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Dubravka Zarkov
Marlies Glasius *Editors*

Narratives of Justice In and Out of the Courtroom

Former Yugoslavia and Beyond

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Editors
Dubravka Zarkov
International Institute of Social Studies/EUR
The Hague
The Netherlands

Marlies Glasius
University of Amsterdam
Amsterdam
The Netherlands

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Introduction

This book is the result of a conference titled 'Regional and International Discourses on Deliveries of Justice in Former Yugoslavia: Histories, Meanings and Narratives', held in April 2012, at the Netherlands Institute of Advanced Studies (NIAS) at Wassenaar.[1] This book considers relationships between contemporary practices of international and national war crime tribunals, and the ways in which competing histories, politics and discourses on law and justice are being re-imagined and re-constructed, both within and outside of the courtrooms. We take discourses and practices of several international tribunals for war crimes as our starting point, and then focus on the struggles with and for justice in the aftermath of the Yugoslav wars, in three countries: Bosnia, Serbia and the Netherlands.

Practice-oriented scholars of transitional justice have tended to analyze international criminal courts, such as the International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda (ICTR), in terms of their success or failure in establishing the facts of war crimes, and achieving the 'liberal normative goods' of retribution, accountability, deterrence, ending impunity and reconciliation. These analyses tend to focus on intended effects of international criminal justice on societies. In this book we try to depart from this usual way of addressing the topic. We do not treat either 'international-legal' or 'local-cultural' understandings of violence, justice or history as given, essential or static. Instead, the contributions focus on the *dynamic* relation between international criminal courts and lived realities of the war-affected societies and the global world, and go beyond *intended* or *proclaimed* effects.

International criminal law and its courts generate both less and more than they set out to do. They create a symbolic space within which competing narratives of crimes, perpetrators and victims are produced, circulated and contested, and intimately related to the narratives of justice, responsibility and guilt. In other words, international criminal law and the courts gather, and in turn produce, knowledge about societies in war, their histories and identities, and their relations to the wider world. But the

[1] Both of us were NIAS fellows in 2012/2013, as members of a team working on the joint project The Real and the Imagined in Contemporary Balkans. The other collective result of this project is a book Post-Yugoslavia. New Cultural and Political Perspectives, forthcoming by Palgrave, edited by Dino Abazovic and Mitja Velikonja. We thank conference participants, our project team members and other NIAS fellows and NIAS staff, and Springer, for their support in realization of this book.

knowledge produced within the courts does not go hand-in-hand with that of the wider society. There, individual people and groups, institutions and organizations, and ingrained power structures produce their own versions of history, their own facts and figures. What interests us are both the narratives within and outside of the courts, but also the relationship between them—the ways they co-produce each other, the ways different narratives compete and contest, and different truths are constructed.

Thus, this book takes as its underlying assumption that, whilst the courts and court cases are ostensibly only concerned with establishing the legal guilt or innocence of the accused, the very establishment of the courts and the specific trials become another occasion to produce new or utilize existing narratives about past and present conflicts and violence and the role of various actors within them. In addressing those issues, the editors and contributors assume no single position towards the international criminal law, criminal courts in general, or the ICTY in particular. Rather, we take them all as contested terrains, showing what theoretical and geo-political influences leave their mark on specific dynamics in court and in the region, as well as on the specific perspectives of the contributors.

The diversity of those positions is meant, first, to emphasize the constructed nature of the meanings of justice, as well as to stress the political and symbolic significance of those struggles. Second, we emphasize that the production of knowledge is the ultimate objective of those struggles: knowledge that allows or disallows political, social and symbolic solidarities for building a peaceful future in the post-Yugoslav region, and far beyond it.

The first set of contributions, in the section *Narratives of Law and Justice in the International Courtrooms*, situates the narratives and knowledge production around the ICTY within a larger historical and geo-political perspective, analyzing the ICTY within contemporary discourses and practices of international criminal law, as well as a theoretical and normative set of questions about international criminal law and justice and its engagement with different cultural, political and geographical environments. It situates the war in the former Yugoslavia and the practices of the ICTY within international political and legal debates, and compares ICTY practices and narratives with those of other tribunals, most notably the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, as well as the historic example of the International Military Tribunal in Nuremberg. Those contributions show that production of *legal knowledge* is highly entangled with geo-political relations—both in terms of the histories of global and regional political affairs, and in terms of contemporary political struggles over legitimacy.

The contribution by Dubravka Zarkov sets the scene with a theoretical reflection on how international criminal tribunals have been part of a larger shift in thinking about war, violence and justice, which produces and reinforces knowledge about, and ontological distinctions between, 'local' victims and perpetrators on the one side and the 'international community' on the other side. The next three articles each focus on a different element of the knowledge-producing character of the tribunals. The article by Doris Buss traces the relation between the use of expert witnesses and the aspiration by prosecutors and judges to understand and narrate historical causes and contexts of large scale violence, using the International Criminal Tribunal for Rwanda (ICTR) as a case in point. Buss shows, with specific reference to the cases

before the Rwanda Tribunal, how the initially strong reliance on expert testimony and explicit aspiration to write the history of Rwandan genocide gave way to much more contestation of the authority of the same experts in the court, and a more narrow legal understanding of the court's remit in the verdict promulgated by the judges.

Marlies Glasius considers the handling of a crime the defining element of which is supposed to lie not in its physical manifestation, but in the underlying intent of the perpetrator: the crime of spreading terror among civilians. She highlights the interpretive risk judges take upon themselves by aspiring to evaluate intent. Analyzing the transcripts of the trials of Radovan Karadzic before the ICTY and Charles Taylor before the Special Court for Sierra Leone, Glasius shows how the contestation of the crime of terror in particular has in fact served the defendants in delegitimizing the trial itself. She then places the move from prohibition to criminalization of such 'acts of terror' in the context of a shift in understanding the nature of war, from an ugly form of politics that cannot be prevented but can be constrained, to the intended outcome of criminal plans of a small set of ruthless conflict-entrepreneurs. She finally considers that the International Criminal Court (ICC) has not chosen to criminalize 'terror', but sketches an unresolved tension between retributive desire to punish the intention to instill fear and recognition of the interpretive limitations of legal professionals.

Predrag Dojčinović contribution similarly concerns criminalization of things that go beyond physical violence as such. He discusses the status of grand narratives such as pan-Germanism, 'Greater Serbia' or 'Greater Croatia' in international criminal trials. Dojčinović argues that in all major international war crimes trials, grand narratives constitute part of the conceptual and evidentiary foundation of the prosecution, but before the ICTY in particular, they have gone beyond 'background information' and have acquired the status of clear-cut forensic evidence. The prosecution in the Seselj case, currently awaiting a verdict, has gone the furthest in arguing for criminalization of propaganda as such. Unlike the contributions by Buss and Glasius that stress contingencies of judicial interpretation of political acts and intentions, Dojčinović holds that acts of propaganda and incitement, and the production of grand narratives that carry the seeds of criminal acts, can and should be put on trial.

The section on *Narratives of Law and Justice after Yugoslav Wars* examines 'effects' rather than the 'effectiveness' of international criminal justice on the region, with a specific focus on three countries: the Netherlands, Bosnia and Serbia. As we analyze meanings of justice and production of narratives on war crimes in those three countries, we are faced with contingencies produced by the specific social-political contexts in each state. The contributors analyze processes pertaining to the diverse struggles about guilt, responsibility, trauma and justice. In all five contributions, the 'local', the 'regional' and the 'international' are constituted as sites of struggles with victimisation, trauma, resistance and denial, in which both reliance upon and battles against specific meanings of violence and their social, political and symbolic implications are at play.

Vladimir Petrovic' chapter connects the first four chapters, focused on the production of knowledge in the courts, to the second set of chapters, with a chapter that illuminates the interplay between a piece of visual material introduced in the Milosevic trial, the infamous *Scorpions* video, and the impact of the same video

footage on politics and society in Serbia immediately after its introduction in court. Petrovic considers the circumstances of the video's creation, its circulation and the role it has played both in public debates in Serbia and in the international and national courtroom. He eventually dispels the idea of an "immediate redemptive effect of visual evidence", documenting the forensic meaning attached to the video by the ICTY, its initial accusatory function in Serbia, but also the multiple forms of denial that have accompanied it.

Eric Gordy pans out from here, contextualising the reception of the *Scorpions* video in a broader consideration of how 'the Serbian public' has dealt with the memory of the war, and how the workings of the ICTY have intersected with the formation and reformation of collective discourses about the war and war criems. He traces the nature of the public debate at three constitutive post-war 'moments' that (could) have opened up the discussion about recognition of Serbian responsibility for war crimes in Bosnia. The three moments are the arrest of Slobodan Milošević in 2001, the murder of prime minister Zoran Djindjic in 2003, and the broadcast of the *Scorpions* video showing the execution of civilian prisoners in Bosnia by a Serbian paramilitary unit in 2005. In reflectng on the politics of denial in Serbia, Gordy concludes, not that denial has turned into recognition, but that the discourses of denial have changed—from denying the facts of the crimes, to reinterpreting their meanings.

Erna Rijsdijk's chapter considers the concept of 'trauma' as constitutive not just of an individual, personal experience, but of the social order and national self-imagination, as well as national positioning within the international world order. She uses several examples regarding the inability of the Netherlands as a polity and society to accept responsibility for the Srebrenica massacre. These include the political rehabilitation of Dutchbat, the description of the Srebrenica episode within the context of an officially sanctioned 'canon' of Dutch national history, and the official reaction to the European Parliament's Resolution on Srebrenica commemoration day. She ends with a discussion of a recent national court case in which the responsibility of both the state as such and the military stationed in Srebrenica is officially recognized, illustrating that the political and indeed legal struggle within the Netherlands over the role of Dutch peacekeepers in Srebrenica genocide is far from over.

Jasmina Husanovic' contribution challenges the 'transitional justice' paradigm as a regime of knowledge and power and the practices and discourses surrounding the politics of witnessing trauma in Bosnia. She makes visible some of the emergent ways of resistance in the form of critical knowledge production at public platforms, in classrooms and in artistic expressions.

The chapter by Frederiek De Vlaming and Kate Clark examines international and national reparation mechanisms, arguing against the strict division between individual and collective forms of reparation, that is typically made in current transitional justice literature. They argue that, in Bosnia, the micro level—classically pertaining to the reparations to individual victims—has hardly ever been about individuals only. Reflecting on specific cases, they show that, for the victims, individual claims for reparation have always had larger 'public good' objectives: the recognition of the war crime, of the wrongdoing and of its effects on the specific people to whom the individual or the group belongs.

In bringing these chapters together, we hope to contribute to the growing body of knowledge that examines international criminal law beyond its legal applications and engages with discourses on war crimes and post-war justice as situated in multiple (geo-)political, social, symbolic and legal domains. We hope to draw attention to the contingent and contested nature of the meanings of war crimes and of post-war justice.

Dubravka Zarkov
Marlies Glasius

Contents

Contributors

Doris Buss Department of Law and Legal Studies, Ottawa, ON, Canada

Kate Clark Royal Conservatory of The Hague, Nuhanovic Foundation, Amsterdam, The Netherlands

Predrag Dojčinović Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, The Hague, The Netherlands

Marlies Glasius Department of Politics, University of Amsterdam, Amsterdam, The Netherlands

Eric Gordy School of Slavonic and East European Studies, University College London, London, UK

Jasmina Husanović Cultural Studies, Faculty of Philosophy, University of Tuzla, Tuzla, Bosnia and Herzegovina

Vladimir Petrović NIOD Institute for War, Holocaust and Genocide Studies, The Netherlands

Erna Rijsdijk Military Ethics, Netherlands Defence Academy (NLDA), AA Utrecht, The Netherlands

Frederiek de Vlaming International Criminal Law Department, Amsterdam Center for International law, Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands

Center for War Reparations, Nuhanovic Foundation, Amsterdam, The Netherlands

Dubravka Zarkov Gender, Conflict & Development, International Institute of Social Studies, Erasmus University Rotterdam, The Hague, The Netherlands

About the Authors

Doris Buss is associate professor who teaches and researches in the Law Department, Carleton University on women and international law. Her interests are in international law as a site for contesting social change. Her recent work is on the Yugoslav and Rwanda Tribunals and the production of legal knowledge about conflict and identity, part of which focuses on the prosecution, and legal recognition of sexual violence against women. She is the co-author of *Globalizing Family Values: The International Politics of the Christian Right* and co-editor of *International Law: Modern Feminist Approaches*. Her most recent publication is an edited volume, *Sexual Violence and Conflict in Africa* (with Joanne Lebert, Blair Rutherford, Donna Sharkey, and Obi Aginam eds), currently under review with United Nations University Press.

Kate Clark has a performing arts background. She studied law at the Universities of London (LLB) and Amsterdam (LLM) specialising in International Criminal Law. She combines her work as a legal researcher for the Nuhanovic Foundation with a career as a concert performer and a lecturer at the Royal Conservatory of The Hague. Clark is a contributor to the series Annotated Leading Cases of International Criminal Law (Intersentia).

Predrag Dojčinović has worked as an editor of academic and non-academic journals, professional reviewer and lecturer. He has authored numerous articles and has edited several volumes on the cultural and political aspects of the 1991–1999 series of armed conflicts in the former Yugoslavia. Since 1998, Dojčinović has been working in the linguistic, analytical and research section of the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Most recently, he has edited the volume *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2012). Dojčinović has been appointed Gladstein Visiting Professor of Human Rights at the University of Connecticut in 2014.

Marlies Glasius is a Professor in International Relations at the Department of Politics, University of Amsterdam and holder of the Special Chair, Citizen Involvement in Conflict and Post-Conflict Zones, Free University Amsterdam. She was previously the managing editor of the Global Civil Society Yearbook, coordinator of the Study

Group on European Security, and a lecturer in Global Politics at the London School of Economics and Political Science (LSE). She published research on international criminal courts, including *The International Criminal Court: A Global Civil Society Achievement* (2006) and a number of journal articles and book chapters on the relations between international criminal courts and their socio-political contexts. In 2012 Glasius was a recipient of NIAS fellowship.

Eric Gordy is a senior lecturer in Southeast European Politics at the School of Slavonic and East European Studies, University College London. He has previously taught at Clark University and the University of California—Berkeley (USA) and the University of Bologna (Italy), and has held visiting positions at the University of Niš (Serbia) and Collegium Budapest (Hungary). He received his MA and PhD in Sociology at the University of California—Berkeley. His research interests include political sociology, cultural politics, transitional justice, and ethnography. He is the author of *The Culture of Power in Serbia* (Pennsylvania State University Press, 1999) and *Guilt, Responsibility and Denial: The Past at Stake in Post-Milošević Serbia* (University of Pennsylvania Press, 2012).

Jasmina Husanović is a Senior Lecturer in Cultural Studies at the Faculty of Philosophy, University of Tuzla (Bosnia and Herzegovina). She earned her PhD in 2003 at the Department of International Politics, University of Wales, Aberystwyth (UK) with the thesis entitled 'Recasting Political Community and Emancipatory Politics: Reflections on Bosnia'. Her research interests are in cultural and political theory and praxis dealing with the politics of witnessing, governance of life, culture of trauma and emancipatory politics, with a focus on intersecting public spaces of cultural and knowledge production (art, education, activism). She has published widely on these themes in the post-Yugoslav region and internationally.

Vladimir Petrovic is a historian. Since 2003 he works as a researcher at the Institute of Contemporary History in Belgrade. He has lectured at the Legal Department of Central European University, and has worked with the Serbian War Crimes Prosecutor's Office and Humanitarian Law Center. He has published two monographs and edited four volumes, as well as published 40 articles, book chapters and essays in Serbian and English. His current research interests are in the field of transitional justice, particularly in examining the role of historical narratives in war crimes trials. He is currently a post-doctoral researcher in the NIOD Institute for War, Holocaust and Genocide Studies, Amsterdam.

Erna Rijsdijk is a lecturer of Military Ethics at the Netherlands Defence Academy. She studied Politics at the University of Amsterdam, FU Berlin and the University of Newcastle upon Tyne. In 2011, she was guest-editor with Tanja Aalberts of the Special Section on "Uncertainty and responsibility" in the *Review of International Studies* and in 2012, she finished her PhD research *Lost in Srebrenica: Responsibility and Subjectivity in the Reconstructions of a Failed Peacekeeping Mission* at the VU University in Amsterdam at the Department of International Law. She currently teaches courses on identity, ethics and complex power relations, and philosophy of science.

Frederiek de Vlaming is a criminologist specialised in international criminal law. She is a lecturer and senior researcher at the Amsterdam Center for International Law (ACIL) of the Law Faculty of the University of Amsterdam. She received her PhD in 2010 on the prosecutorial policies of the International Criminal Tribunal for the former Yugoslavia. She published *De Aanklager* (The Prosecutor) (2010, Boom) and several articles on transitional justice and international criminal tribunals. De Vlaming heads the Nuhanovic Foundation and administers ACIL's Center for War Reparations.

Dubravka Zarkov is an associate professor of Gender, Conflict and Development at the International Institute of Social Studies/EUR, The Hague. She teaches on feminist epistemology, conflict theories and media representations of war and violence. Her main fields of interest are gender, sexuality and ethnicity in the context of war and violence, and their media representations. In 2012, Zarkov was a recipient of NIAS fellowship. She published *The Body of War: Media, Ethnicity and Gender in the Break-up of Yugoslavia* (2007, Duke University Press) about media representations of war in former Yugoslavia, and *Gender, Conflict, Development* (2008, Zubaan) about global dimensions of contemporary wars. In 2002, Zarkov co-edited with Cynthia Cockburn a book about Dutch peacekeeping in Bosnia, *The Postwar Moment: Militaries, Masculinities and International Peacekeeping* (Lawrence and Wishart).

Part I
Narratives of Law and Justice in the International Courtrooms

Chapter 1
Ontologies of International Humanitarian and Criminal Law: 'Locals' and 'Internationals' in Discourses and Practices of Justice

Dubravka Zarkov

> The distinction between war, counter-insurgency and genocide is blurred in practice. All three tend to target civilian populations. In the era of nationalism and nation-states, power as well as its adversaries tend to be identified with entire national communities, whether defined racially, ethnically or religiously. Yet, the regime identified with the international humanitarian order makes a sharp distinction between genocide and other kinds of mass violence, [. . .]. Even if not made explicitly, the point is clear: counter-insurgency and inter-state violence is after all what states do. It is genocide that is violence gone amok, amoral, evil. The former is normal violence, only the latter is bad violence. But what is genocide, and what is counter-insurgency and war? Who does the naming? To consider this question is to focus on the question of power (Mamdani 2010).

It is the question of power that I want to focus on in this chapter. More specifically, the power of contemporary discourses and practices of international humanitarian and criminal law and justice systems to produce hegemonic ontologies of the world. In the last decade, a number of authors have already criticized the appropriation and hijacking of human rights as a justificatory rhetoric of expansionist politics of the most powerful states. Makau Mutua criticized the contemporary 'grand narrative of human rights' for containing a 'subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other' (Mutua 2001). Mahmood Mamdani recently argued:

Some of the ideas expressed in this chapter have a long history. Part of it is my stay at the Five College Women's Studies Research Center, MA, USA, in 2008, with a Ford Fellowship, also the presentation and discussion of an early draft at the Dutch Politicologenetmaal conference in Amsterdam, May 2012; and of course, the Netherlands Institute of Advanced Studies (NIAS) Fellowship between February and June 2012. I am grateful to the many colleagues whose comments made my ideas sharper.

D. Zarkov (✉)
Gender, Conflict & Development, International Institute of Social Studies,
Erasmus University Rotterdam, Kortenaerkade 12, 2518 AX, The Hague, The Netherlands
e-mail: Zarkov@iss.nl

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> The discourse of human rights emerged historically as a language of resistance to power. Its political ambition was to turn victims into agents. Today, the tendency is for the language of rights to become the language of power. The result is to subvert its very purpose, to put it at the service of a wholly different agenda, one that seeks to turn victims into so many proxies. It justifies interventions by the big powers as an antidote to malpractices of newly independent small powers. (Mamdani 2010, p. 59, 60)

My interest is to contribute to these debates by reflecting on the production of the 'local' and 'international'—as symbolic geographies and as ontological positions—in theorization and application of international humanitarian and criminal law. In doing so, I am neither agreeing that what 'small powers' do is simply a 'malpractice', as Mamdani states above, nor am I arguing that human rights or international laws are only the tools of hegemony. For many people across the world, the concept of human rights and international laws that uphold it, with the international institutions and networks that stand up for the plight of the victims, are—literally—the lifeline. Many more people in the world would have been incarcerated, tortured and executed, and many of them in obscurity and silence, without the human rights defenders, activists and practitioners that can today claim and use human rights and international humanitarian and criminal law as legitimate, recognized, institutionalized and globalized tools of protection and justice.

But this should not blind us to the fact that, at the same time, endless lives are destroyed and injustice done through the use of those same norms, those same tools. The world is far from black and white. No word, no deed has only one meaning, or opens up to only one possibility of action. If this is indeed so, then it is important to ask: How are those international tools used today in the context of transitional justice?

I suggest that understanding constructions of the 'local' and 'international' brings us close to answering this question. Thus, I will focus on those constructions, pursuing two lines of investigation: utilization of gendered and racialized discourses that link war, sexual violence and justice; and the absence of powerful states and political-military leaders from the lists of accused for war crimes, including the crimes of sexual violence. I argue that those constructions are part of a shift in thinking about war, violence and justice that occurred in the past two decades, or more precisely, with the wars in former Yugoslavia and the genocide in Rwanda in the early 1990s. The shift has been enabled by the very foundational narratives of the contemporary Western world—the enlightenment and modernity—and their political projects of colonialism and imperialism. As Megret (2005) argues, colonialism 'continues to reverberate through and inform our understanding of the categories of international humanitarian law', even though those laws came about as an answer to European affairs (such as Franco-Prussian and Crimean wars) and were never meant to address European treatment of non-Europeans (see also Mutua 2001, p. 210). The International Committee of the Red Cross was established between the 1870s and 1890s, at the same historical time when the 'scramble for Africa' and the 'devastation on the African continent' were going on (Megret 2005, p. 5). Megret further reminds: 'As late as 1945, while delegates assembled at Dumbarton Oaks to adopt the UN Charter in the wake of German capitulation, the French massacred tens

of thousands of Algerians at Sétif under the pretense of "maintaining order"' (ibid., p. 5). Thus, Megret argues, the non-European is, from the onset, the 'constitutive Other' (ibid., p. 2) of international humanitarian law.

Reflecting on some academic discourses on violence and on practices of transitional justice regarding the wars in former Yugoslavia and the genocide in Rwanda, I propose to show that, today, this Otherness is employed to create ontological distinctions between the people(s) and the spaces commonly referred to as 'local' and 'international', with the objective of sustaining hegemonic world-views and justifying contemporary military interventions.

Gendered Ontologies of Violence: Discourses on 'Locals' and 'Internationals'

When in January 1991 the UN-authorized coalition force started Operation Desert Storm against Iraq, and forced it to withdraw from Kuwait, the world already looked very different from just a few years before. The Union of Soviet Socialist Republics (USSR) has been disintegrating since the late 1980s, with violence in Azerbaijan becoming a predictor of wars in the region yet to come. By the end of 1991, the USSR no longer existed, with most of its former republics becoming independent states. By that time, Germany was reunited, following the famous and hugely televised 'fall of the Wall' in 1989.

Those events gave the USA and the West the perfect material to argue for the superiority of the Western political system.[1] Democracy became not just a system of Western domestic governance and a value within Western social-political life, but the goods that suddenly gained currency in the international political market: goods that can, and should be exported. As Fabry (2009) argues, the post-Cold War era has created a global context within which many authors in the West agreed that there is a global 'democratic entitlement' or that every country, or rather its population, has a 'right to democracy'. This 'entitlement' or 'right' is based on two presumptions: first, that liberal democracy is 'the best form of government' as it 'guarantees social tranquility, human rights and justice internally' and second, 'that coercive foreign intervention in defence of democracy is morally legitimate' internationally (ibid., p. 722).

The old liberal thesis—that democratic states do not forge wars against each other—underpins both of those arguments implying that once democracy is exported throughout the world, there will be no wars. This argument appears very logical—for if the absence of democracy creates wars, then its presence will prevent wars. But this logic is contingent to unacknowledged exclusions. First, while historically, after the Second World War, Western states did not wage direct wars against each other, they did so through proxy wars. So, only if we exclude proxy wars from the equation, can we say that Western democracies do not wage wars against each other. Further, this means that the presence of democracy is not

[1] As indicated in academic writing, such as that of Fukuyama (1992) and Huntington (1993).

what prevents wars from happening—but rather the power of a state to extrapolate war onto a different territory, other locales with other 'warring parties' and presents oneself as a disinterested observer, a 'third party', a legitimate enforcer of democracy. The point here is not just simple hypocrisy, whereby 'democratizers' are dangerously 'prone to sophomoric oversimplification and deliberate manipulation, [and] tend disproportionately to reflect the perspectives of those conflict participants with whom they personally most closely identify' (ibid., p. 738). The point is, indeed, that this *locale,* this *other space* is constituted through symbolic geographies of violence, through 'the architecture of enmity' (Shapiro 2007), becoming, *ontologically*, a totally different world, a world that justifies 'all necessary means' (as stated in the UN Security Council Resolution 678[2] that approved the war against Iraq in 1991) in acting towards it. And gender, race and ethnicity have played an absolutely crucial role therein.

Already in relation to the First Gulf War in 1991, a number of feminists have pointed out that political and cultural representations of femininity, religion and sexuality were essential in this war's justificatory rhetoric in the USA and UK.[3] Demonization of Iraqi men as savages and rapists of Kuwaiti women and of Saddam Hussein as the ultimate tyrant was a crucial ingredient of political speeches and media representations. In addition, celebration of Western women's emancipation (but yes, still, not at the expense of their unmistakable femininity) was coupled with images of Muslim women as (multiple) victims of (religious and patriarchal) traditions. Mainstream feminists in the USA and Europe—whose work for decades was largely concerned with differences between women and men, remaining often blind to differences among women (or among men)[4]—seem to have realized that other forces, next to gender, are at work here. It was clear that nationhood, religion and race, as well as specific assumptions about female and male (hetero)sexuality have been informing the images of the coalition forces' male and female soldiers and civilians, pitting them against the 'enemy' women and men.[5]

The significance of those discussions was in pointing out the use of gendering and racializing in representing countries and peoples, cultures and traditions, showing that entire histories of geopolitical relations stood behind those images: histories of slavery and racism, colonialism and imperialism, with their 'civilizing missions' that define the Other men anything between the beastly and the effeminate (see, for example, Sinha 1995), and the Other women anything between the docile doormats and the threatening matrons (see Bloul 1997).

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[2] http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/678 (1990), pp. 27–28.

[3] Among the first was the superb analysis by Farmanfarmaian (1992); see also Kaplan and Pease (1993); Forder (1995); Crenshaw (1997); Nantais and Lee (1999).

[4] Despite the continuous critique of Black, migrant and lesbian feminists within the USA and Europe and feminists from the South.

[5] It is worth remembering that similar discussions among the UK feminists came about already with the war for Malvinas/Falklands islands in 1982, although the concept of intersectionality, which offered crucial theoretical and methodological tools for such an analysis, came some years later. See, for example, Seidel and Gunther (1988). For intersectionality, see Kimberle Crenshaw's seminal work, Crenshaw 1989.

Those feminist voices spoke not just about the use of gender and race by the war-mongering political mainstream but also about some of their own postulates of equality and emancipation, asking: Into what political projects do women soldiers enter when they enter the state armies and is the equal right to kill and be killed a measure of gender equality? Not surprisingly, those questions were ignored by the political and academic mainstream that, by the end of the 1980s and beginning of the 1990s, had already embraced, to a large extent, the exportability of democracy. Importantly, those questions also did not seem to be loud enough for generating a major debate within Western feminism. As Fraser (2009) notes, second-wave feminists in the West have largely seen their own states as 'principal addressees', leaving to a large extent the critique of imperialism to feminists in the developing world and reducing trans-nationalism and internationalism to participation in highbrow UN conferences (ibid., p. 112). More importantly, within the 'post-modern turn' in Western feminism, cultural politics, together with identity politics, became not just the predominant focus of theorizing but also of political action. Consequently, on the one hand, this meant marginalization of geopolitical and economic inequalities as feminist issues;[6] on the other hand, it meant that—once Western feminist eyes were turned towards the rest of the world—the issues of culture and identity were in focus.

It is into this state of global, political and theoretical affairs that former Yugoslavia disintegrated through violence and Rwanda was shattered by genocide. It was into this state of affairs that war rapes came into focus.

In the summer of 1992, the international media first reported that Bosnian Serb forces have systematically used rape against Bosnian Muslim women (in war camps as well as in many other facilities, including private homes) as one of the strategies in acquiring territory populated by Muslims, securing it for the Serb population—a strategy labelled 'ethnic cleansing'. Those reports have almost instantaneously generated a huge number of activities. First and foremost, women's and feminist organizations have engaged themselves in creating psychosocial, medical and other support facilities for raped women. But they also engaged in lobbying international organizations to verify the facts, provide protection and apprehend and punish the perpetrators. It is important to note that women survivors of camps and war rapes have themselves been engaged in all of those activities, although much of mainstream media and politics, and feminist writing of the time, depicted them almost exclusively as mute, helpless, devastated and abandoned by their communities.[7]

International and supranational agencies and organizations—from the UN and EU to Amnesty International and Human Rights Watch—have sent a number of fact-finding missions, confirming some of the worst suspicions about the war atrocities,

[6] Next to Fraser (2009), see also criticism of the absence of economic justice from Western feminist agendas by Jaquette (2003); and a call for more feminist attention to capitalism by Mohanty (2003).

[7] Much of the argumentation in this and the following paragraphs relies on Zarkov (2007). There I review in detail the feminist literature on war and war rapes in former Yugoslavia.

including the existence of war camps and systematic rapes of women.[8] Parallel to those local and global efforts to find out what was going on, were also the efforts to secure justice. Consequently, the International Criminal Tribunal for former Yugoslavia (ICTY) was set up by the UN in May 1993. As a result of global feminist actions and lobbying, a number of the apprehended war criminals have also been tried for the crimes of rape of women, and, what was much less known at the time and for a long time seldom mentioned, for sexual violence against men.[9]

Less than a year after the establishment of the ICTY, in April 1994, the Rwandan genocide began. While it lasted, it was not widely known that rapes of women were also being perpetrated en masse, nor that some of them apparently involved HIV/AIDS-infected men, with the purpose of transmitting the virus. By the end of 1994, the UN established yet another special court—the International Criminal Tribunal for Rwanda (ICTR).

Next to generating global feminist solidarity networks, the war rapes of women in Bosnia—and to a much lesser extent, rapes during the Rwandan genocide—have also generated a huge amount of feminist theorizing and analyses, in many different fields and disciplines, from anthropology and refugee studies to, especially, law. But many of those studies have taken a rather troubling turn. First, feminist studies of *war* became largely reduced to studies of *war rapes* and on sexual victimization of women. This meant that, in contrast to feminist attention to women's agency in studies on World War II or anti-colonial wars, victimhood and sexual violability became the main conceptual frames for analysing the Yugoslav wars and the Rwandan genocide.[10] Second, much of the feminist work focused on identities, often as an exclusive explanatory factor of violence and often taking ethnicity for granted, as a transparent, fixed identity category, rather than a product of social histories. While the focus on war rapes and identities may appear logical given the dynamics of war violence, it is important to note that reducing causes of violence to ethnic identities and asking how ethnic identity becomes a privileged social category are not the same. The latter approach sees ethnicity as a *product* of nationalism and violence. The former essentializes identity, predefines both the victim and the perpetrator in exclusively ethnic terms and thus simply endorses, instead of questioning, nationalist discourses that produce ethnicity as the ultimate mode of being. This ethnicization, that marked to a large extent early mainstream and feminist work on the war in former Yugoslavia, has also been apparent in some feminist and mainstream work

[8] The fact-finding missions to former Yugoslavia, and especially the UN report, have established that war rapes and 'ethnic cleansing' have been systematic and deliberate strategies of the (Bosnian) Serb forces, and Muslim women (i.e. Bosniak women) the principle victims. They, however, also stated that both perpetrators and victims of war crimes are to be found among all ethnic groups. See especially Bassiouni et al. (1996) and the United Nations Commission of Experts' Final Reports (United Nations Security Council S/1994/674—27 May 1994; United Nations Security Council, S/1994/674/Add.2 (Vol. V), 28 December 1994).

[9] Sexual violence against men in Bosnia was addressed among first by Jones (1994) and Zarkov (1997). For an excellent analysis, later on see Sivakumaran (2007); see also Zarkov (2007).

[10] For a detailed discussion on shifts in the Western feminist theorizing of war, and on Yugoslavia and Rwanda as watersheds, see Zarkov (2006).

on Rwanda, though it seems that Rwandan colonial history has made it easier for ethnicities to be seen as produced—especially produced through colonial and post-colonial histories.[11]

The theoretical attention to war rapes and ethnic identities in feminist studies of Yugoslav and Rwandan violence has been paralleled with mainstream theorizing of war. By the end of the millennium, the attention of the academia and policy world seems to have almost completely shifted to intra-state conflicts and local dynamics of violence, with the concepts such as 'new wars' and 'deliberate targeting' of civilians as their, presumably, historically new and unique characteristic.[12] Of course, one would only have to remember Hiroshima, Algeria, Vietnam, Cambodia and all the US bombing sprees around the world to understand how outrageous are the arguments of the novelty of 'deliberate targeting' of civilians within the intra-state, 'new wars' of the 1990s. However, those views, while disregarded by many academics,[13] have very quickly become the main foundation of intervention(ist) policies of supranational organizations, such as the World Bank, United Nations Development Programme (UNDP) and UN, and have contributed significantly to the shift in thinking about international interventions and state sovereignty, crystallized in the Responsibility to Protect (Bellamy 2008; Hehir 2012; Mehta and Abeysuriya 2009) as a UN-endorsed international policy.

Another effect of much of this work was tremendous in terms of representations of places where the war and genocide were happening, and more importantly, of the peoples in those places. The mainstream political and media discourses on Yugoslavia and Rwanda have already been overwhelmingly saturated with racist, Orientalist and Balkanist imagery. Media have invariably represented both regions through the images of savagery and viciousness of local men and victimization of local women. Coupled with radical feminist discourses of sexuality as a primary site of women's oppression by men, Balkanism and Orientalism[14] worked together to redefine, once again, the symbolic time–space of former Yugoslavia into the past that it escaped after World War II: as the place of the 'history of ethnic hatred' and, as Robert Kaplan stated, the place 'where Western Enlightenment has not penetrated' (Tuastad 2003).[15] Media images of the Rwandan genocide were produced through the plain old racism that has defined Africa for centuries as a continent plagued by tribalism, irrationality and violence, stuck in its barbaric past. Coupling of such media and political discourses with academic discourses that focused almost exclusively on rape of women and reduced causes of violence to ethnic identities was neither difficult nor surprising.[16]

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[11] See especially Mamdani (2001). See also Uvin's review of mainstream academic writing on causes of genocide in Uvin (2001); and Hintjens on the role of identities, in Hintjens (2001).

[12] The most significant contribution in this respect came from Kaldor (1999).

[13] Kaldor's arguments were almost unanimously criticized by a number of academics. See for example Chan (2011); Kalyvas (2009); Dexter (2007); Richards (2005); Newman (2004).

[14] As defined by Todorova (1997) and Said (1994).

[15] Kaplan, p. 45, In Tuastad (2003).

[16] For a convergence of discourses on 'the Balkans' and 'post-communism' with radical feminist discourses on rape in the representation of the war through which former Yugoslavia disintegrated, see Zarkov and Drezgic (2005).

Thus, while feminist activist and academic work on former Yugoslavia and Rwanda has contributed hugely to the visibility of sexual violence against women in wars, it has, at the same time, contributed to the return of the old colonial imageries of primitivism and violence, viciousness and victimization in the regions. As a consequence, 'the Balkans' and 'Rwanda' were no longer territorial/geographical references but symbolic geographies marked by ethnicity and violence, the specific locales wherein histories, cultures and peoples are defined almost exclusively through, and by (sexual), violence perpetrated by 'local' men against 'local' women (and men).

One of the significant implications of this theorizing is that the politics of identity appears to matter only for the 'locals', but not for the 'internationals'. Kaldor, for example, writes *New Wars* as if Edward Said never existed. She totally ignores the huge significance that the past and ongoing wars across the globe have had for the restructuring of Western identities; for struggles over meanings of the Western citizen-subject, Western values of democracy and liberty upon which this subject is predicated and the Western state as a guarantor of these values. Another implication is that the 'internationals' are simultaneously removed and exonerated from any involvements in *such* wars and *such* violence. In other words, territorial location of the *acts of violence* becomes a symbolic location of the *causes of violence*. Ontologically, this means that the local men's subjectivity is defined almost exclusively through the perpetration of (sexual and other) violence, local women are invariably given the subject position of the victim of sexual violence, while the 'internationals' become the 'outsiders'—subjects of non-violence. As such, the 'international' becomes a totally different ontological subject. Importantly, sexual violence in such theorization is not just the ontological marker of the *local people* but also the ontological marker of the *local(ized) wars*. Within the discourses of 'deliberate targeting' of civilians as essential characteristics of the 'new' intra-state wars, nothing seems more deliberate, more targeted, than rapes of women. Rape of women becomes the ultimate signifier of unjust, illegitimate wars. And this means that it becomes absolutely crucial to represent the 'internationals' not just as 'non-violent' but also as 'non-rapists', and to represent 'just war' and 'humanitarian intervention' as actions that prevent rapes, protect 'local' raped women and punish 'local' rapists.

As a result, unless huge scandals erupt, we seldom hear anything about sexual violence or any other forms of 'deliberate targeting' of civilians by the peace-keeping or Western militaries against 'local' population. And if and when such violence happens, we hardly ever see the perpetrators brought to the international courts of justice.

Symbolic Geographies of Justice: 'Locals' and 'Internationals' in Legal Practice

In addressing the contemporary division of roles in the international politics of justice, Mutua notes: 'The human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest

pitting savages, on the one hand, against victims and saviors, on the other' (Mutua 2001, p. 201, 202). Unlike Mutua who places the victims and saviours on the same side, I argue that, in the contemporary grand narratives of human rights, humanitarian interventions and international law and justice systems, it is the victim and the perpetrator of violence who belong to the *same* ontological category; they are both 'locals', both the Other of the saviours. I argued above that this Otherness is visible in the ontological position of the 'internationals' as subjects of non-violence. Here, I turn to their position as subjects of justice and moral subjects, and the subjects of knowledge. I do it by addressing the absence of the 'internationals' as accused parties in international courts.

According to the huge debates among scholars and practitioners of international relations and international humanitarian and criminal law that will be brought up here, one could hardly argue that no crimes have been committed by the 'international community' during 'humanitarian interventions', even if we focus only on the past two decades. Whether any of those crimes have actually amounted to war crimes is difficult to know, among other reasons because hardly any of them have been properly scrutinized, even fewer have been tried and even fewer convicted. Not that there were no attempts—actually, a number of attempts have been made to prosecute the 'internationals' for violence perpetrated during 'humanitarian interventions'.

After the 1999 NATO bombing of Federal Republic of Yugoslavia (FRY), a huge debate ensued not just on the legality of the action within the international criminal and humanitarian law but also on the need for and possibility of prosecuting the NATO for deaths and destruction its Operation Allied Force (as the bombing campaign was called) caused in the FRY (for a review, see Laursen 2002). A number of international courts have been directly involved in different cases. On April 29, 1999—thus amidst the NATO bombing of its territory, which lasted between March 24 and June 7, 1999—the FRY filed a complaint against ten NATO member states (Belgium, Germany, France, the UK, Italy, Canada, the Netherlands, Portugal, Spain and the USA) with the International Court of Justice (ICJ). The FRY cited the Genocide Convention, asking the ICJ to order immediate stop to the NATO's use of force and repay damage. The ICJ rejected the request arguing—for the first time in the court's history—that it has no prima facie jurisdiction on the issue (See Bekker and Borgen 1999). In other words, the ICJ judged that there is no sufficient evidence that actions of any of the member states amount to genocide, and thus, the court has no case to deal with. The court also argued that, as a number of the member states (USA, France, Germany and Italy) would not accept its jurisdiction, it also has no *forum prorogatum* (ibid.). Few international courts have admitted so openly the limits of their authority when it comes to powerful states as the ICJ did in this case.

In 2000, the ICTY also dealt with NATO bombing of the FRY. Following the fact that the ICTY Prosecutor 'has received numerous requests that she investigate allegations that senior political and military figures from NATO countries committed serious violations of international humanitarian law during the campaign', she established a Review Committee which issued the report in June 2000. Following the report, the Prosecutor rejected the general call for criminal investigation of NATO bombing and specific calls to investigate the use of depleted uranium and cluster

bombs. She also decided not to investigate the cases of civilian victims. The report justifies this rejection on a number of grounds. It stated that the ICTY has no jurisdiction over the legitimacy of the NATO's use of force, because 'crimes against peace' are a matter for the ICJ (ibid., Art. 4.).[17] In reflecting on the use of depleted uranium and cluster bombs, the report first stated that those weapons are not prohibited by any international treaty, and then compares the use of cluster bombs in the Martić case by Serbian forces against the city of Zagreb with that of NATO against the FRY. The report concluded that in the former case, the objective was to 'deliberately attack' and 'terrorize the civilians' but that there is 'no indication cluster bombs were used in such a fashion by NATO' (ibid., Sect. iii, Art. 27). In the number of incidents that caused civilian deaths, the ICTY systematically argued that civilians were not deliberately targeted and accepted NATO explanations citing legitimate errors, bad intelligence, etc (ibid., Art. 58–89). In its general reflections, the report cited lack of clarity within the law that would allow for successful prosecution. The report and the Prosecutor's decision seem to have caused as many controversies as did the initial bombing, especially because 'NATO was conducting a war on humanitarian grounds, sanctioned not by the United Nations but by the public in NATO member countries' (Voon 2001) and because 'in too many cases NATO appeared to give absolute precedence to the lives of its forces over those of the civilian population, including the Kosovar Albanians it was fighting to protect' (ibid., p. 1112). Benvenuti (2001) criticizes the Review Committee for its 'inadequate approach' (not demanding official documents from Yugoslavia and not travelling there for collecting evidence), inappropriate use of evidence ('heavy' reliance on NATO press statements), a 'limited and biased choice of the facts to be investigated' (focusing on five specific incidents of civilian deaths and ignoring in-depth investigation of material destruction, lawfulness of specific targets, impact on environment, etc.). He also criticizes the Prosecutor for accepting the report rather than acting on her discretionary power to pursue the investigation and take the opportunity to clarify the law, if it is, indeed, unclear (ibid., p. 504).

It seems that applications of international humanitarian law since World War II show that *non-Western* leaders have been punished for subjecting *their* citizens to violence that went unpunished when perpetrated by the Western leaders and countries. So the US or Dutch governments, presumably, cannot bomb *their* citizens and claim innocence, but they can bomb any other country, and as Mamdani states, by naming their actions as 'counter-insurgency' they can evade the laws of war—for it is not 'war' what they do. The implication of such application of justice is that 'local' victims seem currently to be recognized by international humanitarian law *only* if and when they are victimized by 'local' violators. If this is indeed true, then the very application of the law constitutes the 'locals'—be they victims or perpetrators—as a different ontological category from what Heathershaw and Lambach (2008) call the 'community of interveners'.

When the subject position of the 'local' men is exclusively that of the subject of injustice, the very absence of the 'internationals' from the narratives of violence turns them into the subject of justice. Evidence from many court cases seems to support

[17] It is worth noting that ICTY has jurisdiction over crimes committed during the war in Kosovo.

this argument. While the previously discussed cases from ex-Yugoslavia have been about perpetration of violence, one could think that a different type of accusation might lead to a different result. For example, given that the Responsibility to Protect has become one of the official international policies, maybe the *failure to protect* offers more hope in bringing up a court case against Western states and individual leaders? This was the main accusation in many different attempts of the survivors of the Srebrenica genocide to bring the Dutch government and military to justice. Not surprisingly, the UN, France and the Netherlands have all conducted a number of investigations about the events in Potocari and issued various reports (United Nations Report 1999; French Government Report 2001; and two Dutch reports: NIOD Report 2002; and so-called Bakker Report 2003). The report of the UN secretary general acknowledged a certain level of UN responsibility; the French parliament lamented French failures but pointed fingers at the UN and Dutch; Dutch reports criticized the political decision-making process, but largely exonerated the military on the ground.[18] In 2004 and 2007, the ICTY and ICJ, respectively, declared the Srebrenica massacres to constitute genocide. Until now, ICTY indicted more than 20 persons specifically for the Srebrenica case, and prosecuted many more.[19] However, none of those individuals are from the UN, from Dutchbat or of Dutch nationality. The survivors' search for justice has, for a long time, hit the wall of UN immunity.[20] Actually, it has remained impossible to establish Dutchbat and the Dutch state's criminal responsibility in any *international court,* although survivors associations have tried many different avenues of justice. In May 2011, finally, one of the civil suits filed at the Municipal Court of The Hague almost a decade ago alleging Dutchbat and the Dutch state's failure to protect three specific individuals has been won on appeal.[21] When it comes to the wars since the early 1990s, this is to my knowledge the only case of a successful trial of 'internationals' by the 'locals' in any international or national court.[22]

The European Court of Human Rights has also been approached with two cases on failure to protect, brought by Kosovo Albanian citizens against individual NATO member states, in 2007. Orford (2011) writes about them, indicating that one concerns death of children and another unlawful detention. Both were rejected, as the court declared itself 'not competent to review the acts of respondent states carried out on behalf of the UN' (ibid., p. 18). Furthermore, the court stated that to scrutinize

[18] See Rijsdijk in this volume, as well as Rijsdijk (2012) and Van der Berg (2009).

[19] See ICTY 'Facts about Srebrenica'. http://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf.

[20] See http://www.vandiepen.com/over-ons/maatschappelijk-verantwoord-ondernemen/introductie-van-de-zaak-srebrenica.html.

[21] For details of the court case (LJN: BR5388, Gerechtshof's-Gravenhage, 200.020.174/01; English translation), see: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388. See also: http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-1-a-narrow-finding-on-the-responsibilities-of-peacekeepers/.

[22] As the chapter by de Vlaming and Clark in this volume shows, victims have been much more successful in the trials against perpetrators from the region, in different national courts of the USA and Europe.

UN authority would 'interfere with the fulfillment of the UN's key mission' and its 'universal jurisdiction fulfilling its imperative collective security objective' (ibid., p. 19). Thus, while both cases have been brought forward after the Responsibility to Protect has already become an official international norm, the failure to protect seems as hopeless a claim to international justice as the accusation of war crimes.[23]

It seems that international justice institutions are far from being prone to investigate international actors and powerful states. On rare occasions when this actually happens, the powerful state either simply ignores the rulings (as did Israel on the ICJ statement on the construction of the Separation Barrier) or withdraws from membership of the court (as did the USA when the ICJ ruled that Mexican detainees have a right to consular consultation; see Liptak 2005).

When it comes to national courts, the situation seems mixed. As noted above, the Dutch High Court has judged in favour of the Srebrenica survivors, and ordered the state to pay reparations. But lest we forget, the case concerns three men, out of about 8,000 who have been massacred in Potocari.[24] Whether this ruling opens the door to other similar decisions is yet to be seen. Other situations with national courts in powerful states do not bring much hope. For example, a suit was brought before the US district court against the US Defense Secretary during the 2001 Afghan and 2003 Iraq war, and the senior military leaders, on behalf of nine Iraqi and Afghan men who claimed to have been tortured. The case, known as 'Ali vs Rumsfeld' was dismissed in 2007, and the dismissal confirmed in 2011, on two grounds that 'constitutional protections did not apply to Iraqi and Afghan nationals in US custody in those countries' and 'that the US officials were immune from lawsuits stemming from actions taken "within the scope of their official duties"'.[25]

Maybe the case to consider here is the high rank of the accused. Clearly, it is not the same whether one accuses for war crimes or failure to protect a powerful state and its highest ranking political and military leadership, or a so-called ordinary citizen—be it civilian or military. There is an indication that being a citizen of a Western state does not bring the absolute protection granted to the Western leaders. For example, in 2005, The Hague District Court convicted a Dutch businessman who supplied the Iraqi government with chemicals used to produce mustard gas, employed against

[23] Other attempts to call powerful states and their leaders to account for actions or failures within international humanitarian law have also failed. See, for example, the attempts of activists to hold Israel accountable at the ICC for the 2007/2008 bombing of Gaza. The prosecutor referred the case to the UN, to determine whether the Palestinian Authority is a state, rather than to the judges. See http://www.amnesty.org/en/for-media/press-releases/icc-prosecutor-statement-fears-over-justice-gaza-victims-2012-04-03.

[24] While the chapter by de Vlaming and Clark in this volume indicates that for the victims this legal victory does not have only personal relevance but constitutes a larger recognition of the wrongdoing by Dutchbat, legally the case does not easily translate into an automatic assumption that Dutchbat failed in its responsibility to protect all 8,000 men.

[25] See http://www.aclu.org/national-security/ali-v-rumsfeld-case-profile. In March 2012, the case was filed at the Inter-American Commission on Human Rights (IACHR); see http://www.aclu.org/blog/human-rights-national-security/afghan-and-iraqi-victims-torture-us-military-seek-justice.

Kurdish civilians.[26] He was sentenced to 15 years as an 'accomplice to genocide'. The ICTR has also tried a European—a Belgian journalist, Georges Ruggiu—within the 'Media case', with genocide charges.[27] The case concerned the *Radio Tele Libre des Mille Collines* (RTLM) and Kangura newsletter, both seen as crucial in enabling genocide. Four persons have been tried, three Rwandans and Ruggiu. Ruggiu agreed to cooperate with the prosecution, and in 2000, he received a 12-year sentence,[28] while the other three defendants received between 30 and 32 years.[29]

As to sexual violence by intervening and occupying forces, it seems it either goes unseen or is tried only when it hits the news. Abu Ghraib seems to be the penultimate example: until the photos were published, whatever was going on in the prison was known, but ignored. I have addressed the political and symbolic functions of visibility of sexual violence against Iraqi men in the US press elsewhere (see Zarkov 2011), but it is worth noting here that the discourse of 'bad apples' has distanced the individual violators from the US military and the state as national institutions. And while the trials under national courts gave the semblance of order, no high-ranking officer was ever brought to justice. Interestingly, the Taguba Commission, which investigated the event, noted in its report, on page 17, under point 6 ('intentional abuse of detainees by military police personnel included the following acts') under 'k': 'A male MP guard *having sex* with a female detainee' (emphasis mine). To the dismay of feminists and human rights defenders, the official position of the report is that what could be otherwise seen as a sexual coercion, assault or rape of a woman in the context of incarceration during a military occupation is still just—sex (Taguba Report 2004).

When it comes to violence perpetrated by UN peacekeepers, police and civilian administrators, the practice and the rules of the UN engagement have so far provided ample protection to UN personnel, addressing crimes (such as torture of Somali civilians by Canadian peacekeepers or the use of excessive force by UN police in Kosovo) either within the codes of military discipline or within the national laws of the country from which the peacekeeper comes (Megret 2003).

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[26] See http://www.njcm.nl/site/jurisprudentie/show/56.

[27] I am grateful to Helen Hintjens for personal communication and wealth of information about the 'Media case' and Ruggiu. The details of the case are to be found at http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Ruggiu/decisions/120505.html; for more on Ruggiu, see http://www.haguejusticeportal.net/index.php?id=9164.

[28] In 2005, he was denied the reduction of the sentence. In 2008, he was transferred to Italy to serve the rest of the sentence there. In spring 2009, he was granted an early release by an Italian court in violation of the Statue of the International Criminal Tribunal for Rwanda (ICTR), it was reported on 29 May 2009. According to Art. 27 of the Statute, only the President of the ICTR may decide on the early release of those convicted by the UN ad hoc Tribunal, no matter where the sentence is being served. http://www.haguejusticeportal.net/index.php?id=10688.

[29] See http://www.haguejusticeportal.net/index.php?id=9166; 'Despite complaints by Rwanda about its leniency, Ruggiu's 12 year sentence was justified by the Trial Chamber due to his demonstration of remorse, the fact that he had not directly participated in the massacres, and his agreement to testify against the three defendants in the "Media Trial"'. http://www.haguejusticeportal.net/index.php?id=10688.

The situation with respect to sexual violence seems even graver. From involvement in trafficking of women in Bosnia in 1990s, to rape and forced prostitution of refugees in the Democratic Republic of the Congo (DRC) to the rape of a Haitian teenager, UN peacekeepers of very different rank and responsibility have been part of violations that the UN presumably exists to prevent. This is far from surprising given that the UN Resolutions 1325 and 1820[30] address sexual violence in war by defining it, implicitly and explicitly, as something that happens between the 'locals', with UN personnel as the protecting force (see Holzner 2011; Mumford 2010). True to the ontology of 'local' wars and violent 'locals', Resolution 1820 especially defines sexual violence against women in war as an act against 'international peace and security' and a rightful cause for an international intervention, thus assuming that no sexual violence is perpetrated by the 'interveners'—for who will intervene then? The point here is that, while the UN as an institution apparently stands in defence of international principles, conventions and treaties and in protection of international norms of human rights, it is not accountable under international humanitarian law. The UN has created the ad hoc and permanent courts to deal with war crimes, but the crimes of its personnel, as well as other 'intervening communities' are not defined as war crimes and thus do not fall under the jurisdiction of those courts.

In criticizing today's applications of international law, Orford notes that it 'immerses its address in a world of military calculations' which 'treats the state as its principal referent' (Orford 2011, p. 11, 14) and thus accepts that 'the state must remain free to kill and maim those who threaten its existence' (ibid., p. 15). She asks: 'Should we take part in the ongoing task of differentiating lives to be saved, lives to be risked and lives to be sacrificed?' (ibid., p. 15) However, Orford never makes the step of explicitly asking where the lives of the 'international community' are among those saved, risked and sacrificed; and which states—within the 'community of interveners'—have the power to make those life and death decisions. Further, while Orford in the end argues that 'we should not look to law' to determine life and death, she does it by recalling the 'horror of war' and 'apocalypse' (ibid., p. 21) rather than by analysing the fact that, today—by the sheer geopolitical power—a handful of the states, and the institutions and organizations they control, are able to define the violence they inflict on others as justifiable in the view of the larger, 'humanitarian' objectives.

Taking up those issues, Hutchings (2011) argues that the morality of humanitarian actions and actors is the predominant script of contemporary military interventions. The moment those interventions are not called military any longer, but humanitarian, the violence used by the 'humanitarian actor' is defined as a 'justifiable technique', appropriate to the situation in which others use it unjustifiably (ibid., p. 35). Moreover, 'the humanitarian hero remains himself unaffected by the violence *he* employs, the practice and exercise of killing and injuring in no way compromises either his

[30] See http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1325(2000) for Resolution 1325, http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1820(2008) and for Resolution 1820.

authority or *his* agency' (ibid. Emphasis mine). The genderedness of the moral subject is not incidental here. In the classical, gendered narrative of Western civilization and its wars, *he* is the one who has the capacity of moral judgment, as well as the capacity and responsibility to protect. Furthermore, as noted in the previous section, rape is never assumed to be either one of *his* techniques or justifiable—for rape is the watershed between 'just' and the 'unjust' wars, moral and immoral subjects.

Dexter (2007) points out how the revival of the discourses of 'just war' informs the international juridical systems. The moment a war is called a 'humanitarian intervention', she argues, its legality is established through the endorsement of the highest supranational agency, the UN, and its legitimacy guaranteed through the representations of violence against the innocent. Even without direct recourse to the UN approval and international legality—as in the case of the US invasion of Iraq in 2003 or the NATO bombing of the FRY in 1999—the narratives of victimization and vulnerability of the 'local' (civilian, female and feminized) population offered a wide scope of discursive legitimization. Dexter's arguments are all the more relevant as she points to the 'cosmopolitans' among the academics and activists and the 'uncritical support of international criminal justice that [they] display' (ibid., p. 71) as crucial for establishing new rules of engagement in war. She argues that, while in the past, wars were seen as an evil to be avoided, today we have a situation in which wars become 'morally required' (ibid., p. 69). She further states that 'those writing from a progressive cosmopolitan position . . . are yet unwilling to acknowledge the changed and politically charged context in which their discourse is being received' (ibid., p. 69). I would argue that this inability of 'acknowledging' geopolitical context here is part of yet another ontological distinction between the 'locals' and 'internationals': being the moral subjects of non-violence and justice, the latter are also the knowers, those who will teach the 'locals' non-violence, justice and morality, those who will show the 'locals' how to reconstruct their societies as democratic, free and just.

Finally, as I argued throughout this chapter, the context in which international humanitarian and criminal laws today are produced, justified and received is not incidental. It is carefully crafted through discourses, policies and legal practices that keep multiple ontological distinctions between the viciousness of the 'local wars' and justifiable 'use of force' of 'humanitarian intervention' as 'truly distinct from war-fighting' (ibid., p. 77). Consequently, the agent of the 'humanitarian intervention' is not just the only subject of peace, justice, morality and knowledge, but also ultimately, the only *truly human* subject.

