# *"…They never followed";*
# Transitional Justice and Reconciliation in Bosnia and Herzegovina: The Role of the United Nations International Tribunal for the Former Yugoslavia

## Abstract

**"The people being transferred were told that the Bosnian Muslim men would follow later. They never followed."**
Presiding Judge Alphons Orie,
*Prosecutor v. Ratko Mladić, Judgment, ICTY, 22 November 2017*

The aim of this thesis is to explore the role the United Nations International Tribunal for the former Yugoslavia (ICTY, Tribunal) has had, as a transitional justice mechanism, on the reconciliatory process in Bosnia and Herzegovina (BiH) and whether the Tribunal can be said to have been obstructive to reconciliation in the country. The hypothesis, prior to the research, analysis, and assessment to be conducted, is that indeed the ICTY has played an obstructive part in terms of reconciliation in BiH. However, it must be emphasized, the presumed obstruction lies not in the incompetence or insufficient nature of the Tribunal. Rather, the obstruction lies in the very existence thereof, that is to say, that the perception of the Tribunal plays a negative and divisive role among communities in BiH. The focus point, besides the ICTY's general role in the reconciliatory process in BiH, is the Srebrenica genocide – the "chosen trauma" of the Bosnian War.

To attain this, the study takes several essential steps: it provides a theoretical framework for transitional justice, reconciliation, and international legal prosecutions; it applies these theoretical findings in an analysis of the ICTY in general, and the case of Srebrenica in particular; it also analyses the legacy of the ICTY; it summarizes and evaluates all these findings in a discussion section, which also looks at the role the Dayton Peace Agreements have played in BiH; before finally offering a conclusion and lessons learned in BiH for further reference.

The theoretical section of this thesis starts by providing a look into the development of transitional justice as a field – from its inception to its current conceptualization. This part of the thesis finds that the initial stage of transitional justice was primarily concerned with societies dealing with a past of an authoritative regime, in addition to being preoccupied with a legalist and liberal perspectives. In contrast to this, the current conceptualization of transitional justice is a far more broadened field. It is multidimensional and multidisciplinary, theoretically and practically speaking. It operates primarily in post-conflict context, which in this thesis is defined as armed conflicts. Furthermore, as a field that promotes a wholesome dealing with the past, transitional justice is best applied in a holistic manner. Finally, transitional justice, for the purposes of this studies is, in length, defined as: *a multidisciplinary theoretical field as well as a multifaceted practical engagement with societies undergoing transitions of political, legal,*

*societal and individual dimensions, including mechanisms which will enable the given society overall and its citizens in particular, to deal with a past characterized by various degrees of atrocity, which have often taken place in a warring context. These mechanisms include, but are not limited to, legal prosecutions, truth-seeking processes, reparations, institutional reform, and memorialization. Finally, transitional justice is applied on a case-to-case basis and holistically, meaning that these and other substantial mechanisms are optimally used in a coordinated, contextualized and combinatory manner when dealing with the past, devoted to and for the purpose of truth, justice, rule of law, reconciliation, and sustainable peace.*

Following the delineations and definition of transitional justice, this thesis goes on to account for some goals of the field. This section, firstly, establishes that transitional justice, because it is founded on the four pillars - the right to know, the right to justice, the right to reparation, and the guarantee of non-recurrence – entails that the measures of transitional justice are co-contributors to the attainment of these founding pillars, and in extension thereof, to the ends towards which it aims. This section also finds, that the goals of transitional justice can be divided into immediate and long-term goal. These direct aims of transitional justice, then, are: confronting impunity for massive human rights violations, recognition of the dignity of victims of human rights violations as citizens and human rights bearers, restoration of citizens' trust in state institutions, especially ones charged with guaranteeing fundamental human rights, and prevention of future serious human rights violations. Some of the more long-term goals of transitional justice are restoration of rule of law, good governance, democratization, peacebuilding and conflict prevention, and, finally, reconciliation.

In accounting for reconciliation, this section of the thesis finds that there are four types of reconciliation, namely: individual, interpersonal, institutional and socio-political reconciliation. Individual reconciliation, it is established, denotes the rebuilding of victims' and survivors' rebuilding their lives by coming to terms with their own pasts. Interpersonal reconciliation deals with the relationship between victims and perpetrators. The socio-political reconciliation is about the relations between groups in post-conflict societies. And finally, institutional reconciliation is about the legitimacy of institutions and the restoration of trust therein. Furthermore, it is found that reconciliation can be either thin or thick. The denotes a situation in which individuals, groups, and institutions coexist peacefully but with an absence of trust, respect, and shared values. The latter is a context in which horizontal as well as vertical relations are founded on trust, respect and shared values. Ultimately, all these findings lead to a definition of reconciliation, which goes as follows: *reconciliation is context-dependent and multidimensional, encompassing individual, communal, and national scopes. Being somewhat intangible, reconciliation can be measured in terms of thinness or thickness. Reconciliation*

*deals with, but is not limited to, to the level of agreement with regards to a unified narrative of the past, the existence of trust, and shared values between individuals and groups in the present, and a common aspiration for the future of the country and its citizens.*

Next, this chapter accounts for the central mechanism of this thesis, namely international legal prosecutions. Considering both positive and negative aspects of this transitional justice mechanisms, this section of the thesis concludes that despite its deficiencies, international legal prosecution of mass crimes is vital to enabling transition in a post-conflict society. The formation of a material truth, the vindication of the rights of the victims, as well as the closure offered to them, and combatting impunity via retribution and deterrence, are all impressive aspects of this transitional justice mechanism.

Thereafter, this thesis moves to its central chapter, namely the analysis of the impact the ICTY has had, practically speaking. This section of the thesis begins by accounting for and analyzing the establishment of the Tribunal. It finds, in this regard, that the ICTY was founded on for a legal purpose as well as a political one; its legal aim was to prosecute high-ranking war criminals on the territory of Former Yugoslavia, from 1991 and until "further notice,"; its political aim was to secure peace, stability, and security in the region – and in BiH proper. After this, the chapter turns to a general analysis of the role the ICTY has had in BiH. Here, it is found that the Tribunal has been immensely successful in establishing and documenting facts, a material truth, and a material reality; in vindicating the rights of the victims and survivors by offering them agency, a voice and a closure; and finally, in seeing that justice was done by prosecuting and punishing commission of some of the most atrocious crimes known to man; and finally. All this, in fact, despite the allegations of political bias, the lack of compensation offered to victims, the fact that denial about the ICTY jurisprudence is prevalent in BiH. These findings, furthermore, are only reinforced in the section of this chapter that deals with the Srebrenica genocide in particular. In offering a glance into the legacy of the Tribunal, this chapter finishes by concluding that while the international legacy of the ICTY, seems to be spotless, its legacy in BiH is not so clear-cut. If anything, it is disputed and controversial, to say the least.

The discussion chapter takes a closer look at the state of reconciliation in BiH in order to evaluate and establish the impact the ICTY has had on the reconciliatory process in the country. The discussion chapter finds, that the ICTY has had a *generally* positive impact on individual reconciliation, but that the Tribunal's impact on the other types of reconciliation are limited. In addition, the discussion finds that the reconciliation in BiH is thin. However, the discussion, through its evaluation of the ICTY vis-à-vis reconciliation in BiH, establishes that the ICTY is not the sole culprit of this thin reconciliation. If anything, the "politics of division"

in the country, the lack of other nationally initiated transitional justice mechanisms, such as a TRC and fruitful educational institutions, are highly obstructive to even the positive impact the Tribunal can have in BiH, let alone reconciliation proper. Moreover, the discussion chapter seeks to establish the cause of division in BiH by considering the Dayton Peace Accords. This part of the discussion finds that, indeed, the legacy of the Dayton Accords is one of dichotomy and morally deplorable decisions – perpetuating division and disunity.

In its concluding remarks, this thesis establishes that *The ICTY has played a complex role in the reconciliatory process in BiH*. However, more importantly, the conclusion is that *the legacy of the ICTY is independent of its jurisprudence per se*, and that the Tribunal, therefore is not the sole culprit of the thin reconciliation in BiH. Most notably, it is concluded that *the ICTY has not directly obstructed reconciliation in BiH,* but it has not been successful in effectively accommodating it either – nor could it. No legal institution, no matter how successful, it is established, can miraculously ensure a thick reconciliation in a post-conflict society. That is, simply put, not within the mandate or the powers of any legal institution. The ICTY, instead, provides the legal basis for a more multifaceted approach to transitional justice and reconciliation. It is up to Bosnian-Herzegovinians, then, to pick up where the Tribunal left of. This possibility for action, however, lies in the hands of the young generation, provided that they can gain momentum – and keep it – thus ensuring the path towards a more united BiH.

Finally, this thesis, in its closing remarks, offers some lessons learned for future reference. These lessons are, in short: a lesson learned from the ICTY is that reparation is important; direct dissemination of knowledge about a legal institution's jurisprudence will promote its credibility and legitimacy; punitive measures, if not mingled with by other transitional justice mechanisms will reinforce the narratives that caused the war to begin with; the lesson learned from the Dayton Peace Agreement is that peace agreements must not impede transitional justice measures or reconciliation; the lesson learned from the ICTY and the Dayton Peace Accords is that international involvement in post-conflict societies is necessary and needed, but that it must remain balanced; finally, and most significantly, the lesson learned from BiH is that neither transitional justice nor reconciliation are quick fixes. Both direction, determination, and devotion.

*"Although I did not feel grace or the presence of anything remotely resembling God, I sensed this suspension was a kind of involuntary prayer, a call to make Bosnia matter. To make war matter. But how do you make destruction matter? How do you make people's suffering thousands of miles away matter? How do you make this world, this life, in all its mystery and injustice, matter?"*

**Eve Ensler, *Necessary Targets***

This thesis is not only *about* Bosnia and Herzegovina, it is *for* Bosnia and Herzegovina.
It is my attempt to learn from its past and understand its present in order to work for its future.

And so –

to my home country of yesterday, today, and tomorrow,
to my fellow Bosnian-Herzegovinians,
to all victims and survivors of the Bosnian War,

*This is my devotion to them.*
*This is dedicated to them.*

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## List of Abbreviations

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| **BiH** | Bosnia and Herzegovina |
| **BSC** | Bosnian-Serbian-Croatian |
| **FBiH** | Federation of Bosnia and Herzegovina |
| **FRY** | Former Republic of Yugoslavia |
| **EU** | European Union |
| **ICJ** | International Court of Justice |
| **ICMP** | International Commission on Missing Persons |
| **ICRC** | International Committee of the Red Cross |
| **ICTJ** | International Center for Transitional Justice |
| **ICTR** | United Nations International Tribunal for Rwanda |
| **ICTY, Tribunal, Court** | United Nations International Tribunal for the former Yugoslavia |
| **IGO** | Intergovernmental Organization |
| **IHL** | International Humanitarian Law |
| **JCE** | Joint Criminal Enterprise |
| **MICT** | United Nations Mechanism for International Criminal Tribunals |
| **Municipalities** | Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Trnovo, and Vlasenica |
| **MUP** | *Ministarsto Unutrašnjoih Poslova* [Ministry of Internal Affairs (of Serbia)] |
| **NGO** | Non-Governmental Organization |
| **OHR** | Office of the High Representative |
| **OTP** | ICTY Office of The Prosecutor |
| **RS** | Republika Srpska |
| **SFRY** | Social Federalist Republic of Yugoslavia |
| **TRC** | Truth and Reconciliation Commission |
| **UN** | United Nations |
| **UNSC** | UN Security Council |
| **UNGA** | UN General Assembly |
| **UNSG** | UN Secretary-General |
| **UNDP** | UN Development Programme |
| **UNPROFOR** | UN Protection Force |
| **VJ** | *Vojska Jugoslavije* [Yugoslav Army] |
| **VRS** | *Vojska Srpske Republike* [Army of the Bosnian-Serb Republic] |
| **WWC** | War Crimes Chamber, Court of BiH |

## 1. Introduction

Wars linger on. Ruthlessly. Irrevocably. Ghastly remnants of the past, wars are ghostly visitors in the present, and they are, potentially, eerie visions of the future. Wars haunt – countries, cities, citizens. There is little novelty in the supposition that conflicts can be terminated without being entirely resolved. It is, moreover, a rather feasible notion, uncontested even, that particularly an unresolved conflict lingers on endlessly, perpetuating instability and disunity. Preventing the very formation of such unresolved conflicts, needless to say, is not straightforward and it is not guaranteed. A permanent and positive resolution of a conflict is always already contextual and highly dependent on the conflict in question, including all of its idiosyncrasies – its historical, social, cultural, ethnic, and, at times, religious dimensions. It is crucial, then, that any measure contemplated and enforced in order to reconfigure post-conflict[1] societies in a sustainable manner, should revolve around the characteristics that delineate the particularities and specifics of the conflict and the post-conflict society in question. For the matter at hand, the society in question is BiH.

Any attempt at defining the complexities of the Bosnian War in full here is indeed untenable, given the complex nature thereof. However, a brief outline of the causes of the war, the war itself and the immediate state following the Bosnian War are necessary.[2]

Before the war in the 1990s, BiH had been at the very heart of Yugoslavia – it was the very epitome of *bratstvo i jedinstvo.*[3] It had been, by far, the most multiethnic country in Yugoslavia, a home to Roman Catholicism, Serb Orthodoxy, Judaism, and Islam.[4] Its architecture, its language, its cuisine, its culture, its heritage sites, and so much more, told the stories of the great powers which had partaken in shaping its undeniable diversity. To be sure, territorially speaking, some parts of BiH were predominantly Croat, Serb, or Bosniak, but the county was multiethnic nonetheless.[5] Truth be told, the dismantling of the SFRY had been underway during the 1980s, following Tito's death, but it was not realized until the 1990s, following, first, the secession of Slovenia, then Croatia, and ultimately Macedonia and BiH. The final conflict resulting from the breakup of SFRY was that of the Former Yugoslav Republic of Macedonia.[6] The Bosnian War was essentially fought due to two simultaneous

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[1] Here and henceforth, the term post-conflict denotes societies in the aftermath of armed conflicts. Where the term is used to denote otherwise it will be specified.

[2] For more on the history of BiH, the reader is referred to Noel Malcolm, *Bosnia: A Short History*, 2nd edition, 1996. For more information on the Bosnian War specifically, see Misha Glenny, *The Fall of Yugoslavia: The Third Balkan War*, 3rd edition, 1996.

[3] [Brotherhood and unity]. Translated by the author. The slogan, conjured and used by Josip Broz Tito, signalled the union and solidarity between the Yugoslav people. To some, the very fact that the Yugoslav Wars could happen attests to the non-existence of brotherhood and unity in Yugoslavia. This, however, is simply mentioned in passing as it is far too complex a matter to unfold here.

[4] *Prosecutor v. Ratko Mladić* (IT-09-92), Judgment, ICTY, 22 November 2017, para. 3442.

[5] See Figure 1and Figure 2 in the Appendix.

[6] For more information about breakup of the SFRY and the conflicts that followed, see, for example, ICTY, "The Conflicts."

factors. First, the wish of Bosnian Serbs and Bosnian Croats, residing in BiH, to annex parts of territorial BiH to Serbia and Croatia, respectively, meant that chaos from within the Bosnian-Herzegovinian territory was brewing. At the same time, the dream of a Greater Serbia, disseminated by, among others, Slobodan Milošević, meant that the call for independence in BiH grew ever stronger. Ultimately, the Bosnian-Herzegovinian declaration of independence in February 1992 was the point of no return. Suddenly and quite surprisingly, diversity came to an end. Friends became enemies, neighbors became strangers; BiH stood to face the dream of a Greater Serbia.[7] The ethnic strife in BiH, from then on, would reach unspeakable levels of violence. In either claiming territory or in defending it, adversaries in the Bosnian War committed some of the most heinous crimes known to man.[8] From 1992 until 1995, the landscape of BiH became the place of hate-speech and propaganda, persecution, deportation, ethnic cleansing, killings, torture, rape, wanton destruction of cultural heritage sites, sieges, humanitarian crises - all culminating in the most monstrous malice witnessed; the crime of genocide.

The culmination of the atrocities that reigned in BiH resulted in a massacre now known, lamented, and usually acknowledged by the very mentioning of a single proper noun: Srebrenica. The story of Srebrenica is one of direness and disillusion. In April 1993, taking note of the FRY obligation to take all measures to prevent the commission of the crime of genocide, reaffirming its condemnation of all violations of IHL, concerned by the pattern of hostilities shown by Bosnian Serbs, deeply alarmed by the rapid deterioration in Srebrenica including shelling of innocent civilians, and aware of the tragic humanitarian emergency,[9] the UNSC, acting under Chapter VII, proclaimed Srebrenica a UN safe area.[10] Little did the civilians know – that safe area meant abandonment and slaughter. For more than two years the situation in Srebrenica did not improve. Quite to the contrary. The influx of internally displaced persons from Eastern Bosnia ultimately resulted in some 40,000 Bosniaks living under harsh and inhumane conditions, suffering critically due to the humanitarian crisis in the city, the UNPROFOR forces, in addition, being subjected to hostility and hostage situations from

[7] President of Serbian Academy of Fine Arts and Sciences, Dobrica Ćosić, "Excerpt from the Memorandum 1986," *Roy Rosenzweig Center for History and New Media*.
[8] The Bosnian War is highly contested in terms of its categorization as well as its beginning. To some, particularly in the Herzegovinian region of the country, the war came already in 1991. To others, it came in the beginning and middle of 1992. Furthermore, there is, to this day, great debate regarding the categorization of the war; Was is a war of aggression or a civil war? Space does not permit for a lengthy description of this debate, in historical, political or legal terms, but it suffices, perhaps, to say that the role of the FRY and Croatia in the Bosnian War have been established. For more information about the Bosnian War and the role of Croatia and FRY see, ICTY, "The Conflicts," *supra* note 6.
[9] Preamble, UNSC Resolution 819, *Bosnia and Herzegovina*, UN Doc. S/RES/819, 16 April 1993.
[10] UNSC Resolution 819, UN Doc. S/RES/819, *supra* note 9, para. 1. Note that FRY is called to cease the supply of military arms, equipment, and services to Bosnian Serbs in para. 3. Note also that the Bosnian Serb campaign of "ethnic cleansing" is recognized in para. 6.

Bosnian Serbs. Yet, most of world stood by – idly, unable and perhaps unwilling to do anything to address the plight of the Bosniaks in Srebrenica and the surrounding area.[11] On 11 July 1995, Srebrenica fell, overrun by and surrendered to General Ratko Mladić. Within days, Bosnian Muslims would be either forcibly transferred, killed, or forced to flee on foot. Men and boys of Bosniak ethnicity were separated from their mothers, sisters, wives, and daughters – most of them never to reunite again.[12]

Some months following the genocidal execution of more than 8000 Bosniak men and boys, three signatures in Paris stopped the war. The *dies a quo* was 14 December 1995, putting an end to more than three years of war in BiH. The Bosnian war had cost more than 100,000 lives and had left more than two million people homeless – either as internally displaced persons or as refugees.[13] BiH, formally known as the heart of SFRY, was broken.

During the war, people in BiH were waiting – for a solution, for an end, for life, for peace. In peace, Bosnian-Herzegovinians still seem to be waiting – for justice, for answers, for a way forward. The country appears to be haunted by its past, its own memories, its own histories, its own narratives, its own peoples. This is an undeniable fact to anyone who has walked the streets of various Bosnian-Herzegovinian cities, who has talked to members of different ethnonational groups – across genders, ages, and social statuses. While Bosnian-Herzegovinians remain true to their tradition and culture of hospitality and perseverance, there is no escape from the fact that the war continues to influence, in one way or another, the everyday lives and livelihood of the citizens of BiH. War is still everywhere, it seems.

In light of these observations, it becomes paramount to question and consider why the past seems to have such a hold of BiH. Phrased differently, it is necessary to examine and present a sound assessment of why the reconciliatory process in BiH appears to have come to a halt. More precisely, then, the aim in and of this endeavor is to explore *the role the ICTY has had, as a transitional justice mechanism, on the reconciliatory process in BiH and whether the Tribunal can be said to have been obstructive to reconciliation in the country.* The hypothesis, prior to the research, analysis, and assessment to be conducted, is that indeed *the ICTY has played an obstructive part in terms of reconciliation in BiH*. However, it must be emphasized, the presumed obstruction lies not in the incompetence or insufficient nature of the Tribunal.

[11] Pierre Hazan, *Justice in a Time of War – The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 2004, 86-88.
[12] For a detailed and devastating account of the Srebrenica massacre and the years leading to it, see Leslie Woodhead, *Srebrenica – A Cry from the Grave*, 1999. Also, for a thorough account of the story of Srebrenica from the perspective of Madeleine Albright's senior advisor at the time, see David Scheffer, "Abandoned at Srebrenica," in *All the Missing Souls*, 2012, 87-107.
[13] ICTY, "The Conflicts," *supra* note 6.

Rather, the obstruction lies in the very existence thereof, that is to say, that the perception of the Tribunal plays a negative and divisive role among communities in BiH.

The very focus on transitional justice is on a par with my overall studies. The Master's Degree in Social Sciences in International Security and Law program is an amalgamation of different disciplines and perspectives, engaged in various aspects of international studies and affairs. Much in the same way, transitional justice is multifaceted, both in its theoretical frameworks as well as its practical applications thereof. Transitional justice, then, is a field in which all the aspects of the program prove to be necessary, useful, applicable, and relevant – and vice versa. Put more bluntly, the multidisciplinary nature of the program is as in alignment with transitional justice as a multidisciplinary field of research and practice.[14] In addition to these reflections and considerations, it is important to mention the relevance of this topic, in general. In a world in which atrocities and actualities of war are inescapable, transitional justice is ever more in demand and desirable – for countries, for cities, for citizens. Developing, evolving and appropriating theoretical frameworks and practical mechanisms for *transitional* processes continues to be significant and imperative in international studies. The aspiration here, then, aside from the aforementioned research questions and hypothesis, is to reach a level of meta-reflection regarding transitional justice.

Answering the posed questions and researching the hypothesis, moreover, will be done in several steps. As it is imperative to engage with theoretical frameworks for transitional justice *per se*, this is where this exploration will commence. The first chapter, in other words, begins by briefly tracing the development of transitional justice as a field, from its inception to its current conceptualization. Following this, a significant part of the chapter will be devoted to defining transitional justice in order to fully come to terms with the meaning and scope thereof. Thereafter, the chapter will include a description and a definition of reconciliation as one of the aims of transitional justice. Lastly, this chapter describes, in detail, the mechanism which is the focus of this thesis, namely international legal prosecutions. Secondly, the thesis will turn to a case-specific examination. Needless to say, this chapter is central to this endeavor. It seeks to demonstrate, analyze, and grasp the effects the ICTY has had in BiH. This will be done in several steps. To begin with, the chapter presents an examination of the ICTY. This examination will be threefold. Firstly, it will scrutinize the objectives of the Tribunal, voiced particularly in the UNSC resolutions establishing the ICTY. Secondly, the chapter will seek to analyze the ICTY pursuant to the theoretical framework provided in the antecedent chapter. Thirdly, the

[14] ICTJ, "What is Transitional Justice Factsheet?".

chapter will aim to analyze how the ICTY jurisprudence regarding Srebrenica has impacted the country and its peoples. Here, the focus will be on the ICTY rulings in the cases of *Prosecutor v. Radislav Krstić* and *Prosecutor v. Ratko Mladić* – the first and final ICTY rulings concerning the Srebrenica genocide, respectively. When dealing with the case of *Prosecutor v. Radislav Krstić,* some important legal interpretations of the crime of genocide will be offered, before concisely turning to some reactions to this judgment. Because this case sets a legal precedent, the focus here will mostly be on the legal aspects. Following this, *Prosecutor v. Ratko Mladić* will be scrutinized. The analysis of this case, however, will primarily focus on the reactions to the conviction of Mladić*,* and not so much on the legal aspects of the judgment. This chapter ends with an analysis of the legacy the ICTY can be said to have had thus far – in BiH and internationally. The findings of the central chapter, needless to say, will be part of an assessment and evaluation of the reconciliatory effects of the Tribunal. In the discussion, then, the aim is to finally provide an exhaustive answer to the posed research questions presented above, and consider the hypothesis. This chapter will also devote space to consider the part the Dayton Peace Agreement plays on the path towards reconciliation in BiH. Here, then, all the previous sections and chapters converge to establish *the impact the ICTY has had, as a transitional justice mechanism, on the reconciliatory process in BiH and whether the Tribunal can be said to have been obstructive to reconciliation in the country* - or whether some other aspect is the culprit. To achieve all this, much consideration is required, pertaining to methodology and limitations.

### 1.1 Methodology

The method of this endeavor draws on various disciplines, such as law, international relations, philosophy, linguistics, etc. and is, furthermore, trajectory; it moves from describing and presenting the relevant theoretical framework to an application of these findings in a case-specific analysis. Finally, it evaluates the findings in order to conclusively provide some indications of the main problems related to the impact of the Tribunal in BiH, and, importantly also, to offer some lessons learned from transitional justice and reconciliation in BiH.

The method used in the research, apart from the academic research conducted, is primarily that of multi-sited ethnography. According to George Marcus, this type of research is "designed around chains, paths, threads, conjunctions, or juxtapositions of locations in which the ethnographer establishes some literal, physical presence, with an explicit, posed logic of

association or connection among sites."[15] Although it is a method within anthropology, multi-sited ethnography has allowed for a diverse study and a variety of roles as a researcher, namely participant, observer, or nearly native. This ethnographical approach has involved participation in academic programs in Sarajevo, it has involved field research in Klotjevac and Srebrenica, and everyday conversations and observations in BiH – and abroad. It must be noted, however, that the ethnographical research conducted has never yielded interviews with victims, survivors, academics, organizations, etc. The omission of interviews was intentional, meant to exclude observer effect and to deformalize the research *per se*. Thus, because nothing has been recorded so as not to obstruct the course of the research, observations as well as recommended sources obtained during the ethnographical pursuits will be used here, representatively, instead.

The theories and materials used in this research and in the writing process thereof, are various. The ethnographical approach to research has proven useful in collecting first-hand experiences, emotions, and evaluations of the Bosnian War, the ICTY, Srebrenica and, as such, the questions of transitional justice and reconciliation. Secondly, the theory used in this endeavor will include some of the most prominent theoreticians and practitioners in the field of transitional justice and reconciliation in general, and in BiH in particular. However, all this within certain defined limits.

### 1.2 Limitations of the study

Transitional justice, as a field of multidisciplinary dimensions, is a rather broad topic to research and write substantially about. Adding to this the intricateness of the Bosnian War and its aftermath, the broadness of this topic expands to levels which are unfitting for the limited scope of this thesis. Hence, some limitations have been calculated into both the research and the writing of this endeavor.

*Thematic Limitations*

The choice to exclude non-legal transitional justice mechanisms in BiH, is multifaceted. Firstly, too broad of an approach would undeniably compromise both the ability to research the topic and to turn this research into a qualified piece of writing. Secondly, the chosen mechanism, ICTY, is by no means accidental as it represents the most prominent mechanism of transitional justice applied in, to, and for BiH. A lot of effort and energy has been put in the ICTY, from the international community and various regional as well as domestic agents – for better or

[15] George E. Marcus, "Ethnography in/of the World System; The Emergence of Multi-Sited Ethnography," *Annual Review of Anthropology*, Vol. 24 (1995), 105.

worse. Furthermore, the Tribunal is highly controversial and contested in terms of its reconciliatory effects, making it an appealing and worthwhile investigation. Hence, the ICTY is seen as an integral part of transitional justice and reconciliation in BiH. The choice to focus, partly, on Srebrenica is due to its historic importance – both inside and outside of BiH. Additionally, as the "chosen trauma"[16] of BiH, the Srebrenica genocide is taken, sometimes regrettably so, to represent the bloodshed of the Bosnian War – for Bosniaks, in particular. The ICTY, the integral yet intriguing transitional justice mechanism, and the Srebrenica genocide, the most egregious crime committed in the Bosnian War and on European soil since World War II, make for an undeniably compelling combination. It is imperative to emphasize, nevertheless, with these limitations in mind, that this study will not offer a full analysis of transitional justice and reconciliation in BiH, but merely with regards to themes chosen, hence, reconciliation *in this regard,* pertaining to this measure and the perspectives surrounding it exclusively.

*Personal limitations*

Choosing a topic which has personal dimensions incorporated into is, simultaneously, advantageous and disadvantageous. An understanding of the complexity and diversity of Bosnian-Herzegovinian culture, history, ethnicity, and tradition, is an absolute advantage. In addition to this, there is an undeniable privilege in being able to gain access to the local community – academics, organizations, victims, survivors, etc. Understanding and speaking BSC also allows for a more locally inspired research when dealing with individuals who have experienced, first-hand, the field of this study. Being a cultural insider, then, is a cherished advantage. An undeniable disadvantage, however, is the risk of bias – personal bias as well as perceived bias. It can, at times, be difficult to remain objective, unengaged, and unaffected by the words one reads or hears during the investigation process. However, a certain way to circumvent this bias is to remain true to one's academic integrity and the aim of the thesis itself. Finally, while being a Bosnian necessitates a meta-reflective approach to the research conducted as well as its findings, being *physically* removed and spared from permanently living in and with the aftermath of the war, provides objectivity even, from which to reflect, and from which to organize these reflections – starting from the theoretical framework itself.

[16] According to Vamik D. Volkan, the term "chosen trauma" denotes the shared image of an event that causes a large ethnic group, for example, to feel helpless, victimized, and humiliated by another group. When it occurs, the group carries the image of the event and everything related to it, from generation to generation. In BiH, for Bosniaks, that chosen trauma is Srebrenica. See Vamik D. Volkan, "Bosnia-Herzegovina: Chosen Trauma and its Transgenerational Transmission," in Maya Shatzmiller (ed.) *Islam and Bosnia – Conflict Resolution and Foreign Policy in Multi-Ethnic States*, 2002, 86.

