Longer Than Life

HOW THE ICTY STRENGTHENED THE RULE OF LAW IN BOSNIA AND HERZEGOVINA AND SERBIA

Kei Hannah Brodersen

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The ICTY closed its doors in 2017. It had been set up in 1993 in order to prosecute crimes committed during the Yugoslav wars in the 1990s. Although its mandate was limited to that of a criminal court, the Tribunal aimed at strengthening the rule of law in the countries under its jurisdiction.

This book examines in what respect the ICTY had an impact on the Bosnian and Serbian criminal justice systems. It examines five areas where the footprint of the international tribunal is most tangible: national war crimes institutions, domestic criminal legislation and jurisprudence, witnesses' and victims' matters, and the use of technology in the criminal process. In the end, it is determined whether this influence indeed contributed to the rule of law in Bosnia and Herzegovina and Serbia.

Academics might be interested in this research as it contributes to understanding the domestic impact of international institutions. Practitioners will be guided in setting up and operating international war crimes courts, if strengthening the rule of law is a desired (side) effect of that court.

About the author: Kei Hannah Brodersen was a PhD candidate at Maastricht University's Faculty of Law between 2014 and 2020. She is a lecturer of criminal law at different universities and coaches moot court teams. Besides that, she is the legal research editor of Accountability Unit, a human rights NGO which advances conflict-related gender based rights. Previously, Hannah worked as an assistant lawyer for the Group of States against Corruption at the Council of Europe.

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"[I]t is, in my view, indispensable, I will repeat this for emphasis, indispensable, that at any given moment you should be working on one medium to long-term, truly ambitious project. A project that stretches you (and the field) to the limits of your ability."

Joseph Weiler, On My Way Out – Advice to Young Scholars, 26 The European Journal of International Law 795, 795 (2015)

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List of Abbreviations

BDBiH	Brčko District of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina (*Bosna i Hercegovina*)
BIRN	Balkan Investigative Reporting Network
CC	Criminal Code
CPC	Criminal Procedure Code
DPA	Dayton Peace Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina (*Federacija Bosne i Hercegovine*)
FRY	Federal Republic of Yugoslavia (1992-2002, comprising Serbia and Montenegro)
GC	Geneva Convention
HJPC	High Judicial and Prosecutorial Council (Bosnia and Herzegovina)
HLC	Humanitarian Law Center
IAC	International armed conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IO	International organisation
JCE	Joint criminal enterprise
KLA	Kosovo Liberation Army
MICT	United Nations International Residual Mechanism for Criminal Tribunals
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organisation
NIAC	Non-international armed conflict
OHR	Office of the High Representative
OKO	Criminal Defence Section (*Odsjek Krivične Odbrane*) (Bosnia and Herzegovina)
OSCE	Organisation for Security and Co-operation in Europe

OTP	Office of the Prosecutor at the ICTY
OWCP	Office of the War Crimes Prosecutor (Serbia)
POBiH	Prosecutor's Office of Bosnia and Herzegovina
RPE	ICTY Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
RSBiH	Serb Republic of Bosnia and Herzegovina (*Republika Srpska Bosne i Hercegovine*)
SCBiH	State Court of Bosnia and Herzegovina
SFRY	Socialist Federal Republic of Yugoslavia (1943-1991)
SIPA	State Investigation and Protection Agency (Bosnia and Herzegovina)
UN	United Nations
UNDP	United Nations Development Programme
US(A)	United States of America
USSR	Union of Soviet Socialist Republics
VWS	Victims and Witnesses Section (at the ICTY)
VWSU	Victims and Witnesses Support and Operations Unit (at the Higher Court Belgrade)
WCIS	War Crimes Investigation Service (Serbia)
WPU	Witness Protection Unit (Serbia)
WSS	Witness Support Section (within the Registry of the SCBiH)

1 Introduction: The ICTY between Hope and Disappointments

1 The New Era of Global Justice

> "When the first news and accounts of the atrocities committed on the territory of the former Yugoslavia began to come in, the collective memory of our peoples had to relive the horror of times we had thought long past. But there are lessons to be learned from history. Conditions have changed since the Second World War. The United Nations now has the responsibility of maintaining and restoring international peace and security. Indeed, through the Security Council, the United Nations has firmly committed itself to this cause in the former Yugoslavia […]. The atrocities committed by all sides in the Yugoslav crisis have given rise to an intolerable situation which is fanning the flames of conflict and therefore constitutes a threat to international peace and security. Prosecuting the guilty is necessary if we are to do justice to the victims and to the international community. Prosecuting the guilty will also send a clear message to those who continue to commit these crimes that they will be held responsible for their acts. And finally, prosecuting the guilty is, for the United Nations and particularly for the Security Council, a matter of doing their duty to maintain and restore peace."[1]

Those were the words of the French delegate to the United Nations (UN) Security Council, Jean-Bernard Mérimée, at the 3175th meeting of the Security Council on 22 February 1993, right after the delegates had adopted resolution 808, whereby it decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY). The delegate of the United States of America, Madeleine Albright, added with even more emotion:

> "There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations 48 years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are

1 United Nations Security Council, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting, S/PV.3175, 22 February 1993, https://digitallibrary.un.org/record/159757/files/S_PV.3175-EN.pdf?download=1 (last accessed 01/08/2019), p. 8.

> all accountable to international law may have finally taken hold in our collective memory. This will be no victor's tribunal. The only victor that will prevail in this endeavour is the truth. Unlike the world of the 1940s, international humanitarian law today is impressively codified, well understood, agreed upon and enforceable. The debates over the state of international law that so encumbered the Nuremberg trials will not burden this tribunal."[2]

Resolution 808 charged the UN Secretary General, Boutros Boutros-Ghali, with the task of drafting a report on the modalities of the international tribunal. The statements above illustrate that since day one, high expectations were placed on the ICTY: namely, fulfilling the role of modern alternative to military intervention and war, restoring international peace and security, preventing future crimes, enforcing international humanitarian law, conducting fair trials and enforcing the Nuremberg Principles, doing justice to victims and the international community, and discovering the truth. The Tribunal was established on 25 May 1993 by adopting the UN Security Council Resolution 827, which codified the ICTY Statute. It had jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Established halfway through the conflict in Bosnia and Herzegovina (BiH), which lasted until the end of 1995, when the Dayton Peace Agreement was adopted, the Tribunal encountered more than the usual difficulties faced by new institutions: judges were not in place until six months after the ICTY was formally created by the UN Security Council, it took 14 months to identify a candidate for the Chief Prosecutor who enjoyed the support of the Security Council and remained on the job for more than a few days (the duration of the first Prosecutor's tenure), investigators struggled to gather evidence in a theatre of ongoing conflict, establishing a financially secure foundation for its work was another mountain the Tribunal had to climb, and identifying suspects with respect to whom there was a reasonable prospect of issuing an indictment and, even more challenging, gaining custody –[3] to name but a few important challenges.

The Tribunal's first indictment was issued on 7 November 1994 against Dragan Nikolić, a commander of the Sušica detention camp in eastern BiH, for crimes committed against non-Serb civilians in 1992. After adopting the ICTY Statute, it would take almost three years to start the first trial in The Hague on 7 May 1996: the trial against Duško Tadić,

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2 United Nations Security Council, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting, S/PV.3175, 22 February 1993, https://digitallibrary.un.org/record/159757/files/S_PV.3175-EN.pdf?download=1 (last accessed 01/08/2019), p. 11.

