26] that could detect more effective, if desired, ways international tribunals affect countries under their authority. Post-war BiH has undergone many institutional reforms and has seen the establishment of new institutions that result from the fact that it is a society dealing both with its violent past and the socialist legacy[27]. Looking at some of the most apparent results of the

21 W. B. Burke-White, "The Domestic Influence of International Criminal Tribunals. The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of BiH", Columbia Journal of Transnational Law 46 (2006), 279–350, p. 335

22 Common for states with post-socialist legal heritage.

23 A system that most of the post-socialist states in Central Europe accepted.

24 Chethman investigates 'capacity building' efforts not only by the ICTY but also other actors streaming new standards of legal practice to BiH and concluding that the focus has generally been on providing visible skills, such as specialized forms of training while less attention has been paid to the administrative and material conditions in which these new capacities should be used. See Chehtman, A. (2011). Developing BiH's Capacity to Process War Crimes Cases. Critical Notes on a 'Success Story'. Journal of International Criminal Justice (2011)

25 Ronen, Y. (2014): The Impact of the ICTY on Atrocity-related Prosecutions in the Courts of BiH. 3 Penn. St. J.L. & Int'l Aff.113

26 Thoms, Ron and Paris argued that that there is still not enough empirical data to neither support or reject positive contribution of transitional justice mechanisms' impact. Oskar N. T. Thoms, James Ron and Roland Paris 'State-Level Effects of Transitional Justice: What do we Know?' The International Journal of Transitional Justice, Vol. 4, 2010 p. 329–354.

27 Some of the most important developments of the post-war period include unification of the formerly rival armies: BiH Army and RS Army into the Armed Forces of BiH in 2005 or the establishment of the Institute for Missing Persons. A number of laws and bills regulating the position of victims of war has been passed, many of those addressing the faith of families of missing persons or survivors of rape. Similarly, BiH entered several bilateral and multilateral agreements on international cooperation in the field of

Tribunal's approach to the Bosnian judiciary, such as the establishment of the Special War Crimes Chamber at the Court of BiH and the corresponding section at the Prosecutor's Office, through less evident yet persistent changes in investigation and trial practices of the Bosnian police forces and the local courts to the least tangible effects in the way Bosnians understand justice, the ICTY's impact on the country is a given. While overviewing different changes in BiH that can be attributed, in whole or in part, to the Tribunal's influence, the text pauses to discuss them from two angles: Firstly, to which extent were the reforms heralded as having been prompted by the ICTY in fact elements of modernization of the Bosnian judiciary that would have happened even without the Tribunal's stimulation? Especially in issues as important as changes to the criminal procedures, witness protection or position of victims of sexual violence. Secondly, are the reforms here to stay?

The origin of the relationship between BiH and the ICTY dates back to May 1993, when the ICTY was established by UN Security Council Resolution 827.[28] At the time, the political fragmentation along ethnic lines was massively reverberating on the judicial system of BiH, which was significantly impaired in its functioning due to the ongoing war (loss and/or emigration of skilled legal professionals, physical destruction of judicial facilities and equipment, inappropriate procedural laws, biased and unprofessional judges and prosecutors).[29] In those circumstances, it was almost impossible to properly address cases related to any crimes, let alone war crimes. This started to change with the establishment of the ICTY, since the Tribunal was given the juridical primacy over local Bosnian courts, which were obliged to defer cases of war crimes to the ICTY

investigating war crimes. All of these developments have been somewhat tinted by the Tribunal's work, or at least met with positive encouragement by its representatives. Yet, automatic attribution of reforms and new institutions somewhat related to transitional justice and investigation of the war crimes as being by-products of the Tribunal would be inherently wrong.

28 Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

29 Organization for Security and Co-operation in Europe – Mission to BiH, "War Crimes Trials Before the Domestic Courts of BiH: Progress and Obstacles," March 2005, p. 4. Also see Human Watch Rights Report "BiH: Looking For Justice – The War Crimes Chamber in BiH, Volume 18, No. 1, February 2006, p. 4. There were not few cases, which were prosecuted and sentenced in absentia, not shying away from death penalties. In Sarajevo for instance, two Serbs were sentenced for death penalty for the killing of a Bosniak man who in fact was found alive (http://www.nytimes.com/1997/03/01/world/jailed-serbs-victims-found-alive-embarrassing-BiH.html).

upon request.[30] However, due to limited capacities the ICTY could of course not take over all cases of the Bosnian courts and hence these did not cease to prosecute war criminals even at the height of war violence and despite the impaired functioning mentioned above, so that as a consequence, the judiciary continued to be "an instrument of ethnic discrimination by implementing laws in a biased and politically influenced way."[31] This lack of satisfactory judicial standards by the local courts prompted further interventions by the ICTY and resulted in 1996 in the adoption of the "Rules of the Road", a system of supervision of the national judiciaries.[32] In accordance with the new rules, a unit within the ICTY was responsible for reviewing cases prosecuted by the domestic courts in BiH (as well as Croatia and Serbia) and deciding if indictments could be issued. This procedure was designed to prevent arbitrary arrests, particularly in the light of the post-war elections and the return of refugees. The provisions, while limiting opportunities for politically or ethnically motivated indictments in the domestic courts, also created the first wave of tensions between local legal professionals and the ICTY.[33] For one, the Tribunal did not posses capacities to process the materials submitted by the local courts in a timely manner (due to their substantial volume, the language barrier and their system of classification that was new to the ICTY's staff) and, as a result, many cases were never reviewed. This was met with negative responses from the Bosnian law professionals, who commented that it offended their expertise and integrity. This further complicated the relationship between the local actors and the Tribunal.[34] This negative

30 Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, Annex to S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), http://www.icty.org/sid/135.

31 O. Martin-Ortega,'Prosecuting war crimes at home: lessons from the War Crimes Chamber in the State Court of BiH', *International Criminal Law Review* vol. 12, 2012, 118.

32 S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004). On the process see M. S. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the 'Rules of the Road' for Bosnia and Herzegovina', *Berkeley Journal of International Law*, 5–6 (1999), 17.

33 International Crisis Group, Courting disaster: The misrule of law in BiH, report 1, 2002, available at http://www.crisisgroup.org/library/documents/report_archive/A400592_25032002.pdf.

34 The Human Rights Center and the International Human Rights Law Clinic, University of Berkeley, and the Centre for Human Rights, University of Sarajevo, 'Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutor', *Berkeley Journal of International Law*, vol. 18, issue 1, 2000, 102–164, available at: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1184&context=bjil

or, at best, neutral attitude towards the Tribunal was additionally shared by many more people who were directly involved in the procedures and who believed that the Tribunal had since its establishment worked on distancing itself from the domestic legal professionals and did not employ local professionals at the Tribunal, for fear of bias and for security reasons.[35]

Eventually, this policy of detachment backfired at the ICTY, making its work appear irrelevant, distant and an ideal subject of local nationalist elite's populist attacks.[36] The remedy came in the form of an Outreach Program established in 1998 tasked with encouraging engagement with domestic authorities and communicating directly with the people of the former Yugoslavia. The Program employed people from the Western Balkans region or those who spoke the local languages, opened local offices and strove to present the Tribunal's work as objective and important to the local communities. While commentators tend to agree that when it comes to ICTY's "communication strategy", whatever came, came too late and was too little,[37] the launching of outreach activities targeting the public in the region was nevertheless an important step that signalized the Tribunal's, even if limited, concern with its impact on the citizens of former Yugoslavia.

But despite the Outreach program and the inclusion of local professionals, the ICTY still did not have enough capacities to comply with the provisions of the "Rules of the Road". Since the Tribunal was still facing challenges on a general level, not only in regard to BiH, it released in 2002 the "Completion Strategy".[38]

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35 Y. Ronen, 'The Impact of the *ICTY* on Atrocity-Related Prosecutions in the Courts of BiH', *Pennsylvania State Journal of Legal and International Affairs*, April 2014 (113), Vol. 3, Issue 1, 112–160, available at:: http://elibrary.law.psu.edu/jlia/vol3/iss1/4/, p. 125.

36 Ronen, *The Impact of the* ICTY112-160,; W. B. Burke-White, 'The Domestic Influence of International Criminal Tribunals. The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', *Columbia Journal of Transnational Law* 46 (2006), 279–350.

37 D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in BiH*, New York, 2010, 102–104; L. J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina. The Hague Tribunal's Impact in a Postwar State*, Cambridge 2012, 152–157.

38 http://www.icty.org/sid/10016 The Rules of the Road program ended on 1 October 2004, after the ICTY Prosecutor informed the Presidency of BiH that it would "no longer be in a position to review war crimes cases and that the BiH Prosecutor should take over responsibility for" such reviews. See Organization for Security and Co-operation in Europe – Mission to BiH, 'War Crimes Trials Before the Domestic Courts of BiH: Progress and Obstacles,' March 2005, 5.

This strategy was a pragmatic move to comply with the requirement of the UN Security Council to concentrate on high profile cases only, and it was the result of the anticipated gradual withdrawal from political and financial support to the ICTY by the USA. This new policy of the ICTY opened the door for transfers of cases to the courts in the region, and forced the judiciaries of these states to increase their capacities and efficiency.[39] William Burke-White traced the process from the perspective of Tribunal's attitude and incentives provided to the local actors, arguing that those factors had the greatest impact on the process of reforms. As a result of the ICTY's Completion Strategy of 2002, the jurisdictional relationship changed from what was essentially absolute international primacy toward something far closer to a jurisdictional relationship of complementarity, and the Tribunal turned from 'freezing' of BiH's domestic reforms and capacity building to actively demanding and supporting them.[40]

In the case of BiH, this was matched by the OHR's policy to spearhead a package of rule of law reforms in BiH,[41] which were supposed to rely on the ICTY as a model and a partner.[42] The reform consisted of vetting the judicial staff, the creation of the High Judicial and Prosecutorial Council (HJPC) responsible for the appointment and review of judges and prosecutors, the introduction of a new Code of Criminal Procedure and a new Criminal Code as well as the introduction of a witness protection system.[43] This also included the restructuring and downsizing of courts and prosecutors' offices and the replacement of all judges and prosecutors in an effort to secure the independence of the judiciary and establish an appropriate balance of judges of different ethnicities. By mid-2002, the ICTY and OHR had formulated a joint plan of action that anticipated the creation of a specialized war crimes chamber at the Court of BiH, accompanied by the Special Department for War Crimes at the Prosecutor's Office, which both

39 The proposal to transfer cases from the ICTY to the states of the former Yugoslavia was first announced by ICTY President Claude Jorda already in May 2000, however, for a long time, such relocation was perceived as premature. Report on the Operation of ICTY, Identical Letters (Sept. 7, 2000) from the Secretary-General to the General Assembly Pres. and SCOR Pres., U.N. Doc A/55/382-S/2000/865, Annex I, para. 42 (May 12, 2000).

40 Burke-White, *The Domestic Influence*, 280.

41 Office of the High Representative: Jobs and Justice: Our Agenda http://www.ohr.int/pic/econ-rol-targets/pdf/jobs-and-justice.pdf

42 L.A. Barria, S.D. Roper 'Judicial capacity building in Bosnia and Herzegovina: Understanding Legal Reform Beyond Completion Strategy of the ICTY, *Human Rights Review*, vol. 9, 2007, 324.

43 Barria, Roper, *Judicial capacity building in BiH*, 325.

became fully operational in 2005. And while the creation of the Court of BiH by the OHR[44] was an expensive endeavour, the ICTY's plan to transfer cases to BiH gave the fundraising campaign a great boost.[45] Additionally, the ICTY provided political and technical support to the OHR, thereby bolstering its legal reconstruction efforts in BiH.

On the Bosnian ground, following the creation of the Court of BiH and the State Prosecutor's Office, in 2003 the High Representative Paddy Ashdown had proposed a number of criminal justice reforms that were eventually adopted by the BiH Parliamentary Assembly. One of the crucial novelties was the rewriting of Chapter 17 of the Criminal Code of BiH to include war crimes provisions that were consistent with the ICTY Statute and, for the most part, were modeled according to the ICC Statute.[46] These reforms were mandatory before the ICTY could begin to transfer cases to BiH[47] under the Rule 11*bis*.[48] In 2004, BiH adopted a transfer law concerning the admissibility of evidence collected by the ICTY, which permitted the use of evidence collected in accordance with the Statute and the ICTY's rules before the courts in BiH, an issue that had caused significant confusion among domestic prosecutors, since many of the documents made available were in English, or the trials in front of the ICTY were carried out differently.[49] The introduction of this law led to the first referral of cases to BiH and was a vote of confidence in its judiciary system.[50] In addition, a transfer of knowledge, training and material capacity building supported by the ICTY took place, which led to a visible increase in local war crime trials capacities. In dividing the cases, the three-tier judicial architecture model advocated by ICTY

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44 Available at: http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=362

45 Burke-White, *The Domestic Influence*, 335–336.
The Completion Strategy and the advocacy of the ICTY meant that a much larger part of the available resources ultimately went to institutions in charge of conducting trials for war crimes cases, than otherwise would have been the case.

46 Ronen, The Impact of the ICTY, 148; Burke-White, *The Domestic Influence,* 338.

47 S. Williams, 'ICTY Referrals to National Jurisdictions:. A Fair Trial or a Fair Price?', *Criminal Law Forum* Vol. 2006/17 (4), 177–222, 182.

48 The Rule 11*bis* regulates the referral of indictments to another court, be it to the state in whose territory the crime was committed, in which the accused was arrested or a state that is having jurisdiction and is willing and prepared to accept such a case. ICTY rules of procedure and evidence, Rule 11bis, available at http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence

49 Only later did the ICTY and OSCE help translate these documents and hence make them more widely accessible.

50 Burke-White, *The Domestic Influence,* 324.

President, Claude Jorda in his 2002 report to the Security Council, was replicated. In Jorda's words "the first tier, the International Tribunal, essentially handles the major political […] leaders. […] the second tier, the State Court, chiefly handles intermediary-level accused who would be referred by the International Tribunal. [...] The third tier, the local courts, handles low-ranking accused tried in accordance with the Rome Agreement. Within this structure, the International Tribunal would be responsible for overseeing the proper conduct of the second-tier trials and the State Court the third-tier trials."[51] In accordance with that model, the Court of BiH started to deal with cases that were referred back to it from the ICTY, but also attempted to delegate less sensitive cases to entity courts.

2.1. Bosnian Responses

Over the years, the Bosnian state and its entities adopted a number of legal acts that have regulated its relationship with the Tribunal, among others enabling courts to use during domestic trials and investigative evidence, which was gathered for the trials before the ICTY.[52] While the central government has never passed a law that would define BiH's relationship with the Tribunal, Republika Srpska – BiH's smaller entity – adopted such law.[53] This at first sight could indicate that the

51 Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002).

52 Zakon RBiH o izručenju na zahtjev MKSJ, Službeni list RBiH, br. 12/95 i 33/95; Zakon FBiH o izručenju okrivljenih osoba po zahtjevu MKSJ, Službene novine FBiH, br. 9/96; Zakon BiH o ustupanju predmeta MKSJ-a Tužiteljstvu BiH i korištenju dokaza pribavljenih od strane MKSJ-a u postupcima pred sudovima BiH, Službeni glasnik BiH, br. 61/04, 46/06, 53/06, 76/06; Memorandum o razumijevanju između Posebnog odjela za ratne zločine Tužiteljstva BiH i Ureda tužitelja MKSJ, 2.9.2005.

Also the Dayton Peace Agreement stipulated that BiH (state and its two entities Federation BiH and Republika Srpska) was obliged to cooperate with the Tribunal. The Dayton Peace Agreement, Agreement on Human Rights, Article XIII: Organizations Concerned with Human Rights: "All competent authorities in BiH shall cooperate with and provide unrestricted access to the organizations established in this Agreement; any international Human Rights monitoring mechanisms established for BiH; the supervisory bodies established by any of the international agreements listed in the Appendix to this Annex; the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning Human Rights or humanitarian law.

53 Zakon Republike Srpske o saradnji Republike Srpske sa Međunarodnim krivičnim sudom u Hagu, Službeni glasnik Republike Srpske, br. 52/01. The Law was enacted with an elaborate justification, which recalled the act´s constitutional basis. Moreover the justification explicitly recalled the following acts from which it derives: Security

RS elites were somehow more inclined to cooperate with the ICTY in the early 2000s, but nothing could be less true. When it comes to the political responses of BiH to the cooperation with the Tribunal, it was the state structures and the Federation BiH that were praised for a smooth and willing approach towards the ICTY. Republika Srpska's political elites on the other side have been notorious for obstructing cooperation with the Tribunal, and passing of the 2001 Law on Cooperation of RS with the ICTY, which defined the rules of mutual cooperation as well as the bodies responsible for its implementation, was merely a sign of a "softening" of the Bosnian Serb harsh stance towards the Tribunal.[54] As part of this shift, the Tribunal was allowed to open an office in Banja Luka, the political and administrative center and the *de facto* capital of the RS entity.[55] The Law on the Cooperation with the ICTY was followed by the 2001 opening of the Office for Cooperation with the ICTY comprised of local staff within the Ministry of Justice of RS. However, as time passed, the focus of this Office was less and less on cooperation with the ICTY, but more in the vague field of research about the war and war crimes, independently from the ICTY and far from its approach. So, after many structural and organizational changes, shifts and merges, this unit and its initial mission to establish a cooperation between RS and the ICTY in fact ceased to exist only several years later.[56] During the field research, the Republic

Council Resolution 827 of 1993, the Statute of the ICTY, the Rules of Procedure and Evidence as well as the Dayton Peace Agreement. The cooperation was meant to be carried out within the frames of the ICTY Statute and ICTY Rules of Procedure and Evidence. Moreover, the Law´s preamble explicitly acknowledged the supremacy of Tribunal Acts over domestic legal acts. Lastly, its introductory part acknowledged that additional budgetary means would be provided.