## 2. Theoretically Speaking: Transitional Justice

The present chapter provides the theoretical framework necessary for this investigation of transitional justice, particularly the relationship between transitional justice and reconciliation in BiH. Thus, the objective in what follows below is multifaceted. First, the aim is to briefly outline the origins of transitional justice as an international initiative. Second, a definition of transitional justice will be provided, as well as a definition of reconciliation as one of its aims. All this, in turn, is followed by an examination of international legal procedures as a mechanism of transitional justice.

### 2.1 The When, The Where, The What

While it is possible, for opponents of transitional justice especially and perhaps exceptionally, to encounter errors in the notions and ideas presented below, the point here is not to evaluate the origins, current conceptualization, definitions and measures of transitional justice but merely to present them. As such, what follows holds neither an affirmative nor a negating attitude towards these origins. It simply aims, instead, at a descriptive rather than an evaluative account of transitional justice as a means of dealing with the past. Evaluation will be postponed until a later point in this theoretical endeavor.

*Tracing the Origins of Transitional Justice*

By the initiators of the field which is today known as transitional justice,[17] exclusive attention was payed to "the integral relationship between the rule of law and international peace with justice and freedom."[18] Within this schema, quite predictably perhaps, the focus was put solely on the notions of democracy and rule of law[19] regarding political transitions in society. The former notion was arguably influenced by classical liberalism or the democratic peace theory, arguing for the conciliatory and non-warring characteristics of democracies on a national as well as an international scale.[20] In extension thereof, the second notion was presumably based

[17] ICTJ *supra*, note 14. During its initial phase, the field operating with and researching political changes taking place in abovementioned areas was referred to as "transitions to democracy," resulting, ultimately, in the term as it is known today, namely "Transitional Justice."

[18] Charles Duryea Smith, "Introduction", in: Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume 1. General Considerations, 1995, xv.

[19] *ibid.*

[20] Liberalism goes back to John Locke's idea of the social contract, i.e. the consent of the people to be governed and ruled by the authority as being the sole way for a government to achieve legitimacy. For more information, consult Thomas Hobbes' *Leviathan; Or, The Matter, Form and Power of a Common Wealth Ecclesiastical and Civil,* 1651, or John Locke's *Second Treatise of Government,* 1689**.** For more information on classical liberalism, see Michael Doyle, 'Liberalism and World Politics', *The American Political Science Review,* Vol. 80, No. 4 (1986), 1151-1169. For an extensive examination of liberalism and especially democracy pertaining to justice and peace, see Immanuel Kant, "Perpetual Peace: A Philosophical

on an argumentation which favors rule of law and civil trust as categorical prerequisites for nation-building in the aftermath of totalitarian regimes. Accordingly, any and every attempt made at (re)building stable, secure, and legitimate democratic societies would prove futile unless they adhered to justice. Law, or more precisely rule of law, was thus considered to be an indispensable element of democratization, and it was held that "if judgements lacked fairness and if truth was subverted by bias and propaganda, the democratic foundation would be built on sand."[21] Within this legalist paradigm it is held that "law maintains an independent potential for effecting transformative politics."[22] Without denying the possibility of utilizing other measures in radical political change or passage, Teitel emphasizes the exclusivity of legalism and justice as the predominant elements of the liberal state and the liberal political identity.[23] With this framework – founded on lessons learned from the Latin American transitions, the Eastern and Central European states, the Soviet countries undergoing transitions,[24] as well as the African states emerging from conflict[25] - the road was paved for a field which would enable societies to deal with atrocious pasts, to heal and to become just, legitimate, democratic wholes.

It was undebatable, then, that there, "was increasing international consensus that transitional justice measures were needed to deal with past human rights abuses,"[26] and the idea and notion of transitional justice took hold, maintaining, nevertheless, *transition* and *justice* as indispensable and normative aspects thereof. In other words, *justice* and *transition* were, or so it seems, simultaneously means and ends, meaning that a just democratic society, was attainable solely through democratizing, which is to say, *transitioning*, and legal, which is to say *just*, measures and processes. Rather unsurprisingly, however, these approaches to dealing with the past, would vary significantly from country to country, from case to case – some societies even opting for more peaceful rather than judicial means.[27] This variation expanded the field of transitional justice immensely, becoming eventually, "all things to all people."[28]

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Sketch," 1795, Thomas Paine, "Common Sense," 1776, and Alexis De Toqueville, *De La Démocratie en Amérique* or *Democracy in America*, 1835, 1840.

[21] Smith, *supra* note 18, xv.

[22] Ruti E. Teitel, *Transitional Justice*, 2000, 213.

[23] Teitel, *supra* note 22, 225.

[24] Neil J. Kritz, "The Dilemmas of Transitional Justice," in: Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume 1. General Considerations, 1995, xix.

[25] Johanna Herman, Olga Martin-Ortega and Chandra Lekha Sriram, "Beyond Justice Versus Peace: Transitional Justice and Peacebuilding Strategies", in: Karin Aggestam and Annika Björkdahl (eds.) *Rethinking peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans*, 2013, 51.

[26] *ibid.*

[27] For more on the peace versus justice debate in the initial phases of transitional justice, and the focus on more communitarian conception of dealing with the past through, for example, truth commissions rather than criminal trials, see Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, Vol. 16 (2003), 81-85.

[28] Herman, Martin-Ortega and Sriram, *supra* note 25, 51.

*The Current Conceptualization of Transitional Justice*

Since its original conception, the field transitional justice has undergone an undeniable evolvement and has, as a result thereof, generated reflections and research aimed at clarifying some contested notions within the field. While it is rather uncontested that transitional justice has "grown over the past twenty years into a normalized and globalized form of intervention following civil war and political repression,"[29] there are some disagreements about what this development entails and signifies. According to some, the new paradigm of transitional justice is characterized by the discrepancies that exist between international norms and local traditions, resulting ultimately in a destabilized notion of transitional justice which overemphasizes local practices. Internationality and locality, then, are seemingly dichotomous and an overt engagement with the local endangers the intellectual and normative frame of transitional justice, rendering the latter as a mere abstract conceptuality.[30] "Multiple rule-of-law rules," argues Teitel, "serve the varying aims of transitional societies in global politics, while transitional conditions often exacerbate tension in adherence to these diverse rule-of-law values."[31] To be sure, however, local procedures are, despite their uniqueness or distinctiveness, susceptible to international law, for example, and national responses to atrocious pasts must "satisfy international legal standards"[32] as well as the dynamics thereof. Additionally, it is arguable that local and national perceptions broaden transitional justice by offering alternative procedures, approaches and measures when dealing with atrocious pasts, a trend that is not unproblematic but which, nevertheless, offers other, potentially more successful, roads towards a truly *transitioned* society.[33]

Furthermore, a visible change in the field is the range, so to speak, which is indeed partly due to the inclusion of local, national and regional perspectives, mentioned above. Where the former or initial paradigm was nearly exclusively focused on the aftermath of despotism and totalitarian rule, the new paradigm of transitional justice has a broader scope – in more than simply one sense. Firstly, the expansion of the field deals with the contexts in and under which it operates. The early wave of transitional justice,[34] as it is depicted above, dealt with the shift that takes place from totalitarian rule to democracy. Without negating that

[29] Rosalind Shaw and Lars Waldorf, "Introduction: Localizing Transitional Justice," in: Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds.) *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, 2010, 3.
[30] Shaw and Waldorf, *supra* note 29, 4.
[31] Ruti Teitel, "The Law and Politics of Contemporary Transitional Justice," *Cornell International Law Journal*, Vol. 38, No. 3 (2005), 850.
[32] Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *The International Journal of Transitional Justice*, vol. 3, (2009), 16.
[33] ICTJ, "Factsheet," *supra* note 14.
[34] Teitel, *supra* note 31, 839-840. Here Teitel argues for *three* phases of transitional justice. While other writers cited here see the post-Cold War transitions as the initiators of the field, Teitel, then, seems to disagree – to some extent. See also Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, Vol. 16 (2003), 60-94.

liberalism and democracy are still on the agenda, it is necessary to emphasize that transitional justice, in its current conception, operates – and continuously more so – in contexts "where the transition has to do with a move from civil war to relative peace,"[35] and the measures utilized are often initiated during the conflict, as such. This shift of contextual scope of transitional justice encompasses, however, other expansive changes in the field, namely the innumerable disciplines, perspectives, questions, ideas and explanations that the field has come to contain. The multidisciplinary nature of transitional justice is intricately linked to the complexity and variety of the contexts it now operates in. However, while this expansion indeed is celebrated, it is simultaneously lamented. It can be argued that transitional justice, in its current *hyperconceptualization* and overt utilization, has become alarmingly open and unlimited – it signifies too many things to too many different people.[36] This openness of the field, moreover, caused by its contextual and disciplinary expansion as well as the hyperpoliticized milieu it operates in, is feasibly one of the reasons for the immeasurableness of the effects its mechanisms have in and on transitional societies – especially pertaining to the desired ends thereof. Lastly, then, the scope of field has been broadened in terms of its sought goals. Transitional justice has shifted its exclusive focus on rule of law, democracy, and liberalism towards less tangible and measurable goals, such as reconciliation. For now, then, it suffices to say that transitional justice as it is conceptualized today, emerges as something noticeably different from the original conception as expressed and exercised in its nascent stages. Perhaps, then, concretization and definition of this field are necessary.

*Towards a Definition of Transitional Justice*

Despite the abovementioned development and intricateness of transitional justice, it is nevertheless possible to offer some encompassing definitions of it. Transitional justice can be demarcated as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor

[35] Thomas Obel Hansen, *Facing the Challenges of Transitional Justice: Reflections from Post-Genocide Rwanda and Beyond.* University of Aarhus, April 2010, 60-61. Hansen argues that not only has the context changed in terms of democracy vs. relative peace, but that the context of the conflict has changed as well. For instance, transitional justice cases where the conflict is ongoing, where there is an absence of political transition and where external actors intend to carry out the transition. See also, ICTJ, *supra* note 14; Harvey M. Weinstein, Laurel E. Fletcher, Patrick Wink, and Phoung N. Pham "Stay the Hand of Justice: Whose Priorities Take Priority?" in: Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.) *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, 2010, 34; Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice*, Vol. 9, No. 1, (2015), 150–169.

[36] Kerstin Carlson, "Hybrid Tribunals – The Better Choice?," September 2017. See Lectures in Bibliography. For a more comprehensive evaluation and discussion of transitional justice as a field, see Bell, *supra* note 32.

regimes."[37] While Teitel is accredited with the coinage of transitional justice *per se*, and while the definition offered here is widely recognized, there is a limitation inherent in it. While Teitel recognizes the political change integral to transitional processes, Teitel's focus on "legal responses" is somewhat outdated in an era where transitional justice – and, in fact, the term "justice" itself – denotes a variety of different meanings, circumstances, and methods to dealing with past wrongdoings. Furthermore, as noted above, transitional justice as a field no longer solely deals with "repressive predecessor regimes." As such, while Teitel's definition is considered archetypal, it is necessary to consider other classifications.

In a report, in 2004, the then UNSG, Kofi Annan, among other significant aspects articulated the United Nations' notions and understanding of "justice" and "transitional justice." The importance of delineating the meaning of the central concepts applied in this field "serve both to define our goals and determine our methods."[38] In the report, justice is described, quite normatively, as "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs," and it "implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large."[39] These aspects and definitions of justice are ambitious, admirable and generally accepted – albeit arguably not easily achieved. Moreover, in terms of "transitional justice," the definition given is a,

> full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[40]

What is noticeable in this definition, unlike in Teitel's provided above, is its inclusion of non-judicial processes in transitional stages. Moreover, the definition speaks to the aims and goals of the mechanisms applied and finally, the definition incorporates the potential involvement of the international community in such contexts. However, the definition seems to limit transitional justice to "large-scale past abuses." While it is difficult to pinpoint the threshold for this notion, it appears to be significantly high. What is needed, perhaps, is a balanced definition that encompasses both definitions mentioned thus far.

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[37] Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, Vol. 16 (2003), 69.
[38] UNSC, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, para. 5.
[39] UNSC, UN Doc. S/2004/616, *supra* note 38, para. 7.
[40] UNSC, UN Doc. S/2004/616, *supra* note 38, para. 7.

Such a balanced notion of transitional justice is found in the ICTJ delineation, which opts for the following conceptualization:

> Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.[41]

What is significant in this definition is the terminology used to describe the scope transitional justice, namely "massive human rights abuses." Thus, while others speak of repressive regimes, ICTJ's focus is on human rights – something which is more relatable, while simultaneously being general enough to include various scenarios and breaches. Of the three definitions offered here, the ICTJ variant appears to be the broadest one in terms of the scope of the field, however also the vaguest one regarding the methods applied. As such, it also lacks specificity.

Hence, for the remainder of this endeavor, the term transitional justice will denote a combination of these three definitions and the considerations which preceded them. Henceforth, transitional justice is taken to designate *a multidisciplinary theoretical field as well as a multifaceted practical engagement with societies undergoing transitions of political, legal, societal and individual dimensions, including mechanisms which will enable the given society overall and its citizens in particular, to deal with a past characterized by various degrees of atrocity, which have often taken place in a warring context. These mechanisms include, but are not limited to, legal prosecutions, truth-seeking processes, reparations, institutional reform, and memorialization. Finally, transitional justice is applied on a case-to-case basis and holistically, meaning that these and other substantial mechanisms are optimally used in a coordinated, contextualized and combinatory manner when dealing with the past, devoted to and for the purpose of truth, justice, rule of law, reconciliation, and sustainable peace.*[42] Given the considerations, descriptions and delineations given thus far, this tailored definition is fairly self-evident and straightforward. The final part of it concerning the purposes of transitional justice, however, calls for some elaboration.

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[41] ICTJ, "About Us."

[42] While the general argument is of that presented here, namely that transitional justice is best applied in an integrated and holistic manner, Paul Seils argues that this approach, while attractive in theory, is rarely achieved in practice, and that the presumption that a holistic approach "makes for good policy should be questioned, as it often leads to overload and under delivery." See Paul Seils, "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions," *ICTJ Briefing*, June 2017, 5.

## 2.2 The Why, The How

Founded on the pillars the right to know, the right to justice, the right to reparation, and the guarantee of non-recurrence,[43] the means of transitional justice are all, in diverse manners, co-contributors to the attainment of these founding pillars, and in extension thereof, to the ends towards which it aims.[44] The underlying principles of transitional justice are inextricably linked to both its mechanisms and its goals – which is why an all-inclusive approach is imperative in transitional justice. Thus, it is crucial, at this point to briefly describe the goals of this field, before turning to a more detailed description on one of its goals, namely reconciliation.

The goals of transitional justice can be divided into immediate and long-term goals.[45] The most immediate goal of transitional justice, in contexts of armed conflicts, is to reestablish a dialog between the warring parties and bring an end to the hostilities *per se*.[46] The manner in which this is achieved and with what means, depends on the conflict and context at hand. In an optimal scenario, any measures taken during a conflict are balanced and seek, at the very least, not to compromise the accomplishment of other transitional justice mechanisms and goals. The success of this immediate goal is incontestably crucial to reaching the long-term goals of transitional justice.[47] Moreover, some hold that transitional processes "should be understood to have at least four direct aims to which they can contribute if not bring about on their own."[48] These direct aims are confronting impunity for massive human rights violations, recognition of the dignity of victims of human rights violations as citizens and human rights bearers, restoration of citizens' trust in state institutions, especially ones charged with guaranteeing fundamental human rights, and prevention of future serious human rights violations.[49] While it

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[43] Michel Parente, "Images of contrasting narratives and the changing face of remembrance in the Western Balkans," July, 2017. See Lectures in Bibliography.

[44] When dealing with the question of goals of transitional justice, it is important to consider whose aims one is addressing or describing. While international aims could differ from local aims, the goal here is to present an aim of transitional justice which could arguably be preferred on individual, national, and international levels.

[45] The notion of time is often discussed and questioned in relation to transitional justice. A relatively short period of time will be detrimental to the very crystallization of the mechanisms, and second, one cannot generalize in terms of a timeframe seeing as the resolution of conflicts operates on a case-by-case basis. It is difficult, then, to categorically establish a time-limit for transitional justice. For the purposes of this endeavor, the timeframe for transitional justice is unlimited and left undefined. Transitional justice takes as much time as it needs to, within the given context, and should transpire until the society has, in fact, *transitioned* to a peaceful society Also, when contemplating or discussing the notion of time in transitional justice it is important to remember to ask: "For whom?" Arguably, there is a difference between how long a society needs in order to transition, and how much individuals need. The latter may not have reached a sense of "transition" or "justice" when dealing with the past, even when – or if – the country has sealed that deal, or vice versa.

[46] Frederik Harhoff, "Overview of the types, scenarios and elements of transitional justice," September 2015. See Lectures in Bibliography.

[47] The mediation of peace agreements and the cessation of hostilities is arguably not an exclusive goal of transitional justice. The establishment of peace is an aspect of peacebuilding. Nevertheless, it is significant to note that goals or even mechanisms of transitional justice and peacebuilding often coincide and ought to be mutually reinforcing. For more on transitional justice and peacebuilding, see Herman, Martin-Ortega and Sriram, *supra* note 25; and ICTJ, "ICTJ Course Examines the Place for Justice in Peace Negotiations."

[48] Seils, s*upra* note 42, 2. For more, albeit similar, information on the direct and complementary aims of transitional justice, see; ICTJ, "What is Transitional Justice?"

[49] Seils, *supra* note 42, 2-4.

is undeniable that these are among the objectives of transitional justice processes, it is, however, debatable to what extent these are direct aims and, even more notably, to what extent transitional justice processes can bring these ends about *on their own.* This seems to be a slight simplification of the complexity surrounding transitional justice and the contexts it operates in. Nevertheless, Seils continues to name other contributions which transitional justice can make, namely, restoration of rule of law, good governance, democratization, peacebuilding and conflict prevention, as well as reconciliation.[50] While Seils and ICTJ consider these objectives to be indirect or complimentary, they are the main focus of the remainder of this section. This, however, is not to be taken as an abnegation of the other aims mentioned here, it is merely on a par with this endeavor to focus solely on reconciliation as an aim, henceforth.

*Reconciliation*

That reconciliation is an objective of transitional justice is quite undisputable. The ICTJ, for instance, attributes unique significance to reconciliation and describes it as the "ultimate goal in any society that has been traumatized and riven by violent abuses."[51] What, then, is actually meant by reconciliation?

While the answers to this question will vary depending on whom the answer is sought from, Paul Seils argues for four types of reconciliation which can occur in isolated form or in combination, and which often can be said to overlap in practice. These four versions of reconciliation are: individual, interpersonal, institutional and socio-political. The first, individual reconciliation, entails the victims' and survivors' rebuilding their lives by coming to terms with, making peace with, and reconciling with their own past experiences, namely what happened to them, what they endured, as well as what and who they lost. Secondly, and perhaps in continuation of individual reconciliation, interpersonal reconciliation focuses on the relationship between victims and perpetrators, for example, and is, among other things, achieved through dialog and forgiveness. Thirdly, the socio-political reconciliation deals with relations between groups in divided societies due to political, social, ethnic, religious, etc. differences. Finally, institutional reconciliation centers around the vertical relationships in a society by promoting the legitimacy of institutions and the restoration of trust therein.[52] In addition to these conceptual clarifications, Seils underlines that reconciliation can play out on horizontal as well as vertical axes, and that it can vary in degrees, meaning that reconciliation can be either "thin" or "thick." The former is a scenario in which individuals, groups, and

[50] *ibid.*
[51] ICTJ, "ICTJ at 15: Highlights of Our Work."
[52] Seils, *supra* note 42, 5-6.

institutions coexist and interact peacefully but with an absence of trust, respect, and shared values. The latter, as its opposite, is a context in which horizontal as well as vertical relations are founded on trust, respect and shared values.[53] The two degrees of reconciliation, furthermore, are both at their opposite ends of a spectrum, suggesting that, conceptualized in this manner, reconciliation is a continuum. Furthermore, Seils argues that context can determine not only what reconciliation means but also what relationships need to be restored, and how successful the mechanisms and processes can be. Much alike transitional justice, then, reconciliation is inextricably linked to its context. Additionally, argues Seils, if transitional justice mechanisms are successful in "recognizing victims, restoring trust (in the state and one's fellow citizens), and preventing future violations, they may positively contribute to vertical and/or horizontal reconciliation in different contexts."[54]

In addition to the levels and aspects presented so far, reconciliation arguably has two further dimensions, namely backward-looking and forward-looking ones. The backward-looking aspect of reconciliation is a confrontation with the past and brings about the personal healing of the survivors, (re)builds relationships between individuals and communities and, finally, promotes the acceptance of a common vision and understanding of the past by all former parties to a conflict. The forward-looking dimension of reconciliation entails enabling victims and perpetrators to move on with their lives and, on a societal level, it entails the establishment of a political dialog and an adequate sharing of power.[55] Furthermore, this all-encompassing reconciliation includes three interdependent steps; first, a peaceful co-existence, transcending both isolation and self-pity; second, a relation of trust between former adversaries, including the victim's ability to distinguish degrees of guilt among perpetrators in order to dismantle the idea that all members of a rival group are perpetrators; and, finally, the existence of empathy between victims and perpetrators, including the recognition of the common human identity shared by victims and offenders, and the necessity of genuine togetherness.[56] These stages of reconciliation are arguably comparable to Seils' distinction between thick and thin reconciliation. While they entertain different notions of reconciliation, and while the concept used to define it differ, what is interesting about the conceptualizations of reconciliation presented here, is that they all aspire to a sense of the common, the unifying, the (re)united. Reconciling, in these terms, means to deal with the past jointly in order to embrace a common future. Generally speaking, then, there seems to be agreement on what reconciliation is –

[53] Seils, *supra* note 42, 6.
[54] Seils, *supra* note 42, 9.
[55] Luc Huyse, "The Process of Reconciliation," in: David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation After Violent Conflict – A Handbook*, *International Institute for Democracy and Electoral Assistance*, 2003, 19.
[56] Huyse, *supra* note 55, 19-21.

namely, *a unified narrative* of the past. [57]

However, one cannot help but wonder whether reconciliation, becomes a somewhat naïve conception. The following will help to illuminate the quandary:

> The concept of reconciliation suggests that the enemies of yesterday will give up and let go of their hatred, animosity or wish for revenge, as well as their identity that had been constructed around the conflict. One expects that a new identity construction will develop together with a new relationship between former enemies that will address the roots of the conflict, not only its unfortunate outcomes.[58]

Bar-On's observations are absolutely acute, and they raise an alarming question: Is reconciliation realistic? In countries with atrocious pasts, creating a lasting transformation, for individuals, groups, and society as a whole, necessitates synchronization of various approaches, in order to fully "diminish the danger of a renewed outburst of violence."[59] Phrased differently, transitional justice mechanisms are, indeed, employed in order to serve and promote a thorough and deep transformation of a conflicted society into one in which fundamental rights thrive alongside sustainable trust, peace, and security.

As such, based on the definitions presented here reconciliation is understood to be both an end and a process. It is an end in terms of transitional justice, but a subsequent process in its own right. However, for the remainder of this endeavor, reconciliation will primarily be o dealt with as an objective of transitional justice. In this sense, *reconciliation is context-dependent and multidimensional, encompassing individual, communal, and national scopes. Being somewhat intangible, reconciliation can be measured in terms of thinness or thickness. Reconciliation deals with, but is not limited to, to the level of agreement with regards to a unified narrative of the past, the existence of trust, and shared values between individuals and groups in the present, and a common aspiration for the future of the country and its citizens.*

Having established the meaning of the chosen aim of transitional justice, it is now time to turn to the mechanism chosen as a means to reach it. In actuality, to distinctly establish the role transitional justice plays in the objective dealt with here, one needs to consider the mechanism which could be employed in the pursuit of this ends.

*International Legal Prosecutions*

Faced with the trauma of an atrocious past, the responsibility to respond to this past as well as to adequately deal with it, rests primarily on the shoulders of the government. Some transitional

[57] Carlson, *supra* note 36. I owe the concept of reconciliation as a "unified narrative" to Kerstin Carlson. This definition of reconciliation entails the notions of truth, truth-seeking and truth-telling.
[58] Dan Bar-On, "Reconciliation Revisited for More Conceptual and Empirical Clarity," undated, 5-6.
[59] Bar-On, *supra* note 58, 2.

justice mechanisms are indeed safeguarded by a government, or another able and apt authoritative body. In a post-conflict society, where a fundamental uncertainty about authority exists,[60] the means of adjudication are greatly diminished, perchance even non-existent. And so, the decision and obligation to hold legally accountable those who have committed heinous crimes is often internationalized in some way, shape or form. Moreover, there are purely legal obstacles which must be overcome if prosecution is to precede, such as the *ex post facto* and *nulla poena sine lege* principles, and, more philosophically, the reason for prosecuting in the first place.[61] Furthermore, endless questions concerning jurisdiction, the penal law, locality, funding, etc. permeate the very possibility and processes of legal prosecutions. The following, then, aims to unfold some of these considerations regarding international legal prosecution.

When dealing with post-conflict societies characterized by gross violations of human rights and IHL, the need for prosecution seems inevitable, necessary, and desired. There is little novelty in this notion; ending impunity has and continues to permeate the international scene - legally, morally, and to some extent also politically.[62] Legal theory offers several presuppositions which all figure into the estimation of the purposes of punitive action and the effects thereof – on perpetrators, victims, and societies alike. The ethical considerations and criminological studies concerning criminal sanctions fall into two seemingly dichotomous camps, namely deontology and consequentialism. The former encompasses conceptions such as retribution and impunity, while the later promotes notions such as deterrence and rehabilitation. Due to the complexity of these notions, not all of them can be sufficiently dealt with here, which is why the focus will only be on deterrence and retribution.

Resting on the principles of *punitur ut ne pecce*tur and *punitur ne peccatur*, which is to say special and general deterrence, deterrence rests on consequentialist assumption. It proposes that the fear of prosecution and punishment may prevent both the perpetrator in question and others from future criminal action. In wartime contexts, the assumption is that this very same fear will prevent civil leaders and military commanders from resolving to violations of IHL in future armed conflicts.[63] There are several points to address here. Firstly, it is a compelling and

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[60] Colleen Murphy, "Transitional Justice, Retributive Justice and Accountability for Wrongdoing," in; Claudio Coradetti, Nir Eisikovits and Jack Volpe Rotondi (eds.), *Theorizing Transitional Justice*, 2015, 64.
[61] Kritz, *supra* note 24, xxi-xxiv.
[62] Undoubtedly, there a several crucial differences between domestic law and international law, be it criminal or otherwise. One of the most essential differences, in terms of criminal law at least, is that domestic law and international law operate, adjudicate, and sentence under fundamentally contrasting scenarios; the former during peacetime, the latter during or in the aftermath of gross armed conflict. Another significant difference is the mental process of the perpetrator prior to, during, and after the commitment of the crime. Finally, the context of the crimes – peacetime vs. wartime – is significant in these regards. Nevertheless, it is perhaps possible to transfer some notions of domestic legal theory to the international sphere. For more on the differences in motives and nature between domestic and international crimes and punishment, see Frederik Harhoff, "Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment," in; Ola Engdahl and Pål Wrange (eds.), *Law at War: The Law as it Was and The Law as it Should Be*, 2008, 121-140.
[63] Harhoff, *supra* note 62, 126.

crucial point that general and special deterrence are unlikely to the extent that wartime atrocities are usually committed in pursuit of a higher good. Moreover, given the lack of rationality of the perpetrators and the disorder of the contexts under which international crimes are committed, the possibility of deterrence grows more obscure.[64] Therefore, it is difficult to ascertain that prosecution and punishment will have a preventive affect, as perpetrators view their actions as necessary parts of a greater whole. In terms of transitional justice, this becomes crucial in relation to the question of non-recurrence. It is far too ambitious to claim that any transitional justice measures can guarantee non-recurrence in isolation. It is, therefore, important not to dismiss, point-blank, the possibility of a general deterrent effect of international legal prosecutions. Indeed, perhaps deterrence is proportionated to the extent that international criminal law and prosecution of international crimes become increasingly more established, acknowledged, respected, and normalized. In extension thereof, international prosecution has a wider effect of disseminating and promoting compliance with IHL, as well as generating trust in the rule of law. In this sense, then, international legal responses to atrocity can be said to promote deterrence.[65]

Additionally, a prime purpose of punishment is retribution, resting on the principle of *punitur quia peccatur*. The philosophical core of retributivism, founded on deontology, maintains that a perpetrator *must* and *should* be punished for the pain, suffering, and injury he has inflicted on the victims. Punitive legal measures, then, are a categorical imperative. Additionally, public acknowledgment and judgment of wrongdoing can aid in the process of healing and restoration of dignity of victims and survivors.[66] In this sense, retributivism is not merely about punishing the perpetrator; it is very much also about offering justice to the victims and survivors whose inviolability and humanity have, indeed, been infringed by the very commission of the crimes. Retribution, then, is victim-centered. However, while retribution does seem to guarantee that justice is served, it is not an entirely uncomplicated matter. Firstly, retribution presupposes that the harm or wrong done to an individual can be somehow punitively repaid or righted by the punishment of the perpetrator. Problematically, then, retribution seems to rest on the idea that inflicted pain is measurable, and that it is somewhat meaningfully reproachable through imprisonment.[67] Furthermore, punishment of international crimes, parallel to punishment in domestic law, must be predictable and proportional. Again,

[64] *ibid.*
[65] Harhoff, *supra* note 62, 128.
[66] Roland Kostić, "Transitional Justice and Reconciliation in Bosnia-Herzegovina: Whose Memories, Whose Justice?," *Sociologija*, Vol. 54, No. 4 (2012), 657.
[67] Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review*, Vol. 39 (1992), 1660.

problems arise. In term of predictability, the prospect of international prosecution is still hazy and the meting out of sentences is still uncertain. Furthermore, with regards to proportionality of punishment, it seems rather impossible to appropriate crime and punishment in contexts of armed conflict. There is, in other words, no utterly meaningful sentence to be administered to the perpetrator of heinous war crimes. "We punish these crimes," argues Harhoff, "because there *has* to be some sort of sanction (*punitur quia peccatum est*) and because we cannot put up much longer with the *de facto* or *de jure* impunity of these crimes."[68] Under these conditions, punishment becomes not a matter of retribution but rather a matter of legal retaliation – as problematic as that fact is. As procedures and processes in international law develop, however, one can hope that the predictable and proportional aspects of retributivism will follow suit. For now, retribution must be left to rest on the argument that the "wrongdoer 'deserves' punishment," in order to "vindicate the value of the victim."[69] Nevertheless, some raise questions about the fairness and function of retributivism in international trials – especially in transitional contexts.