3 Cf. D. F. Orentlicher (2018). *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*. Oxford: Oxford University Press, p. 27f.

who was charged with crimes committed during 1992 in the Omarska detention camp in northern BiH, where thousands of Bosnian Muslim and Croat civilians were detained.[4]

Today, the ICTY is history. It closed its doors on 21 December 2017 with a closing ceremony in The Hague, in the presence of UN Secretary General António Guterres and King Willem-Alexander of the Netherlands.[5] Holá and Simić reported the following about that event:

> "The closing celebration was attended by many high-level states representatives, diplomats, top representatives of the UN, and other international organizations, who all gathered to applaud the ICTY's achievements. Its successes were narrated as much larger than its judicial and forensic legacy. The ICTY was celebrated as 'a groundbreaking moment,' not only dispensing accountability to those responsible but also contributing to 'the healing process' of victims, documenting 'undeniable truth and facts of past tragedies' and leaving records, which will 'ensure that the world will not forget, that history cannot be re-written [and] victims' voices will continue to resound down the decades'[6]. 'The ICTY is dead, long live the ICTY!' seems to have been the spirit of the day. The ICTY was hailed and the legacy communicated in the official speeches was full of praise and pride."[7]

Many would say that the praise and pride are justified. The ICTY's greatest achievement is certainly its unparalleled track record of cases. The Tribunal's Prosecutor indicted a total of 161 persons. All have been dealt with in one way or another: 90 were sentenced to imprisonment, 18 were acquitted, 13 defendants were referred to national jurisdictions, 37 accused had their indictments withdrawn or died before or during the proceedings,[8] and three cases are still ongoing at the ICTY's follow-up institution.[9] In comparison, the ICTY's sister-tribunal, the International Criminal Tribunal for Rwanda (ICTR) indicted 93 people, with 80 concluded proceedings, five referrals to national jurisdictions, and eight fugitives remaining at large.[10] The ICTR was established in 1994 and closed in December

4 Cf. ICTY, Timeline, http://www.icty.org/en/features/timeline (last accessed 01/08/2019).
5 Cf. ICTY, Timeline, http://www.icty.org/en/features/timeline (last accessed 01/08/2019).
6 United Nations Secretary General (21 December 2017), Secretary-General's remarks at Closing Ceremony for the International Criminal Tribunal for the Former Yugoslavia (ICTY), https://www.un.org/sg/en/content/sg/ statement/2017-12-21/secretary-generals-remarks-closing-ceremony-international-criminal (last accessed 01/08/2019).
7 B. Holá & O. Simic (2018). ICTY Celebrities: War Criminals Coming Home. *International Criminal Justice Review, 28*(4), 285-290, p. 285f.
8 Cf. ICTY, Key Figures of the Cases, http://www.icty.org/en/cases/key-figures-cases (last accessed 01/08/2019).
9 See section 5 below.
10 Cf. MICT, Key Figures of Cases, http://unictr.irmct.org/en/cases/key-figures-cases (last accessed 01/08/2019).

2015. Seventeen years into its existence, the International Criminal Court (ICC) has brought 27 cases before the Court, involving 34 accused, of which only 16 have appeared before the ICC until now.[11] There have been eight convictions and three acquittals.[12]

In the course of adjudicating these cases, the Tribunal has significantly developed the fields of international humanitarian and international criminal law. While it is true that international humanitarian law was "impressively codified" in 1993, it was not – contrary to Madeleine Albright's assumption – "well understood". It was the ICTY that interpreted international humanitarian law as codified in the Hague and the Geneva Conventions, as well as in the Genocide Convention, besides making imposing inventories of customary international law. The Tribunal's findings have found their way into the national jurisprudence, sometimes even national law, or military manuals of many countries. At the same time, the Tribunal has also developed international criminal procedure, and best practices for criminal prosecutions and trials, both inside and outside the courtroom.[13]

The ICTY itself considers one of its main achievements to be the fact that it established the specifics about what happened during the conflicts in the former Yugoslavia. On its website, the ICTY states: "[t]he Tribunal's judgements have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region."[14] In order to determine the facts, "the Tribunal's judges have carefully reviewed testimonies of eyewitnesses, survivors and perpetrators, forensic data and often previously unseen documentary and video evidence."[15] This evidence is now not only on the record but also available in the ICTY's archives, which have now been partly transferred to Bosnia and Herzegovina.[16]

In addition to this, the Tribunal has also had an impact on global institution building. Orentlicher, for instance, believes that the ICTY developed global influence within just a few years after its establishment: "[u]nexpectedly, the Tribunal was the leading edge in a new era of global justice." Its very existence inspired governments to create specialised institutions dealing with international crimes in other countries, it triggered the founding of an International Criminal Court with potentially global jurisdiction, and served as a

11 July 2019.

12 Cf. ICC, Facts and Figures, https://www.icc-cpi.int/about (last accessed 01/08/2019).

13 See also: F. Gaynor (2012). Prosecution at the ICTY: Achievements and Challenges *Südosteuropa Mitteilungen* (3), 18-31; K. D. Askin (2002-2003). Reflections on Some of the Most Significant Achievements of the ICTY. *New England Law Review, 37*(4), 903-914, p. 907ff.

14 ICTY, Achievements, http://www.icty.org/en/about/tribunal/achievements (last accessed 01/08/2019).

15 ICTY, Achievements, http://www.icty.org/en/about/tribunal/achievements (last accessed 01/08/2019).

16 Cf. MICT, First Information Centre on ICTY in the Former Yugoslavia Opens in Sarajevo, Press release 23 May 2018, http://www.irmct.org/en/news/first-information-centre-icty-former-yugoslavia-opens-sarajevo (last accessed 01/08/2019).

catalyst for national efforts in prosecuting atrocities committed beyond states' borders under universal jurisdiction.[17]

2 The ICTY's Broader Effects

2.1 High Expectations towards the Tribunal

Despite the emotion at the meeting of the United Nations Security Council in February 1993, the 'international community' expected little from the ICTY in the beginning.[18] Reportedly, the Tribunal was viewed as a "low-cost, low-risk way for Western states to signal that despite their opposition to military intervention, they were not indifferent to Bosnia's suffering"[19]. By creating the ICTY, the 'international community' was "pretending" to act, but at the same time did not create a robust mechanism.[20] At best, the expectation of 'Western' states was that this would be a criminal court and nothing more.[21]

The absence of intervention and the lack of a robust mechanism caused cynicism in the region,[22] and at the same time tremendously augmented the expectations towards the ICTY, which was suddenly expected "to do everything", diverting the attention from all the hard work that remained to be done in the countries on a political level.[23]

By "everything", people meant, in particular, deterrence, peace and security, justice, truth, and reconciliation. These expectations were partly triggered by Resolution 827, establishing the ICTY itself. The resolution explicitly mentions the belief that prosecutions would "contribute to ensuring that such […] violations [of international humanitarian law] are halted and effectively redressed" as well as "to the restoration and maintenance of peace". Hopes and expectations were also raised by the way diplomats and representatives

17 Cf. Orentlicher, 2018, p. 2.

18 Cf. D. F. Orentlicher (31 May 2018), speaker at: Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, New York, https://www.opensocietyfoundations.org/events/book-launch-some-kind-justice-icty-s-impact-bosnia-and-serbia (last accessed 01/08/2019).

19 S. Power (2002). *"A Problem from Hell": America and the Age of Genocide*. New York: Basic Books, p. 484.

20 Cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

21 Cf. D. Tolbert (31 May 2018), speaker at: Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, New York, https://www.opensocietyfoundations.org/events/book-launch-some-kind-justice-icty-s-impact-bosnia-and-serbia (last accessed 01/08/2019).