Conclusion

The politics of naming that Mamdani so vividly depicts, keeps alive the fable of the 'humanitarian interventions' as actions by well-trained and disciplined armies of the 'international community' and the 'local wars' as vicious violence with savage local men and devastated local women. I do not wish to deny either the viciousness of contemporary war violence or the devastation it brings. Rather, I want to argue against

the neatness of distinctions made by those representations. Those distinctions are but a well-rehearsed and apparently widely believed hegemonic narrative of war through which the wars conducted by *some* nation-states are supposed to keep the appearances of honour, heroism and civility. This is also a gendered narrative, accompanied by ethnicization and racializing, and most recently by Islamophobia, which reconstructs the West vis-à-vis the rest of the world, through symbolic geographies of violence, and ultimately, of humanity.

The tropes of the Balkans and Africa, and with the 9/11 of the Middle East, are the tropes of time–space-specific masculinities against which the West re-masculinizes itself. The clean-shaven, highly trained, young pilots pressing buttons to release bombs are so much more likable—at least to their own nationals—than bearded Arabs, drugged Africans or drunken Balkan men blowing themselves and others up, hacking bodies or raping en masse.

The problem with such a production of difference between 'local' victims and perpetrators of war violence on the one hand, and 'international' forces on the other, is that it extends from the narratives of war to the narratives of justice. The absence of the Western subject from the narrative of the gruesomeness of the genocides, rapes and 'ethnic cleansings' of the 'local wars' produces this particular subject as non-violent, while the discourses and practices of international humanitarian law simultaneously produce this subject into a legal and legitimate subject of justice and humanitarianism. The international and supranational legal and policy mechanisms obscure the fact that 'international' organizations are based on the membership of states, and even more, that a handful of the most powerful states have had—so far—an unchallenged control over those organizations, and have enjoyed unchallenged impunity within the international legal system.

While feminist interventions into international humanitarian law have made sure that its legal framework recognizes rape of women as a war crime, they have also had implications that we have not envisaged, or have chosen to ignore. Not just in the reinforcement of the gendered-cum-racist constructions of the brutality of men and sexual vulnerability of women from the Balkans and Africa; not just reinforcement of the colonial and ethnocentric constructions of the Balkans and Africa as symbolic continents of violence; but the erasure of the agency and capacity of the people and places that have struggled throughout history against colonialism and imperialism; of achievements that those struggles have brought; and the invisibility of the ways by which the hegemonic powers are implicated in those apparently 'local' histories and wars. All this has served to produce discourses and practices of international humanitarian and criminal law that have reproduced ontological distinctions between the 'local' victim and perpetrator, on the one hand, and the 'international' deliverer of justice, on the other.

As a result, there is an ontological unrecognizability of the 'locals' by the 'internationals', which ultimately serves hegemonic powers. For its dehumanization of both the 'local' perpetrator of violence and 'local' victim not just essentializes the former, but also precludes any possibility for *political solidarity* with the latter.

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Chapter 2
Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda

Doris Buss

The international prosecution of war crimes—by the Yugoslav and Rwanda Tribunals or the permanent International Criminal Court—generates lengthy, detailed judgments about what happened during times of extreme political and military conflict. These international courts are increasingly expected to provide a careful accounting of the patterns of the conflicts, the nature of the different harms suffered, the circumstances that lead to the violence and the roles of different individuals, armies and militias in creating the conditions in which crimes were committed. In this painstaking work, the courts amass volumes of evidence, witness testimony, documents, videos and photos. The resulting written judgments, many running into hundreds of pages, condense this massive archive into a detailed analysis and accounting of the conflict and violence. The judgments both author a narrative about the causes and contexts of large-scale violence and are part of the record about what happened.

In this chapter, I am interested in international criminal courts as institutions that produce their own narratives about extreme violence. International courts are complex institutions, comprised of different bodies—the registry, trial chambers, the Office of the Prosecutor (OtP)—which act in varied, and sometimes contradictory, ways. Judicial accounts of 'what happened' emerge from this complex and changing space. Within the limits of this chapter, I want to begin the process of examining some of the practices, dynamics and actors that underpin and shape how trial chambers come to understand and produce an account of extreme violence. My focus here is on the Rwanda and, less-so, Yugoslav war crimes tribunals which have been in existence for more than 15 years and have generated their own substantial record through judicial decisions and judgments of the events in these two regions. As institutions of comparative long duration, the Rwanda and Yugoslav Tribunals also have had their own life cycle and knowledge trajectories.

Both institutions have relied upon expert witnesses to provide some of the evidence about the historical, social, political and economic contexts of the conflicts in

D. Buss (✉)
Department of Law and Legal Studies, C 473 Loeb Building 1125 Colonel By Drive, Ottawa, ON K1S 5B6, Canada
e-mail: Doris_buss@carleton.ca

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the two regions. In this chapter, I consider the role of 'context expert witnesses', as they are sometimes called, in shaping the tribunals' account of what happened. My focus is specifically on the expert testimony of Alison Des Forges, a renowned international human rights activist and Africanist scholar, who testified in 11 cases at the Rwanda Tribunal. I explore the transcripts of her testimony in two Rwanda Tribunal cases, *Prosecutor v. Akayesu*[1] and *Prosecutor v. Bagasora*[2], to explore three themes. First, and as noted above, I am interested in international criminal courts as dynamic, multivocal and multifaceted institutions. Within transitional justice literature, there is a growing interest in international courts as structured by social relations (Kelly and Dembour 2007). Scholars of the sociology of knowledge have similarly emphasized the importance of exploring the 'day-to-day actions and processes through which' knowledge is made in order to understand the 'specific *historical contexts*' and 'multidimensionality' of social action (Camic et al. 2011). This chapter explores the microdynamics *within* the Rwanda Tribunal to highlight some of the people, circumstances and practices that shaped, at least in part, the tribunal's account of 'what happened' in Rwanda in the 1990s.

Second, Alison Des Forges' testimony provides a useful lens for exploring the relationship between expert evidence as a type of knowledge and the Rwanda Tribunal's use of it to author an account of the causes and contexts of large-scale violence. Mary Poovey (1998; see also Hacking 2002; Valverde 2003) has highlighted the relationship between the format of knowledge and the 'available ways of organizing and making sense of the world' (Poovey 1998, p. xv). That is, the ways in which knowledge is presented and represented can tell us something about the world views that are possible at a particular time and place.

Finally, I argue in this chapter that some expert witnesses, Des Forges in particular, were more influential than is sometimes credited by tribunal insiders. Des Forges' testimony, I argue, had a significant impact in individual cases, particularly in the early stages of the Rwanda Tribunal. Her evidence provided a compelling framework within which the genocide was understood and provided the basis for the legal determination that the crime of genocide was even applicable. Her evidence was additionally influential in subsequent cases by shaping, in part, the way defence challenges to the dominant narrative of the genocide unfolded. I explore some aspects of this dynamic through a discussion of Des Forges' evidence in *Bagasora*. The transcripts of her evidence in this case also reveal a changing Rwanda Tribunal that was evolving as an institution with its own personalities and cultures. The resulting judgment in *Bagasora*, I argue, reveals a court that was both more knowledgeable about Rwanda while less confident in its ability to know the causes and contexts of the 1994 genocide.

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[1] ICTR-96-4-T (Trial Chamber), 2 September 1998.

[2] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, ICTR 98-41-T (Trial Chamber), 18 December 2008.

This chapter is based on a series of interviews and documentary analysis of both the Yugoslav and Rwanda Tribunals, but with a much more focused look at the International Criminal Tribunal for Rwanda (ICTR).[3] My arguments here are sometimes comparative, particularly in the first two sections of the chapter, where I trace the meta-narrative about the conflicts that shaped, in part, the establishment of the two tribunals in the 1990s. In other respects, this chapter provides a close reading only of the Rwanda Tribunal and only of certain cases heard at that institution. Legal arenas are curious knowledge-producing sites. Each case provides its own context in which decisions are made about what knowledge will be considered authoritative (Valverde 2003, Chap. 1). At the same time, certain institutional norms, practices and cultures are constituted and travel from one case (or 'trial chamber' in the ICTR/Y context) to another through legal precedents and the movement of people (i.e. judges at the ICTR often heard more than one case at the same time) (Eltringham 2011). In a further complication, some of the trials at both tribunals, but the ICTR in particular, took years to complete and generated their own cultures, contexts and courtroom dynamics. My discussion here is thus rooted, as much as possible, in the particular circumstances of individual cases. But, as I discuss below, the dynamics in one trial chamber can and do have impacts on other cases.

This chapter is not about the Rwanda genocide. It is much more narrowly a consideration of the knowledge practices of the international tribunal tasked with prosecuting crimes committed during the genocide. Underlying this study is a concern with the ways in which the causes and contexts of large-scale violence, such as the Rwanda genocide, are understood in 'official' knowledge-producing sites. The complexities of the Rwandan genocide and the politics around how the genocide is talked about and understood have been the subject of extensive, sophisticated analysis, (See e.g. Eltringham 2004; Hintjens 2008; Pottier 2002) a review of which is beyond the limits of this chapter. This scholarship, and the concerns expressed about the reduction of complex violence to simple causal explanations, influenced my thinking in this chapter. But my concerns with the simplification of complex forms of violence should not be interpreted as in any way denying the scale and the devastation of the violence in Rwanda in the 1990s including the 1994 genocide.

This chapter begins with a brief explanation of expert evidence and its role in international crimes prosecutions.

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[3] Funded by the Social Sciences and Humanities Research Council, Canada grant number 410-2007-2043. Interviews with 13 'context' expert witnesses, various prosecution and defence counsel, staff of the Office of the Prosecutor and Registry and incidentally, two judges were conducted, most but not all, on the record. The individuals interviewed were connected to one or both of the tribunals. Transcripts of expert witness oral testimony, primarily from the Rwanda Tribunal, were then analysed. Finally, the written judgments of the Rwanda Tribunal were analysed in terms of their use of expert witness testimony.

The Place of Experts in International Criminal Trials

Expert evidence is the oral and written testimony of 'a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute'.[4] In criminal trials, expert evidence is generally thought of as coming from the forensic sciences: DNA testing, fingerprints, lie detectors and the like. The expert in DNA, for example, might testify before a criminal court that the DNA found on the weapon matched the DNA sample taken from the defendant.

International criminal courts also rely on expert evidence of this type and might include, for example, forensic anthropologists who testify about the state of bodies recovered from a mass grave or an expert on typewriters who can testify that a document likely was produced by a certain brand of typewriter (and hence linked to a particular political or military office). But, expert evidence can also come from the social sciences and humanities, though this form of expertise tends to receive much less scholarly attention.

At the Yugoslav and Rwanda Tribunals, experts with backgrounds in anthropology, history, political science, law and sociology testified in multiple cases about the social, political, historical contexts that lead to, and then shaped, the outbreak of armed conflict and violence in these two regions. This expert evidence—often referred to as 'context' or 'linkage' evidence—was primarily driven by two factors relating to the structure and objectives of international war crimes trials established in the 1990s.

The first factor is the definition of the crimes prosecuted by the courts, particularly genocide and crimes against humanity, which require evidence of ethnic, racial or religious social groups and the historical context of social relations between groups. A crime against humanity is a criminal act—torture, killing, rape—committed as part of, and in furtherance of, a larger attack against a population. The Rwanda Tribunal statute goes further than the Yugoslav Tribunal to specify that the attack must be against a population identified by 'national, political, ethnic, racial or religious grounds'. Genocide similarly is the commission of certain acts with the intent of destroying a 'national, ethnical, racial or religious' group. Evidence is thus needed to establish both the existence of distinct groups or populations and their relations overtime (to explain, for example, why a particular act should be understood as part of a larger attack against a group). For example, in the Rwanda Tribunal decision in *Akayesu* (discussed in more detail below), the Court heard lengthy evidence about how the conception of 'Tutsi' and 'Hutu' as distinct groups within Rwandan society was historically and socially constructed and then hierarchically ordered in colonial and post-colonial Rwanda. In *Akayesu*, the Rwanda Tribunal had the difficult task of determining if Hutu and Tutsi were distinct groups within the meaning of the crime of genocide which is limited to 'national, ethnical, racial or religious groups'.[5] Further,

[4] Quoted in *Prosecutor v. Perišić*, IT-04-81 (Trial Chamber), Decision on the Defence Motion to Exclude the Expert Reports of Robert Donia, 27 October 2008, Para. 6.

[5] For a critique of the tribunal's reasoning that Tutsi and Hutu were 'stable and permanent' groups in Rwanda in 1994, see (Nigel Eltringham 2004, Chap. 1).

the court heard evidence about the history of post-colonial Rwanda, where acts of violence were committed against Rwandan Tutsi and Hutu at different historical junctures. This historical context was offered to demonstrate that in different periods of political uncertainty, ethnically inflected violence was orchestrated by Rwandan elites to consolidate their hold on power.

The second major driver for context expert evidence is the tribunals' focus on prosecuting the *leaders* said to be responsible for large-scale violence. Other legal processes within the affected regions, such as local criminal trials or 'traditional' justice measures, are meant to address the 'foot soldiers' or ordinary citizens who engaged in violence and atrocity. While both tribunals have prosecuted some defendants who might be seen as comparatively minor figures, both institutions have dedicated most of their resources in the pursuit of complex, often lengthy 'leadership trials', against individuals like Slobodan Milošević, Radovan Karadžić, Ferdinand Nahimana and Théoneste Bagasora, who were seen as the intellectual, political and military leaders in the regions.

The leadership focus of the tribunals necessitates expert evidence first to demonstrate that the accused were indeed leaders, something that might not be apparent from their formal title, and second, to establish a link between the 'leader', who may be distant from the physical locations of violence, and the atrocities committed 'on the ground'.

Context expert witnesses have attracted some controversy within the tribunals. Some lawyers and judges I interviewed felt these experts complicated and distracted the proceedings from the more central focus on prosecuting and defending individual accused. This view resonates within some transitional justice scholarship that has portrayed the production of a historical accounting of 'what happened' as incompatible with the narrower criminal trial structure and focus on individual guilt. Some scholars have suggested that war crimes trials are too prone to political interference (over which version of history will be authored), (Arendt 1963) or too limited as legal venues, with the rigid rules of evidence narrowly focused on guilt or innocence, to produce a thick accounting of the causes and circumstances of large-scale conflict and atrocity (Eltringham 2009; Petrovic 2009; Simpson 2007).

More recently, Richard Wilson (2011), in an extensive study of the use and production of history in contemporary international criminal courts, has concluded that historical evidence, and the production of a record, is now a regular feature of war crimes prosecutions, required by legal elements of the crimes prosecuted and made possible by the large amount of documentary, witness and expert evidence compiled by the courts. Not only do contemporary international courts routinely engage in 'historical forays', he argues, the resulting accounts of history could even be seen as 'reputable' (Wilson 2005).

The remaining discussion in this chapter builds in part on Wilson's conclusions that the production of a historical record is now a recognized feature of contemporary war crimes trials. But while Wilson may be correct that the Yugoslav Tribunal, at least, is producing 'reputable' accounts of the conflicts, this begs the question: which accounts of what happened become reputable and at what junctures? In the next section, I argue that context expert evidence at the two tribunals was driven in part

by a meta-narrative about the causes of the conflicts in Rwanda and Yugoslavia that prevailed in the 1990s. That narrative, I suggest, depicted the conflict and genocide in Rwanda as elite-orchestrated, ethnically directed violence, designed to create the conditions to secure or maintain power.

Making Sense of Violence

In the mid-late 1990s, when both tribunals were beginning their work, there was a growing consensus in some international policy and scholarly circles that the conflicts in these two regions were problematically portrayed as resulting from tribal, atavistic hatreds that were beyond rational explanation or effective intervention. Scholars and policy practitioners began emphasizing the conflicts as constructed, elite driven, modern and intentional.[6] Robert Hayden, a US-based scholar of the Balkan region and two-time expert witness at the Yugoslav Tribunal, describes Western state and institutional responses to the war in Yugoslavia as 'informed by a particular teleology—in which the demise of Yugoslavia was an aberration, a disaster caused by evil politicians, whose culpability needs to be shown so that normalcy can be obtained' (Hayden 1999). Scott Straus (2006), writing on the Rwanda genocide, refers to a 'new consensus' about Rwanda that emerged in scholarly and activist work in the 1990s. 'Rather than seeing the violence as chaotic frenzy, as state failure, or an explosion of atavistic animosities, scholars and human rights activists alike stress the violence was modern, systematic and intentional'.

The 'new consensus', as Strauss calls it, emerged partly in response to simplistic characterisations by Western media and some political leaders of the conflicts as 'ethnic' or 'tribal' violence. Warren Christopher, then secretary of state in the USA, described the violence in the Yugoslav regions in 1993 as a 'problem from hell': 'The hatred between all three groups . . . is almost unbelievable. It's almost terrifying, and it's centuries old'.[7] Christopher's phrase—'a problem from hell'—became the title of Samantha Power's Pulitzer prize-winning book which was a strongly argued *tour de force* about US government failure to officially recognize and respond to genocide and mass violence in various non-US locations, including Yugoslavia and Rwanda. For Samantha Power, Christopher's comment reflected a US government strategy to absolve itself of responsibility by characterizing the violence in Yugoslavia as an 'amoral mess', centuries-old grievances that were beyond US intervention (Power 2002, p. 306).

Against the powerful trope of 'tribal violence', the new consensus was, on one level, an attempt to insert complexity and responsibility (not only of local leaders

[6] See e.g. (African Rights 1995; Des Forges 1998; Malcolm 1998). The discussion in this section is narrowly focused on what I see as a meta-narrative about these conflicts as elite orchestrated. A close reading of the vast scholarly literature that provides detailed analyses of the contexts of the violence in these two regions is beyond the scope of this chapter.

[7] Interview with Warren Christopher, *Face the Nation*, CBS, March 28, 1993, cited in Power 2002, p. 306.

but also Western decision-makers) into the discussions about mass atrocity. As some scholars have noted, however, the responsibility called for in analyses like Power's is narrowly focused on international/US responsibility to *save* the regions from violence (Orford 2003). Other scholars have noted that 'elite responsibility' explanations for some contemporary conflicts can generate their own distorting policy prescriptions that fail to take account of the complex, multi-level contexts within which violence has unfolded (Autesserre 2010; Kalyvas 2006).

For my purposes, an understanding of violence as elite orchestrated (rather than mindless group violence) suggests an epistemological claim that has important implications for international criminal prosecutions. If the conflicts are understood as caused by rational, calculating individuals, then what happened in Rwanda and Yugoslavia 'was not tribalism run amok; it was genocide' (Straus 2006, p. 33) or, other, related, international crimes. The dominant conception of the conflicts as stemming from criminal actions of individual political, military and social elites makes it possible to conceive of international criminal prosecutions as a justifiable international response to large-scale violence.

The understanding of large-scale violence as resulting from cynically contrived, local, elite-orchestrated ethnic conflict, I suggest, exerted a powerful conceptual pull in the early days of the tribunals. The lawyers, judges, clerks hired to work at the tribunals were drawn from various regions across the globe and almost none of them had any working knowledge of the conflict regions or even the local languages. Faced with the enormity of prosecuting the most serious of international crimes—genocide and crimes against humanity—the judges and lawyers sought a framework within which they could explain what had happened. 'What they [International Criminal Tribunal for the former Yugoslavia (ICTY) judges] pretty much all feel is a need for a vehicle to frame the alien world they are being asked to render judgments on', according to Robert Donia, a 14-time expert witness at the Yugoslav Tribunal.[8] Navanethem Pillay, former judge and eventual president of the Rwanda Tribunal, described the approach of judges in the first Rwanda Tribunal case of *Akayesu* in similar terms: 'We judges agreed that you can't avoid this question of history of Rwanda, otherwise it's just one ethnic group killing another ethnic group with no reason why. History is necessary for an understanding of why the conflict occurred. Our first judgment—*Akayesu*—did this' (Quoted in Wilson 2011, p. 72).

The prosecutors Robert Donia encountered at the Yugoslav Tribunal were not looking for just any kind of historical narrative, he found, but 'one that could be inserted in indictments, could impute motivations of actors as rational rather than crazed and wild. In general, make some sense'.[9] Making 'sense', for both Donia and Judge Pillay, is rooted in a dichotomous way of conceiving the violence; as tribal or atavistic hatred on the one hand or intentional elite orchestration on the other. Within the logic of this dichotomy, the tribunals' focus on elite responsibility is not seen as a 'version' of what happened but simply as common sense; a laudable rejection of the 'ancient ethnic hatreds' characterization.

[8] Author interview with Robert Donia, 8 December 2010.

[9] Author interview with Robert Donia, 8 December 2010.

The context experts who testified in the first 5 or so years at the tribunals, but the Rwanda Tribunal in particular, provided the judges and the prosecutors with the means to construct such an explanatory framework. The most often cited expert witnesses in the first few years of the tribunals were from Europe or North America, with doctoral degrees in topics related to the regions (in various disciplines: history, political science, sociology, anthropology, law), who had a grasp of the local languages, knew the history, culture and political contexts and had done (often considerable) field research in the regions.[10] These experts were able to explain the regions to the lawyers and judges in ways that provided a framework within which the tribunal personnel could 'make sense' of what happened.

In the following section, I explore this 'framing' role for expert context evidence in the first case before the Rwanda Tribunal—*Prosecutor v Akayesu*, which resulted in the first conviction for genocide by that court in 1998. In this discussion, I focus on the expert evidence of Alison Des Forges, the woman who would become the most frequently appearing expert witness at the tribunal and an internationally celebrated expert on the Rwanda genocide. Her evidence, I suggest, had a significant impact in that first case in framing the judges and prosecutors' understanding of what happened and shaping, in turn, how defendants in subsequent cases responded.

Framing Genocide: Prosecutor v. Akayesu

When the Rwanda Tribunal was established in 1994, the OtP turned for assistance to three Rwanda experts: Alison Des Forges, a US-based, long-time scholar of Rwanda who, at the time of the genocide, was working closely as a volunteer (later as an employee) with the organization that would become Human Rights Watch, André Guichaoua, Professor of Sociology at Université des Sciences et Technologie de Lille, France and Filip Reyntjens, Professor of African Law and Politics at the University of Antwerp, Belgium. These three acted as advisors and provided training to the OtP. In the early days of the tribunal, the three would meet with the OtP in various locations, even at Reyntjens' home in Antwerp, where the prosecutors would, as Reyntjens' described it, 'pick their brains' about Rwanda and the genocide.[11]

In 1994, when the genocide in Rwanda unfolded, few scholars or diplomats were familiar with the country and Des Forges, Guichaoua and Reyntjens constituted a sizeable part of the scholarly community undertaking research on Rwanda.[12] Filip

[10] At the Yugoslavia Tribunal, some of the experts who testified in the early cases included: Robert Hayden, a professor of Anthropology at the University of Pittsburgh, Pennsylvania, in the USA, who testified for the defence, James Gow, Professor of International Peace and Security, at King's College, London, UK, for the Prosecution and of course Robert Donia, who was working with Merrill Lynch in the USA when he began testifying for the Prosecution in 1997. Some of the experts who testified at the Rwanda Tribunal are discussed below.

[11] Author interview with Filip Reyntjens, 5 August 2010.

[12] Other notable (international) scholars of the region included J.P. Chretien, who testified as an expert in the Media trial, Gérard Prunier, who authored his own, well-regarded account of the 1994

Reyntjens[13] describes the researchers working on Rwanda as a 'very small community', who, in the days immediately following the genocide, saw their role primarily as activists: 'trying to save people, lobby the international community, et cetera'. This small research community, Reyntjens notes, 'implicitly' divided the research labour of studying the genocide among themselves. Reyntjens settled on an intensive study of the 3 days following the downing of President Habyarimana's plane on 6 April 1994, seen as the start of the genocide (Reyntjens 1995), while Des Forges, along with a team of researchers from Human Rights Watch, undertook a massive study of the genocide itself (Des Forges 1998). All three—Reyntjens, Des Forges and Guichaoua—became an important resource for the OtP with each testifying in numerous cases (with Reyntjens also testifying once for the Defence).[14]

Of the three, Alison Des Forges testified the most often, giving evidence in 11 ICTR cases, as well as appearing in numerous legal proceedings in national courts (Switzerland, Canada and Belgium, for example) involving the Rwanda genocide and several immigration cases (in Canada and Belgium).[15] At the time of her death in 2009 in a plane crash in New York State, Des Forges was a leading figure in human rights circles, in part because of her commitment to testifying about the Rwanda genocide.[16] Des Forges' study of the genocide, published as *Leave None to Tell the Story*, became seen by lawyers and experts at the tribunal as the ICTR's 'bible'.[17] It won the Raphael Lemkin award by the Association of Genocide Scholars and was listed as one of best books of the year by the Los Angeles Times. Des Forges herself was named a MacArthur Fellow and given a 'Genius Grant' in 2000.[18]

Alison Des Forges was the prosecutor's main expert witness in the first ICTR case of *Prosecutor v Akayesu* and she was on the witness stand for 8 days in 1997. The transcripts of her evidence[19] suggest a very positive interaction between her and the three judges who comprised the trial chamber: the presiding judge, Laïty Kama,

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genocide (Prunier 1995) and has appeared as an expert witness before the International Criminal Court, Catharine and D Newbury and Johan Pottier.

[13] *Prosecutor v. Bagasora*, transcript, 15 Sept 2004, pp. 10–11.

[14] *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje, ICTR-98-42*. Reyntjens testified on behalf of Kanyabashi.

[15] *Prosecutor v. Nahimana* et al., transcript, 20 May 2002, p. 8.

[16] For an array of tributes to Alison Des Forges, see: http://www.hrw.org/en/news/2009/02/13/human-rights-watch-mourns-loss-alison-des-forges. Des Forges held a PhD in History from Yale University and her dissertation was on early Rwanda history, published posthumously as *Defeat is the Only Bad News: Rwanda under Musinga, 1896–1931* (University of Wisconsin, US, 2011).

[17] Author interview with Filip Reyntjens, 5 August 2010.

[18] *Prosecutor v. Nahimana* et al., transcript, 20 May 2002, p. 7.

[19] Court reporters are present in every courtroom and record everything that is said in court each day by judges, lawyers, witnesses and translators. The daily transcripts, in English, French, and usually the other working languages of the court, are mostly available from the tribunal websites. My analysis in the following discussion is based on a review of transcripts, court decisions and judgments and interviews with other expert witnesses but not Alison Des Forges whom I was unable to interview for this research.

from Senegal, Lennart Aspegren, from Sweden and Navanethem Pillay, from South Africa.

In the blended common and civil law procedures at the tribunal, judges can and do ask follow-up questions. In *Akayesu*, the judges asked wide-ranging, open-ended questions about a myriad of things, from the meaning of ethnic identity as a sociological term[20] to very specific questions about Rwandan history and the events leading to the genocide.[21] At one point, the presiding judge even commented to Des Forges about the large number of questions asked of her: 'Madam, I hope you will understand that we are taking a lot of your time because your testimony is particularly of great importance. You know very well Rwanda, as well as its history. And also the judges will be benefiting from your knowledge . . . I hope that we will not be accused of asking too many questions'.[22]

Des Forges' role at this point in the tribunal's life cycle was largely educative. The transcripts of her testimony read like a series of erudite mini lectures delivered to the trial chamber. While she was cross-examined by defence counsel for many days, her mini lectures unfolded with little challenge or interruption.[23] The prosecution's questions, like the judges', were also wide-ranging covering topics not limited to the matters raised by the indictment. At one point, the prosecutor asked Des Forges about the conduct of the Muslim community during the genocide, a subject not related to the charges against the defendant, Jean-Paul Akayesu. 'As you know', the prosecutor explained, 'this process, in as much as it is a trial, is also a process for keeping accurate records for posterity'.[24]

The written judgment in *Akayesu* relies significantly on Des Forges' evidence, particularly in establishing the history and context leading up to the 1994 genocide. The second section of the judgment, entitled 'Historical Context of the Events in Rwanda in 1994', contains 33 paragraphs summarizing Rwandan history from the start of German colonial rule in 1897 and concluding with a brief overview of the events in April 1994, which the trial chamber then explores in more detail later in the judgment (ruling that a genocide did occur). Alison Des Forges is the only witness specifically referenced as an authority for the chambers' summary of Rwandan history.

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[20] Judge Aspegren, for example, asked on the first day of Des Forges' testimony, 'Doctor, when you say what we would now call ethnic groups, what are you referring to?' (*Prosecutor v. Akayesu*, transcript, 11 Feb 1997, p. 32). He then followed this question, with a second: 'Now, when, since you are speaking about Rwanda, which groups are you thinking of?' (p. 33) And, then, finally, he gets to the crux of the issue 'Second question, are these to be considered as ethnic groups, really . . . ?' (33).

[21] For example, Judge Laity-Kama asked about the ethnic composition of the RPF invading army in October 1990, and then followed that up with questions about contemporary language usage in Rwanda (see e.g. *Prosecutor v. Akayesu*, transcript, 12 Feb 1997, pp. 124–125).

[22] *Prosecutor v. Akayesu*, transcript, 12 Feb 1997, pp. 105–106.

[23] This 'lecturing' role for context experts is found also in the early stages of the Yugoslavia Tribunal. Robert Donia describes first two testimonies at the ICTY, in 1997 and 1999, as an 'extended lecture of the region' (Interview with author, 2010).

[24] *Prosecutor v. Akayesu*, transcript, 24 May 1997, p. 135.

The 'Historical Context' section of the judgment is an outline of the judges' interpretation of the aspects of Rwandan history they saw as relevant to the events in 1994. As an account of Rwanda history, 33 paragraphs in a legal judgment are obviously too short and there are inevitable gaps. But for a legal judgment, devoting 33 paragraphs to a review of Rwandan history is significant.

The 33 paragraphs tell the story of Rwandan history in terms of the political forces that shaped and manipulated Hutu and Tutsi as identity categories over the course of Rwanda's colonial and post-colonial history. The first part of the 'Historical Context' section of the judgment, for example, details the construction of Tutsi and Hutu as identity categories, by German colonial authorities and their hierarchical ordering under Belgian rule. Hutu and Tutsi elites responded, in turn, to consolidate their hold on power or vie for additional power through the manipulation of those categories (Paragraphs 78–85).

The end of colonialism and the rise of the first Rwandan Republic in the late 1950s to the early 1970s is described as producing an often violent consolidation of Hutu and Tutsi identities (Paragraphs 86–91); elections in 1957, for example, saw ethnic rather than ideological voting patterns, and cross-border attacks by exiled Tutsi in the late 1950s and 1960s led to reprisal killings against Tutsi within Rwanda, generating in turn, more departures from Rwanda.

The dominant focus on ethnicity in this section of the 'Historical Context' is not entirely surprising given the judges' need to resolve the legal question of whether 'Hutu' and 'Tutsi' are distinct ethnic groups and hence, if the crime of genocide was even applicable. This legal question is addressed in another section of the judgment where the judges rule that Hutu and Tutsi emerged over the course of Rwandan history as stable and permanent groups within the legal definition of genocide.[25] In reaching this decision, the judgment contains a lengthy quotation from Des Forges' testimony which explains identity groups as being subjectively determined, shaped by a mix of 'the actual conditions and peoples' subjective perception of those conditions'.[26] The 'Historical Context' section, set out above, could be read as providing the raw materials for an explanation of how the 'actual conditions' of ethnic differentiation were established and then consolidated through the contrivance of various elites.[27]

These 'raw materials' of ethnic differentiation are relevant when the 'Historical Context' moves to a consideration of the events of the 1990s and the factors that shaped the deteriorating political and military situation in Rwanda. At the very end of a long paragraph describing the end of the first Republic in 1975 and the conduct of the second president, Juvenal Habyarimana, in the 1970s and 1980s, the tribunal notes that on 1 October 1990, an army of Tutsi exiles, known as the Rwandan Patriotic Front (RPF), based in Uganda attacked northern Rwanda. 'The attack', the tribunal noted, 'provided a pretext for the arrest of thousands of opposition members in Rwanda considered as supporters of the RPF'.

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[25] *Prosecutor v. Akayesu*, judgment, Para. 511.

[26] *Prosecutor v. Akayesu*, judgment, Para. 172.

[27] For a critical discussion of the Trial Chamber's analysis of ethnicity, see e.g. (Eltringham 2004, Chap. 1; Wilson 2011, Chap. 7).

In the next 12 paragraphs, the 'Historical Context' explains the 4-year period leading to the genocide in terms of 'the worsening internal situation' in Rwanda caused by a number of developments including: increasing pressure on President Habyarimana's government from growing opposition movements, as well as international donors, to share power and democratize; the war with the RPF and RPF demands to return to Rwanda (as well as their plans to overthrow the government, Para. 95) and the Arusha peace accords between the RPF and the Habyarimana government that provided for power sharing and the integration of the RPF into the Rwandan army.

This section explains how a deteriorating political situation was used by different political elites to vie for power, often through the manipulation of ethnic affiliation. For example, the trial chamber describes how the power-sharing arrangements in the Arusha peace negotiations, as well as the 1993 assassination of Burundian president Melchior Ndadye, a Hutu, by Burundian Tutsi army officers, were exploited by Hutu extremists within Rwanda to call for 'solidarity among all the Hutu' (Para. 103). President Habyarimana's inner circle used a similar tactic, according to the judgment, intentionally heightening ethnic tensions to mask its own efforts to stall political change and hold onto/reclaim power. 'To make the economic, social and political conflict look more like an ethnic conflict, the president's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted of fabricating events', the trial chamber concluded.[28]

The 'Historical Context' section ends with the start of the genocide on April 6, 1994, when President Habyarimana's plane was shot down, and a brief outline of some of the main events in April 1994. From there, the judgment moves to a new section and a consideration of whether a genocide happened in 1994 in Rwanda or not. Not only was there a genocide, the trial chamber concluded, but it was also centrally organized. Here too, Des Forges' evidence is cited prominently. '[T]he Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the Chamber, this genocide appears to have been meticulously organized. In fact, Dr. Alison Desforges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres". Indeed, some evidence supports this view that the genocide had been planned'.[29]

The trial chamber eventually concluded that the defendant in this first case, Jean Paul Akayesu, major of Taba commune, was guilty of genocide, incitement to genocide and crimes against humanity. Although Akayesu was not a 'leader' in orchestrating the genocide, the decision was a watershed in establishing some of the parameters of the judges' understanding of the causes and dynamics of the genocide. It also reflects the judges' confidence in summarizing Rwanda's history and political developments, a confidence that is strikingly absent in later decisions (see below). In a 2003 speech, Judge Pillay, one of the three judges in *Akayesu* and who later served as president of the tribunal, observed that 'it has been said that "those who cannot remember the past are condemned to repeat it." The ICTR, through its

[28] Paragraph 99. See also Para. 103.

[29] Paragraph 126.

jurisprudence and trial proceedings, is establishing a historical record of what happened in Rwanda between April and July 1994—a record which will help keep alive the world's collective memory'.[30]

Not all ICTR Trial Chambers in every case, even in the early years, provided a summary of 'historical context', and some even expressed misgivings about doing so.[31] Yet, Des Forges' evidence, I would argue, had a substantial impact on the Rwanda Tribunal even in cases where her testimony, or context evidence in general, was not specifically referenced. First and foremost, the *Akayesu* Trial Chamber's conclusion, from Des Forges' evidence, that Tutsi and Hutu were stable and permanent groups within the legal meaning of genocide, was a foundational move. As other scholars have noted, the Trial Chamber's conclusions here appear premised on a problematic understanding of both ethnicity and the legal elements of the crime of genocide (Eltringham 2004, Chap. 1; Wilson 2011, Chap. 7). Nonetheless, from that determination, the tribunal was able to consider genocide charges against subsequent defendants. In 2006, the Appeals Chamber[32] definitively concluded that the 1994 genocide and the existence of Hutu and Tutsi as stable and permanent groups were 'facts of such notoriety, so well known and acknowledged that no reasonable individual with relevant concern can possibly dispute them'.[33] Trial chambers at the Rwanda Tribunal could, thus, take 'judicial notice' of these facts without having them proved. Importantly, the Appeals Chamber decision refused to categorize Hutu and Tutsi as stable and permanent *ethnic* groups, but relied on the *Akayesu* determination that they were stable and permanent groups within the meaning of the crime of genocide,[34] which was itself based on Des Forges' testimony and an understanding of these groups as ethnic.

In this example and others, Des Forges' evidence in *Akayesu* had an additional impact by travelling within the tribunal. The transcripts of her evidence, for example, were required to be read by OtP staff who arrived at the institution without any background on Rwanda.[35] More significantly, aspects of her evidence in *Akayesu* were used in other cases. For example, the 'Historical Context' segment of *Akayesu*

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[30] 'The Rule of Law and the Role of the Individual in the Pursuit of Human Rights', speech by Judge Navanethem Pillay, president of the ICTR, 20 May 2003 Berlin, Germany on the occasion of the Friedrich-Ebert Stiftung 2003 Human Rights Award awarded to The International Criminal Tribunal for Rwanda, references omitted.

[31] For example, in *Prosecutor v. Kajelijeli*, the Chamber noted in the trial judgment that it 'will not embark on a discussion of the historical and political background, or the origin of the Rwandan conflict. The Chamber has a duty: it is to try the Accused for his alleged individual criminal responsibility and criminal responsibility as a superior on the basis of the charges brought against him in the Indictment' (ICTR-98-44, Judgment, 01 December 2003, Para 61).

[32] *Prosecutor v. Karemera* et al., ICTR-98-44-R94, 'Decision on Prosecution Motion for Judicial Notice: Rule 94 of the Rules of Procedure and Evidence', 9 November 2005.

[33] *Karemera*, 'Judicial Notice', Para. 5, quoting *The Prosecutor v. Caisimir Bizimungu* et al., ICTR-99-50-I, Decision on Prosecution's motion for Judicial Notice Pursuant to Rules 73, 89, and 94 (TC), 2.

[34] Paragraph 8 and footnote 7.

[35] See, e.g. James Stewart, interview with author, 25 February 2011.

was relied upon extensively in the 'Media' case,[36] in which three 'ideologues' of the genocide were on trial. The three judges who sat on that case included Navanethem Pillay as the presiding judge, Erik Mose[37] and Asoka de Zoysa Gunawardana, from Sri Lanka.[38] The judgment in that case 'accepts the importance of this history [of Rwanda], particularly in this case, and for this reason sets forth largely *in extenso* the comprehensive review of the historical context as described in the *Akayesu* judgement'.[39] The judgment then reproduces verbatim 26 of the 33 paragraphs from the 'Historical Context' section of *Akayesu*.

The impact of Des Forges' evidence is arguably felt in a third way; helping the trial chamber establish the framework within which the events leading up to, and during the genocide, were understood. In the words of one tribunal defence lawyer, the judges 'rely on Des Forges even when they don't say in their judgments how much they rely on her. Her evidence puts them in a state of mind for analyzing the rest of the evidence'.[40] The 'Historical Context' section in *Akayesu* based on Des Forge's evidence can be seen as providing the very sort of framework that Robert Donia suggested the judges and prosecutors needed in order to 'make sense' of mass violence. It offers a narrative structure within which the events in Rwanda are explained as resulting from very modern, systemic factors (internal stress caused by the transition to democracy) combined with the nefarious actions of desperate elites who manipulated ethnic identity in order to secure power.

Aspects of this narrative, as it is reproduced in the 'Historical Context' section, provide an account of the events in the 1990s that are challenged in subsequent cases. Defence lawyers have argued that the war between the Rwandan army and the RPF had more of an impact on the events in the 1990s and the genocide than was portrayed in *Akayesu* and in Des Forges' testimony. And indeed, the *Akayesu* judgment, while certainly taking note of the war, mostly discusses the role of the RPF in terms of the actions by Hutu hardliners to hold onto power and resist the Arusha peace accords between the Rwanda government and the RPF. The 'Historical Context' section only first mentions the 1990 RPF invasion of Rwanda, which started the war, at the end of a very long paragraph covering the period 1975–1990. When the invasion is mentioned again three paragraphs later, it is wrongly identified as occurring in 1991.

The judgment in *Akayesu* explains that while 'the genocide against the Tutsi occurred concomitantly' with the armed conflict between the RPF and the Rwandan army, that war can 'in no way be considered as an extenuating circumstance' for the genocide (Para. 128). But the arguments advanced about the role of the RPF in subsequent cases are used to make a different claim: to challenge the conclusion reached by Des Forges and the *Akayesu* judgment that the genocide was planned

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[36] *Prosecutor* v. *Nahimana, Barayagwiza, Ngeze*, ICTR-99-52 (Trial Chamber); See also *Prosecutor v. Gacambitsi*, ICTR-2001-64 (Trial Chamber), Judgment, Para. 230.

[37] See his biography, at http://ictr-archive09.library.cornell.edu/ENGLISH/factsheets/mose.html.

[38] See 'Judge Asoka de Zoysa Gunawardana Sworn in as an Appeals Judge for the ICTY and ICTR', 4 October 2001, available at http://www.icty.org/sid/7947/en (last accessed 5 November 2012).

[39] *Prosecutor v. Nahimana*, judgment, 3 December 2003, Para. 106.

[40] Author interview with Alexandra Marcil, 27 April 2008.

prior to April 1994. The trial chamber in *Akayesu* concluded that this planning did occur, the evidence of which can be found in the circulation of 'lists of Tutsis to be eliminated', 'arms caches in Kigali', the 'training of militiamen by the Rwandan Armed Forces and of course; and the psychological preparation of the population to attack the Tutsi . . . by some news media' (Para. 126).

Des Forges' testimony in *Akayesu* was relatively uncontested over the course of the trial. This all changed in subsequent cases. Four years after *Akayesu*, Des Forges began testifying in the case against Colonel Théoneste Bagasora, the man alleged to have been a central actor in preparing for the genocide in the 1990s. In this case, some of the conclusions reached by the Trial Chamber in *Akayesu* were more centrally in issue and in particular Bagasora's role in planning for the genocide through: compiling the lists of names of Tutsi and Hutu who would be exterminated,[41] establishing, training and then arming militia groups[42] and finally, presiding over the military commission established to determine how to 'defeat the enemy militarily, in the media and politically'. That commission, it was alleged, resulted in various efforts to depict all Tutsi as the enemy and eventually led to the incitement to genocide.[43]

In the following section, I examine the transcripts of Des Forges' testimony in *Bagasora* which suggest a very different experience from her testimony in *Akayesu*. I explore a change in the courtroom climate from the relatively warm embrace of Des Forges' evidence in *Akayesu* to a more combative and sometimes volatile environment in *Bagasora*. This change, I suggest, speaks to a shift within the tribunal itself, which was growing and developing as an institution with its own cultures, personalities and dynamics. More importantly, however, Des Forges' experience in *Bagasora* and the resulting trial judgment suggest a change in both knowledge practices—how expert witnesses were viewed and relied upon, for example—and on the tribunal's knowledge about and accounting of the events in Rwanda in the 1990s.

Contesting the Frame: Prosecutor v. Bagasora

By September 2002, when hearings began in *Prosecutor v. Bagasora,* a series of 'scandals' had significantly tarnished the tribunal's reputation and placed it on a public relations collision course with an increasingly hostile RPF-led Rwandan government (Peskin 2008; Cruvellier 2006; Del Ponte and Sudetic 2008). Members of the defence counsel were also vocal about their concerns that no charges had been brought against the RPF for conducting its own massacres and killings in the 1990s (Del Ponte and Sudetic 2008, Chap. 7). And indeed, no charges would ever be laid

[41] *Prosecutor v. Bagasora,* Indictment, Paragraphs 5.36–5.40.

[42] *Prosecutor v. Bagasora,* Indictment, Paragraphs 5.16- 5.35.

[43] *Prosecutor v. Bagasora,* Indictment, Paragraphs 5.4–5.15.

by the tribunal, a fact that caused Filip Reyntjens in 2005, to write a strongly worded letter to then Chief Prosecutor Jallow, withdrawing his support from the OtP.[44]

In response to concerns about the slow pace of the Rwanda Tribunal, the chief prosecutor in the early 2000s, Carla Del Ponte, was pushing forward with several large trials against multiple accused seen as leaders of the genocide. These were grouped into five, large, multiple defendant trials known in tribunal parlance as: Media, Government I, Government II, Military I and Military II. 'Military I' was the trial involving Bagasora and three other military officers. Bagasora was alleged to have been one of the main conspirators planning the genocide prior to 6 April and who then enabled the installation of the interim government following Habyarimana's death, the same government in power throughout the genocide.[45]

The lead prosecutor at the commencement of *Bagasora*, Chile Eboe-Osuji, called Alison Des Forges as his first witness. He explained to the trial chamber that Des Forges' role as the first witness was to set the context for the remainder of the trial. She would, among other things, 'give the story of the history of Rwanda' and would help the judges 'make better sense' of the factual evidence that would follow.[46] In other words, the prosecutor was beginning with Des Forges so that her testimony would frame the rest of the evidence.

But things did not go according to plan for the prosecution. The lawyers for the four defendants objected to Des Forges as the first prosecution witness arguing that experts normally testify only after the factual basis has been laid by material witnesses. While the judges eventually agreed to Des Forges as the first witness, the prosecutor's strategy proved to be a procedural distraction.[47]

Des Forges testified for what must have been a gruelling 18 days spread over the months of September and November 2002, overlapping with some of the time she was testifying in the Media case. Most of her days on the witness stand were taken up by cross-examination by defence counsel. Even before she began testifying to the substance of her report in *Bagasora*, the three defendants objected to Des Forges' qualifications as an expert, even though she had, at that point, been qualified as such in two other ICTR cases (*Akayesu* and Media). Each of the three defendants took a different position on her authority as an expert, but in principle they contested Des Forges as an expert in post-1990 events, suggesting that if she was an expert at all (and not everyone agreed she was) her expertise was pre-1990 Rwanda history and second, that she was not a human rights expert because she did not have formal training in that field and/or had not carried out her own research on human rights abuses.[48] The OtP responded strongly to the challenge to Des Forges' expertise,

[44] Letter dated 11 January 2005 from Professor Filip Reyntjens to Chief Prosecutor Hassan B. Jallow, on file with author.

[45] *Prosecutor v. Bagasora*, judgment, Para. 2022–2027.

[46] Transcripts, 3 September 2002, p. 53.

[47] Transcripts, 4 September 2002, p. 33.

[48] See e.g. transcript, 3 September 2002.

with the chief prosecutor herself appearing in the trial chamber noting that it was 'improper that Alison Des Forges is subject to this humiliation'.[49]

While the trial chamber ruled that Des Forges was an expert, the judges themselves asked very few follow-up questions, unlike the judges in *Akayesu*. One reason for this change might have been that two of the three judges (Judge Lloyd Williams and Judge Pavel Dolenc) who began hearings in *Bagasora*,[50] were simultaneously sitting on two other cases (*Prosecutor v. Ntagerura* et al. and *Prosecutor v. Semanza*).[51] As one judge explained to me, judges 'learn as we work along. . . . when you've been in a case or two or three, you recognize what you are hearing'.[52] It may have been that the judges in *Bagasora* felt they did not need the same tuition that Des Forges provided the trial chamber in *Akayesu*.

A second reason why the judges may have held back from asking questions was that Des Forges' testimony was already subject to multiple interruptions and took much longer than was budgeted for in the trial schedule. As in *Akayesu,* her evidence was wide ranging, covering topics from early Rwandan history in the nineteenth century to events in the 1990s. But compared to *Akayesu,* her answers to the prosecutor's questions were briefer and often cut off by challenges by defence counsel on various procedural grounds, ranging from the admissibility of certain documents to her use of the term 'genocide'.[53]

Defence lawyers cross-examined Des Forges on everything, including her methodology and professional history. Some of the questions sought to cast doubt on her reliability, suggesting that, for example, as a young undergraduate student doing volunteer work in refugee camps, she became sympathetic to (and biased in favour of) Rwandan.[54] In this and other lines of questioning, the defence lawyers drew on Des Forges' testimony in previous Rwanda Tribunal cases as well as other judicial and quasi-judicial hearings, which they had read closely, exploring any possible inconsistencies in her evidence.

> Mr. Degli (for Defendant Kabiligi): You told my colleague, Ogetto, today that this publication *Leave None to Tell the Story* is your work. Is that correct?
> Answer: I said that I was the author of that book which was based upon research done by myself and colleagues.
> Mr. Degli: Madam Des Forges, when I take this book, contrary to books that are published by individuals, I realized that it was published by our two organizations, International Federation of Human Rights and Human Rights Watch and when I open the French version to the second page of the book . . . I do not seem to see your name as author . . . .

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[49] Transcripts, 3 September 2002, 45.

[50] After hearing Des Forges and one other witness, the panel of three judges were replaced by a new panel consisting of Judge Møse, who also sat on the Media case, as the presiding judge, accompanied by Judges Jai Ram Reddy and Sergei Alekseevich Egorov. The change resulted when two of the original judges in *Bagasora* were leaving the tribunal for different reasons.

[51] ICTR-99-46-T, and ICTR-97-20-T.

[52] Author interview with a judge, 1 May 2008.

[53] See e.g. *Prosecutor v. Bagasora*, transcript 5 September 2002.

[54] See e.g. *Prosecutor v. Bagasora*, transcript 2 September 2002, pp. 47–8.

> Answer: Indeed, Maître, you point to a complicated situation which has caused enormous distress to librarians all over the world . . . Since it is clear that organizations do not write books, it seems apparent that there is a person as author . . . .
> Mr. Degli: Madam Des Forges, is it correct that 16th June 1998 you appeared before the French parliamentary committee that listened to you?
> Answer: That is correct.
> Mr. Degli: Please look at the document which I have just passed to you, the first page of that document . . . I read the words that you said and which were noted by the committee. Talking about you, the committee said the following: 'She stated or she indicated that the data she goes to present were the result of research conducted for 3 years on the field by a research team of FIDH and the Human Rights Watch association, and that it was a common project' . . . I emphasis the world 'common' or 'collective' . . . . Is this the statement exactly what you made to the French parliamentary committee?
> Answer: No, that statement is not mine.[55]

While it is not unusual for a lawyer to try and discredit a witness, this and other lines of questioning point to a changed, more combative, climate in the courtroom. Most of the combativeness took place between the lawyers for the defendants and the lead prosecutor on the case, Eboe-Osuji, but Des Forges herself was also targeted. On different occasions, for example, the presiding judge intervened to correct questions by defence lawyers that suggested something improper about Des Forges.[56] And, on another occasion, Des Forges herself intervened to address what she saw as a challenge to her reputation.

> The Witness (Des Forges): So the document which I used as a sample was one, which was in no way bound by attorney–client privilege, had been handed over with Colonel Bagosora's approval to Professor Reyntjens. I want to make that clear in order to remove any suggestion that I might have inappropriately benefited from this document and also in order to remove any obstacle that might exist to the submission of this diary of Colonel Bagosora to the Court so that the Bench might have the opportunity to use to the full this piece of evidence.
> (this is followed by a short procedural exchange about the document number)
> Mr. Skolnik (counsel for Bagasora): My Lord. I see that my colleague (referring to the Prosecutor Eboe-Osuji) is trying to get the agenda into the evidence after there was ruling yesterday.
> The Witness: Excuse me. The Prosecution has nothing to do with this. This is a point I raised because my honour has been called into question.[57]

Substantively, the cross-examination of Des Forges was very detailed focusing primarily on the events in the 1990s. Here too, the defence counsel seems to be challenging the framing of the events offered by Des Forges. It is not clear from the transcripts that the cross-examination was particularly effective. As the defence lawyers themselves noted on several occasions, most were not trained in the common law tradition of cross-examination, and their questions, while wide ranging were also meandering and imprecise.

But the trial judgment does seem to suggest that the defence had an impact on challenging the certainty of the conclusions noted in *Akayesu* that the genocide was

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[55] Transcript, 2 September, 2002, pp. 80–84.

[56] Transcript, 2 September 2002, pp. 44–45.

[57] Transcript, 18 September 2002, pp. 119–121.

planned and that the various events in the 1990s prior to 6 April 1994 were part of that planning. There is no room in this chapter to discuss in detail the judgment or the defendants' arguments. But in the following concluding comments, I highlight a few aspects of the *Bagasora* judgment that mark a shift in the trial chamber's conception of the genocide and its own remit as a war crimes court.

Throughout its judgment, the *Bagasora* Trial Chamber notes that the specific events listed as evidence of planning for genocide, such as the establishment of local security forces, the compilation of lists of 'enemies' and the ethnicisation of security concerns, could equally be explained as steps taken to protect security during a time of military and political conflict.

> After the death of President Habyarimana, these tools were clearly put to use to facilitate killings. When viewed against the backdrop of the targeted killings and massive slaughter perpetrated by civilian and military assailants between April and July 1994 as well as earlier cycles of violence, it is understandable why for many this evidence takes on new meaning and shows a prior conspiracy to commit genocide. Indeed, these preparations are completely consistent with a plan to commit genocide. However, they are also consistent with preparations for a political or military power struggle.[58]

The judgment concludes that after 408 trial days, 242 witnesses and nearly 1,600 exhibits, the evidence of planning was simply inadequate. 'It is possible that some military or civilian authorities did intend these preparations as part of a plan to commit genocide', but this has not yet been proved.[59] While Bagasora himself is found guilty of superior responsibility for actions of Rwandan army soldiers committed in the first few days of the genocide, the tribunal rules there is insufficient evidence of a conspiracy among the defendants to plan and execute a genocide.

The implications of *Bagasora* are complicated. While this was one of the main leadership trials before the tribunal, there are others that explore the role of, for example, political leaders in orchestrating the genocide. But, *Bagasora* was one case where the OtP sought to prove that the genocide was planned prior to April 1994. The judgment in *Bagasora* begins to cast doubt on that conclusion, as does some scholarly study of the genocide (See e.g. Straus 2006, p. 33).

Filip Reyntjens suggests that he and the other scholars working on Rwanda have changed their views somewhat about the events in Rwanda in 1994. Substantively, his analysis is the same, he says, but some of his emphasis has shifted, for example, towards highlighting the actions of the RPF.[60] In an article on Des Forges' legacy, he co-authored with David Newbury, Reyntjens also suggests that while Des Forges' book, *Leave None to Tell the Story*, on which much of her testimony at the tribunal was based, will 'remain the essential referential work' about the 1994 genocide, 'some of its material will need to be revisited' (Newbury and Reyntjens 2010).

For both the experts and the tribunal then, knowledge of what happened in Rwanda in the 1990s is changing as more information becomes available. The results of this change for the tribunal are paradoxical. As the tribunal amasses more evidence and

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[58] *Prosecutor v. Bagasora*, Trial Judgment, Para. 2110

[59] *Prosecutor v. Bagasora*, Trial Judgment, Para. 2111–2112.

[60] Author interview with Filip Reyntjens, 5 August 2010.

more experience, some trial chambers, such as in *Bagasora*, become less certain about what happened. 'The process of a criminal trial cannot depict the entire picture of what happened in Rwanda', it wrote, 'even in a case of this magnitude'. Thus, writing years after the first decision in *Akayesu*, the Bagasora Trial Chamber sought to distance itself from authoring a record of what happened and opts instead, to depict its task in much narrower terms: 'The Chamber's task is narrowed by exacting standards of proof and procedure as well as its focus on the four Accused and the specific evidence placed before it in this case'.[61]

Conclusion

In this chapter, I suggested that the work of the Rwanda Tribunal was shaped from the beginning by a meta-narrative about the genocide as orchestrated by political, military and social elites for the purposes of securing power. The *Akayesu* judgment, the first issued by the Rwanda Tribunal, confirmed this view, authoring an account of what happened in Rwanda in the 1990s as a series of events and deliberate actions that resulted in a group of elites conspiring to incite ordinary Rwandan Hutus to kill Rwandan Tutsi and politically sympathetic Hutu, allowing the elites to consolidate their hold on power. This account of what happened in Rwanda in the 1990s, and the understanding of large-scale violence that it confirms, was substantially based at the outset on the research of several experts on Rwanda, including Alison Des Forges. Her testimony provided the basis on which the trial chamber was able to, first, depict the violence as inter-ethnic and constituting the international crime of genocide and second that the genocide was planned and then executed by a select group of elites.

I have suggested in my, far too brief, discussion of a later case at the tribunal, *Prosecutor* v. *Bagasora*, that aspects of this meta-narrative became less clear to the judges as the tribunal continues its work. My point here is not that the broad outlines of the account of genocide as elite orchestrated are necessarily wrong. Rather, my argument is that the meta-narrative, as I call it, is an epistemological framing that might not appear as such. As an account of violence, the meta-narrative sometimes appears as a common-sense truth. And while the evidence of elite orchestration of the genocide is substantial, the self evident 'truth' of the meta-narrative may have the unintended effect of obscuring the more uneven, changing and arguably less intentional aspects of the genocide. This is not to say that individual defendants are not guilty, but it does raise questions about how responsibility and guilt are understood in relation to large-scale, complex, multiple perpetrator violence.