There is an undeniable acuteness in Colleen Murphy's argument that the standards of retributive justice inevitably fall short in transitional contexts, where the focal point is not only what a society is transitioning *towards*, but also what is it transitioning *from*. Accordingly, court justice in transitional societies must take into account the context of the crimes. Wrongdoings in wartime are of a collective and political dimension, meaning that misconducts become the rule rather than the exception.[70] Perpetrators, then, do not violate the norms but rather work within the norms of collective wrongdoing. Accordingly, prosecution and punishment become insufficient in transitional contexts simply because both fail to sufficiently counter or alter the institutional contexts and structures, which these crimes can be said to represent.[71] In this sense, prosecution and punishment does little to remedy wrongdoings on a societal level and it does not guarantee the reestablishment of the victims' moral worth and equality, nor the stability and peace of society. Thus, legal procedures *must* be parts of broader transitional programs.[72]

While this last claim is undeniable and reaffirms aforementioned notions of holistic transitional justice, there is another issue in solely pursuing punitive measures in transitional contexts. Punishing perpetrators for the sake of penance and for the sake of justice for the victims alone, potentially divides the post-conflict society into victims and perpetrators, which

[68] Harhoff, *supra* note 62, 125. Italics in original.
[69] Hampton, *supra* note 67, 1686.
[70] Murphy, *supra* note 60, 64. See also Jesper Ryberg, "Mass Atrocities, Retributivism, and the Threshold Challenge," *Res Publica*, Vol. 16, May 2010, 169-179.
[71] Murphy, *supra* note 60, 65-66.
[72] Murphy, *supra* note 60, 67.

inadvertently reinforces the histories and narratives which initially caused the conflict. Within this dichotomy, transition and reconciliation become even more intangible. In fact, some would claim that amnesty or other non-punitive measures should be pursued in contexts where it best serves societal change, stability, and recovery. Justice, accordingly, should not merely be pursued for the sake of justice – its function should be encompassing.[73] Nevertheless, despite the potential inadequacy of retributive measures and the risks that accompany them, one cannot dismiss positive prospects thereof. Firstly, legally addressing wrongdoings is not only a legal obligation, it is also very much something which helps establish rule of law in an unstable society. Most importantly, however, international trials publicly acknowledge and record the atrocities and the suffering.

Indeed, some advocates of international legal prosecution place emphasis on the role court justice can play for the victims. Not only does a criminal trial vindicate the rights of the victims – the right to know, the right to justice, for example – it gives the victims agency, it gives them voice, and it can therefore offer a catharsis, a closure so to speak.[74] Despite these tremendous virtues, the problem with regards to international prosecution lies in the very fact that it focuses on higher ranking offenders. Additionally, individuals' truths, catharses, and so-called closures do not guarantee successful transition to peace and justice on a purely societal level.[75] In fact, one might argue that trials do not only have the potential to provide victims with a sense of truth, acknowledgment, and justice but that victims, who testify at criminal trials, are an integral part of truth-telling in general.[76]

History and truth, then, are another advantage of legal procedures. Criminal trials are an irrefutable source of establishing a material[77] and objective truth, which is an indispensable part of dealing with the past. However, it is irrefutable that judicial truth is not always accepted as the real truth,[78] regardless of how counterintuitive this may seem.

Besides the mentioned critiques, international legal measures face various other criticisms as well, such as expense, location, inadequacy, selectivity and legitimacy. Pursuing international criminal accountability is a costly endeavor, indeed. In addition, international trials are often located far away from the *locus delicti* and thus compromise, according to some, the accessibility of the judicial processes. Furthermore, the far-removed location of the trials

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[73] Jesper Ryberg, "Mass Atrocities, Retributivism, and the Threshold Challenge," *Res Publica*, Vol. 16, May 2010, 169-179.
[74] Robert Cryer et al., "The Aims, Objectives and Justifications of International Criminal Law," in: Robert Cryer at al. (eds.), *An Introduction to International Criminal Law and Procedure*, 2014, 37-38.
[75] *ibid.*
[76] There is a distinct difference between judicial and non-judicial truth-telling. The former, occuring in the form of testimonies, is part of a wider search for evidence and establishment of facts. The latter, however potent, is more an instance of storytelling.
[77] Harhoff, *supra* note 63, 122.
[78] Cryer at al., *supra* note 74, 38-39

results in a lack of ownership at the local level.[79] However accurate, these arguments fail to recognize the neutrality, lack of domestic resistance, sabotage, as well as the expertise of international judges that are all integral to international courts.[80] In term of inadequacy, according to some, international legal responses to mass atrocities fail to address the core of the problem. Individual criminal liability, especially where violence was systematic, is not a sufficient means of countering the monstrosity of the crimes committed.[81] This critique, however, merely paraphrases the already established credo that legal prosecutions must be accompanied by non-legal means when dealing with the past. In terms of selectivity, the argument is that international legal prosecutions represent an inequality. To some, selective justice is even a form of imperialistic undertaking by the Western states.[82] Selective justice and selective punishment *must* be avoided lest the very foundation of legal prosecutions is to be utterly diluted, the imperialist argument does not hold water given the universal prohibition of international crimes. Finally, the argument regarding legitimacy rests on the presumption that courts and tribunals are initiated under false pretense, namely to cover up an unwillingness to act with far more determination during a conflict.[83] Be that as it may, there is little that threatens the legitimacy and legacy of the international legal prosecutions *per se* – provided, of course, that these remain apolitical.[84]

In summation, despite its possible flaws, international legal prosecution is held, by many, to be vital to enabling transition in a post-conflict society. The formation of a material truth, the vindication of the rights of the victims and survivors as well as the closure offered to them, and, finally, combatting impunity via retribution and deterrence, are all impressive aspects of this transitional justice mechanism, as is the link it can foster between justice and peace.[85] At the very least, theoretically speaking, this is so. Practice, perhaps, is another matter.

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[79] Cryer et al., *supra* note 74, 42-43.
[80] Cryer et al., *supra* note 74, 41-42.
[81] Cryer et al., *supra* note 74, 43.
[82] Cryer et al., *supra* note 74, 44.
[83] Cryer et al., *supra* note 74, 43.
[84] For more on politics and legal proceedings in the name of transitional justice, see Bronwyn Leebaw, "Introduction: Transitional Justice and the "Gray Zone," in *Judging State-Sponsored Violende, Imagining Political Change*, 2011, 1-30.
[85] Cryer et al., *supra* note 74, 40. Compare to Jesper Ryberg, *supra* note 73. Here the argument seems to be, as it oftentimes is, that punitive justice comes at the cost of peace. Also see, Teitel, *supra* note 37.

## 3. "…Individually, you agreed to evil"

Having dealt, to an acceptable extent, with the theoretical foundations and objectives pertaining to the chosen transitional justice mechanism, it is time, at this point, to look into how this mechanism has been applied in BiH and to what merit. While there is lot to be said and observed about transitional justice in BiH, the following will focus only on international legal prosecutions, namely the ICTY. The limited nature of this examination does not allow for a complete analysis, and the role of the Tribunal will therefore only be considered in light of the theoretical framework given above. In what follows, a brief inquiry into the establishment of the ICTY will be offered, followed by an analysis of the deterrent and retributive aspects of the legal proceedings in The Hague, after which an analysis of the celebrated as well as criticized aspects of the Tribunal will be provided. Next a closer look at how the ICTY has dealt with and impacted the question of genocide, namely Srebrenica, will be provided, leading, finally, to a glance at the legacy the ICTY can be said to leave.

### 3.1 Judging Backwards to Look Forwards

More than twenty-four years have passed since the historic decision was taken to establish the ICTY. At the time of writing, the Tribunal has delivered its final verdicts, it has *just* ceremonially closed its doors. The Court is evermore adjourned. One cannot help but wonder, then, what functions and effects the ICTY has had for transitional justice, and continues to have for reconciliation, in BiH.

*The Road to Justice: The Establishment of the ICTY*

With the war fully ablaze in BiH, the UNSC, in its resolution 808 (1993), decides that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[86] The decision is based on previous resolutions, among other things, concerning the obligation of all parties to comply with IHL, violations of which yield an individual responsibility and that the situation in former Yugoslavia poses a threat to international peace and security.[87] Resolution 808 (1993) also requests Boutros-Boutros Ghali, the then UNSG, to

[86] UNSC Resolution 808, *Tribunal (Former Yugoslavia),* UN Doc. S/RES/808, 22 February 1993, para 1.
[87] UNSC Resolution 713*, Socialist Federal Republic of Yugoslavia,* UN Doc. S/RES/713, 25 September 1991, is the first to acknowledge the fighting causing heavy loss of human and material damage in the former Yugoslavia. UNSC Resolution 764, *Bosnia and Herzegovina*, UN Doc. S/RES/764, 13 July 1992, dealing with BiH, in which especially para. 10 is of ICTY relevance. UNSC Resolution 771, *Former Yugoslavia*, UN Doc. S/RES/771, 13 August 1992, in which especially paras. 1-3 are relevant to the ICTY. Also dealing with Former Yugoslavia, UNSC Resolution 780, *Former Yugoslavia*, UN Doc. S/RES/780, 13 August 1992, reiterates its former concerns and recalls its former resolutions, and expresses grave alarm at the

submit a report on all aspects of the matter, including proposals and suggestions for an effective and expeditious implementation of the decision to establish the Tribunal.[88]

The report, taking into accounts considerations from numerous UN member states, the ICRC, a significant number of NGOs, international law experts and committees, establishes the legal basis for the establishment of the ICTY; the competences and jurisdictions thereof, *inter alia*, the *ratione materiae*, *ratione personae*, *ratione loci*, *ratione temporis*; concurrent jurisdiction and *non bis in idem*; and, finally, all organizational aspects. Furthermore, the report includes, in its annex, the proposal for the full Statute of the Tribunal.[89] Given the urgency expressed concerning the establishment of the ICTY, the UNSG deems that the time is not apt for a neither a treaty nor a direct UNGA involvement in the creation of the language for the statute of the Tribunal. The UNSG, then, places the legal basis for the establishment of the ICTY on the duties and authorities of the UNSC under the UN Charter, as well as its past practice, including, particularly for this case, its former resolutions concerning the atrocious situation in former Yugoslavia in general, and BiH especially. Additionally, the argument goes, a Chapter VII decision would not only be expeditious and immediately effective, but would also be legally binding and legally justified.[90] The UNSG emphasizes that the ICTY would function independently from political considerations and would not be subject to the authority from UNSC regarding the legal proceedings of the Tribunal.[91] These considerations and findings are essential to the very foundation of the ICTY – and are, furthermore, accurate. Given the sheer impossibility of a treaty, a UNSC resolution perchance the only viable means of

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continuous violations of international law, mentioning also the "practice of 'ethnic cleansing'." Resolution 780 also, in paragraph 2, requests an establishment of an impartial Commission of Experts to investigate grave breaches of the Geneva Conventions and other violations of international humanitarian law committed on the territory of former Yugoslavia. The interim report by this Commission of Experts, UN Doc. S/25274, 10 February 1993, did indeed also figure into the decision to establish an *ad hoc* Tribunal. For more on the role of the Commission, see M. Cherif Bassiouni, "Foreword," in Pierre Hazan, *Justice in a Time of War – The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 2004, xiii.

What is interesting, indeed, is the level of engagement by the UNSC and UNSG – the Council did remain "actively seized of the matter" and was seemingly updated on the violations taking place on the territory of former Yugoslavia, especially in BiH, via letters and reports from the UNSG but also the media coverage of the deteriorating situation in the country. To some, this testifies to an admittance to the threat posed in BiH – not just to Bosnian-Herzegovinians, but to international peace and security – but also to a shameful lack of decisive action to end the conflict. For more on the *realpolitik* of the creation of the ICTY, see Pierre Hazan, *Justice in a Time of War – The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 2004. For more information on the history and establishment of the Tribunal, see Aram A. Schvey, "Striving for Accountability in the former Yugoslavia," in Jane E. Stromseth (ef.), *Accountability for Atrocity: National and International Responses*, 2003, 39-85. See, also, Figure 3 in the Appendix.

The establishment of the Tribunal, however some may view it, was considered by the UNSC to be a further step taken in the interest of ensuring not only legal accountability, but also peace and stability in the region and in BiH. For the sake of argumentation, this line of logic will be the baseline here – albeit not left uncontested.

[88] UNSC Resolution, UN Doc. S/RES/808, *supra* note 86, para 2.

[89] UNSC, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704, 3 May 1993, paras. 16-17.

[90] UNSC, UN Doc. S/25704, *supra* note 89, paras. 19-27.

[91] UNSC, UN Doc. S/25704, *supra* note 89, paras. 28.

implementation.[92] And in fact, within a month, the UNSC unanimously adopted resolution 827 (1993) including the annexed Statute.

Acting under Chapter VII, in resolution 827 (1993), which reiterates the abovementioned concerns and determinations, the UNSC, without any precedent, established an *ad hoc* Tribunal, with the following historic wording,

> Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;[93]

The precision of this provision is crucial regarding three specific aspects, namely the *ratione temporis* and *ratione loci* of the Tribunal as well as the purpose of it. With respect to the *ratione loci,* the Tribunal has jurisdiction to prosecute crimes committed on the entire territory of the former Yugoslavia, meaning the actual SFRY prior to the dissolution thereof.[94] For *ratione temporis*, the jurisdiction is open-ended, providing only the *dies a quo* and no *dies ad quem*. This entails that all commission of crimes henceforth, until a date is determined, will be subject to criminal liability.[95] Secondly, without reiterating the entirety of the preamble of the selfsame resolution, this *operational* provision only establishes the legal ends of the Tribunal. Hence, although the ICTY was established on a conviction that legal measures would contribute to the restoration and maintenance of peace, as well as a belief that the ICTY would contribute to ensuring that violations are halted and effectively redressed,[96] these considerations are not included in the *operational* part of the resolution. As such, one could argue that, indeed, the ICTY is a mainly legal body, and that the aforementioned political and moral aspirations are auxiliary aims, included in the resolution as legal underpinnings and interpretational contexts.

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[92] For more on the legality of the establishment of the Tribunal, see *Prosecutor v. Duško Tadić* (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October 1995, paras. 28-40. See also, Sean D. Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia," *The American Journal of International Law*, Vol. 93, No. 1 (1999), 60. Interestingly, during the UNSC Meeting, at which Resolution 827 (1993) was adopted, the Chinese delegate made the following comment regarding this issue: "It is the consistent position of the Chinese delegation that an international tribunal should be established by concluding a treaty so as to provide a solid legal foundation for it and its effective functioning." None other of the UNSC permanent five members commented on the legality of the establishment of the ICTY, suggesting that this was not considered an issue *per se*. See UNSC, *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, UN Doc. S/PV .3217, 25 May 1993.

[93] UNSC Resolution 827, *Tribunal (Former Yugoslavia),* UN Doc. S/RES/827, 22 February 1993, para 2.

[94] For the provision regarding *ratione temporis* and *ratione loci* of the ICTY, see Article 8 of the Statute. For competences of the Tribunal, including the crimes under its jurisdiction, see the following articles in the Statute: Article 1 (Competences), Article 2 (Grave breaches of the Geneva Conventions of 1949), Article 3 (Violations of the laws or customs of war), Article 4 (Genocide) and Article 5 (Crimes against humanity).

[95] To this day, no date has been determined by the UNSC, although the active cessation of hostilities in BiH is usually attributed to the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina in Paris, 14 December 1995. However, no UNSC resolution has affirmed the "restoration of peace" in the territory or the Former SFRY. In addition to the territorial jurisdiction, the lack of a specified *dies ad quem* also meant that the ICTY, with the indictment of Slobodan Milošević in May 1999, would be the first international Tribunal to indict a sitting head of state, during a conflict.

[96] UNSC, UN Doc. S/RES/827, *supra* note 93, preamble.

Additionally, the UNSC urges all states, IGOs and NGOs to contribute with funds, services, and expertise.[97] Finally, the UNSC decides that the work of the ICTY shall not impede the rights of victims to seek compensation via other means.[98]

The unanimous adoption of resolution 827 (1993) aptly illustrates the opinions voiced during the meeting at the Council without testifying to, nevertheless, the alleged *realpolitik* that permeated the establishment of the Tribunal.[99] Madeleine Albright, for instance, hailed the establishment of the Tribunal, opening her explanatory statement with the words: "Today we begin to cleanse the hatred that has torn apart the former Yugoslavia," and continued to state that "it *is* only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."[100] Albright assured both the victims and war criminals, that justice will be done – for the former, this was a promise, for the latter, it was meant as a peril.[101] Albright finished on an imperious note: "Finally, of this we are certain: the Tribunal must succeed, for the sake of the victims and for the credibility of international law in this new era."[102]

David Hannay, representing the United Kingdom, stressed the horrifying "evidence of massive breaches of international humanitarian law and human rights in the former Yugoslavia," underlining that "all parties in the former Yugoslavia share some responsibility for these crimes, and it is important to emphasize that the action the Council is taking today *is* not aimed at one party alone."[103] Hanney finished by urging all parties to stop violations of IHL or face the consequences, and that: "We hope that message will be heeded.[104]

Quite a similar tone was provided by the French delegate Merimee, who also underlined the impartiality of the Tribunal.[105] Merimee stated, quite triumphantly, that the ICTY represents a "common resolve not to tolerate infamy and to assert the rule of law," and that "My country hopes that this message will be understood by all and that it will help silence the guns on the territory of the former Yugoslavia.[106]

Quite evidently, the rhetoric prowess of these statements varies, the most prominently assertive, truth-oriented, and victim-centered being that of Albright. These differences in tone and subject, indeed, could be expressions of the tumultuous and divisive path that had led to the unanimous

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[97] UNSC Resolution 827, UN Doc. S/RES/827, *supra* note 93, paras. 4-5.
[98] UNSC Resolution 827, UN Doc. S/RES/827, *supra* note 93, paras. 7. This matter of compensation will be discussed in greater detail below.
[99] See, for example, Pierre Hazan, *supra* note 87.
[100] UNSC, UN Doc. S/PV .3217, *supra* note 92, 12. The explicit inclusion of the three states here is due to their role, not only in the UNSC but also in their contributions to the formation of the ICTY and, finally, their role in the war in BiH.
[101] UNSC, UN Doc. S/PV .3217, *supra* note 92, 12-13.
[102] UNSC, UN Doc. S/PV .3217, *supra* note 92, 17.
[103] *ibid*.
[104] UNSC, UN Doc. S/PV .3217, *supra* note 92, 19.
[105] UNSC, UN Doc. S/PV .3217, *supra* note 92, 10-11.
[106] UNSC, UN Doc. S/PV .3217, *supra* note 92, 12.

adoption of resolution 827 (1993). The Americans had desired to play "the primary role on this stage of international justice"[107] while their European counterparts had been primarily interested in the political negotiations underway.[108] Nevertheless, despite their differing and deferring detours, in May 1993, the three permanent members of the UNSC along with the remaining twelve member states, could agree to the impetus of the ICTY, namely justice, or more precisely, hope for the victims, punishment for the perpetrators. Whether driven by morality or *realpolitik*, or even both, the formation of the ICTY was ambitious and magnificent – legally, historically, morally, and politically speaking.

By its creators, then, the Tribunal was intended not only as a promise that legal measures would be taken against those responsible for heinous crimes committed in Former Yugoslavia and that justice indeed would be served, but it also fostered a political ambition and a belief that such measures would also bring peace and restoration to the war-torn territory. To some, like Pierre Hazan, the Court, since its creation, "has been an antilogy, the bearer of all hopes and contradictions."[109] How, then, has the Tribunal effected the process of transitional justice and reconciliation in BiH? How successful has it been in reaching the aims of its founders? What are its merits? What are its pitfalls? What does it signal – to the victims, to the perpetrators, to BiH, to the international community?

*The Guarantee of Non-Recurrence?*

As seen above, the very formation of the ICTY rested of the desire to ascertain justice; for victims and perpetrators. Phrased differently, the Tribunal is founded on a desire to end impunity by deterring and punishing commission of crimes. What, then, can be said of deterrence and retribution with respects to the ICTY?

In its jurisprudence, the Court has held that deterrence is a purpose of punishment, and almost all of the judgments rendered "refer in some way to the deterrent effect as one of the *main purposes of punishment*."[110] Indeed, according to the Trial Chamber:

> It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that punitur quia peccatur (the individual must be punished because he broke the law) but also punitur ne peccatur (he must be punished so that he and others will no

[107] Pierre Hazan, *supra* note 87, 30. Interestingly, this American insistence on partaking in international justice is quite ambivalent, varying from President to President. Furthermore, this desire to play a role on the international legal stage is, indeed, also seen in the role the US curious has played in the establishment of the ICC, while, curiously, it has yet to become a member state.
[108] Pierre Hazan, *supra* note 87, 30. 7-25. See also, Bassiouni, *supra* note 87, ix-xvii.
[109] Pierre Hazan, *supra* note 87, 5.
[110] Harhoff, *supra* note 62, 127. Italics in original.

> longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence. [111]

Undoubtedly, then, deterrence is a determining factor in the practice of the ICTY. Still, despite the insistence on deterrence in the judgements, one cannot help but ask: How effective has the ICTY been in deterring commission of atrocities in BiH?

The uniqueness of the ICTY lies in its establishment during a conflict, reinforcing the need for deterrence– notwithstanding the lack of order, normalcy, and rationality during wartime, of course. Nevertheless, if is rather dubious whether the Tribunal has had any deterring effect. Most aspects, indeed, point to the lack thereof. For instance, the establishment of the ICTY in 1993 did not, in any significant way, halt the commission of heinous crimes in BiH. Contrarily, the most serious and atrocious crime occurred two years *after* the historic *ad hoc* Tribunal was established. The very fact that the Srebrenica massacre of took place, points to the fact that the threat of legal prosecution and punishment did little, even null, to prohibit crimes from being committed. There are, however, several factors which can help explain this non-deterrence of the Court. To begin with, the impotence of the international community and the UNSC to significantly intervene in the Bosnian War could have figured into the perception that nothing would come of this legal measure either. There is a slight possibility, that is to say, that the officials responsible for breaches of IHL in the posterity of the establishment of the ICTY were not deterred due to a general perception that the Tribunal would never be fully efficient. This could suggest, then, that those responsible for Srebrenica and other massacres, *might* have been deterred had they realized that they would be prosecuted for the killings.[112] It is crucial, indeed, to bear in mind the historical post-Cold War context and how it figures into creating the perceived feebleness of the UNSC and the international community at large. Nevertheless, despite these aspects, one cannot help but propose that the dream of a Greater Serbia far outweighed the prospect of prosecution and punishment for the crimes committed in the pursuit thereof – wherever and whenever they may transpire. In this sense, the prosecution and prospect of severe punishment for any crimes committed is simply a price to be paid for

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[111] *Prosecutor v. Anto Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, ICTY, 10 December 1998, para. 288. See also, among many: *Prosecutor v. Dražen Erdemović* (IT-96-22-T), Sentencing Judgment, Trial Chamber, ICTY, 29 November 1996, para. 6. *Prosecutor v. Delalić et al.* (IT-96-21-T), Judgement, Trial Chamber, ICTY, 16 November 1998, paras. 1231 and 1234. *Prosecutor v. Duško Tadić* (IT-94-1-Tbis-R117) Sentencing Judgment, Trial Chamber, ICTY, 11 November 1999, paras. 7-9. *Prosecutor v. Krstić* (IT-98-33-T), Judgement, Trial Chamber, ICTY, 2 August 2001, para. 693. *Prosecutor v. Momir Nikolić* (IT-02-60/1-S) Judgement, Trial Chamber, ICTY, 2 December 2003, paras. 86-88. Interestingly, in some of these judgments, the Tribunal mentions reprobation and stigmatization as a purpose also. Nevertheless, as Harhoff points out, the Appeal's Chamber of the ICTY has been cautious with regards to general deterrence and its weight in sentencing. This reluctance, however, can have several bases, none of which deem deterrence unimportant, but some may deem it unmeasurable. See Harhoff, *supra* note 62, 127-128.

[112] Harhoff, *supra* note 62, 126.

the attempt to attain a higher good.[113] If this be the case, then deterrence stands little chance. Furthermore, if deterrence is a cultural matter, and if, more significantly, crimes committed in wartime reflect and are rooted in an evilness which is thoroughly irrational and always already self-prophetic,[114] the possibility of deterrence is nullified. Moreover, the characteristics of the indicted before the ICTY reveals that these are individuals, driven by nationalistic and ideological motives and thus partook in the commission of crimes with other likeminded perpetrators, all sharing a common criminal intent against and fear of their perceived collective enemy.[115] This testifies to a highly possible credo among the individuals accused before the ICTY; *The desired end justifies the means*, even if that entails prosecution and punishment for the deeds. In actual fact, as many of the denouncements in the courtrooms of the ICTY attest to,[116] even the sentences are ultimately rendered void in the eyes of the perpetrators and likeminded individuals.[117]

However, while it did not succeed in deterring war criminals in BiH from committing some of the most inhumane crimes known to man, it is not unimaginable that the ICTY has played a part in deterrence on an international scale. The part the ICTY has played in the crystallization of international legal accountability should in no way be challenged – the Tribunal is a pioneer, indeed. Undoubtedly, since the creation of the ICTY, international criminal law has become standardized and far more operational, something which the establishment of the ICC testifies to. The pioneering nature of the Tribunal, in fact, also holds water with regards to retribution, the other primary purpose of legal proceedings, as established by the Trial Chamber in the *Furundžija* case cited above.

The ambivalence regarding the effects of the prosecution and punishment before the ICTY is present with respect to retribution as well. While the record of the Tribunal is impressive,[118] and while it did, in fact, adjudicate rather punitively in some of the most prominent of its cases, the matter is nevertheless not straightforward in terms of the sentencing.[119] The public perception of the Courts sentencing practice is that it lacks

[113] Harhoff, *supra* note 62, 126-127.
[114] *ibid.*
[115] Harhoff, *supra* note 62, 126.
[116] The latest of these being that of Ratko Mladić and Slobodan Praljak. Denial and denouncement will be further developed below.
[117] For more on the deterrent effects of the ICTY, see Schvey, supra note 87, 54-55.
[118] The Tribunal has indicted and concluded proceedings for 161 persons, 90 of which have been sentenced. See ICTY, "Keyfigures of the Cases." This is a commendable achievement by a Tribunal which had to legally respond to not only the egregious nature of the crimes committed in BiH, but also to make sense of the complexity of the context within which these crimes took place. Furthermore, compared to the ICTR, the magnitude of the ICTY becomes the more apparent. See MICT, "The ICTR in Brief."
[119] See ICTY Statute Article 24(1) and Article 24(2) for the purposes of sentencing, as well as Rule 101 of the Rules of Procedure and Evidence. These provisions indicate that the scene had indeed been set for proportional and predictable sentencing – albeit both predictability and proportionality are difficult to attain given the *ad hoc*, that is to say unprecedented and novel, nature of the Tribunal.

consistency and transparency.[120] There is little that needs to detain anyone on the critique of transparency, given that the ICTY grants access to *ad verbatim* record of judgments, including dissenting opinion of Judges. The consistency argument, however, should be elaborated. While it can be perceived as inconsistent, the sentencing procedure of the ICTY is arguably quite predictable and proportionate, given the idiosyncrasy of each proceeding, naturally. The gravity of the sentences, for one thing, appears to be organized into categorizes or levels of sentencing. Furthermore, the tendency seems to be to impose harsher sentences on both the lower and the higher ranked perpetrators and more lenient sentences on middle-level ranking offenders. Finally, pursuant to Article 7(1) and Article 7(3) of the Statute, the mode of criminal responsibility is also a crucial factor in the sentencing practice of the ICTY. When determining a sentence, then, Judges will consider the gravity of the offence, the person indicted, any mitigating or aggravating factors, and, finally, perform the test of consistency with the Tribunal's practice and the test of capriciousness and excessiveness. Only then is the sentencing finalized.[121] What all this suggests, then, contrary to public opinion, is that the ICTY has had a systematic, organized, and structured sentencing practice, rendering it *overall* consistent. It would seem, moreover, that the sentencing has been meaningful – to some.

It is of little surprise that particularly persons who are *directly* affected by the crimes will find little meaning in any sentence.[122] For some the sentences are too lenient, for others too harsh – for both, they are not meaningful and they are ineffective. The opinions on this matter are fragmented and scattered, and there is scant probability that they will every fully merge.[123] Independently of these points of critique, which are not without merit and thus will be dealt with below, the retributivism of the ICTY seems to uphold its prerequisites of predictability and proportionality, and it has, at least in this sense, generally been successful, if it has not been deterrent. The achievements of the Tribunal, however, are not limited to its punitive measures.