22 Cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

23 Cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

of international and nongovernmental organisations communicated about the Tribunal. And in addition, they were also simply based on misunderstandings.[24]

Many agree that international criminal courts and tribunals *should* do more than merely adjudicating crimes, and *should* have broader effects than merely holding perpetrators accountable.[25] As Stromseth put it:

> "[o]therwise, international and hybrid criminal trials may simply be a 'spaceship' phenomenon: they arrive, do their business, and take off, leaving a befuddled domestic population scratching their heads and wondering what, if anything, this had to do with the dire realities on the ground".[26]

In her opinion, the "ultimate impact" would be uncertain if the work of international criminal courts and tribunals "is completely disconnected from the challenges of strengthening the rule of law domestically in post-conflict societies."[27] And even worse: the disconnection might even undermine public confidence in fair justice, and reinforce cynicism and despair.[28]

Thus, in order to move forward after violent conflict, the mere adjudication of war crimes at a distant international criminal court is not sufficient.[29] However, many share the hope that international criminal courts or tribunals contribute to general post-conflict management, and therefore attribute broader objectives to them.

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24 For instance, reconciliation is a term often associated with the ICTY. During the interviews that I conducted in Bosnia and Herzegovina and Serbia, I realised that many people (including legal practitioners) until today believe that reconciliation was a proclaimed goal of the ICTY. They believe that reconciliation is mentioned in the Tribunal's Statute, or at least in Resolution 827 establishing the ICTY. That is not true, however. Resolution 827 does not speak of reconciliation. In contrast, Resolution 955 of the United Nations Security Council, which created the International Criminal Tribunal for Rwanda (ICTR) in November 1994, *does*. Maybe the confusion stems from there.

25 In particular, see: J. E. Stromseth (2009a). Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies? *Hague Journal on the Rule of Law, 1*(1), 87–97, p. 88f.; J. E. Stromseth (2006). Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law? *Georgetown Journal of International Law, 38*(2), 251–322, p. 252; or J. Ramji-Nogales (2010). Designing Bespoke Transitional Justice: A Pluralist Process Approach. *Michigan Journal of International Law, 32*(1), 1-72, p. 5; disagreement: C. T. Call (2007). Conclusion. In C. T. Call (Ed.), *Constructing Justice and Security after War* (p. 375-410). Washington D.C.: United States Institute of Peace, p. 398.

26 Stromseth, 2009a, p. 88f.

27 Stromseth, 2009a, p. 89.

28 Cf. Stromseth, 2009a, p. 89.

29 Cf. Stromseth, 2006, p. 252.

2.2 Little Knowledge about the Potential of International Criminal Courts and Tribunals

As the mandate of international criminal courts and tribunals is generally still confined to prosecuting and adjudicating crimes committed during violent conflict,[30] the goals they pursue beyond that mandate are usually side effects rather than primary objectives. The question is therefore: do international criminal courts and tribunals have an impact on their target countries, and if so, how? Do these courts make an impact through fair trials and sound judgments, or only through extra-legal activities?

Surprisingly, little is known about the real potential of international criminal courts and tribunals having these 'side effects'. This is also true for the side effects of the International Criminal Tribunal for the former Yugoslavia. Those who are confident that the ICTY had broader effects than holding a certain number of perpetrators accountable for their crimes, are rarely able to provide proof in support of their claims. At the same time, sceptics, whose numbers have grown considerably since the promising days of the Tribunal's establishment, cannot say with certainty whether it has done nothing or has done harm.[31]

During the first decade of the ICTY's existence, neither the Tribunal itself nor scholars paid much attention to its impact on those most affected by its work: the citizens of the former Yugoslavia.[32] A strategy change in the Tribunal's approach towards its legacy[33] coincided with – or caused? – increased scientific interest in the ICTY's domestic effects.[34]

Orentlicher in particular has contributed to the body of literature on the ICTY's broader impact on its constituents, with a specific focus on Bosnia and Herzegovina and Serbia. Her books *Shrinking the Space for Denial* from 2008 on the ICTY's impact in Serbia and *That Someone Guilty Be Punished* from 2010 on its impact on Bosnia and Herzegovina, as well as her latest contribution *Some Kind of Justice* from 2018, which summarises and complements the two earlier books, are among the most comprehensive accounts of the Tribunal's effects in the countries of the former Yugoslavia. By using domestic expectations towards the ICTY as a primary benchmark, Orentlicher analyses the Tribunal's impact on justice for victims, denial and acknowledgement, and domestic war crimes prosecutions and trials.[35]

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30 See, for instance, Article 1 of the ICTY Statute, Article 1 of the ICTR Statute, or Article 1 of the International Criminal Court Statute.

31 Cf. T. W. Waters (2013). *The Milošević Trial. An Autopsy*. Oxford: Oxford University Press, p. 47.

32 Cf. Orentlicher, 2018, p. 2; Stromseth, 2009a, p. 88.

33 See section 2.3 below.

34 Cf. Orentlicher, 2018, p. 2f., fn. 5.

35 Orentlicher, 2018; D. F. Orentlicher (2010), *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, International Center for Transitional Justice & Open Society Justice Initiative, New York, https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf (last accessed

A research project that deserves to be mentioned in this context, in view of the fact that it provided comprehensive accounts of the impact of the international criminal courts and tribunals, including the ICTY, is the DOMAC project, led by Reykjavik University. As for the ICTY, the research project examined the ICTY's effects on capacity building in domestic judiciaries, and on domestic investigations, prosecutions, and trials.[36]

26/09/2019); D. F. Orentlicher (May 2008), *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Open Society Institute, New York, https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia_20080501.pdf (last accessed 26/09/2019); see also: D. F. Orentlicher (2009). International Justice Marks Its Fifteenth Anniversary: A Preliminary Assessment of the ICTY's Impact in Serbia. *Human Rights Brief, 16*(2), 18–21.

36 Cf. A. Chehtman & R. Mackenzie (2009), *Capacity Development in International Crimininal Justice: A Mapping Exercise of Existing Practice*, DOMAC report No. 2, Reykjavik University, Reykjavik, https://en.ru.is/media/domac/DOMAC2-2009.pdf (last accessed 26/09/2019); Y. Ronen (2011), *Bosnia and Herzegovina: The Interaction Between the ICTY and Domestic Courts in Adjudicating International Crimes*, DOMAC report No. 8, Reykjavik University, Reykjavik, https://en.ru.is/media/domac/Domac8-2011-YR.pdf (last accessed 26/09/2019); A. Chehtman (2011b), *Developing Local Capacity for War Crimes Trials: Insights From BiH, Sierra Leone, and Colombia*, DOMAC report No. 9, Reykjavik University, Reykjavik, https://en.ru.is/media/domac/Domac-9-AC-Final-Paper.pdf (last accessed 26/09/2019); K. Michaeli (2011a), *The Impact of the International Criminal Tribunal For Yugoslavia on War Crime Investigations and Prosecutions In Croatia*, DOMAC report No. 10, Reykjavik University, Reykjavik, https://en.ru.is/media/ domac/Domac-10-KM-Croatia.pdf (last accessed 26/09/2019); A. Trapani (2011), *Assessing the Impact of the International Ad-Hoc Tribunals on the Domestic Courts of the Former Yugoslavia*, DOMAC report No. 11, Reykjavik University, Reykjavik, https://en.ru.is/media/domac/Domac-11-BAlkan-AT-Final.pdf (last accessed 26/09/2019); K. Michaeli (2011b), *The Impact of the International Criminal Tribunal For Yugoslavia on War Crime Investigations and Prosecutions In Serbia*, DOMAC report No. 13, Reykjavik University, Reykjavik, https://en.ru.is/media/domac/Domac-13-KM-Serbia.pdf (last accessed 26/09/2019); A. Chehtman, (2011a). Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'. *Journal of International Criminal Justice, 9*(3), 547–570.