54 This change was carried out by Milorad Dodik, who in 1998 came to power in Republika Srpska and who was, back then, welcomed by international commentators as a more liberal, Western-oriented politician. Ever since, Dodik in particular, and the RS establishment in general, have voiced their open and strong criticism of the ICTY and its judgments, openly welcoming individuals sentenced by the Tribunal for war crimes as national heroes.

55 Orentlicher, *That someone guilty be punished*, 30.

56 By January 2003 the office was merged with the RS Documentation Centre on War Crimes (*Dokumentacioni centar za istraživanje ratnih zločina*) and the Commission of Missing Persons of the RS to give way to the newly established Secretariat for the Relations with the ICTY in Hague and the Research of War Crimes. (Republički sekretarijat za odnose sa Međunarodnim krivičnim sudom u Hagu i istraživanje ratnih zločina, Zakon o ministarstvima (Official Gazette of the RS, no. 70/02) This Secretariat then was assigned to the Centre for the Research of War Crimes in 2008. Yet again in 2013 the Operative Team for Missing Persons was merged with the Centre for the

Centre for the Research of War, War Crimes and Missing Persons in Banja Luka was visited, yet this visit only proved that its employees concentrate not on the legacy of the ICTY, but on maintaining the RS-centred narrative of the war, explaining why the numbers of missing and deceased in the conflict have been manipulated in order to present the Bosnian Serbs in an unfavourable manner."[57]

After these extensive, but crucial remarks regarding the background of the conflict and the history of the relationship between the ICTY and BiH, this chapter will now take an in-depth look at the impact of the ICTY on institutional reforms in BiH. The focus will be on the changes on the state level, distinguishing between new institutions, new legislation and new procedures that were introduced subsequent to ICTY decisions or were triggered by them. In the last section, there will also be an overview of changes that took place on the entity level.

3. Institutional Changes

3.1. The War Crimes Chamber at the Court of BiH and the Special Department for War Crimes of the Prosecutor's Office

The creation of the War Crimes Chamber (hereafter WCC)[58] at the Court of BiH and the Special Department for War Crimes of the Prosecutor's Office represent the most significant direct impact of the ICTY in BiH, and probably the biggest impact of the Tribunal in regard to institution-building in the region of former Yugoslavia. Its origins go back to the establishment of the Court of BiH in July 2002 by the Parliament of BiH, in accordance with the Decision on the Law on the Court of BiH issued by the High Representative on 12 November 2000.[59] Namely, when in 2002 the President of the Tribunal, Claude Jorda, presented his report to the UN Security Council, the transfer of cases involving mid- and low-level accused to national courts under Rule 11*bis* was an essential component of the strategy. At the time, the Completion Strategy required the ICTY to finish all trials in their last instance by 2010. As a consequence, there was an urgent need for a national court in BiH to handle transferred cases "effectively

Research of War Crimes, creating a brand new administrative state organization, the Republic Centre for the Research of War, War Crimes and Missing Persons (http://www.rcirz.org/index.php/lat/).

57 Aleksandra Nędzi-Marek's interview with an employee of the Republic Centre for the Research of War, War Crimes and Missing Persons, February 2015.

58 The War Crimes Chamber is formally known as the Section I of the Criminal Division of the Court of BiH. More details about the division within the court follow below.

59 Decision imposing the Law on the State Court of BiH, http://www.ohr.int/?p=67097

and consistently with internationally recognized standards of human rights and due process",[60] which eventually resulted in the creation of the WCC within the Court of BiH, supported by the international community. So, the initiative for the WCC was clearly not a domestic reform measure, but came out from an agreement reached by the OHR and the ICTY in January 2003.[61]

The amendment, which the Parliamentary Assembly adopted on 2 December 2004, gave the Court of BiH jurisdiction over genocide, crimes against humanity, war crimes, and violations of the laws and customs of war as it was indirectly required by the Completion Strategy. This included the concept of individual (rather than collective) criminal responsibility for these crimes. The amendment's article 8 provided for the formation of three sections within the criminal and appeal jurisdiction: section I for war crimes, section II for organized crime, economic crimes and corruption, and section III for all other crimes under the jurisdiction of the Court.[62] With the adoption of BiH's National War Crimes Strategy in 2008[63], the relationship between the Court of BiH (and the Prosecutor's Office) and the entity courts was further specified. Cases previously submitted to the ICTY in accordance with the Rules of the Road were returned to the Court of BiH for evaluation and in order to decide whether the cases could be carried out at the entity-level courts, or whether their sensitivity and complexity required them to be dealt with on the state level.[64] The WCC included international judges,[65] prosecutors, and other legal professionals.

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60 Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002)

61 B. Ivanišević, *The War Crimes Chamber in BiH: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, 5–6, available at: https://www.ictj.org/publication/war-crimes-chamber-bosnia-and-herzegovina-hybrid-domestic-court. See also: Joint Preliminary Conclusions of OHR and ICTY Experts Conference on the Scope of BiH War Crimes Prosecutions, International Criminal Tribunal for the former Yugoslavia (ICTY) press release, January 15, 2003, http://www.icty.org/sid/8312

62 Sud Bosne i Hercegovine, Istorija Suda BiH, http://www.ohr.int/?p=67097

63 Available at http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf

64 For a critical opinion about the Strategy, see D. Schwendiman, 'Prosecuting Atrocity Crimes In National Courts: Looking Back On 2009 In Bosnia and Herzegovina, 8 Northwestern Journal of Human Rights 269 (2010). http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss3/3 Schwendimann who headed the Prosecutors Office at the time of the document' elaboration, distanced himself from it, arguing that it was more of an attempt to please political actors than a feasible strategy.

65 The international judges arrived and started to play a crucial role at the WCC in 2007, whereas in March 2012, it was announced that the mandate for international actors in

The United Nations Security Council called on the international donor community to support the OHR's work to this end. The joint proposal of the OHR and the ICTY was subsequently endorsed by the Peace Implementation Council, the international body made up of 55 states and agencies charged with implementing the terms of the Dayton Peace Agreement that ended the war in BiH. Initially a hybrid model, the Court of BiH has transformed into a fully domestic institution in terms of staffing and core financing. While international actors still play a significant role in providing additional funding in BiH, the Court (as well as the Prosecutors Office)[66] have been entirely integrated into the Bosnian state-level judiciary and its budget.

Similarly to the above, also the Special Department for War Crimes at the Prosecutor's Office of BiH was created. The High Representative enacted the Law on the Prosecutor's Office of BiH by his Decision of 6 August 2002.[67] Jurisdiction over the prosecution of war crimes was given to the Prosecutor's Office of BiH at the same as to the WCC in December 2004.[75] In January 2005, the third department, the War Crimes Section, was established within the Prosecutor's Office of BiH, and similarly to the Court, the Prosecutor's Office had for some time a hybrid structure, consisting of both international and local staff.

With the establishment of the WCC and the special section for war crimes within the Prosecutor's Office, the influence of the ICTY on the entity-level courts has been to a great extent mediated through these institutions. Challenges of such multilevel justice and jurisdiction fragmentation however have been many. Technically speaking, the Court of BiH and the State Prosecutor's Office are two separate, independent institutions, and each of them has its own communication and relationship with the local courts. The transitional provision in Article 449 of the Criminal Procedural Code establishes the competences of the Court of BiH to assume cases from the entity courts.[68] This process was parallel to the

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the State Court is to end. See more: F. Bywaters, 'Hybrid Courts – A Broken Promise? International Judges and Prosecutors of the War Crimes Chamber of Bosnia and Herzegovina', in: *Democracy and Human Rights in South-East Europe: Selected Master Theses for the Academic Year 2011–2012*, Sarajevo 2012, 1–90.

66 In BiH, the State Court and the Prosecutor's Office operate as independent institutions. See Law on the Prosecutor's Office of BiH (unofficial consolidated version), in Official Gazette of BiH, Nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04, available at: http://www.tuzilastvobih.gov.ba/files/docs/zakoni/zot/s_Office_BiH_-_Consolidated_text.pdf (" Law on the Prosecutor's Office of BiH"), art. 2.

67 http://www.ohr.int/?p=66315

68 Zakon o krivičnom postupku FBiH, available at http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=42&jezik=b

efforts of the State Prosecutors Office to review the cases and the files from the ICTY's Rules of the Road Unit. The lack of synchronization and communication between the Court of BiH and the Prosecutor's Office deriving from it resulted in cases in which e.g. the Prosecutor's Office would transfer a case back to an entity court only to have the Court of BiH resume it from it.[69] Consequently, international professionals, who have worked in BiH, claimed that the entity level prosecutions were unnecessary and the State Court should have taken over the cases from all over BiH. This however had been decided differently in the Rules of the Road and the Bosnian National Strategy for Processing of War Crime Cases.[70]

David Schwendiman, BiH's former Deputy Chief Prosecutor, while pointing out numerous problems with the WCC, but especially with the National War Crimes Strategy, stated that one of its core downsides was to require Cantonal entity-level prosecutors and courts, despite their explicit concerns and reasonable reservations, to manage the bulk of the war crimes workload. "Responsibility for war crimes investigations and prosecutions should have been centralized at the national level in the State Prosecutor's Office and the Court of BiH instead of diluting scarce resources by trying to create the capacity to investigate and prosecute war crimes in every Canton and District."[71] His view was shared by an international legal advisor working in BiH, who stated that the "whole idea of having such difficult and important cases being held at small local courts is harmful to the process."[72] The National War Crimes Prosecution Strategy has been considered a political success rather than a feasible and meaningful judicial tool. The Strategy was meant to advance the trail efforts and help BiH deal with the past crimes, however it also had its political value as it was one of the Peace and Implementation Council's measures which prepared the closure of the Office of the High Representative.

Similarly, the EU pushed for an increase in cases transfers from the Court of BiH to its entity-level counterparts,[73] completely disregarding the dramatic lack of capacities for proper trials in a majority of the local courts. "They didn't care

69 Ortega, p. 123,

70 The National Strategy for Processing of War Crime Cases was developed and adopted in December 2008 by the Councils of Ministers of BiH aiming to process remaining war crime cases.

71 Schwendiman, *Prosecuting Atrocity Crime*, 274–275.

72 Jagoda Gregulska's interview with a legal expert at OHR, who requested to remain anonymous.

73 Structural dialogue on justice http://europa.ba/Default.aspx?id=87&lang=EN

that local courts are not able to offer adequate witness protection and that people will be more reluctant to testify at small local courts, surrounded by people who know them."[74] The lack of adequate capacities of the local courts has been not surprising for the legal experts working on BiH. The situation, for instance in the witness protection program, is still striking, effective protection in and outside the courtroom is still not guaranteed at the necessary level and financial resources for it are lacking.[75] Where the entities are concerned, language barriers and hostility to the ICTY remains an obstacle to cooperation, and the fact that the ICTY's proactive engagement has almost completely overlooked the courts of the entities was not beneficial to it either. Consequently, the impact of the ICTY did not go much beyond the state level, or at least not as much as there would have been potential for it. A high-ranking official at the Federal Ministry of Justice voiced his frustration with this state of affairs saying that "presidents of the Tribunal come to BiH, they meet people from the State Court, State Ministry, they go to Srebrenica and meet victim organizations but they never meet or address authorities on the entity levels. There has never been input aimed at Federal Ministry yet they expect results and commitment on the level of the entity."[76] The feeling that entity judiciaries were overlooked, at least for a certain period of time, has been shared also by practitioners working in the courts as well as international observers. According to Federal Prosecutor Munib Halilović, a lot of time has passed before the process of strengthening entity judiciaries started and this process has in the first period had a negative impact on the war crime trials.[77] First, most resources went to the establishment and operation of the ICTY, then attention was redirected to the Court of BiH and the Prosecutor's Office. It was only around 2008 that serious thought was given to the entity capacities. Halilović assesses the development of the state judiciary as positive, but also sees it blocking the entity courts. A legal expert at the OSCE (who requested not to be quoted) recognized that it was "very late in the day, only when there was a feeling that work at the Court of BiH was done, that sources and attention were being paid to entity judiciaries."[78] However, Halilović, who served several years

74 Jagoda Gregulska's interview with legal OHR expert who requested anonymity.

75 Human Rights Watch Report, Justice for Atrocity Crimes – Lessons of International Support for Trials before the State Court of BiH, March 2012, pp 28–32.

76 Jagoda Gregulska's interview with a representative of the Federation's Ministry of Justice in May 2015.

77 Jagoda Gregulska's interview with Munib Halilović, August 2014.

78 Jagoda Gregulska's interview with an OSCE expert who requested anonymity, August 2014.

as prosecutor at the State Court before becoming entity-level federal prosecutor, pointed out that despite with these institutional reforms the entity level being disregarded, the ICTY did indirectly impact the entity judiciaries: "When the Court of BiH started operating, the only place to look for guidance was the ICTY, there was no adequate training, access to the ICTY's evidence was limited. Now, practitioners at the entity courts can look up rich jurisprudence accumulated at the Court BiH, it is much easier."[79] The impact of the ICTY on the entity level was in that sense rather a side effect than an intended result.

3.2. Legislative Change – The New Criminal Procedure Code of BiH

In 2003, the judiciary of BiH witnessed what some commentators called a "seismic change" to its criminal trials.[80] The Criminal Procedure Code (CPC) introduced by the Office of the High Representative had replaced the country's traditional continental law approach with more adversarial, common law procedures. Contrary to the Criminal Codes, which still differ across state and entity jurisdictions[81], the new procedures governing trial economy have been the same for the whole country as compatible procedure codes were adopted also by the entity parliaments and the Brčko District parliament, even if the numbers of particular articles of the codes do not always overlap. The drafting of the new CPC was based on international standards and the European Convention on Human Rights (ECHR) in particular. As the OHR stated when imposing it, "the CPC was needed for the existence of criminal procedure at the state level of BiH which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the European Convention on Human Rights which itself forms part of the Constitution of BiH and enjoys priority over all other law in BiH."[82]

In 2002, the OHR's consultants recommended that prosecutors establish investigation units within their own offices – a change resembling the ICTY's investigative practices. While some analysts observed such a move was an unavoidable and natural part of the country's transition to a more modern legal system rather

79 Jagoda Gregulska's interview with Munib Halilović, August 2014.

80 C. DeNicola, 'Criminal Procedure Reform in BiH: Between Organic Minimalism and Extrinsic Maximalism', *express0* 2010, available at: https://works.bepress.com/christopher_denicola/1/

81 More details on the Crminial code in the next section.

82 Decision Enacting the Criminal Procedure Code of BiH, 24/1/2003 available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094

than it was prompted by the ICTY,[83] a set of procedures, such as plea bargaining and more broadly, adversary culture of proceedings, were in fact modelled on the Tribunal's practice and designed in cooperation with its experts.[84]

The reform performed by the OHR in 2003 presenting the new CPC abolished investigative judges, made the presentation of evidence more adversarial and introduced plea bargaining, authorized cross-examination, while banning subsidiary and private prosecutions. All these changes resembled the ICTY's procedural system, which is an amalgam of common law and civil law features that favours a far more adversarial approach to criminal justice than that of BiH's prior system.[85] As such, it diverged from procedures used in BiH historically. The 2003 CPC's most significant common law transplant was its abolition of investigative judges accompanied by the authorization of prosecutorial investigations. While according to the 1976 Criminal Procedure of the Socialist Federal Republic of Yugoslavia (SFRY), investigative judges had extensive investigative capacities and held responsibility for compiling comprehensive dossiers prior to trials,[86] after the reform those activities fell into the domain of prosecutors. Today, when a prosecutor has reason to suspect the commission of a criminal offence, it is his task to investigate it and supervise the supporting efforts of authorized officials. This of course happens with the support of the Police, who act under supervision of prosecutors. The active role of judges has been further reduced by the introduction of adversarial presentation of evidence. The old judge-led system was replaced by a new, embodied in Article 261 of the new CPC, party-led (prosecutor and defence lawyer) one. Building and presenting a case fell entirely to the prosecutors who had to suddenly demonstrate both 'managerial' and 'oratory' skills to accompany their legal knowledge. One of the prosecutors recalled participating in a training organized as part of the local judiciary capacity building efforts as 'a sort of theater class': "The instructor from the US tried to convince us, Bosnian prosecutors, that the tone of voice, where we are standing while delivering the closing remarks as well as our gestures are incredibly important in the justice system. We were partly amused and partly irritated by such kind of transfer of knowledge and tried to explain to him that here in BiH, regardless

83 Jagoda Gregulska's interview with Mirsad Tokača, 15 February 2015.

84 M. Bohlander, 'Last Exit BiH – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts', in: *Criminal Law Forum* 14 (1), 2003, 77.