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[120] Harhoff, *supra* note 62, 135.
[121] Harhoff, *supra* note 62, 134-137.
[122] Harhoff, *supra* note 62, 131.
[123] Especially for victims' organizations, sentences are too lenient. Harhoff, *supra* note 62, 131.
The arguments presented here, furthermore, are based on the ethnographic research conducted in BiH in 2017, and the continuous engagement with BiH. They are easily detected and are, at times, representative of ethnonational narratives. Bosniaks seem to be content with the overall work of the ICTY, with discrepancies in opinion concerning special cases and sentences. Bosnian Croats seem to be either supportive or denouncing, depending on the case in question, so that harsh sentences against Croat perpetrators are deemed unjust whereas acquittals or lenient sentences against Croat offenders are deemed to be fair. Bosnian Serbs, however, generally denounce the work of the ICTY. These tendencies are especially visible in the immediate aftermath of the Judgment of any of the major cases. At times, it appears, the issue is not the sentence or even the meaningfulness thereof, but merely the person accused – whether he is Muslim, Catholic, or Orthodox. This points to the divisive nature of the ICTY and will be developed in greater detail below. See, for example, Denis Dzidic, "War Crimes Convicts: Hague Tribunal was a 'Political Court'," *Balkan Insight*, 20 December 2017.

*The Right to Justice, The Right to Know?*

As seen above, the founders of the ICTY had heralded its purpose of catering to the needs, desires and wishes of, first and foremost, the victims. For the sake of justice, rights, and truth, the legal proceedings at the ICTY, in theory at least, had the potential of attaining these ambitious aims. How, then, has the Tribunal delivered in practice?

As could be expected, given the aforementioned theoretical considerations, the Tribunal has been momentous with regard to the victims. The vulnerable, yet vital, role of witnesses in legal procedures was acknowledged by Tribunal itself, which is why the Victims and Witness Section was established. The insistence on including testimonials in the trials was an honorable and commendable aspect of the Court – its collection of evidence and establishment of facts rested not only on documents and forensic findings, but on the words, emotions, and memories of those persons who were directly affected by the commission of the crimes. According to ICTY Judge Howard Morrison, the essential role of testimonials illustrated the bravery of the witnesses to come forward. In addition, for Judge Morrison this bravery, also consisted of the very fact that these testimonials would be judged as being either true or false.[124] Undeniably, the inclusion of eyewitnesses, not only promoted the credibility of the Tribunal, but it also, more importantly, recognized the voices of the victims, and the importance they play in justice being done. While various documentations of the bloodshed in BiH exist – photographs, paper trials, videos, etc. – the multilayered experiences that factor into the reality of the crimes is only ever provided by the voices of the survivors and victims. They gave life to death. They were indispensable to the establishment of material truth and, even more so, to the establishment of the material reality.[125] More than 80 percent of witnesses who came before the Tribunal are survivors of crimes, people who witnessed the crimes, or people whose family members were victims of crimes. "For these people," it goes without saying, "the act of testifying is an extremely courageous one."[126]

Furthermore, the role testimonies played in the lives of the victims and survivors, in turn, is equally substantial. Their suffering was acknowledged, their rights respected, and their truths were recorded. They have not been silenced; they have been given a voice – on an international stage, at that. In no way is this frivolous. The motivation and incentive for testifying, indeed, was voice and agency:

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[124] ICTY In Focus Documentary, *Through Their Eyes, Witnesses to Justice*, [10:37-11:09].
For Judge Morrison's views on the impressiveness of testimonials, and the "innate sense of fairness" that accordingly prompts witnesses to testify, see also [14:05-14:45].
[125] Harhoff, *supra* note 62, 122.
[126] ICTY In Focus Documentary, *Witnesses*. Also, see the background information and reports of the "Echoes of Testimonies" project, at ICTY In Focus, "Echoes of Testimony: A Unique Research Project." Also, for stories from some of the witnesses who testified before the Tribunal, see ICTY In Focus, "Voice of the Victims."

> Even though testifying before the Tribunal may be a difficult and painful experience, witnesses are often motivated to speak for the dead, to tell the world the truth about what happened and to look for justice in the present in the hope that such crimes will not happen again.[127]

While it is in no way a straightforward or trivial task, often involving painful recollection and public display of vulnerability, the testimonials were essential to victims and survivors. Being a witness to atrocity and later becoming a witness to justice, are seemingly diametrical events, yet they coexist during testimonials, obfuscating the process to overwhelming levels. The reactions of the witnesses prior to and during testimonials, varied depending on their relationship with the accused.[128] To all, however, the experience of testifying is a stressful occurrence. To like Minka Čehajić, for example, the act of testifying generated an uncomfortable, unsettling, and shocking experience, dredging up a horrific past, she had intentionally forgotten in order to continue with their lives.[129] To Velibor Trivičević, testifying was deemed as one of the most difficult experiences of his life, not due to the actual testimony *per se*, but the principle of command responsibility.[130] To others, testifying was a duty to be undertaken, regardless of the emotions involved.[131] To others still, the act of testifying generated reflections on the very essence of the commission of the crime, namely, the ability to commit a crime against one's neighbors, against the people one worked, lived, and functioned with prior to the outbreak of war.[132] To Abdulah Ahmić testifying, while being a difficult process, was a moment of truth-telling and was not something one refuses to do, regardless of the circumstances.[133] Finally, even if the act of witnessing was an startling experience, it was something undertaken for the sake of those who are no longer among the living. It was done, in other words, to give voice to those who will evermore remain voiceless. In this sense, even if difficult, testifying breeds content and happiness,[134] even thankfulness and a sense of fairness.[135] In the powerful and precise words of Pierre Hazan,

> Even independent of different religions, the great majority of victims agree on one thing: that they must speak out for truth and justice before any reconstruction is possible. Only through witnessing can they, perhaps, recover their wounded dignity in their own eyes. Only by exposing the truth can they one day occupy the same geographic space as the killers without being constantly tormented by hate and the thirst for vengeance.[136]

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[127] *Witnesses*, *supra* note 126. See also, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [36:13-36:52].
[128] Helena Vranov Schoorl, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [16:00-16:14].
[129] Minka Čehajić, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [16:15-17:00].
[130] Velibor Trivičević, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [23:38-26:00].
[131] Mina Žunac, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [18:38-19:36].
[132] Mirsada Malagić, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [19:37-23:36].
[133] Abdulah Ahmić, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [17:39-18:37], [29:53-32:15] and [37:19-37:50] For the willingness to testify repeatedly, see also Mirsada Malagić at [39:09-39:34].
[134] Minka Čehajić, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [38:08-38:45].
[135] Velibor Trivičević, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [23:38-26:00].
[136] Pierre Hazan, *supra* note 87, xx.

Hazan's observation, as the included victim-witness examples also testify to, is laudable for its exact depiction of the importance and effects of testimonials, and, more significantly perhaps, that these sentiments transcend religion and ethnicity.[137] In establishing truth, generating public acknowledgement and recognition of the gravity of the crimes and the suffering they have inflicted on civilians,[138] in reverberating and promoting a restoration of dignity, a sense of restoration of rights, a cathartic "closure," and a sense of justice being done,[139] the ICTY and its witness-victims have created an undeniable source of healing and reconciliation – individual, and perhaps broader reconciliation too – and it is an undeniably positive effect the Tribunal, as well as other legal prosecutions.[140] However, not everything was uncritical with regards to testimonials before the ICTY. As it was also indicated in the interviews cited here, witnesses do not always face their perpetrators in court, and they, oftentimes, do not see their perpetrators face justice at The Hague Tribunal. Finally, despite the Victims and Witness Section, there have been instances of non-exemplary treatment of witnesses by the ICTY.[141] Nevertheless, despite these imperfections, which in *no way* should be neglected, there is an immense sense of justice and truth in testimonials. In the words of one victim-witness, Mina Žunac:

> Regardless of how many years in prison he gets, what kind of punishment he receives, it cannot bring back my leg, it cannot bring back my youth. That punishment cannot bring back the year I spent in hospital. On the other hand, a punishment must exist primarily as a sort of moral situation in which the wider public is informed that what was done was truly wrong, in which all the victims of his wrongful decisions receive some sort of a moral satisfaction when it is pronounced before the entire world that he has done wrong. The whole world is pointing a finger at him, saying that what he is wrong.[142]

This statement points back to the issues of the ICTY sentencing practice analyzed above, but it also points to the fact that acknowledgement and recognition of the voiced suffering, especially at an international level, is paramount to achieving a sense of justice, morality, and restoration of dignity for victims and survivors – direct and indirect alike. Moreover, truth is, once again, lauded as an important part of legal procedures.

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[137] The witness-victims referenced here are of following ethnicity: Minka Čehajić: Bosniak, Velibor Trivičević: Bosnian Serb, Mina Žunac: (Bosnian) Croat, Mirsada Malagić: Bosniak, Abdulah Ahmić: Bosniak. Their statements, naturally, suggest their ethnicity. However, most, not to say every, ex-Yugoslav is capable of identifying the ethnicity of a person from the former Yugoslavia based on their first and surname – even when the ethnicity is "mixed," so to speak. The reason why religion is not included here is simple: Being a Croat, for instance, does not entail that one is a devout Catholic. In BiH, however, religion is often conflated with ethnicity so that "Croat" entails both nationality, ethnicity and religion, which would perhaps explain Hazan's use of "religion" in the quotation above.
[138] Harhoff, *supra* note 62, 132.
[139] Cryer et al., *supra* note 74, 37.
[140] Harhoff, *supra* note 62, 132.
[141] Cryer et al., *supra* note 74, 37. See also Schvey, *supra* note 87, 59-65.
[142] Mina Žunac, *Through Their Eyes, Witnesses to Justice*, *supra* note 124, [28:40-29:23].

Establishing a material truth is a cumbersome enterprise, in more than one sense of the word. Truth-seeking involves limitless pieces of evidence, it involves countless accounts of what transpired on the ground, and it involves a thorough scrutiny of these. This process, in turn, turns into a truth-telling process in that it cements a record of the crimes that, ultimately, attains a historical or everlasting element, making the denial of such crimes less likely.[143] However, to some, there is a pitfall of establishing truths via trials. Apart from the issue of denial, which will be dealt with further below, some contend that trails, by their very nature, are incapable of providing the full or entire truth and that they fail to address the most important questions pertaining to the crimes, namely the *why?* of the matter.[144] With the ICTY, this critique becomes superfluous. The Tribunal has, in fact, addressed the reasons behind the egregious crimes committed in BiH. The ICTY has, for instance, firmly proven the underlying ideology that motivated the crimes committed by the Bosnian Serbs in BiH, namely Greater Serbia, and the ideology that motivated the Bosnian Croats, namely Herceg-Bosna.[145] According to former Chief Prosecutor Carla Del Ponte, these discoveries "tell us how the war efforts were organized and sustained as well as who was in charge, how the illegal plans were concocted and disguised - all in the service of a specific policy."[146] Judge Patricia Wald reaffirms this tendency of the ICTY, noting that a trial at the Tribunal is "usually more akin to documenting an episode or even an era of national and ethnic conflict rather than providing a single discrete incident."[147] The Tribunal, then, has indeed woven a complex canvas of material truth and material reality. Nonetheless, to some the very grandiosity of the Tribunal is double-edged in that trials that "seek to do justice on a grand scale risk doing injustice on a small scale,"[148] meaning that it produces a "collective guilt" or "collective victimization." However, this can be averted through educational programs.

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[143] Cryer al., *supra* note 74, 38-41.
[144] Schvey, *supra* note 87, 73.
[145] For Greater Serbia, see for example: ICTY, Case Information Sheet (IT-03-67), Vojislav Šešelj. For Greater Croatia or Herceg-Bosna, see for example: ICTY, Case Information Sheet (IT-04-74), Prlić et al.With regards to Bosniaks, no official ideology has been established the, by the ICTY, as being the rationale or motivation for commission of crimes. However, there has been talk of a *Fildžan Država* [*Fildžan* Country] as being the underlying ideology of Alija Izetbegović. *Fildžan* is a very small traditional coffee cup, its presence in BiH dating back to the Ottoman Empire. Symbolically, then, the *fildžan* is a Bosniak trait, and the idea is that Alija Izetbegović sought to have a small country consisting of only Bosnian Muslims. To this day, this dream has not been empirically documented, although *Fildžan Država* is something which is brought up in the media occasionally, by Bosniaks, Bosnian Croats, and Bosnian Serbs alike – although for different purposes. Thus, the only documentation attesting to this are these exemplary articles, in the original language only. From a Bosniak academic: "Muhić: Bošnjačka "fildžan država" je moguća" [Muhić – A Bosniak *fildžan* country is possible], *N1*, 8 March 2017. From Serbia, Mladen Kremenović, "San o „fildžan-državi" na Balkanu" [The dream of a "*fildžan*-country" in the Balkans], *Politika*, 26 March 2017.
[146] Carla Del Ponte, Panel Statement, "Role of war crimes trials in truth-telling" at *Establishing the Truth about War Crimes and Conflicts*, February 2007.
[147] Schvey, *supra* note 87, 74.
[148] Schvey, *supra* note 87, 74.

Indeed, dissemination of the work of the ICTY with the wider public, international and regional alike, has not always existed. Nevertheless, the learning curve that is necessarily integral to this unprecedented Tribunal, meant that the importance of outreach and educational measures was eventually acknowledged. The formation of Outreach was "a sign that the court had become deeply aware that its work would resonate far beyond the judicial mandate of deciding the guilt or innocence of individual accused." Additionally, the mission of the Outreach is to "put into practice the principle of open justice: for justice to be truly done, it must be seen to be done."[149] In engaging with the public through articles, events, youth initiatives, knowledge transfer, conferences, etc. the Outreach program can, in a very momentous way, help foster comprehension of its jurisprudence as well as help disseminate knowledge about IHL. Under any circumstances, Outreach, if pursued adequately, has the potential of dismantling some of the most serious and flawed misconceptions that have surfaced and continue to float about the purposes, prowess, and the positive nature of the Tribunal's results, as described here thus far, namely; the dignity and the rights of the victims and the survivors have *generally* been restored; truth and justice have prevailed.

*The Road to Injustice? The Impact of the ICTY in BiH*

The above analysis indicatively purports the success of the ICTY with regards to retribution, truth, justice, the cathartic and healing effects of testimony, as well as the overall potential of the educative purpose of all of these aspects. However, there are equally telling indications of negative impacts of the Tribunal. These, then, will be offered here.

The obvious points of critique, namely the intrusiveness, expensiveness, remoteness, and slowness[150] of the ICTY, upshot an overall negative perspective of the Tribunal. Instead of dwelling on these aspects here, although they *are* of importance, the remainder of this section turns to a more decisively unwanted impact the ICTY has had in BiH.

As was seen in the deliberations leading up to the establishment of the Tribunal, the ICTY was intended to be apolitical, impartial and neutral. It was to be objective, while safeguarding a definite political aim; to establish peace and stability in the region and thus set the scene for the reconciliatory process therein. While all these factors are not detrimental to this transitional justice mechanism nor to its potentially positive implications for reconciliation in BiH *per se*, critiques of the political bias of the Tribunal have permeated the public debate,

[149] ICTY Outreach, "Outreach Programme."
[150] After 24 years of jurisprudence, the monetary cost of the ICTY exceeds 2 billion US dollars, a large sum spent outside and away from the former Yugoslavia, hence BiH, albeit in the interest of bringing justice, peace and reconciliation to the region. See also, ICTY, "The Cost of Justice."

and they cannot and should not be ignored. The very establishment, to some, is tarnished by ulterior motives, that is the attempt to wash away a bad conscience by the international community for its inability to respond aptly to the violence that ruled in BiH – let alone to stop it.[151] Indeed, critics insist that this apolitical nature of the ICTY is a utopia, endlessly obstructed by agendas of the Western governments. Pierre Hazan, arguing for the *realpoliticians*' ulterior motives vis-à-vis the Tribunal, argues that Western governments "have also cynically tried to use all means at their disposal to influence it: bureaucratic maneuvering, financial asphyxiation, political recruitment of personnel, pressures of all sorts, media manipulation, and so on."[152] Under these circumstances, if this be the case, the ICTY no longer serves neither its judicial purposes nor its political aim. Hazan, indeed, has not been the only one to voice concerns and critiques concerning the political bias of the ICTY. Frederik Harhoff, former ICTY Judge, famously criticized the jurisprudence of the ICTY under the then President of the Tribunal, Judge Theodor Meron, for the acquittals of Ante Gotovina, Momčilo Perišić, Jovan Stanišić, and Franko Simatović. According to Harhoff, the ICTY had changed its set practice pertaining to the JCE, due to pressure from Meron, who, in turn, was following an American/Israeli agenda. Harhoff stated that "I have always presumed that it was right to convict leaders for the crimes committed with their knowledge within a framework of a common goal," and that,

> However, apparently this is no longer the case. The latest judgements here have brought me before a deep professional and moral dilemma, not previously faced. The worst of it is the suspicion that some of my colleagues have been behind a short-sighted political pressure that completely changes the premises of my work in my service to wisdom and the law.[153]

Harhoff's critique of ICTY was the first to emerge from inside the Court. However, several international lawyers, academics and experts, including William Schabas, had also voiced apprehensions about the change of the legal precept of command responsibility, warning against the message it sends to military leaders[154] and, to the "international justice by great-power interests."[155] If anything, then, this so-called scandal had reiterated former concerns, and,

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[151] Hazan, *supra* note 87, 8-9.
[152] Hazan, *supra* note 87, 6.
[153] Harhoff Letter, "Original private letter Judge Frederik Harhoff," *Vaseljenska*, 14 June 2013.
The legal dimensions of Harhoff's critique regarding ICTY case law pertaining to JCE is related to "aiding and abetting" and whether a "specific direction" is necessary for conviction under criminal responsibility. Harhoff's recusal was based on his "bias." While the debate about this disqualification has revolved around the legality of the dismissal, one may wonder why Šešelj's wish for dismissal on the grounds that Harhoff was biased against *Serbs* was not commented. If anything, in his letter, Harhoff shows indifference towards ethnicity and voices purely legal and moral concerns. For more information on the grounds of Harhoff's recusal by the ICTY, see *Prosecutor v. Vojislav Šešelj* (IT-03-67-T), "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President," Trial Chamber, ICTY, 28 August 2013. For more information regarding the JCE and "specific direction," see *Prosecutor v. Momčilo Perišić* (IT-04-81-A), Appeal Judgement, Appeals Chamber, ICTY, 28 February 2013.
[154] Marlise Simons, "Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders," *The New York Times*, 14 June 2013.
[155] Gordon N. Bardos, "Trials and Tribulations: Politics as Justice at the ICTY," *World Affairs Journal*, September/October 2013.

> All of this reinforced what many observers have claimed throughout the ICTY's twenty-year existence—that to unacceptable degrees, the tribunal's work is determined not by impartial standards of justice, but by the great powers' political interests.[156]

For insisting critics, ICTY case statistics suggest an anti-Serb bias, or at the very least, a favorable disposition towards Bosniaks.[157] However, if one compares these numbers to the figures representing the casualties, the story becomes clearer and perhaps less biased – favorably, or unfavorably, towards any ethnic group in particular.[158] Ultimately, whether politics had influenced the work of the Tribunal is difficult to establish empirically, and it is highly unlikely that the world will ever know. What the public was left with, however, were warranted and at times also unwarranted, speculations and conjectures – internationally, regionally, and in BiH proper. And in fact, one might argue that the existence of political influence within and of the ICTY was probably not as significant as the *public perception* thereof, which, *prima facie*, lead to a smeared opinion about the Tribunal. This perception, however, was found in other avenues as well.

Michael Humphrey, for example, points to the individualizing logic of international tribunals like the ICTY. The notion is that individual responsibility, limiting practical circumstances, and political obstruction result in selectivity of prosecution, rendering the trials highly symbolic and political.[159] If this be the case, the ICTY has not been an instrument of serving justice with regards to BiH. When dealing with the ICTY, however, one must keep in mind that this idea of selective prosecution is intricately linked to the very perception of political bias and obstruction – they go, to put it more bluntly, hand in hand. Unlike Humphrey, others consider the very JCE to be a possible culprit for the misperception of the ICTY and its jurisprudence. Anto Nobilo, a Croat lawyer, finds the JCE problematic in that it criminalizes a whole group and creates the image of a collective guilt. This, in turn, leads to conflicts in opinions in society which impede understanding and dialog.[160] While there are instances of precision in both Humphrey's and Nobilo's points, it must be emphasized, nevertheless, that one should not easily dismiss the doctrine of JCE, nor should one insist on the selective prosecution of the Tribunal – two opinions which are, indeed, diametrical. JCE enabled the ICTY to bring to justice not *any* selective few, but *the* selective few who were *responsible*, who

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[156] *ibid.*
[157] ICTY, "Keyfigures of the Cases."
[158] Jan Zwierzchowski and Ewa Tabeau, "The 1992-95 War in Bosnia and Herzegovina: Census-based Multiple Systems Estimation of Casualties Undercut," *ICTY*, 1 February 2010.. See also, Daria Sito-Sucic and Matt Robinson, "After years of toil, book names Bosnian war dead," 15 February 2013*, Reuters*.
[159] Michael Humphrey, "International intervention, justice, and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda," *Journal of Human Rights*, vol. 2 (2003), 499.
[160] Anto Nobilo, "Centralni Dnevnik sa Senadom Hadžifejzovićem," [News with Senad Hadžifejzović], *Face TV*, 2 December 2017,[38:25-1:35:24]. Translated by the author.

had the power and authority over others. In fact, Article 7(1) and Article 7(3) of the ICTY Statute are two distinct modes of criminal responsibility, namely *direct* and *indirect* criminal responsibility, respectively. These two provisions, then, allow for prosecutions of individuals who were *directly* involved in the physical commission of the crimes, and superiors who effectively orchestrated an overarching purpose under which the crimes fall. If anything, then, JCE broadens the range of crimes for which a member of the JCE can be prosecuted and held legally accountable, in addition to enabling the prosecution and conviction of only those *individuals* who were *jointly* responsible for fostering the ideological and nationalist narratives, which were necessary means to attain their ends, inevitable tools used to convince others to pull endless triggers – the echoes of which still can be heard today. It is rather clear, then, that the problem was not in the provisions of the Statute or even, more importantly here, the jurisprudence of the ICTY. In fact, Nobilo, while voicing concerns about the repercussions of the JCE, nevertheless holds that the ICTY has been overall successful in offering a moral satisfaction to victims, that it enabled the wider public to know more about the complexities and the unfolding of the Bosnian War, and that it, despite its flaws, delivered justice.[161] Needless to say, almost, others do not support this view – politicians, perpetrators, and academics alike.

If there is one thing Bosniaks, Bosnian Serbs, Bosnian Croats, as well as Croats and Serbians in general, can seem to agree upon, it is the injustice and partiality of the Tribunal.[162] The strongest reactions against the Court have come from Bosnian Serbs and Serbian politicians, perhaps without much surprise seeing how the sentencing of Bosnian Serbs and Serbians exceeds 1100 years of imprisonment. Croats, whether Bosnian or not, are in favor of the Tribunal when it rules "in their favor," and against it when it does not do so. Bosniak politicians, generally fond of the ICTY nevertheless oppose even minimal sentences imposed on Bosniak war criminals as it, in their perspective, negates their justification for partaking in the war, namely self-defense against aggressors.[163] Furthermore, Bosniak politicians also feel that the Court should have done more, and criticizes the Tribunal for not finding that genocide

[161] Jasmin Klarić, "Anto Nobilo Haag je ipak donio pravdu. Da nije bilo njega ne bi ni Srbi gonili Miloševića" [Anto Nobilo The Hague has brought justice after all. Without the Tribunal, the Serbs would not even have had ousted Milošević], Novilist.hr, 1 December 2017. Translated by the author.

[162] The distinction between a (Bosnian) Serb and a Serbian are many. Here, however, without getting into the complexity of this distinction, the two are taken to represent individuals living in BiH and Serbia, respectively. The term Serb, then, is taken to designate a person living in Bosnia or elsewhere who is Orthodox, while Serbian refers to nationality, meaning a person of any religion or ethnicity residing in Serbia. The same, of course, goes for the disctinction between a Bosnian Croat and a Croat – the former residing in BiH, the latter in Croatia.

[163] Ranko Pivljanin and Mihailo Jovićević, "Sud ostavio municiju za buduće sukobe Haški tribunal na kraju rada ne kritikuju samo Srbi, Hrvati i Bošnjaci, već i strani eksperti," [The Court has Provided Munition for Future Conflicts The Hague Tribunal is not only critized by Serbs, Croats and Bosniaks, but also by Foreign Experts] *Blic Online*, 3 December 2017. Translated by the author.

took place in several Municipalities in 1992, the so-called Count 1 of Genocide.[164] Furthermore, among the foreign critics of the ICTY is Robert M. Hayden, who argues that the verdicts of the ICTY play in the hands of local politicians and lead to future political clashes, adding that the Tribunal is unjust and cannot foster reconciliation.[165] Quite unsurprising, perhaps, politicians and foreign experts are not the only ones voicing their sense of injustice being done at the Tribunal.

While the most dramatic dismissal and denouncement of the Court, far beyond comparison, was that of Slobodan Praljak, before the Appeal Chamber, immediately following presiding Judge Carmel Agius' affirmation of the verdict and sentence of the Trial Chamber,[166] Praljak was by far the only perpetrator to denounce or criticize the Court. Momčilo Krajišnik, for example, argued that although the intention of the Tribunal may have been true and just, "the trials have been selective and political and only served to show that crimes were committed by one side and not three sides," while admitting, however, that he did not believe that all three sides committed the same amount of crimes during the Bosnian War. If anything, then, Krajišnik was ambivalent towards the Court.[167] Similarly, Vlatko Kupreškić, despite being acquitted, described the Tribunal as a politically biased institution which is not based on law or justice.[168] Another convicted war criminal, Esad Landžo, held that the Tribunal was a political, manipulative tool, not created to show the truth. Nevertheless, to Landžo the Tribunal has had personal effects stating that, for him "the court did something it failed to achieve in many defendants, and that is show me the truth and what really happened. I believe it should have done this for every individual."[169] Apparently, what was lacking in the work of the Tribunal was perhaps not impartiality but rather rehabilitation.[170] In any case, what is interesting in these

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[164] Denis Dzidic, "War Crimes Convicts: Hague Tribunal was a 'Political Court'," *Balkan Insight*, 20 December 2017. These ethnic differences regarding the credibility of the Court, are widely recognized. See, for example, also Goran Šimić, "Has the ICTY Brought Justice to the Victims of War in Bosnia and Herzegovina?," *Indian Journal of Law and International Affairs*, Vol. 1, No. 1, (2016), 6.
It is interesting, in this context of ethnonational (dis)agreements about the ICTY and its political bias that 82 percent of Bosnian-Herzegovinians, when asked in a television show, respond that the Tribunal is a politically independent institution, and only 18 percent perceive it as political. From Senad Hadžifejzović, "Centralni Dnevnik sa Senadom Hadžifejzovićem," [News with Senad Hadžifejzović], *Face TV*, 2 December 2017. [1:41:44-1:41:58]. While a television survey is hardly empirically sound, it does perhaps voice a general opinion among BiH residents who watch *FACE TV*, the majority of whom are presumably Bosniaks.

[165] Dzidic, *supra* note 164. See also, Robert M. Hayden, "Biased Justice: Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia," *Cleveland State Law Review*, Vol. 47, No. 4 (1999).

[166] Lauren Said-Moorhouse and Hilary McGann, "Bosnian war criminal dies after swallowing poison in court," *CNN*, 30 November 2017. Praljak's final words, in the courtroom, were: "*Suče, Slobodan Praljak nije ratni zločinac. S prijezirom odbacujem vašu presudu*," [Judge, Slobodan Praljak is nor a war criminal. I hatefully reject your verdict.] Translated by the author.

[167] Dzidic, *supra* note 164. Foran extensive research on the role ICTY has had for national courts, particularly the WWC, see Goran Šimić, *The Influence of the Hague Tribunal on the Criminal Legislation of Bosnia and Herzegovina*, 2008. See also Olga Martin-Ortega, "Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina," *International Criminal Law Review* (2012), 589-628.

[168] Dzidic, *supra* note 164.

[169] *ibid.*

[170] For more on the role of rehabilitation in international criminal law and the ICTY, see Harhoff, *supra* note 62, 129-130.

statements is that, once again, the Tribunal was and is perceived as unjust and political, independently of ethnicity, commission of crimes, and sentences.

The response to the Tribunal, among victims, is mixed. To some critics, the ICTY has been a disappointing enterprise, which did not delivered justice to the families of the departed, missing, and victimized, even though it successfully uncovered many facts about the Bosnian War which would otherwise have been left unknown. Others, however, believe that some justice has been solidified, but that it is not "true justice."[171] What is meant by "true justice" is unfortunately left unspecified, and one can only speculate to its meaning. A sound conjecture, however, is the lack of compensation. According to Harhoff, even the harshest of sentences is not capable of remedying the past in any meaningful way. What can help foster a sense of remedy, however, is direct relief for victims.[172] Goran Šimić, a professor of law, voices profound dissatisfaction with this issue, even aligning it with injustice. According to Šimić, the practices of the ICTY leave one with the impression that the Court centered around the culpability and responsibility of the perpetrator, rather than promoting the rights and sense of justice to the victims. In promising justice, peace, truth, and reconciliation for *primarily* the victims, *then* the region in general, the ICTY has been disappointing and has fallen short in delivering its promises. To Šimić, however, the flawed justice of the ICTY rests on the general inclination towards *procedural justice* of international criminal law, in which victims are highly marginalized and left unsupported while the perpetrators are taken well care of – i.e. the difference between the luxury of the Detention Unit at The Hague versus the scarce resources available to victims in the aftermath of war.[173] Notwithstanding the positive characteristics the ICTY can have for the victim-witnesses as mentioned above, it seems, if Šimić is correct in his observations, that the sense of injustice exceeds the sense of truth and justice amongst victims and survivors.[174]

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[171] Dzidic, *supra* note 164.