Literature is also available regarding the ICTY's contributions to deterrence,[37] peace,[38] justice,[39] reconciliation,[40] the education of people regarding the atrocities committed in the context of the Yugoslav wars and acknowledgment of crimes,[41] the diverse aspects of

37 Cf. S. Lazic (2017). Serbia and the International Criminal Tribunal for the Former Yugoslavia: Deterrence through Coercive Compliance. In J. Schense & L. Carter (Eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (p. 63-94). Brussels: Torkel Opsahl Academic EPublisher; D. Bucaj (2017). Difficulties in Achieving Deterrence by International Criminal Tribunals: The Example of the International Criminal Tribunal for Former Yugoslavia in Kosovo. In J. Schense & L. Carter (Eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (p. 141-178). Brussels: Torkel Opsahl Academic EPublisher; P. McAuliffe (2012). Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law. *New Zealand Journal of Public and International Law, 10*(2), 227-262; P. Akhavan (2001). Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? *The American Journal of International Law, 95*(1), 7–31.

38 Cf. A. K. A. Greenawalt (2013). *Milošević* and the Justice of Peace. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 377-386). Oxford: Oxford University Press; P. Kienlen (2011). International Justice v. Local Peace? Case Study of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Reconciliation Process in the Balkans.: The Reality of International Criminal Justice's Achievements with regard to Peace Building. *Vienna Journal on International Constitutional Law, 5*(4), 632–696; P. Akhavan (2009). Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism and Political Realism. *Human Rights Quarterly, 31*(3), 624–654; J. N. Clark (2009a). Judging the ICTY: has it achieved its objectives? *Southeast European and Black Sea Studies, 9*(1-2), 123-142; H. Shinoda (2009). Implementing peace through the imposition of rule of law: reevaluating peace-building strategies in Bosnia and Herzegovina ten years after the Dayton Peace Agreement. Retrieved from http://www.peacepalacelibrary.nl/ebooks/files/376258039.pdf; P. Akhavan (1998). Justice in The Hague, Peace in the Former Yugoslavia?: A Commentary on the United Nationals War Crimes Tribunal. *Human Rights Quarterly, 20*(4), 737–816.

39 Cf. E. Ramulić (6 November 2012). *What is the Tribunal's Legacy and its Role in Transitional Justice Process.* Paper presented at the Legacy of the ICTY in the former Yugoslavia, Sarajevo; H. Vučinić (6 November 2012). *What is the Tribunal's Legacy and its Role in Transitional Justice Process.* Paper presented at the Legacy of the ICTY in the former Yugoslavia, Sarajevo; G. M. Frisso (2011). The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims. *Goettingen Journal of International Law, 3*(3), 1093-1121; J. Subotic (2009). *Hijacked Justice: Dealing with the Past in the Balkans*. Ithaca: Cornell University Press; N. Kandić (2005). The ICTY Trials and Transitional Justice in Former Yugoslavia. *Cornell International Law Journal, 38*(3), 789–792.

40 Cf. J. N. Clark (2014). *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*. London: Routledge; J. N. Clark (2009b). Plea bargaining at the ICTY: Guilty pleas and reconciliation. *European Journal of International Law, 20*(2), 415-436.

41 Cf. K. Bachmann, I. Ristić, & G. Kemp (Eds.). (2019a). *International Criminal Tribunals as Actors of Domestic Change: The Impact on Media Coverage. Volume 1*. Berlin: Peter Lang; K. Bachmann, I. Ristić, & G. Kemp (Eds.). (2019b). *International Criminal Tribunals as Actors of Domestic Change: The Impact on Media Coverage. Volume 2*. Berlin: Peter Lang; M. Milanović (2016). The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem. *American Journal of International Law, 110*(2), 233-259; M. Milanović (2015). Establishing the facts about mass atrocities: Accounting for the failure of the ICTY to persuade target audiences. *Georgetown Journal of International Law, 47*(4), 1321-1378; J. Dragović-Soso (2013). The Parting of Ways: Public Reckoning with the Recent Past in Post-Milošević Serbia. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 389-408). Oxford: Oxford University Press; M. Klarin (2009). The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia. *Journal of International Criminal Justice, 7*(1), 89–96; J. Obradovic-Wochnik (2009). Strategies of denial: resistance to ICTY cooperation in Serbia. In J. Batt & J. Obradovic-Wochnik (Eds.), *War crimes, conditionality and EU integration in the Western Balkans* (p. 29–47). Paris: European Union Institute for Security Studies (EUISS); M. Spoerri

democratisation,[42] and regarding the role of the ICTY as an actor relevant in politics in the countries under its jurisdiction –[43] to name only a few contributions. Most of these studies have focused on the ICTY's effects on Bosnia and Herzegovina, while Serbia and Croatia (let alone the other former Yugoslav countries) have received little attention.[44] With respect to Serbia and Croatia, a few studies exist that deal with both countries' compliance or cooperation with the ICTY – something which has frequently been equated with improved rule of law.[45]

& A. Freyberg-Inan (2008). From prosecution to persecution: perceptions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Serbian domestic politics. *Journal of International Relations and Development, 11*(4), 350–384; D. E. Arzt (2006). Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone. *The ANNALS of the American Academy of Political and Social Science, 603*(1), 226–239; D. Saxon (2005). Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia. *Journal of Human Rights, 4*(4), 559–572.

42 Cf. K. Bachmann, G. Kemp, I. Ristić, J. Mihajlović Trbovc, A. Ljubojević, A. Nędzi-Marek, F. Bayisenge, M. A. M. Ahmet, V. Krasniqi (2019). Like Dust before the Wind, or, the Winds of Change? The Influence of International Criminal Tribunals on Narratives and Media Frames. *International Journal of Transitional Justice, 0*, 1-19; S. Swimelar (2013). Guilty Without a Verdict. Bosniaks' Perceptions of the *Milošević* Trial. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 183-202). Oxford: Oxford University Press, p. 187f.; J. Hagan & S. Kutnjak Ivković (2011). *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts*. Oxford: Oxford University Press; P. L. Robinson (2011). Creating a Legacy that Supports Sustainable Rule of Law in the Region. In R. H. Steinberg (Ed.), *Assessing the Legacy of the ICTY*. Leiden/Boston: Martinus Nijhoff Publishers; R. H. Steinberg (2011). Rule of Law and the Ambition of a Regional Legacy: Overcoming Political Challenges. In R. H. Steinberg (Ed.), *Assessing the Legacy of the ICTY*. Leiden/Boston: Martinus Nijhoff Publishers; L. Nettelfield (2010). *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*. Cambridge: Cambridge University Press; L. A. Barria & S. D. Roper (2008). Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY. *Human Rights Review, 9*(3), 317–330; P. Katsaris (2007). The Domestic Side of the ICTY Completion Strategy: Focus on Bosnia and Herzegovina. *Revue internationale de droit pénal, 78*(1), 183-207; I. Bandović (2005), *The Activity of ICTY and National War Crimes Judiciary*, Beogradski centar za ljudska prava, Belgrade; D. Raab (2005). Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals. *Journal of International Criminal Justice, 3*(1), 82–102.