85 DeNicola, *Criminal Procedure Reform*, passim.

86 DeNicola, *Criminal Procedure Reform*, passim.

of the new procedures, it is the weight of the evidence and the argument that matters more than courtroom dramaturgy popularized by the American films."[87]

The reform also affected defence attorneys, who not only lacked investigative skills, but also the resources that could match those of the prosecution. In the old system, the investigative judges were the ones who used the state power and resources to gather the defence material.[88] Cross-examination was not a totally new invention because the SFRY criminal code also included it, although with differences.[89]

Two important aspects of the new CPC, the introduction of plea bargaining[90] and a ban on subsidiary and private prosecutions, were those most criticized, first and foremost by victims' organizations,[91] who protested against the possibility of defendants to have their sentence reduced after admitting guilt.[92] As far as private and subsidiary prosecutions are concerned, even if the new Procedural Code from 2003 does not explicitly ban them, it only makes a few references to the rights of injured parties, thereby effectively cutting off their former powers of subsidiary and private prosecutors – acting along with the public prosecutor or instead of her/him.

Similarities and influence of the ICTY on the creation of the CPC of BiH can also be observed with regard to victims of sexual violence. Article 86, § 5

87 Interview with former Bosnian state prosecutor Munib Halilović, 3 March 2015, by Jagoda Gregulska.

88 Jagoda Gregulska's interview with a defence attorney representing defendants in war crimes at the State Court, Zvornik, February 2015.

89 DiNicola, *Criminal Procedure Reform*, 54. Lawyers in the SFRY employed techniques that contemporary Yugoslav practitioners called "cross-examination," this was not however a separate questioning phase, but rather an adjunct to the presiding judge's questions which were the main focus of the trial inquiry.

90 Organization for Security and Cooperation in Europe, Plea Agreements in BiH: Practices before the Courts and their Compliance with International Human Rights Standards, May 2006, available at http://www.oscebih.org/documents/osce_bih_doc_2010122311061412eng.pdf

91 For negative voices on plea bargaining practice used at ICTY see Orentlicher 'That Somebody Guilty Be Punished', 57–66.

92 One of the most prominent cases of plea bargaining was the case of Biljana Plavšić, which greatly contributed to the discrediting of plea bargaining among Bosnian victims. The former president of Republika Srpska had surrendered to the ICTY, admitted guilt and had written an extensive report about her activities, after which she was given a lenient sentence. However, contrary to the prosecution's expectations, she never appeared in court as a witness against other accused and later withdrew her guilty plea.

and Article 264 of the CPC prohibit questions on prior sexual conduct or sexual orientation of victims who appear in court. Article 264 of the CPC also states that "in the case of the criminal offense against humanity and values protected by international law, the consent of the victim may not be used in favor of the defense." This approach is very similar to the first version (proposed by judges on 11 February 1994) of Rule 96 ii of the ICTY's Rules of Procedures and Evidence.[93]

These changes were profound and often bewildered Bosnian trial participants and observers, especially in the first years of implementation. As one Bosnian legal expert said,[94] "Bosnian lawyers and judges had absolutely no idea how to work according to those new rules. Those who practiced at the ICTY were neither keen to share their expertise nor did they have time for it. We were left alone with this problem."[95] The purpose of the reforms had been trial expediency, but during the first years of their implementation, proceedings were far from efficient, and at times, limited the rights of defendants. The OSCE monitored more than a hundred trials in BiH between January and August 2004 and concluded that more than a quarter of the judges, prosecutors, and defence attorneys were "not accomplishing a shift" to the new adversarial procedures.[96] These judges took an active role in the questioning of witnesses and rejected the new rules concerning the presentation of evidence, while the prosecutors relied on judges to question witnesses and lacked in confidence during the proceedings, delivering poor opening and/or closing arguments. Similarly, defence lawyers lacked direct examination skills, remained passive at trial, and lacked familiarity with the new trial procedures. However, over time the CPC ceased to be new, resistance against it got weaker and it became a more and more commonly accepted practice. And as one of the prosecutors concluded, "over a decade since the introduction of the current code, we should really stop talking about lack of training,

93 In its current version rule 96 ii says: "In cases of sexual assault [...] consent shall not be allowed as a defense of the victim."

94 Jagoda Gregulska's interview with an employee of the BiH Prosecutor Office Registry, 6 September 2014.

95 Ibid.

96 OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH, December 2004, p. 27–34 available at http://wcjp.unicri.it/proceedings/docs/OSCE_Trial%20Monitoring%20Report%20on%20the%20Implementation%20of%20the%20New%20Criminal%20Procedure%20Code%20in%20th%20Courts%20of%20BiH%20and%20Herzegovina_2004_ENG.pdf cited after DeNicola, C., Criminal Procedure Reform in BiH: Between Organic Minimalism and Extrinsic Maximalism. February 2010, Available at: http://works.bepress.com/christopher_denicola/1 p. 51.

lack of sources, lack of preparations. Who wanted to become trained, had such opportunities, who wanted to learn, did so." [97]

3.3. The Reform of the Criminal Code of BiH

Beside the CPC, the new Criminal Code (CC) of BiH also entered into force in 2003, initially to ensure its application at trials before the Court of BiH and the WCC. Certainly, the attempt was to introduce the new CC on all levels, and there have been cases in which the new code was applied at the district and cantonal courts. However, the majority of trials, which took place at the entity level, especially in Republika Srpska and the District Brčko, were still processed according to the old Yugoslav code of 1977, which was in force during the conflict. In the Federation of BiH, in addition to the Criminal Code of the Socialist Federal Republic of Yugoslavia, the Criminal Code of the Federation of BiH adopted in 1998 has been used in some cases. Naturally, as pointed out by numerous international observers, this plurality of criminal codes resulted in a lack of equality before the law,[98] since these three criminal codes differ significantly with respect to the definitions of war crimes, command responsibility, and sentencing. The SFRY Code only penalizes genocide and war crimes, while the 2003 Criminal Code of BiH contained additional provisions for crimes against humanity, a more comprehensive definition of war crimes and command responsibility. It barred perpetrators from invoking orders from superiors. The Criminal Code of BiH recognized rape and acts of sexual violence as crimes against humanity, while the Criminal Code of the Socialist Federal Republic of Yugoslavia and the Criminal Code of the Federation of BiH from 1998 recognized rape and forced prostitution only as war crimes committed against civilians and did not mention any other forms of sexual violence.

There are several parts of the Criminal Code that can be traced back to international criminal standards. While the definition of genocide in the Criminal Code (Article 171) is identical to that of all the international instruments criminalizing genocide, the definition of crimes against humanity (CC Article 172) closely follows that of the ICC Statute Article 7 rather than the ICTY Statute Article 5. Contrary to the ICTY Statute, the BiH CC does not require a nexus

97 Jagoda Gregulska's interview with Munib Halilović, February 2015.

98 See for example: OSCE, Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in BiH. 2008, available at http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf

between a punishable act and an armed conflict.[99] Also, the BiH CC explicitly defines several counts of crimes against humanity following the ICC Statute. When it comes to individual responsibility, the CC defines it in Article 180 after the ICTY Statute Article 7.[100] It avoids the distinctions made in the ICC Statute

99 ICTY Statute Article 5 states: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. Article172 of the BiH CC states that Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts: Depriving another person of his life (murder); Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of BiH; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health.

100 Article 7 of the ICTY Statute states: 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

regarding the responsibility of military commanders and civilian superiors, and it does not include the concept of Joint Criminal Enterprise (JCE).[101]

3.4. Witness Support

One of the novelties transplanted from the ICTY's practice into the Bosnian judiciary, both on state and entity level, was the support offered to witnesses testifying in war crimes cases. The ICTY's Victims and Witnesses Section (VWS) was created in order to provide victims who appeared as witnesses in court with counselling, both psychological and legal, and to recommend protective measures where required. The ICTY insisted in its Annual and Completion Strategy Reports on the establishment of a witness support system in all Bosnian courts. The witness support units were first established at the Court of BiH in May 2005 while in 2010 an Investigation and Witness Support Department was established at the Prosecutor's Office of BiH, which employed a psychologist and several staff members.[102]

The BiH model of supporting victims before, during and after trial, has been inspired by the one used by the ICTY. Namely, the witnesses (to a major extent survivors of war crimes themselves) are supposed to receive assistance by specialists – professional psychologists provided by the court or the office of the prosecutor respectively – at the court and in the preparatory (prosecutorial) phase of the proceedrings. This model has been used by the ICTY, however not all states that are within the ICTY's scope of interest have enacted such a model.[103]

Starting from 2008, the National War Crimes Strategy placed more emphasis on trials in the entity courts and the need for assistance to witnesses and victims increased. While it was the responsibility of the governments on the state and entity levels to set up such provisions, the United Nations Development Program (UNDP) took it upon itself to set up witness and victim support services. In cooperation with the High Judicial and Prosecutorial Council of BiH, as part the "Support to Processing of War Crimes Cases in BiH" project, UNDP has, until 2016, established and equipped sixteen Victim and Witness Support Offices in the Cantonal / District courts and Prosecutors' Offices in Sarajevo, Banja Luka,

101 JCE is not part of the ICC's Rome Statute. The ICC instead uses the concept of co-perpetratorship. See also: Ronen, *The Impact of the ICTY*, 155.

102 Aleksandra Nędzi-Marek's interview with the SCBiH WSD on 24 February 2015.

103 For instance the Republic of Croatia has created its own method of helping traumatized witnesses, namely through a network of volunteers.

East Sarajevo, Bihać, Novi Travnik and Travnik, Brčko District and Mostar, aiming to provide victims and witnesses in criminal cases with support before, during and after court proceedings[104]. When the decision had been made to spread the witness support experience to the cantonal and district courts and prosecutors' offices, the SCBiH staff and the ICTY staff took part in their establishment by lending their advice and best practices. Soon the witness support services in lower courts and at the prosecutor's offices around BiH started to resemble the Witness Support Section of the SCBiH and the Investigations and Witness Support Department Prosecutor's Office of BiH, which had been established based on the ICTY model of witness support.[105] In the meantime, witness support and protection protocols, which were initially designed for war crimes cases, have permeated deeply into the criminal justice of BiH and are being employed for the protection of other vulnerable witness groups, such as children and victims or domestic violence.[106]

However, the proliferation of the Court of BiH's witness and victims support experiences to cantonal and district courts has not been without problems. Monitors have frequently complained about the lack of adequate capacities and protocols.[107] A telling example of the lack of symmetry and institutional

104 http://www.ba.undp.org/content/Bosnia_and_herzegovina/en/home/presscenter/articles/2016/01/29/otvoren-odjel-za-podr-ku-svjedocima-u-zenici.html

105 Aleksandra Nędzi-Marek's interview with the Banja Luka District Court's Officer and her interview with the Officers at the State Court of BiH Witness Support Division in February 2015.

106 The basis of the establishment of the witness support divisions on the level of entities within the pilot project was a Memorandum of the UNDP, the Higher Judicial and Prosecutorial Council of BH, the relevant district courts/prosecutor offices, the RS Prosecutor's Office of the RS where applicable, and the Ministry of Justice of the RS. The course of the project was the following: the pilot part of the project started in 2010 and lasted for 15 months in the Cantonal Prosecutor's Office in Sarajevo and DPO in Banja Luka. In 2012, the project was launched at the District Court and District Prosecutor's Office of East Sarajevo and lasted for 9 months. After that, the RS authorities would not fund the newly established offices without a contribution from UNDP. The refusal inclined the the UNDP to assign funds from 1 June 2013 until 1 March 2014, which were then followed by the EU's Isntrument for Pre-Accession Assistence (IPA) funding. At the time of the field research by Aleksandra Nędzi-Marek (mid-2015) all but one of the witness suport divisions were financed from international funding, yet the office at the District Court of Banja Luka was funded from the court budget.

107 See for example OSCE: 'Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year a er adoption of the National

sustainability in the witness support endeavours on the local level could be observed in East Sarajevo. In 2012, staff members employed at the Prosecutor's Office of East Sarajevo were only allowed to lend support to the prosecution witnesses, but not to the defence witnesses in order to not undermine the adversary procedure. The latter could only get assistance from the Witness Support Services at the District Court, which was later challenged with a struggle for funding.[108] Also from 2012 onwards, the witness support program was deprived of stable funding, because the budget for employing qualified staff members was not approved by the entity government. The Head Judge of the East Sarajevo District Court claimed this as the possible reason for witnesses' insecurity, leading to their refusal to take part in trials.[109] The example shows how financial and political struggles on the ground put the internationally and locally engineered victim support sections at a high risk of ceasing to exist.

Sadly, it seems the levels of witness protection and support seem to correspond with the rank of the court offering them: the most comprehensive support is offered at the ICTY, followed by the Court of BiH, and finally by the entity courts. While the capacities of the cantonal and district courts have broadened over time, victims' organizations across BiH remain mistrustful and disappointed with the levels of protection. As one victims' organization representative complained, witnesses testifying in The Hague are lucky, and those testifying in BiH cannot hope for a comparable level of support and assistance.[110] While the United Nations Development Program in BiH contributed to the establishment and improvement of facilities and assistance for the vulnerable witnesses and

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Strategy for War Crimes Processing', January 2010, available at http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf also UNDP, Capacity Needs Assessment for enhancing provision of victim/witness support during the pre-investigative stage of criminal proceedings in BiH. 2013, available at: http://www.ba.undp.org/content/dam/Bosnia_and_herzegovina/docs/Research&Publications/Crises%20Prevention%20and%20Recovery/Capacity%20needs%20assessment%20for%20enhancing%20provision%20of%20victim-witness%20support/Izvjestaj%20ENG%20-%20WEB.pdf

108 Aleksandra Nędzi-Marek's interviews with the employees of district courts of East Sarajevo and Naja Luka and district prosecutor offices of East Sarajevo and Banja Luka in February 2015.

109 Intervju-Senaid Ibrahimefendic: Svijedoci odbijaju svjedočiti. 20 July 2015, available at http://www.justice-report.com/bh/sadr%C5%BEaj-%C4%8Dlanci/intervju-senaid-ibrahimefendi%C4%87-svjedoci-odbijaju-da-svjedo%C4%8De

110 Jagoda Gregulska's interview with members of victims' organizations, Srebrenica, August 2014.

victims at courts,[111] and several NGO's started offering legal and therapeutic support[112], still not much has been done by respective entity agencies.

As with the introduction of the 2003 Criminal Procedure Code, it can be asked to which extent setting up witness protection and support across the courts of BiH has been a result of the ICTY's influence and pressure to strengthen local judiciary capacities, and how much of it has been simply a process of modernizing the country's legal system. By now, witness protection has been recognized as an important aspect of the economy of investigations and trials in a variety of crimes, not only war crimes prosecutions. The European Commission has been supporting witness protection measures across the Balkans within IPA funded projects such as Witness Protection in the Fight against Organized Crime and Corruption.[113] While such projects and standards might have eventually arrived in BiH without the ICTY's input of the early 2000s, it is clear that it was the Witness Protection unit at the Court of BiH and its evident relationship with the practices and standards established at the ICTY that provided a starting point for other actors to replicate and spread across other branches of the judiciary and across BiH. In this sense, the ICTY's impact can be seen as a spillover effect on the judiciary throughout the country.

3.5. Beyond the Judiciary

BiH has occupied a special place in the ICTY's work in a variety of ways. It was the country affected by more crimes than any other part of the former Yugoslavia, it was the object of the biggest number of trials and it was the country which received more referrals than any other under the ICTY's Completion Strategy. The latter has had a substantial impact on reforms in the country. But it has also been claimed that the Tribunal's influence went far beyond that. However, such claims are often based on assumptions that are of no particular substance. Touching upon notions of 'reconciliation', inter-ethnic dialogue or 'truth', a variety of commentators agree that albeit often limited and imperfect, the

111 Available at>http://www.ba.undp.org/content/Bosnia_and_herzegovina/en/home/operations/projects/crisis_prevention_and_recovery/project_sample1.html

112 Viva Zene Tuzla has been successfully implementing project funded by the European Commission "Ensuring access to Justice for witness/victims through strengthening existing and establishing new Witness support Networks across BH" See: http://www.svjedocipravdapristup.com/index.php/en/o-projektu

113 Available at>:http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2012/multi-beneficiary/pf5_ipa-2012_winpro-ii_final.pdf

Tribunal's work made a positive change in the Bosnian society.[114] Among the changes of general societal norms, which are often attributed to the ICTY's influence, a shift in the attitudes towards victims of sexual violence has often been mentioned.[115] While the Tribunal's contribution to gender-based jurisprudence is indisputable,[116] Lejla Mamut, former director of Bosnian branch of the Swiss organization TRIAL who spent several years assisting victims of war-time sexual violence, acknowledges that the fact that the ICTY elevated rape to the level of a war crime has to some extent had a positive impact on Bosnian society, yet she does not want to overestimate its importance: "It gave the struggle of the rape victims some much needed publicity but I do not think that an average Bosnian would think sexual torture were less of a crime without ICTY's classification."[117]

In 2015, BiH witnessed some positive developments concerning the prosecution of conflict-related sexual violence. First, the Bosnian Parliament amended the BiH Criminal Code[118], which now deprives accused of the possibility to invoke consensual conduct. In a civil court case a court sentenced two

114 For the latest study on the ICTY's impact on reconciliation, see Janine Natalya Clark, International Trials and Reconciliation: *Assessing the Impact of the International Tribunal for Former Yugoslavia* (Routledge, 2014). On the impact of the ICTY on historical narratives, see Katarina Ristic 'Imaginary Trials: War Crime Trials and Memory in former Yugoslavia (Leipziger Universitatsverlag, 2014). For a study dealing specifically with the issue of Tribunal impact perception, see Diane F. Orentlicher *That Somebody Guilty be Punished: The Impact of the ICTY in BiH* (Open Society Justice Initiative, 2010).