[172] Harhoff, *supra* note 62, 131. Rules 105 and 106 of the ICTY Rules of Procedure and Evidence, enable victims, pursuant to a judgment finding the accused guilty of a crime that caused suffering or injury to them, to bring an action in a national court or other competent body to obtain compensation, meaning that the Tribunal does not have jurisdiction over such claims. Furthermore, following a judgment of conviction, Chambers may order restitution of property to the rightful owners. While the possibility for compensation is there *prima facie*, it has not been applied in practice.

[173] Šimić, *supra* note 164, 9.

[174] Indeed Šimić' statement is representative of a lot of victims and survivors in BiH. The discrepancy between the living conditions of the convicted war criminals and the victims is repeatedly lamented in BiH - it is seen as a sign of injustice. A family, which I had the pleasure of living with in the summers of 2015 and 2017, the most recent as part of my ethnographic research, voices these same notions of injustice. Returnees to the small village of Klotjevac in Eastern Bosnia in the vicinity of Srebrenica, their living conditions are limited, their children attend school but must travel far to do so, they are isolated due to bad infrastructure, etc. Despite their perseverance and commendably strong spirit, they have lost hope in the ICTY and justice. For more on this family, see Clara Sanchiz' story which the author proudly helped bring about by translating Dule's woeful words of remembrance and concern: Clara Sanchiz, "The Story of a Srebrenica Survivor Who Has Lost Hope in the ICTY," *JusticeHub*, 11 July 2015. See also Figure 4 in the Appendix.

With regards to justice and truth, moreover, especially relating to the victims, Humphrey also expresses discontent. Accordingly, "while the trial enables the recovery of the victim as subject through voice (agency) it also re-victimizes the victim who ritually embodies the very violence the community seeks to expel."[175] Hence, in regaining their voice, victims fortify their victimhood. Furthermore, this re-victimization also reaffirms the otherness of the perpetrator. If one extends this scenario beyond the courtroom, the dichotomy spills over into society as well. In BiH this has meant an immense self-victimization of, especially, Bosniaks and, in turn, an equally immense denunciation of Bosnian Serbs as monstrous perpetrators. This bipolarity obstructs dialog, national reconciliation, and a sense of shared community.[176] Indeed, if the measure of success of international trials is the "extent to which they forge a new political community through their truth and justice policies,"[177] then one cannot help but propose, like Humphrey and Šimić do, that the ICTY did not succeed. However, conceivably, the ambitions of Humphrey, Šimić and other likeminded critics are too unrealistic for any legal institution, let alone one which is foreign, and thus not easily transferable to or adapted in local *hyperpolitical* contexts. The problem, perhaps, is to be found elsewhere.

The problem was not the ICTY *per se*, argues Nobilo. Rather the problem was and is that the jurisprudence of the Tribunal was used in a demagoguery, political play, to create myths with which politicians – regardless of their ethnicity, nationality, or religion –manipulated the public in order to consolidate their own power. Through fear-mongering,[178] politicians succeeded in this political game of chess. At the core of it all, were the self-spun myths that reinforced the nationalistic or political agenda, and perpetuated a division in society. The myths, however, were tightly knit and whoever opposed them or attempted to dismantle them is simply categorized as "the Other," someone to fear, to blame, to conquer. All this, then, created a war of narratives. The key, according to Nobilo, was and still is to demystify the political schemes, subverting the myths, and to decipher the jurisprudence of the Tribunal to the wider public.[179] While much of this demystification is to be enacted by locals, the Outreach program of the ICTY was designed to establish more comprehension and knowledge about its work.

Particularly its work with the younger generation, the Outreach aimed at providing students in BiH with information about their past, in order to boost critical thinking, reflection

[175] Humphrey, *supra* note 159, 499.
[176] Humphrey, *supra* note 159, 500.
[177] *ibid.*
[178] For more on fear-mongering see Barry Glassner, "Narrative Techniques of Fear Mongering," *Social Research*, Vol. 71, No. 4, 2004), 819-826.
[179] Anto Nobilo, *supra* note 160. For more on myths and their importance in post-conflict society, see Sirkka Ahonen, "Post-Conflict History Education in Finland, South Africa and Bosnia-Herzegovina," *Nordidactica - Journal of Humanities and Social Science Education*, 2013, 93-94. For the obstruction of the ICTY by the local politicians, see also Šimić, *supra* note 164, 6.

and, in extension, the building and maintenance of sustainable peace and reconciliation.[180] Youth Outreach found astonishing results regarding the perception of the ICTY, which show that the younger generation is less negatively inclined towards the ICTY, that they are, moreover, far more critical towards their own ethnic groups, and that they understand the complexities at work in reconciliatory processes and what it requires, perhaps, to succeed in reconciling. Most profoundly, the results showed that, according to the younger generation, the culprit for the improbability of reconciliation was and still is nationalism and animosity between the ethnic groups, which is often times handed down from generation to generation.[181] While these results are undeniably positive and hopeful, and may be the seeds of a brighter future for BiH and the region, they are unfortunately not indicative of the general public opinions and polls regarding the credibility and legacy of the ICTY.[182] It is difficult to establish the root of this awakening, so to speak, of the younger generation, yet it is obvious that, generally speaking, they are not influenced by the most notable phenomenon that seems to obstruct the work done by the ICTY, namely denial.

The denial that exists across the ethnic groups regarding their role in the Bosnian War is, paradoxically enough, undeniable. Refusal to admit wrongdoing, glorification of convicted war criminals as heroes and martyrs, and finger-pointing at other ethnic groups, is part of the everyday life of citizens in Croatia, Serbia, Kosovo, and BiH. Needless to say, yet crucial to emphasize, this denial is not only morally deplorable, it is deeply problematic, given that it is taken to indicate that the ICTY did not succeed in being transformative with respects to nationalism in BiH.[183] As such, it seems that, "each ethnic group in the former Yugoslavia is still firmly attached to its own version of reality,"[184] and their own truthiness, their own narrative. Ultimately, however, Milanović and likeminded critics admit that the culture of denial in BiH is "*largely independent of the quality of the Tribunal's own work.*"[185] Perhaps a more concrete example will help to illuminate this argument.

[180] Youth Outreach, "Reaching Out to the Next Generation. Informing Young People in the Former Yugoslavia about the ICTY and War Crimes Trials," Nerma Jelačić (ed.) *Outreach Programme, Registry, ICTY,*1.
[181] Youth Outreach, *supra* note 180, 2-5.
[182] For surveys relating to the perceptions of the ICTY in Croatia, Serbia, and BiH, see, for example, "Detaljne Tabele," *Belgrade Center for Human Rights.*
[183] Marko Milanović, "Understanding the ICTY's Impact in the Former Yugoslavia," *EJIL:Talk!,* 11 April 2016.
[184] *ibid.*
[185] *ibid.* Italics added.

### 3.2 8372…

In July 1995, and in the years leading to that fatefully fatal month, Srebrenica was a battlefield. It was abandoned yet crowded. In 2017, it still is abandoned and it is still a battlefield - only not literally so. Although Srebrenica is far less lethal now, the bare mention of it is poignantly menacing. In what follows, the analysis provided so far will be concretized by looking at the crime of genocide – before the ICTY and in BiH.

Testifying in the *Blagojević* case, Momir Nikolić gave the following statement – revealing the brutality and lawlessness which reigned in the minds of the perpetrators and on the land:

> Do you really think that in an operation where 7,000 people were set aside, captured, and killed that somebody was adhering to the Geneva Conventions? Do you really believe that somebody adhered to the law, rules and regulations in an operation where so many were killed? First of all, they were captured, killed, and then buried, exhumed once again, buried again. Can you conceive of that, that somebody in an operation of that kind adhered to the Geneva Conventions? Nobody […] adhered to the Geneva Conventions or the rules and regulations. Because had they, then the consequences of that particular operation would not have been a total of 7,000 people dead.[186]

Surely, reading these words, one cannot help but ponder on the irrationality they represent. Yet, one must face this and attempt to deeply understand the repercussions of the recklessness presented therein. Law did not rule, attesting to the improbability of deterrence at the time. Yet, prosecution and punishment was inevitable. The legal status of the crime of genocide in international law is undisputed; the prevention of the crime is *jus cogens*, and the punishment thereof an *erga omnes* obligation. Hence, legal accountability for the commission of the crime of genocide in the Bosnian War was preordained with the adaption of the ICTY Statute.[187]

*Prosecutor v. Radislav Krstić*

"Good afternoon, General Krstić, 'May justice be done lest the world perish,' said Hegel. The Trial Chamber is doing its duty in meting out justice today and, in this way, hopes to have contributed to creating a better world,"[188] said Presiding Judge Almiro Rodrigues, before commencing the reading of the judgment in the case of *Prosecutor v. Radislav Krstić*. Eighty minutes later, Rodrigues uttered the famous words: "In July 1995, General Krstić, *individually,*

[186] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, (IT-02-60), Testimony of Momir Nikolić. *ICTY*, 25 September 2003, 1959-1960.
[187] Article 4(2) of the ICTY Statute offers the legal definition of genocide, and Article 4(3) enumerates the acts which are punishable in this regard. These Articles are adapted *ad verbatim* from Articles 2 and 3 of *The Convention on the Prevention and Punishment of the Crime of Genocide* and, thus, adhere to existing international treaty law, which in turn, also represents customary international law.
[188] *Prosecutor v. Radislav Krstić* (IT-98-33), Judgement Transcript, ICTY, 2 August 2001, 10163.

*you agreed to evil*, and this is why today this Trial Chamber convicts you and sentences you to 46 years in prison. The Court stands adjourned."[189]

It was a conviction heard around the world. Historically, the Trial Chamber, without any dissenting opinions, delivered its first conviction of genocide and its harshest sentence thus far. With its judgment in the *Krstić* case, the Trial Chamber accomplished several things of vital importance – historically and legally speaking. With regards to the former, it had concluded the first case of genocide before an international legal institution on European soil. Moreover, the very ruling that the crime of genocide had occurred in Srebrenica rested on documentation, evidence, facts, testimonials, and numbers that had previously been silenced, or even unknown. The judgment goes a long way, a pioneering way even, in buttressing the material reality and material truth pertaining to Srebrenica – reality and truth that will be a part of history. In and of itself this is masterful, seeing how proving the crime of genocide is at best excruciatingly cumbersome, at worst nearly impossible. Legally speaking, the Trial Chamber sat a legal precedent which would resonate in the ICTY's future genocide cases. Finally, the case established crucial aspects pertaining to the interpretation of the crime of genocide.[190] *Actus reus* is affirmed as being proven beyond all reasonable doubt, given the murders and serious bodily and mental harm which the victims and survivors suffered in the enclave.[191] This affirmed the genocidal *act* itself, rendering Srebrenica a crime of genocide until anyone can prove otherwise. With regards to *mens rea*, the Trial Chamber found that "murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica."[192] Significantly, the Trial Chamber emphasized, with regards to individual responsibility and JCE that it is "necessary to establish whether the accused being prosecuted for genocide shared the intention that a genocide be carried out."[193] *Mens rea*, then, is an element which must be determined in each case, meaning that the *intent* of each alleged *génocidaire* must be proven, measured, and established, even in cases of JCE – and vice versa. Additionally, with regards to "a group" the Trial Chamber found that "a group" is not simply a gathering of individuals but a separate or distinct entity, whose national, ethnical, racial or religious identity is at stake.[194] With regards to Srebrenica, the Trial Chamber identifies

[189] *Prosecutor v. Radislav Krstić* (IT-98-33), Judgement Transcript, *supra* note 188, 10191. Italics added. The Appeals Chamber reversed the Judgement in April, 2004, when it ruled that Krstić did not directly perpetrate genocide and lacked genocidal intent, thus sentencing him to 35 years of imprisonment. Nonetheless, despite these reversals, the Appeals Chamber did not reverse the Trial Chambers findings that Srebrenica amount to the crime of genocide. See *Prosecutor v. Radislav Krstić* (IT-98-33-A), Appeal Judgement, ICTY, 19 April 2004.
[190] *Prosecutor v. Radislav Krstić* (IT-98-33), Judgement, ICTY, 2 August 2001, para. 541.
[190] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 542.
[191] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 543.
[192] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 546.
[193] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 549.
[194] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 551-556.

Bosnian Muslims as that "group."[195] With regards to "intent to destroy," the Trial Chamber finds that a *dolus specialis* is necessary to the crime of genocide but that this special intent, nevertheless, need not be goal at the outset of the operation for it to count as genocide. In other words, the intent to destroy could become the objective along the way.[196] Finally, with regards to "in whole or in part," it is determined that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it," and, moreover, that the group, to the perpetrators, must be viewed as ""a distinct entity which must be eliminated as such."[197] The idea, then, is that the group must have been considered *substantial* and that the group must not have been geographically scattered for the crime to amount to genocide – in the act and intent thereof. The Trial Chamber also established that Bosnian Serbs knew what they were intending and doing, when committing the crime of genocide against the Srebrenica community.[198] These rulings regarding the commission of the crime of genocide in Srebrenica are significant to this day. It was a truly *historic* decree – for the ICTY, for the victims, for other indicted perpetrators, whether awaiting their trial or still at large at that point in time. Yet, the reactions to it were polyphonic,

The victims present at The Hague that day, apparently, had "expectations of justice being seen to be done to a sense of being part of history in the making." Once the verdict was given, "a collective sigh of relief," could be felt, and "the general mood as the occupants poured out of the courtroom was slightly more upbeat than when they entered."[199] The Appeal Chamber, later, categorically congealed the gravity of the crime of genocide and what the conviction of the perpetrators entails, stating that,

> Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. […] This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity. […] Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. […] The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act. [200]

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[195] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 560.
[196] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 571-572.
[197] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 190, para. 590.
[198] *Prosecutor v. Radislav Krstić* (IT-98-33), *supra* note 235, para. 595-598.
[199] Geraldine Coughlan, "Court tense for Krstic verdict," *BBC News*, 3 August 2001.
[200] *Prosecutor v. Radislav Krstić* (IT-98-33-A), Appeal Judgement, ICTY, 19 April 2004, paras. 36-37.

Even something as powerful and pioneering as this finding, did little to convince those who glorified the actions of the wrongdoers. Even the Milošević trial did not entirely break the "wall of silence and denial."[201] The conviction of Karadžić, yielded no acknowledgment of the Srebrenica *genocide*. Official apologies have been offered, yes, but always without referring to the crime as *genocide*.[202] Try as they might, Judges at the Tribunal did not succeed in reverting the culture of denial.[203] What hopes, then, could the victims and survivors have that the judgement in the Mladić case would defy all denial?

*Prosecutor v. Ratko Mladić*

General Ratko Mladić, often referred to as the "Butcher of Bosnia," was prosecuted for allegedly being individually responsible, through his participation in a number of JCEs, for a number of counts, including the Srebrenica genocide, Count 2.[204] For Mladić, like for others who partook in the Srebrenica JCE and the Overarching JCE, the prospect of international prosecution and punishment was simply a price to be paid for pursuing a lifelong aspiration of Greater Serbia. In addition, to Mladić, the fall of Srebrenica and the following genocidal acts committed there were gifts to the Serb people and were, moreover, simply retaliatory deeds taken against the "Turks," that is to say the descendants of the Ottoman Empire, or bluntly, Bosnian Muslims.[205] Needless to say, expectations for the rendering of the judgement in the Mladić case were high, the stakes even higher.

For anyone present at the Tribunal – inside and out – on 22 November 2017, the importance of this verdict was *felt*. Outside the building, victims, survivors, and victims' organizations had gathered. True to form, they had brought signs. One of them read: "Srebrenica: 11 July 1995 – We remember the 8372 victims of genocide." Another stated that: "Genocide must not be rewarded: Reunite Bosnia!"[206] How long these people had been there, on this cold and gloomy morning, was hard to tell. At the entrance, from one of the OTP representatives, one was met with the words: "This is a big day." Inside, in the lobby, one was

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Very notably, in terms of the legal interpretation of *mens rea* for genocide, in para. 34 the Appeals Chamber rules that where specific genocidal intent cannot be proven, it can be inferred from surrounding facts and circumstances, such as, among other examples, general context, existence of a plan or policy, etc.

[201] ICTY Outreach, "Facts about Srebrenica," 1. Aside from the ICTY genocide rulings, in 2007 the ICJ historically found that, while Serbia was neither directly responsible for nor complicit in the Srebrenica genocide it failed to honor its legal obligation to prevent genocide from occurring and for not punishing perpetrators of justice. See *Bosnia and Hercegovina v. Serbia and Montenegro*, "Case Concerning Application of The Convention on The Prevention and Punishment of The Crime of Genocide," Judgement, ICJ, 26 February 2007.

[202] Damien McElroy, "Serbian president in historic Srebrenica massacre apology," *The Telegraph*, 25 April 2013. James Miekle, "Serbians say sorry for 1995 Srebrenica massacre," *The Guardian*, 31 March 2010.

[203] CNN Staff, "Serbia's president declines to define killing of 8,000 in Srebrenica as 'genocide'," *CNN*, 26 April 2016.

[204] ICTY, Case Information Sheet (IT-09-92), Ratko Mladić.

[205] Woodhead, *supra* note 12, [41:30-41:46].

[206] See Figure 5 and Figure 6 in the Appendix.

met by a media frenzy. The occasional family member, victim, witness, survivor, recognizable by the Flower of Srebrenica on their collars, could be seen passing by on their way to the public gallery of the court room or one of the many rooms which had been made available to them, where they would finally witness, hopefully, truth be told and justice be done. The atmosphere all around the ICTY that morning was tense, anticipatory - chaotic almost. There was an ineffable buzzing in the air. Then, silence. The Court was in open session. The moment of truth had come.

Presiding Judge Alphons Orie commenced, rather knowingly and sensitively, by greeting everyone in and around the courtroom. As the voice of Presiding Judge Orie filled the space in and around the Tribunal, the facts and figures attesting to the gruesomeness of the crimes of which Mladić was accused further silenced those present. The Tribunal, it seemed, was in a state of suspense, hovering somewhere between the past, the present, and the future – transfixed. Everyone was waiting, listening, watching – some hanging on to every single word pronounced, some listening intently to hear the mentioning of Srebrenica, some waiting only for the verdict and the sentence. While Judge Orie read the summary of the judgement, the look on Mladić's face seemed ambivalent; his fixed eyes seemed to suggest that, internally, he was recounting all the events, yet his face mimicked surprise as if he was hearing these things for the very first time. He had smiled when he entered the courtroom. On his collar was a broche, conspicuous to many, unnoticed by some.[207] When Srebrenica was mentioned, and as the accounts of Kladanj, Potočari, Bratunac, Zvornik, Kravica, Branjevo, Pilica resonated and lingered in the air, Mladić was smirking and shaking his head. It was the demeanor of denial – the epitome thereof. Yet, however unfathomable his reactions were this time, they were far less aggravating than some of his previous appearances in court.[208] Some thirty minutes into the reading of the judgement, Presiding Judge Orie, uttered the words,

> The Chamber now turns to the allegation of genocide in Srebrenica, Count 2 of the indictment. The Chamber found that *the prohibited acts* as set out in the legal definition of genocide […] *were committed* by the physical perpetrators against the Bosnian Muslims of Srebrenica. […] the Chamber found that the *physical perpetrators intended* to destroy *the Bosnian Muslims in Srebrenica*, a *substantial* part of the protected group. The Chamber, therefore, found that the crimes of genocide, persecution, extermination, murder, and the inhumane act of forcible transfer were committed against Bosnian Muslims in and around Srebrenica.[209]

[207] The broche or pin, on Mladić's collar was the *Cvijet Natalijin Ramonda* [The Flower Ramonda of Natalija] also known as *Cvijet Feniks* [Phoenix Flower]. Named after the Serbian Queen, Natalija Obrenović, the pin is the ramonda flower, known for its ability to blossom anew after it has withered away. To Serbs wearing it, the pin represents the Serb victims during World War I. Yet, like the flower ramonda, it also represents the rise of the Serbs posterior to their sufferings. Deeply patriotic, the pin is a symbol of Serb nationalism and is insulting to those who fell victims to this ideology – as, surely, the Flower of Srebrenica is to deniers of the genocide. See Figure 7 and Figure 8 in the Appendix.
[208] Nic Robertson, "Mladic judgment brings back stench of Bosnian genocide," *CNN*, 22 November 2017.
[209] *Prosecutor v. Ratko Mladić* (IT-09-92), Judgment Transcript, ICTY, 22 November 2017, 44918. Italics added. These findings summarize the *actus reus, mens rea*, as well as the "whole or in part" and the group, all parts of the legal definition

Minutes passed, facts were established, and the material reality, history itself, found its place at the ICTY. The reading of the judgment was interrupted, and a break ensued. Had this all unfolded on a theater stage, this intermission would have left the audience in grave suspense, wondering what was happening behind the scenes, and, more importantly, when the show would continue. During the break, one could spend time glancing at some of the drawings, on display at the Tribunal, made by children as part of the Outreach. One of them, made by a primary school student from Sarajevo, portrayed a field of tears, a cannon firing towards a village, a man, presumably the one firing the cannon, standing beside it, with an arrow pointing to a man behind bars, with the words: "*Sada je pravda zadovoljena*."[210] The drawing fostered hope. Back in the Press Room, the dramatic nature of the judgment intensified, when Mladić had decided he had had enough. He stood up and declared, to the Judges, to the ICTY, to the world: "*Ja sam jako uzbuđen. To je, što ste vi govorili, je sve čista laž* --"[211] followed by some profanities unsuited for this endeavor. Then again: "*Sram vas bilo. Sve je laž, sve što si rek'o ceo dan. Lažu! Lažu* --"[212] More profanity. Curtains down. Tragicomedy. Curtains up. Mladić was not present. It was not the first time Mladić had been removed from court.[213] Yet, that day it was different. There was an emptiness to it. "Yes, it was a very short adjournment," Presiding Judge Orie noted, adding that Mladić, "has been taken to a room where there's a couch to sit on and where he is able to follow the proceedings on a screen."[214] The reading of the judgment continued, and almost two hours since the opening of this session, the verdict was in. *Not guilty of Count 1, Guilty of Counts 2 through 11.*[215]

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and interpretation of the crime of genocide. See *Prosecutor v. Ratko Mladić* (IT-09-92), Judgment, ICTY, 22 November 2017, paras. 3434-3437, and paras. 3538-3555. See also paras. 3556-3572 for the findings pertaining the JCE, paras. 4219-4232 for the findings pertaining to the Overarching JCE, para. 4237 establishes the crime of genocide as not being part of the Overarching JCE, paras. 4610-4612 find Mladić to significantly having contributed to the Overarching JCE, paras. 4685-4688 establish Mladić's intent or *mens rea* with regards to the Overarching JCE, paras. 4970-4988 deal with the Srebrenica JCE, paras. 5096-5098 assert that Mladić's acts were so instrumental to the commission of the crimes of the Srebrenica JCE, including genocide, that "without them the crimes would not have been committed as they were." Finally, paras. 5127-5131 establish the *mens rea* of Mladić pertaining to the Srebrenica JCE and crime of genocide. Interesting, for this case, is the establishment of the role Serbia, through *inter alia* Slobodan Milošević, played in the Bosnian War. For the close connection between MUP and VJ to VRS the reader is referred to paras. 4226-4239. At the time of writing, Volume 5/5 of the Judgment is not available online.

[210] [Now justice has been done.] Translated by the author. See Figure 9 in the Appendix.

[211] [I am very unsettled. It is all, everything that You have said, are pure lies -- ] From author's own transcription during the reading of the judgment, ICTY Press Room, 22 November 2017. Translated by the author.

[212] [Shame on you. Everything is a lie, everything you have said the whole day. They lie! They lie! Idiots! You lie -- ] From author's own transcription during the reading of the judgment, ICTY Press Room, 22 November 2017. Translated by the author.

[213] In 2013, for example, Mladić had been removed from court for challenging a survivor, a witness, of the Srebrenica genocide. See Agense France-Presse, "Ratko Mladic removed from UN war crimes court," *The Telegraph*, 10 April 2013.

[214] *Prosecutor v. Ratko Mladić* (IT-09-92), Judgment Transcript, *supra* note 255, 44932.

[215] Presiding Judge Orie dissented this ruling. The Dissenting Opinion, however, is not available on the ICTY webpage at the time of writing. The interpretation of genocide, in terms of the "group," seems to be the issue. According to the ICTY jurisprudence regarding the Municipalities, the problem is in determining that those Municipalities amount to a "substantial part" of the protected group, i.e. Bosnian Muslims. The "substantial group," furthermore, is taken to entail the sheer number of people effected, something which is not mentioned or specified anywhere in the numerous provisions pertaining to the legal definition of the crime of genocide. Ultimately, then, this is a matter of interpretation – a broad or strict one. If anything, there is grounds for Appeal regarding these findings. It will be interesting, indeed, to read Judge Orie's dissenting opinion in

> In determining the *appropriate sentence* to be imposed, the Chamber has taken into account *the gravity of the crimes of which he has been found guilty*. The *crimes committed rank among the most heinous known to humankind and include genocide and extermination as a crime against humanity*. […]
> For having committed these crimes, the Chamber sentences *Mr. Ratko Mladic to life imprisonment.*
> This concludes the delivery of the judgement.
> *The Chamber stands adjourned*.[216]

Applause. Tears of joy. Unfortunately, perhaps, the world was not able to see the face of the accused as he became the convicted. Regardless, with these operative remarks, the ICTY delivered its last conviction regarding the Srebrenica genocide. The material reality and material truth were, once again, spoken for the world to hear. The maximum possible sentence was given. The Trial Chamber had saved the best for last – unintentionally, yet triumphantly nonetheless. A sense of relief ensued. The Mladić case had been momentous – legally, historically, and politically.

Following the issuance of the trial judgment, muffled by the light murmurs and laughs afloat in the ICTY lobby, Chief Prosecutor of the ICTY Serge Brammertz, addressed the press,

> Some today will claim that this judgment is a verdict against the Serbian people. My Office rejects that claim in the strongest terms. *Mladić's guilt is his, and his alone.*
> Others will say that Mladić is a hero and was defending his people. This judgment demonstrates that nothing could be further from the truth. *Mladić will be remembered by history for the many communities and lives he destroyed.*
> *The true heroes are the victims and survivors who never gave up on their quest for justice.* They displayed real courage by coming to the Tribunal to tell the truth and confront the men who wronged them. On behalf of my Office, I would like to thank and recognize them.
> *Today's judgment is a milestone in the Tribunal's history, and international criminal justice.* Ratko Mladić was one of the first persons indicted by my Office, and the last to be convicted. *This judgment vindicates the Security Council's vision twenty-four years ago: to secure peace through justice, by holding accountable the most senior leaders responsible for the crimes.*[217]

Brammertz's statement, in its entirety as well as the excerpt provided here, was on a par with what could have expected. It was a textbook statement which should, nevertheless, be read

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full. For more information regarding the findings for the Municipalities, see See *Prosecutor v. Ratko Mladi*ć (IT-09-92), Judgment, ICTY, 22 November 2017, paras. 3438-3536.

[216] *Prosecutor v. Ratko Mladić* (IT-09-92), Judgment Transcript, *supra* note 255, 44934-44935. Italics added.
In delivering its final verdict, the Trial Chamber reaffirmed ICTY sentencing procedure, taking into account the gravity and nature of the crimes the deliberation and determination of the appropriate sentence. In addition, the Trial Chamber, while acknowledging the mitigating factors presented by the Defense, ultimately deemed that they carry insignificant weight vis-à-vis the judgment in its entirety. The "Butcher of Bosnia" was sentenced to life imprisonment, after which the Trial Chamber stands adjourned for the *final* time.

[217] OTP, "Statement of Prosecutor Serge Brammertz in relation to the judgement in the case Prosecutor v. Ratko Mladić," *ICTY*, 22 November 2017. Italics added.

humbly and understood profoundly. Those who heard the Chief Prosecutor speak at the Tribunal, could, furthermore, hear him affirm his satisfaction with the verdict on behalf of the OTP, but most impressively, on behalf of the victims whose hopes to see Mladić convicted had finally been met, especially given sentence. Additionally, Brammertz reiterated that glorification of war criminals is a real issue which obstructs reconciliation, calling for more responsible politicians to tackle this monstrosity.[218] As the crowd parted, it was time to leave the chaotic yet cathartic confinements of the building.