43 Cf. M. Ostojić (2014). *Between Justice and Stability: The Politics of War Crimes Prosecutions in Post-Milošević Serbia*. London: Routledge; F. Bieber (2013b). The Show and the Trial: The Political Death of Milošević. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 419-435). Oxford: Oxford University Press; P. C. McMahon & D. P. Forsythe (2008). The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics. *Human Rights Quarterly, 30*(2), 412–435.

44 Same observation: Nettelfield, 2010, p. 289.

45 See for instance: V. Peskin & M. P. Boduszyński (2011). Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe. *The International Journal of Transitional Justice, 5*(1), 51–74; C. K. Lamont (2010). *International Criminal Justice and the Politics of Compliance*. Farnham: Ashgate; or N. M. Rajkovic (2007). *The Limits of Consequentialism: ICTY Conditionality and (Non)Compliance in Post-Milosevic Serbia*. Paper presented at the 6th Pan-European International Relations Conference, Turin. My own contribution also goes into this direction: K. H. Brodersen (2014). The ICTY's Conditionality Dilemma: On the Interaction of Influences of the European Union's Conditionality Policy and the International Criminal Tribunal for the former Yugoslavia on the Development of Rule of Law in Serbia. *European Journal of Crime, Criminal Law and Criminal Justice, 22*(3), 219-248. While compliance with the ICTY is certainly a sign of respect for international law, it is my view now that the rule of law is a

Remarkably, among the authors of this body of scientific literature, only few contributors are from the region concerned. In general, as will be further expanded upon in Chapter 9, there is little academic discourse about the ICTY in Serbia and Bosnia and Herzegovina (although there is more in BiH).[46]

Despite the increasing interest in the broader effects of the International Criminal Tribunal for the former Yugoslavia, there is still a need for research, especially empirical research and longitudinal research, as many of the potential side effects might only materialise or become visible with time, or as a consequence of societal changes.[47] There is one side effect in particular that remains under-researched despite numerous affirmations of its existence, namely the rule of law.

2.3 The ICTY and the Rule of Law

In the run-up to its closure, the ICTY held a series of conferences, both in The Hague and in the capitals of the countries of the former Yugoslavia, during which it discussed its legacy with ICTY representatives from the last 24 years, as well as with representatives of the 'international community', academics, and its constituents: politicians, representatives of the judiciary or of victims' associations, but also with the general public from Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, or Serbia.

At the last conference, which took place in June 2017 in Sarajevo, the capital of Bosnia and Herzegovina, then ICTY Registrar John Hocking claimed in his opening remarks that the Tribunal had "strengthen[ed] the rule of law" in the countries under its jurisdiction. He was not the first to say that. In fact, ever since its establishment, it had been asserted that the ICTY "instilled"[48], "re-establish[ed]"[49], "advance[d]"[50], "enhance[d]"[51],

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concept that goes beyond such respect, that is much broader. I develop my rule of law conception in Chapter 2 and Chapter 4, section 2. Cooperation with the Tribunal can therefore merely be seen as an indicator of improved rule of law, but the former cannot be equated with the latter.

46 Cf. interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

47 Cf. A. M. Roccatello (31 May 2018), speaker at: Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, New York, https://www.opensocietyfoundations.org/events/book-launch-some-kind-justice-icty-s-impact-bosnia-and-serbia (last accessed 01/08/2019); R. Byrne (2006). Promises of peace and reconciliation: Previewing the legacy of the International Criminal Tribunal for Rwanda. *European Review, 14*(4), 485-498; Stromseth, 2009a, p. 88.

48 Akhavan, 1998, p. 749.

49 United Nations Secretary General (23 August 2004), *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, www.un.org/ruleoflaw/files/2004%20report.pdf (last accessed 01/08/2019), p. 13.

50 J. Hagan & S. Kutnjak Ivković (2006). War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond. *The ANNALS of the American Academy of Political and Social Science, 605*(1), 129–151, p. 130.

51 Stromseth, 2009a, p. 88.

"strengthen[ed]"[52], "improve[d]"[53], "shap[ed]"[54], "promot[ed]"[55], "bolster[ed]"[56], "contribut[ed to]"[57], or even "brings"[58] the rule of law globally – and in the countries of the former Yugoslavia.

A former President of the Tribunal even believes that the United Nations Security Council itself hoped the ICTY would contribute to the establishment of the rule of law in the countries concerned when it created the ICTY.[59] And even if it was not a goal at that time, it became one. In 2003, the ICTY proposed its so-called "completion strategy", a plan to slowly wind down the Tribunal.[60] The Tribunal declared its intent to do so "in coordination with domestic legal systems in the former Yugoslavia"[61], meaning that the ICTY's mission should henceforth be completed at the national level. As a consequence, domestic judiciaries became responsible for the thousands of crimes that the Tribunal could not deal with in The Hague. As of then, the ICTY undertook a series of measures (which will be addressed throughout this book) in order to enable local justice systems to complete this task. One of the prerequisites was that they needed to be solidly based on the rule of law. In 2009, then ICTY President Robinson explained to the UN Security Council that "[t]he ultimate goal of the Tribunal's legacy strategy is entrenchment of the rule of law in the former Yugoslavia."[62] Hence, at least since the Tribunal had started preparing for its closure, it actively pursued strengthening the rule of law in the countries under its jurisdiction.[63]

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52 For instance: President of the United Nations International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, MICT, President Meron Addresses the UN Security Council, Press release 3 June 2015, https://www.irmct.org/en/news/president-meron-addresses-un-security-council-2 (last accessed 01/08/2019); or Orentlicher, May 2008, p. 62ff.

53 P. C. McMahon & K. L. Miller (2012). From Adjudication to Aftermath: Assessing the ICTY's Goals beyond Prosecution. *Human Rights Review, 13*(4), 421–442, p. 422.

54 E. Simpson (2004). Stop to The Hague: Internal versus External Factors Suppressing the Advancement of the Rule of Law in Serbia. *Georgetown Journal of International Law, 36*(4), 1255–1287, p. 1257.

55 Barria & Roper, 2008, p. 319.

56 Nettelfield, 2010, p. 234f.

57 Swimelar, 2013, p. 201.

58 G. Kirk McDonald (15 November 2011). *The Impact of the Tribunal's Substantive Jurisprudence on the Elucidation of Customary International Law.* Paper presented at the ICTY Global Legacy, The Hague, p. 84.

59 Pocar cited in: F. Mégret (2011). The Legacy of the ICTY as Seen Through Some of its Actors and Observers. *Goettingen Journal of International Law, 3*(3), 1011–1052, p. 1030; similar: Nettelfield, 2010, p. 234f.

60 For more information, see: ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 01/08/2019).

61 ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 01/08/2019).

62 ICTY (13 November 2009), *Completion Strategy Report November 2009*, provided to the United Nations Security Council, S/2009/589, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_13nov2009_en.pdf (last accessed 01/08/2019), p. 21.

63 I have demonstrated elsewhere how the rhetoric of the Tribunal and its representatives shows how contributing to the rule of law increasingly became an objective of the ICTY; see: K. H. Brodersen (2018). The Rule of Law à la ICTY: What the ICTY Deemed Just Good Enough and How it Supported the Countries

Today, the Tribunal indeed lists "Strengthening the Rule of Law" among its most important achievements.[64] Whether it did, however, has never been systematically tested.