Another argument pursued in this chapter is that international criminal courts acquire and produce knowledge about large-scale violence. What are the implications of an international criminal court that concludes after 10 years of amassing evidence that it cannot 'depict the entire picture of what happened', at the same time, that judges in these same institutions are becoming more assertive about their

[61] *Prosecutor v. Bagasora*, Trial Judgment, Para. 5.

own acquired knowledge base (and their need to rely less on context experts)? The discomfort with producing a record expressed by the *Bagasora* Trial Chamber is somewhat understandable. Authoring a narrative about the causes and consequences of large-scale conflict is a difficult business and it is invariably enmeshed in political ramifications. The contexts of large-scale violence are extremely complex, with information and insight unfolding gradually, often years after the formal end of the violence. And yet international criminal courts do author an account of 'what happened' during times of large-scale violence, even when they depict their remit as narrowly about the guilt or innocence of individual defendants.

In this chapter, I have suggested that the narratives authored by these institutions about large-scale violence are contradictory and changing, and that some of that change reflects how, and through what means, trial chambers come to know the contexts they are tasked with judging. Recognizing international criminal courts as structured by social processes, including knowledge processes, is thus crucial for a better understanding of how, through what means and with which limitations international courts produce narratives about the causes and contexts of large-scale violence.

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Chapter 3
Terror, Terrorizing, Terrorism: Instilling Fear as a Crime in the Cases of Radovan Karadzic and Charles Taylor

Marlies Glasius

International criminal tribunals are not for ordinary crimes. The law has found expressions like 'persecution against any identifiable group', 'inhumane acts intentionally causing great suffering', and 'destruction of part of a population' to describe the nature of such crimes. Lately, a more emotive term, with a politically chequered history, has been added to this vocabulary. As will be detailed below, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) have convicted suspects of 'spreading terror' or 'acts of terrorism'.

This chapter will zoom in on two high-profile trials, that of Radovan Karadzic before the ICTY and that of Charles Taylor before the SCSL, to demonstrate how the prosecution uses and the defence contests, how the judges grapple with, and how war-affected elite observers understand, the introduction of 'terror' and 'terrorism' into the courtroom. The intention is not to determine whether or under what conditions terror should be an international crime, but rather to relate its introduction to changing legal understandings of what war is, in what ways it violates the law, and what the consequences of these changing legal understandings are.

These two cases lend themselves particularly well to such an examination. Charles Taylor is only the second former head of state on trial before an international tribunal, after the 5-year trial of Slobodan Milosevic, which ended without a verdict when he died in 2006. Radovan Karadzic on the other hand has also been a head of state of sorts, although not recognized as such by most other states, and is easily the most high-profile defendant after the death of Milosevic. Both cases raise questions, which I discuss more extensively elsewhere (Glasius and Meijers 2012; Meijers and Glasius 2013) about the relation between individual and collective responsibility and about the problem a charismatic defendant causes for international criminal courts. More specifically, both have been charged with acts designated as acts of terror, and both have mounted a spirited political defence against the charges relating to 'terror' and 'terrorism'.

M. Glasius (✉)
Department of Politics, University of Amsterdam, O.Z. Achterburgwal 237,
1012 DL Amsterdam, The Netherlands
e-mail: m.glasius@uva.nl

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The chapter will first discuss the codification of the crime of terror in international humanitarian law and the trajectory of its use in cases before the ICTY and SCSL. It will then go on to discuss the Karadzic case: the charge of 'crimes of terror' against him, the prosecutor's narrative about what constitutes these crimes of terror, and the defence narrative about who were the real terrorists in this case. These narratives are established on the basis of an extensive discourse analysis of the trial transcripts.[1] The Taylor case is then treated in the same manner: discussion of the charges, the prosecution and defence narratives[2] but with an additional section on Liberian elite responses to the notions of 'terror' and 'terrorism' in the context of the Taylor trial based on fieldwork,[3] and a final section on the verdict in the Taylor case (now confirmed on appeal). The penultimate section will analyse the usages of 'terror' and 'terrorism' by different actors in relation to more general changes in the ways war and war crimes are perceived and constructed by lawyers, academics, and policymakers. The conclusion will sum up the argument and points at possible further trajectories of the crime of terror.

Terror and Terrorism in International Law

Codification in Treaties

In contemporary contexts, the notion of 'terrorism' commonly evokes the image of a bomb going off in an otherwise peaceful location frequented by ordinary citizens. The 'crime of terror' under discussion here however has derived from prohibitions under international humanitarian law, and hence presupposes a 'time of war'. The Fourth Geneva Convention of 1949, which deals with protection of civilians, prohibits 'all measures of intimidation or of terrorism',[4] hinting already that this use of 'terrorism' has something to do with intimidating civilians, but not being specific at all. The 1977 Additional Protocols to the Geneva Conventions give a more precise definition: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'[5]

The diplomatic discussions on these provisions at the time of their drafting[6] show that some delegates would have preferred a 'results-based' definition, articulated either as 'acts capable of spreading terror' or with a more solid focus on the actual infliction of terror on a civilian population, arguing that intent is difficult to establish

[1] For a more comprehensive analysis of the trial transcripts, see Meijers and Glasius 2013.

[2] For a more comprehensive analysis of the trial transcripts, see Glasius and Meijers 2012.

[3] Undertaken in Monrovia, Liberia between 16 and 27 May 2011.

[4] Article 33, Fourth Geneva Convention (1949).

[5] This prohibition, in identical wording, is contained in the First Additional Protocol, which deals with international wars, in Art. 51(2) and in the Second Additional Protocol, which deals with civil wars, in Art. 13(2).

[6] Travaux Préparatoires, Additional Protocols, Vol. III, 203–206; Vol. XIV, 53–55, 73.

with objectivity. However, the majority resisted such proposals, and they were not reflected in the final text of the provision. As the French delegate put it, 'In traditional war attacks could not fail to spread terror among the civilian population: what should be prohibited [. . .] was the intention to do so.'[7]

Since these Protocols have been very widely ratified, the prohibition of the use of 'terror' in this sense in war situations is not contested. However, as will be seen below, not everyone agrees that what is a prohibition on warring parties is also necessarily an international *crime* for which individuals can be punished.

Terror at the Yugoslavia Tribunal

The Statute for the ICTY does not contain an explicit crime of terror or terrorism. While common perceptions of the Yugoslav wars would probably endorse that 'terror' in the meaning of the Additional Protocol was one of their constant and defining characteristics, few suspects have been charged with the crime of terror. The first was Stanislav Galic, Major General of the Bosnian Serb Army's Sarajevo corps and responsible in this capacity for the shelling and sniping of Sarajevo. His indictment in 1999 had as its first charge 'infliction of terror',[8] as a violation of the Additional Protocol, but the Trial Chamber decided that what was intended was 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' and convicted him accordingly in 2003.[9]

On appeal, the Galic defence held that his intent to spread terror had not been proven and also that the Trial Chamber should not have changed the charge from 'infliction' to 'acts or threats', etc. The Appeals Chamber however decided that actual infliction of terror, although proven in this case, was not required. The majority opinion sought to establish that 'terror' is not just prohibited to warring parties; it can also constitute an individual crime. It argued that 'numerous states', including Norway, Ireland, the Czech and Slovak Republics, Cote d'Ívoire and Ethiopia, and, last but not least, Yugoslavia, had criminalized terror against civilians and that a Croatian domestic court had already convicted someone on such a charge. It further clarified that while 'extensive trauma and psychological damage form part of the acts or threats of violence', the 'actual terrorisation of the civilian population is not an element of the crime' of terrorism, i.e. it is not necessary to establish actual terrorisation.[10]

In terms of fact, the verdict determined that the shelling and sniping of Sarajevo constituted 'attacks [which] were designed to keep the inhabitants in a constant

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[7] Travaux Préparatoires, Vol. XIV, 65.

[8] International Criminal Tribunal for the former Yugoslavia, *Indictment*, The Prosecutor of the Tribunal against Stanislav Galic, 26 March 1999.

[9] International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Judgement and Opinion*, Prosecutor vs. Stanislav Galic, 5 December 2003, esp. Para. 72, 76, 94, 101, 132.

[10] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Judgement*, Prosecutor vs. Stanislav Galic, 30 November 2006, Para. 102; 104.

state of terror', which, beyond the direct physical victims, caused 'extensive trauma and psychological damage' to the civilian population at large. The intent to spread terror could be inferred from the nature, manner, timing, and duration of the attacks, which had neither military purpose nor the intent to wipe out the population. Instead, the majority of the judges held, the message was that no Sarajevan could be safe anywhere, which was intended to cause a state of extreme fear (ibid. Para. 107).

One judge, Wolfgang Schomburg, gave a dissenting judgment. He was not convinced that terror has been 'penalized beyond any doubt in international customary law', arguing that not 'numerous' but only a few states had in fact criminalized terror, and half of these, including Yugoslavia, failed to explicitly reference the Additional Protocols. Moreover, the fact that no crime of terror has been included in the Rome Statute in 1998 to him constituted strong proof that it is not state practice to consider spreading terror as criminal. Hence, it could only be considered as an aggravating factor to existing crimes.

Schomburg held that 'it would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes—thus highly politicizing its function—where the conduct in question was not without any doubt penalized at the time when it took place'.[11] He also makes clear, however, that he is convinced of the desirability of criminalizing terror in future. Another judge, Mohamed Shahabuddeen, gives an opinion that is not dissenting but 'separate', stating that the 'core' of the crime of terror is known in customary law, even though a more comprehensive definition, relating to state terrorism or terrorist acts by national liberation movements, remains contested.[12]

A second person indicted for terror was Dragomir Milosevic, Galic' Chief of Staff. In his defence, Milosevic argued that his intent, i.e. the primary purpose of the attacks being to spread terror, cannot be read off from witness statements about the actual terror experienced. He also argues a lack of clarity as to who is supposed to be the victim in this crime, i.e. the entire civilian population of Sarajevo or only people physically affected? The Appeals Chamber, however, followed the Galic judgement and also convicted Milosevic for acts or threats of violence that wilfully made the civilian populations their object, with the primary purpose of spreading terror. It made clear how terror was different from indiscriminate attack: terror requires intent, and indiscriminate attack requires injuries.[13] Hence, a suspect can be cumulatively charged for both, or could in principle be punished for terror without there being physical harm to civilians.

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[11] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Separate and Partially Dissenting Opinion of Judge Schomburg*, Prosecutor vs. Stanislav Galic, 30 November 2006, esp. Para. 2, 22.

[12] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Separate Opinion of Judge Shahabuddeen*, Prosecutor vs. Stanislav Galic, 30 November 2006, esp. Para. 3–5.

[13] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Judgement,* Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 39.

Again, one judge dissents: following Schomburg, judge Liu Daqun holds that terror is not a crime under customary law. He exhorts the Tribunal to 'not convict out of disgust but out of evidence', and finds the determination of a 'primary purpose' of the crime arbitrary and impossible to make with any certainty.[14] Nonetheless, Liu Daqun too recognizes a 'gap' in international criminal law relating to the 'infliction of severe psychological scars', which he would like to see criminalized in customary law or by treaty. For him, this would be an already unlawful act, coupled with a specific intent to spread terror, and resulting in severe trauma. He would like to see this crime of 'terror' distinguished from 'terrorism'.[15]

Apart from the indictment against Ratko Mladic, which is less far advanced than that of Radovan Karadzic, there is another case in which 'terror' has been charged. This case, Prlic et al., is the only case where the 'terror' charge does not relate to Sarajevo but to Mostar. In this case, quite differently from the Sarajevo case, it is the expulsion of civilians into East Mostar which is deemed to have been intended to spread terror.[16] This charge is unusual, because it has not been made in the Tribunal's many other cases that featured populations being forcibly moved. At the time of writing, the Trial Chamber has judged the defendants to be guilty of unlawful infliction of terror on civilians, and the defendants have appealed.

Terrorism at the Special Court for Sierra Leone

Unlike the Yugoslavia Tribunal, the Statute of the SCSL, dated 16 January 2002, actually contains a reference to 'acts of terrorism' as a serious violation of international law for which people can be prosecuted.[17] Indeed, the first indictments against three of the protagonists in the Sierra Leone civil war, Foday Sankoh, Johnny Paul Koroma, and Sam Bockarie, all charged the defendants with acts of terrorism. It did so by alleging that most of the other crimes charged were part of a 'campaign of terror and punishment', and as such were also separately punishable.[18] However, all three suspects died before a verdict could be rendered.

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[14] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Partly Dissenting Opinion of Judge Liu Daqun*, Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 5.

[15] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Partly Dissenting Opinion of Judge Liu Daqun*, Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 23–29.

[16] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic, *Second Amended Indictment*, 11 June 2008, Count 25; Trial Transcript (Prosecution Closing Statement), 9 February 2011, p. 52073, 52076, 52079.

[17] Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 3(d).

[18] Special Court for Sierra Leone, Prosecutor against Foday Saybana Sankoh also known as Popay also known as Papa also known as Pa, *Indictment*, 7 March 2003, Count 1; Special Court for Sierra Leone, Prosecutor against Sam Bockarie also known as Mosquito also known as Maskita, *Indictment*, 7 March 2003, Count 1; Special Court for Sierra Leone, Prosecutor against Johnny Paul Koroma also known as JPK, Indictment, 7 March 2003, Count 1.

In the first case to come to a verdict, in early 2008, against members of the rebel group Armed Forces Revolutionary Council (AFRC), the Trial Chamber relies on the Galic verdict to establish that 'acts of terrorism' are to be understood as 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', that they are a crime under customary law, and contain the specific elements of an act or threat, wilfully making civilians its object, with the specific intent of spreading terror.[19] It then goes on to decide that the unlawful killings, sexual violence, and physical violence that had been proven all also constituted a campaign to terrorize the population and hence are an 'act of terrorism'. The use of child soldiers and forced labour, however, can be inferred to have military purposes, whereas sexual enslavement 'was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual needs and to fulfil other conjugal needs'.[20] Thus, it decides that 'the three enslavement crimes' can have other purposes than spreading terror and are not therefore acts of terrorism.[21]

In the second, Civil Defence Force (CDF) case, the Trial Chamber and subsequently the Appeals Chamber did not convict the accused of acts of terrorism, arguing that the spreading of terror has to be specifically intended, not just accepted as a likely side effect of certain acts.[22] In a legal finding relevant to the subsequent Taylor case, it finds that burning of houses, which is not in itself a war crime, can be an 'act of terrorism' if the intent to cause extreme fear is proven (ibid. 117–118; Para. 359).

In the third case, against members of the Revolutionary United Front (RUF), acts of terrorism are again charged, and do lead to convictions. Moreover, sexual enslavement can in some instances be considered an act of terrorism when it is 'not intended merely for personal satisfaction or a means of sexual gratification for the fighter', but rather the 'savage nature of such conduct against the most vulnerable members of the society demonstrates that these acts were committed with the specific intent of spreading fear amongst civilian population as a whole'.[23] The Trial Chamber and Appeals Chamber again rely on Galic, but have a further elaboration. Again in relation to sexual crimes, they find that the intent to spread terror need not be found with the implementers of the acts in question, as long as it is with those (the accused) who gave the orders.[24]

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[19] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement,* 20 June 2007, Para. 665–666.

[20] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement*, 20 June 2007, Para. 1459.

[21] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement*, 20 June 2007, Para. 1450, 1454, 1459.

[22] Special Court for Sierra Leone, Prosecutor against Moinina Fofana and Allieu Kondewa, Appeals Chamber, *Judgement*, 28 May 2008, p. 119, Para. 365.

[23] Special Court for Sierra Leone, Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Trial Chamber, *Judgement*, 25 February 2009, Para. 1346–1352; also 1493.

[24] Special Court for Sierra Leone, Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Appeals Chamber, *Judgement*, 26 October 2009, Para. 1102.

The Karadzic Case

Charges

During the long period in which Karadzic was wanted, but at large, the indictment against him was amended several times. The first indictment in 1995 alleged that Karadzic had 'terrorized the civilian population' with the sniping campaign in Sarajevo, but did not designate this as a separate crime.[25] The 2000 indictment, does include a count of 'unlawfully inflicting terror upon civilians', with a reference to the Geneva Protocols.[26] The third and final indictment, which followed Karadzic's arrest in 2008, follows the language of the Galic verdict:

> Between April 1992 and November 1995, Radovan KARADZIC participated in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population. This objective involved the commission of the crimes of terror, unlawful attacks on civilians, and murder charged in this indictment.[27]

Although in their speeches, the prosecutors occasionally apply the word 'terror' in reference to forced expulsion, internment in camps, and other crimes against the non-Serb population, the charge of the crime of terror is exclusively reserved for the siege of Sarajevo, as it had been in other cases before Prlic.

The Prosecution's Narrative

In their questioning of witnesses, the prosecutors cover some actual incidents of sniping and shelling in detail. In their own speeches in court, they especially devote attention to describing the 'atmosphere of terror'[28] that engulfed the city:

> What is revealed is his primary purpose . . . the terrorisation of an entire civilian population. I want to pause for a moment and talk about the extent of the success of that objective in the daily life of Sarajevans because that bears some focus at this moment. Because his campaign succeeded in its objective, terror was the only constant in the otherwise uncertain daily life of these besieged Sarajevans. As a senior doctor from a hospital said, summing up the daily fear of trying to survive Sarajevan life: 'Every day on your way to work you ran the risk

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[25] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, Ratko Mladic, *Indictment*, 24 July 1995.

[26] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Amended Indictment*, 28 April 2000, Count 10.

[27] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Third Amended Indictment*, 27 February 2009, Para. 15; also Count 9.

[28] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Transcripts* (further: Transcripts Karadzic), p. 602, lines 13–14. Transcripts available at http://www.icty.org/case/karadzic/4#trans; coding frames available at author's personal website.

> of being killed or injured. Every day's work meant exposing yourself to the risk of being added to the long list of the killed and the wounded. Simple daily acts like crossing the street terrified people.'[29] The prosecutor prefaces this description by saying 'For 44 months, the civilian population lived under a pervasive sense of terror; exactly what was intended.'[30] He ends the statement with: 'This terror attack, Your Honours, virtually killed a living city terrified people.'[31]

Although unlawful killings are also separately charged, making the people of Sarajevo afraid for their lives is constituted as a war crime in itself. Even Karadzic's ally Milosevic is said to have 'described the earliest bombardments as "bloody criminal"'.[32] However, instilling fear appears to be just an intermediate purpose, with the following as ultimate aims: 'to secure concessions from the Bosnian government and the international community, the interest in exacting revenge, the interest in securing concessions in negotiations to cement gains and to obtain a resolution consistent with the objectives of the Bosnian Serbs'.[33]

The Defence Narrative

Karadzic turns around the accusation against him made in the indictment that he employed terror to reach his goals with respect to Sarajevo. At the beginning of the war 'there was terror exercised by the Muslims against the Serbs. There were rapes of young girls on an ethnic basis, and there were killings.'[34] Later, it was 'terror in Sarajevo [. . .] it was terrible to be a Serb that night in Sarajevo'.[35] The use of terror is imputed by Karadzic to Muslim leaders, but with a twist: they did not only spread terror, but they were also terrorists.

Central to Karadzic's defence before the ICTY is the portrayal of the Bosnian Muslim leadership as the aggressor and the criminal in the Bosnian crisis. They embarked on a Jihad to gain control of Bosnia.[36] According to Karadzic, who cites a court verdict against Izetbegovic for insurgent activities under Tito, the accomplishment of this goal can only be based 'on terror or possibly foreign intervention'.[37] The Muslim leadership tried to realize 'the implementation of [their] ideology, but not with terror or foreign intervention, but both terror and foreign intervention'.[38] The

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[29] Transcripts Karadzic, p. 599, 5–18.

[30] Transcripts Karadzic, p. 597, 17–18.

[31] Transcripts Karadzic, p. 601, 25–602, 1. The words 'terror', 'terrorize', 'terrorization' are used at least 61 times by the prosecutors.

[32] Transcripts Karadzic, p. 615, 5–6.

[33] Transcripts Karadzic, p. 198, 16–19.

[34] Transcripts Karadzic, p. 978, 14.

[35] Transcripts Karadzic, p. 928, 17.

[36] Transcripts Karadzic, p. 2278, 4–6.

[37] Transcripts Karadzic, p. 888, 19–22.

[38] Transcripts Karadzic, p. 889, 3–4.

tactic of 'terror' was used to scare Serbs in Bosnia. The Muslims were 'organising and preparing terrorist organisations against prominent Serbs'.[39] Also, in Srebrenica 'there was terrible terror exercised by the Muslims of the area'.[40]

Hence, the Muslims are terrorist, not the Serbs: 'we [Serbs] do not have a tradition of terrorism, and we are against killing'.[41] In the end, the 'SDA failed to achieve that [their goals] through terror'[42] and turned to the other tactic, provoking foreign intervention, instead. Karadzic makes a cultural argument, using the post-9/11 association between armed groups based on a Muslim identity and terror*ism,* whether in peacetime or war, to turn around rather than just reject the accusation.

Taylor Case

Charges

Like the defendants in the three preceding group trials, Charles Taylor is charged with 'acts of terrorism', with a reference to the Geneva Conventions and Additional Protocols, and as with the defendants in the AFRC and Revolutionary United Front (RUF) trials, with whom he is alleged to be acting in a joint criminal enterprise, it is the first count listed against him. The crime has two elements: burning of civilian property and committing the crimes listed in counts 2–11 'as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone'.[43] As described above, the judges in the CDF case had determined that burning down houses was not a war crime in itself, but could become one if the intent were to terrorize civilians. Counts 2–11, which were also charged as crimes independent of intent, include unlawful killings; sexual violence; physical violence; use of child soldiers; abductions and forced labour; and looting.

The Prosecution's Narrative

In her summary of the prosecution case, prosecutor Hollis argues that 'terror may also mean or include extreme fear'.[44] The prosecutor goes beyond the case's temporal and

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[39] Transcripts Karadzic, p. 11945, 12; p. 11983, 13.

[40] Transcripts Karadzic, p. 978, 14.

[41] Transcripts Karadzic, p. 2860, 17–18.

[42] Transcripts Karadzic, p. 958, 24–25.

[43] Special Court for Sierra Leone, The Prosecutor against Charles Ghankay Taylor also known as Dankpannah Charles Ghankay Taylor also known as Dankpannah Charles Ghankay Macarthur Taylor, *Second Amended Indictment*, 29 May 2007, count 1.

[44] Special Court for Sierra Leone, The Prosecutor against Charles Ghankay Taylor, p. 24135, line 18. Transcripts (further: Transcripts Taylor). Transcripts available at http://www.sc-sl.org/CASES/

territorial jurisdiction to argue that this was Taylor's primary purpose, in the Liberian as in the Sierra Leonian war. She also cross-examines Taylor himself at some length on the meaning of terrorism, and gets him to agree that 'terror is fear'[45] and that to 'instil fear, that's an act of terror'.[46] The allegation of the use of terror, intended to create or instil fear, is then associated with a phrase from the RUF rebels' own vocabulary: 'making fearful', which could apply to people, areas, or the campaign itself.

A few themes related to 'making fearful' are evoked by the prosecutors. The first is the AFRC/RUF attack on Freetown in January 1999, which according to various prosecution witnesses, Taylor ordered that it be made 'more fearful than any other', either to save ammunition or to assure victory,[47] particularly by burning down houses and killing civilians. The second theme is that of the RUF's practice of amputations,[48] the 'trademark atrocity of Sierra Leone',[49] and of carving its initials into people's skin with a knife.[50] The third refers to the RUF practices of displaying human body parts at crossroads and checkpoints.[51] The prosecution connects this back to the Liberian war to argue:

> Indeed, Mr Taylor told you that there were checkpoints in Liberia with skulls, not human heads, that skulls were used as symbols of death, that he saw them, he drove by them. They were used as symbols and he saw nothing wrong with using them.[52]

The fourth is a single, particularly gruesome incident used by the prosecution to symbolize the 'terrorism' or fearfulness of the RUF, and hence also of Charles Taylor: It concerns the testimony of a woman who heard the cries of children being killed, was forced to carry a bag filled with human heads, discovered her own children's heads among them as she was made to empty the bag, and was forced to laugh about the discovery.[53]

Thus, the prosecution made a skilful effort to 'vernacularise' the charge of terror, by attaching it to the phrase 'making fearful', which it demonstrated was widely

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ProsecutorvsCharlesTaylor/Transcripts/tabid/160/Default.aspx; coding frames available at author's personal website.

[45] Transcripts Taylor, p. 31585, 29; p. 31588, 5.

[46] Transcripts Taylor, p. 31588/28–29.

[47] Transcripts Taylor, p. 24139, 29 to 24140, 1; p. 24169, 7; p. 24175, 12; p. 24176, 16; p. 24184, 8; p. 49160, 29 to 49161, 1; p. 49167, 6.

[48] A direct connection to instilling fear is made at Transcripts Taylor, p. 24136, 28–29; 24137, 25; 24138, 3–4; 49227, 26. For the numerous other references to amputations, see coding frame.

[49] Transcripts Taylor, p. 24331, 26–27.

[50] A direct connection with instilling fear is made at Transcripts Taylor, p. 303, 7–11; p. 24138, 3–4, 7–11; p. 31591, 13, 16, 19–20. Other references to the practice are made at p. 303, 1–4; p. 24151, 6–9; 49149, 7–8; p. 49204, 7–8.

[51] Transcripts Taylor, p. 5863, 7, 12–13; p. 24138, 16–19, 27–28; p. 24139, 13–14, 22–23; p. 31592, 2–4; p. 46192, 24, 29; p. 49179, 13–14, 17–19; p. 49180, 4, 6–7.

[52] Transcripts Taylor, p. 49179, 16–20.

[53] Described by prosecutors at Transcripts Taylor p. 24136, 8–18; p. 31589, 7 to 31591, 6–9. At p. 31589, 4 and p. 49180, 19–20, prosecutors describe an apparently separate incident of a mother forced to laugh as her child is buried alive.

used by the RUF, and using Charles Taylor's cross-examination to strengthen the credibility of this connection.

The Defence Narrative

In the defence case, Taylor's lawyer Courtenay Griffith puts Taylor in the stand and examines him as a defence witness in his own case for more than 6 months, thus giving him a platform to speak in court. Together, they relate the case in general, and the charge of 'terrorism' in particular, to Taylor's incurring of the displeasure of the USA. The USA turned against Taylor, they argue, because he stood up for Liberia, defending its economic interest in, for example, the off-shore oil[54]: '[T]he United States was not used to Liberian governments before mine telling them yes or no. It was, "Yes, sir. Yes, sir. Yes, sir." And I guess to a great extent they were stunned. And so the decision [to oust Taylor from power] was taken.'[55] The USA and the UK funded the Liberians United for Reconciliation and Democracy (LURD) rebel group, which attacked Liberia from neighbouring Guinea: 'my government was a democratically elected government. My government was under attack. What would you do as a friend? You help the democratically elected government. No, you help the rebels. [. . .] The die was cast, we were going to be destroyed anyway and it happened eventually. I'm here.'[56]

The Taylor defence draws attention to the political nature of the terrorist label, and Taylor actually adopts it as a badge of honour placing him in the same camp as, for example, Nelson Mandela.[57] Griffiths asks him in examination: 'Nelson Mandela was called a terrorist at one time, wasn't he, Mr Taylor?'[58] Like Mandela, it is purely in the eyes of those in power, those that want to get rid of him, that Taylor is labelled a terrorist: 'We've seen this throughout history. When leaders are sought for one reason or another, they destroy you. [. . .] Mandela was supposed to be a total—you know, he was a criminal and he—in fact, he was a terrorist, spent 27 years in jail.'[59]

Muammar Gaddafi is portrayed as another misunderstood hero, wrongfully depicted as a terrorist by the West.[60] '[S]omeone trying to say that a pan-Africanist at

[54] For Taylor's perspective on his conflict with Mobil Oil, see Transcripts Taylor, p. 32151, 17 onwards.

[55] Transcripts Taylor, p. 31368, 4.

[56] Transcripts Taylor, p. 27706, 29.

[57] Taylor's relations with and respect for Mandela come up 25 times in Griffith's examination of his client; see coding frame.

[58] Transcripts Taylor, p. 25495, 9–10.

[59] Transcripts Taylor, p. 29970, 10–12.

[60] At the time when Taylor was in the witness box, in the autumn of 2009, Gaddafi's global reputation, while always contested, was of course considerably less problematic than it became after the Libyan uprising of 2011.

that time is a terrorist I'd say is talking pure nonsense.'[61] Taylor counters the accusation that he is a terrorist by saying that this is a label applied to all those who fight for African rule in Africa: 'Africa has to be free. Africa has to determine its own destiny. Yes, things are rough and yes, we are pushed around. But our actions cannot be—should not be—construed as terrorism.'[62]

Responses to 'Terror' in Liberia

As seen above, the notion of 'terror' as the instilment of fear on civilian populations has migrated from an international humanitarian law prohibition to a crime one can be charged with before international criminal courts. Perhaps surprisingly, the idea of terror as a crime turned out to have much resonance with a group of educated Liberians interviewed in 2011. The term 'terrorist' for a terror suspect on the other hand was more contested.

Liberian respondents in semi-structured interviews about their perceptions of the Charles Taylor trial nearly all had a strong, sometimes visceral reaction to the question: 'What does the word "terror" mean to you?' A youth leader said it meant '(e)xtreme wickedness, lack of fear of God. Terror, terrorism, it comes from Al-Qaeda, we didn't know it was also in Africa. It gives me the jitters, it makes me reflect on the past.'[63] A young NGO worker paused before saying '(i)t means a lot. To clearly define what it is, what it does, I cannot say because there is so much trauma. I can say it is the worst side of human beings.'[64] According to a student leader and strong critic both of Charles Taylor and of the USA, it means 'destruction of lives, killing indiscriminately, civilians in the community, defenceless, harmless people. It is not having the right to freely express yourself, having your civil liberties trampled upon.'[65] A women's rights activist said '(t)error is so frightening, so intimidating, without sensitivity, cold'.[66]

In answering the question whether Charles Taylor is a terrorist, respondents were clearly aware of the post-9/11 global context of such a designation, but disagreed about whether it was appropriate to apply to Charles Taylor. The NGO worker Jimmy Sankatuah held that '(b)ecause the definition of terror was not in the public language, he has not been seen as a terrorist, but from the perspective of where we are now, of course he is a terrorist'.[67] Development worker Louise Tukolon similarly believed that '(t)errorists are people who go into another country, disturb peaceful citizens, destabilize'.[68] On the other hand, women's rights activist Miatta Flameulah, cited

[61] Transcripts Taylor, p. 25495, 6–8.

[62] Transcripts Taylor, p. 25496, 25–28.

[63] Interview with Augustus Zayzay, President, Federation of Liberian Youth, 23 May 2011.

[64] Interview with Jimmy Sankatuah, Search for Common Ground/Talking Drum, 20 May 2011.

[65] Interview with Jacob Jallah, President, University of Liberia Student Union, 20 May 2011.

[66] Interview with Miatta Flameulah, former director, Cobaa's girls' centre, 16 May 2011.

[67] Interview Sankatuah.

[68] Interview with Louise Tukolon, development worker, 19 May 2011.

above, said that '(t)errorist is a different thing [from terror]. It is a phrase that we have heard since 9/11 . . . I wouldn't call Taylor a terrorist, not in the same context as Zarkawi'.[69] Similarly, student leader Jacob Jallah said '(s)o he wreaked terror, but again, the word has so many different meanings. Post 9/11 it has a different connotation. For the Americans the definition is anyone with an explosives jacket.'[70] According to human rights worker Davestus James too, '(w)hat it means is someone out of touch with the US'.[71]

The Taylor Verdict

On 18 May 2012, more than a year after the closing statements of the prosecution and defence, and almost a year after the interviews cited above had been conducted, the judges finally rendered their verdict in the Charles Taylor case. It found insufficient evidence of Taylor's participation in a joint criminal enterprise for most of the period charged, and specifically 'the evidence is insufficient for a finding that the Accused's support for the invasion of Sierra Leone was undertaken pursuant to a common purpose to terrorize the civilian population'.[72] It did however find him guilty of aiding and abetting the crimes charged, for which members of the AFRC and RUF had already been convicted, including 'acts of terrorism'.

It does not go into what happens to the intent requirement when one aids and abets acts of terrorism—whether the intent still needs to be with the suspect, or only with those who are being aided and abetted. For the final attack, first on Kono District and subsequently in Freetown and the Western Area, Taylor was also found guilty of planning the commission of crimes, including 'acts of terrorism'.

As in the AFRC case, the judges decided that the use of child soldiers, sexual enslavement or forced labour, and looting were not acts of terrorism because other purposes could easily be inferred. Murder, burning of houses, sexual violence, and physical violence—in particular mutilations and amputations—can constitute acts of terrorism.

The verdict distinguishes the 'international crime of terrorism' from the war crime of 'acts of terrorism' of which Taylor stands accused. The defence, basing itself on the Appeals Chamber of the Special Tribunal for Lebanon (STL), had argued that according to customary law terrorism required '(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or

[69] Interview Flameulah.

[70] Interview Jallah.

[71] Interview with Davestus James and Herron Gbidi, Foundation for Human Rights and Democracy, 16 May 2011.

[72] Special Court for Sierra Leone, Prosecutor vs. Charles Ghankay Taylor, *Judgement*, 18 May 2012, Para. 2388.

international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element' (ibid., Para. 408). However, the verdict states, the judges of the STL were referring to the international crime of terrorism 'in times of peace' (ibid., Para. 409). For the war crime of acts of terrorism, these elements are not required.

The verdict refers to the Appeals Chamber verdict in the *Dragomir Milosevic* case to find that 'actual infliction of death or serious bodily harm was not a required element of the crime of terror, but . . . it must be shown that the victims suffered grave consequences resulting from the acts or threats of violence' (ibid., Para. 407). Why the judges found it necessary to assert this is not clear, since there was ample evidence of death and bodily harm in the Taylor case.

Contextualising the Crime of Terror

The criminalization of 'spreading terror' can be seen within the wider context of a move in international law from attempts in the early and mid-twentieth century to humanise war with prohibitions on warring parties to an attempt to criminalize war with trials against individuals. This in turn relates to a shift in the perception and framing of the 'scourge of war' from an unfortunate but not unusual state of affairs, to seeing the waging of war, and particularly civil war, as a criminal activity actively pursued by a handful of masterminds. The Yugoslavia Tribunal pioneered the criminalization of war in this manner.[73]

Interestingly, the indictments against Galic and Dragomir Milosevic, Karadzic, and Mladic all predate the 9/11 attacks on the USA. Hence, the recent prosecutorial preoccupation with terror as a war crime is clearly not simply a result of the war on terror declared by the Bush Administration. Instead, the interest in deliberate instilment of extreme fear on civilian populations is more likely to be connected to the way in which the two war situations in question, the disintegration wars of Yugoslavia and the Sierra Leone[74] war have been perceived both in the media and in academic accounts. As both Zarkov and Buss have noted in this volume, scholars 'began emphasizing the conflicts as constructed, elite drive, modern and intentional'.[75] More specifically, two dominant, perhaps even foundational, academic treatments of the Bosnian war and the Sierra Leone war, by Mary Kaldor (1999, esp. ch. 3.) and Paul Richards (1996), respectively, draw attention to anti-civilian violence as a prime characteristic of these wars. While there are important differences in their

[73] The context of the International Criminal Tribunal for Rwanda's mandate and activities were rather different; although there was of course also an ongoing civil war, it has been constructed as primarily a genocide rather than a war crimes situation (and the winners of the war, the RPF, have remained immune from prosecution).

[74] The war in Sierra Leone was deeply connected to previous and subsequent conflicts in Liberia and Cote d'Ivoire, but gained a notoriety far beyond the other conflicts in the region, and became the object of international criminal justice in isolation from the connected conflicts across the borders.

[75] Doris Buss, this volume, pp.

respective interpretations of the wars in question,[76] they both see the wars as contemporary in nature and connected to processes of globalisation, and they both consider anti-civilian violence as a deliberate instrument to achieve political aims, rather than as an atavistic phenomenon. Kaldor sees the violence of the Bosnian war in particular as instrumental to a project of corrupt political elites desperate to hold on to power. For her, it was not ethnic nationalism that led to anti-civilian violence, but on the contrary, spectacular violence was used to destroy traditions of tolerance and co-create exclusivist nationalist identities. Richards similarly considers the use of extreme violence against civilians as 'performance', but in particular as a functional substitute for resources or more sophisticated weaponry, which the RUF lacked.

The legal personnel of the tribunals, including prosecutors and subsequently also judges, were probably influenced by these dominant interpretations, which coincide neatly with the needs of criminal law, namely to discern rational individuals with clear motives behind violent acts. If the atrocities of the Yugoslav and Sierra Leone wars were indeed part of an intentional political project, rather than just being by-products of war, prosecutors and judges would want to find ways to see the particular wickedness of intending to instil extreme fear separately punished.

Existing international humanitarian law does not lend itself particularly well to such a pursuit, as it focuses on material and physical damage in its relation to strategic necessity in order to come to a determination whether such damage is 'collateral' or excessive. Yet the tribunal workers, prosecutors followed more cautiously by judges, found in a few underspecified provisions on 'terror' an avenue for founding a new doctrine, the contours of which we can begin to see. Spreading terror escapes easy detection in the standard humanitarian law framework first because it is intent-based, and second because the damage can extend to those not physically affected in the form of psychological harm.

Judges have dealt with the first issue by determining that intent *can* be read off from effects, provided no other 'obvious' primary purpose, military or otherwise, presents itself. Hence, the use of child soldiers, forced labour, or 'bush wives' are mostly ruled out in Sierra Leone because the judges could easily imagine other purposes. On the other hand, the courts require their defendants to be rational actors, not interested like Hollywood serial killers in scaring people for the sake of it; so the primary purpose of terror must also have an ultimate purpose beyond it: taking over Sierra Leone and expulsion of Bosnian Muslims, respectively. Hence, the verdicts separate intent from infliction and primary purposes from secondary purposes, as well as immediate purposes from ultimate purposes, yet in terms of evidence, they revert to using physical acts to infer purpose and intent. In the case of Charles Taylor, to further complicate the interpretation of intents and purposes, the judges held that he was for the most part only 'aiding and abetting' the intent to instil fear.

The hermeneutic risks and contradictions involved in these determinations are obvious. Yet remarkably, even dissenting judges who believe the verdicts in question to be straying from legal interpretation into law creation hold that a crime of terror

[76] Richards relates the war in Sierra Leone in part to traditional forms of managing the rainforest; Kaldor relates the war in Bosnia to the political and economic context of a 'post-totalitarian' society.

should be codified into international law, because psychological traumatization ought to be criminalized separately from physical acts that cause it. Moreover, the idea of 'terror' as a crime of instilling extreme fear in civilians turned out to be not exclusively a construct of the legal imagination, but also internalized by elite figures who had lived through a period of 'terror' caused by civil war in Liberia, even whilst some rejected 'terrorism' in this context as politicized and connected to the USA.

At the same time, the two cases discussed show that the charge of terror gives high-profile defendants fertile ground to undermine the legitimacy of their trials, in particular pointing out how political and politicized the crime of terror is. The two defendants discussed here did so in very different ways, both highly plausible in particular to their home-base audiences. Taylor employed the classic 'one man's terrorist is another man's freedom fighter' argument, appealing to anti-imperialist sentiments, whereas Karadzic plays into a post-9/11 Islamophobic narrative, persuasive not only to a Serbian audience but also to western publics beyond, that Muslims in general, and Muslims in Europe in particular, are natural terrorists.

Conclusion

As suggested above, it is inaccurate to dismiss the recent international criminal convictions for terror, and similar charges in ongoing cases, as simply a side effect of the post-9/11 obsession with terrorist attacks. Instead, the increasing criminalization of 'terror' can be seen in relation to changing understandings of war, and measures to prevent or civilize war, amongst policymakers.

The initial intent of international humanitarian law was to civilize warring parties, whilst at the same time considering both the occurrence of war and even the idea that 'terror comes with war'[77] as relatively unavoidable. International criminal law, as a field that has rapidly expanded since the 1990s, on the other hand, sees war as an active choice of a handful of 'criminal minds', which can be combated in part by trying and incarcerating such individuals.[78] Even if wars cannot entirely be eradicated, the civilizing mission of international humanitarian law is taken a step further by criminalizing the 'cruel intent' of the perpetrators of war. In theory, this could even work in pre-emptive ways: a suspect could be tried exclusively for a 'crime of terror' in the form of intent evidenced by threats.

All cases involving terror to date have been very far from such a pre-emptive scenario. The actual effect of the recent shift of emphasis towards intent has been exclusively discursive: In every one of the recent and ongoing cases, the intent to terrorize was coupled with actual terrorization and indeed read off from the actual terrorization. A careful reading of the sentencing verdicts shows that the sentences

[77] As noted by the French delegate at the Additional Protocol negotiations, quoted above.

[78] The belated criminalization of 'aggression' in Kampala in 2010, after the Rome Conference had initially been unable to find agreement on the definition of this crime, constitutes further evidence of such a crime. See de Hoon (2012) for a critical treatment.

have not been significantly lengthier than they would have been without the crime of terror: it just becomes one of many concurrent rather than cumulative sentences. Nonetheless, the verdicts of both the ICTY and SCSL have repeatedly insisted that in principle, intent is separate from actual infliction of terror and can exist without actual infliction.

The terror convictions of these two ad hoc tribunals have received little if any attention either from academics or from civil society. It has attracted neither critics nor advocates. The ad hoc tribunals are wrapping up their work. As noted above, the permanent International Criminal Court does not contain any form of 'crime of terror' either in its 1998 Statute or in its much more detailed Elements of Crimes document. There has been no attempt to include such a crime in the 2010 review, nor have the suspects to date been charged with crimes of terror.

It is conceivable that an ICC prosecutor would take up the crime of terror as a further interpretation of a crime that has been spelled out in the Elements of Crimes, and that judges would go along with this argument, referencing the ICTY and SCSL jurisprudence. The war crime of wilfully causing great suffering (Art. 8 (2) (a) (iii) of the Elements), in conjunction perhaps with attacking civilians or another 'results-based' crime, could lend itself to such interpretation. Or it could be that such a charge in the indictment would fail, or not even be attempted, but ICC staff or their civil society supporters would feel the need for a terror provision to do justice to the terror felt by civilians in a specific case, and push for its inclusion, along the lines outlined by the ad hoc tribunal verdicts, in the next ICC review round in 2017.

Equally, the legal profession may recover some of its caution in inferring intent from effect, and converting psychological scars of generalized victims of collective violence into penal consequences for individualized perpetrators. Time will tell whether the conviction of a handful of people in the early twenty-first century for intending to instil extreme fear in civilians during war has been a blip, or whether it is a harbinger of an international criminal law system that aspires to understand and prosecute the intentions of those it designates as war criminals.

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Chapter 4
The Shifting Status of *Grand Narratives* in War Crimes Trials and International Law: History and Politics in the Courtroom

Predrag Dojčinović

> *As well as politics in general, particular forms of politics are on trial. Most obviously, the trial is an investigation of, and accusation directed against, the political project of the accused.* (Gerry Simpson, *Law, War and Crime* (Polity 2007), 13)

> *History and context are part and parcel of the process of legal reckoning in cases involving war crimes, crimes against humanity, and genocide.* (Richard A. Wilson, *Writing History in International Criminal Trials* (Cambridge 2011), 22)

Stories and plots, theories and paradigms, when elevated above the ordinary perception of social life, have all been described by the social sciences as *grand narratives* or *meta-narratives*. All social realities, to a large extent, reside in the blueprints engineered within the shadowy meta-narrative avenues of history and politics. Some of the derivative variants of the original concept of these narratives, typical for nationalism, patriotism or various forms of tribalism or other related 'isms', such as pan-Germanism or pan-Slavism, Nazism or Bolshevism, have historically manifested themselves through the so-called pan-movements.

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P. Dojčinović (✉)
Office of the Prosecutor, International Criminal Tribunal
for the former Yugoslavia, The Hague, The Netherlands
e-mail: dojcinovic@un.org

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In the context of war crimes trials and international law, such major movements have also resurfaced under the names of 'Greater Germany' and, somewhat smaller in magnitude, but comparable in nature, 'Greater Serbia' and 'Greater Croatia', the latter two as the most dominant grand narratives from the series of armed conflicts in the former Yugoslavia. The 'grandness' of these grand narratives, or meta-narratives, can be scaled down and reduced to their implications and applications as reflected and interpreted in the records and jurisprudence emerging from the war crimes trials and international law. As part of the historical, political, social, economic, demographic and cultural aspects of the international criminal trials, because of their implicit complexity, both culture-determined and even 'coded', the importance of the evidentiary and forensic impact of grand narratives on the proceedings and jurisprudence has to a large extent been underestimated. In all major international war crimes trials, however, grand narratives constitute part of the conceptual and evidentiary foundation of the trials. From the time when they made their major historical appearance at the International Military Tribunal (IMT) in 1945–46, grand narratives have been discretely blurring the separation line between the concepts of *legal* and *extralegal* as applied in the international legal arena. While they were initially relevant as a mere contextual necessity, the post-IMT grand narratives may have gradually, and particularly before the International Criminal Tribunal for the former Yugoslavia (ICTY), acquired the status of clear-cut forensic evidence. In technical legal terms, the relevance and probative value of this evidence has been successfully tested within the backdrop of the relative reliability of their sources: Hitler's, Milošević's and Tuđman's propaganda machineries. Some of the consequences of these grand narratives have subsequently become manifest as mass atrocities committed in the names of these grand narratives.

Paradoxically enough, the primary value and the potential hazard of grand narratives reside in their unrestricted public accessibility. This evidence can be obtained from the speakers' corner, radio, television, newspaper stands, bookstores, public archives and libraries, the Internet or through license-based commercial Internet applications, and any number of available search engines. The oral transmission of information or the traditional mouth-to-mouth mode of communication, whether the information is true or false, can also be a generally accepted manner of bringing and disseminating grand narratives within a community. This is how myths, legends or fables, born out of the traditional storytelling, continue to live as grand narratives in the collective memory of tribal, ethnic or national communities. This particular cognitive trait of grand narratives has too often become a tragic demonstration of how the distant past can, in its imagined or fantasized forms, be transformed into a bizarre live media broadcast and the news of the day. Grand narratives can indeed also become the very quintessence of propaganda.

The Pan-Movement of 'Greater Germany' and the Common Plan or Conspiracy

The patterns and traces grand narratives leave in the records of international justice are more than evident. Perhaps, the grandest narrative of the IMT, or the Nuremberg trials, was the idea and project of a 'Greater Germany'. The IMT records contain

numerous references to this concept. One of the key documents and trial exhibits introduced by the prosecution in this regard was 'The 25 Point Program of the National Socialist German Workers' Party (NSDAP)', the political program of the Nazi party made public on February 24, 1920 in Munich. Article 1 of the program did not hesitate to address the key objective of the party: 'We demand the union of all Germans to form a Greater Germany on the basis of the right of self-determination enjoyed by nations.' Article 3 developed the same idea further: 'We demand land and territory (colonies) to the sustenance of our people and for settling our excess population.' And Article 4 stressed the racial element of the program by straightforwardly stating that 'no Jew therefore may be a member of the nation' (Stackelberg and Winkle 2002).

In his opening statement, the chief prosecutor, Robert H. Jackson, did not fail to utilize the relevance of the Nazi party political program. Jackson referred to the articles from the NSDAP program and suggested that, as it existed, this program could have been realized only through the means of aggressive warfare. Jackson's references to this document also introduced a novel approach to the evidence dealing with the aspect of temporality, its relevance and its probative value. In other words, Jackson began his line of argumentation at least 20 years prior to the outbreak of the Second World War and the crimes charged in the indictment.

A perceptive legal analyst from that period would have noted that on the first page of the First Volume of *Mein Kampf* (1925), Hitler dreamed about the 'reunion' of the two 'German states', Austria and 'the great German mother country', as the 'accomplishment of a lifetime'. Hitler made his point by concluding that 'The people will only earn the right to acquire foreign soil when the Reich has expanded to include every German. The plow will become the sword, and the wheat which becomes the bread of posterity will be watered by the tears of war' (Hitler 1925). Hitler could hardly have sent a more direct, albeit pathetic, call for a war of aggression. The *intent*, a key concept in law, captured by this line of thought was crystal clear.[1]

[1] In his seminal study *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), Lawrence Douglas makes a clear note of 'the clash between intentionalists and functionalists (who claim that the "Final Solution was not a premeditated goal toward which Hitler and the Nazis consciously strived" but was "the unplanned product of an evolutionary process")'. Referring to the specific claims by the 'intentionalists', Douglas writes: 'Such extreme intentionalism is not necessarily to be dismissed. (By "intentionalism", I mean the idea that the final solution can be explained "in terms of Hitler's intentions derived from a coherent and consistent ideology and implemented through an all powerful totalitarian dictatorship".)' In my view, as an inseparable building block of the element of *mens rea* (guilty mind or criminal intent), in a hypothetical international criminal trial of Adolf Hitler, the sub-element of *intent*, or, more accurately, *special intent* (dolus specialis), would be treated by criminal law as one of the key components of the case. The evidence of Hitler's intent, based on the definition of genocide, regarding 'the deliberate and systematic destruction, in whole or in part, of an ethnic, racial, religious, or national group', that is the Jewish population, is well documented in his writings, speeches and meetings with some of his high-ranked Nazi associates, including those responsible for the implementation of the 'Final Solution'. Looking at the most recent ICTR and ICTY jurisprudence, the evidence of Hitler's *mens rea* would in all likelihood be more than sufficient to prove the crucial mental element of genocidal intent.

In the footsteps of the chief prosecutor, the same line of reasoning with regard to the dimension of temporality of the crimes was adopted by the IMT judges as well. Dealing with the aspects of planning and preparation for the war, the IMT's section of the Judgment entitled 'The Law as to the Common Plan or Conspiracy' contains the following passage:

> The 'common plan or conspiracy' charged in the Indictment covers twenty-five years, from the formation of the Nazi party in 1919 to the end of the war in 1945. The party is spoken of as 'the instrument of cohesion among the defendants' for carrying out the purposes of the conspiracy the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and 'lebensraum' in Europe, by the use, if necessary, of armed forces, of aggressive war.[2]

Notably, the concept of 'common plan or conspiracy' was introduced as a new legal mechanism.[3] The concept itself was designed and formulated by the Anglo-American legal team, initially in opposition to the Soviet and French approach, which utilized other, better known and more well-defined charges in international law. However, the Anglo-American part of the prosecution team thought that the scope of the collective criminality of Nazi war criminals could not have been captured exclusively within the framework of the crimes against peace, war crimes and crimes against humanity. One can be led to believe that the prosecution, in fact, needed a more effective tool to deal with the temporal aspects of the commission of crimes, which commenced long before the actual perpetration of the mass atrocities in the course of the Second World War. Already, the prosecution team had an excellent intuition as to the importance the grand narratives must have played in the preparation and the planning of these crimes.

With hindsight, of course, it is unambiguously clear, as it must have been graspable at that time as well, that Hitler's plan and the Nazi party program could not have resulted in a peaceful expansion of Germany and subsequent creation of a 'Greater Germany'. Moreover, and perhaps most importantly, this grand narrative not only provided the motive for the crime but also provided the purpose and, considering the geopolitical outline of the concept as explained by Hitler, at least part of the plan. The ideological and geopolitical plan was thus created, even when a compatible military plan had yet to be designed. In addition, it also provided a set of collective beliefs and desires built into the element of *mens rea* (guilty mind or criminal intent)[4] in the form of a shared intent within a common plan. This line of reasoning may offer at least part of an explanation of why the concepts of 'common plan or conspiracy' flawlessly fall within the context of a 'Greater German' grand narrative.

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[2] Online. Available HTTP: <http://avalon.law.yale.edu/imt/judlawco.asp>.

[3] It should be noted that 'planning' and 'conspiracy' represent two essentially different concepts in criminal law. See, for example, the definitions offered by Antonio Cassese (2003).

[4] For the most comprehensive source on the meaning and role of *mens rea* in international criminal law (ICL), see Mohamed Elewa Badar (2013).

The Sub-Narratives: Lebensraum and Anschluss

Revolving around this powerful force of narrative gravity were the two conceptually related sub-narratives in history known as the concept of *Lebensraum* (living space) and the project, or event, called *Anschluss* (linking up).[5] Together, they represented the two key components of Hitler's pan-Germanic plan and project to re-create a 'Greater Germany'.

In *Mein Kampf*, Hitler dedicated many pages to the idea of *Lebensraum*. The acquisition of additional land for Germany became his deepest obsession. The *Führer* equated the borders of Germany, established in 1919 by the Treaty of Versailles, to a crime and perceived them as 'momentary frontiers in a political struggle that was by no means concluded'.[6] He believed that another 'sample year' from German history should be picked out for the restoration of its Teutonic power and historical frontiers. As noted by journalist and historian William Shirer, this "'sample year" would go back some six centuries, to when the Germans were driving the Slavs back in the East' (Shirer 1998). References were regularly made to the Teutonic Knights, thus placing the narrative of German expansion within the framework of ancient Germanic mythology and legends. In this way, the imagined past would become a tangible reality.

The idea of *Lebensraum* boiled down to the expansion of the German frontiers at the expense of the Slavic people in Europe with Russia as the main target. Hitler repeatedly and publicly discoursed on the concepts of self-preservation and the need for additional 'living space'. The 'historical injustice' had to be undone and the glorious past had to be revived, reinstated and continued. The blueprint for the bloodiest and most atrocious imperialist project in the twentieth century was being conceived. Moreover, in his seminal and authoritative biography of Hitler, the British historian Ian Kershaw dedicates a significant number of passages to the explanation of the fact that Hitler 'established the link between the destruction of the Jews and a war against Russia to acquire *Lebensraum*'. Kershaw makes the point clear as follows:

> War against Russia would, through its annihilation of 'Jewish Bolshevism,' at the same time deliver Germany its salvation by providing 'living space.' Crude, simplistic, barbaric: but this invocation of the most brutal tenets of late nineteenth-century imperialism, racism, and antisemitism, transposed into eastern Europe in the twentieth century, was a heady brew for those ready to consume it. (Kershaw 1998)

Along with a rapid development of the German war industry of the late 1930s, and with chancellor Hitler as a bestselling author since mid-1920s, as some of the pertinent socioeconomic factors of the pre-World War II period in Germany, these themes translated themselves into radio broadcasts and printed press, and any average

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[5] Other connotations of the German word *Anschluss* include 'unification' and 'annexation'.

[6] As quoted from *Mein Kampf* at the IMT proceedings, Nuremberg Trial Proceedings Volume 19, 188th Day, Monday, 29 July 1946, Morning Session. Online. Available HTTP: <http://avalon.law.yale.edu/imt/07-29-46.asp>.

newspaper reader or radio listener could have concluded at the time that an *aggressive war* was in the making. The grand narrative of *Lebensraum* seemed to be a truly powerful predictor.

At the Nuremberg trials, yet again, the prosecutor Robert Jackson could not neglect the coherence of these facts as the dominant narrative of the Nazi plan for an aggressive war. Jackson relied on the relevance of *Lebensraum* in both his opening and his closing statements before the IMT. In his closing address, referring to the specific crimes and charges, Jackson stated that 'these crimes were only the inevitable and incidental results of the plan to commit the aggression for Lebensraum purposes'.[7] After quoting a speech of Hitler's to his commanders and noting their bloodthirsty response, Jackson concluded the following: 'This was Lebensraum on its seamy side. Could men of their practical intelligence expect to get neighboring lands free from the claims of their tenants without committing crimes against humanity?' In other words, without the *purpose* and the *plan* provided by the idea of *Lebensraum*, the crimes committed by the Nazi war criminals would most probably not have taken place on such a massive scale. And indeed, once more, the IMT section of the Judgment dealing with the *common plan or conspiracy* relied heavily on the same grand narrative.[8]

At the same time, the event or process known as *Anschluss*, the second key subnarrative present in the IMT trial records, was inextricably linked to the development and realization of *Lebensraum*. The idea of reunification of Austria with Germany was Hitler's teenage dream.[9] Virtually, all of his influential writings and speeches were based on this grand narrative. The two German-speaking peoples had to be married within the same state once again: a truly supreme, albeit only initial and anticipatory, grand narrative with a strong resonance across the German-speaking world in the Europe of the 1930s. Moreover, this project presented an attractive *Bauplan* (blueprint) and opportunity for all pan-Germanic Nazi supporters in both Austria and Germany. For Hitler, however, the reunification with Austria, to be followed by other German-speaking regions in Europe, such as the Sudetenland in Czechoslovakia, was no more than the first step towards the acquisition of *Lebensraum* and, ultimately, the dreamed creation of a Germany territorially much greater than a 'Greater Germany' of Germany and Austria together. The *Blut und Boden* (Blood and Soil) policy was to be implemented at any cost. After much pressure and

[7] Online. Available HTTP: <http://heinonline.org/HOL/Page?handle=hein.journals/temple20&div=17&g_sent=1&collection=journals>.

[8] Online. Available HTTP: <http://avalon.law.yale.edu/imt/judlawco.asp>.