Outside, the world appeared to have utterly changed; victims and survivors laughed and rejoiced. They ate lunch under the newly appeared sun. The signs seen on the way in had gotten new meaning, new life. The atmosphere was no longer terribly tense, it was lighter – as if a heavy burden had been lifted. Yet, the further away one ventured from the Tribunal, the more the world looked and felt exactly as it had the day before, even four hours before. *The world had changed, yet it remained the same - somehow.* Then, the reactions came – and the reports and transmissions thereof. They continue to this day, painting a hazy picture of justice being done and truth being told on what was, "the closing of one of Europe's most shameful chapters of atrocity and bloodletting since World War II."[219]

The spectrum of headlines that permeated the global media ranged from disappointment to denial, from relief to refutation. Reactions were and still are mixed. Footages of the women in Srebrenica, who had symbolically followed the live transmission of the judgment "on site," namely at the Srebrenica-Potočari Memorial Center, portrayed relief and a sense of true justice being done. As the life imprisonment sentence was read, cheers and applause filled the room. Stories, of then and now, historically collided. One of the widows of Srebrenica remarked:

> I was a refugee in Srebrenica, I lost my loved ones in Srebrenica, and in Srebrenica I lived to see truth and justice after 20 years. Mladić will die in The Hague like he slaughtered my son here. I found parts of his remains, looked for them in a hundred mass graves, and buried him without his full body.[220]

Another widow expressed, somewhat content with and thankful for the verdict: "Any other verdict would have been worse."[221] Among other positive, thankful, joyful, and relieved reactions from the victims and survivors was that of Nedžiba Salihović: "Thank you, God! I kiss you God, for the sake of our sons!," adding that, "I'm so happy that justice has been

[218] When asked whether the OTP would appeal the findings about the Municipalities, Brammertz answered that he understands the frustration regarding Count 1, adding nonetheless that the judgment in the Mladić case is a step in the right direction as the Judges have recognized, for the first time, that a number of the physical perpetrators had *genocidal intent* in a number of the Municipalities. From author's own recoding at the ICTY, 22 November 2017.
[219] Marlise Simons, Alan Cowell and Barbara Surk, "Mladic Conviction Closes Dark Chapter in Europe, but New Era of Uncertainty Looms," *The New York Times*, 22 November 2017.
[220] APF News Agency, "Srebrenica Family Members Welcome Mladic Verdict," *APF News Agency*, [00:15-00:37]. Translated by the author.
[221] APF News Agency, *supra* note 220, [00:50-00:53]. Translated by the author.

done."[222] Fikret Alić, recognizable to anyone who has seen footages and pictures documenting the Bosnian War, was at The Hague that day, holding, in his hands, the emblematic photo, which had appeared on the cover of *Time Magazine* and telling the world about crimes committed in BiH: "Justice has won," he had stated.[223] Joining these appraisals, human rights activists also welcomed the verdict. Nataša Kandić, a leading Serbian human rights activist, lamented the atrocities of the Bosnian War, adding that after the conviction of Mladić, "we can see who stopped our progress and why we became a society without solidarity or compassion."[224] Similarly, The UN Human Rights Chief, Zeid Ra'ad al-Hussein, said that the verdict was "a momentous victory for justice" and that "Mladić is the epitome of evil."[225] Also, al-Hussein had added: "Today's verdict is a warning to the perpetrators of such crimes that they will not escape justice, no matter how powerful they may be nor how long it may take."[226] Whether future war criminals will heed this warning remains to be seen.

While others cheered, applauded, and rejoiced, some were less reluctant to accept it as justice, deeming it only partially just. To Munira Subašić, the famously forthright and familiar President of the Mothers of Srebrenica organization, the day of the pronouncement of the judgment had brought back memories of the past. In the present, having heard the verdict, Subašić had not found utter solace in the conviction.[227] In front of the Tribunal, she had, among other things voiced a lack of forgiveness, cursing Mladić, saying, "may all the innocent victims he killed haunt his dreams."[228] Munira Salhović, also a Mother of Srebrenica, expressed that no true justice can ever be achieved for crimes of this enormousness.[229] Adding to the unenthusiastic responses, Sead Numanović, a journalist from Sarajevo, said that this verdict like all the others, "will not bring back sons to their mothers, dead brothers to their sisters and husbands to their wives."[230] Mimicking this tone of hopelessness, Ajša Umirović, who had lost 42 relatives in the Srebrenica genocide, expressed: "Even if he lives a 1,000 times and is sentenced a 1,000 times to life in prison, justice would still not be served."[231]

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[222] Julian Borger, "Bosnians Divided over Ratko Mladić Guilty Verdict for War Crimes," *The Guardian*, 22 November 2017.
[223] Laura King, "Genocide Conviction of Ex-Bosnian Serb Commander Ratko Mladic Fuels Hopes for Future Accountability," *Los Angeles Times*, 22 November 2017.
[224] Simons, Cowell and Surk, *supra* note 219.
[225] *ibid.*
[226] Toby Sterling, Stephanie van den Berg and Anthony Deutsch, "Ex-Bosnian Serb Commander Mladic Convicted of Genocide, Gets Life in Prison," *Reuters*, 22 November 2017.
[227] *ibid.*
[228] AFP New Agency, "Mothers of Srebrenica 'partially satisfied' with Mladic Verdict," *AFP News Agency*, 22 November 2017, [00:21-00:35]. Translated by the author.
[229] Radio Free Europe, "For Srebrenica Mother, Mladic Verdict Promises Little Sense of Justice," *Radio Free Europe Radio Liberty,* 22 November 2017.
[230] Simons, Cowell and Surk, *supra* note 219.
[231] Borger, *supra* note 222.

Hasan Nuhanović, a renowned lawyer and survivor of the Srebrenica massacre, who had, during those abysmal days of July 1995 been an interpreter, aiding the communication between the DucthBat III of UNPROFOR and Mladić, has sought and waited for justice ever since.[232] In July 2010, fifteen years after the genocide, Nuhanović had buried his mother, father, and brother, whose lives he had pleaded and begged for on 13 July 1995 – alas, without avail.[233] Seven years since that burial, Nuhanović took comfort in the verdict, welcoming it, while also doubting its ability to bridge the gap between ethnic divisions in BiH. "The question is:" he said, "when will this politically-hostile environment change? I hope Bosnian Serbs and Serbs in the region will understand better now what Ratko Mladic did to us - to what extent it has disrupted our lives."[234] Lamenting the never-ending presence of the ghosts of the past and a delayed justice, Nuhanović said: "This should all have been behind us by now," but that the "only thing that is behind us is that war."[235] Those who have heard Nuhanović speak, and many undoubtedly have, could surely sense the solemnness and straightforwardness resonating in and with these words.

A quite similar tone and sentiment could be felt in the reactions of Hariz Halilović. Originally from Srebrenica, Halilović was circumstantially absent from the town at the time of the Srebrenica atrocities. The war had found him in Prijedor, by coincidence. Halilović was twenty-five when the massacre happened. Prior to the Bosnian War, he had studied medicine. During the war, Halilović had provided aid to those around him who needed his assistance. There were many. Halilović had witnessed, first-hand, the murders, the bloodshed, the Camps. A 5-year-old girl, Emira Mulalić, had bled to death in his arms after having been shot by one of the Scorpions. He had worn her bloodstains on his clothes for days. Triumphantly, however, in the midst of killing fields, Halilović had helped deliver a baby. A girl. He had helped bring life and light, where darkness and death reigned. Seventy members of Halilović's extended family and friends, however, unfortunately did not manage to escape the gravity and brutality of Mladić's orders. Now a social-anthropologist and writer, Halilović, like Nuhanović, devotes his time to the betterment of his home country, to giving voices to those who have been left unheard. While relieved by the conviction, Halilović said he sees very little reason to celebrate,

[232] In July 2011, after years of perseverance, Nuhanović found some justice. He won on appeal against the Dutch Government. The court stated that Dutch were to blame for handing over his family member to Mladić.
[233] See Hasan Nuhanović, "15 years after the Srebrenica massacre, a survivor buries his family," *The Washington Post*, 11 July 2010, translation by Peter Lippman. The original text, famously known as "Made in Portugal" or "*Pismo iz Srebrenice*" [Letter from Srebrenia] finishes with a hope that children of today, Bosniak and Bosnian Serb alike, will never, in their future, face what Nuhanović and others had faced in the past. See also Hasan Nuhanović, *Under the UN Flag: The International Community and the Srebrenica Genocide*, 2007. Also, see Woodhead, *supra* note 12.
[234] Guy Delauney, "Ratko Mladic verdict fails to ease pain in Bosnia," *BBC News*, 22 November 2017.
[235] Simons, Cowell and Surk, *supra* note 219.

adding that, it was "not rejoicing or a time to be euphoric."[236] Ever at the grips of memory, echoing the words so often heard from this survivor, Halilović continued: "Every time I am back in Bosnia I think of the people who are not there." He added: "I don't feel any kind of triumph but I am happy that the verdict is as it is."[237] To Halilović, the crimes of which Mladić has been found guilty represent an evil which has left its scars on an entire generation of Bosnian-Herzegovinians, intensely so on those who have been directly affected by the egregiousness that had befallen them.[238] In a lengthy interview, some days posterior to the conviction, Halilović called the newly convicted *génocidaire*, "an old man, the embodiment of evil," facing life imprisonment, a sentence which paradoxically prompted Halilović to wish him a long life, as emotionally difficult as that can be to fathom.[239] Following this, the social anthropologist, uncompromisingly pronounced that

> No alleged flaws of the conviction should influence the very fact that this conviction is a historical moment. It is the biggest and most significant thing to happen, since the war came to a halt. An individual, not acting on a whim, but acting intentionally, as a representative of the country Serbia and the then para-country Republika Srpska, has been convicted of no less than genocide by an international tribunal, the biggest legal institution existing for these crimes mandated to prosecute and punish the commission of crimes in the region. Often times, in the Bosnian perspective, these facts are lost, forgotten, and omitted. […] The conviction is a planetary occurrence. Mladić and this conviction are the main and biggest news worldwide. This is history – in the making. For Bosnia and Herzegovina, then, this should be considered and appraised as being of utmost importance. The Trial Chamber, with the striking reading of the judgment, has once again solidified the amplitude and volume of the crime that transpired in Srebrenica. Once again, the facts of the matter were examined and established, omitting nothing. The mayhem and wrongdoing of Srebrenica has once again been proclaimed as genocide.[240]

Hearing this, reading, and seeing it, one can hardly help but hang on to every word, measuring its volume, and the vital importance of the message Halilović, indirectly, sent to BiH: Do not forget, Srebrenica is *genocide*! When asked about the culture of denial that occupies the region, and whether this is something to be feared, Halilović hopefully held that there is no need to fear this culture of denial and the ideology it represents, since this very ideology, "has suffered defeat on a global sphere – judicially, politically, morally." Nevertheless, Halilović added that, "every support of Mladić, whether it comes from Serbia, Republika Srpska or the streets, is an insult to victims and survivors, to reason, to truth." Interestingly, Halilović stated that if the

[236] Hannah Lucinda Smith, "'Butcher of Bosnia' Ratko Mladic convicted of war crimes and genocide," *The Times*, 23 November 2017.
[237] *ibid.*
[238] Hariz Halilović, "Gost Dnevnika TV1 – Hariz Halilović, profesor na Univerzitetu u Melburnu," [Guest of TV1 News - Hariz Halilović, professor at the Univerusty of Melbourne] *TV1*, 24 November 2017, [1:44-1:54]. Translated by the author.
[239] Halilović, *supra* note 238, [2:20-2:53]. Translated by the author.
[240] Halilović, *supra* note 238, [3:04-4:54]. Translated by the author.

many convictions before the ICTY have not resulted in a cathartic effect on a mass scale – for victims and survivors, as well as perpetrators – it is because, "no one has led the masses towards that end," but that on the contrary, "political leaders manipulate the sentiments of the people."[241] Hence, to Halilović the culture of denial and the sense of injustice that it entails is a politically manipulative tool. edures. Yet, this occurs repeatedly, because it serves a political agenda, purpose and interest.

And indeed. Denial was everywhere. Throughout BiH, particularly in RS, as well as in Serbia the streets were sites of sympathetic demonstrations. Pro-Mladić slogans and paraphernalia was juxtaposed with anti-ICTY allegations. Eastern Sarajevo, Banja Luka, Bratunac, Bijeljina, Trebinje, Novi Sad, Belgrade were some of the cities which witnessed these protest, hailing Mladić, glorifying him as a war hero, while simultaneously refuting and bashing the conviction in particular, the ICTY in general. In Belgrade, the gathered demonstrators had sung, "*Generale, nek je tvojoj majci hvala,*" and "*Mladiću moj, problem je tvoj što si mi srpski heroj,*" [242] The masses ran astray, to paraphrase Halilović, with no one to guide them towards an acceptance of truth and justice. Quite the opposite, in actuality, the masses represented sentiments uttered by politicians – this time, as hitherto, whenever a significant verdict against Bosnian Serb perpetrators had been delivered.

Indeed, the politicians denied and denounced. Mladen Grujičić, the current mayor of Srebrenica, a devout denier of the Srebrenica genocide, whose election reached world media,[243] alleged that the verdict "confirmed the Tribunal was made to prosecute only Serbs."[244] Milorad Dodik, President of RS, went a step further in his statements. Wearing the Phoenix Flower on his collar, Dodik expressed that the conviction was not surprising given that the Tribunal had held unbalanced, that is to say unfairly anti-Serb, proceedings in this case as in others. Furthermore, Dodik deemed the conviction as an insult to all Serb victims and survivors, because the Court demonized Serbs. Moreover, the President of RS alleged that the convictions of Serbs by the ICTY had the objective to amnesty the ideology of Alija Izetbegović, then President of BiH, who had allegedly sought to establish a "mujahedeen country." With respect to Mladić, Dodik quite explicitly stated that, "No tribunal can judge Mladić, only history can do so," adding that no one in RS believes that Mladić is guilty of having committed war crimes. In addition, the President of RS said that to Serbs, Mladić "is a hero and a patriot, and today's

[241] Halilović, *supra* note 238, [17.53-20.09]. Translated by the author.
[242] [My General, we owe thanks to your mother] and [My Mladić, your problem is that you are my Serb hero.] N1 Beograd, "Protest u Beogradu: Mladiću moj, problem je tvoj..." [Protests in Belgrade: 'My Mladić, your problem is...'] *N1*, 22 November 2017. Translated by the author. See also, Srna, "Istočno Sarajevo: Protesti zbog presude Ratku Mladiću" [Eastern Sarajevo: Protests following conviction of Ratko Mladić], *N1*, 22 November 2017. Translated by the author.
[243] Reuters, "Srebrenica elects as mayor Serb who denies massacre was genocide," *The Guardian*, 17 October 2017.
[244] Delauney, *supra* note 234.

judgment will only reinforce those sentiments." Finally, stating that the *ICTY* had obstructed any reconciliation in BiH, Dodik proclaimed and urged Serbs to "forever erase every mention" of the Tribunal's proceedings from school textbooks."[245] While expected, these statements must have been frustrating for victims and survivors to hear.

In Serbia proper, President Aleksandar Vučić, a former ultra-nationalist, had a more nuanced reaction. Vučić had expressed that the conviction had been expected, but adding that the possibly of appeal still stands. Lamenting the lack of justice being done in the name of Serbian victims, Vučić said,

> Serbia has honored and respected all victims of other peoples, but I am not sure that the same respect has been given to Serb victims. No one has been held accountable for the victims of Ramush Haradinaj, Ante Gotovina, and Naser Orić. Our tears will not find solace in the international society. We will have to find remedies for our own victims ourselves. Today is not a day for neither happiness nor sorrow, but a day for us to consider what kind of future we desire, holding our heads high. We should not justify the crimes committed by those carrying a Serb name and surname. […] We should not drown in tears of the past but work hard for a better Serbia for us all.[246]

Elsewhere, Vučić had been quoted as having marked that the trial and conviction of Mladić should mark a turning point, bidding "farewell to all those who want to return us to the past; we want to go to the future."[247] One cannot, upon these statement, help but ponder: Who are these "others" Vučić is referring to, those unwilling to accept responsibility and those insistent upon a return to the past? In addition, Vučić's statements, begs two rhetorical questions*:* Given the Serbian reluctance to acknowledge the Srebrenica massacre as genocide proper, how can the victims and survivors feel respected and honored? *How can anyone look to the future if everyone is not willing to acknowledge and responsibility for their deeds in the past?* In any instance, is fairly certain that Vučić, in his desire to look ahead towards a better Serbia, towards peace and stability, is distancing himself from the aggressive and polemical kind of Serb nationalism which permeated the rhetoric of Dodik, for example.[248] Before turning to the

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[245] Er. M, "Dodik: Ratko Mladić je heroj za sve Srbe i to ništa ne može promijeniti" [Dodik: Ratko Mladić i a hero to all Serbs and nothing can change that], *Klix*, 22 November 2017. Translated by the author.
[246] Ma. B., "Vučić o presudi Mladiću: "Svi smo znali kakav će biti ishod," [Vučić on the Mladić Verdict: 'We all knew what the result would be"] Dnevnik.hr, 22 November 2017. Translated by the author.
[247] Delauney, *supra* note 234.
[248] While there is no space to go into a lengthy analysis of Vučić and his politics, some underlining must be made. Firstly, for a man who, in July 1995, had uttered the words: "Ubijte jednog Srbina, mi ćemo stotinu Muslimana," [If you kill one Serb, we will kill a hundred Muslims] the distance Vučić has taken to this kind of nationalist propaganda is remarkable. While many still do not believe he is a changed man and that he is simply catering to the wishes of the EU, Vučić's admittance to the wrongness of this utterance is a testament to, at the very least, a new vision for Vučić with regards to Serbia. Secondly, a man who, on 11 July 2015, visited Potočari with a reconciliatory intent, allowing a Mother of Srebrenica to pin a Flower of Srebrenica on his collar, is certainly not interested in dredging up any of his old deeds or sayings. Changed or not, Vučić is definitely not a man who can be blamed for publicly causing deeply cutting ethnic divisions. See Jutarnji.hr, "Vučić pokušao objasniti da je ova njegova izjava izvučena iz konteksta: 'Nisam ja to tako pozivao' [Vučić tried to explain that his statement is taken out of context: 'I did not incite this'] *Jutarnji Vijesti*, 4 November 2015. See also David Blair, "Serbian leader forced to flee as thousands remember dead of Srebrenica," *The Telegraph*, 11 July 2015.

Bosniak political reaction, it must be mentioned that the allegations of the anti-Serb or anti-Serbian bias of the ICTY is unwarranted, according to Nevenka Tromp, former member of the Leadership Research Team at the ICTY. If anything, Tromp proclaimed that in failing to explicitly include Serbia, that is to say Milošević, in the Overarching JCE, in failing to include the Srebrenica genocide in the Overarching JCE as well, and in its dismal failure to obtain concealed documents from Serbia, the ICTY had *protected* Serbia.[249] What is crucial here are not the merits of this claim *per se*. Rather, what is important is that the claim establishes that the alleged anti-Serb(ian) bias of the ICTY is not left uncontested. Quite to the contrary, it appears.

Bakir Izetbegović, son of Alija Izetbegović, and the Bosniak Member of The Presidency of BiH, wearing the Flower of Srebrenica on his collar, commenced his press statement by reading all the counts from Mladić's indictment, saying: "I purposely read this in order for us to face this once again." Izetbegović proceeded to acknowledge that the "silence of the majority of the Bosnian Serbs is a sign that they do not identify with Mladić and they refuse to justify his actions."[250] Izetbegović continued to assert that,

> This burden will not be carried into the past. It is crucial to rid the people of the strain of atrocities and focus on individuals because only this will guarantee a decent future for the citizens of BiH. Mladić is a war criminal and a coward. For the sake of our future and better relationships between our neighbors, no one should call Ratko Mladić a hero, no one should honor war crimes, or erect monuments to commemorate them. I hope that this conviction will lead to an acceptance and acknowledgement of truth as a better path towards a better future, in comparison to an evil past […] In their hearts, Serbs know that they cannot support the acts of Ratko Mladić and that they should not defend a war criminal, but that they should rather leave his misdeeds to him in order to absolve the Serb people from them.[251]

The diplomatic nature of Izetbegović's statement should not go unnoticed. With the tension of the situation in mind, one cannot help but appraise the lack of nationalist and aggressive tones in the quotation above. Izetbegović, similarly to Vučić, with these choice of words, at least, opted for a more appeased and promising message, as opposed to the message given by Grujičić and Dodik who opted for denial, denunciation, and division – once again. *The world had changed, yet it remained the same – this is how. The world had changed, yet it remained the same – this is how.* At this point, it is necessary to turn attentively to the significance of this denial. What does denial entail?

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[249] Nevenka Tromp,"Centralni Dnevnik sa Senadom Hadžifejzovićem," [News with Senad Hadžifejzović] *Face TV*, 23 December 2017. [44:49-56:02].
[250] Zinaida Đelilović, "Bakir Izetbegović: Ratko Mladić je zločinac i kukavica i nijedan narod ga ne bi trebao zvati herojem" [Bakir Izetbegović: Ratko Mladić is a war criminal and a coward and no one should call him a hero], *Oslobođene*, 22 November 2017. Translated by the author.
[251] *ibid.* Translated by the author.

David Pettigrew, professor of philosophy and a member of the Steering Committee of the Yale University Genocide Studies Program, has been a devout researcher and advocate for victims in BiH for more than a decade. In Pettigrew's opinion, whether the denial of the Srebrenica genocide is hard or soft – the former is a complete rejection that *any* crime took place, the latter, among other things, is a dispute about the number of victims[252] – it amounts to nothing less than a *perpetuation thereof*. Denying genocide, in some sense, is a repetitive commission of the crime, and it has deeply negative psychological effects on the victims, and it precludes them from ever healing.[253] In terms of the Serb denial in the Mladić case, especially the glorification of Mladić by Dodik, Pettigrew observes that,

> President Dodik is consistent in his glorification of war criminals. I remember in 2014, 9 or 10 July, he praised both Karadžić and Mladić as heroes. Even a few days before the verdict in the Mladić case, he had praised him as a hero. I think this is an unfortunate legacy in RS, that there is a glorification or heroization of war criminals. […] While RS was created with genocidal and criminal intentions, it continues to operate with the same exclusionary intention. […] I think this is unfortunate because it has the effect of psychologically intimidating the survivors and it also produces a painful collective retraumatization for survivors. […] I believe that the alternate approach for the leadership of RS and Serbia would be to disassociate themselves from the founding leadership of RS, to denounce them and the crimes they committed, precisely in the interest of saying that it is not the Serb people *per se* that founded RS, it was Ratko Mladić and the policies of RS at the time. [254]

One cannot deny that there are echoes of Chief Prosecutor Serge Brammertz in Pettigrew's reaction to the conviction of Mladić. What is needed, it seems, is to denounce Mladić as well as the ideology their crimes represent, and *not* the judgment thereof. What the above analysis, including these final remarks by Pettigrew attest to, is that justice, under these dire conditions, is a matter of interpretation, succumbing to subjectivity. Justice is a matter of perspective, of narrative, of political inclinations, of ideologies, of trust – as is truth. The perception of justice and truth cannot simply be implemented. The seeds of both justice and truth, indeed, can be planted. What they blossom into depends on both the soil those seeds are planted in and how often they are watered – and with what. The question one must ask, then, is whether this means that the ICTY has failed to bring truth and justice, and sustainable peace and reconciliation, to BiH. What legacy is the ICTY leaving behind as a transitional justice mechanism?

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[252] Marko Milanović, "The Shameful Twenty Years of Srebrenica," *EJIL:Talk!,* 13 July 2015.
[253] From author's personal conversations with David Pettigrew. See also David Pettigrew,"The Suppression of Cultural Memory and Identity in Bosnia and Herzegovina: Prohibited Memorials and the Continuation of Genocide," in Nerkez Opacin and Ibrahim Dursun (eds.) *Learning from the Past: Exploring the Role of Transitional Justice in Rebuilding Trust in a Post-Conflict Society*, 2016, 115-128. For more on genocide denial and its retraumatizing effect on victims, see Genevieve Parent, "Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)," *Genocide Studies and Prevention: An International Journal*, Vol. 10, No. 2 (2016), 38-58.
[254] David Pettigrew, "Gost Dnenvika: David Pettigrew, profesor filozofije, holokausta i genocida" [News Guest: David Pettigrew, professor of philosphy, the Holokaust and genocide], *TV1*, 22 November 2017.

### 3.3 In Summation – The Legacy of the ICTY

From the viewpoint of The Hague, the ICTY has brought with it several indispensable achievements. The Tribunal has held leaders accountable and thereby dismantled impunity, it has brought justice to thousands of victims and given them a voice, it has cemented, beyond a reasonable doubt, crucial facts and truths, and it has strengthened the rule of law.[255] In other words, the ICTY has enabled that justice was done. Looking thoroughly and impartially at the work of the ICTY, independently from the aspect of reconciliation in BiH, the view is spectacular – legally and historically speaking, in particular.

The very initiative to form the ICTY led, inevitably to establishments of the ICTR, the Tribunal for Sierre-Leone and Cambodia. In this sense, the ICTY is a zenith – a "symbol of justice to other victims and survivors."[256] Moreover, the jurisprudence of the ICTY, while not flawless, is impeccable. Trial Attorney, Patricia Sellers-Vise, accurately states: "There has been more jurisprudence out of our Tribunal in five years than in the past five hundred years from international criminal courts."[257] As an unprecedented *ad hoc* international legal institution, the Court has been vital in the development and crystallization of international criminal law and international criminal justice. The colossal contribution it has made in these respects cannot be denied. In the words of Chief Prosecutor Serge Brammertz: "We greatly developed the law and practices needed to bring war criminals to justice. Our work prosecuting conflict-related sexual violence is notable in this respect."[258] Brammertz's comment is far too humble – especially the latter part thereof. The ICTY is the *first* international criminal tribunal to enter convictions for rape as a form of torture, and sexual enslavement as a crime against humanity. Moreover, it is the first international tribunal based in Europe to deliver convictions for rape as a crime against humanity. With this, the ICTY has been a true legal pioneer.[259] The ICTY has established that crimes against heritage are crimes against humanity. The Tribunal has been the first court to indict a sitting head-of-state for crimes committed during an ongoing conflict, proving to leaders around the world that they are never outside the reach of international criminal law. Since the Nuremberg Tribunal, the ICTY was the first on European soil to prosecute and convict the crime of genocide, and has therefore, significantly contributed to the understanding and legal interpretation of this crime.[260] With all these examples, the ICTY has effectively been a

[255] ICTY, "Achievements." See also ICTY, "ICTY Legacy Dialogues," and ICTY, "ICTY Symposium, Final Reflections on the ICTY."
[256] Chief Prosecutor Serge Brammertz, "The International Tribunal and Beyond: Pursuing Justice for Atrocities in the Western Balkans," ICTY, 12 December 2017, 2.
[257] Patricia Sellers-Vise, ICTY "End of Impunity," [5:58-6:04].
[258] Chief Prosecutor Serge Brammertz, *supra* note 256, 3.
[259] ICTY, "Crimes of Sexual Violence."
[260] ICTY, "End of Impunity," *supra* note 257, [5:58-6:04].

vital figure in ending impunity for war crimes which, according to President Carmel Agius, is "the greatest, the most fundamental, the most important legacy of the ICTY."[261] The legal impressiveness of the Tribunal has shown that international criminal justice is strong – and growing stronger. Impunity, it seems, belongs to the past. Retribution belongs to the present. Deterrence will, per chance, follow. Yet, while its legal accomplishments in The Hague are prodigious, the Court has legally contributed to BiH as well.

Legally speaking, the ICTY has been fundamental to the establishment of the WWC in BiH. An example hereof is the *lex generalis* and *lex specialis* pertaining to war crimes procedures. Also, the BiH Law on Missing persons codifies the right to truth about the fate of missing relatives, which is incumbent to the groundbreaking work conducted by the ICMP.[262] In the words of Brammertz,

> Looking at the ICTY's experiences, we can see clearly how international justice can help reestablish the rule of law in countries devastated by conflict. If international tribunals focus on those most responsible for the crimes, there will need to be national courts to bring other perpetrators to justice in order to avoid significant impunity gaps. As the ICTY has shown, if international and national justice mechanisms work together, meaningful justice can be achieved. In the future, collaboration and intense cooperation between the international and national should be the rule, not the exception.[263]

Indeed, recognizing that the mandate of the Tribunal has not enabled a *full* justice, and that many victims are still waiting for justice, Brammertz emphasized that, "the completion of the Tribunal's mandate is not the end of war crimes justice, but the beginning of the next chapter. Further accountability for the crimes now depends fully on national judiciaries."[264]

In addition to having helped promote the rule of law in BiH and in the region, the ICTY has had an everlasting effect on the history and documentation of the Bosnian War. Hence, "we have one of the most completely documented incidents of mass violence in the history of humanity."[265] The oral history established via testimonies, and the factual evidence gathered and provided by the ICTY, is nothing short of commendable. In the words of Ed Vulliamy, Tribunal has written a "narrative for the annals of history. Whether history cared to listed or not is another matter, but the story was told – of what happened."[266]

Lastly, but not least, as seen above, the Tribunal has given voices to victims and survivors, it has provided them, generally speaking, with a sense of justice having been done.

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[261] President Carmel Agius, ICTY "End of Impunity," *supra* note 257, [2:38-2:58].
[262] ICMP, "Bosnia and Herzegovina."
[263] Chief Prosecutor Serge Brammertz, *supra* note 256, 3.
[264] *ibid.*
[265] Dr. Eric Gordy, "End of Impunity," *supra* note 257, [4:47-4:58].
[266] Ed Vulliamy, "End of Impunity," *supra* note 257. [5:33-5:48].

More broadly, the Court has helped all Bosnian-Herzegovinians come significantly closer to comprehending their fates. Indeed, "the ICTY archives are the single most important repository of the horrors that ripped Yugoslavia apart. For a former Yugoslav such as myself, it holds some of the answer to the question: what happened to us?"[267] Absolutely.

Despite all its critics and despite all the cynical prophesies when it first was established, the ICTY has persevered – profoundly. It did so, however, because of the international community. To Chief Prosecutor Brammertz: "The lesson is clear: if there is a clear political agenda in support of justice, and if the international community speaks with one voice, those most responsible for atrocity crimes can be held accountable."[268] With these remarks, Brammertz not only applauded the unity of the international community in its support of the Tribunal, he also quite directly stated that law and justice, while unpolitical in nature, are nevertheless at its mercy, at times. Nowhere is this more evident than in BiH.