115 Contribution of the ICTY to jurisprudence related to conflict-related sexual violence is given.

116 For example, in a breakthrough judgment in 2001, the ICTY convicted two defendants of the crime against humanity of enslavement for treating two women as sexual slaves—the first time this charge had been found applicable to gender-based violence. For the impact of the ICTY's legacy on Bosnian jurisprudence related to gender-based violence, see Orentlicher, That somebody guilty be punished, 125; For an analysis of BiH's State Court jurisprudence in gender-based violence cases see OSCE reports 'Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges. An Analysis of Criminal Proceedings Concerning Sexual Violence Before the Court of BiH between 2005 and 2013', available at http://www.osce.org/bih/117051 and *Combating Impunity* for *Conflict-Related Sexual Violence* in *Bosnia* and *Herzegovina*: *Progress and Challenges* (2004–2014) available at http://www.osce.org/bih/171906

117 Jagoda Gregulska's interview with Lejla Mamut, May 2014.

118 http://depo.ba/clanak/131109/vazna-izmjene-krivicnog-zakona-odgovorni-za-mucenja-silovanja-i-prisilni-nestanak-vise-teze-ce-izbjeci-pravdu

men found guilty of wartime rape to pay financial reparations to the victims.[119] While the first came as a late response to the recommendations made by the UN Committee Against Torture, and signalled a significant improvement in the legal framework applied to investigation and trials of sexual crimes, in practice, even prior to the change in the legal code, the BiH court ruled that 'coercive circumstances' exclude the possibility of invoking the consent of the victim.[120]

While there has been a substantial increase in both international and national attention paid to the issue of wartime sexual crimes, Mamut attributes it more to the initiative of of individuals such as William Hague and Angelina Jolie and the UK's financial support than to the Tribunal's impact. In a similar manner, Saliha Djuderija, who has for years been working on the issue of wartime rape victims' rights on behalf of the State Ministry for Human Rights and Refugees, does not see much of an impact of the ICTY on the issue of sexual war crimes. "They [ICTY] offered a classification but they did not set an example of retribution."[121] Referring to the 2006 change in law in BiH Federation[122] (the Bosniak-Croat entity), which enabled victims of wartime rape to claim benefits as civilian victims of war without the need to undergo a physical examination proving 60 % bodily harm (a condition required prior to the law amendment), Djumbrija credits local victims' and women's organizations with the change. Specifically, she emphasizes the importance of "Grbavica", a Bosnian award-winning film telling the story of a woman who brought up a child born of wartime rape: "The film did more to the victims than the Tribunal did as it helped different actors to mobilize and lobby for the change of the law." The Federation of BiH is the only post-conflict zone in the world where rape survivors are explicitly recognised as war victims and can thus claim a war pension. All of this would not have been possible without the commitment of women's organizations in BiH and the rape survivors themselves, the very women that were supposedly silenced by shame.[123]

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119 http://trial.ba/wp-content/uploads/2015/12/Saopcenje-za-javnost_Okrugli-sto_TRIAL-1.pdf

120 OSCE, Combating Impunity, 6.

121 Interview with Saliha Djuderija, August 2015.

122 http://fmrsp.gov.ba/s/images/stories/zakoni/Zakon%20o%20izmjenama%20i%20dopunama%20zakona%20o%20osnovama%20socijalne%20zastite%20sl%20novine%20FBiH%2039-%202006.pdf

123 "… and that it does not happen to anyone anywhere in the world" The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yogoslavia. Medica Mondiale, 2009 available at http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/

4. Institutional Change on the Entity Level

The impact of the ICTY in general, and its jurisprudence in particular, on the entity level is much less pronounced than on state level. As Ronen points out, the fact that ICTY jurisprudence was not, at first, translated to the local languages prevented it from being directly accessible to entity courts. On the normative level, it is notable that parties and judges in entity courts do not usually cite international or foreign jurisprudence, and the decisions of these courts are often at odds with international jurisprudence.[124] For example, important substantive legal doctrines developed by the ICTY, such as command responsibility, have been disregarded, if not outright rejected. Human Rights Watch describes a situation in which "in many cases, cantonal and district court decisions do not even mention relevant ICTY verdicts. This has resulted in several decisions that are significantly out of line with international precedent."[125] In one verdict rendered by the Federation's Supreme Court, a defendant was acquitted of the charges that, as the prison warden, he failed to prevent the prison guards from maltreating prisoners-of-war and that he failed to initiate disciplinary or criminal proceedings against these prison guards. The grounds for this acquittal were that such conduct was not a criminal offence under Article 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia.[126] Only the Criminal Code of BiH foresees provisions for crimes against humanity and only it comprehensively defines command responsibility and excludes "superior orders" as a defence. A high-ranking representative at the Ministry of Justice of the Federation of BiH defends the entity parliament's decision not to abandon the 1977 SFRY Criminal Code. While he acknowledges that the 2003 BiH Criminal Code is much more up to date with the developments in international criminal law, having integrated crimes against humanity, the fact that it was the old SFRY Code that was in power at the time of crimes being committed ought to be binding for its applicability during the war-crimes trials. As such, he considers the Federation's resistance to use the newer code a success, and he is glad that entities were not subjects of

Dokumente/English/Documentations_studies/medica_mondiale_and_that_it_does_not_happen_to_anyone_anywhere_in_the_world_english_complete_version_dec_2009.pdf

124 Ronen, *The Impact of the ICTY,* 155.

125 Human Rights Watch, *Still Waiting Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in BiH's Cantonal and District Courts*. Human Rights Watch, 2008, 55.

126 OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in BiH. OSCE*, August 2008, passim.

as much "international engineering" as the state level judiciary.[127] However, the Constitutional Court of BiH took a different, more critical standpoint in 2007, when it upheld the legality of applying the new Criminal Code in cases dealing with crimes committed during the war, arguing that in some cases the ICTY has also imposed long-term prison sentences that would not be allowed under the SFRY criminal code. At the same time, the Constitutional Court argued that that the new CC should not per se be seen as more strict or disadvantaged in comparison to the – at first sight – more lenient SFRY Code, since at the time the crimes were committed, the code from 1977 permitted the death penalty.[128]

The unresolved dispute on the possibility of retroactive application of criminal codes of 2003 in war crimes cases eventually reached the European Court of Human Rights in Strasbourg (hereafter: ECHR). In the case Damjanović and Maktouf against Bosnia and Herzegovina,[129] the ECHR's Grand Chamber was in line with Bosnia and Herzegovina's entity courts' logic. The latter had been consequently resisting the application of the 2003 reformed criminal laws to war crime cases, even though the State Court of BiH would do so. Yet, according to the ECHR, Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms prevailed over any utilitarian justification.

4.1. Capacity Building and Knowledge Transfer

As several of the international legal experts working in BiH stated: the lack of local interest or an active approach towards the improvement of war crimes trials is significant. One of the informants commented that while the lack of financial support to the entity courts has been apparent for years, he fears that even if the international community had invested more, the money would have simply been stolen.[130] Another legal professional recalled the total lack of interest on the side of the local professionals in developing the local capacities: "Everything has to be done for them".[131] Some authors believe that local institutions are, also due to a lack of their managers' leadership skills, usually unable to take an effective

127 Jagoda Gregulska's interview with a high-level representative of the Federal Ministry of Justice, May 2015.

128 Human Rights Watch, *Still Waiting*, 54.

129 See more: Maktouf and Damjanović v. Bosnia and Herzegovina (Applications nos. 2312/08 and 34179/08), Judgment of the Grand Chamber (18 July 2013)

130 Interview with a high-ranking functionary at the Federal Ministry of Justice,

131 Interview with an expert at OHR

and leading role in organizing formalized transfer of knowledge initiatives.[132] Instead, they have been largely reliant upon internationals to conduct these initiatives. The so-called "human factor" has also been identified by several of our interlocutors, and starting from the devastation that the war wrought upon the professional legal milieu in BiH and ending with the current apathy widespread in the country, the role of the individuals involved in the war crime trials certainly cannot be overlooked. When the OHR, in cooperation with the ICTY, started its reforms of the Bosnian judiciary, the lack of local professionals became apparent. The wartime brain drain impacted the legal sphere, as most of other professions, and left the state without a great number of professionals who were either killed or relocated to other countries. Consequently, it was not a great number of lawyers and judges who responded to the internationally announced calls and openings for new legal positions in BiH. Those more capable went on to work at/with the ICTY and in many cases stayed with their international careers. The lack of adequate attitudes, skills and professional standards, while less tangible than the argument of logistical gaps, is nevertheless important for understanding the scope of the ICTY's impact on the entity-level judiciary. From the signing of the Dayton Peace Agreement, officials of the Federation of BiH supported full cooperation with the ICTY and never offered protection to any accused.[133] Similarly, an OSCE's legal expert confirms that anti-ICTY messages sent by the Republika Srpska's political leadership have been absent on the Federation side.[134] However, when it comes to practicalities of improving war crimes trials, both entities have offered similar responses: nobody says no to training and improving capacities. According to the OSCE expert, at this stage, the difference is mostly on the level of political publicity rather than on-the-ground cooperation. More than that, given the Federation's administrative and judiciary fragmentation (ten cantons, each with its own judiciary structures) on the one hand and RS's centralized system on the other make cooperation within the Federation more difficult as there are many more actors involved.

A to some extent local initiative in this regard came with the National War Crimes Strategy of 2008, which included setting up special capacities for the

132 J. A. Chatman, J. T. Polzer, S. G. Barsade, M. A. Neale, 'Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes', *Administrative Science Quarterly*,, vol. 43, No. 4. (Dec. 1998), 749–780.

133 Nettelfield, *Courting Democracy*, 59.

134 Jagoda Gregulska's interview with an OSCE officer who requested anonymity, May 2015.

referral of war crimes cases to the entity courts.[135] The least complicated cases were to be tried on the entity levels. In the framework of the Strategy, the UNDP was charged with the capacity development *sensu stricto*, through – among others – furnishing the interiors of courtrooms and witness facilities, whereas the Office Of Overseas Prosecutorial Development Assistance And Training (OPDAT) and USAID would conduct various training activities for court and prosecutors' offices staff.[136] The OSCE, apart from dealing with the training of professionals, would also monitor cases. UNDP conducted a project facilitating access to the ICTY's digitalized archives and the exchange of experience between legal professionals through conferences and study visits.[137] Between 2009 and 2011 the ICTY, along with the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE implemented a joint project funded by the EU whose aim was to assist domestic jurisdictions of the Western Balkans region in strengthening their capacities to handle war crimes cases in an effective and fair manner, consistent with the highest international standards of due process. However, while the project was supported by OSCE field operations in Belgrade, Podgorica, Priština, Sarajevo, Skopje, and Zagreb, the OSCE Office in Banja Luka was not at all involved in it, which even more contributed to the existing mistrust towards the ICTY in the RS and bolstered the impression of a lack of ownership in the realization of the project. If the Banja Luka OSCE Office had been added to the list, it could be accused of questioning the statehood of BiH and its claim to have only one official capital – Sarajevo.

Nevertheless, the project allowed the local judicial authorities to grasp the methods of acquiring useful evidence from the ICTY and facts established by it. But still, the project left space for more training in this regard, because not all the prosecutors and legal advisors use the facts already established by the ICTY, which hinders a rapid processing of cases.[138] Within the framework of this project, 15 manuals for legal professionals in the region were drafted in English and translated into local languages. The manuals were developed by the International

135 OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges (2004–2014)', http://www.osce.org/bih/171906, 10.

136 Available at: http://wcjp.unicri.it/proceedings/docs/ICTJ_BiH_Court_BCS.pdf, 30–33.

137 Available at: http://www.ba.undp.org/content/dam/Bosnia_and_herzegovina/docs/Operations/Projects/CPR/Needs%20Assesment/SPWCC%20Project%20Document%20ENG.pdf, 12

138 Aleksandra Nędzi-Marek's interview with OSCE officals in June 2015.

Criminal Law Services (ICLS), an independent organization of experts of international criminal law and the related humanitarian law.[139] Moreover, a jurisprudence database of the ICTY was established in local languages in order to allow local legal professionals to develop literacy in the international standards. The deliverables of the project have been distributed to the RS district courts' principals, the district prosecutor offices (hereafter DPOs) principals, as well as to the Centre for Education of Judges and Prosecutors of the RS (hereafter: CEJP RS). However, while the judges interviewed had come across the publications, they did not show enthusiasm about the materials.[140]

Generally, the RS is a good example to illustrate the division between adaptation and internalization, which permeates the literature on Europeanization.[141] The EU, the OSCE, the UN, and the ICTY may be able to initiate the amendment of laws, the reform of institutions and even shifts in budget allocations, but it is up to the actors on the ground to adopt the new rules as theirs and implement them on a daily basis. When the norms that proliferate from the international institutions are not accepted as legitimate, it is unlikely that they will be channelled into everyday decisions and administrative routine. This lack of internalization in the RS is to some extent a result of the ICTY's distance from the conflict region, of its detached character, as well as the political ambient in the entity, which has been questioning the legitimacy and impartiality of the ICTY from its very beginning.

As William Burke-White claims, for the ICTY it was helpful to be ignorant, remote, to be removed, not to have a dialogue in order to remain impartial.[142] When local lawyers were later encouraged to work at the Tribunal and gain understanding of its culture, there were very few incentives for these professionals to go back. "Put boldly, it is much harder to find a job in the justice sector in BiH coming from the ICTY or another international tribunal than if they had stayed there in the first place."[143] This only changed with the Completion Strategy and the new focus on developing local capacities for war crimes trials. The buzzwords of the ICTY's "capacity building" and "transfer of knowledge" should be however looked at more carefully. The development of domestic capacities should not be conflated with the mere transfer of knowledge or skills. One of the concerns is

139 Available at: http://wcjp.unicri.it/deliverables/

140 Aleksandra Nędzi-Marek's interviews with RS judges, conducted in February 2015.

141 See among others Kmezić, Marko, EU Rule of Law Promotion – Judiciary Reform in Western Balkans, London, 2017.

142 Burke-White, *The Dometic Influence*, 314.

143 Burke-White, *The Domestic Influence*, 286.

that the focus has generally been on providing visible skills, such as specialized forms of training.[144] Less attention has been paid to the administrative and material conditions in which these new capacities should be used.[145]

The RS Police[146] has aided the ICTY Investigators working on the BiH territory.[147] The cooperation was at first informal. On 17 May 2005, the Minister of Interior of the RS issued a decision establishing a special unit within the RS Police called "The Working Team for documenting and initiating proceedings for the prosecution of war crimes committed in BiH by members of military, paramilitary, police and other formations on territory under the control of Federal authorities", which would work under close supervision of the ICTY Investigators, using their methods of investigation, collecting evidence material for the ICTY as well as capturing the indictees. The cooperation had a "learning by doing" approach. The police worked with prosecutors and the ICTY investigators. In the meantime, the RS Police has undergone demilitarization and certification through vetting and various trainings including on Human Rights issues.[148]

Due to the nature of Police tasks at that time, police work has gained a strictly regional character. BiH (including the RS) Police started to cooperate with Serbia and Montenegro for the purpose of capturing fugitives. They would hold regular meetings for the purpose of coordination, exchange of experience and knowledge. The extensive regional dimension of Police cooperation lasted from

144 Some of the critical voices regarding ICTY's capacity building actions in the region come from Justice Richard Goldstone and Prosecutor David Schwendiman. See Mark S. Ellis, 'The Legacy of the ICTY: National and International Efforts in Capacity Building', In: R. H. Steinberg (ed), *Assessing the Legacy of the ICTY*, Leiden-Boston 2011, 141–145.

145 Ellis, *The Legacy*, 141–145.

146 The systematization of the Police in BiH is as follows: SIPA, Centar Javne Bezbjednosti, MUP, see more: http://www.fichl.org/fileadmin/fichl/documents/Pre-TOAEP/FICHL_3__Backlog_in_BH.pdf, p. 23

147 *National War Crimes Strategy adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008* decided to strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases; – the agenda of the NWCS 2008, but in practice very close involvement of the RS police from 2003/2004, from when the RS started to cooperate in handing the fugitives to the ICTY.

148 Aleksandra Nędzi-Marek's interviews with high-ranking Police officers from Banja Luka, Doboj and the ICTY investigator working on BH territory, in June 2015 and February 2015 respectively.

around 2004 until 2011. This proves that if not for the needs of the ICTY, there would be no regional cooperation in the above described manner.