[9] The pan-Germanic idea was born within a student movement in the late nineteenth-century Germany. It was Georg von Schönerer, an Austrian wealthy man and a politician, who advocated the return to the Germanic Teutonic roots. Schönerer also discovered the pragmatic potentials behind this rhetoric: an extreme form of anti-Semitism. Hitler acknowledged that he was deeply inspired by Georg von Schönerer. (See also H. Arendt 1976) However, Hitler's true 'intellectual' patron and the person who exercised the most profound influence on Hitler's central ideas was Dietrich Eckart, a poet and a critic. Eckart was the publisher of *Auf gut Deutsch* (In Plain German) and co-owner of HoheneichenVerlag, both anti-Semitic and hate-mongering publishing enterprises. Hitler remained publicly indebted to Eckart for the rest of his life. (See Timothy W. Ryback 2008).

threats of a military intervention, in a propagandistically manipulated plebiscite on April 10, 1938 (which made Goebbels call it 'a badge of honor for all election propagandists'),[10] virtually 100 % of both populations voted in favour of the *Anschluss*. Even though this event had in reality already meant the creation of a 'Greater Germany', the newly emerging state was not even close to achieving the growing territorial ambitions of Hitler and the Nazis. As part of the common plan or conspiracy, new items were being hastily added to the *carte du jour* of the Nazi territorial cuisine.

The prosecutor Jackson relied on this event as one of the turning points in the preparations for the forthcoming war of aggression. Referring to the specific exhibits introduced during the trial, and writing about the conspiratorial and secret preparations for the war, Jackson, in his closing address, said:

> Lying has always been a highly approved Nazi technique. Hitler, in Mein Kampf, advocated mendacity as a policy. Von Ribbentrop admits the use of the 'diplomatic lie.' Keitel advised that the facts of rearmament be kept secret so that they could be denied at Geneva (EC-177). Raeder deceived about rebuilding the German Navy in violation of Versailles. Goering urged Ribbentrop to tell a 'legal lie' to the British Foreign Office about the Anschluss, and in so doing only marshaled him the way he was going (2947-PS). Goering gave his word of honor to the Czechs and proceeded to break it (TC-27).[11]

Yet again, the IMT section of the Judgment referred to the common plan or conspiracy, this time by quoting the official interpreter of the German Foreign Office, a prosecution insider witness, Paul Schmidt, as follows:

> The general objectives of the Nazi leadership were apparent from the start, namely the domination of the European Continent to be achieved first by the incorporation of all German speaking groups in the Reich, and secondly, by territorial expansion under the slogan 'Lebensraum.'[12]

In this particular case, the Tribunal demonstrated the full grasp of the implications and emerging illegality of the ideological and military blending of the two subnarratives: the *Anschluss* and the *Lebensraum*, both within the grand narrative of the creation of a 'Greater Germany'.

The Pan-Movements of the Former Yugoslavia and the doctrine of Joint Criminal Enterprise

The geopolitical, ideological and military equivalents of a 'Greater Germany' within the framework of the armed conflict in the former Yugoslavia are the concepts of 'Greater Serbia' and 'Greater Croatia'.

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[10] Kershaw, *Hitler*, 414.

[11] Online. Available HTTP: <http://avalon.law.yale.edu/imt/07-26-46.asp>.

[12] Online. Available HTTP: <http://avalon.law.yale.edu/imt/judlawco.asp>.

The Grand Narrative of 'Greater Serbia'

The ICTY trial records and jurisprudence unambiguously indicate that most of the so-called Serb leadership cases had this component incorporated into their indictments, pre-trial and final briefs, opening and closing arguments and judgments. Although the phrasing varied from case to case—all Serbs 'in a single state', as Slobodan Milošević put it,[13] 'single Serbia', 'unified Serbia', 'Serbian lands', as phrased on various occasions by Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Ratko Mladić, Milan Babić, Milan Martić and many others, 'Greater Serbia', or 'Karlobag-Ogulin-Karlovac-Virovitica line', an ideologically projected boundary cutting through the western parts of Croatia, as defined by Vojislav Šešelj—they all referred to the same concept. Some of the 'Greater Serbian' trial records and jurisprudence include the cases of the aforementioned individuals. Most of these cases are conceptually defined by the grand narrative revived by the propaganda machinery in Serbia in the 1980s as a political and military idea to create a state entity called 'Greater Serbia'. As Richard Wilson correctly points out in his analysis of the specific prosecutorial strategies dealing with Kosovo, Croatia and Bosnia and Herzegovina (BiH) as the three main components in the case against Slobodan Milošević: 'The plan to create a Greater Serbia was the organizing principle integrating the three elements of the case.'[14]

The idea of 'Greater Serbia' has been present in Serbian social and political history in various forms throughout the past several centuries. Some scholars believe that the seeds of the 'Greater Serbian' idea can be traced back to the (primarily) religiously motivated efforts of the Serbian twelfth-century Nemanjić dynasty to establish the first independent Serbian state. However, the majority of scholars today would undoubtedly agree that the most direct and most aggressive approach to this idea was finally articulated by the Serbian politically active intelligentsia in the first half of the nineteenth century. In the twentieth century, the pro-Greater Serbian ideology has clearly been marked by the writings, public appearances as well as by the political and (para)military activities of Dr. Vojislav Šešelj, a law professor, the president of the Serbian Chetnik Movement (SČP), a paramilitary organization, and the Serbian Radical Party (SRS), founded in 1990 and 1991, respectively. In his books, as well as in his countless public and media appearances, Vojislav Šešelj, the founder and director of the newspaper and the publishing enterprise called *Velika*

[13] As the ultimate political authority among the Serbs in the 1990s, the Serbian President Slobodan Milošević may have set the pro-Greater Serbian pace openly when he stated: '(. . .) The Serbian people want to live in a single State. For this reason, any division into several States which would separate the various parts of the Serbian people by placing them in different sovereign States cannot, in our opinion, be accepted, that is—and I will be more specific still—cannot even be considered.' (*Dana*s, 15 January 1991). As quoted in Exhibit No. 446, expert report on propaganda by Renaud De La Brosse, 19 May 2003 (open session), The Prosecutor of the Tribunal Against Slobodan Milošević, Case No. IT-02-54. See also the testimony of Robert Donia, 18 November 2008 (open session), The Prosecutor versus Momčilo Perišić, Case No. IT-04-81-T.

[14] Wilson, *Writing History in International Criminal Trials*, 102.

Srbija (Greater Serbia), indicates that his idea of a 'Greater Serbia' was developed on the foundations of existing ideologies.[15]

Of all the ICTY cases, Šešelj remains the most aggressive advocate of a 'Greater Serbia'. The political programs of his party, the SRS, and the *Platform* and *Declaration* of his paramilitary movement, SČP, incorporated into the SRS, bear most resemblance to Hitler's NSDAP. *The Political Platform* of the SČP defined its 'fundamental political objectives' in July 1990 as:

> The renewal of a free, independent and democratic Serbian state in the Balkans, which shall comprise all Serbdom and all Serbian lands. This means that, in addition to the present imposed Serbian federal units, it shall encompass within its borders Serbian Macedonia, Serbian Montenegro, Serbian Bosnia, Serbian Herzegovina, Serbian Dubrovnik, Serbian Dalmatia, Serbian Lika, Serbian Kordun, Serbian Banija, Serbian Slavonia, and Serbian Baranja.[16]

The programs and statutes of the SČP and SRS have gone through several stages and—having been changed and adapted for various political purposes over the period of almost 15 years—they have evolved from the documents defining the objectives and activities of the SČP in 1990, to the lengthy 'Serbian Radical Party—A 100 Item Program' in 2003. All official SČP and SRS documents approach the concept of 'Greater Serbia' in a comparatively similar manner. These documents promote three fundamental and, essentially, identical objectives: (1) the 'restoration of a free, independent and democratic Serbian State in the Balkans which will include all Serbian people and all Serbian territories'; (2) and/or 'independent statehood and liberation and unification of the other parts of the Serbian nation' within the same state; and (3) as it is plainly stated that 'It is a wish of the Serbian Radicals that this unified Serbian state be named Greater Serbia.'[17]

In his speech at the founding assembly of the SRS, on February 23, 1991, Šešelj said: 'We are prepared, though, for a bloodbath should it be necessary, but only for the sake of the Serbian lands, territories and people.'[18] In his countless media appearances and party rallies, Šešelj promised 'bloodshed', a 'bloody civil war' and 'rivers of blood' flowing in BiH if Croats and Bosnian Muslims rejected Serb

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[15] The following are some of the main documents, organizations and individuals Šešelj has repeatedly referred to in the context of his pro-Greater Serbian propaganda: *Načertanije* (Draft) by Ilija Garašanin from 1844; Nikola Pašić, founder and leader of the first Serbian Radical Party (1881); *London Treaty of 1915*; *Velika Srbija* (Greater Serbia) by Ernest Denis from 1915; *Velika Srbija* (Greater Serbia) by Vladimir Ćorović from 1924; *The Expulsion of the Albanians* by Dr. Vasa Čubrilović from 1937; *Serbian Cultural Club*, an organization founded by the Serbian emigrants and intellectuals in 1939; *The Homogenous Serbia* by Dr. Stevan Moljević from 1941; *The Ravna Gora Chetnik Movement* of Draža Mihailović (1893–1946), Chetnik WW II General.

[16] *The Political Program of the Serbian Chetnik Movement* (Politički program Srpskog četničkog pokreta), published in *Velika Srbija* (Greater Serbia), July 1990, Exhibit No. P00027, The Prosecutor of the Tribunal Against Vojislav Šešelj, Case No. IT-03–67.

[17] As read and retrieved by the author of this chapter from the SRS website on December 9, 2003. Online. Available HTTP: <http://www.srs.org.yu>.

[18] Minutes from the Founding assembly of the Serbian Radical Party in Kragujevac, Serbia, published in Vojislav Šešelj's book *The Serbian Radical Party* (Srpska radikalna stranka, Belgrade, 1995).

territorial ultimatums. The *territorial aspirations* and *blood* were inseparably linked in Šešelj's Greater Serbian discourse. The pattern of his utterances and subsequent events was truly Hitleresque. The Serbian version of *Blut und Boden* ideology was thus introduced as a powerful and dominant public narrative.

Grand Narrative in Evidence

As previously mentioned, looking at the trial records from the IMT and beyond, the position of grand narratives in international criminal trials has been steadily shifting from the contextual evidence as a mere background decoration in the jurisprudence to the body of forensic evidence introduced in virtually all major cases. Debatably, the grand narratives have become a serious shareholder in an enterprise with other legal conceptual relatives such as 'incitement' and 'instigation', or 'intent' and 'intention', the concepts placed within the confines of well-defined and relatively safe niches, whether as modes of liability or classes of *mens rea*.

Intentional Causation

A telling, albeit very basic, introductory example of the intrusion of grand narratives into the culture populated by the 'smoking gun' type of forensic evidence can be explained by an analogy dealing with causation as offered by the philosopher John Searle. As part of his explanation of the functioning of mental causation, Searle developed the concept of intentional causation (Seale 1999). This is a form of intentionality[19] which provides an explanation for our intentions and our beliefs, some of the key components of the concept of *mens rea*, including the somewhat controversial concept of collective criminality in international criminal law. The analogy Searle gives to support his theory can be an important test for the key grand narrative in both Nazi Germany and the former Yugoslav conflict. Searle writes: 'Suppose we explain Hitler's invasion of Russia by saying he wanted *Lebensraum* in the East.'[20] And, as we now know, the equivalent of this grand narrative is the grand narrative defined as the political and military idea to create outside Serbia proper a state entity called 'Greater Serbia'. In the exact footsteps of Searle's model, the evidence of the

[19] Searle: 'Intentionality is that property of many mental states and events by which they are directed at or about or of objects and states of affairs in the world. If, for example, I have a belief, it must be a belief that such and such is the case; if I have a fear, it must be a fear of something or that something will occur; if I have a desire, it must be a desire to do something or that something should happen or be the case; if I have an intention, it must be intention to do something.' John R. Searle (1983).

[20] Searle, *Mind, Language and Society*, 106.

presence of grand narratives can lead legal analysts to the inference that, for instance, as someone who shared a part of the collective intentionality:[21]

a. The accused *wanted* 'living space' for the Serbs in the territories of Croatia and BiH.
b. He *believed* he could get these territories by occupying parts of Croatia and BiH.
c. **a** and **b** together, by 'intentional causation', provide at least part of the causal explanation of the *decision,* hence the intention, to occupy parts of Croatia and BiH.
d. The *intention* to invade them is at least part of the cause of the occupation of these territories, by intentional causation.

Ultimately, the Searlian model brings the mental and the physical elements of the commission of crimes closer together and, as such, it can become a useful analytical tool in the criminal analysis of grand narratives.

Speech Acts: Mental Fingerprinting

This is, however, only a bird's-eye view of the evidentiary conceptual landscape created by the pan-movements and grand narratives. By contrast, if we zoom in and take a closer look at the smallest particles in this process, the *speech acts*, or individual words and phrases, we may discover that some of them play a crucial role within the framework of intentional causation. For instance, Vojislav Šešelj's phrase 'Karlobag-Ogulin-Karlovac-Virovitica line', or simply 'Karlobag-Karlovac-Virovitica line', is different from all other pseudonyms assigned to the grand narrative of 'Greater Serbia'. Research and analysis offer strong indications that this phrase was originally designed and introduced into the public discourse of the former Yugoslavia by Vojislav Šešelj, and, as such, it can be considered as his unique *mental fingerprint*. Other concepts used countless times by Šešelj only, as part of a political discourse in Serbia in particular, include the word 'amputation', always linked to the 'amputation of Croatia', or the concept of 'retorsion',[22] implying reprisal, retaliation or, more precisely, retribution, as known in international law. Every time any of these or similar phrases are found in the statements or documents produced by other individuals, such as Serbian politicians or volunteers who joined various (para)military formations, and particularly those who may have been the principle perpetrators of crimes, it can be concluded that a specific mind has been cognitively 'fingerprinted' by the originator. The most interesting question is whether such 'mental fingerprints' may have also caused further physical actions, particularly those defined as criminal in international law, by the 'fingerprinted' mind.[23] As fact-finders, analysts have to identify and place

[21] Searle: 'Collective intentionality exists both in the form of cooperative behavior and in consciously shared attitudes such as shared desires, beliefs, and intentions.' John Searle (1995).

[22] The original word used by Vojislav Šešelj in Serbo-Croatian is 'retorzija'.

[23] I am greatly indebted to Dr. Jordan Kiper of the University of Connecticut (UConn) for his most recent discovery of a similar line of reasoning by the IMT prosecution team in Nuremberg. As part

a 'mental fingerprint' into the *evidentiary feedback loop*[24] and close the trajectory of such a piece of evidence.

One of the most indicative examples in this regard was evidence offered in the form of a video footage at the trial of Vojislav Šešelj. This particular exhibit, an excerpt from a documentary film 'A Hundred Days in Vukovar', captured a scene with a group of Serb military and paramilitary units celebrating the takeover of the Croatian town of Vukovar in November 1991. The motto on their black flag is 'Freedom or Death', a traditional Chetnik slogan. The reporter, Aernout Van Lynden, asks one of the combatants, 'What steps do you, as the Serbs, need to take before the war is over?' In the midst of the ruins of Vukovar, the interviewee answers in fluent English: 'The war will be over when we have our limits, Karlobag-Karlovac-Ogulin-Virovitica. All places where Serbian people live must be free, you know. We must clean up with the Croatians.'[25] In other words, as a unique word or phrase, a 'mental fingerprint', such as the phrase 'Karlobag-Ogulin-Karlovac-Virovitica line', should fit into the evidentiary feedback loop as one of the links between the instigator and

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of his research into the IMT trial records relating to the Nazi propaganda archived at the UConn's Thomas J. Dodd Research Center <http://doddcenter.uconn.edu/>, Dr. Kiper has identified two key references in the case against Julius Streicher. First, in relation to Count Four of the Indictment (crimes against humanity), the prosecutor writes as follows: '[It is then claimed that three speeches given by Streicher "gave birth to the watchword which, 14 years later, was to become the official policy of the Nazi Government—'the Annihilation of the Jews"'. These speeches were: (1) in Nurnberg 23 Nov. 1932, (2) in Bavarian Diet 20 Nov 1924 and (3) in Nurnberg 3 April 1925].' (Subseries D: Defendant Files: Streicher, Julius. Trial brief concerning Streicher, 1945–1946, 315:8050.) Second, in a memo from the Office of the US Chief of Counsel for Mr. Dodd, dated 29 May 1946, Ms. Harriet Zetterberg Margolies, a member of the prosecution team, writes: 'The theory of the case is that Streicher helped to create, through his propaganda, the psychological basis necessary for carrying through a program of persecution which culminated in the murder of six million men, women and children—a program of mass extermination which he openly advocated. The chief point in issue is the causal connection between the Streicher propaganda and the program that was carried out. (Cf. Streicher testimony, tr. pp. 8510–11.) Streicher will undoubtedly claim that no direct evidence was introduced by the Prosecution to prove that his propaganda did, in fact, influence the action of those directing and physically participating in the execution of the program, or that it promoted the acquiescence on the program by the German people as a whole. The nexus rests on the compelling inference arising from the nature of the propaganda, the closed market in ideas in which it was disseminated, and the tremendous circulation of the Stuermer. No direct evidence on the point has come to our attention, except for a single court record of the trial of an SA member for murder of a Jew in 1934. In this case the defense relied on the fact, inter alia, that the defendant had read about ritual murder in the Stuermer. It was felt, however, that it was incongruous to introduce a single instance of incitement to murder in a trial involving the murder of six million persons.' (Subseries D: Defendant Files: Streicher, Julius. Defense of Streicher, 1946, 316:8062.).

[24] *Evidentiary feedback loop*, an analytical and prosecutorial process opened by the initial identification of the relevant open source records and specific utterances, continued with the authentication of these records or utterances in the official witness statements and their subsequent verification before the court by the originators or witnesses who would have been influenced by them, and, finally, concluded with a closing brief by the prosecution indicating the value of this evidence, in Predrag Dojčinović (2011, 2012).

[25] 11 March 2008, Exhibit No. P275, witness Vilim Karlović (open session), The Prosecutor versus Vojislav Šešelj, Case No. IT-03-67-T. Online. Available HTTP: <http://www.icty.org/x/cases/seselj/trans/en/080311ED.htm>.

the instigated. These particles of evidence would in that case also have to fit into the Searliean bird's-eye view on grand narratives. A high degree of correspondence between the two evidentiary levels must exist.[26]

Another useful example emerging from the ICTY trial records along the same lines can be found in the testimony of Goran Stoparić, a former volunteer of the SČP and SRS paramilitary forces and a prominent member of the Serbian Ministry of the Interior (MUP) notorious units known as 'Red Berets' and 'Scorpions'. In the course of his court appearance in the Šešelj trial, Stoparić, inter alia, stated that Šešelj's Greater Serbian borders were 'not political but they're state borders, territorial borders'. The reasoning of the witness indicates a delicate shift in thinking from the realm of political and ideological to the realm of particular territorial issues. An assumed gap between the mental and the physical in this case ceases to exist. Consequently, the actionability of the key concepts in the utterance increases as well. After listing the territories defined by Šešelj as Serbian outside Serbia proper, Stoparić said: 'He explained this by mentioning the Karlobag-Karlovac-Ogulin-Virovitica line. I am not sure I remember it correctly, but that was the ethnic territory Dr. Šešelj believed belonged to us Serbs.'[27] When asked about his response to Šešelj's speeches advocating the creation of a Greater Serbia, Stoparić said: 'Well, it did actually awake some patriotism in me.'[28]

Regardless of its multiple names and polysemic features, 'Greater Serbia' represented a shared goal,[29] which, similar to the conceptual landscape of Greater Germany with *Lebensraum* and *Anschluss* as its key components, may have been instrumental in defining the Serbian political and military leadership as members of a joint criminal enterprise (JCE), a legal doctrine and a mode of liability initially introduced by the ICTY and also applied at the International Criminal Tribunal for Rwanda (ICTR). Thousands of exhibits—political speeches, scientific publications, press articles, public memoranda and also including demonstrative evidence such as maps, photographs, video recordings, etc.—were introduced as part of these cases to evidence and support the significance of this grand narrative for the commission of crimes. All of these exhibits reside in the public domain and would have been

[26] The question as to whether the prosecution should demonstrate that the criminal act (*actus reus*) was committed by one or more than one member of a group instigated by the accused remains unresolved in the currently available ICTY and ICTR jurisprudence. Based on the evidence introduced during the trial, the judgment in the Šešelj case might be an opportunity for the judges to resolve the issue. As Mohamed E. Badar prudently indicates, 'One might suggest that it is sufficient that the accused instigated the conduct of any of the perpetrators. A "chain of instigation" would then be punishable under Articles 7(1) and 6(1) of the Statute.' Badar, *The Concept of Mens Rea in International Criminal Law,* 332.

[27] 16 January 2008, witness Goran Stoparić (open session), The Prosecutor versus Vojislav Šešelj, Case No. IT-03-67-T.

[28] 24 January 2008, witness Goran Stoparić (open session), The Prosecutor versus Vojislav Šešelj, Case No. IT-03-67-T.

[29] For the most insightful analysis of one of the key evidentiary components of the joint criminal enterprise (JCE) introduced in virtually all major Serbian leadership cases tried before the ICTY, the collection of exhibits also known as the 'Supreme Defense Council' minutes of the Federal Republic of Yugoslavia (FRY), see Ozren Jungic (2012).

reiterated and recycled countless times by the local media both before and during the armed conflict. With historians and other social scientists providing the necessary records and interpretation, the expert evidence offered in most cases was overwhelming. The crime-base witnesses and victims[30] testified viva voce about the impact the grand narratives had on their lives. Numerous other witnesses, including combatants and principle perpetrators, confirmed and confessed that they had been inspired and prompted to join the struggle for this particular reason. It thus transpired that they had committed specific crimes precisely *because* of the content of these exhibits. In their testimonies, they often, intentionally or unintentionally, made references to the exact pro-Greater Serbian phrases they may have read or heard from the accused or the accused's associates.

Interestingly enough, the vocabulary of the ICTY accused sometimes followed the same conceptual apparatus employed by the Nazi war criminals. The forensic similarities are self-evident. Concepts such as *Lebensraum*, sometimes uttered in German, or just as 'living space', or 'annexation' and 'reunification', popped up frequently as part of the evidence introduced during the ICTY trials. Just like in the cases of Nazi war criminals, the ICTY grand narratives meant that areas outside Serbia and Croatia populated with Serbs or Croats should be used to create additional 'living space' for the expansion and must be 'linked up' to their mother countries of Serbia and Croatia. Inasmuch as Hitler's grand narrative of *Lebensraum* was directly linked to the *Endlösung* (Final Solution), the extermination of the Jewish population, the Serbian and Croatian projects were directly linked to the 'ethnic cleansing' of non-Serbs or non-Croats in Croatia and BiH. Following this line of reasoning, it can be argued that any approach to the explanation of the 'Final Solution', legal and historical, and particularly their coexistence in international criminal trials, must be done componentially. The grand narrative of 'Greater Germany' and its sub-narratives, *Lebensraum* and *Anschluss*, cannot be explained and placed within a legal framework in any other way but a *relational* or *correlational* way. Similar to building blocks, all of the meta-narrative components in both these and the ICTY trials constitute parts of single grand narrative.

Serb Leadership Cases, Key Documents: 'Six Strategic Objectives'

One of the key exhibits introduced in all ICTY Serb leadership cases is the Bosnian Serb 'Decision on Strategic Objectives of the Serbian People in Bosnia and Herzegovina'. This document was adopted on May 12, 1992, at the Bosnian Serb Assembly Session and subsequently published in the Official Gazette of the Republika Srpska,

[30] Crime-base witnesses offer evidence which mainly relates to 'the persons who had physically committed the crimes, such as soldiers, camp guards and wardens'.

the self-proclaimed independent state of the Bosnian Serbs.[31] It sets out the six strategic objectives or priorities of the Serbian people in BiH and is a preamble of a plan to ethnically cleanse parts of BiH of its non-Serb population and to *link up*, or annex, the Serb entity to the Republic of Serbia. In effect, this would create a 'Greater Serbia', a new state for all Serbs. In his speech at the Bosnian Serb Assembly Session, on May 12, 1992, while referring to the six strategic objectives, Radovan Karadžić said: 'The third strategic goal is to establish a corridor in the Drina Valley, that is, elimination of the Drina as a border between two worlds. We are on both sides of the Drina, and our strategic interest and our living space are there.'[32] The phrase 'living space'[33] and its implications are immediately recognizable.

It is interesting to note that the Trial Chamber (TC) in the Krajišnik case,[34] referring to Krajišnik's speech at the Deputies Club on February 28, 1992, highlighted the part of the evidence saying that 'the Serbs, on the verge of being swamped, could not afford to share their future, which came down to their living space, with the Muslims'.[35] The emphasis in this sentence lies in the phrase 'living space', derived by the TC from Krajišnik's speech and conduct. Thus, the key phrase, a grand narrative of the IMT and ICTY trials, was adopted and employed by the judges in the Krajišnik case as well. Its purpose was clearly to address the *mens rea* and the intent of the accused, Momčilo Krajišnik, the former president of the Bosnian Serb Assembly and one of the highest-ranking members of the JCE.

The *Grand Narrative* of 'Greater Croatia'

Prior to the break-up of the Socialist Federal Republic of Yugoslavia, and parallel to the Greater Serbian project, the Croatian political leaders reintroduced their

[31] It should be noted that the first recorded discussion about the 'Six Strategic Objectives' of the Bosnian Serb leadership can be found in the personal diaries of Ratko Mladić, dated May 7, 1992, 1600 h, that is, several days before the Bosnian Serb Assembly Session of May 12, 1992. This meeting was closed and, according to the diary, attended only by Momčilo Krajišnik, Radovan Karadžić, Božidar Vučurević and Mladić himself. On that occasion, Mladić noted down the 'strategic goals' as dictated by Krajišnik. This part of Mladić's diaries has been admitted into evidence in both Karadžić and Mladić trials. See, for example, the examination-in-chief of expert witness Robert Donia by the prosecutor Camille Bibles.

[32] Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgment, 27 September 2006, para. 994.

[33] In an interview to the leading German weekly *Der Spiegel*, as carried by the Bosnian Serb daily *Serbian Oslobođenje* (Srpsko Oslobođenje), 8 November 1994, p. 2, the commander of the Army of Republika Srpska (VRS), General Ratko Mladić, used the same phrase when he stated that he was defending the 73.8 % of 'the living space' held by the Serb forces in BiH. In the same interview, Mladić said: 'If they [the Moslems] continue the war, they will lose everything.' In unambiguous terms, Mladić defined the key objective of the Serbs as follows: 'Our aim remains the unification of all Serbian lands', Mladić said. 'Borders are drawn up with blood.' Online. Available HTTP: <http://global.factiva.com/ha/default.aspx>.

[34] Prosecutor v. Momčilo Krajišnik, Ibid., para. 994.

[35] Ibid., para. 918.

own grand narrative of a 'Greater Croatia' under its historical name of 'Croatian Banovina'. In addition to the foundations laid in the nineteenth century by the Croatian political leaders, such as Ante Starčević and Eugen Kvaternik, the Croatian Banovina was a reference to the 1939 agreement between the then Yugoslav prime minister Aleksandar Cvetković and the Croatian leader Vladko Maček to create a semi-independent region in the Kingdom of Yugoslavia corresponding to the boundaries desired by the Croatian political leaders of that period. This was one of the nine 'banovinas' created within the Kingdom of Yugoslavia as administrative units governed by their own administrations. Although the Croatian Banovina would last for only 2 years, that is, until the April 1941 invasion and occupation of Yugoslavia by the Nazi allied forces, the possibility of a 'Greater Croatia' remained a strong and nostalgic sentiment among the Croatian nationalists during and after the Second World War. Half a century later, the Croatian Banovina was mentioned in the Republic of Croatia's 1990 Constitution as a meta-reference to the agreement of 1939, as confirmed by Robert Donia, a historian and expert witness in several ICTY cases, in his testimony before the ICTY in the Prlić et al. case.[36] As part of his analysis of the decision to establish the Croatian Community of Herzeg-Bosna published in the Official Gazette of Herzeg-Bosna from September 9, 1992, Donia, in addition, concluded the following: 'The municipalities which are listed in the decision to form the Croatian Community of Herceg-Bosna, in my opinion, best correspond to the delineation of territory in the Croatian Banovina of 1939 to '41.'[37]

A decade earlier, in a publication entitled *Nationalism in Contemporary Europe*, Franjo Tuđman outlined some of his views about BiH as follows:

> The creation of a separate Bosnia and Herzegovina makes the territorial and geographic position of Croatia extremely unnatural in the economic sense and, therefore, in the broadest national-political sense, very unfavorable for life and development and in the narrower administrative sense unsuitable and disadvantageous. These factors largely explain why the 1939 agreement between Belgrade (Prince Paul and Cvetković government) and Zagreb (Maček's Croatian leadership) included the following areas of Bosnia into the Banovina of Croatia: the whole of western Herzegovina and Mostar and those Bosnian districts where the Croats have a clear majority (Bugojno, Fojnica, Travnik, Derventa, Gradačac, Brčko). (Tuđman 1981)

This particular political belief formed the nucleus of Tuđman's political and military plans ultimately implemented between 1991 and 1995. In a meeting with the leaders of the Hrvatska demokratska zajednica (HDZ) BiH,[38] his party's political branch in

[36] The Prosecutor v Prlić et al., Case No. IT-04-74, 10 and 11 May 2006, witness Robert Donia.

[37] 10 May 2006, witness Robert Donia (open session), The Prosecutor v Prlić et al., Case No. IT-04-74.

[38] The Croatian Democratic Union of BiH (Hrvatska demokratska zajednica Bosne i Hercegovine) is a Croatian Democratic Union of Croatia affiliated political party established in August 1990 in Sarajevo. The Croatian Democratic Union (Hrvatska demokratska zajednica) is a political party founded by Franjo Tuđman and a group of his associates in June 1989 in Zagreb. The HDZ won the majority of votes in the first multi-party elections in Croatia in 1990 and Tuđman became the first democratically elected president of the Socialist Republic of Croatia. After the constitutional changes in Croatia, Tuđman was elected the president of the Republic of Croatia in 1992 and 1997,

BiH, in his Zagreb residence on December 27, 1991, according to the testimony of the former HDZ leader from BiH, Stjepan Kljujić, Tuđman said that '. . . the State of Croatia cannot survive such as it is, but a Croatian state even within the borders of the banovina could, not to mention if these borders were improved on'.[39] Although this line of thinking can in various references be traced back in Tuđman's writings from the 1970s onward,[40] the *intent* to create a 'Greater Croatia', as phrased in this passage, could have hardly been expressed in a more direct fashion by the then president of Croatia, Franjo Tuđman.

One of the key documents introduced before the ICTY in this regard is an HDZ BiH document originating from the meeting dated November 12, 1991 in Grude, a town in western BiH, referring, inter alia, to 'the agreement with President Dr. Franjo Tuđman on 13 and 20 June 1991 in Zagreb'. This document openly states that 'the Croatian people in Bosnia and Herzegovina must finally institute a decisive and active policy in order to bring about our age-old dream—a common Croatian state' (Klip and Sluiter 2008). The document further recalls the entity of the Croatian Banovina and calls for 'the organization of a referendum to join the Republic of Croatia'.[41]

Numerous insiders and international witnesses have in the past 15 years testified before the ICTY in the Croatian leadership cases about an open plan by Franjo Tuđman and his associates to create a 'Greater Croatia'. Tuđman's 'Greater Croatia' has thus found its corroboration in both documents and witness testimonies. Moreover, the second of the two grand narratives of the former Yugoslavia had revealed its own sub-narrative of *Lebensraum*.

The Croatian Lebensraum

In the case of the Prosecutor v. Prlić et al., which tried a number of local Croatian military leaders and warlords in Herzegovina, one of the accused, Slobodan Praljak, used the exact term *Lebensraum*, *nota bene* in German, in an interview given in December 1993 to *Newsday* journalist Roy Gutman, to describe the reasons for war

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the position he held until his death in December 1999. The HDZ BiH remains closely affiliated with the HDZ of Croatia to this day.

[39] 27 June 2006, witness Stjepan Kljujić (open session), The Prosecutor v Prlić et al., Case No. IT-04-74.

[40] The most explicit example can be found on the many pages dedicated to the historical importance of the Croatian Banovina in Franjo Tuđman, *Usudbene povjestice* (History's Fates, Hrvatska sveučilišna naklada, Zagreb, 2005).

[41] The signatories are the 22 political leaders of the Croatian people in BiH, including Mate Boban, president of the Regional Crisis Staff for Herzegovina, and Dario Kordić, president of the Travnik Regional Community. (Dario Kordić was sentenced to 25 years in prison for the violations of the laws or customs of war, grave breaches of the Geneva conventions, and crimes against humanity. 'LašvaValley', Kordić & Čerkez, Case No. IT-95-14/2, 23 April 1999, witness Dragutin Čičak (open session), The Prosecutor versus Dario Kordić and Mario Čerkez, Case No. IT-95-14/2.

the Croats were waging in BiH. Praljak testified in his own defence, and during the cross-examination, when confronted with his reference to the war as the Croatian fight for *Lebensraum*, he tried to re-describe the meaning of the phrase he had once uttered in his interview with Gutman. This is what Praljak said on the record:

> I may have used 'Lebensraum' at one point. But I provided an explanation. Not Lebensraum, we will expel the French, the Ukrainians, the Polish because we are the chosen people, well that explanation was, We are now defending the last bits and pieces of the territory that we used to have in Bosnia-Herzegovina against Serbs and Muslims alike.[42]

In his defence, as it may transpire, the defendant offered all the necessary elements the prosecution and the trial chamber may have needed to draw the conclusion that Praljak's use of the term *Lebensraum* was virtually identical to its use and interpretation at the Nuremberg trials. As a matter of fact, in his closing address before the IMT, the Prosecutor Jackson had an appropriate name for such use of the term *Lebensraum* by the Nazis—'double-talk'.[43] Be that as it may, the subtle cognitive facets of the sub-narratives such as *Lebensraum*, all residing within the ICTY's grand narratives of 'Greater Serbia' and 'Greater Croatia', have not in their entirety slipped through the legal net created by the mode of liability known as JCE.

From the Common Plan Or Conspiracy to the Joint Criminal Enterprise

The legal doctrine of JCE was initially introduced by the Appeals Chamber (AC) in 1999 in the first ICTY trial of Dušan Tadić.[44] The AC held the following:

> JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia. It did so after reviewing relevant treaties and national legislation, as well as several post-WW II war-crimes cases, and concluding that these warranted the conclusion that JCE liability is consonant with the principles of criminal responsibility under customary international law.[45]

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[42] 3 September 2009, witness Slobodan Praljak (open session), cross-examination by Douglas Stringer. The Prosecutor v. Prlić at al., Case No. IT-04-74-T.

[43] It is worth noting that Hannah Arendt developed a similar theme in *Eichman in Jerusalem*. She referred to the strategic policy instrument the Nazis introduced under the name *Sprachregelung* (language rule), whereby a number of key words and phrases were replaced by the euphemisms. The 'Final Solution', 'evacuation' and 'special treatment', for example, stood for killing and extermination (Arendt 1994). Similarly, the Rwandan 1994 genocide against the Tutsi population was to a large extent based on the number of coded and polysemic terms. The witnesses, both crime base and experts, testified, for instance, that during the genocide in Rwanda the word 'work' in Kinyarwanda, under the specific contextual conditions, meant 'kill the Tutsi'. (See the chapter of Mathias Ruzindana 1994).

[44] Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999.

[45] Prosecutor v. Radoslav Brđanin Case No.IT-99–36-A, Appeals Chamber, Judgment, 3 April 2007, para. 363. For Tadić, see Appeal Judgment, para. 226.

The most coherent abridged explanation of the ICTY jurisprudence relating to the JCE may have been offered in the Brđanin Appeal Judgment. This judgment refers to the Tadić and Vasiljević cases and states:

> The Tribunal's jurisprudence recognises three categories of joint criminal enterprise. Regardless of the category at issue, or of the charge under consideration, a conviction requires a finding that the accused participated in a joint criminal enterprise. There are three requirements for such a finding. First, a plurality of persons. Second, the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute. Third, the participation of the accused in this common purpose.[46]

The *mens rea* required to determine the degree of culpability in those cases would differ according to the category of JCE. All of them, however, incorporate the concepts of intent, knowledge, foreseeability and willingness. The category of the JCE will then, of course, have distributed, combined or re-distributed these mental cards according to the evidence presented in the case.[47]

The concepts of common plan or conspiracy, created by the IMT, and JCE, conceived by the ICTY and applied at the ICTR as well, share part of the same legal genetic code. They are a direct descendant and consequence of the conduct recognized as 'organized crime', which may also fall under the (occasionally disputed) theory of 'collective criminality'. As Cassese writes about these types of crimes in his textbook *International Criminal Law,* 'they are perpetrated by a multitude of persons: military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy'.[48] Cassese's phrasing, which needs to be emphasized, is that the crimes are committed 'in most cases, in pursuance of a policy'. All of the grand narratives under discussion incorporate a common policy, plan and purpose of a number of participants who shared the same goal or objective and, albeit not necessarily, the same criminal plan. With regard to the mental elements of *mens rea*, it can be concluded that in the majority of the cases they also share the same intent, knowledge, foreseeability and willingness to commit a specific crime, potentially including the commission of other members of the group, also known as the 'principle perpetrators', or 'tools', the individuals who may have carried out the *actus reus* itself.

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[46] Ibid., para. 364.

[47] As an appropriate illustration of the volume and complexity of the JCE cases tried before the ICTY, it can be noted that 8,152 exhibits were admitted into evidence in the Krajišnik case, 3,124 exhibits were admitted in the Brđanin case, and, prior to the death of the accused Slobodan Milošević, which abruptly ended the trial in March 2006, 5,608 exhibits were admitted in the case against former Serbian and FRY president. If compared to the tens of thousands of potential exhibits filed by the prosecution pursuant to Rule 65 ter of the Rules of Evidence and Procedure, the above-noted final figures represent a relatively small percentage of evidence initially selected and planned to be introduced in the course of any of the JCE trials.

[48] Cassese, *International Criminal Law*, 189.

The Status of *Grand Narratives*: An Open Question

Having established all of the above, one may conclude that the status of the grand narratives in international criminal trials have been shifting from secondary contextual evidence to evidence which can be causally linked to the commission and the perpetration of crimes. In this regard, history and politics are no longer utilized as a mere contextual backdrop, a *grand dans maccabre*, a bloody introductory fresco of characters and events in international criminal trials. It is the specific content of that backdrop which may now constitute the evidence and/or the reasons for the commission of crimes.

Grand Narratives as Didactic Legality

There are at least two logical trails we can follow from this evidentiary puzzle. One is *legal*, representing a standard approach to forensic evidence in analysis. The other trail can perhaps best be described as an extralegal borderliner. The specific modes of the latter have also been recognized in the notion of didactic legality,[49] as memorably explored and explained by Lawrence Douglas in *The Memory of Judgment*, an aspect which does not necessarily have an effect on a purely forensic current in the legal proceedings, jurisprudence or the law emerging from the trials. The so-called demonstrative evidence—films, photographs, maps, etc.—are used as corroborative evidence, whereas courtroom narratives about pain and personal loss of the victims of war, as well as other similar mnemonic courtroom efforts, overwhelmingly present in all trials for mass atrocities, often seem to be too detached from the corroborative evidence. The grand narratives under discussion belong to the same domain of challenges in legal proceedings. The experience behind the curtains of the trials can indeed be truly enlightening in this respect. Too many trial attorneys have thus far failed to recognize the didactic aspect of their legal enterprise as a potential part of the trial records with direct evidentiary value for their case.[50] Witness testimonies along these lines are accepted and tolerated, but not necessarily

[49] Douglas, *The Memory of Judgment*, 74.

[50] Apart from a steadily growing number of historical, political, economic, linguistic and demographic expert reports introduced through academic witnesses in international criminal trials, a standard type of forensic evidence can also have direct didactic impact on the general public. To this effect, an attempt was made by the prosecution in the trial of Slobodan Milošević to introduce an authentic video recording of the execution of a group of young Muslim men from Srebrenica by a Serbian State Security Service unit called 'Scorpions' or 'Red Berets'. (See ICTY court transcript dated June 5, 2005, The Prosecutor of the Tribunal Against Slobodan Milošević, Case No. IT-02-54. Online. Available HTTP: <http://www.icty.org/x/cases/slobodan_milosevic/trans/en/050601IT.htm>). This was the first time that the very acts of mistreatment, torture and, finally, execution of the Bosnian Muslim men and boys from Srebrenica were publicly presented as evidence before the ICTY. Although the TC in this case rejected the admission of the particular exhibit into evidence for a number of procedural reasons, the impact this footage had among the Serbs was substantial. The initial responses in the Serbian media outlets were mainly

preferred as a useful instrument in the legal arena. Inasmuch as individual human suffering and pain captured in words and images, the history and politics in evidence routinely remain part of the legally hibernated trial records. The controversy and deep, though increasingly more subtle, dividing line between the *legal* and *extralegal* evidence in war crimes trials has recently been given the most thorough scholarly treatment in Richard Wilson's study on the role and perceptions of historical evidence introduced into the international criminal trials. Based on comprehensive research, this publication, *Writing History in International Criminal Trials*, reflects some of the core arguments here presented about the current position of grand narratives as evidence in international legal practice.[51]

Grand Narratives as a Form of Criminality

If taken to its ultimate end, the exclusively *legal* line of argumentation raises the question as to whether a strong re-emergence of grand narratives in public discourse, under specific conditions, can be viewed through the optic nerves of criminal codes. Should colonial and imperial ideas leading to wars of aggression, such as 'Greater Germany', 'Greater Serbia' or 'Greater Croatia', and their sub-narratives such as *Lebensraum* or *Anschluss*, all ready to reappear under different semantic veils, be criminalized under existing provisions or under some new provisions of national or international law? Would this mean a direct infringement upon the freedom of expression? Is there a niche in legal reasoning which may provide for the criminalization of this well-corroborated, proven and recurrently fatal mode of communication?

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those of a great shock. Some of the most influential anti-ICTY voices in Serbia were quick to publicly condemn the massacre, asking for an immediate arrest and trial of the perpetrators. Shame and remorse began to emerge as a realistic alternative to the previously dominant discourse of a strong denial and disbelief that such crimes could have been committed on behalf of the Serbs. The *tu quoque* types of arguments were also losing their power of persuasion. The idea that justice must be instantly sought and found in this case was gaining ground among the Serbs. And, indeed, as a result, some of the key perpetrators were arrested and tried in Belgrade. Their trial, in addition, told the story of the involvement of the Serbian units in the area of Srebrenica in July 1995. The public record of the responses to this crime is truly overwhelming. Thus, a piece of evidence, initially rejected by the ICTY judges, brought considerable alterations to the standard Srebrenica narrative among the Serbs. In sum, an unsuccessful attempt to introduce a single exhibit may have become a *moment suprème* of didactic legality in Serbia.

[51] Wilson: 'International trials are not driven by two disconnected logics, one inside and the other outside the law, that clash with each other. Overstressing the divergence between legal and historical ways of knowing can forestall a more complete awareness of how they are effectively combined in some international criminal trials. One of the main findings of this book is that, like it or not, historical discussions are a permanent feature of international criminal justice, because historical evidence has become an integral part of prosecution and defense cases. History has legal relevance and is not merely a "chapeau" requirement emanating from the florid preamble of an international criminal statute.' Wilson, *Writing History in International Criminal Trials*, 218.

An insight into the relevant national criminal codes, that is, the German, Serbian and Croatian respective legal provisions, clearly indicates the possibilities of criminalization of the grand narratives within the scope of the discussion in this chapter. The German Criminal Code prohibits 'spreading of propaganda of unconstitutional organizations' (Verbreiten von Propagandamitteln verfassungswidriger Organisationen) and refers, inter alia, to 'propaganda, which, when determined by its content as continuation of efforts of a former National Socialist organization [. . .]' is punishable 'with imprisonment up to 3 years or a fine'.[52] Article 386 of the Serbian Criminal Code, on the other hand, deems as liable calls for, or instigation of, a war of aggression.[53] This Article is followed immediately by the stipulations dealing with the racial and other related types of discriminatory conduct as defined by international law.[54] It can indeed be concluded that the Serbian Criminal Code may include the key elements of the Greater Serbian grand narrative as some of the necessary requirements for the initiation of an investigative and, as a result of that, prosecutorial action. Article 151(a)(1) of the Croatian Criminal Code seems to offer a hybrid version of the previously referenced articles under the definition of 'Extolling of fascist, Nazi and Other Totalitarian States and Ideologies or Promoting of Racism and Xenophobia'.[55]

As part of his discussion on the conceptual relationship between the planning, preparation and initiation of a war of aggression and conspiracy, Cassese may have offered the most applicable general answer to the question of criminalization by concluding that, following the Nuremberg and Tokyo statutes and jurisprudence, 'it seems warranted to infer from the present system of the ICL [international criminal law] the criminalization of the early stages of preparation of the crime, when more persons get together and agree to put in place the necessary measures to engage in a

[52] Art. 86(4) of the German Criminal Code (Strafgesetzbuch (StGB). Online. Available HTTP: <http://lawww.de/Library/stgb/86.htm>.

[53] Art. 386 of the Serbian Criminal Code, 'War of Aggression', and Art. 387, 'Racial and Other Discrimination'. Online. Available HTTP: <http://legislationline.org/documents/section/criminal-codes>.

[54] Article 387 of the Serbian Criminal Code may, in this regard, be considered a close relative of Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Article 20 of the ICCPR states: '1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The specific evidentiary scope of the grand narratives, as part of this discussion, may certainly fall under Article 20 of the ICCPR. Online. Available HTTP: <http://www2.ohchr.org/english/law/ccpr.htm>. Michael G. Kearney discusses the history of confusion in international debates relating to different interpretations of the concepts of 'war propaganda' and 'propaganda for war', arriving at the conclusion that, given the critical importance of this distinction for international criminal law, the former 'relates to propaganda inciting war crimes against humanity during a conflict, whereas the latter concerns propaganda inciting to wars of aggression'. Michael G. Kearney (2007).

[55] Art. 151(a)(1) of the Croatian Criminal Code, 'Extolling of fascist, Nazi and Other Totalitarian States and Ideologies or Promoting of Racism and Xenophobia'. Online. Available HTTP: <www.vsrh.hr/CustomPages/. . . /Legislation_Criminal-Code.pdf>.

war of aggression'.[56] Apart from the Cassesian prudent strategy of turning this type of crime into an inchoate crime,[57] it seems to the author of this chapter that there are indeed no major evidentiary and jurisprudential obstacles inhibiting the investigation and prosecution of such historical and political acts of propaganda[58] and incitement, or instigation, during the formative period of these acts or after the crime has already been committed. As of recently, Article 8*bis* of the International Criminal Court (ICC) provided clear provisions for both the 'crime of aggression', which includes planning, preparation, initiation or execution, and the 'act of aggression' relating to the use of armed force such as invasion, coastal and land attacks, bombardment, use of irregular forces and other types of crimes.[59] Whether this 'immense stumbling block in the development of international criminal law' (Schabas 2012), as William Schabas appropriately qualified the crime of aggression, will see its effective application in law, however, remains to be seen.

The first relevant jurisprudential response to this 'no-go area' of legal reasoning and deliberation may soon be offered by the Trial Chamber in the ICTY's trial of Vojislav Šešelj,[60] the case cautiously argued by the prosecution within the ideological and military framework of the grand narrative of 'Greater Serbia'. In his closing argument on March 7, 2012, the prosecutor, Mathias Marcussen, said: 'Your Honours, the accused's individual criminal responsibility for the crimes charged in the indictment has been proven beyond a reasonable doubt. For the accused, Greater Serbia is his *raison d'etre*.'[61] If adequately addressed, the outcome of the Šešelj trial could mark the turning point in the standard legal approach to grand narratives in international criminal law.

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[56] Cassese, *International Criminal Law*, 161.

[57] Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. Online. Available HTTP: <http://definitions.uslegal.com/i/inchoate-crime/>.

[58] For the treatment and status of propaganda in the ICTY jurisprudence, see Michael G. Kearney, 'Propaganda in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', in Dojčinović, ed., *Propaganda, War Crimes Trials and International Law*, 231–253.

[59] Article 8 *bis*, inserted by resolution RC/Res.6 of 11 June 2010, Rome Statute of the International Criminal Court. Online. Available HTTP: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>.

[60] The Prosecutor of the Tribunal Against Vojislav Šešelj, Case No. IT-03-67, Third Amended Indictment, 7 December 2007.

[61] 7 March 2012, prosecution closing argument (open session), page 17314, The Prosecutor versus Vojislav Šešelj, Case No. IT-03-67-T.

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Part II
Dealing with Justice after Yugoslav Wars

Chapter 5
A Crack in the Wall of Denial: The *Scorpions* Video in and out of the Courtroom

Vladimir Petrović

> *It was such a great afternoon [. . .] and then they showed that awful film, and it just spoiled every thing.* (Hermann Goering after a screening of the documentary Nazi Concentration Camps in the IMT (1945))

> *Is that an appropriate way to act? On all world TV stations and Serbian TV stations, it has been said time and again that this is footage from Srebrenica [. . .] to play footage here that has nothing to do with Srebrenica whatsoever [. . .]. I do not understand this kind of handling of evidence at all.* (Slobodan Milošević after screening the Scorpions footage in the ICTY (2005))

The wars that had torn apart socialist Yugoslavia were characterized by grave crimes. Their thoroughness indicates that they were neither sporadic nor circumstantial, but an integral part of the overall war strategy. Aimed towards the creation of homogeneous national communities, these violent strategies quickly came to be known as 'ethnic cleansing', a misnomer covering criminality ranging from the forced removal of population and unlawful detention in concentration camps to intimidation, torture, rape and mass killings reaching genocidal levels.[1] The legal system in the disintegrating state collapsed in the face of widespread crimes. Apprehension of war criminals stalled, despite numerous reports on human rights breaches by international commissions and nongovernmental organizations. Well after the war, the legal reaction in the successor states remained far from adequate and notoriously reluctant to put to trial wrongdoers from their own ranks. This obstruction was matched by the unwillingness of the political elite and the inability of the population to come to terms with the past. Impunity and denial were reinforcing each other.

[1] On the Yugoslav war in the context of a global change in warfare, see Mary Kaldor (2012, pp. 32–70); the course and character of warfare in Bosnia are analysed in Xavier Bougarel (1996). Crimes in wartime as strategy are extensively discussed in James Gow (2003). On the genesis of the term 'ethnic cleansing', see Vladimir Petrović (2007, pp. 219–244).

V. Petrović (✉)
NIOD Institute for War, Holocaust and Genocide Studies, The Netherlands
e-mail: v.petrovic@niod.knaw.nl

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Therefore, a classical question of transitional justice, formulated by Argentinean legal scholar Carlos Santiago Nino, became the political reality of Yugoslav successor states: 'How shall we live with evil? How shall we respond to massive human rights violations committed either by state actors or by others with the consent and tolerance of their government' (Santiago Nino 1996)? The answer was not at hand, although the options were neatly summarized by Richard Goldstone, the South African constitutional judge: 'Some countries have attempted to deal with the past crimes by simply ignoring the issue. Some have granted blanket amnesties, some have prosecuted the perpetrators, and some have instituted truth and reconciliation commissions designed to achieve some form of acknowledgement for the victims. And in some cases, prosecution is pursued under the auspices of international criminal tribunal' (Goldstone 2000). Goldstone particularly advocated this last item from the transitional justice toolkit. He was also exceptionally well placed to do so, being appointed to head the prosecution of the International Criminal Tribunal for the former Yugoslavia (ICTY), created in May 1993 through the resolution of the Security Council 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'.[2] Two decades and three prosecutors later, the accomplishments, as well as blunders of the ICTY, are constantly debated, and reaching a peak in the context of forthcoming closure of the Tribunal.[3] At the centre of many of these debates is an attempt to assess the transformative impact of the ICTY on the successor states in the region of former Yugoslavia. This chapter aims to contribute to this elusive quest by an in-depth scrutiny of a telling case of usage of visual evidence at the ICTY, its reception in the Serbian courtroom and its impact in the public sphere.

The Role of Visual Evidence in the Debate on Didactic Effects of Trials

The ICTY-generated discussions have added new insights into some old debates. Among them is the one on the didactic effects of trials. It was triggered as early as 1963 by Hannah Arendt in her analysis of the Eichmann trial, whose didactic aspects Arendt discarded as 'bad history and cheap rhetoric'. In contrast, felt Arendt, 'justice demands that the accused be prosecuted, defended and judged, and that all the other questions of seemingly greater importance [. . .] be left in abeyance'. Her general conclusion was formulated in an influential dictum: 'The purpose of the trial is to

[2] UN, S/Res/827 (1993), 25 May 1993. Tribunal has the power to prosecute persons suspected for committing grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity. On the creation of the tribunal and context it operates in, see Michael Scharf (1997, p. 128). Rachel Kerr (2004).

[3] Richard H. Steinberg (ed. 2011); A set of ICTY Global Legacy Conferences was held since 2011. See the video recording of the latest on ICTY TV, *Legacy of the ICTY in the the former Yugoslavia*, Sarajevo, 6 November 2012, http://www.youtube.com/watch?v=vQ843aYwp44&list=PLqBsjklrfWbiq5lDKRvi954lg5x4d_O7w.

render justice, and nothing else' (Arendt 1963). However, just around the same time, Judith Shklar equally persuasively recognized the need to situate trials within their overall political and social context, warning that 'it is not the political trial itself but the situation in which it takes place and the ends that is serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another' (Shklar 1986).

Opinions have remained polarized ever since. Over the years, Arendt was followed by a number of authors who echoed her doubts about pedagogical functions of the legal process. Amidst hectic legal developments following the end of the Cold War, Ian Buruma expressed suspicion towards the relevance of historical narratives in the proceedings: 'Just as a belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics—though I have my doubts about this too. But good politics don't necessarily serve the truth' (Buruma 1995). Dwelling on subsequent attempts at a legal encounter with the communist legacy in Central and Eastern Europe, Tina Rosenberg arrived at similar conclusion: 'Trials, in the end, are ill suited to deal with the subtleties of facing the past' (Rosenberg 1995).

On the other hand, the end of the Cold War was a powerful boost to a body of literature on transitional justice, readily recognizing that many trials are inevitably monumental and historical events, whose extralegal functions should not be overlooked. Ruti Teitel perceived them as 'long-standing ceremonial forms of collective history making' which 'enable vivid representations of collective history through the recreation and dramatization of the criminal past' (Teitel 2000). Mark Osiel emphasized their importance in shaping collective memory (Osiel 1997). Eventually, the Arendtian argument was confronted head on by Lawrence Douglas: 'No one, I believe, would deny that the primary responsibility of a criminal trial is to resolve question of guilt in a procedurally fair manner. And certainly one must appreciate the potential tension between the core interest of justice and the concerns of didactic legality. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice and nothing else, presents, I will argue, a crab, bad and needlessly restrictive vision of the trial as legal form' (Douglas 2001).

Researching along these lines, Douglas analysed pivotal Holocaust-related trials, convincingly dissecting their pedagogical function, as expressed in the choice of the accused, the nature of incrimination, the scope of the indictment, the selection of witnesses, the collection of evidence and the manner of its presentation in the courtroom. Moving from theory to the mechanics of this process, which he called *didactic legality*, he assigned particular attention to the introduction of new media into the evidence. He particularly emphasized the screening of footage taken mostly in Nazi concentration camps, exhibited in the International Military Tribunal in Nuremberg. Douglas observed that 'the standard of admissibility of filmic proof, at least in Anglo-American jurisprudence, centered on the doctrine of the authenticating witness. This doctrine [. . .] maintained that the motion picture does not itself prove an actual occurrence but the thing reproduced must be established by the testimony of witness' (Douglas 2001). The screening of atrocity material in Nuremberg

through the documentaries *Nazi Concentration Camps* and *The Atrocities Committed by German-Fascists in the USSR* marked a departure from this doctrine, enabled through relaxation of rules of gathering evidence, and empowered by the reactions of the audience and accused, which confirmed that visuals could serve as a powerful vehicle of pedagogical messaging.[4]

In this respect, the ICTY, the first international criminal tribunal since Nuremberg, followed in the footsteps of its predecessor. Its high-profile legal proceedings operate in a complex context in which law, politics, history and memory intertwine in an extraordinary public happening. Ambitiously tasked from the creation, in time the ICTY developed an equally ambitious understanding of its own role, best expressed in its 1998 annual report to the Security Council: 'ensuring that history listens is a most important function of the Tribunal [. . .]. Through our proceedings we strive to establish as judicial fact the full details of the madness that transpired in the former Yugoslavia. In the years and decades to come, no one will be able to deny the depths to which their brother and sister human beings sank. And by recording the capacity for the evil in all of us, it is hoped to recognize warning signs in the future and to act with sufficient speed and determination to prevent such bloodshed.'[5]

In attempting to do so, the ICTY could not rely on stacks of written evidence of the kind seized by the Allies and exhibited in Nuremberg. Withheld by most of the Yugoslav belligerent entities, many relevant documents were, at least in the beginning, out of reach of the Office of the Prosecutor. However, ICTY's rules of admissibility of evidence stated that the 'Chamber may admit any relevant evidence which it deems to have probative value'.[6] As in Nuremberg, the reasons for this somewhat relaxed rule were inherently practical: 'To adopt strict rules on admissibility of evidence in these circumstances would complicate the task of the Tribunal tremendously when its lack of coercive powers already makes gathering of evidence very difficult.'[7] Thus, the ICTY proved to be very open to admitting visual records in evidence, showing considerable lenience and therefore adding new fuel to an already vivid debate on their admissibility and probative value. Indeed, many compelling photos and videos were exhibited in the course of the trials, from photos of Goran Jelisić murders in Brčko to videos of Serbian concentration camps in Omarska and Trnopolje, to satellite and aerial photographs of mass gravesites around Srebrenica at the Krstić trial (see Campbell 2002; Nice 2004).