While the international legacy of the ICTY seems to be spotless, its legacy in BiH is seemingly otherwise. However, according to Anto Nobilo, the work of the Tribunal will bring about its promised prophesies, only if and when the local communities and political leadership aptly transfer its accomplishments to BiH successfully. Yet, because the ICTY is seemingly under political siege, because justice and material truth are held hostage by demagogism, at least the reconciliatory effect of the Tribunal seems to be out of reach.[269] Phrased differently, it seems that whatever comes of the ICTY in terms of reconciliation in BiH, will "*not have come because of anything the ICTY has directly said or done*, but because of how the communities of the former Yugoslavia decided to use its legacy – or not."[270] These decrees carry with them the presumption that justice is not done vis-à-vis legal prosecutions. Rather, justice is done when the convictions and crimes are accepted and acknowledged – by all former adversaries. Sadly, it seems that BiH has not reached that stage yet. Despite the praiseworthy inheritance of the ICTY, it appears that, in BiH, its legacy is obscured. In the words of Sead Numanović, given the current political agendas in BiH, reconciliation is "mission impossible."[271]

[267] Iva Vukusic, "Assessing the ICTY's legacy," *JusticeHub*.
[268] Chief Prosecutor Serge Brammertz, *supra* note 256, 2.
[269] Anto Nobilo, *supra* note 160.
[270] Milanović, *supra* note 183. Italics added.
[271] Delauney, *supra* note 234.

## 4. Absurdistan: Transitional (In)Justice in Bosnia and Herzegovina?[272]

Impossible is, perhaps, too harsh and deeming word, albeit, *prima facie*, it does seem that reconciliation in BiH has not reached completion – if it even has truly begun. In what follows, then, a closer look at the state of reconciliation in BiH will be discussed and evaluated, with the above theoretical framework and analysis in mind. To evaluate and establish the impact the ICTY has had on the reconciliatory process in BiH, the discussion summarizes some of the findings of the analysis and compares these to Seils' types of reconciliationand the thickness/thinness distinction.[273] All this is done, nevertheless, bearing in mind that the effects of transitional justice mechanisms are extremely difficult to pinpoint and to empirically establish with certainty, and that, moreover, Seils' types of reconciliation are in no way exhaustive. Secondly, this chapter examines what part the Dayton Peace Agreement has played in the prospect for reconciliation in BiH.

### 4.1 ICTY and Reconciliation in BiH

*Individual reconciliation*

As explained above, individual reconciliation denotes rebuilding own lives by coming to terms with the past, making peace with it, and reconciling with it. From the analysis provided above, it would seem that the ICTY has had significant effect on this type of reconciliation. It has aided those who were directly and indirectly affected by the Bosnian War in general, and the Srebrenica genocide in particular, in three important manners; retribution, establishment of a material truth, and testimonials. The sense of justice being done to those who irreversibly destructed one's life, the knowledge of what happened to one's country and family, how and why it happened, and the ability to restore one's dignity and reach some sort of catharsis through testimonials in court, goes, undoubtedly, a long way in allowing individuals to reconcile with their gruesome pasts. The moral satisfaction of these victims seems to be high. Other individuals, of course, voice the opposite, namely lack of moral satisfaction in the retributive,

[272] When talking about the destiny of their home country, Bosnian-Herzegovinians will sometimes refer to it as "Absurdistan." The epithet, indeed, needs little elaboration, but the present chapter will aim to discover the underpinnings of the term. This information is attained from author's personal conversation with Bosnian-Herzegovinians.

[273] The discussion will only focus on individual, interpersonal and socio-political reconciliation. The omittance of institutional reconciliation is due to the fact that the ICTY can have little effect here. Seeing as institutional reconciliation centers around the vertical relationships in a society by promoting the legitimacy of institutions and the restoration of trust in these institutions, especially of the alienated parts or groups in a society, the Tribunal's role here is limited. Indeed, the Tribunal has had a pivotal role in the establishment of the WCC, but only that. The discussion of the impact of the ICTY on the vertical reconciliation in BiH is therefore excluded here. The reader, instead, is referred to: Goran Šimić, *The Influence of the Hague Tribunal on the Criminal Legislation of Bosnia and Herzegovina*, 2008, as well as, Olga Martin-Ortega, "Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina," *International Criminal Law Review* (2012), 589-628., and Sanja Kutnjak Ivković and John Hagan, "The Legitimacy of International Courts: Victims' evaluations of the ICTY and local courts in Bosnia and Hercegovina," *European Journal of Criminology*, Vol. 14, No. 2, (2017), 200-220.

just, and truth-establishing aspects of the ICTY. This is even true of victims and survivors who have suffered at the hands of Mladić, the so-called Butcher of Bosnia, the perpetrator who is perhaps a symbol of the atrocity of Bosnian War. The Tribunal has punished Mladić with the maximum of crimes: life imprisonment *and*, via statements made, reprobation. Yet, to some victims and survivors of the Srebrenica genocide, the ICTY has had little effect in terms of individual reconciliation.[274] To these individuals, however, the jurisprudence of the Tribunal is highly unlikely to *ever* facilitate individual reconciliation, and they have to face the demons for their pasts and find outlets for them via other mechanisms. One very crucial fact, however, seen in the accounts above is the lack of compensation or reparations offered via the passing of the judgments of the Court. The right to reparations is completely neglected by the ICTY. In not being mandated to this end, the Tribunal has failed to help accommodate financial aid which could have gone a long way in helping individuals rebuild their lives. Instead victims and survivors had to turn elsewhere. Nevertheless, notwithstanding the lack of empirical evidence in this regard, it would seem that the ICTY has been *generally* successful in terms of individual reconciliation when dealing with retributive justice and truth. Interestingly, Seils did not include the individual reconciliation of perpetrators or those who identify with their ideologies, in his conceptualization of individual reconciliation. It is clear, from the arguments and viewpoints presented above that individual reconciliation with past misdeeds and misconduct is not achieved, broadly speaking, with regards to perpetrators or those who sympathize with them. The question is, however, whether the ICTY could have ever fully helped individuals face their past wrongdoing – even if great effort had been put into rehabilitation. Nonetheless, this lack of rehabilitation and individual reconciliation of the wrongdoers plays a negative part in both interpersonal and socio-political reconciliation.

*Interpersonal reconciliation*

Interpersonal reconciliation, in Seils' conceptualization, focuses on the relationship between victims and perpetrators, for example, and is among other things achieved through dialog and forgiveness. The ICTY, in this regard, has had very little, if any, effect. Given the profile of the perpetrators, many victims have not even faced their physical perpetrators in Court and will, hopefully, get that chance in national courts. With regards to the trials relating to the Srebrenica genocide, even when faced with the man responsible for the planning, organizing and physical commission of the genocide this offered absolutely no dialogical function – the ICTY does not,

[274] It is imaginable that the ICTY, in its failure to establish that the crimes committed in the Municipalities, has had a more negative effect on the victims and survivors of *these* atrocities. In extension, one could imagine that this could negativelly affect individual reconciliation intra-ethnically. However that is a far too complex hypothesis to unfold here.

in any way, facilitate dialog. If anything, sitting across from the man at the Tribunal – whether in the courtroom or behind its glass wall – did not yield optimum effect on the victim-perpetrator relationship, given Mladić's unrepentant demeanor. Under any circumstance, legal proceedings do not facilitate dialog between the perpetrators and victims and survivors, and ICTY is no different in that regard, hence it offers near null in terms of interpersonal reconciliation. The most optimum way of orchestrating this type of dialog and hence reconciliation, is through TRCs. One of the undeniable advantages of this transitional justice mechanism is that it accommodates and promotes, non-judicial accountability, apologies, forgiveness, and truth through dialog – on a face to face, personal basis. However, given that initiatives towards the establishment of a national TRC in BiH have failed abominably interpersonal reconciliation is non-existent.[275] The lack of this type of reconciliation is undoubtedly connected to individual reconciliation and, possibly also, carries with it negative repercussions for socio-political reconciliation.

*Socio-political reconciliation*

This kind of reconciliation, as seen above, deals with relations between groups in divided societies due to political, social, ethnic, religious, etc. differences. In other words, socio-political relation deals with intergroup relationships and the level of trust, for example, between different groups. In regards to this, the ICTY has had, surely rather unintentionally, negative repercussions. The convictions as well as acquittals have not only affected the perception of the ICTY in terms of legitimacy and credibility, but it is also safe to claim that they have fostered antithetical and untrustworthy scenarios for Bosnian-Herzegovinians, by which intergroup reconciliation has suffered. Especially, as seen, with regards to the Srebrenica genocide, the prosecutions and punishments of the Tribunal have seemingly created dichotomies between Bosniaks and Bosnian Serbs, the identity of the former group being shaped through continuous victimization and the latter, in turn, through persistent sympathetic identification with the perpetrator. Undoubtedly, the ICTY *indirectly* has partaken in this division. The ICTY has not judged ethnic groups, it has judged individuals, enterprises, and the ideologies that motivated the commissions of egregious crimes. Hence, it would be absurd to claim, especially given the analysis above, that the ICTY is the *sole* culprit for this dichotomy and lack of trust between

[275] Jasna Dragovic-Soso, "History of a Failure: Attempts to Create a National Truth and Reconciliation Commission in Bosnia and Herzegovina, 1997–2006," *International Journal of Transitional Justice*, Vol. 10, No. 2, (2016), 292–310. In the article, the argumentation is presented that both the ICTY and the political elites in BiH have hindered the establishment of a national TRC. Furthermore, in light of this failure to form a national TRC in BiH, NGOs and member of the civic society have initiated a regional commission for the establishment of facts about war crimes and other serious violations of human rights in the former Yugoslavia, also known as Coalition for RECOM. The success of RECOM, nevertheless, is highly contested. See also, ICTJ, "In Focus: Former Yugoslavia."

these two ethnic groups in particular. Indeed, there are other malefactors in BiH which enable and perpetuate a lack of socio-political reconciliation, malefactors who operate completely independently of the ICTY.

Knowledge and education is one of the key factors in this division. The proceedings before the ICTY are complex undertakings, they are challenging and difficult to comprehend, especially if one does not or is not able to fully engage with them first-hand. Knowledge about the Tribunal, in BiH, is mostly mediated through either politicians or the media, rendering the knowledge of and perspective on the Court biased and misconstrued.[276] In light of this, two crucial circumstances occur. Firstly, biased knowledge, such as, for instance, the claim that the Tribunal is anti-Serb, influences the Bosnian Serbs' trust in the Tribunal and leads to a lack of acceptance and internalization the facts, prosecutions, and punishments produced by the Court. Secondly, and in extension thereof, this causes a lack of interethnic trust and acceptance, because of the discrepancy between the Bosniak and Bosnian Serb way of dealing with the past. [277] This asymmetry in accepting the ICTY as a legitimate adjudicator as well as a credible establisher of facts, is evident. The antithetical narratives between these two groups is even more conspicuous in relation to the Srebrenica genocide. This is seen, for instance, in the denial of the Srebrenica genocide and the glorification of Mladić as a war hero on the side of the Bosnian Serbs, and the claim to justice being done and truth being told in the Mladić case on the side of the Bosniaks. However, once again, while ICTY may be faulted for *indirectly* causing this asymmetry,[278] it is absolutely not the biggest culprit in creating this division, if it is at all. If the Youth Outreach of the ICTY shows anything it is that the ICTY can succeed in facilitating reconciliation for the younger generations. However, this success depends on unobstructed and direct dissemination, omitting all political, nationalist and ethnic bias.[279] Otherwise, knowledge about the Bosnian War *and* the Tribunal, is left in the hands of demagogy and nationalist education, both of which are completely counter-reconciliatory in BiH.

Education is crucial in circulating truth and comprehension of the country's violent past, and is an essential factor in forming national identities, state-building, and promoting a socio-political connectedness. Education in BiH, however, is catastrophic. In utterly failing to address

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[276] Milanović, *supra* note 183. See also Oskar N.T. Thoms, James Ron and Roland Paris, "State-Level Effects fo Transitional Justice: What Do We Know?," *The International Journal of Transitional Justice*, Vol. 4, (2010), 329-354. For more on the role of media in war and peace, see, for example, David Campbell, "Representing Contemporary War," *Ethics & International Affairs*, Vol 12, No. 2 (2003), 99-108, and Susan Sontag, *Regarding the Pain of Others*, 2003.

[277] Mirko Klarin, "The Elusive Reconciliation in the Former Yugoslavia: Role of the ICTY," *FICHL Policy Brief Series*, No. 31 (2015).

[278] In relation to Srebrenica, the acquittal of Naser Orić, for example, is viewed as unjust by the Bosnian Serbs, attesting in their opinion, yet again, to their claims of the anti-Serb bias of the Tribunal. For more on Orić the see Case Information Sheet (IT-03-68), Naser Orić. Also see, *Prosecutor v. Naser Orić* (IT-03-68), Judgment, ICTY, 30 June 2006, and *Prosecutor v. Naser Orić* (IT-03-68-A), Appeals Judgment, ICTY, 3 July 2008.

[279] See, for example, Ivković and Hagan, *supra* note 273.

the question of education in transitional justice and reconciliation initiatives, education has been left in the hands of decision-making bodies of nationalistic political tendencies within the FBiH and RS. This has led to formations such as "two-schools under one roof" doctrine, and otherwise segregated educational institutions. Hence, in many parts of BiH, children and youth attend different schools and follow different curricula, creating a continuation of cross-ethnic isolation and division, in addition to fostering differing knowledge and understandings of the Bosnian War.[280] In fact, studies and figures show a clear discrepancy between the knowledge accessible to children in their curricula,[281] leading, inevitably, to a dissymmetrical comprehension of the Bosnian War in general, and of the Srebrenica genocide in particular.[282] This helps perpetuate ethnocentric narratives of the war which, in turn, hinder trans-ethnic or interethnic reconciliation. It generates and accelerates ethnocentric identities, and simultaneously thwarts the formation of a national identity. Adding to this, the transgenerational trauma and transgenerational narratives of the Bosnian War and the Srebrenica genocide, the prospect of socio-political and national reconciliation grows dimmer. If the younger generation is constantly influenced into thinking in a divisive way, through history textbooks in school and their relatives' story-telling at home, reconciliation does seem impossible because it is held hostage by *ethnic* rather than *national* priorities.

Fortunately, there are indications that especially the youth is tending towards a less isolated and more integrated, cross-ethnic engagement with their society and with reconciliation. This motivation, indeed, stems from a resentment of and a frustration towards the political establishment of BiH.[283] The youth in BiH, then, is the key to reconciliation – of any kind – provided, of course, that they can effectively surpass the grips of ethnocentric nationalism dispersed across the country by the political elite. If the youth can avoid getting trapped by and in the top-down, politically tainted, paths taken, or not taken, towards transitional justice and reconciliation and opt for more (de)constructive paths provided by bottom-down approaches initiated by on the grass root level, reconciliation in BiH is not only possible, it is secured. Hopefully, they can. Time will, indeed, tell.

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[280] Nerkez Opacin, "Reconciliation in Post-Conflict Societies Through Education," in Nerkez Opacin and Ibrahim Dursun (eds.) *Learning from the Past: Exploring the Role of Transitional Justice in Rebuilding Trust in a Post-Conflict Society*, 2016, 20-27.

[281] Alma Jeftic and Jelena Joksimovic, "Divided Presentations in History Textbooks in Three Ex-Yugoslav States: Discussing Implications for Identity Development," in Official Conference Proceedings of *The European Conference on Psychology and the Behavioral Sciences*, 2014, 47-60.

[282] Milanović, *supra* note 183.

[283] Ivan Avramović, "Reconciliation in Bosnia and Hercegovina," *Beyond Intractability*, May 2017.
See also, for example, Daria Sito-Sucic, "Bosnian students keep up their protest against segregated schools," *Reuters*, 20 June 2017; Igor Spaic, "Bosnian Pupils Rally Against Ethnic Segregation in Schools," *BalkanInsight*, 20 June 2017; and "Victorious Bosnia students 'will continue segregation struggle'," *BBC News*, 21 June 2017.

*Thickness and thinness of reconciliation in BiH*

The image painted in the discussion thus far, in general and broad strokes admittedly, is one of development but also division.[284] As an objective of transitional justice, reconciliation, besides being multidimensional as seen in the discussion so far, is also context-dependent, meaning that the context will determine the connotation of the term, in addition to emphasizing which relations need to be restored, and how successful transitional mechanisms can be. Finally, reconciliation can be measured in terms of thinness or thickness, as described previously.

The above elements of reconciliation point to an evident notion, namely that the relations in dire need of being restored in BiH are the interpersonal and intergroup relationships.[285] They impede, to a great extent, a fruitful and sustainable reconciliation – as an end and as a process in its own right. In addition, it is evident from the above analysis and the discussion thus far that ethnocentric nationalism and ethnocentric narratives, truths, and perceptions of the Bosnian War create a deep dichotomy – physical, political, as well as ideological – between the local communities. This division, in turn, proliferates and enhances the very existence of these clashing narratives. Indeed, insofar as reconciliation is a unified narrative of the past – and that is how it was defined previously – in BiH there is little trace of reconciliation. In other words, *in BiH, reconciliation is within the spectrum, but it is thin*. Within its territory, individuals, groups, and institutions of BiH, do coexist and interact peacefully, this is a certainty evident to anyone who visits the country. This coexistence is geographically conditioned – Sarajevo is, for example, a much more integrated scene than Mostar is, not to mention parts of the ethnically cleansed territory, i.e. RS[286] – but citizens do cope and get along in their everyday lives, albeit with an absence of trust, respect, and shared

[284] The discussion is broad, for example, in that it focuses on *general* intergroup relationships between Bosnian Serbs and Bosniaks only. It does not include the intergroup or interethnic dynamics and divisions existing between Bosnian Croats and Bosnian Serbs, or Bosnian Croats and Bosniaks for that matter. The limitation of the discussion is, needless to say, due to the focus on Srebrenica. There are also, one must add, individuals in and across all ethnic groupformations that do not succumb to divisions along ethnic lines. These individuals, however, are not loud enough to mute the nationalist and ethnocentric voices – unfortunately. Additionally, the discussion only considers intergroup relations, and does not include intraethnic or intragroup divisions and narratives, and hence identities. The ethnic groups are not homogeneous. Not all Bosnian Serbs glorify Mladić and others who have committed some of the most horrifying crimes known to mankind, in their pursuit of a Greater Serbia. Similarly, not all Bosniaks praise Naser Orić or Alija Izetbegović. In fact, some Bosniaks partially blame Orić and Izetbegović for Srebrenica, considering them the greatest abandoners of the Bosnian Muslims within the enclave. However interesting, the limited scope of this discussion and the thesis in general, does not permit an exploration into these complexities as well.

[285] The word reconciliation in BSC translates to *pomirenje*. This word, in BSC, means something quite different than reconciliation does in, for example, the English language. The word *pomirenje* denotes an element of apology and forgiveness, something which the word reconciliation does not. *Pomirenje,* then, seems to require more than reconciliation does. These differences of meaning are important for several reasons, but mostly because reconciliation or *pomirenje* rests on the very consensus and agreement on what it is the society is working towards. In BiH, they are working for *pomirenje,* yet the world is evaluating its *reconciliation*. There is an undeniable discrepancy here – not merely linguistic, but beyond – and it is worthy of a thorough inquiry, something which the limited space of this endeavor does not permit. As such, as hitherto, the only meaning of reconciliation employed here will be the English version.

[286] Generally speaking, Sarajevo is still a multiethnic city, although the majority of the population are Bosnian Muslims. Mostar, in turn, is a city which is divided along ethnic lines, with Bosniaks residing on one part of town, and Bosnian Croats in the other.

values. For a country who was once at the heart of SFRY, this is a gloomy present picture. The younger generation, hopefully, will partake in a process that will dismantle the disunities of the country, promoting a more unified narrative in the future, and thus bring about a thicker reconciliation.

However, it *must* be ceaselessly emphasized that this picture is not painted by the ICTY *alone*. Surely, the ICTY has *indirectly* painted some strokes in that its jurisprudence, quite conveniently, has played into the wrong hands – the main painters, the political elite. However, as stated above, the legacy of the Tribunal does not singlehandedly depend on the Tribunal *per se*. In BiH, its legacy depends very much, if not almost exclusively, on what is done with that legacy. At the present, that legacy is deemed illegitimate, proving an important factor in transitional justice and reconciliation with regards to this particular measure. In the words of former President Judge Theodor Meron,

> The judgements of a court alone cannot heal the deep wounds inflicted by crimes such as those at Srebrenica. Court rulings on their own cannot bring about reconciliation – and they cannot bring back those who were lost. For those of us who have seen so many of our loved ones perish – whether during the Holocaust or at Srebrenica – we know this all too well.[287]

Indeed, those who insist on singling out the ICTY for the failure to bring about reconciliation in BiH, especially, given its recent history of genocide, have misunderstood not only the Tribunal's mandate, but they have also misunderstood transitional justice and reconciliation at large. If anything, given the lack of political will towards implementing *national* non-legal transitional justice mechanisms, the fate and feat of reconciliation in BiH rests in the hands of able and willing individuals, aided, per chance, by national and international NGOs. Under any circumstance, blaming politics for the impossibility of reconciliation seems trite, yet in BiH politicians and their nationalist political agendas are highly obstructive to forming a *unified narrative* of the Bosnian-Herzegovinian past. In light of this, it is imperative to ask the question: What has caused this "politics of division" in BiH?

[287] President Judge Theodor Meron, "Statement: Srebrenica Commemoration," ICTY, 11 July 2015, 2.

## 4.2 The Dayton Peace (Dis)Agreement[288]

This part of the discussion aims to do this local renaming of the Dayton Accords justice.[289] It aims to put forth the issues and impossibilities of the settlement which has led, at best, to a frozen conflict in BiH.[290] By describing the nature of the Dayton Peace Agreement – why it is a blessing and a curse, or a blessing in disguise, the aim here is to uncover why the Agreement is an adversary to reconciliation in BiH. Finally, a proposition of a way forward for BiH will be offered – in light of the aforementioned analysis and the discussion thus far.

By 1995 it had become clear that BiH had been, more or less, abandoned to its tragic fate, to its heinous war. Despite the numerous UNSC resolutions urging for and demanding an end to hostilities, determining who the culprits of the humanitarian crisis were, and establishing the ICTY, mayhem had continued to dominate and wreak havoc in BiH. Some months after the Srebrenica massacre, the international community, led by the Americans, orchestrated an agreement between the warring parties, i.e. the Republic of BiH, the Republic of Croatia, signing on behalf of the Bosnian Croats, and the FRY, signing on behalf of Republika Srpska.[291] who recognized the "need for a comprehensive settlement to bring an end to the tragic conflict in the region" and thereby, at desire "to promote an enduring peace and stability."[292] With three signatures, the fate of BiH was sealed – for better or worse. Phrased differently, "the settlement seemed morally wrong and politically impracticable, but still necessary."[293]

Commencing with the latter first, it is irrefutable that one of the advantages of the Dayton Accords, and the most prominent one, is the fact that it permanently halted the war. Given the magnitude and maliciousness of the crimes committed during the Bosnian War, this fact cannot be emphasized enough. While it did not resolve the underlying causes for the war, the legacy of the atrocities committed during it, or proclaimed a possible way to deal with the war – there is no mentioning reconciliation in the Agreement – the signatures meant that the war was going to be halted, stopped, ceased. There is an undeniable blessing in this, which is merely reinforced if one takes into account the otherwise pessimistic estimates of the viability

[288] When talking about the Dayton Peace Agreement, Bosnian-Herzegovinians will sometimes refer to it as the "Disagreement." This information is attained from author's personal conversations with Bosnian-Herzegovinians.
[289] The Dayton Peace Agreement, the Dayton Agreement, the Dayton Accords, the Dayton, the Accords, and the Agreement will all be used interchangeably hereafter.
[290] The author thanks Dr Goran Šimić for this "frozen conflict" concept, which was first heard from him in 2015 in Sarajevo, during conversations about the ICTY and BiH.
[291] Not only did Croatia and FRY sign the treaty, they also agreed to be guarantors of the upholding of the Agreement, thus becoming directly involved in the maintainance of peace in a country raveged by a war both countries had previously "denied being the very minds behind." See Paola Gaeta, "The Dayton Agreements and International Law," *Symposium: The Dayton Peace Agreements: A Breakthrough for Peace and Justie?, EJIL* (1996), 155-156.
[292] UNGA/UNSC, Dayton Accords, *The General Framework Agreement for Peace in Bosnia and Herzegovina*, UN Doc. A/50/790, UN Doc. S/1995/999, 30 November 1995, 2.
[293] Marc Weller & Stefan Wolf, "Bosnia and Herzegovina Ten Year after Dayton: Lessons for Internationalized State Building", *Ethnopolitics*, Vol. 5, No. 1 (2006), 1.

and long-term suitability of the Accords.[294] The fighting did *stop*, indeed, yet it did not *end*. The conflict went on. Only it became a war of politics, of narratives, of ethnonationalities, of stories, of justices, and of truths all of which were allegedly brought to appeasement by the signing of the Dayton in Paris. The problem, indeed, is that the Agreement seemingly froze the *status quo* of the time, perpetuating its disagreements, causing the remnants of the Bosnian War to resonate to this day. The curse of the Dayton Accords, indeed, are many.

Morally speaking, the Dayton is problematic in multiple ways. Firstly, it allows for the formation and constitutive nature of RS in BiH. The entity RS, represented on the map in the Appendix to Annex 2, was the result of ethnical cleansing and the Srebrenica genocide. RS, then, is established with genocidal intent, and to some, the very recognition of this entity is seen as a reward for these atrocities.[295] Furthermore, not only was RS included in the content of the Agreement at a time when the ICTY had issued indictments for the very people that had formed it, but the entity was given autonomy, a voice, a signature, and legal standing on the same footing as the other entity and the other Parties. To anyone who has the slightest regard for international criminal law, this inclusion seems illogical – at best. In addition, the moral value of the Dayton Agreement is compromised in the Preamble to the Constitution of BiH, found in Annex 4, where the constituent peoples of BiH are mentioned as "Bosniacs, Croats, and Serbs…(along with Others)."[296] The biggest problem here is not the use of "Bosniacs, Croats, and Serbs," although these are not at all unproblematic.[297] The greater disgrace is the use of the parenthetical Others to denote significant minorities in BiH – Jews and Romas being only some of them – whose existence, importance, and rightful claim to constituency was added in a strikingly undermining manner. They exist in a parenthesis; their identity is that of the "Other." However, while these aspects of the Dayton Accords are morally deplorable, the curse of the settlement does not stop there.

It is barely a secret and a widely uncontested idea that the Dayton Peace Agreement was, paradoxically enough, a forced endeavour. From its nascent stages to its enforcement, it was an internationally conceived settlement brought to life and reality only by the intense insistence of its originators. There are several instances that point to this very fact. First, there is the fact that the agreement was nearly coercively signed, given that the representatives were

[294] Weller & Wolf, *supra* note 293, 2.
[295] Weller & Wolf, *supra* note 293, 1.
[296] The Dayton Accords, *supra* note 292, 59.
[297] One could wonder why these peoples are mentioned and included in such a divisive manner in the Constitution. If the three religions/ethnicities are to be included explicitly, then why not refer to them as "Bosnian Muslims," "Bosnian Catholics," and "Bosnian Orthodoxs," so as to give them all a common identity of being *Bosnian*, only differing in ethnic or/and religious background.

"subjected to a state of quarantine until an agreement had been hammered out."[298] None of the signing Parties initiated the peace negotiations and, seemingly, none of them had enthusiastically welcomed it *per se*. The Bosniaks were not particularly interested in a cessation of hostilities at that particular point in time since their efforts in the war had finally gained momentum, and they were confident about their ability "roll back ethnic Serb forces."[299] Moreover, the Bosnian Croats and the Bosnian Serbs were frustratingly left with mere "entities" instead of actual states, with the Dayton Accords. As such, the Agreement was a fusion of frustrated and fatigued warring parties, neither of which were ready to lay down arms since their war objectives had not been achieved nor had either of them lost sufficiently enough to admit defeat.[300] The Dayton, indeed, brought active cessation of hostilities, but no one could call themselves winners of the war, and the signing Parties had certainly all lost – in some way, shape or form.[301] Moreover, the very fact that the Dayton was externally conceived and imposed on the warring Parties, rendered the process *and* the product locally illegitimate.[302] Moreover, due to the role of the OHR, as outlined in Annex 10, local agency, responsibility and accountability becomes even less "owned." The responsibility for ensuring peace and stability in the country, then, became highly internationalized, especially given the international guarantors.[303] To this day, some local academics claim that the presence of the international community in the country is the sole reason why the political situation is, at the very least, relatively stable.[304] Paradoxically, however, the presence of the international community is one of the reasons why neither the most legitimate politicians nor, to a lesser extent, the average citizens take charge of their own destiny. Hence, the promise of a better future becomes forced and forged in the hands of the local government and the intricately complex political setup of BiH. It is clear, then, who loses and who wins is in this Daytonian game.