At the later stage in 2013, once partial informal and formal trainings for the local Police had been concluded, the OSCE with support of several foreign embassies[149] published a crucial document meant to facilitate the work on war crimes investigations by the local police. The document was considered a compendium of war crime investigations and entitled: "Investigation Manual for War Crimes Against Humanity and Genocide in Bosnia and Herzegovina". It has been used as a handbook for the local police and investigators within prosecutor's offices. The manual has included exactly the experience in war crimes investigations gained – among others by the ICTY Staff – on the territory of BiH. Another handbook created at a later stage was the manual on "Investigating Wartime Sexual Violence", written in the course of the project implemented by the OSCE, yet financed by the British Embassy, in cooperation with FBiH and RS Ministries of Interior.

Both handbooks have been used in Police Academies all over Bosnia as well as in other ad hoc trainings for investigators and police professionals. The trainings were mostly conducted by Trainers of Trainers, who have undergone a set of trainings themselves in 2014 by Patricia Sellers[150] who previously worked at the ICTY and with ICTY investigators. The trainings not only concentrated on the technical skills, but also included the element of soft skills and gender sensitive training. The trainers have themselves been involved in working with survivors of wartime sexual violence in the years after the conflict.

Conclusions

The institutional reforms in BiH resulting from an (in)direct impact of the ICTY, which were subject of this chapter, showed the complexity of post-war BiH, not only of the judiciary, but even more of the political and social system.

A quick glimpse at BiH's post-2003 legal system is enough to notice that the country has been subject to a number of dramatic changes. Even if the institutions and procedures discussed throughout this chapter have been mostly imposed by the OHR, they have been modeled on the ICTY. It should to be stated here that several respondents contributing to this research argued that some of the reforms were inevitable for BiH with or without ICTY's impact. For instance, a move towards a more adversarial mode of conducting trials was a trend evolving

149 Switzerland, UK, US, the Netherlands, Norway, Germany, Italy.
150 https://www.opensocietyfoundations.org/people/patricia-sellers

in most of European countries distancing from their socialist legacy and as such should not be automatically attributed to the ICTY's influence. In a similar manner, a state-level court was also to be expected once the country advanced in the process of centralization and consolidation. The chapter also illustrated that, in comparison with other states in the region, in BiH it is more difficult to capture whether (and to what extent) reforms could be solely attributed to the ICTY, due to the fact that the state administration has been controlled and financed by the international community. In this sense, the international community (of which the ICTY can be considered, at least indirectly, a part) remains an overarching instance that impacts not only the introduction of reforms, but also its long-term functioning, since many judiciary institutions would very likely cease to function in one way or another if they were not financed or protected by the international community. Certainly, despite all difficulties in creating and internalizing these reforms, and despite all tensions that they caused, the reforms in the long run contributed to an improvement on certain levels within the judiciary of BiH. However, these reforms were not able to completely lift the existing political deadlock in BiH that is mirrored on all parts of the state, including the difficult relations between the central state and the entities (especially RS), which are still contested. Arguably, whatever success the ICTY has had in influencing BiH institutions was the result of the tight control that the international community has exercised over the country, and, correspondingly, limited to the state of BiH, where it enjoyed such control.[151] Many of the relevant laws were ultimately approved or ratified by the national Parliament. Yet its national approval was arguably influenced by the belief that this was internationally required. In this context, it was argued that the internationalization of the transitional process resulted in removing it from local responsibility and actors.[152] At the same time, how likely would the reforms have been without the significant roles played by the international actors in a country facing such strong internal divisions? Dissatisfaction with the constitutional structure of the country is particularly forceful in RS, where the possibility of secession is occasionally raised. This lack of unity has had an impact on the interaction between institutions and on the sense of a commitment to act jointly toward the achievement of common goals. In this context, Lara Nettelfield calls the ICTY's impact a "liberal interventionist project projected into what was fundamentally an illiberal environment."[153]

151 Ronen, *The Impact of the ICTY*, 115.
152 Subotić, *Hijacked Justice*, 162–163.
153 Nettelfield, *Courting Democracy*, 56.

As a consequence of this, a formal hierarchy between the state and the entity courts is missing – rather than supervising the local courts, the Court of BiH can merely distribute the war crimes cases to them based on an assessment of their complexity and sensitivity, and recall the cases should it be established that the standard of the trial is questionable. This again is because the entity level courts are supervised by their respective entity supreme courts. The lack of a supreme court on the state level seriously undermines the justice efforts of BiH; as a local lawyer stated, without a supreme court on the state level, it is difficult to speak of equality before the law.[154] But while the ICTY did not attempt – nor would have had the mandate – to create a supreme court in BiH, it did certainly directly contribute to the creation of special institutions that deal with war crimes, which is – given the fragile political situation in BiH even 20 years after the end of the war and given the comparative look in the region – a remarkable impact.

Over two decades have passed since the end of the Bosnian war, nearly fifteen years since the Tribunal announced its Completion Strategy and consequently shifted efforts to support local judiciaries. While international assistance, at times coming close to direct command, has been vast, certain political forces within BiH remain sceptical, to say the least, of some of the reforms introduced to the country since the end of the war. This translates into a lack of adequate financing of services necessary for assuring fair and efficient investigations and trials, or even, as open obstructions to system of war crime trials put in place during the past decade. With international presence and leverage presumingly set to decrease in BiH over the next years, one can't help but wonder how much of the ICTY's influence channelled into the country will remain.

What seems to be certain is that the ICTY has contributed to the ways in which Bosnians understand and desire transitional justice to happen: Justice means putting criminals on trial and sentencing them.[155] Further, with a great number of Bosnians testifying or informing the investigations, the ICTY has contributed to a certain feeling of participating in the 'justice process; it has given a sense of importance, dignity and power to the victims and witnesses.[156] Those testimonies and investigations resulted in the creation of an enormous archive full of documents illuminating BiH's tragic war fate. While some hoped that this archive would offer an authoritative 'truth' about the war, facts and interpretations collected there continue to be contested and challenged. The

154 Interview with an officer at the Bosnian State Court, August 2014 (who requested to stay anonymous)

155 Interview with OHR justice expert, August, 2014

156 Ibid

ICTY's contribution and cooperation with the OHR, the OSCE, UNDP, and the EU transformed the country's judicial system and improved war crimes trials standards. It has been argued that this could further positively improve the entire judiciary and provide a spillover effect on other branches.[157] The question of domestic ownership of those changes however remains. In a country with fairly weak central institutions, the State Court, with the War Crimes Chamber central to this chapter remains. This fact takes the impact of the ICTY beyond the judiciary and the societal – ICTY's cooperation with other international actors active in BiH has been used to strengthen state institutions, and, as claimed by some, to weaken and delegitimize the uncooperative Bosnian Serb entity in order to make calls for a unitary and centralized BiH.[158]

157 Y. Shany, 'How Can International Criminal Courts Have a Greater Impact upon National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation', Israel Law Review 431 (2013), 431–453.

158 Subotić, Hijacked Justice, 162.

Jagoda Gregulska

The Legacy of the Judgments about the Genocide in Srebrenica

On 2 August 2001 General-Major of the Bosnian Serb Army (VRS) Radislav Krstić became the first person convicted of genocide before the ICTY, and was sentenced to 46 years in prison.[1] The Appeals Chamber reduced Krstić's responsibility for genocide and for the murder of the Bosnian Muslims from that of a direct participant to that of an aider and abettor, and shortened his sentence to 35 years in prison.[2] Regardless of the reduction of the sentence in Krstić's individual case, the Appeals Chamber upheld the initial judgment, according to which the killing of over 7,000 Bosnian Muslim men and boys in the Srebrenica area in July 1995 amounted to an act of genocide. Thus this and the ICTY's subsequent Srebrenica genocide verdicts confirmed and legalized what the Bosniak population had claimed ever since the war: the brutal, systematic extermination of men and boys accompanied by the forced displacement of women, children and elderly from what was proclaimed in 1993 a "UN Safe Heaven"[3] was not an act of military combat, neither a massacre nor ethnic cleansing, but genocide. Tragic events of July 1995 were however not the first time the term "genocide" was introduced into Bosnian public discourse. For one, nationalist discourses of the late 1980s and early 1990s in BiH and in other republics of Yugoslavia publicized brutal histories of Second World War prosecutions of each respective nation, fueling the spiral of violence to come.[4] As such, atrocities committed in the war in BiH 1992–1995 were being written into preexisting templates of ongoing

1 *The prosecutor vs. Radislav Krstić*, trial judgment, 2 August 2001, available at http://www.un.org/ icty/cases/indictindex-e.htm.

2 *The Prosecutor vs. Radislav Krstić,* appeals judgment, 19 April 2004, available at http://www.icty.org/x/cases/Krstić/acjug/en/krs-aj040419e.pdf

3 United Nations Security Council Resolution 819, available at http://www.nato.int/ifor/un/u930416a.htm.

4 For an analysis of the uses of stories of past suffering in the dissolution of Yugoslavia see G. Duijzings, 'Commemorating Srebrenica. Histories of Violence and the Politics of Memory in Eastern BiH' in: X. Bougarel, E. Helms, G. Duijzings (eds), The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society, Abingdon, New York, 2007, 141–166.

suffering and genocides.[5] Already in March 1993, a few months into the Bosnian War and more than two years before the mass executions of Srebrenica, the government of newly recognized independent BiH initiated at the International Court of Justice a case against the Federal Republic of Yugoslavia[6] accusing it of nothing less than committing genocide against the Bosniaks.[7] The verdict came only in 2007, and it confirmed what the ICTY had established in the Krstić case – in the view of both Tribunals only the events of July 1995 in Srebrenica stood out from the sea of terror in BiH and amounted to an act of genocide. While there were other genocide charges presented at the ICTY in relation to BiH, mainly against Serbia's former president Slobodan Milošević, Ratko Mladić, and Radovan Karadžić, the events of July 1995 in Srebrenica remained until the year 2016 the only act classified as genocide by the ICTY and the ICJ as well as BiH's domestic courts. Even within the brutal history of Srebrenica's losses, singling out only the massacres of July 1995 accompanied by forced deportations of women and children has been problematic. Already in 1993, after his visit to the besieged town, Diego Arria, the head of the UN Security Council's mission to Srebrenica, referred to the horrendous conditions there as "slow-motion genocide."[8] The ICTY's verdict, followed by the verdict of the ICJ, however proclaimed that violence and massacres prior to July 1995 did not fall into the genocide category – a decision that embittered many survivors.

This chapter investigates the dynamics created by the first ICTY genocide verdict in BiH. Rather than looking at the particular agency created among Srebrenica's survivors in response to the Tribunal's work,[9] it seeks to examine

5 For a discussion of how the term 'genocide' has been used in BiH see A. Nielsen, 'Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina', *Journal of Southeast European and Black Sea Studies*, vol. 13, no. 1, 2013, 110–122.

6 Once Yugoslavia ceased to exist as a country, the case was conducted against Serbia and Montenegro.

7 Application of the Republic of BiH, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=91&code=bhy&p3=0

8 Paul Lewis, U.N. Visitors Say Srebrenica Is 'an Open Jail', The New York Times 26.4.1993, available at: http://www.nytimes.com/1993/04/26/world/un-visitors-say-srebrenica-is-an-open-jail.html

9 This issue has been addressed in great detail by Lara Nettelfied and Sara Wagner who look at the agency and influence the survivors have had, 'against a view from local elite, media, international community, and occasionally academia, that they are merely supportive players as an uneducated and manipulated population'. L J. Nettelfield, S. E. Wagner, *Srebrenica in the Aftermath of Genocide*. Cambridge, Cambridge University Press 2015, 4.

first the impact of the two findings of the ICTY and the ICJ on Srebrenica on the position of the town in BiH and the situation of the town's population in the overall Bosnian context. Its aim is to find out in how far the changes that can be observed there can directly be attributed to the ICTY judgments.[10] While the unique position of Srebrenica in the Bosnian society is apparent to anyone familiar with the country, it seems only logical that the ICTY played a role in creating such a situation. But other factors might have been of great importance, too. Thus, this chapter does not aim to present numerous aspects of genocide legacy in BiH;[11] rather, it provides a brief overview of those processes insofar as they serve the main objective – discussing perceptions of the impact of the Krstić verdict.

1. Locating Srebrenica

The word Srebrenica used to stand for nothing more than the name of a small town in Eastern BiH. Today, it is mentioned among places such as Auschwitz and Hiroshima. Srebrenica went through a process of what Sławomir Kapralski, in reference to the Polish town Jedwabne, called "the localisation of evil" that describes a situation in which a concrete name begins to stand for a whole complex of events, a name that we refer to when we are unable to fully understand or even name the events themselves.[12] The "planetary importance" of Srebrenica

10 This paper is the result of ethnographic work carried out in Srebrenica and Sarajevo from 2007 to 2015. The author specifically researched Srebrenica for a master thesis defended at the Central European University in 2009, and as from 2012 did so as part of her doctoral research. Views and information expressed here come from this ethnographic research unless marked specifically as interviews. In the latter case, they result from research conducted specifically for this chapter. A series of interviews with Srebrenica survivors, Bosnian intellectuals and activists, representatives of the international community and politicians took place in BiH between June 2014 and March 2015. The aim of the interviews was to establish the interlocutors' view on the importance of the Krstić verdicts. A total of 20 semi-structured interviews were conducted. Where interviewees asked for anonymity, they will not be identified in the text in a manner other than indicating their belonging to a broader category (international community, politician, genocide survivor, etc).

11 For an extensive work on this topic see Nettelfied and Wagner, *Srebrenica in the Aftermath of Genocide*, New York 2014, passim.

12 S. Kapralski, 'The Jedwabne Village Green? The Memory and Counter-Memory of the Crime', *History and Memory*, vol. 18, no 1, 179–194.
Jedwabne is one of a number of towns in the borderland between Poland, Belarus and Ukraine, where in summer 1941, during the advance of the German Army and

results from the fact that it is the only massacre in Europe classified as an act of genocide since the World War II.[13] Subject to significant academic research,[14] investigations by several national and international bodies,[15] horrifying accounts written by survivors[16] and visual representations,[17] this small Eastern Bosnian town gained an important place in the world's pantheon of atrocities. Nevertheless, the events of July 1995 still divide Bosnian society. While there is denial of genocide within Bosnian Serbs circles, be that common people or political elites,[18] the ICTY verdict also created ambivalent responses among the

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the withdrawal of the Red Army, a pogrom against the Jewish population (instigated by German officers and carried out by the local non-Jewish population) took place, causing several hundred victims. The event is highly controversial in Poland and has made Jedwabne the "localisation of evil" with regard to the violent anti-Semitism of a part of the Polish population.

13 Jagoda Gregulska's interview with Ćamil Duraković, Mayor of Srebrenica, August 2014, Mirsad Tokača, President of Research and Documentation Center, September 2014, Sadik Ahmetović, former Minister of Security in the government of BiH, March 2015.

14 On wartime violence, see D. Rohde, *A Safe Area: Srebrenica, Europe's Worst Massacre since the Second World War*, London 1997. (The book is a journalistic reconstruction of the siege, take-over of the town and the subsequent massacres). On postwar developments, see S. E. Wagner, *To Know Where He Lies: DNA Technology and the Search for the Srebrenica Missing*, Oakland 2008; S. Leydesdorf, *Surviving the Bosnian Genocide: The Women of Srebrenica Speak*, Bloomington 2011.

15 For an overview of those reports, see I. Delpla, X. Bougarel, J.-L. Fournel (eds.), *Investigating Srebrenica: Institutions, Facts, Responsibilities*, New York, Oxford 2012.

16 H. Nuhanović, *Under The UN Flag; The International Community and the Srebrenica Genocide*. Sarajevo 2007 and E. Suljagic, *Postcards from the Grave*, Saqi 2005.

17 For the most haunting images visit Tarik Samarah's webpage http://tariksamarah.com/

18 On genocide denial among the Bosnian Serbs, see Nettelfield, Wagner, *Srebrenica in the aftermath of genocide*, 251–185; J. Gregulska, *Memory Work in Srebrenica: Serb Women Tell their Stories*. Budapest, CEU, Master Thesis; K. Bachmann, A. Fatić, *The UN International Criminal Tribunals. Transition without Justice?* London, New York 2015, 105. For the specific cases of Prijedor see H. Subašić, and N. Curak, 'History, the ICTY's Record and the Bosnian Serb Culture of Denial', in: J. Gow et al. (eds), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the Former Yugoslavia*, New York 2014; 133–151. On denial in Serbia see J. Obradovic-Wochnik, *Ethnic Conflict and War Crimes in the Balkans: the Narratives of Denial in Post-Conflict Serbia*, London: IB Tauris 2013 and K. Bachmann, 'The loathed tribunal. Public opinion in Serbia toward the ICTY', in: K. Bachmann, D. Heidrich (eds), *The Legacy of Crimes and Crises. Transitional Justice, Domestic Change and the Role of the International Community*, Frankfurt/M: Peter Lang 2016, 113–134. In general on denial, see S. Cohen, *States of Denial: Knowing about Atrocities and Suffering*, Cambridge 2001.