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[4] Douglas (2001, pp. 11–37). The reactions of the accused to the film were carefully recorded by prison psychologist G.M. Gilbert (1995, pp. 45–49, 161–163). On American video, see also Lawrence Douglas (1995, pp. 449–481). On Soviet video see Holocaust Controversies, *The Atrocities Committed by German-Fascists in the USSR* http://holocaustcontroversies.blogspot.nl/2011/04/atrocities-committed-by-german-fascists.html; On the role of visuals in war crimes trials from Nurember to Milošević see Christian Delage (2006).

[5] ICTY Annual Report, A/53/219-S/1998, p. 66. About the connection between the ICTY and history writing, see: Richard Ashby Wilson (2005, pp. 908–994), Robert Donia (2004).

[6] Rules of Procedure and Evidence, 22 May 2013, 89 C.

[7] Almiro Rodrigues and Cecile Tournaye (2001, p. 297). Therefore, the rules do not address explicitly the issue of visual records and photography as evidence.

What remains more difficult to assess is the role visual evidence has had outside of the ICTY courtroom. Logistically, the ICTY courtroom proved to be a very suitable place for the introduction and dissemination of visual material. The building housing the ICTY met the highest technical criteria, and the interest the proceedings provoked, at least in the early period of Tribunal's activity, caused considerable media attention. Thus, much of the proceedings, including its visual imagery, was broadcast internationally. To what extent it reached the war-affected region is another matter, where reception was less straightforward. According to the 2002 regional survey of the International Institute for Democracy and Electoral Assistance on the trust in international institutions in the Balkans, 'for The Hague Tribunal (ICTY), according to the survey trust ratings are highest in Kosovo (83 %) and the Bosnian Federation (51 %), lowest in Serbia (8 %) and Republika Srpska (4 %)'.[8] Around the same time, the ICTY was about to embark on its greatest venture, the trial of Slobodan Milošević, wartime president of Serbia and the Federal Republic of Yugoslavia, transferred to ICTY in mid-2001 and charged with three separate indictments covering crimes committed in Kosovo, Croatia and Bosnia and Herzegovina.

Perceived as the symbolic peak of the Tribunal's activity, the Milošević case was also a moment of global relevance. For the first time, a head of the state was charged for the crimes from the time of his reign. Cases of such an importance inevitably function on at least two frontlines—in the courtroom and with the wider audience.[9] While the prosecution was carefully balancing these two aspects, the defendant showed no such intention. Uninterested in the legal aspect of the trial, Milošević was using every opportunity to score at the 'home front'.[10] In this communication, visual material played a significant role from the very start of the trial, turning the opening statements of the prosecution and the accused into multimedia events.[11] This trend lasted until the end of the trial, with Milošević presenting 50 video recordings of uneven length and content and the prosecution outperforming him with 117.[12] Their legal relevance and out-of-courtroom impact were equally uneven. In a sort of a paradox, one of these visuals, which never even became an accepted exhibit in the ICTY, nonetheless, had a huge impact out of its courtroom.

The Screening of the *Scorpions* Video in the ICTY Courtroom

The first of June 2005 started as any other day in the ICTY courtroom, with prosecutor Geoffrey Nice conducting a pedantic cross-examination of Milošević's witness, Serbian police general Obrad Stevanović, once assistant minister of the interior.

[8] IDEA, South East Europe Public Agenda Survey, http://www.idea.int/europe_cis/balkans/see_survey.cfm. Accessed on 05.05.2013.

[9] About Miloševic trial and history, see Vladimir Petrović (2013 in print); Judith Armatta (2012, pp. 10–38).

[10] Eric Gordy (2003). See also Eric Gordy's analysis of attention to the Milošević trial in Serbia, in this volume.

[11] ICTY, The Milošević case, Transcripts, Opening statements, 10–158.

[12] About the amount of evidence and problems it caused see Gideon Boas (2006).

Stevanović claimed that Serbian authorities would not allow paramilitary units to freely pass the border between Serbia and Bosnia and was particularly resentful to the allegations that such passage would be secured for the units which were perpetrating war crimes. He claimed he personally would have never turned a blind eye on something like that. It was during this questioning that Geoffrey Nice suddenly announced: 'I'm going to show you some extracts from a video. The video lasts about 2 h but it will only be a few minutes of it that we will show in order to give its context. It comes in several clips [. . .]. *It's only—it doesn't have to become an exhibit* [emphasis VP]. It's just a guide to the general territory.'[13] What followed was a display of a short footage, interrupted with questions of the prosecutor and witness's answers about a particular wartime unit from Serbia, named *Scorpions*:

> 'NICE: What we see here, we see here a ceremony of the Scorpions being blessed by a priest, and this is happening at Djeletovci. And so that you can understand the usefulness of the film, we may get to the point where they come individually to be blessed so that they have full facial views provided for us, many or most of them, if not all of them.
>
> STEVANOVIC: I cannot see the faces very clearly. I don't know if it's the quality of the image.'
>
> 'NICE: So far as necessary, I will help you later with freeze-frame pictures to make life easier. To save time, we'll move to the next clip.
> NICE: Now, you can see the date, 25th of June. This is the same unit on its way. We saw there, of course, the sign of Pale, it having already entered Republika Srpska via, as I'm suggesting, Raca and now being on the—to the east of Sarajevo at Pale. Next clip.'
>
> 'NICE: Now, this—pause there. This video, which is potentially distressing viewing and I'm only going to play very small parts of it. . . reveals, Mr. Stevanovic, if the evidence is in due course admitted, and that's why I want your assistance, reveals that men were brought from Srebrenica in batches to this group of Scorpions to be executed and they were executed, and what you see here is a lorry load of six young men (. . .)[. . .]
>
> NICE: The lorry leaves. The men are eventually taken up into the hills. It may be difficult to move it, but I don't need to linger on this. Here they are taken up into the surrounding countryside.'

[13] ICTY, The Milošević case, Transcripts, 40275.

Stills from the Scorpions video

> 'NICE: Two remaining not shot are untied. I needn't go into the detail, or we needn't view the detail. They're untied, they move the four bodies, and then they are themselves shot, and I'll leave it there'.[14]

At this point, after a moment of silence, the courtroom went into a state of agitation, with the judges asking about the origin of the video, amicus curiae interrupting the prosecutor to object its introduction and the witness protesting its display in connection with his testimony:

> 'JUDGE ROBINSON: Mr. Nice, can you tell us about that film?
> MR. NICE: Yes, to a degree I will. But if I can just deal with—
> MR. KAY: We haven't established any foundation for this. To my mind, this looks like sensationalism. There are no questions directed to the witness on the content of that film in a way that he can deal with it. It's merely been a presentation by the Prosecution of some sort of material they have in their possession that has not been disclosed to us and then it has been shown for the public viewing without any question attached to it. It's entire sensationalism. It's not cross-examination.
> JUDGE ROBINSON: Mr. Nice, there is some merit in that. That's why I asked what are we going to be told about the film. Who made it, in what circumstances, and what questions are you putting to the witness in relation to it?
> MR. NICE: Certainly. I'm coming to that. As to the film, my suggestion to the witness is that this is a film showing, as it happens, Scorpions executing prisoners from Srebrenica. And the questions I wanted to ask him and want to ask him are as follows:
> JUDGE ROBINSON: Let him answer that question first.
> MR. NICE: Certainly, he can answer that question, yes. I'm suggesting this film shows Scorpions executing prisoners from Srebrenica
> STEVANOVIC: As I am upset, I have to say that this is one of the most monstrous images I have ever seen on a screen. Of course I have never seen anything like this in—live. I am astonished that you have played this video in connection with my testimony because you know full well that this has nothing to do with me or the units I commanded. I attempted to explain this yesterday, and I have also attempted to explain it today. I'm not saying that you do not have the right to do this, but I have to say that I am really upset—JUDGE ROBINSON: Do you agree with the—do you agree with the Prosecutor's suggestion or proposition that this is a film that shows Scorpions executing prisoners from Srebrenica ?
> THE WITNESS: Of course I do not intend to cast doubt on what the Prosecutor is saying, but I have not seen a single person I know here, and I have seen no evidence that this is the unit in question.'[15]

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[14] ICTY, The Milošević case, Transcripts, 40277–8.

[15] ICTY, Cases and Judgements, The Milošević case, Transcripts, 40279–40280.The stills are connected to the transcript at the website *Medien und Krieg, 'Bilder lügen nicht!' oder: Fand das 'Massaker von Srebrenica' gar nicht in Srebrenica statt?* http://www.arbeiterfotografie.com/galerie/kein-krieg/hintergrund/index-srebrenica-0005.html. Full video shown in the ICTY courtroom is available on Stephen Talbot, *Srebrenica: The Video of a Wartime Atrocity*, http://www.pbs.org/

The session soon went to recess. However, if there was agitation in The Hague, it could not be compared with the havoc in Belgrade and in the rest of the Balkans. During the day, the video was broadcast by major regional broadcasting networks. It was promptly shown in Bosnia as breaking news, with shocked families recognizing the victims from the video. In Serbia, the footage was screened in the evening on the independent television B92, followed by a rapid police action in which four former members of the *Scorpions* unit were arrested in Serbian towns Novi Sad and Šid. The day after, new arrests followed. Chief Prosecutor of the ICTY, Carla Del Ponte, visited Belgrade and met with Serbian highest officials. As she commended the arrest action as 'brilliant', even the conservative prime minister Vojislav Koštunica stated that 'it was important to react immediately on the basis of this video which was shocking and terrible for all of us'.

On June 2nd, the footage was shown on the Radio Television of Serbia (RTS), Serbian national television, followed by the grim statement of Serbian president Boris Tadić: 'This video is an evidence of monstrous crimes which have been committed during the war in that region. The crimes were committed in the name of our nation.'[16] In the next couple of days, the public reactions of indignation were flooding Serbia.[17]

During this flood of reactions, one man was silent—Milošević himself. He remained silent on the topic the next day too, while Stevanović was vigorously cross-examined by the prosecution about the *Scorpions* unit activities in Bosnia and Kosovo in 1995 and 1999. As the court adjourned over the weekend, Milošević addressed the issue only on 8 June while redirecting examination of general Stevanović. He insisted the tape be replayed, stating that the video shown in the courtroom was cut and doctored. He pointed out that most of the tape is undated, that the location of the murder is Trnovo, a village 160 km from Srebrenica, and claimed that the prosecutor merely speculated that the victims were from Srebrenica and that the perpetrators belonged to the Serbian Ministry of Interior.[18] Most of all, he demanded information as to 'when this footage was taken, when the tape was filmed, who taped, who took it, when it came into Mr. Nice's possession and so on?' Nice refused to oblige, on the grounds that the clips are not legal exhibits yet: 'I'm quite happy to provide a certain amount of information, although the detailed information will come [. . .]. As to the source of the tape, no, I have no intention of providing any information of that at the moment.' Instead, he rubbed into Milošević's greatest concern, expressing hope that soon the entire background of the tape will be known in the light of 'reactions and

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frontlineworld/blog/2005/07/srebrenica_the_1.html#. The full video of ICTY courtroom during the screening of the footage at Milosevic Trial Public Archive, http://hague.bard.edu/past_video/06-2005.html.

[16] 'Horrific video of Srebrenica killings shown', *AFP*, 3 June 2005, http://www.smh.com.au/news/World/Horrific-video-of-Srebrenica-killings-shown/2005/06/03/1117568366412.html.

[17] 'Srebrenica Video Sobers Serbia, prompts arrests', *Reuters*, 3 June 2005; IWPR, Snimci egzekucije osvezili pamcenje Srbiji, http://iwpr.net/sr/report-news/snimci-egzekucije-osvezili-pamcenje-srbije; Beti Bilandžić, 'Murder Video Broadcast Stuns Disbelieving Serbs', *The Age*, 4 June 2005; 'A Video Shocks Serbia', *Radio Free Europe*.

[18] ICTY, The Milošević case, Transcripts, 40697–40706.

acknowledgements in Serbia, by government sources, which may be of considerable value [. . .] *as a result of its being screened in Serbia* [emphasis VP]'.[19]

Milošević's amici curiae also insisted on full disclosure of the entire visual material to the defence. They insisted that, even though the tape is not considered evidence, it is still a subject of disclosure. As they seemed to have the support of the judges on the matter, Nice conceded to disclose once Milošević makes a formal request.

> 'JUDGE ROBINSON: Well, he has made a request.
> MR. NICE: As he has made. I agree.
> JUDGE ROBINSON:He has made a request.
> MR. NICE: But only today. I can check on whether there are any outstanding issues, and I don't believe there are [. . .]. That can be done. But it can't be done literally now.'
>
> Milošević could only fume:'Is that an appropriate way to act? On all world TV stations and Serb TV stations, it has been said time and again that this is footage from Srebrenica. And Mr. Nice says now that he is yet to establish the link showing that this has to do with Srebrenica.
>
> JUDGE ROBINSON: Mr. Milosevic, whether he establishes the linkage or not is a matter for the Chamber. *We have no concern with the public's perception of the matter* [emphasis VP]. Ultimately we will examine all the evidence before us and come to a conclusion as to the worth, the value of the tape.
>
> THE ACCUSED: Mr. Robinson, but he said, he spoke in the future [tense] that he has yet to establish this linkage. I assume that if he is asserting something, he has to prove that there is this kind of linkage, and it is only then that he can work on that basis, not for him to play footage here that has nothing to do with Srebrenica whatsoever. And you saw that it is 150 or, rather, 160 kilometers away from Srebrenica, and then he promises that he has yet to establish by way of a witness linkage between that footage and what happened in Srebrenica. And on the footage you do not even have the actual place where it was filmed and the time when it was filmed. I do not understand this kind of handling of evidence at all.
>
> JUDGE ROBINSON: Mr. Milosevic, those are matters for us. We will determine—we haven't made any determination as to the production of the tape as an exhibit.'[20]

Milošević's worries materialized on 18 July 2005, as the prosecution bundled the tape with other additional newly acquired evidence and proposed new witnesses in a motion requiring the partial reopening of the case against him. It took the Chamber almost half a year to reach a decision—and deny—this request: 'Although most of the items have some probative value in relation to the underlying offences charged in the indictments, none is of significance for the ultimate legal question of whether the Accused is responsible for the crimes alleged in the indictments. None of the material proposed would add significantly to the existing evidence relating to the Accused's individual criminal responsibility. The Prosecution's request to reopen its case with regard to these items is therefore denied.'[21] Milošević need not have worried, at least from a legal point of view. The evidentiary role of the *Scorpions* video was virtually

[19] ICTY, The Milošević case, Transcripts, 40723, 40727.

[20] ICTY, Cases and Judgements, The Milošević case, Transcripts, 40730–4.

[21] ICTY, Cases and Judgments, The Milosevic Case, Decision on application for a limited re-opening of the Bosnia and Kosovo components of the prosecution case with confidential

nonexistent in this case, and the death of the accused on 11 March 2006 closed this chapter permanently.

The *Scorpions* in Belgrade: In and Out of the Courtroom

However, the extralegal effect of this video material could hardly be overemphasized. The clip was aired in different versions more than 2,000 times on different TV stations, out of which 500 times in the region of the former Yugoslavia.[22] Inquiries focused on the actual crime, identity of the perpetrators and the place of their unit within Serbian wartime tactics. The *Scorpions* were not a completely unknown unit. They captured public attention due to their activity in Kosovo in 1999, when the unit was briefly deployed in Podujevo on 26 March 1999, and withdrew in haste, after the murder of 14 or more Albanian women and children perpetrated by its members. The investigation (which lingered for some time until the verdict of the Belgrade court sent unit member Saša Cvijetan to 20 years imprisonment in 2004) brought the case to the attention of the Humanitarian Law Center, a major war crimes investigating non-governmental organization (NGO) in Serbia. Its director, Natasa Kandić, took part in the trial as a representative of the victims, collecting the information at the same time about the pre-1999 activity of the *Scorpions* unit and its wartime commander, Slobodan Medić Boca.[23] In the course of this activity, she heard about the existence of a certain tape, filmed by the unit members and documenting a crime, but was unable to locate it. The disclosure of one former *Scorpions* member gave her the details: The tape was actually multiplied after the end of the war in Bosnia in 1995, shared and screened among unit members. However, Medić launched a scrabble for the copies, with the intent to destroy the damaging evidence. Still, due to the discord among *Scorpions* veterans, a master copy was dispatched to the Bosnian city of Tuzla in late 2004, and eventually landed both at the ICTY and in the hands of Kandić.[24] Rather than screening it publicly, Kandić showed the tape to the Serbian authorities, during a meeting with war crimes prosecutor, Vladimir Vukčević, in the presence of the Serbian police head of war crimes investigation, Gvozden Gagić, and legal advisor to the US embassy, Sem Nazzaro, in early May 2005. After receiving commitments that the case would be immediately opened, she conceded to wait for 10 days. As time was passing and nothing happened, she revolted with a denialist public event staged at (of all places) Belgrade Faculty of Law, and she publicly announced the existence of the tape at a press conference on 23 May. About a week later, on 1

annex. Cf. 'Judges Crack Down on Milosevic case', Institute for War and Peace Reporting, http://www.iwpr.net/?p=tri&s=f&o=258726&apc_state=henptri.

[22] Humanitarian Law Centre, *Škorpioni—od zločina do pravde*, (Scorpions—From Crime to Justice), (Beograd: Fond za humanitarno pravo: 2007), 7–8.

[23] Dejan Anastasijević, *Ubod Škorpiona*, Vreme, no. 667, 25.12 2003. http://www.vreme.com/cms/view.php?id=361981.

[24] Tim Judah, Daniel Sunter, 'How video that put Serbia in dock was brought to light', *The Guardian*, 5 June 2005.

June, as she saw that the ICTY prosecutor screened the segments of the tape in the Stanojević cross-examination, Kandić dispatched the entire tape to several Serbian broadcasting media. Only television B92 agreed to play the content immediately, but the day after the other media caught up, as the arrests of *Scorpions* and public statements by Serbian officials indicated that they meant business.[25]

In the midst of public attention, the indictments against the commander of the *Scorpions*, Slobodan Medić, and unit members Pera Petrašević, Branislav Medić, Aleksandar Medić and Aleksandar Vukov were made public on 7 October 2005 by the Office of the Serbian War Crimes Prosecutor.[26] At that time, the full-length *Scorpions* tape, containing a 2-h long collage of different aspects of the activity of the unit from 1994 to 1995, entered the public sphere. If the segments containing the Trnovo murders were crucial for the upcoming trial, the rest of the material was revealing in terms of connections between the *Scorpions* and the post-Milosevic state security apparatus. One segment of the tape showed Medić in the company of Milorad Luković Legija during the 1994 operations in Western Bosnia. Legija rose in the ranks of the similar unit, the *Tigers* (a.k.a. Serbian Volunteers Guard), headed by the dreaded Željko Ražnatović Arkan. In the post-war period, Legija was instrumental in the institutionalization of wartime special units into the Serbian Ministry of Interior. Under the supervision of Jovica Stanišić and Franko Simatović, wartime heads of the Serbian Secret Service, these detachments merged into the armed wing of the Serbian secret police, known as the Unit for Special Operations. This unit, which was no less than Milošević's death squad responsible for the elimination of his political opponents, survived the deposing of its master.[27] Acting in collusion with organized crime, the leadership of the unit was involved in a succession of kidnappings and murders, culminating in the assassination of Serbian reformist prime minister Zoran Đinđić in March 2003.[28] This assassination triggered a massive police action, leading to the arrest of the unit members and transfer of Stanišić and Simatović to the ICTY. Legija surrendered to the authorities, and by the time of the screening of *Scorpions* video, he was on trial for a number of assassinations he masterminded.[29] Simultaneously, the *Scorpions* trial commenced in Belgrade on 20 December 2005.

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[25] The entire story of making this video, its dissemination and recovery of the tape is neatly described by Natasa Kandic in Humanitarian Law Centre, *Škorpioni—od zločina do pravde*, [Scorpions—From Crime to Justice], (Fond za humanitarno pravo: Beograd 2007), 4–8.

[26] Serbian War Crimes Prosecutor's Office. http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2005_10_07_ENG.pdf.

[27] Cf. Vreme film/ TV B92, *Jedinica* (The Unit) (http://www.b92.net/specijal/jedinica-eng/index.php). See, in particular, part 3 of 17, http://www.youtube.com/watch?v=7hcXnxtG1C8&feature=relmfu. Also see Jovan Dulović and Filip Švarm (2003).

[28] Transcripts of the trial are available at the archive of Humanitarian Law Center, FHP-DJ-021, *Transkripti sa suđenja za ubistvo Predsednika Vlade Republike Srbije dr Zorana inđića*. They are also published by Dorotea Čarnić, Aleksandra Petrović (ed.), *Proces KP 5/03, Ubistvo Zorana Đinđića* I-III (The Murder of Zoran Đinđić), (Sedma sila: Beograd, 2008).

[29] Tatjana Tagirov, *Izrecene presude za ubistvo Ivana Stambolića i atentat u Budvi*, (Verdicts rendered for assasionation of Ivan Stambolić and he assasination attempt in Budva) http://www.vreme.com/cms/view.php?id=422576.

On the same day in The Hague, the ICTY's prosecution amended the indictment against Jovica Stanišić and Franko Simatović to include the Trnovo murders shown in the *Scorpions* tape.[30] The disclosure of those connections and simultaneous trials in Belgrade and in The Hague raised hopes that the murky background of the system of repression launched during Serbia's wars in Croatia and Bosnia would be fully exposed. Indeed, if that was the case, the position of those authors who stipulate the extralegal, ethical and pedagogical relevance of the legal processes would be fully vindicated.

The trial of five *Scorpions* in Belgrade did start on that note. The trial was extremely tense and unusually well visited, as it was among the first large war crime trials in Serbia, with additional interest fuelled by the visual material. The large and recently refurbished courtroom of the Special Court in Belgrade was occasionally too small to receive all the visitors, families of the accused and of the victims, human rights supporters and journalists.[31] During the pre-trial investigation, the arrested *Scorpions* were confronted with the video records, the existence of which completely undermined and broke into pieces their pre-prepared defence story. The commander of the unit, Slobodan Medić Boca, did his best to obfuscate even the elementary details about the creation and institutional design of this military unit, particularly hiding links to his direct superiors in Serbia's state security institutions.[32] Building on the fact that he was not visible on the crucial segment of the video tape, he simply denied that he ordered the killing in Trnovo arguing that he learnt about it only once it was shown on TV. He claimed that he was never informed about the killing, suggesting that recorded soldiers did it on their own volition. He even went as far as to claim that, had he known that his soldier was recording the murders, he would cover the crime but 'would kill [the cameraman] like a rabbit for filming it'.[33]

Medić's arrogant defence antagonized the other accused, Pero Petrašević and Aleksandar Medić, who testified that the direct order to kill six civilians, who were brought to Trnovo by a van of the Army of Republika Srpska (ARS), was given by Slobodan Medić. 'If you were a real commander', said Petrašević to Medić on trial, 'you would never allow your most trusted soldier to end up in jail with such a label. Just imagine, you claim that this was an incident, that we are not normal, that we killed those people and filmed it because we are retards!'[34] Only the fourth accused, Branislav Medić, supported the commander's version of events, claiming that in his absence that day he received an order from an unidentified colonel of ARS to shoot the prisoners and never reported back to his commander. The other

[30] ICTY, The Prosecutor of the Tribunal against Jovica Stanisic and Franko Simatovic, Second Amended Indictment, 20. December 2005.

[31] The tense atmosphere with many interesting details from the trial is described by one of its observers, Jasmina Tešanović (2009).

[32] Partial transcript, including the indictment, judgment-selected motions and selected evidence is contained in the volume *Škorpioni—od zločina do pravde*, [Scorpions—From Crime to Justice], (Fond za humanitarno pravo: Beograd 2007), 52–54.

[33] *Škorpioni*, 55.

[34] *Škorpioni*,323.

members of the *Scorpions* testified, including the two who were assigned with the camera. One of them, Slobodan Stojković, claimed that Medić directly ordered him to film the execution of the prisoners.[35] He was a particular target of Medić's anger: 'If I knew about this fuck-up, you would remain there with them'.[36] 'Them' were the victims, Safet Fejzić (17), Azmir Alispahić (17), Sidik Salkić (36), Smail Ibrahimović (35), Dino Salihović (18) and Juso Delić (25), men and boys from Srebrenica identified by the family members who bravely testified in the hostile Belgrade courtroom, in which the attorneys of the accused wasted no opportunity to force them into contradictions.[37] This was mostly futile, as the existence of the tape completely confirmed their testimony. The video recording underwent audiovisual expertise, confirming the integrity of its content and undermining the possibility of the accused to pose a united front and to deny any knowledge or participation.[38] In the courtroom, old relationships between accused *Scorpions*, grounded not only in veteran solidarity and criminal complicity, but also in childhood friendships and family ties, quickly deteriorated in the frenzy of mutual incriminations.

Gradually, from all the gathered evidence, the story came out. On 16 or 17 July, a bus operated by personnel from the ARS, loaded with an unidentified number of Muslim men and boys captured after the fall of Srebrenica, came to the *Scorpions* outpost in Trnovo. Unloading six men and boys, the ARS officer assigned them to Medić, referring to them as 'packages', explained they were to be executed, and continued travel with the rest. It remained unclear if Medić consulted his superiors before assigning a group of his trusted men to carry out the execution and ordering a cameraman to tape it. The execution was carried out near the abandoned weekend house in an exceptionally cruel manner. The victims were driven there by the truck, beaten and insulted on the road, lined up on the ground and made to wait for the cameraman, whose battery ran out, to return with a new one. Continuously insulted, refused even a sip of water which they pleaded for, they were taken off the road. Four of them were made to walk in line and were executed one after another. The two remaining victims were made to carry their bodies into the house, where they were shot as well. The executioners returned to the command post and informed Slobodan Medic that the job was done. Soon the unit was withdrawn from Trnovo. The tape was shared by other *Scorpions* members, multiplied in Šid and periodically watched by a number of persons making it even to the local video store *Laser*.[39] However, the entire affair remained dormant until the 1999 massacre in Kosovo became a subject of judicial interest. The tape was finally unearthed due to the internal discord among the *Scorpions*, as not all of them obeyed Medić's instructions to destroy their copies.

The evidence mounted during the trial, which lasted from December 2005 until April 2007, when the judgment was rendered. Four out of five defendants were

[35] *Škorpioni*, Testimony of Slobodan Stojković (345–359) and Duško Kosanović (440–448).

[36] *Škorpioni*, 401.

[37] *Škorpioni*, Testimony of witnesses Hana Fejzić, Safeta Muhić, Nura Alispahić, Osman Salkić, Semir Ibrahimović and Betko Delić, 278–317.

[38] *Škorpioni*, Forensic expertise on the tape, 534–558.

[39] *Škorpioni*, 151.

pronounced guilty of war crimes against the civilian population. Slobodan Medić got 20 years for ordering the murder, Branislav Medić and Pera Petrašević got 20 and 13 years for the executions and Aleksandar Medić 5 years for assisting in execution. Aleksandar Vukov was acquitted. After the appeal, the Serbian Supreme Court on 11 September 2008 confirmed the sentences of Slobodan Medić and Pero Petrašević, but reduced Branislav Medić's sentence from 20 to 15 years and ordered a retrial for Aleksandar Medić.[40]

The Aftermath of the *Scorpions* Video

On the face of it, the screening of *Scorpions* video reads as a showcase for the importance of extralegal aspects of international criminal trials and their didactic effects in particular. Indeed, on 1 and 2 June 2005 and in subsequent days it seemed that the wall of denial in Serbia came tumbling down. The events unfolded as if following pages from a transitional justice textbook: Screening of a shocking video material in the international courtroom was reported by the global media, taken over as breaking news by the media in the region, followed by a swift police action leading to a local judicial process, rounded off with the acknowledgment of the crime by leading politicians. No wonder that observers tended to describe the event in terms of a collective soul-searching process.[41] The *Scorpions* footage will undoubtedly enter the literature as an example of the transformative value of high-profile war crimes trials and the integration of their societal impact into courtroom management. In fact, it already has. Carla Del Ponte, Chief Prosecutor at the time of the ICTY screening, noted in her memoires: 'Slobodan Milošević was sitting in the dock, his face motionless [. . .]. In any case, if I were him at that moment, the despair would paralyze my soul [. . .]. Consciously, and what is even more important unconsciously, Milošević had to know that he will never be a free man again.' She also commented on the extrajudicial effect of the screening: 'Internet will make video-recording of the *Scorpions* available to anyone anytime, with a left click of a computer mouse, which will reduce Milošević's legacy to dust along the Bosnian road, right on the spot where these *Scorpions* murdered their victims, so certain in their impunity that they even bothered to record the crime, show their faces and faces of their victims in front of the camera, as if they are dancing on the wedding'.[42] A Human Rights Watch report also noted: 'Although the video was never admitted as evidence [. . .] it had an enormous impact on Serbia [. . .] sending shockwaves through society. The

[40] The full judgment in *Škorpioni*, 597–732.

[41] *The Guardian*, 'Serbia shocked by video showing Srebrenica shootings', 3 June 2005.; Allisa J.Rubin, 'Shattering images: Massacre prompts Serb soul-searching', *Los Angeles Times*, 15 June 2005.

[42] Karla Del Ponte, *Gospođa tužilac*, (Beograd: Profil, 2008), 307–308.

airing of the video engendered a great deal of national discussion, forcing people to confront the fact of atrocities they had previously denied.'[43]

Tempting as it might be to conclude that out of the sea of documents presented at the ICTY during the two decades of its activity, the greatest potential to move the hearts and minds of people in Serbia was displayed by this short video clip, one needs to scrutinize more deeply the actual nature of its impact. Otherwise, we run the risk to confuse what we want to see with what actually occurred. There are some solid empirics on the matter. The Belgrade Center for Human Rights and the Organization for Security and Co-operation in Europe (OSCE) have been conducting yearly surveys on public attitudes towards war crime trials based on a carefully chosen sample in Serbia. One was done in April 2005, shortly before the *Scorpions* screening and another in December 2006, well into the Belgrade trial of the members of the unit. The most striking feature of the results was the level of ignorance. Although a number of respondents who considered themselves informed about the activity of the ICTY and national war crimes prosecution increased (from 27 % in 2005 to 43 % in 2006 and from 24 to 50 %, respectively for ICTY and national courts), when asked to name a single trial which was conducted in Belgrade in 2006, 59 % respondents were unable to do so. Only 6 % knew that something in relation to Srebrenica was going on. However, even the respondents who knew about the *Scorpions* trial had problems to connect it to Srebrenica. When asked to respond if they heard that a large number of Bosniak civilians were killed in Srebrenica, 72 % responded they had heard about it in 2005 and 71 % in 2006. When asked if they believe in what they heard, both in 2005 and 2006, exactly 50 % answered positively. When asked if they consider it a crime, only 42 % in 2005 and 43 % in 2006 answered affirmatively.[44] Therefore, one can only conclude that the initial dramatic reaction of indignation and outrage following the screening of the *Scorpions* video, no matter how genuine, was short-lived.

To account for those results, one needs to turn to the mechanics of transitional justice and the way it unfolded in the *Scorpions* case. The screening of the *Scorpions* video was an outcome of a complex interplay of key actors—international and national legal institutions, the state institutions, NGOs and politicians, global as well as local. They have worked towards specific, often contradictory aims and often with opposing interests. But this particular case seemed to serve them all well, despite their differences. By the virtue of example, on 1 June 2005, immediately after the ICTY screening of the video, Nataša Kandić demanded in vain that the director of Serbian national television screen it too. He insisted that she supply him with comparably

[43] Human Rights Watch, *Weighing the Evidence. Lessons from the Slobodan Milosevic Trial*, vol. 18, no. 10 (December 2006), 14.

[44] Cf. Surveys of Serbian public by the Belgrade Center for Human Rights and OSCE for the period both before and after the release of the Scorpio footage, available at http://english.bgcentar.org.rs/index.php?option=com_content&view=article&id=406:attitudes-towards-the-international-criminal-tribunal-for-the-former-yugoslavia-icty-&catid=103. Regrettably, people were not asked if they think that Serbia or its police forces were in any way related to or responsible for murders in Srebrenica or whether they consider this crime an act of genocide.

grim visuals of crimes committed against Serb population, to screen in parallel.[45] The day after, he readily allowed the screening of the video, as the *Scorpions* were already in jail and Serbian leading politicians were condemning the crime, rubbing elbows with the ICTY Chief Prosecutor Carla Del Ponte who had just arrived in Belgrade.

So what happened overnight? With many details still unknown, it appears that the swift reaction of Belgrade police, politicians and media could to a large extent be attributed to a local political context, with its key players finding benefits in the arrest of the *Scorpions*. Serbian president Boris Tadić used the occasion to fortify his image in the international community and in the region, as his condemnation of the war crimes correlated with a visit to the 10 years commemoration at the Potočari complex near Srebrenica in July 2005. On the wings of the *Scorpions* arrest, potential political losses of his visit to Bosnia on the home front were minimized, whilst he earned applause in the US Congress, 'for the courage and humility he displayed by attending the commemoration of the tenth anniversary of the Srebrenica massacre'.[46] At a more technical level, the arrests of *Scorpions* members were also welcomed by the local war crimes prosecuting institutions, for which the issue of *Scorpions* was a publicity heyday, earning them over 700 articles in the media in June 2005, as opposed to the usual 200–300 monthly mentions.[47] Even the conservative Serbian prime minister, Vojislav Koštunica, conceded to the prosecution of the *Scorpions* executioners as a measure to impress Carla Del Ponte, his head of secret police running to a meeting in sweatshirt and jeans, apologizing that he was hunting *Scorpions* all night long.[48] Behind this diligence, there was an attempt to appease the demands from the international community to extradite much more highly ranked indicted persons, such as Radovan Karadžić or Ratko Mladić, to the ICTY. Uneasily as it might be, the key actors' interests matched up.

But this agreement was temporary. Initial readiness of Serbian politicians to do some 'housecleaning' by dissociating themselves from the direct perpetrators of war crimes soon withered away, as the trial of *Scorpions* threatened to reveal much more unpleasant information about the wartime role of Serbia and its state institutions. The evidence appeared to indicate that besides being enlisted in the security apparatus of Republika Srpska Krajina, the Serbian proxy state in Croatia, the *Scorpions* also belonged to the Ministry of Interior of Republic of Serbia, or more plainly, were part of the Serbian police force. One is tempted to conclude that the court was unwilling to probe further in these directions for a particular reason: Simultaneously with the Belgrade trial, another proceeding was unfolding in The Hague, this time in front of the International Court of Justice (ICJ), where Bosnia and Herzegovina sued Serbia for violating the Genocide Convention during the war, by both committing

[45] *Škorpioni*, 8.

[46] Congressional Record Volume 151, Number 93 (Tuesday, July 12, 2005, http://www.gpo.gov/fdsys/pkg/CREC-2005-07-12/html/CREC-2005-07-12-pt1-PgE1471-3.htm.

[47] Tužilaštvo za ratne zločine Republike Srbije, *Drugi o nama*, http://www.tuzilastvorz.org.rs/html_trz/DRUGI_O_NAMA/DON_2005_06_00_LAT.PDF.

[48] Karla Del Ponte, *Gospođa tužilac* (Beograd: Profil, 2008), 309.

and aiding and abetting genocide on the Bosnian territory. There was a risk that full disclosure in the *Scorpions* case and especially their ties to Serbia, as well as full assistance in the ongoing cases in the ICTY, could strengthen the Bosnian case before the ICJ with unforeseen, but undoubtedly grave consequences for Serbia. This risk probably played a decisive role in determining the reduced, almost myopic scope of the trial in Belgrade.[49] The murder of six Muslim men and boys was tried as a totally isolated case, unrelated to the Srebrenica genocide, despite the continuous effort of the team of the Humanitarian Law Center representing the victims to call upon additional witnesses and introduce additional evidence.[50] All the possible questions that could have connected those six murders to Srebrenica remained unanswered and sidetracked, allowing for a gradual decontextualisation of the crimes and the proceedings.

On 26 February 2007, the ICJ ruled that Serbia did violate the Genocide Convention, not for perpetrating genocide but for not preventing it and for the lack of willingness to prosecute those responsible.[51] This added another brick to the wall of denial that was steadily being rebuilt, though with different material. Public discourse quickly accommodated the presence of the evidence of crimes, with the absence of willingness to confront one's responsibility. On one level, there was occasional doubting of the authenticity of the video material and twisting of its context.[52] Although such blatant denial was never mainstreamed, it was falling on fertile ground. Already in an opinion poll conducted 10 days after the release of the footage, one third of the respondents considered the footage a fake.[53] However, such attempts were more or less efficiently counteracted by civil society campaigning. On the occasion of the first judgment of the Belgrade trial, the Humanitarian Law Center made a documentary entitled *Scorpions—a home movie*, including footage with testimonies of two repentant *Scorpions* members.[54] As blatant negation of the content of the tape did not deliver lasting effects, disputing its context became a much more powerful tool of demobilising civic reactions. On that level, the public

[49] A similar explanation for the nature of the cooperation of reformist authorities with the ICTY was given by Karla Del Ponte, *Gospođa tužilac* (Beograd: Profil, 2008), 207.

[50] Many motions of HLC for calling witnesses and introducing other evidence were denied (*Š*korpioni, 613–614). On the other hand, wartime Deputy Interior Minister of Republika Srpska Tomislav Kovač (Skorpioni, 448–520) and Milan Milovanović (*Š*korpioni, 559–574), Deputy minister of Defense of Republic of Srpska Krajina, were called as witnesses on the trial and did their best to explain that documents connecting *Scorpions* to the Ministry of Internal Affairs (MUP) of Serbia (*Š*korpioni, 521–528) were doctored.

[51] International Court of Justice, Bosnia and Herzegovina vs Serbia and Montenegro, *Case Concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 26 February 2007.

[52] See Nebohsa Malic, 'Deaths, Lies and Videotape', http://www.antiwar.com/malic/?articleid=6275; JulijaGorin, 'Serbs, Lies and Videotape', *Frontpage Magazine*, http://www.freerepublic.com/focus/fnews/1424168/posts; Milan Bulajić, '*Srebrenica*—Outline for revision of the ICTY judgment on genocide', http://guskova.ru/misc/docs/2004-may.

[53] Beth Kampschror, 'Serbs divided over grim video', *Christian Science Monitor*, 15 June 2005.

[54] Humanitarian law Center—*The Scorpions: a Home Movie* http://www.hlc-rdc.org/?p=14360&lang=de.

was served by a number of obfuscating assertions about the incidental nature of the taped crime, about a number of crimes against Serbs which remained unseen and hence unpunished, about the catastrophic effects of the potential establishment of the Serbian state responsibility for genocide, etc.[55] When all was said and done, the impression was created that *Scorpions* were a loose paramilitary formation of 'dogs of war' under a dubious chain of command, the top end of which was most definitely not in Belgrade. There was no readiness to take *Scorpions* for what they were—a unit for special operations, organized, funded and in all probability controlled by the Serbian security apparatus. To be sure, civic activists continued to hammer at the unpleasant questions, but this was rather in vain, as anaesthesia had already spread through the society.

Even if unintended, the long-term effects of such strategies of denial are downright worrisome. The regular survey on public attitudes towards war crimes in Serbia, repeated in 2009, revealed that although a larger percentage of respondents (77 %) heard that many Bosniaks were killed in Srebrenica, only 46 % believe it to be true and only 39 % think of it as war crime.[56] According to another poll, in 2010, only 30.5 % of respondents believe that there were atrocities against Bosniaks/Muslims in Srebrenica and only 1.4 % labelled it genocide. Another 30 % claimed they did not know about it; 1.5 % consider Srebrenica to be a crime staged to blame the Serbs and 2.8 % thought it to be a massacre of Serbs.[57] This is astonishing if one keeps in mind that Srebrenica remains among the best-documented atrocities ever and its perpetrators have been on trial at the ICTY from 2001 onwards. In many of these cases, the *Scorpions* video was properly introduced as evidence, from Beara and Tolimir to Stanišić and Simatović, as well as in the ongoing processes against Radovan Karadžić and Ratko Mladić.[58] However, the weight of legal evidence simply does not cut through the powerful obstructions of the political context of denial in Serbia.

When asked in 2009, 'do ICTY proceedings contribute to the establishment of truth about what happened in the wars in the former Yugoslavia', 54 % of respondents in Serbia said 'no, because the truth will never reach the general public'. Another 35 % were of the opinion that this contribution would be only partial and utilitarian. In addition to that, 58 % of the respondents find the ICTY judges biased. The impression is that the majority Serbian population cannot wait for the Tribunal to shut its doors. Serbia is also divided on what comes next—46 % respondents think the trials

[55] Gradual decontextualizing of the crimes of Scorpions and public statements to that effect are analysed in Helsinski odbor za ljudska prava, Slucaj Skorpioni http://pescanik.net/2008/09/slucaj-skorpioni/See also Sabrina Ramet (2007).

[56] Belgrade Center for Human Rights and OSCE, 2009.

[57] Dubravka Stojanović, Radina Vučetić, Sanja Petrović Todosijević. Olga Manojlović Pintar, Radmila Radić, Novosti iz prošlosti. (Beograd: Beogradski centar za ljudska prava, 2010), 153.

[58] Sense Tribunal, 'Wolves' and 'Scorpions' at Ratko Mladic's Trial 19.04.2013, http://www.sense-agency.com/icty/%E2%80%98wolves%E2%80%99-and-%E2%80%98scorpions%E2%80%99-at-ratko-mladic%E2%80%99s-trial.29.html?news_id=14880.

should continue in Serbia once the ICTY is closed; 36 % think they should not.[59] A true measure of Serbia's ability to publicly articulate these trends was a Declaration of the Serbian Parliament from March 2010, brought with an extremely narrow majority (127 out of 250 members of Parliament), as a condition in the process of European integration. The Declaration condemns 'a crime committed against Bosniak population of Srebrenica in July 1995', but expressing reciprocal expectations.[60] To make the situation worse, one senses a certain amount of a boomerang effect in the ICTY itself. Hailed only a couple of years ago for shrinking the space for denial, this aspect of ICTY's work seems to have eroded with the gradual winding down of the Tribunal since 2010. A number of acquittals of highly ranked accused, including the Secret Police bosses, Jovica Stanišić and Franko Simatović, disentangled from the *Scorpions* by the ICTY due to the lack of evidence in May 2013 is a case in point.[61] In the meanwhile, in Serbia, on the last day of 2013, there was a shocking news that Slobodan Medić, ex-commander of *Scorpions*, was killed in a car crash with his wife and son, while driving back to a prison from a holiday leave. The tragedy revealed that he was serving his prison sentence under privileged conditions, and has caused loud, but short lived public outcry. All in all, there is a feeling that Serbia is entering 2014 with war crimes becoming old news.

Against this background, one is forced to conclude that the screening of the *Scorpions* video indeed was a crack in the wall of denial in Serbia, but remained no more than that. What initially appeared as a cathartic process of facing the darkest side of the recent past in the region was cut short. The intermediaries, including governmental and nongovernmental leadership in Serbia and abroad, national and international legal institutions as well as global and local media, whose mutually favourable constellation proved crucial for the initial public reception of the video, were equally instrumental in dismantling any lasting effects. Each cultivating its own contradictory visions of dealing with the atrocious past, these actors served as a powerful filter for production and dissemination of evidence, struggled to retain control over the seeming spontaneity of the process that the video seemed to have triggered. That said it is certain that this bleak situation would look even bleaker if it were not for the *Scorpions* screening. Indeed, both the ICTY and national trials have succeeded in proving the guilt of the immediate individual perpetrators and to secure confirmation of the authenticity of the video beyond reasonable doubt. The space for denial has shrunk that much. However, it still remains wide enough for local actors vested in exploiting a basic cognitive dissonance of the post-atrocious surrounding of former Yugoslavia. Rather than a coordinated effort to enforce justice, juridical reactions to Yugoslav wars—at the ICTY, the ICJ and Serbian and Bosnian courts

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[59] Belgrade Center for Human Rights and OSCE, 2009 http://english.bgcentar.org.rs/images/stories/Datoteke/public%20perception%20of%20icty%20and%20the%20national%20courts%20dealing%20with%20war%20crimes%20serbia%202009.ppt.

[60] Peščanik, Deklaracija o Srebrenici, http://pescanik.net/2010/03/deklaracija-o-srebrenici-2/.

[61] ICTY, Cases Stanišić and Simatović, Judgment. The impact of the trials was subject of *Diane Orentlicher, Shrinking* the *Space for Denial. The Impact of the ICTY in Serbia*, (New York: Open Society Justice Initiative, 2008).

—resemble a battlefield in which the armed conflict continues through legal means. 'This does not mean, of course, that all attempts to arrive at the truth in criminal trials are doomed, much less that we should abandon them', observes David Chuter soberly: 'It means rather that we must stop loading onto the shoulders of justice requirements it is not suited to meet and that we should be modest in our expectation of what incidental clarifications justice can achieve (Chuter 2003).'

Lowering the high expectations one understandably seeks from the legal system means both saving oneself from a lot of disappointment and opening up the space for the proactive role of other social actors to wrestle with the issues of political and moral responsibility for the crimes of recent past. Evidence as striking as the *Scorpions* tape indeed creates a link between legal, political and moral dimensions of the case, but the links are not straightforward. The material displayed in the courtroom acquires a complex afterlife outside of it. Therefore, as much as the events surrounding the release of the *Scorpions* tape indicate that the extralegal effects of the trials are valuable and potentially crucial ingredient of social change, they also indicate that no matter how well conceived or timed, their consequences are neither fully predictable nor controllable. No matter how authors who abhor pedagogical functions of the trials dislike it, the extralegal aspect is simply here to stay. No matter how much hope other authors vest in the extralegal effects of trials and their didactic utilization, what we face is random effects which are up for grabs in an ongoing battle of context-specific interpretations of past events and their meanings.

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Chapter 6
Tracing Dialogue on the Legacy of War Crimes in Serbia

Eric Gordy

Twelve years after the fall of the regime led by Slobodan Milošević and 13 years after the last major conflict in the wars of Yugoslav succession, several fundamental questions related to Serbia's transition to democracy and to the development of peaceful relations within the society and reconciliation with its neighbours remain unanswered. Beyond basic factual dispute over the character of the violence that took place and the number of victims, there is passionate disagreement over questions of responsibility, over the degree to which the state or the public is involved in or obligated by the historical record, and over the question of what kinds of responses are sufficient. The debate expands into what could be thought of as the moral realm, considering whether the public can be conceived of as identifying with victims or with perpetrators, and whether the effort to 'confront the past' (as the widely used and varyingly understood phrase has it) addresses a genuine social or political need.

The lack of consensus and resolution may not be so surprising. From the beginning, there existed little popular demand for confrontation; almost everything that has been done in the field of transitional justice has been undertaken in response to external pressure and conditionality. In the second place, there exists no real historical precedent for the expectation that a society recently emerged from violence would produce both institutional and cultural accounts, and do so both willingly and quickly. While post-World War II Germany is frequently (and controversially) cited as a comparative case, it may be worth noting that a large-scale discussion of social responsibility and a concerted engagement with the past did not begin there at the moment of defeat in 1945 or with the operation of an international military tribunal there shortly afterward, but with the engagement of domestic institutions, activists and intellectuals in the following generation (Maier 1997). Similarly, the Armenian genocide remains a subject of energetic denial including legal restrictions in contemporary Turkey, (Hovanissian 1999) while 20 years after the events, accounts of the Rwandan genocide remain distorted by a sustained practice of 'victors' justice'

E. Gordy (✉)
School of Slavonic and East European Studies, University College London,
16 Taviton Street, Room 323, London WC1E 6BT, UK
e-mail: e.gordy@ucl.ac.uk; eric.gordy@gmail.com

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(Peskin 2005). It might be fair to say that at the moment of regime change in Serbia in 2000, the project of accounting for the past carried high hopes, but that these hopes were only weakly supported by precedent and scantly accompanied by conceptual clarity with regard to what was involved.

In the decade after 2000, Serbia provided a unique opportunity to observe a process of transitional justice and to trace successes and failures, advances and reversals, and obstacles and disputes that emerged along the way. The development of the discourse is traced here principally through discussion in popular media of three highly charged events related to public memory of the recent past. These three 'moments' were incidents where a dramatic event or the emergence of new information appeared to have the potential to move public understanding dramatically forward. Each of those 'moments' saw less movement than could have been anticipated at first. The principal reason that effects were limited was the engagement of various actors—in media, politics, and culture—to deny, recontextualize, or trivialize the dramatic events and information.

The dialogue did not simply take place between two opposed and unchanging forces. Rather the discourse of denial functioned creatively: Unanticipated issues were raised, boundaries of debate were shifted, and arguments were refined. Consequently, although a discourse of denial has persisted since the Milošević period, its shape has changed. While denial of established facts remains a marginal phenomenon, the discourse has migrated from denial of facts to dispute over their meaning, and contention over the authority to present facts. It is a matter of standards and interpretation whether this constitutes meaningful movement or not. Much of the existing literature on public memory of atrocities provides little ground for understanding the migration of contention from the factual to the significatory: Stanley Cohen's influential work, (Cohen 2001) for example, develops multiple modes of acknowledgement but generally confines denial to denial of facts. The examination here proposes that the migration of denial traced through the 'moments' indicates a partly failed and partly achieved effort of accounting for the past, which leaves visible traces in Serbian society.

Goals and Ambitions of Transitional Justice

The existing literature on transitional justice in Serbia has been almost entirely concerned with legal or political analysis. That is to say that mostly researchers have sought to answer either questions like what facts have been demonstrated and what precedents set or broken in law, or else they have sought to answer questions like why states comply with demands to participate in transitional justice initiatives. A much smaller proportion of the literature has been concerned with social meanings and discourses or has sought to treat such commonly used phrases as 'truth' or 'confrontation with the past' independently of the context of benchmarks for conditionality, where they appear most frequently in international and domestic politics.

And yet the environment of transitional justice demands such an approach. Although it is a process that (usually) operates within a legal framework, it has the explicit purpose of achieving political goals that have visible social and moral content. Consequently, theorists of transitional justice are explicitly concerned with social and political meanings. Mark Osiel presents human rights trials as sites of contestation, where an exchange takes place and a determination is made regarding the understanding of history:

> As ritual expressions of collective conscience, trials for administrative massacre have decidedly not been simple and unmediated reflections of moral sentiments already universally felt within the society toward the accused [. . .] [T]he criminal courtroom will inevitably be viewed by all concerned as providing a forum in which competing historical accounts of recent catastrophes will inevitably be promoted, in search of authoritative recognition, and that judgments will inevitably be viewed as endorsing one or another version of collective memory (Hesse and Post 1999).

Similarly, Ruti Teitel considers the diffusion of verdicts and their eventual repercussions in popular consciousness, introducing a new element that is both epistemological and moral in character:

> Making the truth 'official' presumes a degree of democratic consensus; yet, in transition, democratic processes are often not fully consolidated, with implications for the authority and legitimacy of transitional production of knowledge. In transitional truth-telling, accordingly, there is a concerted attempt to make historical and political accountability converge [. . .]. Consensus on the history produced is predicated on the truth's dissemination and acceptance in the public sphere. [. . .] For what is at stake is a contested national history (Teitel 2000).

The implication here is that large ideas like truth, history, and the character of the past are fundamentally contested but eventually capable of resolution. More evidence confirms the premise that they are contested than the premise that they are capable of resolution.

In Serbia, as in the other countries of the former Yugoslavia, most people would readily agree that the recently ended past was a uniquely painful period which caused long-lasting damage, and that any effort to overcome the difficulties which remain would have to involve some symbolic declaration that this period has ended and an effort to understand more fully what was involved. Here, the consensus probably ends. There are inescapable controversies involving questions like identifying when the past to be broken with begins, which victims and perpetrators need to be affirmed, what elements of the past are to be accorded the greatest importance, whether legal mechanisms of attributing guilt or social mechanisms of developing responsibility respond to the needs of the communities involved, and, finally, who has the authority to offer conclusions on any of these questions.

While all of these questions are urgent, they can only be answered through a political process which is bound, for many reasons, to be both contested and slow. Powerful international actors, in their efforts to produce a quick answer (of a particular nature) through intervention might bring about the unintended effect of preventing any sort of conscious 'break with the past' from occurring at all.

One of the reasons that legal instruments backed by political conditionality tend to produce at best incomplete effects derives from the tendency to reduce questions

of substantive justice to formal, quantifiable benchmarks, like the delivery of indictees or documents (Subotić 2009). Another set of reasons has to do with sensitive issues particular to the Serbian environment but not necessarily of much concern to international actors. These include questions of balance and 'comparative victimization', and the perception that charges applied against members of one national group should be accompanied by equivalent charges applied against others. They also include questions of the structure and organization of violence and the scope of potential political responsibility, which could conceivably result in the diffusion of attribution of guilt well beyond a mostly consensually agreed list of prominent figures. More broadly, a chronic source of controversy bears directly on questions of collective identity and the chimera of 'collective guilt', as there exists no consensus in Serbian society on the legitimacy and character of the wars of the 1990s or the question of whether the commission of crimes constituted an essential element of war goals or occurred incidentally.

Receptivity of the Public

In early 2001, shortly after the fall of the Milošević regime, public opinion research indicated that readiness for intensive interrogation of the recent past was mixed and uncertain. Of course, any number of factors might have contributed to contradictory survey findings in 2001. The preceding period was characterized by genuine uncertainty and fear, and also by extensive propaganda and, especially throughout 1999 and 2000, a closely controlled media. The North Atlantic Treaty Organization (NATO) bombing campaign in 1999 also contributed to a widespread feeling of victimization that was mostly neither artificial nor a product of media propaganda. In his final address as president, Slobodan Milošević hit upon a formulation that proved to have meaningful popular resonance over time: *'Ne napadaju oni Srbiju zbog Miloševića, nego napadaju Miloševića zbog Srbije'* (They are not attacking Serbia because of Milošević, they are attacking Milošević because of Serbia).[1] In short, there were many reasons why people might be hesitant about a vague and broad demand, and many reasons why the demand might have been perceived as an unwelcome and ideologically charged burden.

At the same time, the posture of trepidation was hardly monolithic. At least on a small scale, public discussions on questions of responsibility began at the same time the war began, mostly as private initiatives or as efforts on the part of independent (and generally small) groups of intellectuals. These included antiwar groups as well as public intellectuals and documentation and legal advocacy nongovernmental organizations (NGOs). Further contributions were made in independent media, including both popular media and some academic journals. However, the debate could not reach a wide audience, partly because of restricted access to media, and partly because the fresh experience of war (combined with mostly one-sided information about the war) did not prepare many members of the public for an open discussion.

[1]The line came in his televised address to the country after his electoral defeat. The full text of the address is available at Unsigned, 'Milošević napada lidere DOS', B92 vesti, 2 October 2000.

For many reasons, a country recently emerged from war and dictatorship and uncertain about what will follow does not offer a conducive environment for measurement of public opinion by surveys. The most reliable surveys ask familiar questions in a stable environment where little depends on the answer—the results of marketing surveys on brand preference can be taken with more confidence than those of political surveys on controversial issues. Asking about public memory in Serbia in 2001 meant raising new issues with which respondents were likely to be highly emotionally engaged, a sense that some answers could be understood as threatening or objectionable, and a lack of security as to what changes in public memory would mean. There exists every possibility that surveys produced mixed results because public opinion was either in the process of change or in the process of formation.

Nonetheless, a look back at the opinion in 2001 seems to offer some guidance for understanding events thereafter. The May 2001 survey[2] by the Strategic Marketing agency indicates, unsurprisingly, high levels of distrust toward International Criminal Tribunal for the former Yugoslavia (ICTY) and toward members of other national groups, and low levels of preparedness for 'reconciliation'. At the same time the survey results suggested the softness of those positions. Respondents did not believe that they were well informed, or that their fellow citizens were well informed. Paradoxically, feeling badly informed did not prevent people from having an opinion.

On questions related to responsibility, respondents showed a marked tendency to project responsibility onto factors far from themselves. When asked to name the most important reason for NATO intervention against the Federal Republic of Yugoslavia in 1999, 29.8 % named 'the policy of the Milošević regime', while 55.2 % identified the 'interest of the West'. The factor of distance was transferred to comparative scales as well. When asked to choose between two options for 'guilt for misfortune', respondents named Slovenes (45.3 %) more than Serbs (10.8 %), the USA (27.3 %) more than NATO (25.2 %), the 'international community' (44.8 %) more than 'all the peoples of the former Yugoslavia' (20.5 %), Milošević (42 %) more than 'the people who elected him' (17.6 %), and the interests of international business (53.7 %) more than the interests of domestic business (11.2 %).