The people who gain most from the Dayton Accords are the politicians, the leaders of BiH, the elite, the so-called *war profiteers*.[305] To them, irrevocably, the Dayton Agreement is

[298] Weller & Wolf, *supra* note 293, 1.
[299] Weller & Wolf, *supra* note 293, 3.
[300] *ibid.*
[301] The lack of a clear winner has, to some theorists, had detrimental repercussions for the (re)building of BiH as well as transitional justice and reconciliation. The notion is that a "winning" government could have had more autonomy and perhaps legitimacy to set the course for its future – and to achieve it. With the Dayton Accords and the tri-partite, power-sharing framework, everyone decides. While this could work in other contexts, in BiH, where historical narratives of animosity between the three "constitutive peoples" resurfaces far too often, each carrying with it its own agenda and ambitions for the future, this tri-partite solution is an ill fit, to say the least.
[302] Weller & Wolf, *supra* note 293, 2.
[303] Gaeta, *supra* note 291, 154-156.
[304] Information obtained during personal conversations about the Dayton Peace Agreement with locals, including academics such as Goran Šimić and Hariz Halilović, as well as David Pettigrew.
[305] To refer to their current leaders as "war profiteers" (*ratni profiteri*) is common in BiH. The corruption of the politicians, their illegitimacy, and their lack of regard for their peoples' aspirations and needs are not hidden facts, they are not taboo, they are not even conspiracy theories – they are all realities. The Dayton Accords are not the culprit of this situation, but the settlement is the direct reason for the inability of the Bosnian people to change the system. Regardless who sits in power,

a blessing. To the citizens of BiH, it is a curse – at least, until circumstances change for the better. What is needed in BiH is consensus, a national and common understanding of where the country has been where it should aim to go, and how to get there – together. The political, geographical, and ethnonational divisions of the Dayton Accords, nevertheless, are haunting the country and with it the ghosts of the war will never cease to exist. This frozen scenario leaves the country perpetually adrift, in a limbo, stuck between an atrocious past and an arid future. The present situation in BiH is that of a nation who keeps transitioning, but never agrees on what it is actually transitioning from, or what and where it is transitioning to. There is simply no possibility for unification, no possibility for common ground while the general setup of the country keeps perpetuating disunity, disintegration, disillusion, and disagreement. In BiH, people are "hungry in three languages,"[306] which unfortunately, albeit succinctly, describes the Dayton Agreement and its legacy. *Dejtonski (Ne)Sporazum*, indeed.[307]

To pessimists, the only true way forward for BiH is to finish what the Dayton stopped, namely the war. For proponents of this frame of thought, a new war would settle the cross-ethnic latent frustrations and dormant hate. This is, needless to say, a radical notion and goes hand in hand with the very ideologies that caused the war, in the first place. To naïve optimists, the state of the country is not at all so bleak and everything will become better once BiH becomes a member of the EU.[308] In between these two almost opposite notions, is the nostalgic wish for a return to a farther past, namely Tito's *bratstvo i jedinstvo.*[309] Finally, there is the optimistic but relatively realistic option, namely reconciliation – in all its forms.

What is evident in the Dayton Peace Accords is that transitional justice and reconciliation *must* be part of peace agreements. Even if not explicitly so, peace agreements must have a component of *unity* in them. They should, at the very least, not be disruptive and obstructive to the process of transitional justice. This is something that the drafters and signers of the Agreement, despite their honorable intentions, good faith, and political perceptiveness, failed to realize. Furthermore, in the Accords, the sole provision pertaining to the only *real* transitional justice mechanism in place at the time, the ICTY, is Article II(8) of Annex 4. In it the Parties agree to "cooperate with and provide unrestricted access to" the Tribunal and comply

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they will always have to follow the structure set up by the Agreement, which will inevitably lead to inefficiency, disagreement, and populism. This downward trend, in turn, is most likely linked to the less invasive position the OHR has had since 2008.

[306] Graffiti tags of *Gladni smo na tri jezika* ("We are hungry in three languages") can be seen on innumerable walls and buildings in BiH, especially in Sarajevo. See Figure 10 in Appendix.

[307] [Dayton DisAgreement]. Translated by the author.

[308] For information on the BiH and EU relations, see European Commission, European Neighbourhood Policy And Enlargement Negotiations, "Bosnia and Herzegovina."

[309] [Brotherhood and unity]. Translated by the author.

with Article 29 of the ICTY Statute.[310] Nothing more on the ICTY, regrettably. The echoes of these failures are heard to this day. And so, in the words of David Pettigrew,

> If RS was founded with genocidal intent and it carried out its establishment with the commission of the crimes, and then was recognized by the Dayton Peace Accords, it should be a signal to the international community, to the EU, to the UN, to question the political integrity of RS and to take initiatives that would, let us call it, turn the page from a legal context to a political context where there would be measures taken to unify Bosnia through constitutional reform. […] I think we have to address the legacy through political reform, *in order to unify Bosnia*.[311]

However accurate and aspiring Pettigrew's statement may be, it is certain that such change, if at all possible, will take time. It may very well take Bosnian-Herzegovinians generations to get untangled from their past: the Bosnian War, the legacies it still carries regardless of the justice and truth generated by the Tribunal, and finally, the Daytonian web of complexities. Nonetheless, one must remain determined and devoted to the prospect and process of real reconciliation – for BiH, for Bosnian-Herzegovinians, for all victims and survivors of the Bosnian War.

[310] The initial indictment of Ratko Mladić was issued by the ICTY in 1995, he was finally in the Tribunal's custody in 2011. It took 16 years. This very fact attests to the lack of ownership and legitimacy of the Dayton, even to the signers of it.
[311] Pettigrew, *supra* note 254.

## 5. In Conclusion: Lessons Learned in BiH

The aim in and of this endeavor was to explore *the role the ICTY has played, as a transitional justice mechanism, in the reconciliatory process in BiH* and *whether the Tribunal can be said to have caused an obstruction to reconciliation in the country*. The hypothesis was, furthermore, that the ICTY has been obstructive to reconciliation in the country, or rather, that the perception of the Tribunal plays a negative and divisive role among communities in BiH.

The theoretical framework, the application thereof in the lengthy analysis, the evaluation of these findings in the discussion, have finally led to the proposition of a conclusion: *The ICTY has played a complex role in the reconciliatory process in BiH*.

On the one hand, the Court has successfully prosecuted and punished higher-ranking officials for their commission of egregious crimes during the Bosnian War, especially the Srebrenica genocide. In addition, in its jurisprudence, the Tribunal has developed an astounding record which portrays the material truth and material reality of the Bosnian War. The ICTY has factually and thoroughly documented the wrongdoings of the past – and it has adjudicated accordingly. The ICTY has helped victims and survivors to regain agency, voice, dignity, and rights. In short, as a legal transitional justice mechanism, the Court has ensured that justice was done and truth was told. On the other hand, the Tribunal has played into the complex and dichotomous nature of the political, ethnic, and nationalist arenas of BiH. The convictions of hardened war criminals, such as Ratko Mladić, has yielded a deepening of the division that BiH already finds itself in. The perceptions of and reactions to the work of the ICTY span from absolute appraisal, to ambivalent assessment, to downright denouncement. To some, the Tribunal fosters a sense of moral satisfaction, justice, and truth, to others a deep sense of dissatisfaction, injustice, and falseness – to some, neither of these. The very existence of these differing perceptions attests to the fact that *the legacy of the ICTY is independent of its jurisprudence per se*. The legacy of the Tribunal is either commended or criticized, depending on one's preconceived notions of what truth and justice entail. Try as they might, Judges, Presidents, and Chief Prosecutors of the Court have not been able to dismantle the culture of denial, ethnocentric narratives, and political divisions that permeate BiH. While it has successfully established the causes of the Bosnian War, while it has punitively punished those who wronged others and the country during the war, the ICTY has not been successful in enabling Bosnian-Herzegovinians to translate and internalize these findings. However, and this point is central, *given the political turmoil in the country, it is highly unlikely that anything coming from The Hague could have cemented a reconciliatory path in BiH, let alone ensure*

*that it is pursued.* As such, *the ICTY has not directly obstructed reconciliation in BiH,* but it has not been successful in effectively accommodating it either – nor could it.

Transitional justice, as has been underlined numerous times, does not center around legalism in its contemporary conceptualization. The very promise of transitional justice is that it will be holistic and wholesome, providing tools and measures from various disciplines to be applied in a multifaceted manner in order to ensure, among other aims, reconciliation in a post-conflict society. This promise has not been kept in BiH, keeping reconciliation at bay:

> Furthermore, the legacy of war crimes and the slow progress with regard to the implementation of transitional justice, are critical issues that BiH needs to address in order to put the past behind it and to move forward. Facing the past, truth-telling and civic dialogue need to be strengthened in order that social educational and political institutions, as well as the media, can work as one to bring BiH's communities together so that they can more effectively address common problems. Thus, the peace-building process and reconciliation are still required.[312]

Surely, then, the fault is not with the ICTY *per se*. Perhaps the pioneering and momentous accomplishments of the Tribunal will only be recognizable beyond reasonable doubt, once other mechanisms are brought into play. In any case, what is certain and apparent is that the work of the ICTY did not singlehandedly piece the brokenness of BiH back together. In actuality, to depend on the Tribunal to singlehandedly ensure reconciliation in the country is not only illogical, it is quintessentially anti-transitional. No legal institution, no matter how successful, can miraculously ensure a thick reconciliation. That is, simply put, not within the mandate or the powers of any legal institution. The ICTY, instead, provided the legal basis for a more multifaceted approach to transitional justice and reconciliation. Indeed, then, while the Tribunal has had its undeniable flaws, it is not the culprit for the thin reconciliation in BiH, in which only individual reconciliation is rising, the other types being unsuccessful or neglected. No legal institution can heal the wounds of the past in and of itself. If anything, the governmental failures to initiate, for instance, a national TRC, to facilitate nationwide educational institutions and curricula that promote factual knowledge of the past and a sense of national identity, to encourage citizenship of unity and togetherness despite the legacy of the Dayton Accords, have all led to a *thin reconciliation* in BiH. For a country that is far too obsessed with looking back at the divisions of its past, the ability to look forwards towards the possibility of a unified narrative seems, yet, out of reach.

However, if more than two decades after the war in BiH was *stopped*, the war continuously rears its ghostly head from the darkest corners of history, if *it* never appears to lose

[312] UNDP in Bosnia and Herzegovina, "About Bosnia and Herzegovina."

strength, fright or volume, if time does little to heal *its* wounds completely, if the most peaceful melody is not capable of muting *its* shrieks – what remedy is there?

Firstly, for the sake of a future *unified narrative* of the past, other vital transitional justice in BiH must be initiated and followed through. To this end, a common understanding of and an agreement upon the desired *outcome* of the besought measures must be envisioned and established – and engaged in. Without a fundamental understanding of these aspects of the then, the now, and the future, any transitional measures applied in a post-conflict society will presumably lead to, at best, a conflicted society. In order to reach a thick reconciliation, then, the government in BiH must decide first that it needs and wants it, and then ensure that their political decisions follow suit. Nevertheless, as long as the political elite thrives in its "politics of division," this scenario is utopian.

Given the political deadlock in BiH, the only viable way forward must come from a strong civic society. What is needed in BiH is for people to come to terms with their past individually, to reconcile with their own story, truth, narrative, and place in society. Out of this individual reconciliation a possible social bond can be nurtured, one that is cross-ethnic, defies isolation, and ethnonational narratives, opting instead for a unifying cross-ethnical, socio-political reconciliation. *The power of the people* is as clichéd as any phrase can be, but it nevertheless represents the only real opportunity for a better future for BiH. The younger generation in BiH is the future – in more than one sense. If they are taught to unite, especially if they t choose to unite despite everything that divides them, i.e. the legacies of the Bosnian War and the Dayton Peace Agreement, there is hope for a unified national *movement* that would transform the manner in which the country is governed. If powerful and perseverant enough, this movement could lead to a much-needed institutional reform, resulting ultimately in an institutional reconciliation as well. With this change, a thick reconciliation, on horizontal *and* vertical axes, would be tangible and reachable, a reality to work towards. Surely, the legal foundation for this transitional and reconciliatory reality has been momentously delivered by the ICTY. It is up to Bosnian-Herzegovinians now, the younger generation especially, to turn this legacy into an irrevocable momentum and a powerful promise that: "We are here to create a future, not to repeat the past." [313] Hopefully, this will reverberate its way to a thick reconciliatory road in BiH - a perfectly conceivable, even a possible path to pursue in BiH. All it needs is proper nourishment and time to grow. Under any circumstance, it is imperative, for national and regional security, that BiH adequately deals with its past. Lest it should be deemed

[313] Spaic, *supra* note 283. This chant is from the demonstrations held against the "two schools under one roof" doctrine and its ethnic segregation.

a threat to international peace and security again, BiH simply *must* reconcile – thickly. Surely, however, BiH will reach a state of thick reconciliation in time, with a unitary, inter-ethnic direction, determination, and devotion fully in sync.

With this in mind, then, time has come to propose some lessons learned from BiH, lessons which could be used as a point of reference for other post-conflict societies, even though transitional justice, theoretically and practically speaking, is a case-by-case field.

The first lesson learned from the fall of the SFRY and the Yugoslav Wars, including the Bosnian War, is that transitional justice is needed *also* when the past has not involved an armed conflict. Indeed, as the initiators of the field recognized, dealing with the past is necessary even in the aftermath of authoritative regimes. It is, naturally, difficult to ascertain that the Yugoslav Wars would not have occurred if there had been a transition following the Tito regime. One could imagine, however, that transitional justice, in some cases, can be a preventive tool – one that eliminates the eruption of armed conflict. One can only, however, surmise. Nevertheless, the very causes of the Bosnian War and its Yugoslav equivalents point to a lack of thorough resolution and reconciliation with the past. Indeed, some of the present prevalently nationalistic tendencies in the region and BiH proper attest to this very fact.

Secondly, the lesson learned from the ICTY and its jurisprudence are several. For one thing, a lesson learned from the ICTY is that compensation is important. The Tribunal was not mandated to rule regarding reparations, regrettably. The omission of this transitional justice pillar from the competences of the Court, was unfortunate. If nothing else, reparations could have ensured that victims and survivors were able to also rebuild their lives materialistically speaking. Furthermore, the ICTY Outreach project has shown that it is crucial to the neutral dissemination of knowledge. Dissemination of knowledge about a legal institution's jurisprudence will promote its credibility and legitimacy, vital components for international courts given their remoteness. It is essential, nevertheless, that this dissemination of knowledge is not left to bodies at the national level as this can create obfuscation in countries which have not dismantled the narratives that divide them. As such, insofar as the information about the legal institution, mandated to address past atrocities, is only available to citizens via ethnocentrically tainted mediation, it will negatively influence the citizens' readiness to accept and internalize the legal facts and findings. Finally, and most importantly, the current state of BiH and its thin reconciliation point to the fact that punitive measures, if not followed and supported by other national transitional justice mechanisms will only reinforce the narratives which caused the commission of atrocious crimes *per se*, hence lead to crossroads. Nowhere is

this lesson more evident than in the case of Srebrenica – the genocide and the town itself. [314] Legally speaking, justice has been done, and an objective truth has been told, but it has not been enough – it simply cannot be. In actuality, because justice means different things to different people, it is essential that it is pursued and established outside a courtroom as well – through TRCs, educational programs, broader institutional reforms, etc.

Thirdly, the lesson learned from the Dayton Peace Accords is that peace agreements must not hamper transitional justice measures overall, nor must they hamper the very possibility of future reconciliation. Peace agreements, in short, must not, under any circumstance, impede a national unity – politically, socially, and geographically speaking. Furthermore, peace settlements must denounce any moral or legal wrongdoings of the past, if not expressively then through the lack of allocation of territory, legal standing, and political powers. In failing to do so, these past misdeeds become legitimized and they perpetuate disparity and disunity. Moreover, peace agreements must have local ownership, in its initiation and its realization. Without ownership, a peace agreement will only ever change the nature of the conflict, it will not fully thwart it. In BiH, for example, there is a war of narratives now, a frozen conflict, keeping true peace and stability out of reach.

The lesson learned from the ICTY and the Dayton Peace Agreement is that international involvement is necessary and needed in post-conflict societies, as well as during a conflict, for legal and political guidance, for financial and moral support, for alternative perspectives, and so on and so forth. Nevertheless, this involvement must not turn into an intervention. Striking that balance is the be-all and end-all. Without involvement, people are left to themselves, and no international actor – legal or otherwise – is able to survive singlehandedly, let alone during an armed conflict or in the aftermath thereof. If and when, on the other hand, the involvement is too excessive, when it intervenes beyond measure, it becomes obstructive and intrusive, yielding a loss of ownership. If citizens and politicians of a country do not perceive their problems as fundamentally theirs to solve, if they depend on others to rescue them, they become self-unsustainable. This, surely, is an ill fit for everyone's interests.

Finally, and by far most significantly, the biggest lesson learned from BiH is that neither transitional justice nor reconciliation for that matter are quick fixes. Quite contrarily. They both necessitate wholesomeness, time, and most importantly, equally from all participating actors, both transitional justice and reconciliation require direction, determination, and devotion.

[314] See Figure 11 and Figure 12 in the Appendix.

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Figure 2:
OHR, “Etnic composition in 1998, *OHR*, (available at https://reliefweb.int/map/bosnia-and-herzegovina/bosnia-and-herzegovina-ethnic-composition-1998 )

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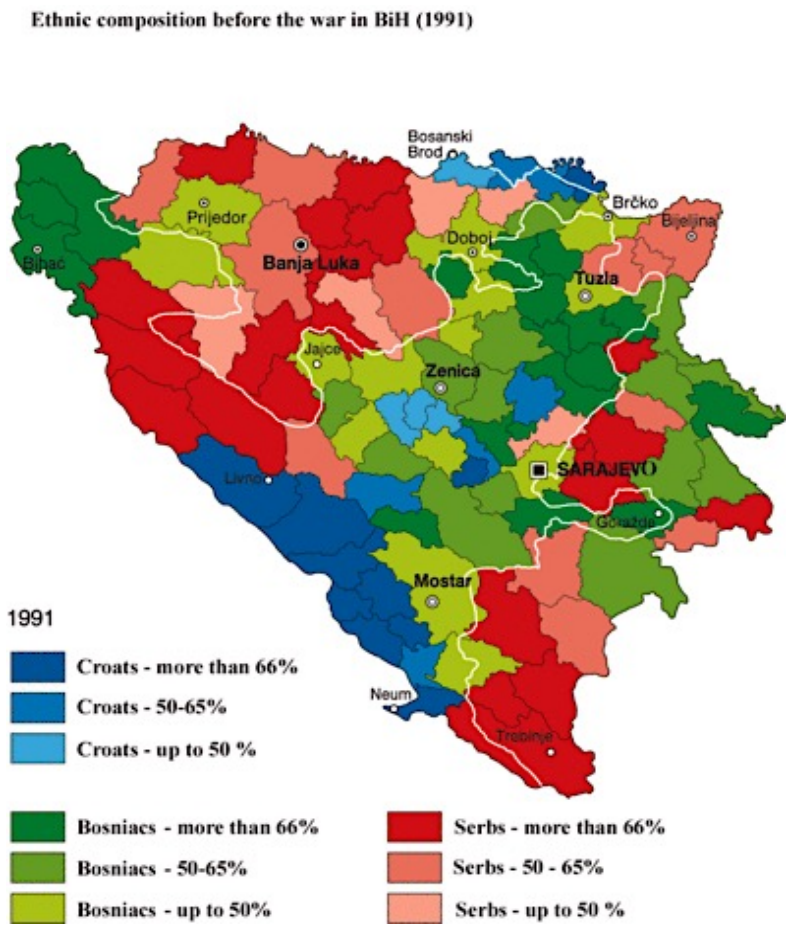
# Appendix

## Figures

*Unless stated otherwise, the figures below are from author's personal records and collections.*

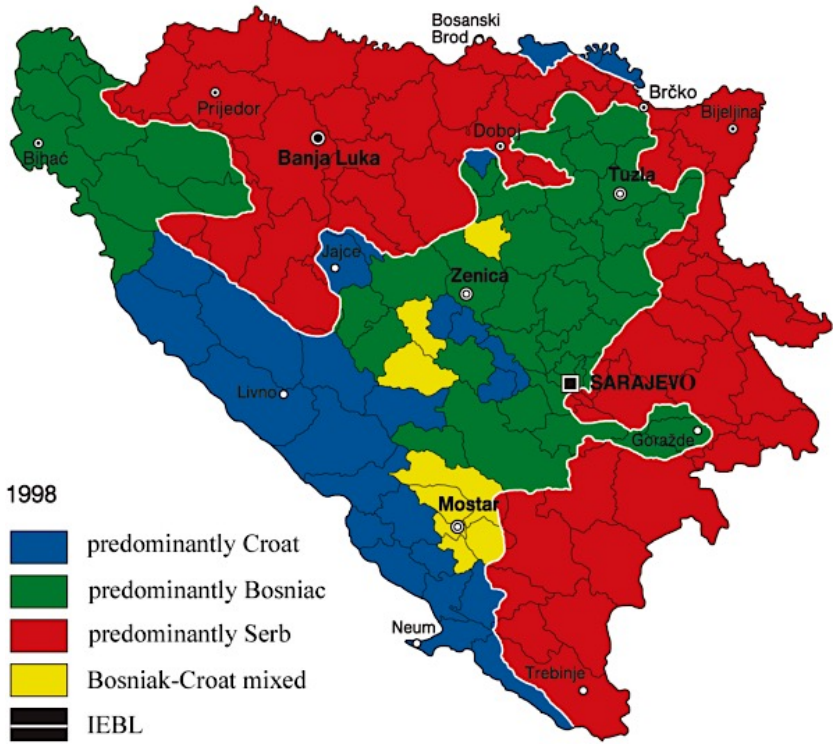
Figure 1




*Source: OHR.*

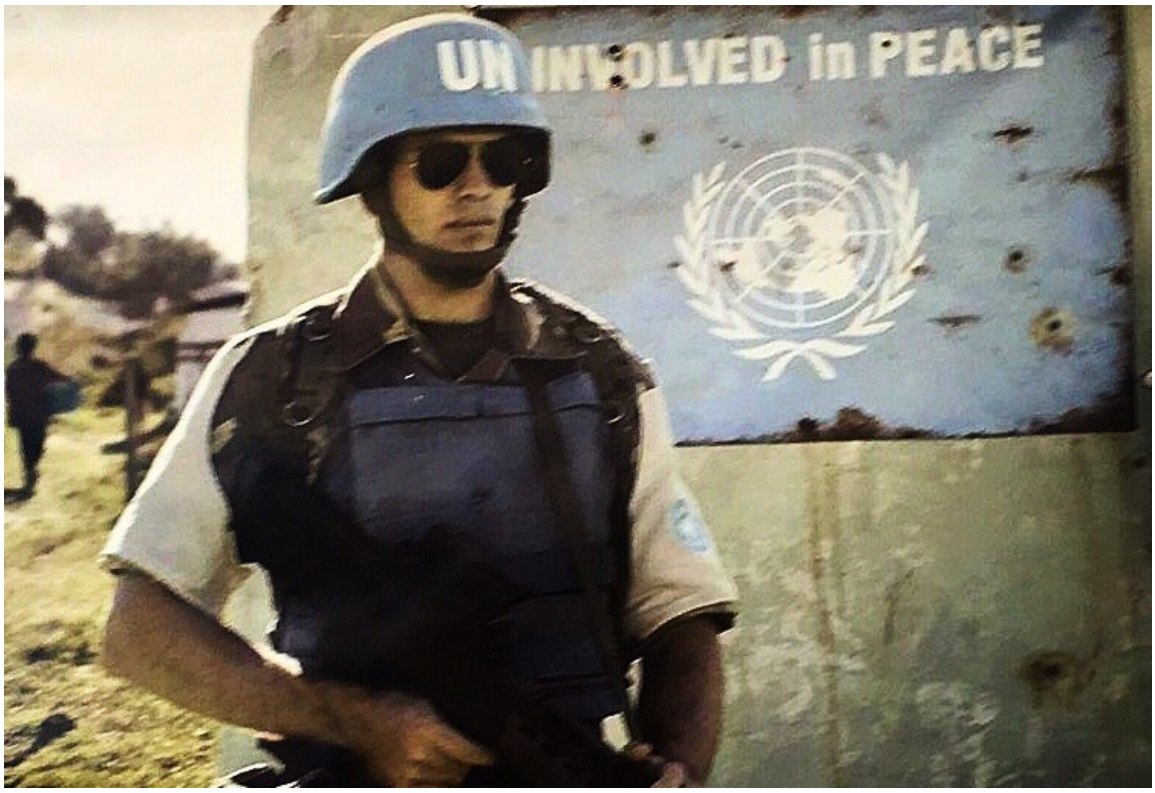
Figure 2

Ethnic composition in 1998




*Source: OHR.*

Figure 3




*This is an enlarged poster, hanging on the wall of Houdini, a café in Sarajevo, on the Maršala Tita street. Photographed by author in July, 2017.*

Figure 4


*Klotjevac. In the photograph are the senior members of the family, Hariz Halilović, and the author. Photographed by Nerkez Opačin in July, 2015.*

Figure 5


*Banner in front of the ICTY. Photographed by author on 22 November 2017.*

Figure 6


*Banner in front of the ICTY. Photographed by author on 22 November 2017.*

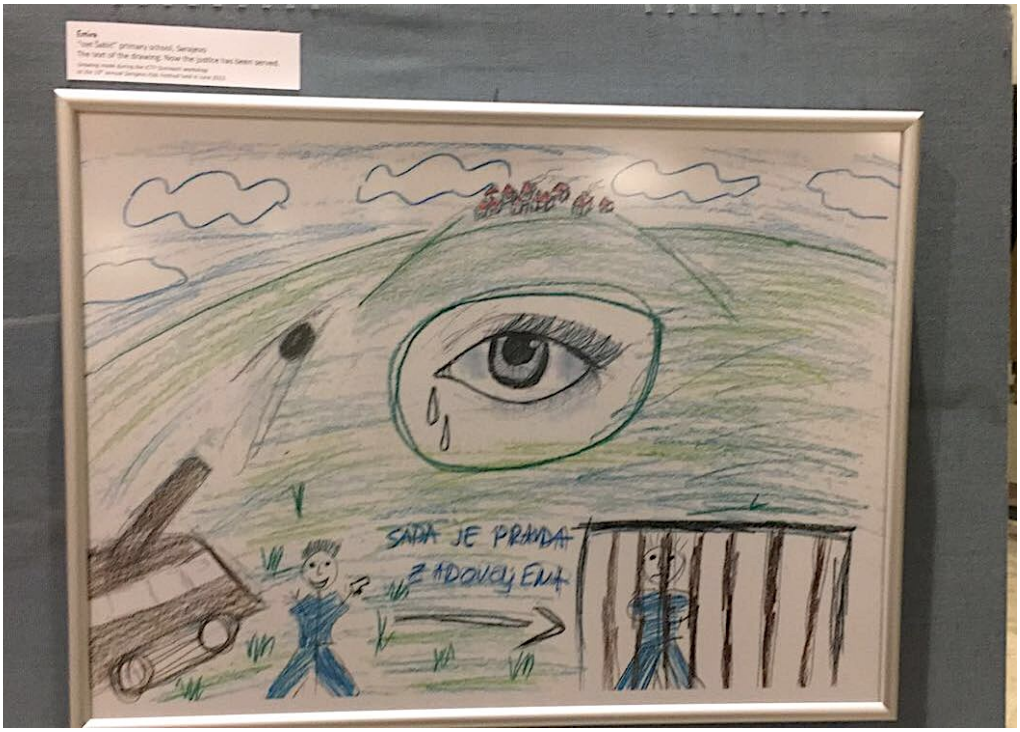
Figure 7

*Ratko Mladić and President of RS, Milorad Dodik, wearing Cvijet Natalijin Ramonda [The Flower Ramonda of Natalija] also known as Cvijet Feniks [Phoenix Flower]. Source: BanjaLukaNews.*

Figure 8

*Flower of Srebrenica: The white symbolizes innocence, the green symbolizes hope, and the eleven petals stand for 11 July 1995. Photographed by author in December, 2017.*

Figure 9




*Drawing at the ICTY: "Sada je pravda zadovoljena" [Now justice has been done].*
*Photographed by author on 22 November 2017.*

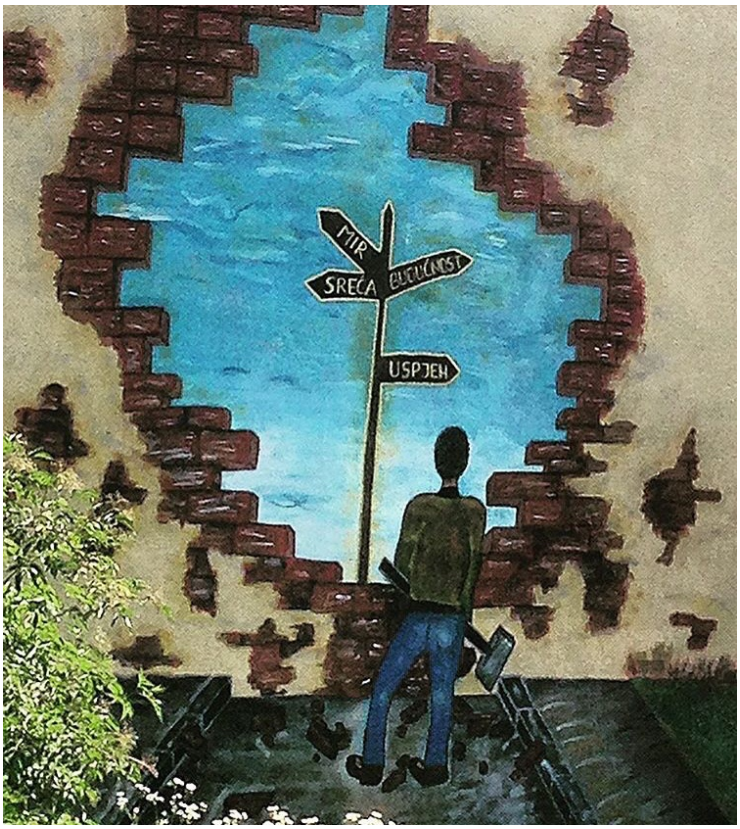
*Figure 10*


*"Gladni smo na tri jezika" [We are hungry in three languages].*
*Graffiti in front of The Academy of Fine Arts, Sarajevo. Photographed by author in November, 2017.*

Figure 11


*Banner: "Don't forget Srebrenica! I poslije rata je rat." [Even after war, there is war]*
*Photographed by author in Sarajevo, 11 July 2017.*

Figure 12




*Street art in Srebrenica: "Mir, Sreća, Budućnost, Uspjeh" [Peace, Happiness, Future, Success]*
*Photographed by author in July, 2017.*