Bosniak population. On the one hand, Srebrenica came to symbolize the most important, unifying event in modern Bosniak history, bringing together political, religious and intellectual elites around the issue of commemorating the crime and seeking redress.[19] This made the town and its tragic past a focal point of BiH's symbolic map of suffering. On the other hand, the fact that the ICTY singled out events of July 1995 as the only act of genocide committed during the Bosnian war, giving it a unique albeit tragic position among numerous atrocities committed against the Bosniak nation, caused disillusionment among other victim groups. In the words of historian Paul Miller: "Had there be no Srebrenica, the battles over memory in BiH would likely be quite different."[20] This twofold dynamic of embracing Srebrenica as one of the nation's most important myths,[21] yet contesting its uniqueness among other equally horrifying atrocities endured by the Bosniak nation, has received far less academic and media coverage than the fairly exploited topic of Serb denial. Elevating the crimes of July 1995 to the level of genocide strengthened the role Srebrenica has played in Bosniak nation building ever since the end of the war. As Robert Hayden observes: "There is an added political value in proclaiming that victims died in genocide instead of (mere? ordinary?) persecution, extermination, or massacre, but this accrues not to the dead but to those who claim to be entitled to benefit from their martyrdom."[22] Srebrenica, especially since the 2003 opening of the Genocide Memorial Center, has become a sacred place for the Bosniaks living in the country and abroad. If memory, "on one level, does indeed seem surprisingly similar to religion – it is a shared practice, partially constitutive of identity, and leads to the kind of moral certainty whose dark side is moral absolutism,"[23] then

19 For a debate about the importance of burials and re-burials, see K. Verdery, *The Political Lives of Dead Bodies: Reburial and Postsocialist Change*, New York 1999.

20 P. Miller, 'Contested Memories: The Bosnian Genocide in Serb and Muslim Minds', *Journal of Genocide Research* 8:3 (Sept. 2006), 311–24.

21 Applying the term 'myth' to Srebrenica can be controversial as it is one of the ways genocide deniers refer to the crime, claiming it was invented and manufactured by the Bosniaks (for an example of such reasoning see I. Deretić, Srebrenica, available at http://www.srpskapolitika.com/intervjui/2010/latinica/015.html. The author of this chapter does not at all share such interpretations and instead, uses 'myth' as a reference to what nationalism studies consider as one of the corner stones of nation building: historical events occupying a particularly important place in national historiographies.

22 R. Hayden, '"Genocide Denial" Laws as Secular Heresy: A Critical Analysis with Reference to BiH', *Slavic Review*, Vol. 67, No. 2 (Summer, 2008), 384–407.

23 J. Mueller (ed), *Memory and Power in Post-War Europe: Studies in the Presence of the Past*, Cambridge, 32.

Srebrenica became a place of pilgrimage. As one Sarajevan writer mentioned during an interview, "every Bosniak should at least once visit the Genocide Memorial."[24] Both the *milieu de mémoire* and *lieu de mémoire*,[25] the Memorial Center and the graveyard erected in Potočari, at the place where thousands of Bosniaks sought protection from the UN forces in July 1995, became a central arena for those who want to derive legitimacy from the tragedy of Srebrenica. Political uses and abuses of Srebrenica's dead and survivors have been to a certain extent addressed in the literature.[26] Ger Duijzings writes about the commemorative space becoming an arena for ethnic and nationalist politics, where Muslim leaders as well as representatives of family associations, may indeed at times promote a nationalist agenda.[27]

The centrality of the Srebrenica genocide to the nation-building processes among the Bosniaks made voicing criticism regarding the town's special position more difficult for other victims.[28] Ćamil Duraković,[29] Srebrenica's Mayor until November 2016 and Sadik Ahmetović,[30] former Minister of Security, recall being reproached by representatives of Bosniak victim groups from other regions of BiH for all the attention and special treatment Srebrenica receives. Those comments however would always come in informal settings, during coffee breaks and in hushed voices. Nobody dared to approach them in public.[31] Srebrenica survivors have been long aware of the divisive effect of the Krstić verdict and the relationship it created with other places of suffering in BiH. Emir Suljagić, Srebrenica survivor, author and politician, has a "problem with this whole Srebrenica thing. This whole thing started as

24 Informal conversation with the author of this chapter in August 2012.

25 P. Nora, *Realms of Memory, Rethinking the French Past, Vol. 1 – Conflicts and Divisions*, New York 1996.

26 For a fascinating discussion of a similar process yet in different national context see I. Zertal, *Israel's Holocaust and the Politics of Nationhood*, Cambridge et al 2005.

27 Duijzings, *Commemorating Srebrenica*, 141–167. Those public uses of history in Srebrenica are most often linked to the main Bosniak party Stranka Demokratske Akcije/Democratic Action Party (SDA), which enjoys the greatest vote among the Bosniak returnees to Republika Srpska.

28 Saliha Đuderija of BiH Ministry of Human Rights and Refugees spoke on how the verdict, while it called 'the crime with its real name', in fact divided the victim groups. Jagoda Gregulska's interview with Saliha Đuderija in February 2015.

29 Jagoda Gregulska's Interview with Duraković, 2014.

30 Jagoda Gregulska's interview with Ahmetović, 2015.

31 Nettelfied and Wagner, Srebrenica in the aftermath of genocide, 117–119.

genocide in BiH and it ended with genocide in Srebrenica and it's so unfair to those tens of thousands of people who died before the July 1995 massacre that their extermination is left outside the ICTY's judgment of genocide in Krstić."[32] Similarly, Hasan Nuhanović, one of the Srebrenica's most prominent authors and Human Rights activists, recognizes that the verdict has had a very "localizing effect." He reminds that 60 % of those killed in genocide came from many different municipalities in eastern BiH and as such certain discussions of "local" or "municipal" genocide are truly insulting. "Genocide was committed against the Bosniaks, Srebrenica was only the crime scene."[33] He also perceives singling out July 1995 as the only act of genocide as injustice to all other victims and a factor that contributed to dividing victim organizations.[34] Nevertheless, both Suljagić and Nuhanović agree that the ICTY was of great importance. For Nuhanović, the verdict succeeded in calling the crime by its proper name – genocide – and this created a basis for the prevention of such crimes in BiH.[35]

The Krstić verdict thus had a threefold effect on the social dynamic in BiH. First, it did not prevent Bosnian Serbs from denying the crime. On the contrary, it could be argued that classifying events of July 1995 as an act of genocide made it more difficult for many Serbs to accept responsibility and distance themselves from the crime, despite the fact that this and subsequent ICTY trials produced large amounts of evidence and documentation. Second, the verdict provided a unifying platform for Bosniak collective memory and nation-building practices, and as such, contributed to the centralization of the commemorations and political discourse. Third, by singling out Srebrenica as the only act of genocide in BiH, it positioned victims of other mass atrocities in a position where they have been receiving far less attention and support.[36] The verdict distorted the understanding of the war advocated by the Bosniaks ever since the beginning of the

32 Orentlicher, *That Somebody Guilty Be Punished,* 67.

33 Jagoda Gregulska's interview with Hasan Nuhanović, February 2015.

34 Ibid.

35 Ibid.

36 Srebrenica, among other numerous forms of assistance, received major development input in form of the UNDP's Srebrenica Regional Recovery Programme. See http://www.ba.undp.org/content/Bosnia_and_herzegovina/en/home/operations/projects/poverty_reduction/srebrenica-regional-recovery-programme--srrp--.html. Wagner and Nettelfield, *Srebrenica in the Aftermath of Genocide*, 16 indicate that much of that aid pledged for development and return in the postwar municipality was driven on some level by the guilt of the states involved.

war – that the whole systematic, brutal campaign of terror carried out by the Bosnian Serb forces (supported by Serbia) throughout the country amounted to genocide.

2. Reclaiming Srebrenica

Regardless of the 'symbolic' placement of Srebrenica on the Bosnian map of suffering, the town remains located on the territory of Republika Srpska (RS), the entity controlled by Bosnian Serbs. This political-administrative arrangement further complicates the already difficult inter-ethnic relations in BiH. When the 1995 Dayton Peace Agreement codified BiH's war-time division into two ethnically-organized entities, the predominantly Bosniak-Croat Federation and the Bosnian Serb Republika Srpska, it also placed Srebrenica under the direct jurisdiction of the Serb entity. The government of RS, with the extraordinary exception of one historical moment when its leadership acknowledged the crimes committed in Srebrenica,[37] continues to deny the crime and glorify war crimes and war criminals.[38] This has provoked strong reactions from the Srebrenica survivors who demand a special status for the municipality, its removal from the control of Republika Srpska and placing it under the direct political, judiciary and administrative control of the Bosnian state. "If the Tribunal confirmed that what happened in Srebrenica was genocide, the only genocide that took place in Europe since the Holocaust, then isn't it logical that not only the individuals who committed the crimes should be punished but also the structures produced by the very crime ought to be torn down?", asks Ćamil Duraković, who was longtime Mayor of Srebrenica until November 2016.[39] "It is as if somebody came to your house, raped your sister, killed your father and expelled you just to be sentenced guilty yet given the very house you lived in", Duraković adds illustratively. The notion of "genocidal entity"[40] has been a recurring slogan of several high-profile

37 RS President, Dragan Čavić, issued a public apology on 22 June 2004, for complete text see: RS Predsednik: "Srebrenica je sramota" (RS President: "Srebrenica is a Shame") available at http://www.6yka.com/novost/2277/predsjednik-rs-srebrenica-je-sramota

38 See for instance Bosnian Serb leaders welcoming Biljana Plavšić, RS wartime president and war criminal who pleaded guilty to genocide at the ICTY' Biljana Plavšić stigla u Beorgrad' (Biljana Plavšić Arrived in Belgrade), available at: http://www.b92.net/info/vesti/index.php?nav_id=388935&dd=27&mm=10&yyyy=2009

39 Jagoda Greguska's interview with Ćamil Duraković, August 2014.

40 One of the more morbid ways of advancing this notion came on December 2013, when several Serb employees of the Srebrenica town hall and Councilors received 'greeting cards' with a picture of bodily remains and caption 'If you celebrate RS Day,

Bosniak politicians and genocide survivors campaigning for the removal of the Srebrenica municipality from the jurisdiction of the government of Republika Srpska.[41] As Wagner and Nettlefiled point out, "the term genocide carries a social force as well. Its meaning circulates beyond the courtroom and becomes integrated into the language of survivors. They insist on its recognition, and demand action, money, and attention by drawing on its moral authority. The term can also provide political grounds to act: justification for specific policies."[42] It has been a long struggle that has taken a variety of forms and presented a number of claims for two decades now. The campaign gained momentum in 2007, when the International Court of Justice (ICJ) published its judgment in *BiH vs. Serbia and Montenegro* upholding the ICTY's classification of the Srebrenica events as genocide, yet stating that Serbia was neither directly responsible for it, nor that it was complicit in it. While the ICJ ruled that Serbia had committed a breach of the Genocide Convention by failing to prevent the genocide from occurring and for not cooperating with the ICTY in punishing the perpetrators of the genocide, the whole blame for carrying out genocide fell onto the structures of RS. This verdict, however disappointing for the Bosniak population, provided yet further legal ground for demanding Special Status for Srebrenica.

The struggle for Srebrenica's Special Status serves as a telling example of the gap between the Bosniak's gains in the symbolic arena and losses in terms of institutional territorial reforms. Ever since the war, the fight over Srebrenica's ownership, both in terms of political control and symbolic rights, has been waged on many fronts. While the July 1995 genocide constituted the most dramatic instance of this struggle, it has been long before and long after that the tensions and confrontations between the Bosnian Serbs and the Bosniaks over Srebrenica evolved. The 2001 ICTY verdict provided the Bosniaks with a substantial legal argument with which they hoped to challenge BiH's ethno-territorial division codified in the Dayton Peace Accords that placed Srebrenica within the territory of RS.

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don't forget: these are its fundaments'. It was signed by twenty-five Bosniak victim and activist organizations. On file with the author.

41 Novinar Online, 'Silajdžić: Želim da ukinem Republiku Srpsku', 16.3.2007, available at: http://www.novinar.de/2007/03/16/silajdzic-zelim-da-ukinem-republiku-srpsku.html, See also: the International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH v. Serbia and Montenegro) Summary of the Judgment of 26 February 2007* available at: http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=3&case=91&k=f4&p3=5

42 Wagner and Nettelfield*, Srebrenica in the Aftermath of Genocide*, 19.

Already in 2002, the Srebrenica Municipality Assembly voted a resolution calling for the recognition of Srebrenica's distinct past.[43] This was the time when the return of the Bosniak population to Srebrenica was taking off, and the municipality, entirely populated by the Serbs ever since the end of the war, started regaining some sort of an ethnic plurality. In order to be passed by the Assembly, the document also needed the votes of the Serb councilors, therefore the original call for a special political status favoured by the Bosniaks had to be replaced with a more moderate call for a "special treatment of the Srebrenica municipality" that could be accepted by all. The resolution, once it had emphasized economic aspects of the demand, was voted for also by three Serb councillors and as such was adopted. Since it was the result of a political bargain, the document did not mention the word genocide nor did it refer to the ICTY's Krstić judgment. The justification for the demand listed in the resolution mentioned, among others, the fact that Srebrenica was proclaimed a UN Safe Zone and had endured crimes and losses of a great scale during the 1992–1995 period and especially in July 1995. Based on that, the Assembly asked for a special treatment of Srebrenica by the RS government, the Federation government and the government of BiH as well as the international community. This special treatment translated into demanding additional funds to be assigned to Srebrenica by all the governments, a revision of the privatization, and the enhancement of the process of return of the pre-war population. It also included the establishment of a memorial center and commemoration of other losses endured during the 1992–1995 period in the Srebrenica area (not specifically Bosniak ones). From the seven points listed in the Resolution, the only one – the establishment of a memorial center – was addressed at that time. But the memorial created did not address all the victims of Srebrenica, since it was reserved for the victims of genocide. The Potočari Memorial Foundation was established by a decision of the Office of the High Representative,[44] previously having assigned a piece of land[45] for this purpose, yet this decision came in response to lobbying carried

43 Rezolucija o posebnom tretmanu područja opštine Srebrenica, Republika Srpska – Skupština Opštine Srebrenica, 11.03.2002.

44 Decision establishing and registering the Foundation of the Srebrenica-Potocari Memorial and Cemetery, 10 January 2001 available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=125

45 The initial plan to have the Memorial erected in Federation has been strongly opposed by the organization "Mothers of Srebrenica" who insisted that the only location acceptable was the former UN Compound at the outskirts of Srebrenica – the place where many of the women saw their male family members for the very last time in July 1995.

out by the local victim organizations, mainly Mothers of Srebrenica. This intervention signalled a turning point in the ongoing struggle for the symbolic ownership[46] of Srebrenica. Even if the town and the municipality have been almost exclusively inhabited by Bosnian Serbs ever since the end of the war, with the establishment of the Memorial Center Potočari Srebrenica became a unique destination for Bosniaks and members of the international community.[47] The scope of this chapter does not allow a detailed discussion of the impact of the Memorial Center on the reconciliation process in BiH, what matters here is that its erection has been one of the scarce institutional successes of the Bosniak population, and especially of victim and survivor groups working relentlessly towards setting up an institutionalized place of memory and burial of genocide victims. This was however the only point of the 2002 Municipal Resolution that was implemented. While the talks about the demands for a special political-territorial status for Srebrenica have been ongoing within Bosniak circles, it was not until 2007 and the ICJ verdict on *BiH vs. Serbia and Montenegro* that a political and juridical momentum for a public campaign demanding wide-reaching institutional changes with regard to Srebrenica appeared. This time, there has been no political bargaining with the Serbs. On the contrary, Hakija Meholjić, board member of the Initiative for Special Status and the local leader of the Social-democrat Party (SDP) suggested threatening the international community with an ultimatum: either Srebrenica is given a special status by 24 March or all the Bosniak returnees will leave *en masse*.[48] Once this was not met with a response, a resolution was passed by the Bosniak councilors of the Srebrenica Assembly on 24 March 2007 proclaiming that the Srebrenica Municipality no longer falls

46 On the importance of the Memorial Center for the return process see G. E. Pollack, 'Burial at Srebrenica: Linking Place and Trauma', *Social Science and Medicine*, 56 (2003), 793–801 and G. E. Pollack, 'Intentions of Burial: Mourning, Politics, and Memorials following the Massacre at Srebrenica', *Death Studies*, 27 (2003), 125–42 and G. E. Pollack, 'Returning to a Safe Area? The Importance of Burial for Return to Srebrenica', *Journal of Refugee Studies*, 16/2 (2003), 186–201.

47 Duijzings, *Commemorating Srebrenica*, 160, talks about the Srebrenica commemorations being not only demonstrations of Muslim survival and unity, but also evolving into a platform for the ritual declarations of guilt and responsibility by members of the international community, who use it to express their regret at having allowed the massacre to happen. Through their strong political and financial support, the High Representative and other representatives of the international community have also made the Srebrenica commemorations, unlike other commemorations in BiH, into acts of remembrance meant for an international public.

48 Jagoda Gregulska"s interview with Hakija Meholjić, August 2014.

under the jurisdiction of Republika Srpska.[49] During the voting, all the Serb councillors left the Assembly meeting. The response that came from the RS government proclaimed the resolution invalid on the grounds of the absence of Serb members of the Assembly as well the fact that this move was considered in violation of the Srebrenica Municipality Statute which states that no decision can be made exclusively in favour or for the interest of one ethnic group only.[50] The response from the RS government did not come as a surprise nor did it intimidate Srebrenica's Bosniak political elites. On 16 April, they set up a "camp of genocide victims"[51] in Sarajevo demanding the implementation of the 16 points that were put down by the organizing committee.[52] For months adults and children set up a tent camp on a parking lot in one of Sarajevo's neighbourhoods.