The results also suggested that the influence of new information was likely to be severely limited. To the lengthy question, 'Has it ever happened that a new fact which you have learned from any source about any event related to the conflicts (wars in Croatia, Bosnia-Herzegovina, Kosovo) caused you to change your thinking or position about the role (responsibility) of the warring sides?', an overwhelming 85.5 % answered negatively.

These results seem to suggest that even among people who were dissatisfied with their own level of information, largely self-serving and more or less fixed views had taken root. However, on questions about trust and sources of information, a slightly different picture begins to emerge. People identified their primary sources of information during the war period as follows:

[2]All references to survey results in the section that follow are to Strategic Marketing, 'Vidjenje istine u Srbiji', May 2001.

Radio Television of Serbia (RTS)-TV/state media	80.4 %
Independent papers (*Blic, Glas, Danas*)	67.9 %
Stories of witnesses	62.3 %
Stories of relatives	45.5 %
State-controlled papers (*Politika, Ekspres, Novosti*)	43.1 %
Independent radio/TV (ANEM, B-92)	42.4 %
Personal experience	17.4 %

When asked what sources of information they trusted, the structure of responses was different:

Source	Trusted (%)	Did not trust (%)
RTS-TV/state media	23.2	42.5
State-controlled papers	28.8	36.5
Independent papers	44.7	17.9
Independent radio/TV	62.4	16.2
Relatives	68.6	16.2
Witnesses	62.2	15.4

The disjunction here—people used most the sources they trusted least—suggests that public opinion was potentially open to new information and to change, but whether this happened would depend on the existence of factors contributing to trust: open dialogue, credible sources, engagement of institutions and individuals that enjoyed high levels of confidence, and encouragement of shared storytelling on a public level. In an environment where all institutions, especially political ones, enjoyed remarkably low levels of public trust, these conditions were never very likely to obtain.[3] As events developed, such an outcome became less probable. The process instead came to be characterized by displacement of responsibility, mandates from above, formalism, and discourses confined to an elite. The general lack of public participation did little to address the fear that a finding about crime might constitute a finding against 'the whole people'.

Three Moments

Inconclusive and contradictory findings in public opinion surveys may indicate that public opinion related to the sensitive topic of public memory was in formation and subject to negotiation. My research sought out incidents where the negotiation of memory took place publicly, and where visible shifts (not all of them fundamental and some of them small) in the contours of discussion took place. These incidents are 'moments'—points at which new information or dramatic events opened a window

[3]Levels of trust were higher in pre-political institutions—like the Church and the military—than in political ones. But for many reasons, these institutions were themselves unprepared to engage in dialogue.

to reconsideration of a view that had up until that point been dominant. I then trace exchanges that took place around those 'moments' as indicative of negotiation around public perceptions and understandings. The three moments examined here are: (1) the arrest of Slobodan Milošević at the beginning of April 2001, marking a symbolic end to his protected status and position of dominance; (2) the murder of Prime Minister Zoran Djindjić in March 2003, opening a broad popular consideration of the links between regime-sponsored crime occurring in the context of armed conflict and ordinary crime occurring in the everyday social environment; and (3) the broadcast in June 2005 of an amateur film showing the execution of civilian prisoners in Bosnia by members of a paramilitary unit controlled by Serbian security services, at a time concurrent with the genocide in Srebrenica in 1995. Considered together, the three moments indicate the contours of sustained disagreement and also suggest that the discourse of denial has altered shape over time, moving from crude denial of facts to a more refined effort to recontextualize events and to redefine their meaning.

Moment 1: The arrest of Milošević

Between 7.00 p.m. on Friday, 30 March and around 4.35 a.m. on Sunday, 1 April a series of events and small confrontations developed that ended with the former president Slobodan Milošević being placed in pretrial custody in a Belgrade prison. Although domestic charges against him would never be clarified and he would never face a domestic court, this incident may be understood as marking the moment at which the former ruler was neither untouchable nor invincible.[4] Prior to this date, he had been received for a meeting with his successor Vojislav Koštunica as leader of the main opposition party, and several government officials had argued in public that they could not order an arrest or investigation without compromising the independence of law enforcement or the judiciary. Not much official effort was exerted to downplay the fact that his arrest coincided with a deadline that international actors had imposed for Serbia to take action or face a suspension of economic aid.

Public statements as the events were occurring were rare and quite general in character. Federal President Vojislav Koštunica denied knowing anything about the events.[5] Federal Premier Zoran Žižić declared that the arrest was not under his jurisdiction.[6] Prime Minister Zoran Djindjić told reporters that he had not been following the events, but had been watching a film with his son. People outside the government were not so reticent. There were voluminous postings in the 'comments

[4]It may also have been possible to choose 28 June 2001, when Milošević was transferred to the custody of ICTY. I chose the earlier date because: (a) the events were carried out publicly rather than secretly, (b) it marked the first dramatic break from the protected status enjoyed by the former ruler, and (c) the events as they took place were less anticipated, and hence 'newer' as a catalyst for discourse.

[5]Koštunica's comment 'I am not informed' (*nisam obavešten*) came to mark him for a long time thereafter, with detractors calling him 'Mister Uninformed' (*gospodin Neobavešteni*).

[6]Unsigned, 'Test za novu demokratsku vlast', *Danas,* 2 April 2001.

on the news' section of the website of Belgrade's B-92 radio. This section invites readers to respond to news items, and responses are published on a page linked to the original article. What follows is a categorization of several of those comments as a broad picture of the responses people shared about the arrest.[7]

Over the 34 hours that it lasted, the process of arrest was beset by confusion and small confrontations. The police and Milošević's personal military guard and private security had minor clashes, media and official sources appeared confused, and there were some brief gestures of heroism on the part of Milošević's supporters and relatives.[8] Although the arrest was eventually carried off without major violence, this outcome did not appear certain as it was ongoing.

The confusion resulted in speculation as to whether the incoming regime had the power to engage in a test of dominance with the remnants of the outgoing one. The uncertainty raised the question of whether the new government would be able to deliver on its promised rule of law, or whether it remained subject to influential informal powerholders. The prospect that extralegal power continued to outflank law enforcement provoked bitter responses:

> Aleksandar, 31 March Milošević is not God above all people and law that he can resist arrest.
>
> Beogradjanin u Washington DC-u, 31 March][he came to power in] 1986, and now 15 years later he is still laughing in all our faces.

The theme of incompletely established legal authority emerged strongly with these events and would continue to characterize discussion as time went on.

More controversial than the question of whether Milošević would eventually be arrested was the question of what he should be arrested for. Public officials avoided clarifying this point, aware that the subsidiary questions it raised were sensitive ones involving whether international oversight should be accepted and of whether people in Serbia, or elsewhere, had the most legitimate claim to being Milošević's victims. In fact, the government's indictment against him was modest, charging him with embezzlement, theft, and abuse of power—all relatively small offences falling exclusively under domestic law, in an attempt to discourage or, at least, defer international involvement.[9] Responses ranged from patriotic defences of his general innocence to derision for the narrow scope of the charges:

> Nenad, 31 March I don't regard him as guilty, he defended the homeland from a satanizing that was prepared in advance. He is a hero, not a traitor.
>
> BranislavZekićZeka, 31 March The fact that He has been arrested is very good news. But that he will be charged for embezzlement, building without a permit, and unpaid electric, sewer and heating bills . . . Garbage! That is throwing crumbs to us, because every honest citizen of Serbia has at least a few, more or less bloody, reasons to bring charges against our former president. I hope that he will be tried in Belgrade for all of the crimes he committed

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[7]All of the comments quoted in this chapter can be found at http://www.b92.net. They will not be cited individually. The translations are mine. Material of this type has to be treated as an indicative rather than as a representative sample, as participants in the discussion are self-selected volunteers.

[8]For a chronology of the events of the weekend, see Dokumentacioni centar Vremena, 'Privodjenje za narodnu zabavu', *Vreme,* no. 535, 4 April 2001.

[9]The text of the initial indictment filed against Milosevic on 2 April 2001 can be found at http://www.xs4all.nl/~freeserb/facts/2001/02042001.html.

> against his own people, for all the killings he ordered, for treason and theft and especially for all the things he is charged with by the Hague Tribunal.

Here, responses covered a range that would continue to be apparent in discourses over public memory, encompassing positions from a defense against any accusation on the grounds of the legitimacy of the war goals, to contentions that domestic victims and interests take priority over regional and international ones, to a general acceptance of the suitability of international law.

A lack of clarity as to what Milošević should be arrested for was accompanied by disagreement over where he should be tried. Here, considerable reserve toward the International Criminal Tribunal in The Hague is apparent. Concerns included not only a doubt about the fairness and objectivity of the Tribunal but also the broader fear that an international trial of a former president would amount to an imposition of collective guilt involving all citizens:

> VukVujović, 31 March Now, anybody who thinks about it even a little bit knows that he will be tried in The Hague as a former president, which automatically and immediately means that if he is found guilty, everything that the Serbian people did during the period when Milošević was president will be declared a crime. That means every commander or soldier who was on the battlefield will be a war criminal, every dead soldier will be a war criminal, and every mother who cried for her child will be a war criminal.

> siniša, 31 March Our country is in the condition it is in and one more betrayal or surrender of our citizen to The Hague, even if it is the former president, brings a bad image to all members of the Serbian nation. Our citizens should only be tried in our country for their actions. Any other decision is shameful and stamps us with recognition as a genocidal horde which only understands force and blackmail.

Rejection or fear of the Tribunal was not universally expressed, however. Alternatives included both the compromised propositions that should be tried for violations of both domestic and international laws and the optimistic formulation that tying guilt to specific individuals absolves ordinary citizens of collective guilt:

> aca, 31 March It would be best for us to offer some compromises to the West . . . first, that WE (the Serbian people) try and convict him, then after his 50th year of prison we send him to the Hague. Or even better, we should CLONE him . . . we're satisfied, they're satisfied.

> marko, 31 March Arrest that murderer, traitor and WAR criminal Milošević. Send him immediately to the Hague and that way we can remove the guilt from the whole Serbian people . . . just do that and show that you are for change, for a better future, for equality between people without regard to religion, nationality or political belief, don't forget that we are in the twenty-first century.

In each case, more was at stake in the arguments offered than an opinion of the Tribunal. Expressing perspectives on this question also involved articulating general orientations about the sovereignty, the nature of individual and collective responsibility, and the contested character of national identity.

The centrality of identity becomes clear when the commenters turn to commenting about one another. Here, a division emerges distinguishing the people who regard Milošević as the representative of Serbia from the ones who do not. Some of the anti-Milošević commenters raise questions of authenticity of experience, identifying Milošević supporters with a nationalist diaspora that is pictured as both more extreme

than the domestic population and also as uncaring and alien, not sharing the fate of people living in the country:

> Petar, 31 March I really enjoy the comments from people who see the arrest of Milošević as their own shame, and the people who think it is a shame 'for the whole Serbian people'. I am ashamed too, but only because this bloodsucker was arrested only after almost 15 years of robbing and pillaging a country that was once beautiful and that once had a future. I can only hope that this is the beginning of sobering up and real denazification, although I think that the job will never be finished, because I have the impression that what people hold most against Milošević is that he didn't succeed in creating Greater Serbia.
>
> Olja Bročić, 31 March If by Saturday morning that man is not on a helicopter to Scheveningen or in a Yugoslavian jail, I will ask for political exile in any foreign country, tear up my Yugoslav passport, and forget I ever lived here. I authorize RTV B92 to publish this statement as they choose and to forward it to the president of Yugoslavia and to the Ministries of Internal and Foreign Affairs.
>
> Zoran P, 31 March All the people who have gone to stand by Slobodan should do just that, they should be with him. I hope there is space for all those people.

A possible implication here is that conflicts over the character of public memory carry with them a division in perception as to what part of the population best represents the character and interests of the country.

The questions raised around the moment of Milošević's arrest set the framework for much of the debate that would develop in the years to come. In hindsight, we know that the arrest was followed by an extradition, involving a legal battle that weakened the government. We also know that the extradition was followed by a lengthy and inconclusive trial that served as publicity for Milošević and distraction for most other people. That is to say, we know that the process continued with irresolution and disorder. Some results of this became apparent in the second moment.

Moment 2: The murder of Djindjić

One of the consequences of the arrest and extradition of Milošević was the political isolation of Prime Minister Zoran Djindjić, regarded as most responsible for his extradition to the Tribunal. He was frequently described in the press as a traitor and accused of collaboration with international intelligence services and criminal organizations. People prominent in the former regime participated in the media campaign against him. In February 2003, Milošević's one-time information minister Aleksandar Tijanić predicted in a newspaper column, 'if Zoran Djindjić survives, Serbia will not'.[10] Shortly afterward, Tomislav Nikolić, the then vice president of Milošević's coalition partner the Serbian Radical Party, addressed a rally; referring to a sports injury Djindjić had received, he offered a darkly prophetic joke, noting: 'Tito also had problems with his leg before he died.'[11]

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[10]The line appears in *Nacional,* 1 February 2003. I have not succeeded in finding the original edition of the publication where it first appeared, but it is quoted in several places, including in Popović and Nikolić (2006, p. 217), and in JUKOM (2005). These two publications do not give the title of the article in question.

[11]Tito's left leg was amputated in January 1980, and he died in a hospital in Ljubljana on 4 May 1980.

Cooperation with the Tribunal had served as a focal point for challenges to Djindjić earlier. In November 2001, members of the State Security-commanded Unit for Special Operations (*Jedinica za specijalne operacije*, JSO) staged a rebellion at their base in Kula. The immediate pretext for the protest was the arrest of Predrag and Nenad Banović, former members of a paramiltary group commanded by JSO, on an ICTY warrant.[12] The case contributed to fear among JSO members that they could be charged and prosecuted as well.[13] They demanded the passage of a law protecting the rights of Tribunal indictees and the replacement of officials in the Interior Ministry and State Security service. The rebellion ended with most of the demands granted and a guarantee that JSO would not be ordered to participate in law enforcement.

JSO was also associated with Serbia's most prominent organized crime group, the 'Zemun clan', through its former commander Milorad Ulemek—Legija, who had been compelled to resign from state security in 2001. The media campaign against Djindjić intensified in early 2003, just as the government was preparing to launch Operation 'Witness', an assault on organized crime that would introduce a protected witnesses regime. Publicity was already being afforded to the expected lead witness, former 'Zemun clan' member Ljubiša Buha—Čume. Legija responded to the publicity in an open letter seeking to identify himself and JSO with patriotic sentiments, and to accuse Djindjić and his government of lacking them:

> I cannot but imagine that all this is the work of the same people, to whom nothing is sacred and who do not care a bit for anything that is Serbian! Not even for those who bled and whose dead bodies were spread across the battlefields and of whom all that remains is a modest memorial on a faded photograph in the room dedicated to our heroes in Kula. If you cannot and will not respect the former or the current commanders, at least respect the dead ones! Nobody, not even history, will forgive you.[14]

An unsuccessful assassination attempt against Djindjić on 21 February was followed by a successful one on 12 March. According to the initial indictment against the members of the JSO and 'Zemun clan', the conspiracy involved 'completely regulated "connections" with various personalities from state institutions, the police, the judiciary, the prosecutors' office, the Security Information Agency [BIA], with the president of the Serbian Radical Party Vojislav Šešelj, with military security commander General Aco Tomić, and with the entire command of the Unit for Special Operations'.[15] Following the murder the plan foresaw that 'the capital city should be massively covered with posters carrying the message "Stop the Hague"; that rumors should be released claiming that Djindjić was killed because of his criminal connections; that the government should be portrayed as a group of traitors with criminal connections.[16] Then as saviors and forces of order would appear the formations of

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[12]Predrag Banović admitted to beating 27 camp prisoners at Keraterm, causing the death of 5 of them. He received a sentence of 8 years from ICTY in 2003. The indictment against Nenad Banović was withdrawn and he was released in April 2002.

[13]In fact, aside from JSO founder Franko Simatović, ICTY has not charged members of JSO.

[14]'Jadna je zemlja kad Čume rešava tajne', *Blic,* 28 January 2003.

[15]The full text of the original indictment is available at http://sr.wikisource.org/sr/Optu%C5%BEnica_za_ubistvo_premijera_%C4%90in%C4%91i%C4%87a.

[16]E.H., 'Scenario haosa', *Politika,* 8 April 2003.

JSO. On the political front an idea would be proposed for the formation of some kind of "unity government" (its membership is not specified).'[17]

While the murder was carried out according to plan, the rest of the conspiracy was not. A state of emergency was declared, many of the conspirators were identified and warrants were produced for their arrest, and a large-scale operation set in action against JSO, major figures from the world of organized crime, and (some of) their political allies. In the course of the action, several outstanding criminal cases were solved—including political murders from the Milošević period. As the state of emergency appeared to be having effects across the spectrum of crime, the Interior Ministry released a statement confirming that:

> As this investigation goes on, police receive new information every day that clearly demonstrates that the murder of the Prime Minister of Serbia was part of a conspiracy comprised of the so-called patriotic forces led by war criminals, war profiteers, the patrons and inspirers of a policy of crime from the ranks of the parties of the regime of Slobodan Milošević. . . Those false patriots, in cooperation with criminal bands, above all the Zemun band, in the name of the couple [Slobodan] Milošević—[and his wife Mirjana] Marković, but also to meet the needs of [Marković's political party] JUL, [Milošević's political party] SPS and [Šešelj's political party] SRS, killed political opponents and people who disagreed with them, beat members of opposition parties and abused citizens who stood against them.[18]

Acting president Nataša Mićić described the activity of the crime groups as 'selling drugs to our children, and using the money from that for political activity, killings, and hiding from the Hague'.[19]

The investigation seemed to confirm, in a dramatically public way, that people involved in war crimes and people involved in organized crime were the same people and that an opportunity had emerged to address both. Writing in the semiofficial *Politika*, Ivan Torov demanded:

> That they finally, without hesitation and calculation, reveal that machinery of evil, that powerful symbiosis—created and nurtured since 1990—of politics, public and secret police, criminals, war criminals, profiteers and thieves. In short the humiliation and destruction of Serbia, all under the pretext of 'patriotism' and 'defence of national honor'.[20]

In the liberal *Danas*, Miloš Minić was more categorical still:

> The regime that was born on 5 October 2000 neither wanted nor dared to arrest those killers. Among other reasons this is because into the front lines of the regime broke some people who had assisted the leaders of Bosnian and Croatian Serbs during the war to put 'all Serbs in one state', in a 'Greater Serbia'. The regime never found the will, readiness or courage to break with that past. Only Zoran Djindjić had the courage to send Milošević to the Hague. That is why they killed him. If the government does not begin now to arrest the leaders of all the paramilitary formations, they will not achieve anything. The death of Zoran Djindjić will have been pointless. Now or never—they must do it. And not just to confront the 'Zemun clan of killers'.[21]

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[17] *Ibid.* See also E.B., "'Haško bratstvo" planiralo ubistvo', *Blic,* 8 April 2003.

[18] Unsigned, 'Zavera "patriotskih snaga"', *Politika,* 1 April 2003.

[19] Unsnigned (Beta), 'Nataša Mićić pozvala građane na jedinstvo', B92 vesti, 19 March 2003.

[20] Ivan Torov, 'Snajperski izazov', *Politika,* 16 March 2003.

[21] Miloš Minić, 'Vreme za obračun sa masovnim ubicama', *Danas,* 20 March 2003.

Popular responses appeared consistent. An opinion survey in March 2003 found that 73 % of the respondents supported the state of emergency.[22] An online commentator declared that with sustained action finally taking place against criminals it was not a 'state of emergency' (*vanredno stanje*) but a 'fantastically good state' (*izvanredno dobro stanje*).[23]

At the end of 42 days of state of emergency, the government declared that it had been a success:

> During the state of emergency and the police action 'Sabre' in Serbia, from 12 March to 23 April, over 10,000 people were arrested, of whom 4500 were kept in custody. 3700 criminal complaints were filed against 3200 people for 5600 criminal acts. Among those acts were 28 killings, 15 kidnappings and 208 cases of trade in narcotics.[24]

The perception of success would come under attack quickly, however, from Djindjić's political opponents. A premonition of the critique that was to come was offered by bishop Amfilohije (Risto Radović) at Djindjić's massively attended funeral on 15 March. His funeral address combined faint praise with harsh condemnation:

> In a moment when above the head of his people hung the sword of Pilate's justice—Zoran Djindjić set into motion the renewed flow of national and social life. The renewal of the unity of the state and of the state community of Serbia and Montenegro, of broken connections with the world. But, he was killed by the hatred of brothers, shortsighted and blind, which prophesies the eternal truth—he who lives by the sword shall die by the sword.[25] The suggestion that Djindjić had lived 'by the sword' and that his fate was deserved fit well with an effort to alter the terms of discussion and to put the criminals' victims on the same level as the criminals themselves.

Two theses dominated the campaign to displace the responsibility for Djindjić's murder. One argued that Djindjić had been killed because he tried too hard to please the West, provoking rage at home. Stojan Cerović accused 'Slobodan Milošević and Carla Del Ponte'[26] of killing him in his column in *Vreme*. A subhead in the daily *Večernje novosti* made the connection implicitly: 'The world's recognition—that there was too much pressure and conditionality placed on Belgrade even after 5 October—came too late.'[27] This line of argument revived the claims like those made by Legija that criminal groups advanced patriotic sentiments and government undermined them.

The second thesis was that Djindjić had not opposed organized crime but had rather taken sides in an internal conflict between the 'Zemun clan' and its rival the 'Surčin clan'. The planned role of 'Surčin clan' leader Čume as lead protected witness was understood as indicating the government's loyalty, with the prime minister suffering

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[22] SMMRI, 'Istraživanje javnog mnenja', March 2003, p. 3.

[23] 'Nino' in comments to the article 'Koštunica: Koncentraciona vlada je najmanje loše rešenje', B92 vesti, 17 March 2003.

[24] Aleksandar Roknić and Vuk Z. Cvijić, 'Mukotrpno dokazivanje krivice', *Danas,* 2–3 August 2003.

[25] Unsigned, 'Rana posred srca naroda', *Večernje novosti,* 15 March 2003.

[26] Stojan Cerović, 'Posle Djindjića', *Vreme* no. 637, 20 March 2003.

[27] D. Vujanović, 'Kajanje u senci haga', *Večernje novosti,* 17 March 2003.

as a predictable consequence. Parallel to this came a campaign by the party led by Djindjić's former coalition partner Vojislav Koštunica, who became a bitter rival after the extradition of Milošević. Koštunica argued that the state of emergency threatened 'complete lawlessness, the violation of all political, human and labor rights, and in the final instance anarchy',[28] and contended that it represented an abuse of the instruments of law enforcement to disqualify political opponents.

The government that succeeded Djindjić did not last out the end of 2003. The December 2003 elections produced a coalition headed by Koštunica, who proceeded to use the Ministry of the Interior to discredit the state of emergency. Incoming minister Dragan Jočić charged that the action had moved 'from the field of fighting against organized crime [and] entered into the sphere of political struggle and struggle against political opponents'.[29] The new government offered compensation to anybody who either had been arrested but not charged or against whom charges had been withdrawn.[30]

The claimants who received the largest awards turned out to be people who had been initially charged as conspirators in the Djindjić killing but left out of the later indictment which limited charges to people directly involved in the execution of the plan, leaving aside its development. The former president of the 'Republic of Srpska Krajina' Borislav Mikelić (named suspect #37) demanded 22.8 million dinars[31] and was awarded 620,000.[32] Koštunica's security advisor Rade Bulatović (held and questioned but not named in the indictment) received 669,700 dinars in compensation.[33] Former military intelligence commander Aco Tomić (named suspect #38) received the richest compensation with a take of 6 million dinars in 2008.[34] Several members of JSO joined in, demanding but not receiving 40 million dinars.[35]

The decision to limit the scope of investigation was a political one, which had the consequence of both undermining the legitimacy of the state of emergency and obscuring the connection between domestic organized crime and organized violations of international humanitarian law that became apparent in the immediate aftermath of the murder. It meant that the intensive action that was engaged under the state of emergency would not be sustained, and that the extent of the criminal nexus that had been established in the preceding decade would remain unelaborated. What initially appeared to be shocking and revelatory ended as a stalemate.

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[28]Unsigned, 'Koncentraciona vlada bez vanrednog stanja', *Večernje novosti,* 13 March 2003.

[29]Unsigned (FoNet), 'Dragan Jočić: Akcija 'Sablja' je imala pozitivne rezultate!', *Kurir,* 27 July 2004.

[30]Dušan Telesković, 'Bulatoviću 669.700 dinara', *Politika,* 31 August 2004.

[31]E.V.N., "'Sablja" pred tužiocem', *Večernje novosti,* 21 May 2005.

[32]E. Radosavljević, "'Sablja" se vuče po sudu', *Večernje novosti,* 16 January 2008.

[33]Dušan Telesković, 'Bulatoviću 669.700 dinara', *Politika,* 31 August 2004. Bulatović headed the Security Intelligence Agency after the December 2003 election.

[34]Unsigned, 'Aci Tomić odšteta od šest miliona dinara', *Blic,* 11 January 2008.

[35]M.L., 'Beretke traže odštetu od 40 miliona dinara', *Balkan,* 29 July 2004.

Moment 3: The 'Scorpions' film

In the aftermath of the campaign to discredit Zoran Djindjić and the state of emergency that followed his murder, domestic confrontation with crime underwent some respite. At the same time, as international investigations of war crimes advanced, increased attention was dedicated to them from outside the country. One event came increasingly to stand for the role of Serbia and Serb forces in the commission of crimes: the 1995 genocide in Srebrenica. It was the last and largest crime of the conflict in Bosnia-Herzegovina, and the only crime from the wars of Yugoslav succession for which there exists a legal finding of genocide.

At his trial in 2005, Milošević brought onto the stand a former assistant interior minister, Obrad Stevanović. Stevanović was there to 'completely reject any thought that I knew that some paramilitary units had crossed over from Serbia into Republika Srpska in order to perpetrate crimes'.[36] To rebut that assertion, the prosecutor showed a film that had been made by a member of one such paramilitary unit: it showed the paramilitaries transporting and then executing a group of six prisoners in July 1995, during the time of the Srebrenica killings.[37] The film was subsequently broadcast on television. As ICTY did not admit the film into evidence, the broadcast constitutes its main importance.

The film entered into an environment where denial was ascendant. A report prepared by Republika Srpska authorities in 2002 had sought to portray all but 100 deaths at Srebrenica as battle deaths. When that report was universally rejected, the international High Representative for Bosnia-Herzegovina ordered the appointment of the commission that produced 2004 report, detailing 7,800 victims and leading to an apology from the Republika Srpska government. But the original report invited an alternative interpretation that remained current for some time: There was no genocide but rather killings of soldiers under arms, in some versions in battle attempting to escape the enclave and in others as prisoner of wars (POWs) following the battle.

These alternative versions continued to receive publicity, reaching a height in May 2005, when a law students' group hosted a panel presentation, 'The Truth About Srebrenica: Ten Years After the Liberation of Srebrenica', at the Law Faculty in Belgrade. The meeting began with cheers for Radovan Karadžić, charged with genocide in the killings and still a fugitive at the time.[38] A retired army general, Radovan Radinović, offered the thesis that the massacre had been staged to encourage international intervention. Dragoslav Ognjanović, a legal advisor to Milošević, presented the numbers that had been offered as findings in the rejected 2002 Republika Srpska report on Srebrenica. The journalist Ljiljana Bulatović got received an enthusiastic response from the audience by congratulating them on 'the tenth anniversary of the liberation of Srebrenica'.[39]

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[36]Milošević trial (IT-02-54) testimony, 1 June 2005, p. 40274.

[37]The paramilitaries wore red berets, associated with the Unit for Special Operations (JSO) of the Serbian interior ministry. The film begins with scenes filmed at the paramilitaries' base in Djeletovci in Croatia, which testimony in another trial (Tolimir trial transcript [IT- 05-88/2-PT], 25 November 2010, p. 8127) established was under the control of Serbian State Security.

[38]Unsigned (B92), 'Srebrenica u Beogradu', B92 vesti, 17 May 2005.

[39]Unsigned, 'Beograd u atmosferi poricanja zločina', Radio Slobodna Evropa, 17 May 2005.

Two weeks later, on 1 June 2005, the 'Scorpions film' made its first public appearance. The graphic document shows the members of the paramilitary unit the 'Scorpions' at a mountain house where they receive the prisoners. The prisoners are briefly seen lying face down in the back of a truck with their hands bound behind them. The truck proceeds to an isolated roadside where the prisoners are ordered to step out. They are forced to lie face down again by the roadside, their hands still bound. As they wait for further instruction, the 'Scorpions' ridicule the bound boys. After several minutes the boys are directed to walk in a single file into the woods, with a pair of armed paramilitaries on each side and another group of armed paramilitaries following them. When they reach a meadow, four of the boys are shot at close range and killed. The remaining two are instructed to carry the bodies to an abandoned house at the edge of the meadow. Then they are brought to the house where they too are shot.

The film's value as evidence was limited: It demonstrated that killings had taken place and showed that units under Serbian command participated in massacres contemporaneous with the Srebrenica killings. It has played no role in trials at ICTY. Its impact upon being broadcast, however, appeared at first to be enormous.[40] Its force was magnified by the testimony of relatives of Smail Ibrahimović, a victim whose fate was unknown until he was recognized in a broadcast of the film.[41]

Both President Boris Tadić and Prime Minister Vojislav Koštunica came forward immediately with expressions of shock and condemnation. More surprisingly, so did spokespeople for the Socialist Party of Serbia (SPS) and the Serbian Radical Party (SRS), which had been involved in the crimes of the period and engaged in denial afterward. Polling suggested that public support for cooperation with ICTY had risen.[42] Shortly after the film was made public, it began to appear as though public opinion was rapidly moving in a direction it had not appeared to be headed for the previous 5 years.

By 9 July, though, the film was greeted with a cinematic reply. In the large performance hall in Belgrade's Sava Center, the Serbian Radical Party organized a showing of their own film 'Istina' (The Truth),[43] offered an hour-long montage of footage involving crimes committed against Serbs by other participants in the wars of succession in the former Yugoslavia. SRS official Aleksandar Vučić[44] opened the ceremony with a letter from Vojislav Šešelj, sent from custody in The Hague,

[40]The film had been available for rental at a video club called 'Laser' in the town of Šid. The Belgrade-based Fund for Humanitarian Law delivered a copy to the ICTY prosecutor. Dorotea Čarnić, 'Kaseta prodata Hagu zbog osvete', *Politika,* 12 April 2006.

[41]A. Roknić, 'Zločincima da se sudi po pravdi, ako je ima', *Danas,* 27 January 2006; E. Radosavljević, 'Pucali u glavu', *Večernje novosti,* 27 January 2006; Dorotea Čarnić, 'Snimak jedini trag', *Politika,* 27 January 2006.

[42]Unsigned (Beta), 'Više od dve trećine građana smatra da Srbija treba da sarađuje', Centar za razvoj neprofitnog sektora Arhiva vesti za mesec Maj 2005.

[43]An electronic copy of the film can be dowloaded at http://istina.srpskinacionalisti.com/. The electronic copy of the film includes the introductory addresses by SRS leaders Nikolić and Vučić.

[44]Nikolić and Vučić split from SRS in 2008, forming the Serbian Progressive Party (*Srpska napredna stranka—SNS*) and taking most of the leadership and membership of SRS along with them.

charging that domestic and international media were using the 'Scorpions' film 'to portray the entire Serbian people as genocidal. . . they see victims on only one side while the Serbian helpless, women and children are treated as if they do not exist'. The letter framed the film as responding to a charge.

SRS deputy leader Tomislav Nikolić reached for a more balanced tone. He began his address combatively, accusing other actors of wanting to 'place the burden of historical responsibility on us and our children'. Then in a departure from his customary rhetoric, he presented a formulation of responsibility:

> On the territory of the former Yugoslavia there were many crimes. They were committed by individuals of every nationality. We Serbs as members of the nation that has suffered the most must condemn all crimes. All crimes. Those that were committed by members of our nation but also those that were committed against Serbs. We had to do this in order to be able to forgive. We had to do it in order for it not to be forgotten.

The formulation was clearly intended as a key for interpretation of the film: It was repeated by the narrator twice, once at the beginning and once at the end. Nikolić's recognition of crimes was a large step for him—in a first, he mentioned Srebrenica—compensated by a step in the other direction, accusing the world of representing (all) Serbs as criminals and ignoring crimes committed against them.

If the film was meant as a 'reply'[45] to the film that had shocked public opinion the previous month, it was not a direct reply. The reach for balance in Nikolić's speech was undercut by the propagandistic tone of the film itself, while the promise of new and transformative evidence remained unfulfilled. To the degree that *Istina* did function as a reply, it was oriented toward consolidating the political bloc that had been jarred by the 'Scorpions' film, setting the stage for a campaign not to deny the evidence presented the month before but to alter the context in which it would be understood. In the publicity rejecting the conclusion that genocide had occurred in Srebrenica that would develop over the next several years, denial of facts would take a more minor role. Instead emphasis would be placed on highlighting crimes committed by other parties in order to recast the comparative frame, arguing that the perpetrators of crimes were not subject to official command, and undermining the finding that genocide had occurred by suggesting not that there was no crime but that there was a crime of a less serious type.

On the one hand, it can be observed that the window to recognition that was opened by the 'Scorpions' film was quickly closed. On the other hand, it closed on a changed environment, where the most important change was that dispute now rested much less on facts than it did on their meanings.

What the Moments Show

Any general impressions taken from the 'moments' presented here have to be mixed. While it is clear that public dialogue and understanding moved forward in some way in each of them, they did not move as far forward as it initially appeared that they might. Sometimes questions were covered over by denial, sometimes by altering the

[45]Unsigned (B92 and Beta), 'Nikolić: Film je odgovor', B92 vesti, 7 July 2005.

context, and sometimes by trivialization. But, in each case, protecting people engaged with the past required a refinement of the discourse, thus maintaining its longevity, while at the same time demonstrating its fundamental fragility. The importance of this movement may become clear if we contrast the three 'moments' to many 'nonmoments', events in which no movement occurred but it became apparent how severely the core audiences for the extreme poles of opinion are divided from one another.

Is an insight of this type meaningful? It may help to compensate for two widely diffused conventional accounts of the record of transitional justice in Serbia, each of which is true but incomplete in its own way. The first concentrates on achievements and breakthroughs: criminal trials of high military commanders and heads of state, a regionwide system of special prosecutors, exchanges of declarations and apologies, and legal precedents on sexual violence in war and genocide. The second concentrates on disappointments: a long record of obstruction, relativization and denial, the return of the parties of the old regime to power, and the widespread impunity. Neither account is wholly right or wrong; both the achievements and failures of the process are best understood in the social and political context of contemporary Serbia. That is the context that makes exploration of the 'moments' at once productive and maddeningly complex.

The Meaning of a Job Partly Done

The first reference point in the narrative of transitional justice in Serbia offered in this account was the survey from early 2001, indicating a broad tendency of public opinion toward avoidance and rejection, appearing as a shaky consensus troubled by doubt, uncertainty, and the desire to know more. In the period that followed, lines of differential understanding and memory began to be drawn, dividing those parts of the public that sought refuge in continuity with the recent past and those who rejected that legacy. While the basic contours of disagreement largely follow the lines established at the moment of Milošević's arrest the ground has shifted with regard to what people know, what they feel compelled to recognize, and what they feel able to deny. Not all of these shifts, however, have resulted in active engagement with the legacy of the recent past or dialogue about it.

If changes in public understanding have not been rapid or massive, this might obscure a more fundamental fact: that over a relatively short time anything meaningful happened at all. Historically speaking the motivation to produce accounts and to right wrongs, from the point of view of most political actors, is generally very weak indeed. Rather, as Theodor Adorno observed long ago, 'the attitude of forgetting and forgiving everything, which should be the province of people who have suffered injustice, has been adopted by the people who practice it'.[46] We have a few examples of major 'confrontation with the past' occurring in other states and societies, and most of them occurred with far more delay than has been seen in Serbia. We might be able to conclude that in Serbia the impulse for confrontation ran up against the

[46]Quoted in Rodriguez Molas (1984, p. 13). The translation from the Spanish is mine.

limited capacities of political actors and elites, producing a blocked process in an environment where many forces had an interest in cutting dialogue short, and few actors energetically invited the public to an opening of the books. The process got as far as rigid procedures and weak will could take it, and in historical context this may be impressively far.

To get a gauge of how far, it may be necessary to try to unpack just what is indicated by ambitious expressions like 'truth', 'justice', and 'confrontation with the past'. It could be useful to move from the realm of enormous philosophical abstraction to the middle range. There is a genuine interest, difficult to contest, in knowing how many people were victims of violence and accounting for their condition.[47] There is a genuine interest, contested but perhaps not legitimately, in knowing who were the perpetrators of violence, under what command and what pretexts they operated, and whether the violence occurred as unaccountable acts or in the context of state policy. There is probably a need for an understanding of how repressive regimes and large-scale violence could thrive for a period. There is probably a need to assure that the major perpetrators and planners of violence are likely to be tried and punished. At the emotional level, there is very likely a need for the personal experiences of people who suffered from violence to be heard, shared, and understood.[48]

These needs have been neither wholly unmet nor wholly met. The dimensions of both how far the process went and how much it was limited are apparent in the paths of the 'moments'. What becomes more uncertain as the temporal distance from the events in question increases is whether they will ever be met. There are obvious implications of this absence for the prospects of reconciliation and the development of peaceful relations in the region. On the social level, however, there may be more important dangers, as lack of clarity over the meaning of events in the recent past obscures the ability to make distinctions in the present: between the parties that participated in the regime in the 1990s and the ones that opposed it, between figures representing the best and ones representing the worst variants of national identity, and between cultural engagement and isolation.

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[47]According to the Helsinki Committee for Human Rights in Bosnia-Herzegovina, in 2008 there were still 15,000 people unaccounted for from the conflict. Helsinki Committee for Human Rights in Bosnia-Herzegovina, *NGO Progress Report on the Follow-Up of the Concluding Observations*, CCPR/C/BH/CO/1, October 2008, p. 5.

[48]An implicit conflict exists between the need for guilty parties to be punished and the need for stories to be told. In a criminal trial, the accused has little motivation to reveal more than is required, while victims are encouraged to share not their entire stories but only those elements that have a direct bearing on establishing guilt or innocence. Narrative testimony is potentially much fuller, but for perpetrators in particular there is not much reason for them to tell their stories unless they are offered something—like immunity from prosecution—in return.

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Chapter 7
'Forever Connected': State Narratives and the Dutch Memory of Srebrenica

Erna Rijsdijk

In January 2009, 14 years after the fall of Srebrenica, the European Parliament adopted a resolution on the event. The resolution declares that Srebrenica was 'the biggest war crime to take place in Europe since the end of Second World War' and states that 'this tragedy, declared an act of genocide by the International Criminal Tribunal for the Former Yugoslavia (ICTY), took place in a UN-proclaimed safe haven, and therefore stands as a symbol of the impotence of the international community to intervene in the conflict and protect the civilian population' (European Parliament 2009). It also calls on the European Council and Commission 'to commemorate appropriately the anniversary of the Srebrenica-Potočari act of genocide by supporting the European Parliament's recognition of 11 July as the day of commemoration of the Srebrenica genocide all over the European Union (EU) and to call on all the countries of the western Balkans to do the same (ibid.).' It is stated that this would be 'the best means of paying tribute to the victims of the massacres and sending a clear message to future generations' (ibid.).

This chapter explores why the Dutch government did not follow up on this resolution and why it makes sense to consider Srebrenica as a trauma within a Dutch political context. It analyses the political relevance of trauma in relation to the Dutch/United Nations (UN) Srebrenica mission and shows that talk of a 'Srebrenica trauma' touches upon the core values of social order. It explores why the failed peacekeeping mission in Srebrenica is not approached to reflect on the effects of peacekeeping, but has instead been reconceptualised in a narrative of national progress in order to adjust the image of the Netherlands in terms of a robust partner

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E. Rijsdijk (✉)
Military Ethics, Netherlands Defence Academy (NLDA),
P.O. Box 90004, 3509 AA Utrecht, The Netherlands
e-mail: e.rijsdijk@nlda.nl

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on an international stage. I also argue that the official Dutch discourse on Srebrenica has been destabilised by a recent judgement of the Supreme Court of the Netherlands. This judgement may—at least partly—open up a way of processing the past in different ways.

Srebrenica as a Dutch Trauma?

According to many commentators, Srebrenica is not only 'Europe's worst massacre since the Second World War', but it also became 'a Dutch trauma' (Rohde 1997).[1] The *New York Times*' journalist, Marlise Simons, reported:

> 'As in previous debates on the Srebrenica episode, newspapers and television broadcasts have been filled with angry commentaries. They convey the message that the fall of Srebrenica, while not the defining event of the war, was its greatest single atrocity and that the Dutch, because of their presence in the area, bear part of the shame.'

In this context, she quoted the Dutch historian Jos Palm stating that Srebrenica is the nation's 'greatest post-war trauma' (Simons 1998). Also, the British newspaper *The Guardian* has called Srebrenica 'the most traumatic event in recent Dutch history' (The Guardian 2002) and the Canadian radio station *CBC* reported:

> 'The killing of 8,000 Bosnians after the fall of Srebrenica 10 years ago still stands as the worst massacre in Europe since World War Two. It has also become a lasting trauma for the Netherlands as Dutch peacekeepers were supposed to protect the enclave when it was overrun by Serb forces. Srebrenica has never been far from the Dutch headlines but that doesn't mean the Netherlands is any closer to coming to terms with what happened.'[2]

Most of the references to Srebrenica in terms of a trauma for the Dutch come from Dutch sources, though. The term 'Srebrenica trauma' has come up frequently in the Dutch media ever since the fall of the enclave (Zarkov 2002). Moreover, the 'Srebrenica trauma' mostly referred to Dutch sentiments and not to the experiences of Bosniak survivors of Srebrenica (ibid., p. 189). Some of these Dutch accounts have differentiated the problem by addressing more specific groups and organisations as suffering from a 'Srebrenica trauma'. Four years after the fall of the enclave, the Dutch newspaper *NRC Handelsblad* published an article headed "'Srebrenica" Continues to be Trauma for [the Dutch Ministry of] Defence' (Kalse 1999). In this article, it is suggested that the Ministry cannot function well because every summer, around 11 July, the Defence organisation is plagued by the media presenting mainly old facts on the Dutchbat mission (ibid.). Srebrenica is also portrayed as an 'open war wound' for Dutch politics and as a trauma for Prime Minister Wim Kok who led the cabinets that were responsible for the Srebrenica mission (Van Olst 2002). On 17 April 2002, 1 week after the publication of the national research report on

[1] See e.g., Rohde (1997). Since Rohde's publication, the phrase is frequently used in publications on Srebrenica. One could say that the phrase has become Srebrenica's second name.

[2] 'Vox Humana—Long Road to Justice', *CBC Radio Overnight*, 11 July 2005.

Srebrenica by the Netherlands Institute for War Documentation (NIOD), the Dutch cabinet led by Wim Kok resigned over Srebrenica. Later, Pieter Broertjes, the chief editor of the Dutch newspaper *De Volkskrant* stated that 'the Srebrenica drama is not only a trauma for politics, but for journalism as well' (ANP 2002). In a self-accusing statement, which he addressed to an audience of Dutch newspapers editors, he claimed that 'we, and you and I have shaped a rather stereotypical image of the Bosnian conflict and the Dutch involvement in it. We, some more than others, have offered too much morality, too little facts, too many opinions, too little analysis and too much emotion (ibid., My translation).'

Two years after Pieter Broertjes made the trauma diagnosis for journalism, Srebrenica was identified as a 'disease' in the academic field as well. The psychologist/historian Eelco Runia claimed in his article "'Forget about it": "Parallel Processing" in the Srebrenica Report' that the NIOD researchers who had been given the official task to write a historical construction of the events in Srebrenica had not only described the 'traumatic event', but also had displayed in their work some of the symptoms of the trauma. According to Runia, this phenomenon is known as 'parallel processing' in the discipline of psychology. He explains that the NIOD research report not only addresses the problems of Srebrenica but also evades them, like patients who suffer from traumatic experiences. As a result, the report generated feelings of 'numbness, apathy and deadlock and diffused an atmosphere of "forget about it"' (Runia 2004).

Finally—it took some years to find out—the Dutch Ministry of Defence estimated that about 10 % of the Dutchbat soldiers who served in Srebrenica suffer from the post-traumatic stress disorder (PTSD) and about 40 % have undergone, or still undergo, psychological treatment.[3] Now and then, brief news items can be found in the newspapers that illustrate some of the consequences of suffering from PTSD:

> The [41 year old ex-soldier T. H.] has been found guilty [by a Dutch court] for murder and attempt to murder an elderly couple in Schokkerhaven. In June last year, he shot the victims in the head with a revolver. The ex-soldier of Dutchbat actually was looking for their son who had been his commander during another UN-mission in Libanon. The confused H. wanted revenge, because Dutchbat did not recognise his 'telepathic' gifts.[4]

Ten years after the fall of the enclave, the national television network aired a news item 'The Trauma of Dutchbat' on the PTSD topic.[5] According to Jolande Withuis, the Netherlands *has* a trauma culture in which ever more people are recognised as being traumatised (Withuis and Mooij 2010). She says that in the Netherlands, even losing a football match and vacation stress are sometimes marked as traumas

[3] According to the Ministry of Defence, the number of Dutch soldiers who take part in missions all over the world is 5 % on average. Praamsma et al. 2005.

[4] ANP, 'Ex-militair krijgt tbs na moord en moordpoging' [Former soldier sentenced after murder and attempted murder], *De Volkskrant*, 3 June 2005. (My translation.) A couple of reports about ex-Dutchbat soldiers who committed suicide after the mission have also been published by the media—'Dutchbatters pleegden zelfmoord' [Dutchbatters commited suicide], *NOS Journaal*, 6 April 2002. These reports, however, have never been verified.

[5] 'Het trauma van Dutchbat', *NOS Netwerk*, 13 July 2005. (My translation.)

(Withuis 2006). Withuis notes that the origin of this trauma culture can be found in the way the Dutch dealt with the Second World War. After a long silence on the psychology of Holocaust survivors, the war trauma was discovered in the 1970s. Since the 1980s, however, the trauma diagnosis became a model for all kinds of victimhood. In this way, many psychological problems could be defined as being caused by 'external stressors' instead of being the result of having a 'weak character' or other personality problems (Withuis 2010). Thus, trauma has transformed from 'a source of shame into a source of "recognition"' (ibid., p. 213). Although Withuis notes that it is a positive development that persons who display difficulties coping with daily life situations after having experienced an horrific event are no longer seen as being 'mad', she also thinks, however, that the broad application of the trauma diagnoses today has led to many 'pseudo-victims'. She speaks of a 'trauma inflation' that could have negative effects on real victims.[6]

Except for the survivors and the Dutchbatters who had immediate experiences with the horrors of Srebrenica, the discourse on a Dutch national 'Srebrenica trauma' can easily be disqualified as 'trauma inflation'. However, I will argue that the trauma discourse and its relation to politics are more complex. Firstly, as I have illustrated, the perception of a Dutch 'Srebrenica trauma' is not only a Dutch phenomenon. As Madeleine Bunting reported in the British newspaper *The Guardian*, other countries too seem to suffer from 'national traumas' as a result of failed international peacekeeping operations. She mentions Canada, where two senior army figures resigned following the court cases of six soldiers involved in the torture and murder of a Somali boy in 1993 and notes that 'the country struggled to reconcile the incident with its history of enlightened internationalism'. Furthermore, she says, 'Rwanda was even worse; a Canadian general broke down and wept in a war crimes trial, still traumatised by his failure to prevent genocide' and 'in 2000, the Belgian prime minister gave a formal apology for the withdrawal of Belgian troops ahead of the massacre' (Bunting 2002). One could infer that 'trauma inflation' as detected by Withuis is not just a Dutch phenomenon, but actually a more general problem of the Western world, in relation to the peacekeeping operations and thus to situations of war.

In fact, discussions about which events qualify as *real* traumas and which do not are in essence highly political discussions. As Georges Canguilhem has noted, 'every conception of pathology must be based on prior knowledge of the corresponding normal state, but conversely, the scientific study of pathological cases becomes an indispensable phase in the overall search for the laws of the normal state' (Canguilhem 1991). So what does the 'Srebrenica trauma' discourse say about the 'normal' Dutch state?

Trauma as a Condition of Social Order

The discussion on trauma and its relation to communities is no novelty. The trauma discourse belongs to the field of psychoanalysis and even the father of psychoanalysis,

[6] Withuis, 'De ontstuitbare mars van het psychotrauma'. Withuis also elaborates on this argument in her book, Jolande Withuis, *Erkenning, van oorlogstrauma naar klaagcultuur*, 2002.

Sigmund Freud, approached it by analysing connections between human nature and forms of human organisation. Costas Douzinas has noted that Freud searched not only for the structure of the human psyche, but also for an *origo* that he imagined as "'a time before history and memory" at which human society was founded' (Douzinas 2002). Later, Jacques Lacan built on Freud's idea of the interrelatedness between human nature and society. However, where Freud tried to explain the social bond and the law by human nature, Lacan reversed this relation and emphasised how the symbolic structures like language and law contribute to the constitution of human identity.[7]

Jenny Edkins, a theorist of international relations, explored the relation between violence, trauma and forms of political community in her book *Trauma and the Memory of Politics* (Edkins 2003). Edkins adopts a Lacanian perspective on the role of trauma:

> In its birth into the symbolic or social order, into language, the subject is formed around, and through a veiling of, that which cannot be symbolised—the traumatic Real. The Real is traumatic and has to be hidden or forgotten, because it is a threat to the imaginary completeness of the subject. The 'subject' only exists in as far as the person finds his/her place within the social or symbolic order. But no place that the person occupies—as a mother, friend, consumer, activist—can fully express what that person is (ibid., p. 11, 12).

Edkins explains how trauma manifests itself. She relates this manifestation to an 'extreme menace' (ibid., p. 4) which comprises a situation of utter powerlessness, betrayal by the powers we trust and shame because of this powerlessness. She says that

> to be called traumatic—to produce what are seen as symptoms of trauma—an event has to be more than just a situation of utter powerlessness. [. . .] It has to involve a betrayal of trust as well. There is an extreme menace, but what is special is where the threat of violence comes from. What we call trauma takes place when the very powers that we are convinced will protect us and give us security become our tormentors: when the community of which we considered ourselves members turns against us or when our family is no longer a source of refuge but a site of danger. [. . .] Witnessing violence done to others and surviving can seem to be as traumatic as suffering brutality oneself. Here, a sense of shame is paramount. The survivor feels complicit in the betrayal done by others (ibid.).

Edkins adds that 'taking part in violence oneself can evoke a similar shame [. . .] though this of course is *not at all to be equated with* witnessing violence done by others' (ibid., Emphasis by Edkins). As an example, she mentions the combat veteran who 'has not only seen his comrades killed or mutilated but [. . .] in some cases betrayed his own supposed code as a warrior (or as a person)' (ibid., p. 5).

According to Edkins, traumatic events do not only expose the three elements of powerlessness, betrayal and shame, but they also expose relations of power between personhood and community. She states that who we are or who we think we may be depends very closely on the social context in which we place and find ourselves. Our existence relies not only on our personal survival as individual beings but also, in a very profound sense, on the continuance of the social order that gives our existence

[7] (ibid., p. 301). Lacan does not make a clear distinction between law and language. Law is—at least not explicitly—used in the sense of 'positive law'. See also Douzinas p. 316.

meaning and dignity: family, friends, political community, beliefs. If that order betrays us in some way, we may survive in the sense of continuing to live as physical beings, but the meaning of our existence is changed (ibid., p. 4).

So far, it is not hard to see the relevance of Edkins' theories for the experiences of the Bosnian Muslims in the UN enclave. The relevance is also clear for the UN Dutchbat soldiers. The soldiers who have been diagnosed with PTSD indicate that the reasons for their psychological problems are 'powerlessness in a horrible situation, bad publicity, [and] lack of accountability by the Defence management, politicians and the UN'. Moreover, 'they could not deal with the burden of guilt that was attributed exclusively to them' (Praamsma et al. 2005). As Edkins notes, witnessing violence done to others and surviving can be as traumatic as suffering brutality oneself (Edkins 2003, p. 4). Many Dutchbatters feel betrayed by the Dutch community and, if we go along Edkins' line of thought, it is very well possible that the Dutchbatters also feel shame and complicity in the betrayal done by others. However, establishing that the experiences of former Dutchbat soldiers meet the trauma criteria does not automatically imply the relevance for a much broader group or even a crisis of Dutchness as is suggested in many publications, exemplified by Marlise Simons' description:

> The Dutch like to think of themselves as model international citizens. They are generous with foreign aid, they take in many refugees from far-off political conflicts and they play host to two world courts in The Hague. They also consider it their duty to take part in international peacekeeping operations. Yet today the Dutch find this upstanding image of themselves tainted by a fresh wave of public accusations that their peacekeepers who served in the eastern Bosnian town of Srebrenica were witnesses and unwitting accomplices to the worst massacre of civilians in the Bosnian war (Simons 1998).

Stefan Dudink has explored the representations of Dutchness in historical publications and his findings confirm a self-image of high morality, of moderation and contemplation and of a special moral mission connected to the lack of power and specific historical development (Dudink 2002, p. 160). According to Dudink, fantasies of moral righteousness are 'at the heart of a Dutch national sense of self', but they have often been contradicted by historical facts.[8] Thus, in this respect, the mission in Srebrenica is one of the more recent 'historical facts' that exposes the Dutch self-image as a fantasy.

As I have discussed elsewhere, others phrase the Dutch problem in terms of having been entrapped by the 'international community'.[9] From this perspective, the Dutch themselves became hostages of the Bosnian war, lacking support from the UN for their mission. As a result, the supposedly internationalist Dutch would feel betrayed by the UN, which they had always supported wholeheartedly. This idea of betrayal

[8] (ibid., p. 161). Another prominent instance of a (colonial) historical past that contradicts the Dutch self-image as a peace-loving country is the bloody war that was fought over Indonesian independence between 1946 and 1948, which was accompanied by atrocities committed by Dutch soldiers. See Dudink 2002, p. 160.

[9] Rijsdijk (2012) on Both (2000) and other authors with similar perspectives on the Dutch position in Srebrenica.

by an international order that we trusted also matches Edkins' trauma description. Thus, in this respect, both the account of a shattered positive self-image as well-doer and the image of entrapment and betrayal by the international community seem to be plausible explanations fitting Edkins' description of trauma. Additionally, Edkins notes that 'witnessing and responses to trauma are not limited to survivors but extend to those to whom survivors speak' (Edkins 2003, p. 194). This can result in three levels of witnessing: 'being a witness to the experience oneself, being a witness to the testimonies of others, and being a witness to the process of witnessing itself' (ibid., p. 195).[10] It is generally agreed that the events in Srebrenica were shocking, and that all three levels of witnessing are represented in the Dutch society. So, in this respect, I argue that there is more at stake than a fashionable 'trauma inflation'.

But, in order to understand the possible *political* workings of such trauma, we need to follow Edkins' arguments further. In Edkins' definitions of politics and the political, she reconciles the psychoanalytic account on the formation of personhood with the interdependent formation of statehood. In this view, she differentiates two orders of politics. The first order is the domain (sphere of activity and institutions) of 'politics' that is usually opposed to the domains of 'economics' or 'society'. The second order involves a less common definition of the political. She defines it as the events that bring the politics of the first order into being (ibid., p. 12). It is the politics that 'enjoins us not to forget the traumatic Real but rather to acknowledge the constituted and provisional nature of what we call social reality' (ibid.). This second order of politics is the process that configures politics into a common symbolic order. The way we see the democratic state rests on *not* questioning the second order of politics, which is 'the particular form of political community or the forms of individuality or personhood on which it is based' (ibid., p. 10).

Edkins sees trauma as fundamental to both the production of the self (individuality and personhood) and the state. This production takes place at what she calls the traumatic intersection between peace and war, inside and outside (ibid., p. 3). This view involves a profound critique on mainstream political science, which, according to Edkins, usually focuses on the internal (supposedly peaceable) workings of the state, international politics and external conflict and ignores the processes that lead to the production of the self and the state (ibid., p. 10). She sees political science as dominated by a liberal view of statehood, in which statehood is imagined as 'individual citizens banding together to form democratic institutions which (more or less) represent the views of those citizens and which (more or less) have their interests at heart. The state possesses power (and can use violence), in this narrative, because the people legitimise its authority' (ibid.). The form of personhood as a separate, autonomous and sovereign individual, on which this liberal view relies, is supposed to exist independently of, or prior to, the social order.