This book intends to fill this gap by answering the following question: *To what extent and how did the ICTY contribute to the rule of law in the countries of the former Yugoslavia?*

This research therefore aims to analyse not only whether the Tribunal had an impact on the rule of law in its constituencies, but also to explain what triggerd that impact. Several sub-research questions therefore ensue: *1. What is the rule of law? 2. Did the ICTY have an impact on the rule of law, and if so, what were the effects? 3. Which mechanisms and dynamics led to its impact?*

I will thereby make several contributions to the literature regarding the side effects of international criminal courts and tribunals; two of those contributions are conceptual and one is empirical. First, I will outline an analytical framework of the rule of law that is suitable for analysing courts' effects on it. As will be demonstrated in more depth later, there are multiple conceptions of the rule of law, ranging from minimalist formalistic to maximalist substantive approaches. None of these, however, are yet apt for assessing the domestic impact of an international criminal court or tribunal. Second, I will design an impact theory for international criminal courts and tribunals that explains their influence on domestic societies; I will test that theory and revise it. And third, I will make an inventory of the ICTY's effects on the domestic criminal justice systems in two countries under its jurisdiction. For my research, I will use two case studies: Bosnia and Herzegovina and Serbia, a choice that will be explained in Chapter 4, section 1.3.

3 Structure of This Book

Accordingly, the research has been structured as follows:

After these preliminary remarks which explain the context, Part I of this research will be conceptual and theoretical. Chapter 2 outlines the conceptual background by defining a conception of the rule of law in transitional justice contexts. It will be demonstrated that the conceptions of ordinary rule of law are only of limited value in a transitional context. During the transition from war to peace, from lawlessness to a functioning society where rules are enforced, from arbitrary to reliable and reasonable government, the law takes on

in the Former Yugoslavia to Become Better. *Goettingen Journal of International Law, 9*(1), 221-265. Also others count the rule of law promotion among the Tribunal's goals. Ostojić, for instance, opines that "[r]estoring the rule of law in the former Yugoslavia constitutes an intrinsic part of the ICTY's mission." Canter claims that promoting the rule of law is at least a "secondary purpose" for the Tribunal; cf. A. S. Canter (2008-2009). "For these Reasons, the Chamber: Denies the Prosecutor's Request for Referral": The False Hope of Rule 11 *bis*. *Fordham International Law Journal, 32*(5), 1614-1656, p. 1654.

64 Cf. ICTY, Achievements, http://www.icty.org/en/about/tribunal/achievements (last accessed 01/08/2019).

a mediating function: it structures the transition. Tension therefore exists between the ordinary perception of the rule of law being something established and the law being dynamic in times of transition. Ordinary rule of law is essentially about adherence to known rules. However, in times of transition, there might not even be any 'known rules'; they have to be newly defined. Eventually, this process will lead to the evolvement of a new notion of justice: what will from now on be considered as 'just' in our society? What will be considered 'right' and 'wrong'? According to which rules does a society want to live? Answering these questions might require breaking with the past and with those who have previously corrupted the legal system by disrespecting existing rules or applying manifest injustice. One possible response is to hold those individuals criminally liable for their wrongdoings. How can these trials have an impact on the wider process of defining a new conception of the rule of law for society? Are trials triggers or blockers, supporting or undermining, pointing or leading towards a specific notion of justice?

Next, Chapter 3 will develop the impact theory needed to analyse the domestic effects of an international criminal court or tribunal. Essentially, the theory supposes that international criminal courts and tribunals can trigger the internalisation of a particular norm at the national level. There are different views on how this process is brought about: the realist approaches that follow the logic of consequentialism, and constructivist approaches that follow the logic of appropriateness. The former posit that actions are driven by expectations of consequences. The latter presume that actions follow rules that are perceived as natural, rightful, or legitimate. Most authors concede, however, that both logics are usually at play in varying degrees. The assumption is that the right combination of logics – or factors – leads to a point where a 'norm cascade' is set in motion – where a particular norm 'cascades' from an international criminal court or tribunal into domestic society. The question is: what are those factors? The theory developed in Chapter 3 suggests that international criminal courts and tribunals have demonstration abilities and capacity building abilities. The former relate to the court or tribunal's institutional features, main characteristics, and performance, and the latter to its potential to contribute to domestic resources, skills, and knowledge. Correct usage of the court or tribunal's demonstration and capacity building abilities may lead to a norm cascade, and ultimately, to norm internalisation at the domestic level. This theory is interdisciplinary, and developed using literature on both international relations and international law, as well as impact analyses of international criminal courts and tribunals.

Chapter 4 will outline the methodology of this research. The approach that will be adopted is interdisciplinary, involving methods of analysis used in political and social sciences, as well as in the field of law. As mentioned above, I will use two case studies in order to determine the factors that lead to the impact of the ICTY: Bosnia and Herzegovina and Serbia. The case selection and methods used for researching both cases will be described, and in particular, the sources used for information gathering. Large parts of my research

are based on 60 semi-structured expert interviews held with legal practitioners from the ICTY and from the domestic justice systems in Serbia and Bosnia and Herzegovina, and with observers. The last part of Chapter 4 will refine the analytical framework; it will explain that in view of the impact model developed in Chapter 3, an analysis of '*the* rule of law' makes little sense, as an international criminal court or tribunal cannot influence '*the* rule of law' in its broadest sense. This was confirmed during the first round of interviews with legal practitioners. In order to analyse the Tribunal's impact on the rule of law in Bosnia and Herzegovina and Serbia, a narrower conception was therefore necessary: one that is more focused on the criminal justice system – an area on which international criminal courts and tribunals *can* have an influence. Hence, as a proxy for the conceptualisation of any rule of law, the ICTY's rule of law definition will be proposed as the appropriate analytical framework for this research. The Tribunal's approach to the rule of law will be developed in section 2.1 of Chapter 4 using a variety of ICTY sources, after guiding the reader through the chronology of this research in more detail in section 1.4 of Chapter 4.

The second Part of this research is predominantly empirical. Each Chapter of Part II will describe selected aspects of the Bosnian and Serbian domestic criminal justice systems where the impact of the ICTY can be observed. Chapter 5 is dedicated to domestic specialised institutions that were established in order to deal with those crimes that could not be adjudicated in The Hague. It will be pointed out how the Tribunal triggered – actively (Bosnia and Herzegovina) or passively (Serbia) – the establishment of these specialised institutions and what their main features are. A short appraisal will also evaluate the ICTY's contributions to their work.

Chapter 6 looks at the Tribunal's impact on criminal law, both substantive and procedural, written law and case law. In BiH, the ICTY had great influence on the new Bosnian Criminal Code, which was adopted in 2003 and which included the state of the art of international crimes, as defined in the Tribunal's Statute and its jurisprudence. The ICTY's experience was later also used in the adjudication of international offences in trials that deal with crimes committed during the Yugoslav wars. Interestingly, Bosnia also incorporated procedures and best practices from the Tribunal in its Code of Criminal Procedure and in its court practice. The same does not hold true for Serbia: its Criminal Code remained largely based on the old Yugoslav Criminal Code, while incorporating only a few elements that needed to be implemented following Serbia's accession to the Rome Statute. Judges and prosecutors make little use of the ICTY's jurisprudence in the few trials that are held at the Serbian specialised institutions. Serbia's Criminal Procedure Code does not incorporate the lessons learned from the Tribunal's practices. Which factors led to impact (Bosnia and Herzegovina) or inhibited impact (Serbia) will be outlined in the first part of Chapter 6.