Soon after, on 19 June 2007, a coalition of organizations of genocide victims addressed the Municipal Assembly with a letter requesting an emergency Assembly meeting for the sole purpose of adopting a decree that would "return the Srebrenica Municipality under the exclusive jurisdiction of BiH as it was before the war and genocide."[53] The demand was based entirely on the ICJ's ruling that genocide in Srebrenica was committed by the government and institutions of Republika Srpska, in particular the RS Army (VSR) and the RS police forces. The removal of the Srebrenica Municipality from RS would "prevent future genocides and offer the protection of Human Rights of all the citizens of Srebrenica."[54] The response to this call that came from the SDA Srebrenica

49 Skupština Opštine Srebrenica, Odluka o pokretanju inicjative prema institucijama Bosne i Hercegovine i međunarodnim institucijama na temelju sledeće Rezolucije o posebnom status opštie Srebrenica u okviru Ustava Bosne i Hercegovine, 24.3.2007.

50 Obavještenje Opštini Srebrenica, Ministarstvo uprave i lokalne samouprave, Republika Srpska, 10.4.2007.

51 The official reason for the establishment of the camp had to do with alleged attack on Bosniak returnee to one of the hamlets in Srebrenica. The story of the attack, and subsequent exile of the Bosniak residents has been since debunked in local media.

52 On file with the author.

53 Zahtjev Asocijacija žrtava genocida u Srebrenici, U.G. "Majke Srebrenice i Podrinja", U.G: "Srebreničke majke", U.G. "Pokret majki enklava Srebrenica i Žepa", U.G. "Žene Srebrenice", Klub SDA Srebrenica, Klub SDP Srebrenica, Klub SBiH Srebrenica Skupštini opštini Srebrenica za donošenje odluke o vraćanju Opštine Srebrenica pod isključivu jurisdikciju Bosne i Hercegovine kakvu je Opština Srebrenica imala prije agresije i genocida, 19.6.2007.

54 Zahtjev Asocijacija žrtava genocida u Srebrenici, U.G. "Majke Srebrenice i Podrinja", U.G: "Srebreničke majke", U.G. "Pokret majki enklava Srebrenica i Žepa", U.G. "Žene Srebrenice", Klub SDA Srebrenica, Klub SDP Srebrenica, Klub SBiH Srebrenica Skupštini opštini Srebrenica za donošenje odluke o vraćanju Opštine Srebrenica pod

Assembly Club was even more unequivocal in quoting ICJ and ICTY genocide rulings as well as basing itself in The Convention on Prevention and Punishment of the Crime of Genocide and the principle of *restitution in integrum* in its demand for freeing Srebrenica of jurisdiction of the "genocidal entity".[55] The demand was based on the fact that the ICTY and ICJ proclaimed Srebrenica as a place of genocide and put the responsibility for its conduct on the RS government as well as on the fact that the UN Security Council Resolution 819 of April 1993 proclaiming Srebrenica a "safe haven" had never been implemented. As Ćamil Duraković mentioned earlier: "They [Bosnian Serbs] were sentenced for the crime yet given the house."[56] But the draft resolution has never been put to the vote at the Srebrenica Assembly meeting.[57]

Meanwhile, the Special Status initiative gained the support of Haris Silajdžić, the Bosniak member of the tripartite rotating presidency, who took it to the next level: not only should Srebrenica be removed from RS, RS ought to be dismantled as it was a product of genocide.[58] This claim went even beyond the attempts to use the ICTY and ICJ verdicts for a change of Srebrenica's status in BiH. Both verdicts were invoked as grounds for an entire restructuring of the country. In response former US Ambassador and senior Deputy High Representative Clifford Bond was chosen as the OHR's Special Envoy to Srebrenica and helped broker deals between the involved parties. As a result, the protesters lost the main battle – Srebrenica has remained under the jurisdiction of the RS – yet gained several concessions. The Council of Ministers allocated a lump sum of ten million KM (approximately five million euro) to Srebrenica in order to improve the economic and social conditions of the municipality. The government of Republika Srpska proclaimed Srebrenica "an area of special economic interest" and pledged, among other things, substantial investments in the municipality, the revision of the privatization process and a better representation of the current ethnic structure of the Srebrenica population within state owned companies

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isključivu jurisdikciju Bosne i Hercegovine kakvu je Opština Srebrenica imala prije agresije i genocida, 19.6.2007, p. 2.

55 Klub odbornika SDA Srebrenica, Prijedlog odluke o vraćanju Opštine Srebrenica pod isključivu jurisdikciju države Bosne i Hercegovine kakvu je Opština Srebrenica imala prije agresije i genocida, 23.6.2007.

56 Jagoda Gregulska's interview with Duraković, 2014.

57 Jagoda Gregulska's interview with Amir Kulaglić, August 2014.

58 'Silajdžić: Hoću da ukinem Republiku Srpsku' (Silajdžić: I want to dismantle Republika Srpska), Novinar Online, 16. 03.2007 http://www.novinar.de/2007/03/16/silajdzic-zelim-da-ukinem-republiku-srpsku.html

and public institutions. As far as territorial demands went, the *Law on the Center for the Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide*[59] was enacted by the OHR, giving *de iure* authority over the Srebrenica-Potočari complex placed in the territory of the RS to the State of BiH. This law in effect violated a number of articles of BiH's core documents: the Dayton Peace Agreement,[60] the State Constitution,[61] and the RS Constitution.[62] In this sense, the new territorial status of the Memorial Center was a small victory in the battle waged over Srebrenica's ownership. Even if it was not a decision made by local politicians or institutions: once again, as with the establishment of the Memorial Center several years before, it was the High Representative, taking advantage of the Bonn Powers who unilaterally removed the Memorial from under RS jurisdiction. There is, however, little doubt that he did that in response to the pressure exercised by the victim organizations and political activists from Srebrenica. As with most of the institutional changes in BiH, it is difficult to clearly assign ownership of the processes. While the organizers of the protests considered this a positive albeit limited progress, some commentators felt that the OHR actually did the RS a favor by relieving it of the responsibility for the Memorial.[63] Eventually, despite their recurring threats that the Bosniak returnees would leave Srebrenica if the protesters' demands for a special status were not fulfilled (threats that were never seriously considered as Hakija Meholjić, the Campaign's

59 Chapter III on Institutional structure, Article 8(1), identifies the role of the State of BiH to 'manage the Memorial Center', http://www.ohr.int/decisions/plipdec/default.asp?content_id=40028

60 Article 1 of the DPA says that "The boundary between the Federation of BiH and the Republika Srpska (the 'Inter-Entity Boundary Line') shall be as delineated on the map at the Appendix', while the Article 2 states that 'the parties may adjust the Inter-Entity Boundary Line only by mutual consent'.

61 Article 3(b) of the Constitution of BiH regarding the Law and Responsibilities of the Entities and the Institutions. It states that 'all governmental functions and powers not expressly assigned in this constitution to the institutions of BiH shall be those of the Entities.' Article 3, 2(d) of the Constitution of BiH says that the responsibility to govern its territory for all its citizens in a safe and secure environment is 'solely under the authority of entities'.

62 It challenged Article 2 of the RS Constitution ('the territory of the Republic is unified, indivisible and inalienable').

63 O. Simić, Remembering, Visiting and Placing the Dead: Law, Authority and Genocide in Srebrenica., *Law Text Culture*, 13(1), 2009, 298, Available at: http://ro.uow.edu.au/ltc/vol13/iss1/13.

Board member admitted),[64] by 2 July, the tent camp set up in Sarajevo was empty, and most of the protesters had returned to their homes.

It was 2008 that brought a significant, if temporary success for the Srebrenica victims' organizations and activists. While placed within Republika Srpska and inhabited predominantly by Serbs, ever since the 2001 local elections, Srebrenica had been ruled by a Bosniak-dominated municipal government. This was possible due to the fact that the electoral law allowed internally displaced persons (IDPs) and refugees with residence in foreign countries to vote in the local elections for their pre-war municipalities. As a result, the fact that Bosniaks were a majority in Srebrenica prior to the war was reflected in the post-war electoral results.[65] However, between the 2004 and 2008 local elections, BiH started to systematize the registration of residency and centralize the distribution of ID cards. As a result, only citizens with ID cards issued in their respective municipality could cast a vote in local elections there. Conversely, by purchasing any piece of land or property outside of one's pre-war municipality, people lost their status of IDPs and as such, the right to elect councillors and mayors in their pre-war municipalities. On the other hand, many Bosniaks who returned to live in Srebrenica remained registered in the Federation where they were entitled to a number of benefits such as pensions and benefits for war veterans and families of *sehids* (fallen Muslim soldiers). For them, legalizing their life in RS would have amounted to losing their social and economic benefits in the Federation. As a result of this, the electoral law of 2008 presented a real possibility for the Serbs to win the local elections in Srebrenica (particularly as many of those who moved to Serbia after the war kept their IDs issued in Srebrenica in the immediate post-war period and based on that were allowed to vote in the local elections). This was not acceptable to the Bosniak population of Srebrenica and a campaign for the exemption of this municipality from the new electoral law was organized. Headed by an entirely Bosniak Student Association in Srebrenica and gathering eight victims' organizations, the coalition undertook a series of activities lobbying the Bosnian parliament for special treatment of Srebrenica.[66] Once again Haris Silajdžic, the Bosniak member of the Presidency[67] and leader

64 Jagoda Gregulska's Interview with Hakija Meholjić, August 2014.

65 For results of local elections in BiH over the years, see Central Election Commission of BiH https://www.izbori.ba

66 Interview with Almir Salihović, president of the Srebrenica Student Association, August 2014.

67 The Presidency of BiH is a three-member body which collectively serves as the head of the state. According to the Article V of the Constitution of BiH, the Presidency of

of the Party for BiH[68] offered his full support for the initiative. Public meetings were organized at the Potočari-Srebrenica Memorial Center[69] leaving no doubt about the fact that the Bosniaks demanded exception for Srebrenica based on its genocidal past.[70] The 2008 local elections were the moment when Srebrenica's special standing in BiH translated into institutional exceptionality of the municipality, since the new electoral law did not apply. The Bosnian Parliament (The House of Representatives and the House of People) amended its Election Law on 7 May 2008. The elections took place in October of the same year.[71] While initially Bosnian Serb parties and entities' leaderships were strongly against such an amendment (Serb MPs did not attend the special sessions of the Parliament where the law was debated and voted on), Republika Srpska's Prime Minister, Milorad Dodik, changed his mind after meeting with the High Representative and the Representative of the European Union, Miroslav Lajčák.[72] The OHR welcomed the decision, stating that it was a sign of "political maturity and taking into account Srebrenica's tragic history."[73] Srebrenica's pre-war residents were allowed to elect the local government regardless of their current residency and a possible lack of ID cards issued there. As predicted, the Bosniaks remained

BiH consists of three members: one Bosniak and one Croat elected from the Federation and one Serb elected from the Republika Srpska. Together, they serve one four-year term. The member with the most votes becomes the chairman unless he or she was the incumbent chairman at the time of the election, but the chairmanship rotates every eight months, to ensure equality.

68 Stranka za BiH/Party for BiH has been traditionally a Bosniak-lead party known for a non-compromising approach to Serb counterparts, and advocating the unification of BiH.

69 The fact that the Memorial Center is being used for political meetings causes ambivalent feelings among the genocide survivors. As Hasan Nuhanović commented, this place should not be used for such purposes, yet, if using it may help improve the situation of Bosniaks in RS, then it should. Interview with Hasan Nuhanović, February 2015.

70 Jagoda Gregulska's interview with Almir Salihović, one of the campaigns' organizers, August 2014.

71 Zakon o izmjenama i dopunama izborngog zakona Bosne i Herzegovina avialable in „Službeni glasnik BiH", broj: 37/08 od 07.05.2008.g accessed at https://www.izbori.ba/Documents/documents/ZAKONI/Sl_gl_BiH_37_08/IZ-Sl_gl_37-08-bos.pdf

72 'Zbog Srebrenice bojkotovali sjednicu parlamenta', Index.hr available at http://www.index.hr/vijesti/clanak/zbog-srebrenice-bojkotirali-sjednicu-parlamenta/385608.aspx

73 'Srebrenica dobila poseban izborni status', Radio Slobodna Evropa, 7 May 2008. Available at http://www.slobodnaevropa.org/a/1109900.html

in control of the local government and Srebrenica remained the only municipality in RS governed by Bosniaks, more precisely by its diaspora and displaced persons.

But this exception from the 2008 electoral law was a singular concession and as the 2012 local elections were approaching, the question of Srebrenica's political ownership was re-opened. When it became clear that another exceptions would not be made, a new campaign was organized in order to register as many Bosniak voters in Srebrenica as possible. The "Glasaću za Srebrenicu" ("I'll Vote for Srebrenica") movement consisted of local civil society organizations that called for Bosniaks to register in Srebrenica and vote there.[74] While the organizers claim that they intended to bring in as many pre-war Bosniak Srebrenica residents, the campaign was in fact conducted in a way that encouraged any person (regardless of their connection to Srebrenica) to get a local ID card and vote for Bosniak candidates.[75] The campaign was financially supported by Bosniak business circles, parts of the diaspora, and by Bosniak political parties. Facing the possibility of losing the position of mayor to the Serbs, all the Bosniak parties agreed to avoid vote-splitting among Bosniak candidates and instead endorsed one joint candidate: Ćamil Duraković, known to the public since the 2007 Sarajevo tent camp campaign and Deputy Mayor during the 2008–2012 mandate. Duraković, who had been very strongly embedded in the SDA party, formally resigned from

74 Nedim Jahić, one of the campaign's organizers, reminds that the initiative to help Bosniak population vote in their pre-war municipalities that with the Dayton Peace Agreement fell onto the territory of RS was not envisioned as exclusively addressing Srebrenica. Similar campaigns were organized for the Bratunac municipality (bordering with Srebrenica, the place where a majority of the July 1995 massacres and executions took place), as well as Vlasenica, and Stolac. However, only the campaign for Srebrenica reached such a significant scale and success. He explains this fact partially with the exceptional symbolic position of Srebrenica as well as the fact that in the case of this municipality, the campaign aimed at defending the already existing control of the mayor's seat by the Bosniaks while in the remaining municipalities, should the campaign have succeeded, the Bosniaks would come into government for the first time since the war. Interview with Nedim Jahić, February 2015. Similarly, an employee of one of the most influential international organizations operating in BiH speaks of the difference in Bosniak mentality and ability to mobilize in Srebrenica and Bratunac: "Both municipalities witnessed horrific crimes against the Bosniaks, both have seen the Bosniak returned. Yet, Bratunac and its Bosniak population remain in the shadow of Srebrenica."

75 The author of this text received a circular e-mail distributed at the time of the campaign urging all Bosniaks to register and vote in Srebrenica.

its membership in order to appear as a multi-party candidate.[76] The aim of the campaign was not so much to elect a Bosniak mayor as to prevent the election of somebody who denied the genocide.[77] As a result of a widespread campaign, the Bosniaks won the elections and Ćamil Duraković became the Mayor.[78] This did not happen without strong counteractivities from the Serb side that ranged from public attacks on the campaign by Milorad Dodik, the RS President, obstruction in the process of issuing ID cards for the Bosniaks registering in Srebrenica, to a parallel campaign of bringing Serb voters from Serbia and other parts of BiH to the town *en masse*. While the Bosniaks won, the feeling that Srebrenica's government is elected by anyone but its current residents became even more widespread. This became particularly evident when Bosniak public figures such as Sarajevo based intellectuals and Muslim religious leaders from Serbia also registered in Srebrenica.[79] Their support illustrated that Srebrenica's faith was considered a responsibility of all Bosniaks, yet it also served the opponents of the initiative as an argument in their claim that the whole campaign was a sham rather than support for Srebrenica's real pre-war inhabitants.[80] Nevertheless, Srebrenica's mayor remained a Bosniak and based on this success the organizers of the campaign decided to continue with their activities – this time taking it beyond the local elections.[81]

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76 The Party of Democratic Action (Bosnian: *Stranka demokratske akcije* or SDA) is the biggest Bosniak political party in the country.

77 Jagoda Gregulska's interview with Almir Salihović, August 2014.

78 Duraković's electoral success should be at least partly attributed to the fact that the Serb vote was for the first time divided among two Serb candidates. Usually, voters in Srebrenica have only two candidates to choose from – one Bosniak and one Serb.

79 While strongly publicized, the number of such registrations was not higher than 50. Interview with Nedim Jahić, one of the organizers of the campaign, February 2015.

80 Ahmetašević, a Bosnian journalist, is very critical of the campaign and the idea that people who were never connected to Srebrenica suddenly were given the right to elect local government there. "Imagine somebody who's never been to Sarajevo has the right to choose who the mayor here will be". She also believes that Srebrenica's mayor does not have to be an ethnic Bosniak, it should be more than anything, a good manager. "Srebrenica has had Bosniak mayors for years now and look where it led us – total underdevelopment, corruption. We need to stop employing the ethnic key." Jagoda Gregulska's interview with Nidzara Ahmetašević, February 2015.