Edkins argues instead that personhood can only come into existence through its interaction with a social order like the state. In this view, the individual and the state are constitutive of each other. Moreover, social orders and persons are inherently incomplete and insecure. This fundamental instability is not acknowledged in

[10] Edkins bases the levels of witnessing on Dori Laub's chapter (1995).

mainstream political theory. 'In the west both state and subject pretend to a security, wholeness and a closure that is not possible' (ibid., p. 11). Recognising this fundamental instability and the mutual interdependence of social orders and subjectivity enables us to see the role of trauma. According to Edkins, an event can be described as traumatic if it reveals the pretence of security, wholeness and closure as impossibility. After this disclosure, the pretence will be experienced as a betrayal (ibid.).

The memorialisation of trauma can constitute a questioning of the second order of politics, and Edkins comes to the radical conclusion that memory and trauma are central to the production of political space (ibid., p. 216). She states that sovereign power produces and is itself produced by trauma; it provokes wars, genocides and famines. But it works by concealing its involvement and claiming to be a provider not a destroyer of security. It does this, of course, directly, through discourses of international security that centre around the state as well as through claiming to provide security internally for its citizens. In addition, however, the state does this in no small part through the way in which it commemorates wars, genocides and famines. By rewriting these traumas into a linear narrative of national heroism, the state conceals the trauma that it has, necessarily, produced (ibid., p. XV).

In this perspective, I will consider three cases related to the memory of Srebrenica in the Netherlands in order to see how they relate to the disturbed self-image of the Dutch. The first is the speech by the Dutch minister of defence Henk Kamp at a special meeting for Dutchbat III soldiers in 2006. The second case is the formulation of the official Dutch history canon, a guideline for primary and secondary education—in which the events in Srebrenica are remembered—and the third case is the Dutch response to the call of the European Parliament to organise a national Srebrenica commemoration on the 11th of July in all EU member states.

The Rehabilitation Speech for Dutchbat III

In 2006, in a speech named 'Forever Connected', the Dutch minister of defence Henk Kamp stated before a group of former Dutchbat soldiers:

> Dutch society, politics and the Defence organisation have struggled with Srebrenica for a long time: the role of politicians, the role of the international community and the role of Dutchbat. Many debates in Parliament and many investigations were necessary before the Netherlands cleared its own mind and got a clear view on what really happened during those terrible days in July. The reports by the United Nations, the Dutch Institute for War Documentation [NIOD] and the parliamentary inquiry proved that the responsibility for the mass murder cannot be attributed to the soldiers of Dutchbat.[11]

After this statement, Kamp emphasised how much Dutchbat soldiers have suffered from the lack of recognition for their difficult position and work in Srebrenica by

[11] H. G. J. Kamp, '*Voor altijd verbonden*', ['Forever Connected'], 4 December 2006, speech by the Minister of Defence at a special meeting for Dutchbat III. (My translation.)

Dutch society and by the international community and the injustice of it all. He presented to every Dutchbat soldier a decoration as the symbolic 'completion of rehabilitation'.[12] Two Dutchbat soldiers were mentioned by name to indicate their special status in this process of rehabilitation: Dutchbat commander Thom Karremans and the commander of the Dutchbat Bravo Company, Jelte Groen. Both have received a large share of negative public attention because of their role in Srebrenica. Karremans' leadership qualities have been questioned and the photo of Karremans drinking with the Bosnian Serb general Ratko Mladić has become the symbol of the fall of Srebrenica and the humiliation of Dutchbat and the UN.[13] Jelte Groen has been accused of not having responded adequately to the misconduct of the soldiers in his company. This misconduct included racism, sexism, right-wing extremism, rudeness and lack of empathy towards others (Blom and Romijn 2002). Furthermore, Groen has been accused of a lack of commitment to the Bosnian Muslims of Srebrenica since he decided not to aim fire directly at the Serbs even when Dutch soldiers were attacked by them in the so-called blocking positions, although he was ordered to do so to fulfil the conditions for UN air support.[14]

The performances of Karremans and Groen have been explained and defended in the NIOD report and in the report of the Dutch parliamentary inquiry. On the leadership of the Dutchbat, the Dutch Parliamentary Committee concludes that 'Dutchbat could hardly influence their situation', (ibid., p. 440, My translation) and that it is 'understandable' that the leadership of Dutchbat underestimated 'the number of men and the risks that they confronted' because of 'the chaos of the moment' (ibid., p. 447). The Committee also concludes that Dutchbat could not have stopped the 'evacuation' of the men (ibid., p. 448). On the performance of Groen, the NIOD report finds that the misconduct of Groen's soldiers was an 'internal' matter that did not affect the operational capacity of Dutchbat. Moreover, they justify Groen's 'macho-behaviour' and lack of interest in the misconduct of subordinates as a result of his fighting mentality that may have served him well in other difficult situations (Blom and Romijn 2002, p. 1638). The Parliamentary Committee did not find a 'single indication that the accusation that members of Dutchbat were guilty of crimes was justified' either.[15] On Groen's interpretation of Dutchbat shooting tasks, the Committee states that it was up to this commander to judge how to fulfil his orders, and that the local situation could never have been fully overseen by his superiors. According to the Committee, Groen filled in his space for decision making 'in his own way' and, after all, it did contribute to the conditions for air support that were set by the French UN Force commander, Janvier (ibid., p. 442).

Minister Kamp referred to those reports and explicitly expressed his trust in Karremans and Groen and all other former Dutchbat soldiers. Moreover, he situated the difficult position of Dutchbat and the lack of public recognition for their actions in

[12] Not every member of Dutchbat III attended the meeting. Some of them did not want to be decorated for this mission, as one member of Dutchbat explained to me.

[13] See, for an elaborate analysis of this photograph and its symbolisations De Leeuw (2002).

[14] Parlementaire Enquêtecommissie Srebrenica, *Missie zonder vrede: Eindrapport*, [Mission Without Peace: Final report of the Dutch Parliamentary Inquiry], 27 January 2003, pp. 177–183.

[15] Parlementaire Enquêtecommissie, *Missie zonder vrede,* p. 445. (My translation)

a perspective of a better future. Kamp addressed the hardship of Dutchbat soldiers and turned their suffering into a narrative of progress. He claims that the hardship the Dutchbat soldiers had undergone has led to significant improvements in Dutch crisis management operations:

> After 1995, Dutch soldiers have never been deployed again under conditions comparable to those of Dutchbat. The Hague has learnt the lessons that were necessary, albeit at a high price *for Dutchbat*.[16] Many things changed after 1995: no more 'double keys' in the line of command, stricter conditions for the feasibility of peacekeeping missions, strongly improved intelligence capacity, better armament and better aftercare. [. . .] All these changes [now] contribute to a good and well prepared participation of the Netherlands in crisis management operations.[17]

In Kamp's ritual of rehabilitation, he not only reduced the Srebrenica genocide to a practical lesson for the Netherlands, but he also re-established the Netherlands as a provider of security instead of a potential destroyer of security. Kamp's rehabilitation speech for the Dutchbat soldiers is thus no exception to the phenomenon identified by Edkins that states tend to rewrite traumas into linear narratives of national heroism and so conceal the traumas they have (co-)produced—although 'national heroism' in this occasion has been moderated into 'national progress'.

Srebrenica in the Canon of The Netherlands

The events in Srebrenica are also remembered in the official Canon of the Netherlands. The Canon was initiated by the Dutch government in 2005 as a result of a perceived identity crisis of the Netherlands.[18] The minister of education, culture and science, Maria van der Hoeven, states in the task description for the canon committee that 'social developments in the Netherlands have led to rethink the identity of the Netherlands and the way it is expressed in education' (ibid., p. 1, My translation). She notes a need for a new 'story of the Netherlands' and says that the Canon should aim to provide a common (cultural) historical knowledge of the Netherlands in an international—but foremost European—context. She adds that 'valuable parts of our history' could include both positive and negative aspects (ibid., pp. 1, 2).

A committee—chaired by Professor Frits van Oostrom—has developed the Canon and presented its work to the Dutch government in 2007.[19] Since 2010, the culture and history of the Netherlands are represented in a web-based chronological framework of 50 'windows' that serve as a guideline for primary and secondary education. The

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[16] My emphasis.

[17] Kamp, '*Voor altijd verbonden*'. (My translation.)

[18] Minister van Onderwijs, Cultuur en Wetenschap Maria J. A. van der Hoeven [Dutch Minister of Education, Culture and Science], 'Taakopdracht voor de commissie Ontwikkeling Nederlandse Canon voor Prof. dr. F.P. van Oostrom [Task description for Committee Development Canon of the Netherlands, to Professor F.P. van Oostrom]', 26 May 2005. http://www.entoen.nu/doc/opdrachtbrief.pdf, accessed on 5 October 2013.

[19] About the Canon, see http://entoen.nu/over, accessed on 5 October 2013.

Canon is translated into six languages.[20] Srebrenica is represented in one of the 50 windows and contains a footnote that frames the events as a 'black page' in the history of the Netherlands. The window is also accompanied by the following warning:

> The canon committee hesitated before including this window. Not so much because the underlying story is so complex, or unflattering, to put it mildly, to the Netherlands. [. . .] It is, however, the case that thanks to the internet, the most horrific images of the drama in Srebrenica are only a mouse-click away. Although the truth is undoubtedly served by this, the committee would like to warn teachers and other staff about the attendant risks.[21]

These risks are not specified.

The Canon of the Netherlands memorialises Srebrenica primarily as a practical lesson for Dutch peacekeeping. As such, it runs parallel to Kamp's rehabilitation speech for Dutchbat. The Srebrenica window of the text of the Canon consists of four paragraphs and the aforementioned warning of the committee. The first paragraph describes the violence that took place in Srebrenica, without naming it genocide, and reducing the event to a very narrow time frame:

> On 6 July 1995, the Bosnian-Serbian troops of General Mladic moved towards the Dutchbat III protected enclave of Srebrenica. Without too much resistance the attacking troops on July 11th took control of this safe-haven for Muslims. The Serbs had the Muslims removed in buses, after first separating the men from the women and children with assistance from the Dutch forces. A short time later, the Serbs executed most of the men (at least 7000). The Dutch soldiers, some of whom suspected what was to come but none of whom witnessed the executions, were given safe passage to Zagreb, where they were welcomed by Prime Minister Kok and Crown Prince Willem-Alexander (ibid.).

In the second paragraph, the events are reconstructed as a political problem for and responsibility of the Dutch government that was 'accepted' by the resignation of the Dutch cabinet in 2002:

> When news of the slaughter that had taken place 'under the very eyes of Dutchbat' reached the Netherlands, the question was raised as to whether the Dutch soldiers should have protected the enclave against the Bosnian-Serbian troops and so avoided the genocide. Initially, attention was largely focused on the troops, but it soon became clear that responsibility could not be laid at their feet. Their mandate prohibited them from participating in the war. In September 1996, the Netherlands Institute for War Documentation (NIOD) was commissioned by the government to investigate the exact circumstances of the incident. When the NIOD report was published in 2002, Prime Minister Kok accepted political responsibility for the massacre in Srebrenica and resigned (ibid.).

In the third paragraph, this 'political' problem is placed in the broader history of Dutch peacekeeping since 1948 in which the Dutch Lower House has not had sufficient control over the formulation of the missions led by UN and especially over the troops' use of force. 'Events in Srebrenica' are taken up as a call for the Lower House to be better informed:

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[20] The full text of the canon—De *Canon van Nederland*—can be found at http://entoen.nu, accessed at 2 October 2013. The Canon is also published as a book in English: Oostrom (2007). Furthermore, the website can be accessed in English, German, Polish, Turkish, Indonesian and Arabic.

[21] http://entoen.nu/srebrenica/en, accessed on 5 October 2013.

> Right from the outset, Dutch soldiers have participated in UN peacekeeping missions whereby, on behalf of the United Nations, troops supervise compliance with peace treaties and ceasefires in various troubled areas around the globe. The first mission was in 1948, in Israel. A recurring problem during these missions is the instruction on the use of force. What are the peacekeepers allowed to do, and what is prohibited in these trouble spots? The Dutch Lower House has the ultimate say in instructing Dutch troops. The House has to endorse the agreements made between the government and the UN regarding the degree to which the troops are armed and the type of force they are permitted to use. This means that the balance between the duties of Dutch troops and the dangers they consequently run is ultimately struck in the Dutch Lower House. After the massacre at Srebrenica, it was once again set down that the House must be kept as well informed as possible in this regard (ibid.).

In the last section, the role of Dutch peacekeeping after Srebrenica is described as accepting international requests for military support more cautiously and as aiming to 'play a role' on an international stage. The role of Dutch peacekeeping is thus no longer defined in terms of a contribution to international justice or humanitarianism:

> The aftershocks of Srebrenica were felt deeply in the Netherlands. It led to increased hesitation and more caution when deploying Dutch troops abroad. However, the incident did not result in the Netherlands sitting on the fence and rejecting international requests for military support, because the Netherlands desires to continue to play a role in international politics and peacekeeping (ibid.).

Both Kamp's speech and the Srebrenica window in the Canon of the Netherlands confirm what Dubravka Zarkov earlier found on the Srebrenica discourse in Dutch newspapers: The official way that Srebrenica is remembered in the Netherlands is more concerned with national recovery and the position of the Netherlands in world politics (Zarkov 2002, pp. 198–120) than with the 'horrific images' that are only 'a mouse-click' away. The main aim is to make sure that the Netherlands can still 'play a role' on the international stage. This role is related to (future) international 'requests', but also to the need for the Dutch Lower House to be in control of future peacekeeping operations. The text, however, displays a refusal to engage with the 'horrific images' and as such excludes a politics that would be more sensitive towards the victims as well as the larger context of some of the unforeseen effects of peacekeeping. These two issues will be the focus of my investigation of the question why the Netherlands did not follow up on the Srebrenica commemoration resolution of the European Parliament.

The Question of an Official Srebrenica Commemoration Day in The Netherlands

Since 1997, a yearly Srebrenica commemoration is organised in The Hague by non-governmental organisations (NGOs) on the 11th of July.[22] After the adoption of the EU resolution on Srebrenica in January 2009, member of Parliament, Mariko Peters posed an official question to the Dutch minister of foreign affairs, Maxime Verhagen, whether he was prepared to follow up on the EU resolution by organising a

[22] See srebrenica-herdenking.nl. The NGO's are Politiek Comité Stari Most, BiH Platform, IKV Pax Christi, IZB Selam and Mladi BiH.

Srebrenica commemoration on the 11th of July in the Netherlands and if he was willing to get in touch with NGOs in order to discuss such a memorial day.[23] Verhagen, however, speaking for the Dutch government, did not see a special reason to do so. He answered:

> The European Parliament aims to proclaim 11 July a day on which the entire EU remembers the genocide in Srebrenica. To that end the [European] Parliament called on the European Commission and the Council. Until now, those institutions have not given effect to this call. The genocide in Srebrenica is included in the Canon of the Netherlands and has an important place in Dutch history. The commemoration of Srebrenica is thus not only limited to one day a year (ibid., My translation).

Verhagen's first argument against a commemoration in the Netherlands is that the European Commission and the Council did not give effect to this call. In fact, the European Parliament instructed 'its President to forward this resolution to the Council, the Commission, the governments of the Member States, the Government and Parliament of Bosnia and Herzegovina and its entities, and the governments and parliaments of the countries of the western Balkans' (European Parliament 2009). This instruction does not include any hierarchy in the organisation of Srebrenica remembrance days, so it is unclear why Verhagen sees a problem for a commemoration day in the Netherlands in this. Verhagen's second argument is that the Canon of the Netherlands already provides a more extended attention to Srebrenica than 'one day a year', by having 'an important place in Dutch history'. Verhagen's third argument against a Dutch national Srebrenica commemoration is as follows:

> The Dutch government is of the opinion that de yearly meeting in Potočari on 11 July is the most important and single authentic commemoration, which should be honoured. The Dutch ambassador in Bosnia and Herzegovina represents the government at this yearly commemoration. Apart from this commemoration there is no rationale for a specific Dutch commemoration day. There are organisations in the Netherlands that do give attention to 11 July. My colleague of VWS [Department of Health, Well-being and Sport] talks to relevant organisations about the way this subject can get broader attention, for example in education (ibid., My translation).

Thus, in Verhagen's and Dutch government's view, attention to Srebrenica in education is better than a commemoration day. The fact that the Canon of the Netherlands does not remember the 'underlying story' of the genocide is apparently not an issue. Moreover, a combined approach—education *and* a national Srebrenica commemoration day—is not considered because there is already a more 'authentic' Srebrenica commemoration in Bosnia. As such, the Canon of the Netherlands not only upholds a particular self-image of the Netherlands, but it is also situated as a replacement for commemoration.

[23] Response to questions by Member of Parliament Mariko Peters on European Remembrance of Srebrenica, Tweede Kamer, 'Aanhangsel van de Handelingen No. 2224, Vergaderjaar 2008–2009, retrieved from https://zoek.officielebekendmakingen.nl/ah-tk-20082009-2224.html

Towards a Conclusion: The Law and the Cracks in the Official Srebrenica Discourse

As mentioned earlier, according to Edkins, sovereign power works by concealing its involvement and claiming to be a provider, not a destroyer of security. This is in part done through the ways in which states commemorate wars and genocides (Edkins 2003, p. XV). In the case of the Netherlands, it works by *not* officially commemorating Srebrenica and situating the Srebrenica experiences as an issue of education, (governmental) control and international representation. However, Edkins has also pointed at the inherent instability of such discourses (ibid., p. 11). A recent judgement of the Supreme Court of the Netherlands in a case related to Srebrenica, which has attracted the attention of both national and international media, could destabilize the official Dutch Srebrenica discourse. I will first give a brief outline of the legal case and this final decision by the Supreme Court on the appeal in cassation by the State of the Netherlands (see also Zarkov and De Vlaming in this volume, discussing different aspects of the judgment). For the four Srebrenica survivors and their lawyer Liesbeth Zegveld, this court decision represents the final stage of many years of a juridical fight against the State. Finally, I will relate the decision to the official Dutch Srebrenica discourse as discussed above.

The case concerns the events that occurred shortly after the fall of Srebrenica. At the time, a young Bosniak, Hasan Nuhanović, was a UN interpreter who worked for Dutchbat, stationed in Potocari. He had a UN pass and was on the list of local personnel who could be evacuated with Dutchbat. After the fall of the enclave, his father and brother had sought refuge in the compound, but they were sent away by Dutchbat and shortly afterwards, they were murdered by the Bosnian-Serb forces (or related paramilitary groups) (Supreme Court of the Netherlands 2013a). Another case—which was part of the same proceedings—concerns the death of Rizo Mustafić. He worked for Dutchbat as an electrician. After the fall of the enclave, he had sought refuge at the compound together with his wife and children. Dutchbat sent this family away from the compound too, and Rizo Mustafić was killed shortly afterwards (Supreme Court of the Netherlands 2013b). Nuhanović, Mustafić's wife Mehida, daughter Alma and son Damir together initiated the case because they claimed that the State of the Netherlands was responsible for the death of their family members.

On 6 September 2013, the Supreme Court of the Netherlands decided on two central issues. The first question was whether Dutchbat's conduct could be attributed to the State and the second question was whether Dutchbat's conduct was wrongful (Supreme Court of the Netherlands 2013a, p. 4). The Court indeed found that 'the State did have effective control over Dutchbat's conduct in the compound' and that 'Dutchbat's disputed conduct can be attributed to the State' (ibid., pp. 26, 27). Moreover, answering the question whether Dutchbat's conduct was wrongful, the Court ruled that this was the case. It based this decision on the Law of Obligations Act of Bosnia and Herzegovina, the European Convention on Human Rights and the International Covenant on Civil and Political Rights, including the right to life

and the prohibition on inhuman treatment.[24] The Court has decided that the State is responsible for the damage that Hasan Nuhanović and the relatives of Mustafić have suffered and are still suffering (Supreme Court of the Netherlands 2013b, p. 28). Furthermore, it countered a claim by the lawyers of the State that the exercise of judicial restraint was necessary in cases like this, because it could have an adverse effect on the implementation of peace operations by the UN and the willingness of member states to provide troops for such missions. The Court judged, instead, that then 'there would be virtually no scope for the courts to assess the consequences of the conduct of troop contingents in the context of a peace mission [. . .]. Such far-reaching restraint is unacceptable' (Supreme Court of the Netherlands 2013b, p. 34, 35).

The central issues at stake are relevant to the three examples of the official Dutch Srebrenica discourse, because the final judgement of the Supreme Court contradicts the idea that no responsibility for the course of events could be attributed to Dutchbat soldiers or the State and that there was no effective government control in the UN mission (as implicated in Kamp's rehabilitation speech and the Canon). At least, the judgement exposes a form of Dutch government control that has been denied for a long time and was instead attributed to the UN organisation which enjoys 'immunity'. It also opens a discussion on the suffering of the victims and survivors by providing space for the voicing of their individual experiences with Dutchbat and the suffering that was caused by the mission—albeit in the language of law. This is only a small window of opportunity, because it concerns just two specific events that took place after the fall of the enclave and a limited number of victims. Nevertheless, the judgement has exposed the official Srebrenica discourse as unsustainable and so causes a crack in the way that the memory of Srebrenica can be scripted by the government. Moreover, it can be expected that other claims by survivors will follow, based on this judgement. In this respect, the legal judgement has opened up a new political space for discussion on the effects of peacekeeping in relation to victimhood that will perhaps be enhanced by other cases to follow. Nevertheless, there is probably still a long road ahead before the government is ready to answer the call by the European Parliament for national Srebrenica commemorations.

Until then, 'paying tribute to the victims of the massacres and sending a clear message to future generations', as desired by the European Parliament, will depend on the work of NGOs in collaboration with Bosniaks living in the Netherlands, the alternative annual National Srebrenica Commemoration in The Hague and the courts.

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[24] European Convention on Human Rights (ECHR), articles 2 and 3 and the International Covenant on Civil and Political Rights (ICCPR), articles 6 and 7. The Court added in its decision that 'these principles should be regarded as rules of customary international law which have universal operation and are binding on the State'. Mustafić 12/033329, pp. 27, 28 and Nuhanović 12/033324, p. 29.

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Chapter 8
Resisting the Culture of Trauma in Bosnia and Herzegovina: Emancipatory Lessons for/in Cultural and Knowledge Production

Jasmina Husanović

Life is governed through a *culture of terror as usual* (Taussig 1984, 1992).[1] This sentence, I believe, aptly metaphorises the material experience of precarious subjectivities caught in multiple complex emergencies affecting lives, labour and thought today, in Bosnia and Herzegovina (B&H). Michael Taussig's term *terror as usual* is understood as something that, through its 'irregular rhythms of numbing and shock', constitutes 'the apparent normality of the abnormal created by the state of emergency' (Taussig 1992, p. 12). In B&H, this state of *terror as usual* is created, on the one hand, by the effects of the war, and especially traumas related to the continuous state of emergency related to the excavations of mass graves and ongoing traumas related to the missing persons, and, on the other hand, by the continuous appropriations and governing of both the dead and the traumas of the living for the benefit of ethno-nationalist, neoliberal politics. Mass graves become the sites of continuous production of 'human waste' that in turn becomes a site of governing the living.

According to Michael Taussig, to 'understand our reality as a chronic state of emergency, as a Nervous System', is to recognize its 'terror as usual', visible in the 'the political Art of the Arbitrary' (ibid., 13, 11, 2) as a nexus of 'illusions of order congealed by fear' (ibid., p. 2) and reproduced through an overarching obscurity between order and disorder, rule and exception. This 'apparent normality of the abnormal created by the state of emergency' (ibid., p. 13) underpins arbitrarily the core of social experience in B&H for more than two decades, with unrelenting intensity and worsening political, economic and cultural-symbolic conditions of life for its citizens. The past two decades have undoubtedly brought forward new forms of global governance that accompanied wars at the turn of the twenty-first century, forming a complex 'development–security terrain' and its multiple emergencies (Duffield 2001) which pose serious challenges to emancipatory politics.

[1] I refer here to the terms 'culture of terror' and 'terror as usual' as developed in the inspiring anthropological works by Michael Taussig. See Taussig 1984.

J. Husanović (✉)
Cultural Studies, Faculty of Philosophy, University of Tuzla, Tuzla, Bosnia and Herzegovina
e-mail: makjasmina@yahoo.co.uk

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Various colonising structures and agents within this development–security complex in B&H navigate the playing field embellished with banners of reconciliation and reconstruction, peace and development. These have also framed it as a place 'transitioning' to 'something', whilst undergoing post-atrocity, post-Yugoslav, post-war, post-socialist, post-conflict, post-Dayton ordeals. B&H has become a stand-in for a community in need of intervention until order is restored, and such intervention presumes various 'gifts' handed to the country by the 'international community'—democracy, capitalism, justice, peace, and so forth. It is worth mentioning that the wave of 'postisms' attributed to the operative discourses of governmentality and practices of statecraft in B&H has been matched in the field of action by a team of 'neo's' (neoliberal, neocolonial, neoconservative, neofascist, neoracist).

A particular implosion of 'gifts' and the projects and ideals of freedom, equality and justice (Balibar 1994)[2] they rest upon, as well as the emergence of a distinct security–development terrain, can be traced in the political economy of remembrance and witnessing, and the overall politics of loss and affect in B&H and its region. In this regard, a spectre haunting this chapter is a series of personal stories and collective endeavours to intervene in and through knowledge production into this context which turns everyday life into *terror as usual*. Thus, this chapter reflects, first, on the ways terrors and traumas are incorporated in the institutional and everyday politics, by examining practices of the International Commission on Missing Persons (ICMP) and its relation to the people, the state and the politics it serves. Second, this chapter also focuses on the possibilities for the emancipatory politics that resists the politics of terror as usual and strives for the politics of hope. Such politics of hope is found in the intersections of critical pedagogies of academia, arts and activism as collaborative sites of production of a different kind of knowledge. Some interesting projects of solidarity and hopeful politics give us an opportunity to rethink new modes of struggle against inequality, and reclaim critical pedagogical conditions and visions of transformative politics.

My insights here are based on extensive individual and collaborative research, fieldwork and activism in the past 20 years through several formal and informal projects concerning the politics of witnessing to trauma in B&H, former Yugoslav region and internationally, where various materials, corpora and methods of research have been used (individual interviews, focus groups, archive research, print and electronic media, textual analysis, participant observation). Perhaps, the key lesson of this personal and collective engagement has been to respond to the following imperative: to position themselves critically in their academic and public work demands from scholars to engage in a specific 'art of diversion, which is a return of the ethical, of pleasure and of invention within the scientific institution' (de Certeau 1984). Producing such a setting, however, is a matter of collective intellectual and political enterprise and creative work in the horizon of hope, solidarity and social change. In these collaborative cooperatives of critical knowledge production, one must find a response to the emergency-induced hysterias, numbness or acceptance around us,

[2]Or what Étienne Balibar calls the proposition of égaliberté, equaliberty. See Étienne Balibar 1994.

fighting against resentment, envy, nostalgia and despair as the predominant affective mechanisms of the culturalised governance of terror and trauma and regimes of knowledge that accompany them. What follows is a contribution in this direction: a reflection on the governing of terror and trauma, as well as on the emancipatory potential in particular interventions against this governance of life and death.

A broad theme of many academic and activist platforms, concerned with the politics of terror and trauma, has been a critique of specific technologies of culturalised governance of life in B&H, going hand in hand with productive public interventions concerning the politics of abject, atrocity, trauma and terror in the past two decades. In my own work, I have engaged with practices and discourses critical of the statecraft behind the 'transitional justice' industry and institutional and symbolic regimes of governing the persons 'missing' materially, socially or politically, the dead and the living, their symbolic geographies of loss and remnant inscribed in a *no man's land* between *mass grave* and *ghetto*. The symbolic geographies of violence and terror are hard to 'illustrate' despite the abundance of empirics—they are, however, perpetually lived in the bodies of those caught in the vortex of various operative discourses, narratives, regimes and technologies of governance, squashed in the clinch of ethno-nationalist and neoliberal forms of authority operative in the public spaces of B&H. It is an apocalyptic sight, considering a perpetual loss of human bodies, capacities and material resources spiralling down for more than 20 years.

In the foggy business of *terror as usual,* new heuristic tools are required to discern those operative technologies of governing people (codification in science, law and identity politics) and the ways in which they permeate everyday life experiences, cultural production and forms of life in B&H. How then, through knowledge production as public activism, are we to challenge the institutionalised imaginaries which quilt around signifiers and materialities of 'mass grave' and 'ghetto', as metaphors for human waste produced by identity politics, both globally and in the post-Yugoslav context? Critical lessons of the politics of witnessing to trauma of 'the missing', which emerge from this context, should come from fieldwork engaging with the emancipatory gestures that think and act against the traumatic technologies and regimes of power in (inter)national politics, enacted in B&H, and globally. How are we to contextualise important practices in the field of knowledge production, critical pedagogies, art and social activism, which radically question the merging of ethno-nationalist and neoliberal regimes of power and violence into ethno-corporate regimes, through specific post-atrocity orders of governance and their colonisation of the whole spheres of public and everyday life? This chapter starts from the assumption that the field of cultural production and knowledge production is a battlefield for the public good. It has transformative potentials for the politics of hope, rejecting the foreclosure of the horizons of possibility and plausibility, and resisting the very politics which produces this foreclosure—the terror of racist, colonial and patriarchal technologies of the human, exemplified at the level of everyday life.

Governance of Affect and Abject in Bosnia and Herzegovina: Ghettoes and Mass Graves as Everyday Life and Terror as Usual

In 2008 and 2009, as part of collaborative research and activist platforms and projects in the region, I have tried to engage critically with the particular regimes of governing the trauma of missing persons by analysing the areas of work conducted by ICMP under the headings of 'telling the story of a mass grave' and 'mapping a genocide' as stated in the ICMP factsheet at the time.[3] Doing the ethnographic work, which navigated several ICMP's facilities and processes of identification of missing persons, meant witnessing to the near-abject experiences where hard science of ICMP's identification process engages with the politics of terror materialised in mass graves. Behind the screens and languages of forensic sciences as the leading engine in the service of truth and justice, with special projects such as the Forensic Database Management System (FDMS), we undergo a peculiar undoing of our own humanity and politicality, for what we witness is terror which reeks of our ongoing subjection and dehumanisation. Whether it is in the visceral response to the odour in the storages and halls of Podrinje Identification Project Mortuary in Tuzla,[4] in the words and images that oversaturate us in the Lukavac Reassociation Centre or in the laboratories, offices and computers of the Identification Coordination Centre,[5] we see how our losses and our remains are being tabulated and indexed in the world of new forms of political authority managing atrocity.

My archive of stories and resources still awaits a systematic articulation, and I will here only sketch out a particular instance. As a researcher, you are, for instance, given a tutorial in the FDMS, a part of the so-called Bosnian technology of DNA identification (as it is referred to in relevant research), a software produced by local ICMP IT staff and invented module by module, as a response to the challenges of identification in B&H. This is now a global technology for identification of persons killed by political violence or natural disasters. Folders open up, named by the name of the country affected, containing subfolders entitled 'blood' and 'bone', storing the DNA markers of the dead and the living family members which are codified through a chain of letter and numbers, a barcode, specific to each individual. A hyper-scientific language processes the horror of mass graves and human remains in former Yugoslavia through barcodes and collectively stores them in folders: *B&H blood, B&H bone, Kosovo blood, Kosovo bone, Croatia blood, Croatia bone*. Above the computer, you see a plate decorating each work station and office desk—with

[3] Retrieved in 2008 from ICMP's website, http://www.ic-mp.org/wp-content/uploads/2009/10/fact-sheet-eng1.pdf. It is worth quoting some of its list items here:
Science in Service of Truth and Justice: Forensic Sciences
Telling the Story of a Mass Grave:
A Profile of the Missing
Irrefutable Evidence of Identity
Public Involvement: Civil Society Initiatives
Special Projects: Mapping a Genocide; Paths to Reconciliation
Finding Long-term Solutions: Institution-Building.

[4] http://www.ic-mp.org/facililities/podrinje-identification-project-pip-mortuary/.

[5] http://www.ic-mp.org/resources/photos/a-brief-look-at-icmp-dna-identification-process/.

name and position of employee, his/her photo, and a graph of their DNA. These are the people handling the FDMS, forensics implemented to counter the effects of political violence, to the highest international and global standards. The 'home made' forensic identification of blood and bones in the countries of former Yugoslavia is done at a fraction of the cost a foreign, professional software company would ask for. This is a technology which is 'so cool and so cheap' as I was able to hear an ICMP official say repeatedly to international officials visiting their facilities (its cost efficiency being measured in 'Euros per [dead] head'). FDMS surely represents an excellent tool from the perspective of international humanitarian management, forensics or bioinformatics, as the work it does is scientifically and technically admirable. This technology produces particular knowledge, techniques and political effects around us that are not just about the supreme ethical gesture of identifying the missing persons and 'bringing them back to their family and closest ones through the means of science', as the usual ICMP discourse goes, for we are far from the 'truth and justice' being delivered to the remnant community.

How science is put in the service of truth and justice in the public arena by the national and international post-conflict regimes governing grief, trauma of loss should be a matter of closer scrutiny. In B&H, the ongoing crisis still surrounds the material abject of the catastrophe in the 1990s. The materialised remnants of genocide are part of the ongoing trade in the politics of memory, dominating the public sphere. Rampant political economies that serve the very same projects that produced violence, that destroyed, impoverished and ghettoised lives reveal today unquenched appetites for power amongst both the old and new elites and institutions which manage trauma and govern destitution. Their symbolic order is embroidered with diligent work on identity, culture and religion, and blood and territory, through various forms of populist ethno-nationalism as well as neoliberal multiculturalism. Life is stripped of political or economic relevance at everyday level, and turned into a permanent security issue, while death and loss and their resulting and ongoing traumas are turned into the items of governance of everyday life.

To understand both the governance of trauma and the terror as usual as universal predicaments in B&H politics, one must realise the common goal of various strategies of statecraft, or sovereignty, through the mechanisms of exclusion and segregation, on the one hand, and appropriation and politicisation, on the other. And, one must look at their outcome. The outcome of the terror as usual is an aggregation of lives in ghettoes. What better example for a ghetto ending in mass graves than the infamous category of international protection—'safe zones' / 'safe areas' in the 1990s war in B&H, or simply Srebrenica. Today, almost two decades after Srebrenica, ghettoes in B&H do not result in mass graves but contain masses of lives and multitude of experiences with intensified 'levels of blight, poverty and hardship', by being reduced and relegated to 'the status of a social anomaly and being deprived of control over one's collective representation and identity', (Wacquant 1993) as well as one's bare life and livelihood. Deployed as a strategy of 'tying the undesirable to the ground', and with the task to immobilise and confine,[6] ghettoisation is a process constitutive

[6]Bauman 2001. There is, according to Bauman, a difference between the true ghettos (denial of freedom and security, such to peripheries populated by the poor, and the false 'voluntary ghettoes' safeguarding freedom and security, such as the EU.

to the 'waste-disposal mechanisms' that operate over the living bodies and lives of those who are no longer useful to state, to capital, to nation (ethnic group, etc.) (Bauman 2001, p. 120), resulting in destitution.

The outcome of the governance of trauma and its scientific, mathematical, sanitized technologies of excavations of mass graves is production of political discourses and practices of commercialization and appropriation of the missing dead and the loss and grief of the living, for the benefit of ethno-corporate statecraft, nationally and internationally. The twin faces of trauma and destitution are the common grounds for the perpetuation of ideological myths and construed threats behind ethno-nationalist, as well as neoliberal–multiculturalist politics which share many interests in the contemporary political and economic governance of life, through its inscription into 'normal' order and 'natural' territory. The citizens and their remnants in Bosnian and Herzegovinian ghettoes are produced by the trauma of sovereignty constitutive to various practices of governmentality, whilst a materialised ideology of the sovereign fantasies to render society and life governable is normalized on the level of everyday life. Resisting the governability with its sovereign fetishes is a question of political life or death for those whose bare life as labour power is violated into human slum and violence overtaking the field in public instantiations of affect and abject.

If *ghetto* is a metaphor of human life governed as social and political waste, and produced by spatialized violence of slum, alienation and politics of inequality, another dominant cipher of this politics of abject, *mass grave* is a metaphor for the absolute human waste, for dead bodies produced by specific political projects and violence masked in the phantasm of identitarian orders. In the identification processes of missing persons in former Yugoslavia, the postmortem waste in a mass grave is associated with concrete political and social meanings, which re-inscribe it into the symbolic order and political projects at stake, and do so through the languages of law, science and ethnicity/religion. The political economies surrounding mass grave multiply if we also understand it as a metonymy of the post-atrocity order in B&H. In other words, governing technologies and authorities emerging after mass atrocity can be viewed as a specific instantiation of the politics of trauma, even when it comes as the gift of therapeutic/transitional justice through legal, administrative or scientific means. Such attempts to master 'trauma time' through managing 'its affects', as *the political* time *par excellence,* take various institutionalised forms in the arena of international justice. However, institutions acting punitively towards the violations of freedom and security internationally are in a poor state and often in a serious crisis of legitimacy (Wastell 2010).

When confronted with the wasteland produced through genocide and the actualised ideology of reconciliation, we must rethink the governing of (post-)genocidal trauma in the politics of missing persons as something which currently goes hand in hand with the very politics of terror as usual, and identification based on blood and bone of ethno-national kinship. This is 'what the facts mean' in B&H. The politics of missing persons enacted through the work of ICMP is also a specific instantiation of the politics of trauma in the guise of 'therapeutic/transitional justice'. My

studies of the politics of witnessing in the language of law, art and science[7] have charted some ways of contextualising and empiricising global administration, management and codification of trauma, as an attempt to think and act against the new/old (inter)national forms of political authority within operative economies of loss and dominant politics of memory.

Thus, symbolic geographies of DNA technology and forensics, as well as narratives of justice and reconciliation at political and societal level, share a dominant mechanism of governance: the management of affect and indexation of its abject results in post-atrocity settings. They rest on specific illusions fortified by fear, specific decontextualisations and depoliticisations evident in practices and institutions of international jurisprudence. The paradigm of therapeutic governance of trauma which contains the categories of transitional and restorative justice has been rightly criticised in scholarship for its disconnection from the political, and reduction on the language of law, bureaucracy, administration, science and identitarian politics, and its tendency to obscure or culturalise the problem of the political origins of violence. When science and law—rationalisation and order—are put in the service of truth and justice, the emergent strategies of social repair in the aftermath of atrocity, built on the discourses of human rights and humanitarianism, reveal the actual nature of the relationship between states and their citizens in moments of crisis and disorder (Wagner 2008). Studying the ICMP means telling the story about reinserting 'the missing back into the embrace of the state or nation' that will insert them right back into identitarian political trades, and building 'mechanisms for tabulating losses and indexing post-disaster/post-conflict political will' (ibid., p. 255).

I have shown elsewhere how a deep suspicion of all processes outside the law of science leaves the space of the extralegal to be occupied by the mobilisation of affect through mythologisation, denial, technicalisation, bureaucratisation or medicalisation, entrenching narratives of national loss or triumph in the public sphere that obscure the question of political origins of violence, as well as avoid responsibility for the 'repair' of destroyed sociality.[8] Reducing politics to administration, pathologising communities and failing to condemn, delegitimize or overthrow violence in the very foundations and conditions of society have resulted in all-encompassing demoralisation of political subjects navigating the reconciliation and development terrain in the previous decade (for more information, please see Pupavac 2004, 2005). Additionally, a treacherous concept of 'national kinship' (and the idea of imaginary continuity between power, right to territory and historical authority) (Petrović-Šteger 2008) has suffused the international paradigm of transitional justice, including the production of 'expert knowledge' in the sphere of 'rule of law', 'reconciliation'

[7]Jasmina Husanović, *Između traume, nade i imaginacije: Kritički ogledi o kulturnoj produkciji i emancipativnoj politici*. Belgrade 2010; Jasmina Husanović, 'Ka emancipativnoj politici svjedočenja: politika nestalih kao vladanje traumom kroz kodifikaciju, matematizaciju i depolitizaciju', public lecture presented *at Mathemes of Reassociation* exhibition, October Salon, 28 August 2008, Belgrade; Husanović 2009; Husanović 2007.

[8]Jasmina Husanović, 'Ka emancipativnoj politici svjedočenja: politika nestalih kao vladanje traumom kroz kodifikaciju, matematizaciju i depolitizaciju'; Jasmina Husanović, 'Etičko-politička zaviještanja lica i ožiljaka: bosanske priče i traume kao imenice ženskog roda u množini'.

and 'trust-building' initiatives. Identitarian terror in this symbiosis of neoliberal and ethno-nationalist regimes obscures the fact that the terrain of B&H continues to be a laboratory for the 'punitive regulation of poverty' and 'punitive politics of marginality' (Wacquant 2011) in the neoliberal age, with an ethno-corporate twist.[9]

How, then, to think and resist politically the culture of trauma compounded by the everyday terror as usual? How to produce critical social practice? This task demands from us further work and new forms of cooperative efforts in public spaces of thinking and acting nationally and internationally, by bringing together critically important instances of knowledge production, social activism and art in the form of public classrooms and interventions. Certain gestures and interventions in the field of art, theory and activism can anchor us in this regard, through hopeful imaginaries and solidarities necessary for transformative actions and subjectivities concerning the terror of inequality in a society organised through the logic of poverty, corruption and banality (Sullivan 2002). The argument is that critical knowledge and cultural production have to face the abject behind violence and exploitation hidden in the cloaks of ethno-capitalism, through affective politicality and commonality, through vigorous work on the emergence of agents, solidarities, visions, means and spaces necessary for the politics of equality, through the inventive art of the ordinary, in the face of terror.

On Critical Pedagogies, Art and Social Activism: Interventions Towards Hopeful Politics

In the academic sphere that suffers from the usual symptoms of post-atrocity order, evident in various public institutions (including universities), a challenge to talk and 'teach' about subjects such as the culture of trauma or the politics of terror, without perpetuating the same logic of violence, remains unanswered. What, indeed, can be seen as emancipatory in knowledge production, when the social logic of commodification extends to all common goods, including knowledge, using strategies of ghettoisation to govern precarious life and its labour power necessary for production and consumption? The position of students and critical educators in public universities, which are caught in the ethno-corporate matrix of feudal struggles in heartless institutions (Flecha 2008), attests both to the precarization of cognitive labour and our capacity for public collective action and to the management of 'us' as precarious subjectivities in the public sphere and labour market. In the complex

[9] 'Ethno-corporatism or ethno-materialism refers to a group or groups of people unified by a common corporate or material culture but displaying distinct characteristics of an ethnic group. A definition for an ethno-corporate identity would be based upon the conflation of user or customer culture (including brand or trademark loyalty) with decidedly-ethnic overtones (marriage within the culture, ethnic self-classification based upon user or customer ancestry, etc.); as a result, an ethno-corporate identity would not be exclusively based upon ethnic ancestry but also upon corporate or material usage, sponsorship and adherence'. Retrieved from http://en.anarchopedia.org/ethnocorporatism, 8 March 2012.

emergencies besetting the academic knowledge production and its agents, neoliberalism once again appears as a 'theatre of cruelty' (Giroux 2010, pp. 49–70), a mode of biopolitical governance through cultural politics that produces 'new forms of subjectivity and particular forms of conduct' through its own 'cultural politics of subjectification and self-regulation' (ibid., p. 51). In the academic spaces intersecting B&H, neoliberalist governance comes in a double act with another theatre of cruelty, ethno-nationalism, which has already produced ethno/religious identity-based forms of subjectivity and ensuing forms of conduct, leaving devastating consequences for the horizon of education.

What has to be stressed is that neoliberalism (as well as ethno-nationalism), in B&H and beyond, has become a pedagogical force that threatens any critical thought and action, mobilising all pores of everyday life to 'legitimate its norms, values, institutions and social practices' and normalize its regime of common sense and reductive notion of political rationality (ibid). Therefore, 'neoliberalism has to be understood and challenged as both an economic theory and a powerful public pedagogy and cultural politics' (ibid., p. 61) which violates and exploits in the actual contexts of precarity our universities, workplaces, streets, communities, etc. in order to dissolve our capacity for political action (Touraine 2001). Neoliberal, ethno-nationalist and racist public pedagogy and cultural politics is evidently on the increase in the post-national Europe too, dissolving our capacities for transformation. Many transversal practices, subjectivities and emancipatory potentials resist this dissolution, reclaiming transformative politicality and sociality in the public field, at the intersections of art and knowledge production, social activism and critical pedagogies. As Giroux's imperative goes:

> Under the reign of neoliberal globalization, it is crucial for intellectuals and others to develop better theoretical frameworks for understanding how power, politics, and pedagogy as a political and moral practice work in the service of neoliberalism to secure consent, to normalize authoritarian policies and practices, and to erase a history of struggle and injustice. The stakes are too high to ignore such a task. We live in dark times and the spectre of neoliberalism and other modes of authoritarianism are gaining ground throughout the globe. We need to rethink the meaning of global politics in the new millennium and part of that challenge suggests the necessity to 'recognize that equality and freedom, class and culture, as ineluctably linked.' Doing so offers educators and others the possibility to take new risks, develop a new vitalized sense of civic struggle, and exercise the courage necessary to reclaim the pedagogical conditions, visions, and economic projects that make the promise of a democracy and a different future worth fighting for (Giroux 2010, p. 66).

What can be our lessons in this direction? Lessons from the experience of actual struggles to repoliticise the current governance of trauma and logic of commodification; lessons of working in social institutions in the hands of the ruling regimes; and lessons of intervening into the knowledge production on the margins, in the interstices escaping the political/economic rationality of 'recognizable deliverables' and 'usefulness' present in dominant matrices of governing? What is the position of these valuable remnants of subjectivities, sites and struggles that hold emancipatory potential? I repeatedly take as a starting point Frank Seeburger's insight that 'it is only as such remnants, or at that level of ourselves where each of us is just such a good-for-nothing, ready-to-be-discarded remnant, that we can be encountered in

our pure singularity, our "ipseity"... to distinguish it from our "identity", which is always a matter of social construction and ... "symbolic investiture"' (Seeburger 2010). Only through the struggle with and within this 'remnant position' can we realise the traumatic fact that we are always already human waste, whose economic and political value is that of 'usable bodies', objectified through fears of having no protection by state/nation/capital, staring in the face of the political art of the arbitrary (Mezzadra and Neilson 2003). Bare life as labour power, precarity and migration, violence and waste are the facts of our everyday life, in the clutches of the dominant political imagination whose hidden ciphers remain wavering between ghetto and death, between 'safe zones' and mass graves.

Perhaps, then, it is time to put the spotlight on the *ipseity* of our labour: to start from the very capacity of the body exploited for the purpose of profit to catch the threads of emancipatory politics. In the context of our plunging transition, for the bodies and for the remnants of our sociality, politicality and solidarity, where and when do we dare ask about the economies and geographies of exploitation surrounding remnants of genocide? Recycling bodies and erasing bare/precarious life as a trade in humanness/humanity around us are *difficult questions*. And how to deal with the abject/affect which floods over in excess when we unravel the stories and uncover the political economies around us?

The answer to the politics of atrocity, racism, inequality and terror will *not* be found in the institutional academic space. Rather, the focus of our attention has to be specific critical and social spaces and practices that produce hope, equality and justice, as indications of affirmative and universal politics of new subject. We witness those spaces emerge in a triangle of art, knowledge production and activism (see more on this in Husanović 2010) at the locations where we produce *theory in art, art in theory and school in both*.[10] We find them in critical interventions by a new wave of public workers engaged in the field of theory, art and activism in post-Yugoslav spaces, whose work is underexplored in current academic research (Husanović 2011).

In this sense, interventions by *Kooperativa Front Slobode* (Cooperative Freedom Front) and *Grupa Spomenik* (Monument Group) artist–activist–theorist groups dedicated, amongst other things, to investigating the politics of memory of the war(s) of the 1990s have been particularly significant and productive. Their work on the politics of memory and genocide investigates limit points of a range of discourses: science, law, forensics, bureaucracy and their repoliticisations in theory, art and activism. An example is the engagement with the issue of missing persons in the *Mathemes of Reassociation,* a series of public events in the region and internationally, which were instigated by the fluctuating group of artists, theorists and activists from the post-Yugoslav region, Grupa Spomenik (Monument Group), in the period 2008, 2009 and 2010. In various contexts and formats, the *Mathemes of Reassociation* attempted to produce a public classroom in a new way, undoing the coordinates

[10] 'Theory in art, art in theory, school in both' is a concept developed within the *Yugoslav Studies Platform*, developed by a group of organisations and individuals during the Konjuh Plenary Session, July 2009.

of what has been set as possible or impossible, engaging disparate audiences as producers of knowledge, whilst exploring the issue of missing persons and the work of ICMP.[11]

For example, several interactive public performances in Banjaluka during the Spaport Biennial of contemporary art in 2010,[12] engaging with selected works of poetry, autobiography, theory and contemporary art, attesting to the possibility of a different idiom in which we can speak about come into solidarity and act upon our political affects encircling the most traumatic points of current social reality. Most importantly, it produced a circulation of knowledge as transformative social practice, and facilitated future collective efforts passing far beyond the boundaries of the event itself. To tell a simplified story about them would be superficial, at least, since the concepts and politics behind them demand a thorough explanation for each particular event. What is sorely missing is a detailed study of these complex interventions, including a thorough engagement with the archive of audiovisual and electronic records of these events, their preparatory and aftermath processes, as well as thorough research work with and amongst the actors involved in these events. It is, however, a task beyond the scope and aims of this chapter.

The imperative remains, nevertheless, to continue the search for a community of equals that intervenes into difficult subjects through a reinvented classroom as activism, or activism as a classroom. Those interventions, which include a common work of artists, theorists, students, activists, citizens, are an act of knowledge production where we build the stage to 'frame the story of a new adventure in a new idiom. The effect of the idiom cannot be anticipated. It calls for spectators who are active interpreters, who render their own translation, who appropriate the story for themselves, and who ultimately make their own story out of it. (. . .) What had to be done was a work of translation, showing how empirical stories and philosophical discourses translate each other. Producing a new knowledge meant inventing the idiomatic form that would make translation possible' (Ranciere 2010). The task is clear: We have to 'get our hands dirty' finding the forms of action which engender the political subjects struggling for equality today, and we have to do some radical groundwork precisely at the sites of greatest antagonisms, there where the emancipatory potential shines through. The field of knowledge production is certainly one such site.

Authentic political interventions opposed to the culture of terror are those practices that set up the possibility of political subject which traverses ventriloquism of the official politics and public and their continual blood-hounding ideological operations for the purpose of further impoverishment of the public good. Testifying collectively to the potentiality of a promising politics includes particular strands of

[11]For more information on Grupa Spomenik and *Mathemes of Reassociation*, please see http://grupaspomenik.wordpress.com/.

[12]For more information on the event, please see http://www.protok.org/Spaport/spaport.htm. See also, http://www.manifestajournal.org/issues/i-forgot-remember-forget/where-everything-yet-happen.

academic, cultural, activist and artistic production which share a particular pedagogy. They testify to and resist violence/terror by turning experiences of trauma into critical insights of hope (Felman 2002), by attributing creative ability to the loss, (Eng and Kazanjian 2003) and through insisting on the emergence of emancipatory political subject in relation to the dominant (inter)national regimes of governance and accompanying forms of political authority. In our own ghettoes—taking shape in particular laboratories of 'hegemony, neoliberalism, rise of fundamentalism and fascism, masculinization, ethnicization, racialization and militarization of the world, as well as (feminization of) poverty' (Mohanty 2002)—there are still many things that propel us, affirming the postulate 'I revolt, therefore we are . . . still to come' (Kristeva 2002).

When working with people in the art of the ordinary on making the impossible possible, one becomes acutely aware of the multiple dimension of the loss of sociality/politicality, with voicelessness which results with invisibility of political subject of change. In this sense, the emancipatory charge, with various degrees of political visibility as a resource of critical knowledge and social practice, is reclaimed by the engagements of artists, theoreticians and cultural workers in B&H, in the post-Yugoslav region and beyond. New optics and registers of intelligibility in the field of art and cultural production often intervene in emancipatory ways against the biopolitical interests in relation to colonialization of history and future, of the experience, the body, humanity and everyday life. These new radical social imaginaries exhibit a particular politics of witnessing that navigates the triad of bare/precarious life—sovereign power—the biopolitical *nomos* of the new empires around us. They also oppose the confiscation of experience and memory, resisting that which constricts critical thinking and intellectual life today.

There are several questions still to be asked. How do these emergent social imaginaries and political gestures struggle with the 'loss of the ability to speak, or the loss of the capacity for language, which means in turn the loss of belonging to the world as such' (Marazzi 2008)? In which direction do they modify this loss in order to bring us together, 'communify' us (ibid) against the identitarian politics, through *new* languages of political action and *new* collectivities? How do these voices and subjects probe the paradoxical im/possibility of justice, coping with the critical traumatic contents of political reality, since 'it is always from the face, from responsibility for the other, that justice appears' (Levinas 1998)? The language of art offers radical kinds of witnessing to trauma that at the same time reveal the contingent nature of the forms of political and social organisation. The politics of affect here strikes directly at the very political sovereignty of the nation-state as a mask for the reorganisation of old and new elites. In this unstable field of oscillation of culturalised political emotions, what counts as transformative? I imply that a certain practice has an emancipatory charge only if it responses to the loss of the capacity for language (i.e. of belonging to the world and a way of life) in such a way that it rejects the language of sovereign biopolitical power; if it turns loss into something that brings us into communality through affirmative political imaginary against the perpetuation of the politics of atrocity that produces human waste; if it offers cultural readability, intelligibility of the 'proper places' and 'proper language' (see also Athanasiou 2008) intended for

those excluded/included from the *res publica* through political violence, corruption, impoverishment and banality.

Where and what is the place of academia and academics in contributing to such politics of hope? Let us assume that the evidence of the virtuosity of our labour force (as the *cognitariat*) is the public intellect as the main productive power. But, in the context in which this public intellect is pressed by the nationalisation or etatisation, with the authoritarian transfer of the potentials of intellect to the administration and its power (the hypertrophied growth of administrative apparatuses as the opposition of cooperation), does our virtuous conduct not become universal servile work, while we drift apart and personalise our own subjections instead of finding common solidarities (Virno 1996)? One symptom of this general diagnosis is the situation in institutionalised academic spaces in B&H suffocating the public intellect by tramping the virtuousity of its labour force and by betraying the struggle for public good such as higher education. Is it, then, that the only subversive act is the one which institutes the non-governmental public sphere as a community apart and as such requires collective defection from the statecraft apparatus, alliance of the general intellect and political action, and movement to the public sphere of intellect (Virno 1996)? The issue of public good and the commons in the sphere of knowledge production demands all our inventive capacities and virtues calling into question the very coordinates of political life and everyday realities of our public institutions. Perhaps, it is through disobedience and immoderation of demands (for instance, cooperatives which bring the academia to the public) that we can respond to social and political antagonisms by a gesture of exodus (traversal) that disorients the opponent, through the act of collective imagination that gives expression to the abundance of knowledge, communication and acting together, whilst rejecting the transfer to the power of sovereign imagination (ibid., p. 213–221).

Only interventions and platforms which 'think' commonality and solidarity *differently*—in the context of the technologies governing the humanness, the management of the human and the production of human waste through political, economic and social violence—can engage with the scar of the mass grave against the perpetuated terror of inequality in everyday life, through hopeful politics. Such trajectories and networks of hopeful politics should revolutionise our lenses and senses because their engagement with the questions of abject, affect, revolt and collectivity today brings into the field of visibility and intelligibility the very question of emancipatory politics after the catastrophe of experience that overcame us in recent decades.

Therefore, the coming critical pedagogies should focus on the practices of cultural criticism and analysis that engender classroom as 'an emancipated community, which is in fact a community of storytellers and translators' (Ranciére 2007). There is a strong legacy in the former Yugoslav region of actors and spectators in a communal space of knowledge production, transforming the relationships of inequality into a community of equals. However, their work on producing knowledge in an emancipatory classroom has to be furthered. In this respect, it should be wedded to complementary strands of feminist theory, cultural studies, psychoanalysis and post-colonial theory, which have produced emancipatory public classrooms as a critical practice beyond the conventional models of knowledge transmission. These

imply a cooperative learning process outside the traditional walls of institutionalised classroom culture, which is practice-oriented, non-authoritarian, building on the experiences, insights and affects around texts and stories of everyday life, its practice and politics. At the same time, such a social movement in the field of knowledge production must be the site where we resist the politics of terror as usual, the governing of trauma and loss and the logic of commodification and exploitation of dead and living, by undergoing ideological inoculations, reclaiming the means of knowledge production and assuming a different relationship to labour necessary for social change. The conversations have to bring together a complex world of audiences, their stories, passions and experiences into a public classroom framed as a community of equals, where together we produce maps of knowledge and action, articulating a triple search: for the subject/agent/collectivity; for the space of intervention and for the vision-imaginary of change.