Chapter 7 examines the matters related to victims and witnesses, with a specific focus on compensation for victims and protection and support of witnesses. The ICTY did not

have a system in place providing reparations to injured parties involved in its criminal trials, which was perceived negatively in the region. In order not to repeat this mistake, possibilities were created for victims to apply for compensation as part of the criminal trial, instead of during a second civil proceeding. National jurisdictions therefore consciously chose *not* to copy the ICTY's system, which is – albeit indirectly – also an impact. With regard to witness protection, specialised units were established in Serbia and BiH, using the ICTY's victims and witness unit as an ideal example. Witness protection and witness support have now been fully entrenched in the Serbian and Bosnian criminal justice systems.

The same applies to technical innovations that were introduced in the realm of trials at domestic specialised institutions; copying the ICTY, these innovations were later also used in other (than war crimes) trials. This concerns for instance the possibility of witnesses testifying via video-conference link, because s/he is unable to appear in court. Such technical innovations have generally been made available in courthouses. These will be addressed in Chapter 8.

The concluding Part III is predominantly analytical. Chapter 9 will examine in detail which factors account for the different effects of the ICTY in Bosnia and Herzegovina and Serbia. It will explain the norm cascade in relation to the ICTY's rule of law in both countries. This analysis will also provide the opportunity to revisit the theoretical impact model and correct specific aspects of it. Chapter 9 will therefore also form the basis for generalisations made in the conclusion, in Chapter 10. Recommendations will be formulated for future situations in which criminal trials form part of the transition from war to peace. International criminal justice is a politically and culturally sensitive topic. It is therefore essential to make well-informed decisions based on knowledge regarding the type of court features that have an impact on the ground. In addition, as international criminal justice is very expensive, resources must be allocated in the best possible – i.e. most efficient/effective – way. Experiments in post-war situations are costly and can even have negative effects on trust in the rule of law. Providing guidance in this respect is the underlying aim of this research.

4 The Political Context: Societies in Transition

I do not intend to conduct value-led research, meaning that I do not intend to advocate for the rule of law, or to endorse the idea that international criminal courts and tribunals should have mandates that include the promotion of broader goods beyond the adjudication of crimes. I also do not intend to advertise the ICTY. With this research, I merely intend to test assumptions made about the ICTY and about other international criminal courts and tribunals.

It should be noted, however, that improved rule of law is a declared goal of Bosnia and Herzegovina and Serbia, at least since their accession to the European Convention on Human Rights, and consequently their membership to the Council of Europe, as well as their application to the European Union (EU). Before either of the two countries become a member of the EU, they will still need to go through reforms. Arguably, reforms started right after the wars, which is why both countries have been characterised as 'countries in transition'.

According to Aitchison, Bosnia and Herzegovina has been in transition since 1995. The transition relates to several domains: military, economic, and political.[65] The country went from war to more peaceful political means of resolving social conflict, from a single-party authoritarian regime to multi-party democratic politics, from a socialist economy – with aspects of self-management – to a free market economy and the privatisation of previously publicly-owned assets.[66] Its transition involves significant external intervention, the most tangible being that BiH is still under supervision of the 'international community' through the Office of the High Representative, which oversees the civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina.[67] A wide range of international multilateral and bilateral organisations have been – and remain – active in BiH; the country receives considerable aid from other states, and incentives and thresholds for reform are set by European and international bodies to which BiH seeks admission.[68]

In Serbia, there was less engagement of the 'international community'. In fact, Serbia was rather isolated during the aftermath of the wars, and had to fight its way back to integration with other states. Nevertheless, the breakdown of the communist regime of Milošević did not lead to fully-fledged democratisation. The socialist system was replaced by a hybrid regime, which maintained authoritarian practices behind the facade of democracy. There is no consensus among Serbian scholars on whether the transition away from authoritarianism occurred, and if so, when.[69]

Despite the seemingly unfinished transitions in both countries, Bosnia and Herzegovina and Serbia – which were both still in a state of war when the Tribunal was established in

65 Cf. A. Aitchison (2011). *Making the Transition: International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina*. Cambridge/Antwerp/Portland: Intersentia, p. 60.
66 Cf. Aitchison, 2011, p. 76.
67 Cf. OHR, General Information, http://www.ohr.int/?page_id=1139 (last accessed 01/08/2019).
68 Cf. Aitchison, 2011, p. 60f.
69 Cf. Ostojić, 2014, p. 21.

1993 –[70] are now recognised as being on the way of being stable democratic states.[71] The ICTY's contribution to this process is the topic of this book.

70 A historical introduction into the topic is outside the scope of this book. Those who are interested in the history of the countries concerned, might want to refer to these works: N. Malcolm (1996). *Bosnia: A Short History*. New York: New York University Press; J. K. Cox (2002). *The History of Serbia*. Westport: Greenwood Press; N. Malcolm (2002). *Kosovo: A Short History* (2 ed.). New York: New York University Press. The history of the Yugoslav wars is dealt with here: Carnegie Endowment for International Peace (1996), *Unfinished Peace: Report of the International Commission on the Balkans*, Washington; or T. Schmid (Ed.) (1999). *Krieg im Kosovo*. Reinbek: Rowohlt. History after the war is the subject of these contributions: J. Becker & A. Engelberg (Eds.). (2008). *Serbien nach den Kriegen*. Frankfurt a. M.: Suhrkamp Verlag; and M.-J. Calic (1995). *Krieg und Frieden in Bosnien-Hercegovina*. Berlin: Suhrkamp. This is a book on the dissolution of Yugoslavia, using a lot of evidence obtained through ICTY proceedings: C. Ingrao & T. A. Emmert (Eds.). (2009). *Confronting the Yugoslav Controversies: A Scholars' Initiative*. West Lafayette: Purdue University Press. Introductions into history to the extent that is necessary in order to understand the context in which the ICTY was operating is given here: Waters, 2013, p. 3-33; Michaeli, 2011b, p. 12-28.

71 In its opinion from October 2011 on Serbia's application for membership of the European Union, the European Commission expressed the view that "Serbia has considerably progressed towards fulfilling the political criteria related to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, set by the Copenhagen European Council in 1993, as well as the conditions of the Stabilisation and Association Process", and recommended the Council to grant Serbia the status of candidate country; cf. European Commission (12 October 2011a), *Communication from the Commission to the European Parliament and the Council: Commission Opinion on Serbia's application for membership of the European Union*, COM(2011) 668 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2011/package/sr_rapport_2011_en.pdf (last accessed 01/08/2019), p. 11. This status was granted in March 2012; cf. EU Commission, European Neighbourhood Policy And Enlargement Negotiations: Serbia, https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia_en (last accessed 01/08/2019). With regard to Bosnia and Herzegovina (BiH), the European Commission was more sceptical in its 2018 report on the country's efforts to become eligible for candidate status. Regarding political criteria, the Commission raised doubts, in particular, regarding Bosnia and Herzegovina's electoral framework, the functioning of the tripartite presidency, and its public administration. At the same time, the European Commission acknowledged the progress made in the areas of the judiciary, fight against corruption and organised crime, and human rights; cf. European Commission (17 April 2018), *Commission Staff Working Document: Bosnia and Herzegovina 2018 Report*, SWD(2018) 155 final, Strasbourg, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf (last accessed 01/08/2019), p. 2f. Also the Global State of Democracy Indices (data from 2018) or the World Justice Project Rule of Law Index (data from 2019) attest Serbia and BiH midrange democracy and rule of law scores; cf. International IDEA (Institute for Democracy and Electoral Assistance), *The Global State of Democracy Indices, Bosnia and Herzegovina 2018*, https://www.idea.int/gsod-indices/sites/default/files/profile-pdfs/2018/country/bosnia-and-herzegovina.pdf (last accessed 01/08/2019) and International IDEA (Institute for Democracy and Electoral Assistance), *The Global State of Democracy Indices, Serbia 2018*, https://www.idea.int/gsod-indices/sites/default/files/profile-pdfs/2018/country/serbia.pdf (last accessed 01/08/2019); or World Justice Project (2019), *Rule of Law Index 2019*, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf (last accessed 01/08/2019), p. 49 (BiH) and p. 130 (Serbia).