81 By the time this book was undergoing the last revisions, local elections in Srebrenica were held in October 2016 and the Bosniak candidate Ćamil Duraković lost to Mladen Grjuičić, the candidate of a coalition of Serbian parties named "Coalition for Srebrenica".

The "Prvi Mart" (1 March)[82] coalition consisting of 30 civil society organizations, victims' associations, veterans' associations, the organization of returnees, refugees and displaced persons, was created in order to strengthen the representation of returnees in the Republika Srpska government. The declared objective was to register 100,000 refugees and displaced persons for the 2014 elections with the aim of electing five members of the RS Parliament from parties that do not deny the genocide.[83] Srebrenica survivors played a very important role in the work of the Coalition, ranging from Emir Suljagić, a genocide survivor who served as the face of the movement, through Srebrenica-based activists doing a great part of the campaigning, to the leaders of Srebrenica women victims' organizations being present at the press meetings and actively supporting the cause. In the words of Nedim Jahić, one of the coalition's activists: "Srebrenica survivors gave the campaign the necessary symbolic legitimacy. Srebrenica has the mobilizing and fundraising power that cannot be matched by anything in BiH."[84]

The aim of "Prvi Mart" has been to challenge the political strength of the Serb parties denying the genocide. Rather than perceiving events of July 1995 as genocide, the most radical Serb discourse describes losses endured by the Serbs in BiH, in particular in Sarajevo, as the only genocide that happened in BiH. This lack of acknowledgment from the Serbs is painful, frustrating and unacceptable for Bosniaks as it is considered the final phase of genocide itself.[85] Again, having the ICTY and ICJ verdicts on their side, the Bosniaks managed to stigmatize any person who as much as hinted a doubt about the events of July 1995.[86] "Genocide

82 The name of the coalition referes to the date of the 1992 referendum in BiH resulting in the country's secession from the Federal Republic of Yugoslavia. More on the issue of the referendum and the controversies it created, see D. Dizdić, *Bosnian Independence Day Divides Ethnic Communities*, Balkaninsight, available at http://www.balkaninsight.com/en/article/Bosnian-independence-day-still-divides-ethnic-groups

83 Available at: http://www.prvimart.ba/

84 Jagoda Gregulska's interview with Nedim Jahić, February 2015.

85 Considering denial as the final stage of genocide has been theorised by Gregory H. Stanton, President of Genocide Watch. Other phases of genocide incude, according to his categorization: classification, symbolization, discrimination, dehumanization, organization,polarization, preparation, persecution and extermination. See http://www.genocidewatch.org/genocide/tenstagesofgenocide.html

86 As eloquently described by historian Paul Miller: "The operative subtext of this austere word suggested that if I had any doubts about what happened in Srebrenica in July 1995, then the pictures that followed would prove—indeed were meant to prove—that it was nothing less than genocide: not a massacre, not organized mass murder, not a tragedy of inestimable proportions or some other well-intentioned cliche, but genocide,

denier" became one of the strongest insults that can be used against an individual, especially one pertaining to public life in BiH. In fact, one does not have to bluntly disagree with the genocide classification of the massacre, it might be enough to challenge an aspect of the genocide claim, or to simply express interest in crimes committed by the Bosniak forces in Srebrenica to risk being labelled a genocide denier.[87] The ICTY and ICJ genocide verdicts gave Srebrenica survivors and their supporters the ultimate moral tool for the symbolic battle for remembering July of 1995 as genocide. As one of the guides at the Potočari Memorial Center explained (echoing sentiments of numerous survivors, researchers and intellectuals): "Genocide is not a matter of opinion. It is a fact, there is a verdict."[88] The rulings and subsequent international recognition of their victimhood changed the power relations within BiH in favour of the Bosniaks. Any attempts at bringing Srebrenica victim organizations from both sides to one table and fostering a dialogue aimed at reconciliation, or at least dealing with the past, were confronted to this symbolic asymmetry between survivors of a legally recognized genocide on the one hand, and survivors of atrocities, that were "just" atrocities on the other.[89] However, the power of morally based accusations about genocide denial eagerly used by victim organizations, Bosniak politicians and activists did not translate into institutional arrangements. Several attempts at passing a "Law Against Denial, Minimizing, Justifying or Supporting Holocaust, Genocide and Crimes Against Humanity in BiH"[90] in the BiH parliament

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the crime of crimes." P.B. Miller, 'Contested Memories: the Bosnian genocide in Serb and Muslim Minds', *Journal of Genocide Research* (2006), 8(3), September, 312–313.

87 Miller recalls participation in what was billed as an international scientific conference on Srebrenica that took place in Sarajevo in July 2005: "If you had so much as hinted that Srebrenica might be equivalent to anything less than the Holocaust, the attacks that followed would have made you very much regret such independent thinking." He claims that whereas Armenian genocide deniers disavow a fact of history itself, Srebrenica denial seems merely to entail questioning how to name that fact. See Miller, *Contested Memories,* 313.

88 Note from a visit to the Potočari Memorial Center, May 2008.

89 "How dare you mention your dead husband when you are in a room with women who lost their sons in genocide?" a young Bosniak journalist vigorously attacked a representative of a Serb Civilian Victims Association during one of the round tables organized in Srebrenica by Sarajevo-based organizations (in this case, the German Friedrich-Ebert Foundation). Loss of family members in genocide was the ultimate form of suffering (often times followed by the inability to bury their remains), and in this light, Serbs should not speak of their losses.

90 The draft of the law prepared by Bosniak party Stranka za BiH included financial punishment and imprisonment lasting between eight days and three years for those

failed.[91] The draft law never made it through the Parliamentary Commission for Human Rights, where its Serb members objected to it. Disappointment of the Srebrenica victim organizations and Bosniak politicians has been widespread. Regardless of Paul Miller's observation that the battle was waged solely over the use of the term genocide, survivors of July 1995 had to put up with denial of their suffering that went far beyond the categorization of the crime itself. Messages that came from Bosnian Serb circles (and Serbia proper) challenged the scale of the crime, its intentionality, accused the victims of fabricating evidence that took as morbid forms as claiming that dogs' bones had been buried at the Memorial Center[92] in order to artificially increase the scale of Muslim victimhood.[93] Repetitive attacks and insults by the Serbs (corresponding with a lack of acknowledgment of Serb civilian loses by the Bosniaks) addressed to survivors of July 1995 made their return to Srebrenica very difficult, especially in the early period of the process. Not being granted the tool in form of a law against the denial of genocide, the victims have been left with nothing more that public condemnation of those who challenge their narrative.

3. The ICJ as an actor of Institutional Change in Srebrenica

Outside BiH, the Krstić trial judgment is mostly associated with the notion of the Srebrenica genocide, because it is the first court decision that defined the events of July 1995 as genocide. But Bosnians more often associate another judgment with the genocide label – the 2007 International Court of Justice decision of *BiH vs. the Federal Republic of Yugoslavia*. This is the "genocide verdict" for most Bosnians.[94] The Krstić genocide judgment, albeit important, is considered as only one of the factors contributing to Srebrenica's special position and mobilizing Srebrenica survivors in their struggle for criminal, social and political justice.

denying, minimizing or justifying genocide as well as for anyone who would disseminate materials that do so. On file with the author.

91 This is of course the result of the ethnic and ideological divisions in BiH. Such a law was passed and enacted in Rwanda, where "genocide denial" is now strongly penalized, and denial accusations may even be brought against a person who uses ethnic labels (Hutu, Tutsi etc.) in order to describe the Rwandan population.

92 Informal conversation with Bosnian Serb women in Srebrenica, May 2009.

93 Robert Hayden is of a similar opinion, see R. Hayden, 'Genocide Denial Laws as Secular Heresy: A Critical Analysis with Reference to BiH', *Slavic Review* Vol. 67, No 2 (2008), 384–407.

94 This conclusion is based on the interviews as well as more general observation of the Bosnian scene.

In fact, as the discussion which is reflected in this chapter shows, the survivors' demands have been based on the fact that Srebrenica became one of the greatest failures of international peacekeeping efforts, hence it is regarded rather as a failure of the UN, than as a success of an UN tribunal. Nidžara Ahmetašević, a Bosnian journalist who has been covering transitional justice and reconciliation issues in the country for years, does not think that the ICTY Krstić verdict played a significant role in establishing Srebrenica's special status in the Bosnian society. In her view, the verdict itself was a result of extensive lobbying carried out by the victim organizations and as such, it only confirmed what was clear and indisputable for the Bosniaks: "Srebrenica has been a very political issue from the beginning of the war, long before July 1995 happened so even longer before the Krstić verdict. The verdict might have strengthened the argument but it certainly did not create the agency of the victims."[95] While "international criminal law recognizes the extraordinary nature of genocide, and its legal definition has heavily influenced how people have framed the postwar debate surrounding Srebrenica",[96] it was the failure of the UN Peacekeeping forces to protect the Bosniak population in July 1995 that constituted the ground for numerous initiatives. The sense of abandonment and betrayal by the international forces has played a very important role in the Srebrenica survivors', and BiH's struggle for acknowledgement. Several victims, with great support from Dutch lawyers, Bosniak politicians and activists, attempted to put the UN on trial.[97] This initiative, even if a failure, constituted a tremendously important moment for those who attempted to hold the international community and the UN legally accountable and to challenge the immunity of the UN. Srebrenica survivors were more successful in suing the Dutch government for its responsibility for the conduct of Dutchbat, the Dutch batallion, which was present in Srebrenica when the genocide happened. In a landmark decision,[98] the Supreme Court of the Netherlands found the Netherlands responsible for the deaths of three Muslim men who were sent away from the Dutchbat compound in Potočari in the very last hours before the closure of the compound and the withdrawal of the Dutch

95 Jagoda Gregulska's interview with Nidžara Ahmetašević, February 2015.

96 Wagner and Nettelfield, *Srebrenica in the aftermath of genocide*, 17.

97 B. E. Brockman-Hawe, 'Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation', *Washington University Gobal Study Law Review 10*, 727 (2011), available at: http://openscholarship.wustl.edu/law_globalstudies/vol10/iss4/3

98 The State of The Netherlands (Appellant) vs Hasan Nuhanovic, Supreme Court of The Netherlands, First Chamber, 12/03324 LZ/TT, 6 September 2013.

battalion from the scene. The case raised complex questions as to exactly which law should govern international troops in contexts such as these, relating also to the immunity of the UN and to the possible sharing of responsibility between the UN and national military units participating in UN peacekeeping missions. The Court held that in the very specific circumstances in which the facts of this case were played out, the Dutch ministries of Defence and Foreign Affairs – and not the UN – were in effective control of their military staff on the ground, and were therefore responsible for their actions.[99] Despite the limitations of the verdict, which only dealt with the responsibility of the Dutch government for the conduct of its soldiers (and avoided any legal evaluation about the UN or the failure of Dutchbat and the UN for preventing the genocide) it nevertheless brought some relief and satisfaction to the survivors.[100]

For some interlocutors, the ICTY's genocide verdicts have been important, though. As Muhamed Duraković, himself a genodice survivor, explains, without the ICTY verdict, Srebrenica would have got less international attention and special treatment and commemorations would not be taking place on such a scale, and it would be more difficult to mobilize people invoking Srebrenica. "No matter how big the international failure in July 1995 was, without the judgments, with time it would become only a tragic massacre, it would slowly fade away from our memory. Not among families of the survivors, but among the rest of the world."[101]

Yet it was the 2007 ICJ ruling rather than the 2001 and 2004 ICTY Krstić decisions that mobilized Srebrenica survivors and prompted a campaign for removing Srebrenica from under the jurisdiction of Republika Srpska. The campaign started almost immediately after the ICJ verdict, whereas the ICTY judgments in the prosecutor vs. Krstić did not trigger a similar mobilization. Some interlocutors speculated about the reasons for it. Ćamil Duraković brought up the difference between the jurisdictions of the tribunals. The ICTY judged

99 Nuhanović Foundation: http://www.nuhanovicfoundation.org/en/reparations-cases-2/the-state-of-the-netherlands-appellant-vs-hasan-nuhanovic-supreme-court-of-the-netherlands-first-chamber-1203324-lztt-september-6-2013/

100 For an account of the July 1995 events in Srebrenica with a specific focus on the role played by the UN forces see Nuhanović, H. (2007): Under the UN Flag: The International Community and the Srebrenica Genocide. DES. During one of the author's visits to the Genocide Memorial Center in Srebrenica/Potočari, she witnessed the guide explaining to a group of primary school pupils that "we hate the Serbs but we hate the Dutch even more."

101 Jagoda Gregulska, Interview with Muhamed Duraković, April 2015.

individuals, while at the ICJ states appear as conflict parties. "With the ICJ expectations were higher. The victims wanted to hear a tribunal finding guilty of genocide political structures, everybody knew that such a crime could have not been committed by random individuals. We didn't need to hear that we were victims of genocide, we knew that. We needed to see organizations, be that political, administrative or military found guilty and respond for the crime. That is why the ICJ verdict was much more important." When the Tribunal declared Republika Srpska guilty of genocide, it was expected that the international community would act upon it and dissolve this structure. This did not happen, and the survivors decided to organize the Special Status campaign seeking if not the dissolution of the RS and its police, then at least special treatment for Srebrenica. Sadik Ahmetović also complains about the lack of institutional follow-up to the ICJ verdict, that there was a verdict that found Republika Srpska guilty of committing genocide, yet Republika Srpska, and even its police forces remained untouched.[102] The meaning of the ICJ was however deeper than just confirming the ICTY's findings on Srebrenica. The Bosniaks hoped that the Tribunal, by finding Serbia guilty of genocide, would have confirmed their understanding of the Bosnian war, which, according to them, was an international aggression of one state against another. With Serbia guilty of merely not preventing the genocide from happening, Bosnian Serbs felt at least partially satisfied. Another reason why the public response to the prosecutor vs. Krstić was weaker than after the ICJ verdict was poor media coverage. The ICTY's poor outreach in those years could be partly blamed for that. As Hasan Nuhanović explained, "the genocide verdict was the result of a legal process that happened two thousands kilometers away from BiH. When the Krstić decision was announced, not many people in BiH knew about it. Of course, leaders of victim organizations did know it, but average victims, often elderly, uneducated women did not follow the process, nor did they really understand what the legal term meant."[103] When the ICJ decision in 2007 was about to be announced, the situation was quite different. Sadik Ahmetović remembers counting hours till the announcement and recalls the general feeling of nervousness in the country. "Everybody waiting, everybody was commenting once it was made public. The media created a vast build up to that moment."[104]

Nuhanović recalls that the victims did not lobby for the genocide verdict, they asked for justice. They asked for the war criminals to be put on trial and

102 Jagoda Gregulska's interview with Sadik Ahmetović, March 2015
103 Jagoda Gregulska's interview with Hasan Nuhanović, February 2015.
104 Jagoda Gregulska's interview with Sadik Ahmetović, March 2015.

sentenced. However, once the verdict was passed and knowledge of it spread, the notion of "genocide victim" became an important element of identity of those who survived Srebrenica. It filled a gap. How should they identify themselves? As victims of Srebrenica? Victims of the UN Safe Area?[105] The initiatives and interventions organized by and in the name of Srebrenica's genocide survivors, even if not always successful, remind the Bosnian and international public that there has been no significant political or institutional redress for genocide.[106] The ICTY verdicts served as one of such tools that went far beyond naming the guilty ones and punishing the perpetrators. Contrary to what Hannah Arendt argued in *Eichmann in Jerusalem*[107], that "the purpose of a trial is to render justice and nothing else," trials carried out at the ICTY produced much more than legal verdicts,[108] they created historical accounts of the war, collected endless pages of documents and testimonies, strengthened survivors' claims for justice and accountability and to a certain extent, shaped identities. The events of July 1995 in Srebrenica remain the only series of events from the brutal Bosnian war recognized by international law as acts of genocide, memory of Srebrenica is thus memory of genocide. The ICTY Krstić judgment shaped the frames of memory of Srebrenica and made the annual commemorations of genocide the focal point of the Bosnian landscape of memory and Bosniak nation building. On the scale of victimhood, Srebrenica's survivors were given the highest rank offered by international law, the ICTY ascribed them the status of genocide victims. Yet this, translated into the crude Bosnian postwar reality, did not result in much retribution, restoration or restitution. What is more important for the purpose of this chapter: the institutional change in Srebrenica, which did take place as a result of bottom-up mobilization, was clearly the result of the ICJ judgment and its perception on the ground. The ICTY's Krstić judgments with their genocide findings delivered the tool for the fight for acknowledgement of the survivors and created the symbolic and moral asymmetry between the different groups in BiH, but it was the ICJ judgment, which led to institutional changes in Srebrenica, which have been described in this chapter.

105 Jagoda Gregulska's interview with Hasan Nuhanovic, February 2015.

106 For a discussion of the gender aspect of such criticism of women survivors, as well as comments on the destructive image of Bosniak women produced by the Krstić verdict, see E. Helmes, *Victimhood and Innocence: Gender, Nation, and Women's Activism in Postwar BiH*, Madison 2014.

107 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, London: Penguin Books 1994 [1963].

108 For an analyses of the impact trials may have, see L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of Holocaust*, New Haven et al. 2001.

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