The question for all of us is utopian, of course: Which of our own material experiences of life (as the combination of intellect, work and action) affirms the subject, space and imagination of emancipatory politics today, and how? Today in B&H, to engage in a knowledge production that may claim an emancipatory potential to reclaim politicality and sociality set against violence, exploitation and alienation requires confronting material experiences of perpetual terror and hopeless politics of loss by inventing a public language of hope. What can lead us in this direction are new public languages of communality and hope in various circles of emancipatory knowledge production and collective action, in the region as well as globally (Arsenijević 2010; Arsenijević et al. 2009; Husanović 2009, 2010). Interventions in hopeful politics produce collective spaces of knowledge production, where teachers and students become both actors and spectators transforming the relationships of inequality into a community of equals. What has to be brought into this space through classrooms in community as academia is a complex world of experiences, interests and passions we share when resisting exclusion, exploitation and domination in all its forms: poverty, patriarchy, racism, ethnocentrism, elitism, colonialism, homophobia, capitalism, etc.

The important gestures in the area of cultural production and public acts which arrive from multiple trajectories in the region of former Yugoslavia and internationally deal with some of those difficult questions—as a community of equals, in solidarity through their struggle for the public good, and as an emancipatory public classroom in the aftermath of the catastrophe of experience which has been striking us during the past decades. Such living spaces of solidarity in cooperative knowledge and creative collective public action is where our critical energies must fully focus today in resisting the ideological lies constitutive of the official institutional spaces of education in schools and universities. In other words, knowledge must be reclaimed as public good, against its further depletion, commodification and exploitation. Producing critical insights and acts in the politics of abject, affect, revolt and collectivity, against material conditions and symbolic geographies of terror as usual, is hard labour and everyday practice that requires the commons/communality in heartless institutions and regimes of governance around us.

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Chapter 9
War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests

Frederiek de Vlaming and Kate Clark

Introduction

Bosnian war victims and groups of victims have taken different paths to seek redress for harm they suffered as a result of the 1991–1995 war. The Dayton Peace Accords of 1995 established two reparations mechanisms: the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) and the Human Rights Chamber (HRC). The CRPC oversaw an administrative restitution scheme that allowed war victims to claim repossession of their lost properties. The HRC could order Bosnian authorities to take measures providing compensation or other forms of assistance to victims of human rights violations. The two institutions received and administered thousands of individual applications. The Dayton reparation mechanisms ceased to operate in 2003. Since then, Bosnia no longer has a national war reparation program for war victims. Thousands of victims, both in and outside Bosnia, have filed applications with domestic courts. Up to this day, most of these claims have been unsuccessful.

Transitional justice literature distinguishes between micro- and macro-level mechanisms of war reparations. At the micro-level, it is the individual victim (or a group of victims) who files a claim before a court against another individual, i.e. an alleged perpetrator, or against an institution, with the aims of establishing the facts that lead to the particular harm done to them, and of identifying or exposing those responsible for it. Such claims are typically initiated by the victims themselves, either individually

F. de Vlaming (✉)
International Criminal Law Department, Amsterdam Center for International law, Faculty of Law, University of Amsterdam, Oudemanhuispoort 4–6, 1012 CN, Amsterdam, The Netherlands
e-mail: F.deVlaming@uva.nl

Center for War Reparations, Nuhanovic Foundation, Amsterdam, The Netherlands

K. Clark
Royal Conservatory of The Hague, Nuhanovic Foundation, Pythagorasstraat 31, 1098 EW, Amsterdam, The Netherlands
e-mail: kateclarkonline@gmail.com

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or as a self-appointed group, or by their legal representatives. In this procedure, the victim occupies the central place, raising a claim on his or her own behalf, in order to gain proper recognition of the harm and suffering endured, and possibly also other forms of reparation. Reparation claims can be made either through a civil (tort) case or on the basis of criminal proceedings. The latter are run by the prosecutor and reparations may be awarded after the defendant's liability has been established.

Macro-level or administrative mechanisms, on the other hand, are designed to enable a large group or specific category of victims to bring claims directly to national or local authorities (as opposed to through the courts). The claims are administered through the application of some existing or specially created law. These mechanisms are aimed at securing collective solutions. They are typically initiated at the governmental level and they imply prima facie recognition of the existence of a large group of victims whose needs must be addressed. Here, it is not the suffering of individuals that is the driving force, but the recognition that a large body of victims has been created by the conflict and that their needs can be, to some extent at least, addressed by the systematic application of some reparatory mechanism. We will refer to these as administrative or collective claims mechanisms.

The two levels are sometimes portrayed as antagonistic to each other, in other cases as complementary. As we will discuss in this chapter, it is generally argued that collective claims mechanisms are a better instrument to provide redress to war victims: These mechanisms may potentially reach out to large numbers of victims, recognize victims as a special group in society, can serve to reflect on the responsibility and liability of authorities and better represent the collective dynamics of war crimes. By contrast, individual litigation is often seen as serving the interests of only one or a few victims and thus failing to represent adequately the collective nature of mass violence.

This chapter proceeds with a discussion of the multiple aims of reparations mechanisms. Central to the discussion are the observations of Pablo de Greiff, long-time specialist in the field and since 2012 United Nations (UN) Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence. The chapter then looks at how both individual and collective mechanisms have worked in practice during and in the aftermath of the Bosnian war. Our central question is to what extent the neat and potentially antagonistic divide between individual and collective claims mechanisms, as conceptualised in transitional justice literature, exists in the Bosnian context. How strict is or was the division between the two mechanisms? Do individual proceedings indeed only serve individual interests and represent the individual's narrative? And, to what extent do collective mechanisms focus only on the collective aspects of harm and disregard individual interests?

We will argue that both the individual and the group claims for reparations made by Bosnian victims have ultimately always served interests broader than the claims themselves. Firstly, they have helped establish historical truths and determine the responsibility of individual actors as well as institutions. Secondly, they have bolstered a growing demand for leaders to be held to account. Finally, they have contributed to the further development of the international body of law on reparations.

Concepts of War Reparations: The Individual vs. The Collective[1]

Answering the basic—but all encompassing—question of 'what should [war] victims in fairness receive?', de Greiff suggests three notions that should be at the heart of any reparation program: recognition, civic trust and solidarity (de Greiff 2006, p. 452, 454, 455, 459).[2] Recognition can be understood as the aim of a reparation program to depict victims both as individuals and as citizens. De Greiff argues that 'Citizenship is a condition that rests upon the equality of rights of those who enjoy such status. And this equality of rights determines that those whose rights have been violated deserve special treatment, treatment that tends towards the reestablishment of the conditions of equality' (de Greiff 2006, p. 460, 461). Thus, firstly, recognition entails acknowledgment of the (historical) facts and the harm suffered by the victims, and the appreciation of the victim as a bearer of rights. Secondly, reparation is aimed at restoring civic trust among citizens as it 'involves an expectation of a shared normative commitment' (ibid., p. 462). Civic trust is thus understood both as trust towards others—including government and other authorities—and as trust in the national legal or normative system (ibid., p. 463). Finally, solidarity—understood as 'having an interest in the interests of others'—should be at the heart of any reparation policy (ibid., p. 464).

By presenting these three aims of post-war reparation programs, de Greiff positions the issue of reparation in the context of a wider post-war reconstruction program. Reparation programs should, according to de Greiff, be developed 'in relation to a broader political agenda' and 'have a political perspective' (ibid., pp. 454–456). The collective dynamics of war violence and the state's involvement therein should be reflected in a collective, state-driven and administrative reparation model that reaches out to victims as a particular group of citizens in society. According to Teitel, the consequences of this approach imply that not just any form of harm suffered by any individual can be repaired (Teitel 2000, p. 134). She argues that reparation should 'transcend[s] the affected individuals and reach [. . .] the wider society' (Teitel 2000, p. 134). Thus, where a state has involved itself in persecution and discrimination and failed to provide for equal protection among its citizens, it should, in Teitel's words, 'advance reconstruction of equal citizenship rights' (Teitel 2000, p. 134). In the case of massive abuse, and here we return to de Greiff, 'an interest of justice calls for more than the attempt to redress the particular harms suffered by particular individuals. Whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an aim that has a public, collective dimension.'[3]

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[1] War reparations may have different forms: compensation, restitution, rehabilitation, satisfaction and guarantees of non-recurrence. See Teitel (2000, p. 119).

[2] See also Teitel on the same question but in slightly different wording: 'Of all the wrongs committed under past repressive rule, which inequalities merit redress?' (Teitel 2000, p. 134).

[3] De Greiff (2006, p. 457). See also Malamud-Goti and Grosman (2006, p. 551: 'reparation programs restore the dignity of the victims and allows for reintegration into society as equal citizens'). See also Segovia (2006, p. 655: 'programs of reparations are essentially political in nature' and 'are part of a

The question then is whether this interpretation of the aims of war reparation schemes leaves room for any form of individual claim for harm that is suffered in a collective context. Transitional justice literature advances a number of principled and pragmatic arguments that preclude individual recourse to the courts. First, achieving justice for only one or a limited number of victims would discriminate against those who suffered the same harm but are not able to initiate litigation due to a lack of awareness or resources. Second, as de Greiff and Malamud-Goti and Grosman argue, the legal system is simply not equipped to deal with massive and systematic forms of violence; thus, litigation, whether individual or on behalf of a group of victims, is bound to impose an unsustainable burden. Third, a traditionally complex and lengthy, as well as antagonistic, legal procedure may not be sensitive to the particular position of traumatized war victims (Malamud-Goti and Grosman 2006, pp. 541–543). Moreover, the impartiality of the legal system may be doubtful: Judges may have been appointed by the former government and thus be prejudiced against victims (Malamud-Goti and Grosman 2006, p. 543). Other legal obstacles that are mentioned concern evidential requirements, such as the statute of limitations and the identification of perpetrators (Malamud-Goti and Grosman 2006, pp. 544–545). De Greiff criticises the focus on financial compensation as victims may have other needs, such as the wish to bring out and share their experiences (de Greiff 2006, p. 459). Incidentally, de Greiff warns that in the individual 'traditional tort approach', it may be impossible to quantify the harm that was suffered. Thus, a legal interpretation of 'adequate compensation' or 'restitution', as foreseen by international standards on war reparation, may lead to unrealistic outcomes and, on the other hand, 'pernicious' demands that defendants are unable to fulfil (de Greiff 2006, pp. 455–456; Malamud-Goti and Grosman 2006, p. 541).

Although administrative or collective programs may appear to be the most logical response after mass violence, they have shortfalls too. There is the potential for political manipulation of such mechanisms, for example, when they aim at silencing victims, a phenomenon that we have seen in a number of South American countries after military rule. There may also be problems in the area of implementation and enforcement of administrative reparation programs. As observed by Abazovic (in press) that even the best-intended post-war collective programs to mitigate the war's consequences may be rendered ineffective when the root causes of the conflict still prevail (Abazovic in press).

In such cases, the individual legal path is an option that can complement or even replace administrative schemes (Malamud-Goti and Grosman 2006, p. 557; Hamber 2006, p. 565). But even then, it is argued in transitional justice literature, legal proceedings should aim at transcending the individual level and contextualise the individual's harm in order to fully represent the collective dynamics of the crimes,

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more general human rights agenda'). See Teitel (2000, p. 137, 146) and Chap. 4, where she argues that reparation should be a 'social response to persecution', and 'a means to prospective political and economic transformation'. Teitel refers to the Latin American experiences where reparations were meant as a 'public apology', and where reparations drew a 'line on past wrongdoing' (Teitel 2000, p. 137).

thus satisfying and serving the interests of a wider circle of victims (Malamud-Goti and Grosman 2006, pp. 552–553).

In the following sections of this chapter, we will examine a number of cases outside and inside Bosnia, in order to reflect on the debate about the relationship between individual and collective reparation claims.

Individual Reparation Claims Outside Bosnia

Since 1993, a limited number of Bosnian war victims have sought redress before US and European courts. Generally, these claimants had fled Bosnia, and foreign courts provided the only forum in which to file their claims. Victims filed civil claims against individual perpetrators in the hope of obtaining public recognition and reparations. The civil cases were initiated by smaller or larger groups of victims, some of them being represented by victims' organizations or human rights organizations. These cases were directed at individuals and in one case against a government and governmental agencies. Criminal cases are normally initiated by state prosecutors but in a number of cases, this was done on the victims' requests.

Claims Filed Before US Courts

In 1993, while ethnic cleansing was still raging in the region, a group of Bosnian rape victims filed a claim in the USA under the Alien Tort Claims Act and Torture Victims Protection Act against Radovan Karadzic, political leader of the Bosnian Serbs and one of the RS's former presidents. The claimants alleged that Karadzic had been responsible for ordering war crimes, crimes against humanity and genocide in the form of brutal sexual violations and other forms of torture and extreme cruelty. The claimants approached Professor Catherine MacKinnon of Michigan Law School to represent them in seeking redress through international justice (MacKinnon 1998). MacKinnon explained the rationale for ultimately pursuing their claim through a national court as follows: 'Their first priority was to stop the genocide. [. . .] Second, the clients wanted to hold those responsible, from the top to the bottom of the hierarchy, accountable to them for what they had done.' In particular, 'the clients were not attracted to a confidential investigation by an international inquiry leading to a secret report in which perpetrators were told they did something bad' (ibid., p. 1). Moreover,

> [i]nternational bodies were not set up to achieve either of these goals. Briefly put, the applicable international law was strong in principle but weak on delivery. Domestic law in many countries had the reverse problem. It was often short on principle by international standards but long on teeth. We concluded that if you want a statement of principle, go to an international forum; if you want delivery, go to a national court. (ibid., p 1)

MacKinnon's clients wanted 'to testify about their rapes in a court of law' (ibid., p. 3). The claim was 'a civil claim, seeking declaratory relief (acknowledgment that what happened to them violated these laws), an injunction against the genocide (requiring Karadzic to order it to end), and substantial damages for the human atrocities committed as a result of his policy of genocidal aggression' (ibid., p. 2). MacKinnon's clients listed their first three goals in the following order: '(1) stopping the violations; (2) naming them what they are; (3) accountability to the violated for what was done to them' (ibid., p. 3). Plainly, alongside immediate cessation, public recognition of the harm done to them and public exposure (of at least one) of those responsible were primary goals for these survivors. MacKinnon observed that:

> [a] forum in which survivors choose their own lawyer, shape their own claims, and direct their own case leaves the process of justice substantially in their own hands. The process, by design, is accountable to them—not to the press, not to international politics, not to the bureaucratic imperatives of international organizations, not to the fundraising competitions or turf battles or empire-building of human rights organizations, and not to criminal prosecutors enhancing their careers by claiming to represent 'the law'. The ICTY is not accountable to survivors by design or in practice. Survivors have no decisive voice in it. (ibid., p. 3)

She added in her conclusion that 'the legal system has a lot to learn from the survivors' choice of a process they control themselves' (ibid., p. 4).

The claimants' fourth goal was 'continuity between the legal changes made and other law, so that what was done here counts and has meaning beyond the context of these proceedings' (ibid., p. 3). Indeed, they amended their initial claim, moving

> to certify a class of plaintiffs consisting of: all people who suffered injury as a result of rape, genocide, summary execution, arbitrary detention, disappearance, torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb Forces under the command and control of defendant between April 1992 and the present.[4]

The court granted this amendment.[5]

It is obvious that this landmark claim aimed, on the micro-level, at recognition, exposure and reparation, and on the macro-level at cessation of the violations in Bosnia, acknowledgement of the existence of a great collective of victims and an enduring legal impact for the benefit of others beyond the context of this claim. The court of appeals found that 'Karadzic may be found liable for genocide, war crimes and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process'.[6] On that basis, the jury decided to award US$ 745 million (US$ 265 million compensatory damages and US$ 480 million punitive damages) in favour of 14 plaintiffs.[7]

In December 1998, a lawsuit was filed before a US court by four Bosnian Muslim plaintiffs seeking compensatory and punitive damages against Nikola Vuckovic, a Bosnian Serb soldier during the course of the armed conflict in the former

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[4] Order—US District Court, S. Dist. of New York Order regarding class status in the matter of Jane Doe I v. Karadzic Opinion And Order 93 Civ. 0878 Para. 2.

[5] Order—US District Court, S. Dist. of New York Order regarding class status in the matter of Jane Doe I v. Karadzic Opinion And Order 93 Civ. 0878 Para. 4.

[6] Kadić v. Karadžić, 70 F.3d 232, 238–46 (2d Cir. 1995).

[7] Kadić v. Karadžić, No. 93 Civ. 1163, judgment (S.D.N.Y. August 16, 2000).

Yugoslavia (Mehinovic et al. 1998, p. 1). The principal plaintiff, Kemal Mehinovic, and the defendant were both residing in the USA at the time of the claim. Vuckovic was allegedly responsible for the arbitrary detention, torture and abuse of Bosnian Muslims and Croats from the municipality of Bosanski Samac, Bosnia and Herzegovina (BiH), and the forced relocation of Bosnian Muslim and Croat families living in the municipality (Mehinovic et al. 1998, p. 7). The applicants accused Vukovic of torturing them and committing gruesome atrocities against them during their arbitrary detention (Mehinovic et al. 1998, p. 3). In its judgement, almost 11 years later, the court relied on the testimony of expert witnesses and on International Criminal Tribunal for the former Yugoslavia (ICTY) findings on ethnic cleansing campaigns in Bosnia at the relevant period as ample evidence of the fact that the alleged crime was part of a larger criminal scheme (Mehinovic et al. 2009, p. 3, fn 2).[8] It awarded the plaintiffs US$ 10 million each in compensatory damages and US$ 25 million each in punitive damages (Mehinovic et al. 2009, p. 7).

After the conclusion of the trial, plaintiff Mehinovic expressed satisfaction at the outcome, saying:

> I am satisfied. I brought this case because I feel an obligation towards those who were killed or suffered extreme cruelty because of acts Vukovic committed or in which he participated. I survived. I have an obligation to tell their stories and to seek justice on their behalf. It is important that the public knows what happened, that they know what our lives were like before all of this happened, and that they know that we did nothing, nothing at all, to provoke these acts.[9]

Sandra Coliver from the Centre for Justice and Accountability which represented the plaintiff stated:

> Justice has been served because the victims had their day in court, and Mr. Vukovic has been forced to flee his current home in the Atlanta area [. . .] to live as a fugitive, unless he decides to accept responsibility for his crimes. [. . .] If he manages to re-enter the United States, we will work to have him arrested [. . .] and deported. [. . .] The case sends the message that the U.S. will not be a safe haven for torturers and war criminals. (ibid., p. 2)

Referring to the Bosnian Human Rights claims that had been brought under the Alien Torts Act in the USA, Hoffman, Coliver and Green (Professor Green represented plaintiff Mehinovic) have argued that this type of litigation 'contributes to the worldwide movement against impunity' by, among other things, 'holding individual perpetrators accountable for human rights abuses; providing the victims with some sense of official acknowledgment and reparation and contributing to the development of international human rights law'. Green and co-authors considered that '[. . . it] appears that these cases, when taken together with other anti-impunity efforts around the world, are also helping to create a climate of deterrence and [to] catalyze efforts in several countries to prosecute their own human rights abusers' (Coliver et al. 2005. pp. 174–175).

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[8] On the ambiguous role of expert witnessing and on the legal and political relevance of recognition of larger criminal scheme, see Doris Buss and Predrag Dojcinovicin, respectively, in this volume.

[9] Centre for Justice and Accountability, 'Dramatic Testimony on Closing Day of Bosnian Torture trial', Press release, 24 October 2001, p. 1. Available at: http://cja.org/downloads/Mehinovic_PR_10.24.01.pdf.

Finally, for the individual plaintiff:

> [t]hese cases often help survivors experience a sense of justice, a sense of meaning in their survival, and tremendous satisfaction in knowing that they have brought dignity to the memories of those who were killed or tortured. The cases are a way of setting the historical record straight—not just about what happened but also about who was responsible. As such, the cases can serve as a kind of mini-truth commission. (ibid., p. 180)

Beyond a sense of victory for themselves individually, the testimonies of these claimants and their legal representatives speak unequivocally of the great significance that their successful claims were intended to have, and did have, for the collective of victims and survivors.

Claims Filed Before National Courts in Europe

A number of other Bosnian victims have been awarded reparations in successful civil claims or following criminal convictions in European countries. The first Bosnian reparation claim ever brought before a European court was filed in France in 2005. Here the *Tribunal de Grande Instance de Paris* found sufficient evidence that former Bosnian Serb political leaders Radovan Karadzic and Biljana Plavsic were personally responsible for the harm suffered by the claimants, Zuhra and Adil Kovac, during the Bosnian war (Irwin 2011). The Kovac family had fled to France and obtained French citizenship after being attacked in, and deported from the eastern Bosnian town of Foca in 1992. In what one commentator has called an 'unprecedented civil decision' (Riley 2011) the French court ordered Karadzic and Plavsic to pay € 200,000 to compensate the claimants and their children for the pain, humiliation and loss they suffered as well as for the costs they incurred from Adil's injuries which resulted in disability. The family's legal representative, Ivan Jurasinovic, remarked that the court's ruling had 'pave[d] the way for victims of war crimes to obtain civil compensation from war criminals without a criminal trial'.[10] His clients expressed a sense of victory even while they acknowledged the possibility that actual reparation payments may never result from the decision, saying: 'This will not erase all the suffering, but for us it is a great victory' ('*Ca ne rattrapera jamais les souffrances vécues, mais c'est une grande victoire pour nous*'; ibid.).

In Norway in 2008, a former member of the Croatian Armed Forces, Mirsad Repak, was indicted for war crimes and crimes against humanity.[11] In the months from May to October of 1992, the defendant had been stationed as a guard in the Dretelj detention camp in BiH imprisoning Serb and Muslim civilians. He was alleged to have been involved in the arrest and unlawful detention of many civilian

[10] Ivan Jurasinvic, paraphrasing his interview with the newspaper 'Liberation' on 15 March 2011. Available at: http://avocats.fr/space/ivan.jurasinovic/content/-liberation–a-propos-de-l-affaire-kovac-c–karadzic_EBAA973D-FC18–4027-9E9A-EA589D94FE90.

[11] *The Public Prosecuting Authority vs Mirsad Repak*, Oslo District Court case no: 08-018985MED-OTIR/08, 2 December 2008.

non-combatants and to have continued their detention in conditions calculated to cause suffering and sometimes involving torture. In 1993, he fled to Norway with his family, subsequently obtaining Norwegian citizenship, and settling there (ibid., p. 3). The District Court of Oslo found Repak guilty of war crimes. The case gave rise to difficult questions concerning the relationship between Norway's domestic provisions on war crimes (which dated only from 2005) and those existing in international law particularly under the Geneva Conventions. The original decision of the District Court of Oslo was overturned by the court of appeal in early 2010, the higher court finding that the defendant's acts predated the existence of the relevant legislation in Norway and that retroactive application of new legal provisions was not permissible.[12] However, later the same year, the appeal court ruling was itself overturned in Norway's Supreme Court: Repak's conduct in depriving non-combatant civilians of their liberty and condoning their continued detention, which involved suffering and in some cases torture, was contrary to the law as laid down in the Norway's penal code of 1902. It was also contrary to the international legal prohibition against the detention of protected persons during armed conflict, under the Geneva Conventions to which Norway had long been a signatory.[13] Repak was sentenced initially to 5 and later to 8 years' imprisonment for illegal deprivation of liberty and detention of civilians and ordered to pay damages ranging from approximately € 4,000–12,000 to the Bosnian Serb victims.[14]

The case against Repak was the first of its kind in Norway. It demonstrates how judicial reasoning succeeded in weaving together domestic and international legal provisions that came into being at different times but were nonetheless aimed at protecting the same interests. Moreover, the extensive investigations that led to the indictment were done by the Norwegian prosecutor in cooperation with the Serbian war crimes prosecutor, and they involved the statements of at least 211 former detainees of the Detelj camp,[15] almost all the prisoners who were detained in the camp at the time.[16] The above points taken together show once again that the criminal prosecution of individual war crimes perpetrators can bring benefits to more than the small group of witnesses/victims involved in the case: They can help facilitate the intermeshing of national and international law to achieve broader jurisdiction over war criminals, and such cooperation between national and foreign prosecutors signals that crossing a border may no longer be enough to save a war criminal from prosecution.

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[12] Borgarting Lagmannsretten (Court of Appeal) Judgement 12 April 2010. See case summary at International Red Cross database on Humanitarian Law available at: http://www.icrc.org/customary-ihl/eng/docs/v2_cou_no_rule99.

[13] Norges Domstoler (Supreme Court of Norway) Judgement, case no. 2010/934, 3 December 2010. Summary available at: Norges domstoler > The Supreme Court of Norway > Summary of Recent Supreme Court Decisions.

[14] Oslo District Court Judgement (fn 5) at pp. 287–295. The sentence was raised by the Supreme Court.

[15] Republic of Serbia, Office of the War Crimes Prosecutor, Press Release, 17 April 2011.

[16] Oslo District Court Judgement (fn 5) at pp. 15.

In 2008, the district court in Stockholm found another Dretelj camp commander, Ahmet Makitan, guilty of having participated in the abuse of 21 Serb civilian prisoners and sentenced him to 5 years in prison.[17] The case similarly involved intensive cross-border cooperation, between the Swedish National War Crimes Commission, authorities in the region of former Yugoslavia and the ICTY in The Hague. The defendant, a former Bosnian Croat, who in the meantime had become a Swedish citizen, was arrested in 2010, 9 years after having settled in Sweden with his family. The indictment was partly based on the statements of 30 former camp prisoners. He was ordered to pay Krona 1.5 million (approximately € 170,000) as compensation to victims.[18]

The most recent European judgement in a Bosnian case was made in The Netherlands. Relatives of four Bosnian Muslim men who were killed in Srebrenica in 1995, sought to have the Dutch state found liable for the Dutch military's conduct on the UN compound that led to the death of the four. Their claim was confirmed by the Dutch Supreme Court in September 2013, 11 years after the start of the civil law proceedings. The main aim of the case was to establish the facts and the extent of responsibility of the Dutch state in situations where it acted on behalf of or in cooperation with the UN.[19] Commenting on the Supreme Court's decision, the claimants' lawyer stated that:

> The main victory is the facts that have been established, [...] that victims were expelled from the United Nations premises, that the Dutch military should have known and actually knew that [the three Bosniak men] would face certain death if they were to be expelled, and that Dutch government intervened in the United Nations command structure—these are all factual determinations that cannot be affected by any appeal in the future.[20]

The relatives of the victims—some of whom have become Dutch citizens—did not request reparation of pecuniary or non-pecuniary damages, though it is expected that the Dutch government will make an offer in this direction. Instead, the claimants stressed two important effects of the decision. First, they commented that the Supreme Court's decision had restored their trust in the Dutch government. 'I am proud of the Netherlands again', said one of the relatives of one of the killed Muslims shortly after the Supreme Court's decision was made public.[21] Second, the court confirmed what, in the claimants' eyes, had been the truth since 1995, namely that autonomous decisions made by the Dutch authorities had led to the death of their relatives. 'I feel we heard the truth today', said another relative briefly after been informed about the Supreme Court's decision (Simons 2013).

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[17] Stockholms Tingsrätt (Stockholm District Court), case no. B 382-10, 8 April 2011.

[18] International Review of the Red Cross, Volume 93, Number 883, September 2011, English language summary, available at: http://www.icrc.org/eng/assets/files/review/2011/irrc-883-reports-documents.pdf.

[19] For political discourses within The Netherlands on Dutch state's and Dutchbat responsibility regarding Srebrenica, see Erna Rijsdijk in this volume.

[20] IWPR Report News, International Justice, 'Lawyer Claims Dutch-bat Chiefs May Face Trial', Issue 700, 8 July 2011.

[21] Radio 1 Broad Casting Netherlands, 6 September 2013.

Without exception, the US and European cases mentioned earlier represented a legal novelty. For the first time, war victims took steps to use the law as a tool for seeking recognition for their harm and the consequences thereof. The cases expose an active engagement of victims with the proceedings, even in the criminal proceedings where the victims acted as witnesses. Both the civil cases (seeking reparations) and the criminal cases aimed at the establishment of the responsibility of individuals or state agents. The cases received a lot of publicity through national and international media. The criminal cases, in particular the Swedish ones, also reveal a new and intensifying form of cooperation between national authorities and ICTY to investigate and prosecute Bosnian crimes.

Claims Before Serbian Courts

Bosnian war victims filed lawsuits against the Serbian government for the conduct of its military functionaries. Generally, cases were not initiated by the victims themselves, as they feared repercussions and also because of the costs involved. Human rights organisations such as the Humanitarian Law Centre (HLC) in Belgrade acted on behalf of the victims.[22] For the HLC, this was part of its overall strategy towards achieving the 'public acknowledgment of victims [that] constitutes the prerequisite for reconciliation in the region of the former Yugoslavia'.[23] Since the war, it has been the HLC's aim to 'support post-Yugoslav societies in the promotion of the rule of law, and the acceptance of the legacy of mass human rights violations and, therefore, in establishing the criminal responsibility of the perpetrators, serving justice and preventing recurrence.'[24] In particular, its efforts focus on acceptance in Serbia of Serbia's role in the conflict,[25] as may be seen from its many publications focusing on Serbia then and now.[26]

Among the HLC-supported cases were the claims submitted in 2007 and 2008 on behalf of 20 former prisoners of detention camps in Serbia. They belonged to a group of about 1,500 Bosnians who in 1992 had fled from Zepa to Serbia hoping to reach a third country from there. Instead, they were captured by the Yugoslav army and detained, tortured and robbed of their belongings by members of the Serbian Ministry of Interiors (MUP). In the majority of the Serb court cases that subsequently

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[22] Humanitarian Law Center, 'Material Reparations for Human Rights Violations Committed in the Past: Court practice in the Republic of Serbia', (2012, p. 6).

[23] http://www.zarekom.org/RECOM-Initiative-Voice/RECOM-Initiative-Voice-15–2013.en.html.

[24] Humanitarian Law Centre, Mission Statement available at http://www.hlc-rdc.org/?page_id=14390&lang=de.

[25] See the chapters of Eric Gordy and Vladimir Petrovic in this volume on the dynamics of and debates about Serbian responsibilities for war crimes in Bosnia.

[26] Humanitarian Law Center, see publications listed under 'Public Information Outreach'.

ensued, the victims had requested an amicable settlement before filing a complaint but all of these were rejected (or simply ignored) by the attorney general.[27]

In 2011, the HLC also requested the Serbian war crimes prosecutor's office to prosecute 52 members of the Serbian MUP for war crimes committed against the Bosnian inmates. When the prosecutor declined the request, the HLC filed a complaint to the Serbian Constitutional Court. The organization requested the court to order investigations and the payments by the government of 234 million dinars in damages to the victims.[28] It was in January 2013, that a Belgrade court for the first time awarded one of the victims from Zepa with € 5,000 compensation (Ristic 2013).

The Serbian HLC positions its litigation work on behalf of war victims in the broad context of reconciliation in the region. The organization states that:

> The massive and systematic nature of the genocide and other crimes committed in the name of the Serbian people in Bosnia and Herzegovina was unparalleled in the wars during the nineteen-nineties on the territory of the former Yugoslavia. The victims of these crimes and their families have been waiting for 18 years for a genuine recognition of what they have suffered by the present and future generations of Serbian society. All of the Serbian institutions concerned need now to prove that they have accepted dealing with the past as a civilizational obligation. The criminal prosecution of a much greater number of perpetrators of crimes, the provision of material and nonmaterial satisfaction for the victims, the introduction of the comprehensive truth about the crimes in the former Yugoslavia into the history books and support for the RECOM Initiative [a regional truth and reconciliation project], are only some of the steps that would make institutions in Serbia an honest actor in reconciliation throughout the region.[29]

In these Serbian cases, as well the Dutch cases, victims had first sought to obtain an out-of-court settlement with the authorities. They turned to the court only after these efforts failed. In Serbia, the Bosnian war victims requested Serbian authorities to recognize them as civilian war victims and grant them such status so that they could benefit from the state welfare system and obtain pension rights. The government declined their requests and the victims brought civil proceedings before the Belgrade Municipal Court to obtain compensation for the harm they suffered during the war.[30]

In all litigation cases, individual stories were contextualised both by the claimants and the courts and presented as parts of large-scale violence and collective suffering. Most cases aimed at establishing both the historical facts and the responsibility of authorities in order to obtain reparations for a larger group of victims. In doing so, the victims hoped to achieve structural solutions or at least solutions that would benefit other members of their group.

With respect to the US cases, the applicants—as individuals and groups—explicitly aimed at further developing jurisprudence regarding the status of victims of sexual crimes. Not all applicants expressed explicit broader goals as did the Bosnian rape victims in the USA or the Bosnian claimants in The Netherlands (at least not to the knowledge of the authors). However, it is possible to draw conclusions about

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[27] Humanitarian Law Center Report: 'Material Reparations', p. 12.

[28] Humanitarian Law Center, Press Release, 11 April 2013.

[29] Humanitarian Law Center, Press Release, 26 April 2013.

[30] Humanitarian Law Center, Letter to the Prime Minister Ivica Dacic, 18 July 2013.

the potential broader benefits that flowed from their success at court. It is certainly evident that the claims predominantly aimed towards the first of the de Greiff pillars—recognition.

On the issue of the restoration of trust in the legal system, it is conceded that de Greiff was referring to restoration of trust *in the legal system of the state where the crimes took place* as the being most valuable kind of trust, because it contributes to the perception that the rule of law has returned and this tends to foster social stability. By comparison, a successful claim against Vukovic in the USA, Repak in Norway or against Plavsic in France would not have the equivalent value. Nevertheless, one can argue that the public condemnation that is implied by a conviction (especially where this led to imprisonment as well as compensation—see the Repak and Makitan cases) are indicators that the misconduct of perpetrators, in particular political and military leaders, is condemned by other actors in the international community. It shows also that where there is no hope of turning (successfully) to the courts of the state where the crimes took place; other avenues may still be open.

Reparation Claims in Bosnia

International Reparation Schemes: Serving the Collective

Inside Bosnia, it was the international community that established a system to provide redress for large numbers of war victims. As noted earlier, the Dayton Peace Accords of 1995 introduced two reparations mechanisms in Bosnia. War victims could file claims for restitution and reparations with two internationally administered institutions. The first one was the CRPC that received individual claims for repossession of lost properties of refugees and displaced. The program's aim was to enable more than 2.2 million Bosnian refugees and displaced to return to their homes. The second mechanism involved the HRC, a supranational court of last resort that could order local authorities to provide for reparations to victims of human rights violations.

The Dayton Peace Accords' main aim was to allow the return of the refugees and displaced persons and to re-establish the multi-ethnic country Bosnia once was. The restitution of property program was the international community's main asset in achieving these aims. To illustrate, Annex. 7 of the Accords states:

> All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. *The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.* (italics added)[31].

Land and house owners submitted their case with the commission and made a claim for restitution, compensation or a confirmation of ownership or legal possession

[31] The General Framework Agreement, Annex. 7, Agreement on Refugees and Displaced Persons, Art. 1.1.

(Buyse 2008, p. 280; Ferstman and Rosenberg 2009, p. 501). The CRCP's decisions were final and binding (Buyse 2008, p. 280). The commission could 'determine property ownership, and [. . .] value the property for the purpose of awarding compensation' (Ferstman and Rosenberg 2009, p. 501). In the end, however, the commission only decided about the lawful ownership of houses, apartments and business facilities (ibid., p. 505). Compensation of lost property was never awarded to claimants. The commission had not established a compensation fund, despite being formally mandated to do so, because the international community feared that compensation—instead of restitution—would hamper returns and thus the 're-creation of a multi-ethnic Bosnia' (Buyse 2008, p. 280; Rosand 2000, pp. 130–131; see also Ferstman and Rosenberg 2009, pp. 505–506: 'fears that affording compensation in the immediate aftermath of the conflict would simply exacerbate and entrench ethnic cleansing'; von Carlowitz 2005, p. 550). Claimants who would have opted for compensation had to claim housing restitution and subsequently sell or lease their housing to obtain de facto compensation (Buyse 2008, p. 280; von Carlowitz 2005, pp. 613–614).

In order to be able to handle the numerous individual claims, the commission developed procedures and policies 'to address particular categories or types of claims' (Ferstman and Rosenberg 2009, p. 505). There were, for example, different types of ownership, ranging from real property to 'socially owned property' of former employees who had enjoyed 'occupancy rights', implying a 'quasi-ownership right' before the war (ibid., p. 507). The commission solved a number of structural problems resulting from illegal property transfers during the ethnic cleansing campaigns (ibid., p. 507). For example, the commission decided to 'disregard all wartime sales [. . .] on the basis of the assumption that all such contracts were made under duress' (ibid., p. 508). In order to be able to decide about individual claims, the commission put in place new land registration and renewed property records that had been destroyed during the war. The commission collected and digitized cadastral data and established a cadastral database covering a large part of the country (ibid., p. 504).

The CRPC received 240,000 claims concerning 320,000 properties during its 8 years of existence and decided upon almost 312,000 of the claimed properties (Buyse 2008, p. 279).[32] According to United Nations Development Programme (UNDP), 93% of 200,000 properties had been returned to prewar owners by 2004. To some, the process was thus considered completed and successful.[33] Others, however, observed that the fact that the commission was able to make decisions in such high percentage of applications did not imply that *all* actual owners had returned. Many displaced persons appeared to have sold or exchanged their property and had chosen to stay where they had found refuge. The program had done little to remove the obstacles to return, such as discrimination of, and violence against the displaced who sought to return (Williams 2006, p. 10, 11; see also Ballard 2010, p. 495). The conclusion was thus made that the program had not 'fostered the type of mass-return foreseen by the drafters of Annex. 7 of the Dayton [Accords]' (Ferstman and Rosenberg 2009,

[32] CRPC, *End of Mandate Report* (1996-2003), 2004, p. 17

[33] UNDP Access to Justice, 2009–2011, year of publication unknown, p. 8.

p. 510–511).[34] It had not reversed ethnic cleansing (Ballard 2010, p. 476). Moreover, the program had excluded a number of groups, such as the Roma minority, who did not own property before or during the war.

However, the critique seems mainly to touch upon the way the international community had formulated and presented the restitution program, i.e. as an instrument to achieve political results rather than a rights-based project. The international community's later efforts to distance itself from the 'politicized approach' and to formulate the program in terms of the rule of law was seen as a positive development. Buyse (2008) observes that this shift from a return-oriented approach towards a rule-of-law-oriented approach to reparations indicated a new policy that was based on individual choice as the leading principle (Buyse 2008, p. 358). Whether a political or a rights-based project, the restitution program was an expression of the international community's recognition of one of the most serious problems resulting from the ethnic cleansing campaigns, the massive expropriation and displacement of a huge part of the Bosnian population. In the end, a large number of war victims, benefitted from this collective scheme.

The HRC was also part of the peace plan of the Dayton Accords, and as such constituted one of the 'institution-building activities' in the fields of 'democratisation, the rule of law and human rights' (Nowak 2005, p. 246). Its aim was to convey 'a feeling that victims of human rights violations were entitled to a judicial remedy before an independent court which went beyond the mere establishment of the facts and the respective violation' (Nowak 2005, p. 246).

The HRC received applications from individual victims or legal entities, such as religious organizations, concerning all alleged human rights violations by the state of BiH, the Bosniac-Croat Federation of BiH and the RS. Applications could also be lodged by one entity against another. The HRC's most important limitation was that it had no competence to receive applications that concerned human rights violations that had taken place during the war. The Chamber's mandate started only after the entry into force of the Dayton Peace Accords. A number of complaints, however, were closely linked to crimes that were committed during the war, such as disappearances, discrimination and expropriation.

The HRC had the power 'to order adequate reparation to the victims of human rights violations' (Nowak 2005, p. 246, 247). It could request the state or the entities in question to take specified steps to remedy human rights breaches 'including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures' (Art. Xl, (1) Annex. 6 of the Dayton Peace Agreement). Pecuniary damages could cover losses of property and other legally protected interests, such as income (Yeager 2004, p. 46). The HRC could also order payments even without the claiming party having asked for it (Nowak 2005, p. 257). More structural measures that had to be taken by the respondent party could involve legislative action or overturning pieces of legislation. The HRC could also order a domestic court or police to take action (Cornell and Salisbury 2001–2002, p. 399).

[34] Williams, 'Post Conflict Restitution and Refugee Return', p. 10.

The Chamber's decisions were final and binding which implied that its orders were 'intended not just to redress the situation of the applicant, but also to prevent other similar violations from occurring' (Yeager 2004, p. 46). The HRC informed the international community about its decisions and orders and relied on the international community for their enforcement: 'Chamber decisions on the merits are forwarded to the Organization for Security and Co-operation in Europe (OSCE) and the Office of the High Representative (OHR) for monitoring of compliance'.[35]

Between 1996 and 2003, the Chamber received more than 15,000 applications of which 6,243 were resolved in 2,619 decisions (Nowak 2005, p. 247; Yeager 2004, p. 46, 47). The majority of the cases taken up by the HRC concerned real property issues. Denial of access to prewar homes and other instances of obstruction of refugee returns were the most common violation of human rights (Nowak 2005, p. 262, 278). The Chamber also dealt with, among others, wartime death penalties, discrimination, violations of the freedom of religion, disappearances and fair trial issues.

The HRC made both individual and collective decisions. It also could order the Bosnian authorities to change or withdraw legislation or policies. If the HRC decided the application admissible, it could, make a decision on the merits of the case or decide to 'strike out' the application from the list. This meant that a decision already had been made on a similar case, and the applicants were thus referred to the measures the Chamber has decided upon to be taken by the responsible authorities.

Generally, priority was given to cases that involved serious and systematic violations and cases that would serve as an 'important precedent for establishing the rule of law in BiH' (Yeager 2004, p. 47, 48). In most individual cases, the Bosnian Serb authorities—and in one case the federation—were ordered to carry out investigations, to bring the perpetrators to justice and, in the case of disappearances, to inform the relatives of the disappeared about the fate of the disappeared. HRC decisions often included an order to guarantee non-repetition (Nowak 2005, p. 254, 285). In death penalty cases, the HRC ordered the lifting of the sentence and the general abolishment of the death penalty. In illegal arrest cases, the HRC established the violations and awarded victims pecuniary and non-pecuniary damages.

A special collective measure was ordered in a case filed by 49 relatives of victims of disappearances in Srebrenica. The HRC requested the RS authorities to undertake a collective compensation measure, i.e. to pay 4 million KM to the Foundation of the Srebrenica-Potocari memorial and cemetery to cover the costs of the burial of and memorial for the victims (Nowak 2005, p. 255). It was the highest amount that was awarded by the Chamber (Nowak 2005, p. 284). No separate reparation measures were ordered to benefit individual claimants or assist in individual cases. In subsequent cases, the RS authorities were ordered to pay additional payments to the Foundation as well as to the Institute of Missing Persons (Ferstman and Rosenberg 2009, p. 495).

Notwithstanding the huge amount awarded to them, the applicants were not satisfied with the HRC's decision *only* to order a collective measure. They considered this to be an inadequate response to the genocide and the suffering of the individual

[35] Human Rights Chamber's official website, http://www.hrc.ba/ENGLISH/DEFAULT.HTM.

applicants and because it gave insufficient consideration to the victims' social and economic needs (Nowak 2005, p. 255). The victims were disappointed by the HRC's decision to 'strike out' all other applications concerning the crimes in Srebrenica. This decision implied that the Chamber would no longer deal with the outstanding 1,800 individual applications related to the Srebrenica disappearances as it had already addressed the issue (Ferstman and Rosenberg 2009, p. 495). 'It's all politics', commented one of the victims' representatives who had wanted the HRC to handle each case individually (Nettlefield 2010, p. 124).

The two international institutions—the CRPC and the HRC—are considered 'quasi-judicial' administrative bodies in that they acted upon individual claims and made individual rulings but their decisions also affected groups of victims and involved structural changes such as ordering legislation and policymaking (Ferstman and Rosenberg 2009, p. 502). Similarly, with its collective and 'strike out' decisions, the HRC sought to force authorities to come up with collective solutions and to reach larger groups of victims. In particular, the CRPC in that sense 'bore greater resemblance to a mass arbitration or claims process than to a judicial process' (ibid., p. 502). It was also the commission's ultimate aim to provide for a consistent pattern of decision-making and to contribute to new domestic legislation that would satisfactorily deal with property and return issues (ibid., p. 513).

Both mechanisms stopped operating at the beginning of 2004. In the next section, we will discuss what options were left for war victims who were seeking to obtain reparations after that date.

From the Dayton Mechanisms to the Bosnian National Courts

Present-day Bosnia has no formal reparation scheme or policy for war victims. It has 'a complex array of on-going payments to people who suffered war-related personal harms' (Popic and Panjeta 2010, p. 4). Payments are regulated separately by the two entities, i.e. the federation and the RS. The only state law on compensation is the Law on Missing Persons; but so far, it has remained a dead letter.[36] The entity programs support war veterans and demobilized soldiers and their families as well as civilian war victims and their families, but under such strict conditions that these cannot be categorised as war reparation programs sensu stricto. Rather, the schemes are considered as welfare and veteran benefits (Sostaric 2012, p. 50, 51). Civilian claims can be made on the basis of a minimum of 60% physical disability as a result of the war, while veterans require a disability of 20–40%. Payments to civilian victims' relatives depend on the family's income (Popic and Panjeta 2010, p. 7). Moreover, the applications are subject to statutes of limitations. There are a number of differences between the two entities. In the RS, for example, victims of sexual abuse also have to prove 60% bodily disability, while in the federation, they are not

[36] This law foresees in the right to health care, social protection and property. See also Popic and Panjeta (2010, p. 6); Sostaric (2012, p. 49, 54, 57).

required to do so and payments are not subject to income restrictions (Popic and Panjeta 2010, p. 17; Sostaric 2012, p. 53). In practice, however, neither entity has awarded any compensation to sexual abuse victims.

Alongside these government schemes, the Bosnian court system has received claims from thousands of war victims who started proceedings through the Bosnian court system to obtain reparations. To illustrate the differences between the international mechanisms and the Bosnian courts' handling of these claims, we will focus on two cases. First, we will describe a case filed by the Islamic Community (IC), essentially a class action that sought the RS authorities' approval to rebuild 15 mosques in the capital Banja Luka. Second, we will briefly describe the claims made by individual former camp detainees to be compensated for physical and mental harm they suffered in the detention camps.

More than half of the 1,144 Bosnian mosques and numerous other Muslim sites were destroyed during the ethnic cleansing campaigns. After the war, the destruction of the remains of the mosques continued and the sites were turned into car parks or waste disposals. In some instances, Serb Orthodox churches were built on the locations. The IC requested the RS authorities to rebuild the mosques in Banja Luka and other RS cities. RS authorities objected, arguing that the IC was not entitled by any right pertaining to the sites in question because, though it had been the owner of the mosques, it was not the owner 'of the real estate on which these mosques were built'—the sites of the mosques 'had become public property' (Nowak 2005, p. 257–259). The IC then filed an application with the HRC in which it requested, among other things, that the RS authorities reconstruct the 15 Mosques and 'enable Muslims in Banja Luka free expression of religion in previous places of worship, to provide temporary premises for Muslim worship in Banja Luka until the mosques had been rebuilt, to refrain from further destruction of the remains of the mosques [and] to refrain from any action to change the purpose of the sites of the destroyed mosques [. . .]'.[37]

The Chamber considered the RS refusals a violation of freedom of religion and the right to property and ordered the RS authorities 'to take immediate steps to allow [the Islamic Community] to erect enclosures around the sites of the 15 destroyed mosques [. . .], to refrain from the construction of buildings [. . .] on the sites of the 15 destroyed mosques [. . .], and to swiftly grant the IC the necessary permits for reconstruction of seven mosques at the location where they had previously existed.'[38]

The RS authorities did not follow the HRC's orders, and the IC took its case to the RS court of first instance, known as the Basic Court, in Banja Luka. By this time, it was year 2000 and this was the first such trial ever to take place in Bosnia. In addition to the above claims, the IC sought reparation for damages (material compensation) and the prosecution of the persons responsible for the demolition of the mosques. The IC regretted the necessity of seeking justice through the courts. It would have

[37] Decision on the Admissibility and Merits, delivered on 11 June 1999, case no. CH/96/29, The Islamic Community in Bosnia and Herzegovina against The Republika Srpska, Para. 3.

[38] Decision on the Admissibility and Merits, delivered on 11 June 1999 paragraph 212; See also Nowak (2005, p. 258-259).

preferred to continue negotiating its demands with the government because, as a spokesman said, 'we did not want to increase tensions'.

The Basic Court approved the IC's requests and ordered the RS government to pay 65.7 million KM to the IC. The RS appealed the decision and in November 2009, the verdict was overturned by the district court in Banja Luka on purely formal grounds because the suit had been filed too late.[39] Interestingly, the IC concluded that the decision was not entirely negative as it implicitly confirmed both the facts and the RS's responsibility 'for having failed to prevent the damage'. Therefore, for the IC the verdict was 'of historic significance'.[40] In February 2012, the RS Supreme Court confirmed the ruling of the district court in Banja Luka, but acknowledged that the responsibility of the RS and the city of Banja Luka, 'was not in question'.[41] In the summer of 2013, the BiH Constitutional Court, that is superior to the entity courts, made a final ruling. It reasoned that the statute of limitations upon which the district court in Banja Luka had relied, was not applicable to war crimes and awarded US$ 42 million to the IC to rebuild the mosques.

Among the victims who requested the Bosnian authorities for compensation, but ended up bringing their claims before Bosnian courts, are many of the 200,000 former detention camp inmates.[42] They had originally asked for compensation from the federation and the RS government authorities on the basis of the entity laws for veterans and disabled war victims but soon discovered that these laws did not recognize them as actual war victims (Šoštarić 2012, p. 52, 55).[43] Thousands of former detainees then filed their claims through the courts, mostly in the RS and against the RS authorities (Šoštarić 2012, p. 53).[44] However, the RS state attorney and the minister of justice rejected these legal claims on the grounds that they deemed themselves incompetent to deal with military (sic) matters. The claims were also rejected because of a strictly applied statute of limitations. With respect to the latter ground, the former detainees had been unable to submit documents proving their status as former detainees and their medical situation in time (Sostaric 2012, p. 52).[45]

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[39] Erna Mackic, 'Historic Decisions by Banja Luka Court', Balkan Investigative Reporting Network (BIRN), 13 Nov 2009.

[40] Mackic, 'Historic Decisions'.

[41] 'RS must pay compensation for mosque destruction', Daily News, PISE Oslobodenje PORTAL 26.11.2012.

[42] TRIAL, 'Accessing Justice: Improving the situation of victims of international crimes in Bosnia and Herzegovina and Croatia', (2013, p. 6).

[43] UNDP, 'Access to justice, Facing the Past and Building Confidence for the Future (2009–2011)', p. 10–12; Selma Boracic, 'Bosnia War Victims' Compensation Struggle' (International War and Peace Reporting (IWPR) 3 August.2011.

[44] Sostaric reports on more than 20,000 of such lawsuits against the RS and more than 500 against the Federation. See also UNDP, 'Transitional Justices Guidebook for Bosnia and Herzegovina,' (2009, p. 44), mentioning the Association of Concentration Camp Detainees BiH filing 16,000 lawsuits during 2007 and 2008, predominantly against RS.

[45] TRIAL, 'Freed, but not free yet! The situation of former camp detainees in Bosnia and Herzegovina', report to the Special Rapporteur on Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment and the Working group on Arbitrary Detention (2012, p. 41, 43).

In November 2011, the Supreme Court of the federation overruled this decision, reasoning that the statute of limitations was not applicable to the claims by the former detainees for non-pecuniary compensation.[46]

Interestingly, the former detainees' principal objective to go to court was to inform the public of the existence of the detention camps and to establish the responsibility of both entities for their confinement. Furthermore, the victims wanted to achieve recognition in order be able to regulate the status of the entire group of victims (Sostaric 2012, p. 67).[47] 'The human aspect is far more important than the financial. Victims get moral satisfaction when their suffering is recognized by the authorities. Without that, there will be no reconciliation and coexistence in BiH', said a representative of the Association of Concentration Camp Prisoners RS that filed 536 cases at the municipal court in Sarajevo.[48] For the former detainees, litigation was above all a means of establishing a 'collective truth' and an instrument to compel authorities to formally acknowledge their suffering and to force them to come up with a 'proper solution' (Sostaric 2012, p. 67, 69).[49] Ultimately, compensation was only awarded in a very limited number of cases and varied, arbitrarily, from a few euros to hundreds of euros for each day in detention (Dzidic 2012).[50] However, the sums were never actually paid.

As we have also seen in Serbia, the former detainees from Bosnia first tried to reach a collective settlement with Bosnian authorities. When negotiations failed, they started legal proceedings at Bosnian courts. Both the mosque and the former detainees' cases sought to serve the interests of a particular group in society, as a group, not just as individual victims. The victims aimed at obtaining public and governmental recognition of what had happened during the war and acknowledgement of the suffering of their own victims' group.

Conclusions

Since the war in Bosnia (1992–1995), individual victims and groups of victims have claimed reparations for harm they suffered during the war. Reparations were offered through collective schemes or hard won by individual victims before domestic and foreign courts, international bodies and national authorities. Analysing the

[46] TRIAL, 'Freed, but not free yet!', p. 47.

[47] UNDP, 'Transitional Justices Guidebook,' p. 45.

[48] Boracic, 'Bosnia War Victims' Compensation Struggle'.

[49] Boracic, 'Bosnia War Victims' Compensation Struggle'. Sostaric observes that, unlike former camp inmates, relatives of disappeared persons and victims of sexual abuse 'focus on individual truth-finding'.

[50] Boracic, 'Bosnia War Victims' Compensation Struggle,'; BIRN Justice report, 'Prison Camp Detainees to Sue Bosnian Serbs' 8 February 2013; Dzidic (2012) tells the story of one former detainee who received € 4 for each day of the 17 months he was imprisoned in Bosnian Serbs-run camp while another former detainee received € 100 for each day spent in a camp run by Bosnian Croat and Muslim forces. See also Sostaric (2012, p. 53).

micro- and macro-divide as advanced in the transitional justice literature, none of the reparation schemes and claims proceedings discussed in this chapter served either exclusively individual interests or purely collective ones. The legal proceedings initiated by individuals or victims' groups achieved results that would ultimately benefit a wider circle of victims. Equally, measures that were taken in the context of the international and collective reparation programs were to a certain extent tailor made, as the actual awards were based on claims submitted by individual victims. These programs combined collective and individual interests.

In our view, it is indisputable that the legal claims that have been pursued in the aftermath of the Bosnian war, whether by individual victims or larger groups, and whether successful or unsuccessful for the claimants themselves, have nevertheless succeeded in serving broad collective interests. Individual stories were presented as part of collective events. Establishment of responsibility of both high-level defendants (in criminal cases) and authorities also benefitted other victims than the applicants alone. Litigation contributed to recognition of collective victimhood, albeit this was implicitly limited to the victims' own 'ethnic' or national group. Most cases aimed at achieving structural change and sought collective measures, in order to re-establish a relationship with governmental entities. Overall, most court cases were filed on behalf of large groups of victims and were an expression of solidarity within specific victim groups.

The internationally administered mass claims mechanisms were part of an international peace effort, which, in essence, was a political project. The programs claimed to aim at re-establishing a multi-ethnic Bosnia and the restoration of the rule of law. The schemes reached out to groups of victims and aimed at developing structural changes and long-term solutions. However, the restitution program was criticised for insufficiently paying attention to the circumstances of return and the obstacles for return. In the end, many displaced were not able to go back to their places of origin. Responding to the criticism, the international community increasingly adopted a rule-of-law and rights-based approach which, it can be argued, recognized the centrality of individual victims and their particular claims. The HRC is generally praised for its work though some victim groups expressed frustration about collective measures the Chamber ordered, where victims had hoped for the individual handling of each claim.

In the absence of a genuine national reparation scheme in Bosnia, victims have sought recourse to local courts since the conclusion of the international mechanisms instituted by the Dayton Accords at the end of 2003. Most claims were filed on behalf of larger groups of victims, such as former detainees and members of the IC. These claims aimed to compel the authorities to publicly recognize and accept responsibility for the harm suffered by large groups of victims. The claims were also meant to force authorities to come forward with structural changes and solutions that would in turn re-establish trust between victims and the authorities.

This survey of individual and collective efforts to seek or to provide reparations has shown that all measures taken have either explicitly combined elements aimed at serving both individual and collective interests or, in the case of individual legal claims, nevertheless resulted in benefits that transcend the parameters of the court

action itself. The academic distinction between micro-level (individual) and macro-level (collective) reparations thus appears to be largely theoretical in the Bosnian context. Even the most micro-level examples we have presented, that of the individual victim opposing an individual defendant before a foreign or domestic courts, has, as de Greiff would hope, 'an eye also on the preconditions of reconstructing the rule of law, an aim that has public, collective dimension' (de Greiff 2006, p. 457). If not directly reconstructing the rule of law in the theatre where the conflict took place, such an action nevertheless recognizes and upholds the value and the potential of the rule of law. It constitutes an appeal to the broader international legal community to witness the plight of victims of violent conflict and to provide redress where other mechanisms have failed.

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ERRATUM
Narratives of Justice In and Out of the Courtroom
Former Yugoslavia and Beyond

Dubravka Zarkov[1] • **Marlies Glasius**[2]

[1] International Institute of Social Studies/EUR
The Hague
The Netherlands

[2] University of Amsterdam
Amsterdam
The Netherlands

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