5 Terminology

Language can be a complex matter when researching or writing about the countries of the former Yugoslavia, where a war fought along ethnic lines dissolved a country, and where the way you spell or pronounce a word immediately reveals on which side you supposedly stand, where it matters whether you say "Kosovo" or "Kosovo and Metohija", and where you are corrected by the Bosnian Croats when not referring to "Bosnia and Herzegovina" – even though for Bosniaks, it is customary to use the short version "Bosnia". A few words on the terminology used throughout this book are therefore warranted.

As a preliminary remark, I am not on anyone's side and this book does not seek to interpret different ethnic or national truths. I studied the Yugoslav language – which is now Bosnian/Croatian/Montenegrin/Serbian[72] – in Serbia, and was taught by Serbian teachers. Throughout this book, I – like many others – refer to this language as Bosnian/Croatian/Serbian, or in short: BCS. When speaking the language, I use the Serbian pronunciation, except when in Bosnia and Herzegovina, and if I happen to know of a particular difference in vocabulary or pronunciation. I can write both. When I conducted interviews in Serbia and Bosnia and Herzegovina, I did not get the impression that my way of speaking had any impact on my research – my interview partners could understand me, and I could understand them. I also never had any bad experiences as a result of my language use.[73]

When it comes to places, I refer to:

- Bosnia and Herzegovina, or in short: BiH. BiH is the short version for "*Bosna i Hercegovina*" in BCS.
- Serbia, which refers to the Republic of Serbia as it exists today, or its predecessors, i.e. from 2003 to 2006: the State Union of Serbia and Montenegro, and from 1992 to 2003: the Federal Republic of Yugoslavia, which was a federation constituted of Serbia and Montenegro. Although until 2006, Montenegro, and until 2008, Kosovo, were still part

72 The ICTY itself treats these as the same language. On the need to take into consideration different language variants when adjudicating ethnic crimes, see: B. Fidahić (2018). *Linguistic justice: Translation and interpretation at the International Criminal Tribunal for the former Yugoslavia.* (Doctoral thesis), Maastricht University, Maastricht.

73 The only two slightly awkward examples are the ones mentioned above: I was once corrected by a Bosnian Croat for speaking of "*Bosna*", instead of "*Bosna i Hercegovina*" (i.e. of "Bosnia", instead of "Bosnia and Herzegovina"), which must be understood because the Herzegovina is the part of the country where the Bosnian Croats are the majority. He explained to me that to him, it was very important that in the name of the country, the Bosnian Croats are not forgotten. The other example is a bit more delicate, as "Kosovo" is the name of a country, while "Kosovo and Metohija" is the name of a province which belongs to Serbia. In Serbia, people would therefore speak of "*Kosovo i Metohija*" and mean a part of their country. In Kosovo, people speak of "*Kosova*" (in Albanian).

of "Serbia", I only examine developments strictly in Serbia. I leave out developments that happened on Montenegrin and Kosovo territory.
- Yugoslavia, which means the Socialist Federal Republic of Yugoslavia (SFRY), one out of the six socialist republics Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, as well as the two autonomous provinces within Serbia: Kosovo and Vojvodina. It existed between 1945 and 1992, while between 1945 and 1963, it was called the Federal People's Republic of Yugoslavia.
- Kosovo, which refers to the Republic of Kosovo as an independent country since 2008.[74]

When it comes to people, I refer to:
- Serbian(s) as the citizens of Serbia.
- Bosnian(s) as the citizens of Bosnia and Herzegovina, including all ethnic groups, the main ones being Bosniaks (also referred to as Bosnian Muslims), Bosnian Serbs, and Bosnian Croats.
- When speaking of ethnic groups, I refer to "Serbs" (generally meaning Serbian Serbs and Bosnian Serbs), or "Croats" (generally meaning Croatian Croats and Bosnian Croats).[75]

When speaking of the ICTY, I only refer to the ICTY and do not include its follow-up court – the United Nations International Residual Mechanism for Criminal Tribunals (MICT). All remaining retrials and appeals, as well as all requests for early release or access to evidence that are yet to come, are handled by the MICT. While the MICT can be viewed as a fully-fledged court, it only responds to requests, rather than initiating new proceedings, and it convenes chambers only when there is need. In that sense, the MICT also only continues those ICTY initiatives that are geared towards supporting domestic judiciaries in the countries of the former Yugoslavia that are absolutely necessary. However, the MICT's activities are outside the scope of this research.

74 I hereby follow the policy of my own, the German, government, which recognises the Republic of Kosovo since February 2008 (cf. Deutsche Botschaft Pristina, Kosovo: Beziehungen zu Deutschland, 30 April 2019, https://pristina.diplo.de/xk-de/themen/willkommen/laenderinfos/bilaterale-beziehungen (last accessed 01/08/2019)). That Kosovo's declaration of independence did not violate international law was also confirmed by the International Court of Justice in 2010; cf. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf (last accessed 01/08/2019), para. 122.

75 Bosnian Serbs live, by majority, in the Republika Srpska (Serb Republic) of Bosnia and Herzegovina, while Bosnian Croats live, by majority, in Herzegovina, which is part of the Federation of Bosnia and Herzegovina. Bosnia and Herzegovina is made up out of two entities – the Federation of BiH and Republika Srpska of BiH – and the autonomous district of Brčko.

When speaking of the "ICTY" or "Tribunal", I allude to all its organs (Chambers, Office of the Prosecutor, Registry)[76], unless I specifically refer to one of its organs. People in the countries of the former Yugoslavia refer to the ICTY as the "Hague Tribunal" ("*Haški tribunal*").

Lastly, the international crimes – war crimes, crimes against humanity, genocide, and aggression – are summarised under the generic term "war crimes". In doing so, I follow the general trend in the countries of the former Yugoslavia, where, for the purpose of simplification, international crimes are referred to as "*ratni zločini*" (literally only meaning "war crimes"). Only when referring to a specific crime, I use the term of that crime. Likewise, in the region, one would speak of "*sud za ratne zločine*" when referring to a court that adjudicates international crimes. I therefore also speak of "war crimes courts", when I mean specialised courts that deal with the crimes committed during violent conflict.

6 Epilogue

On 21 December 2017, the International Criminal Tribunal for the former Yugoslavia closed its doors for good. It is unlikely that the world will see a similar court in the future, seeing as the circumstances under which it was established, its resources and powers, as well as its successes, were so unique.

It is nevertheless worth researching the Tribunal. Its contributions to the development of international law have been extensively analysed. There is, however, still little research on its broader effects – effects that go beyond the evolution of the legal doctrine, or beyond 'merely' holding perpetrators of crimes accountable. Effects that were perhaps unforeseen and presumably unintended (at first).

This research was mainly conducted during the last years of the ICTY's existence – arguably the best time to make a first account of the Tribunal's impact on Bosnia and Herzegovina and Serbia. As explained above, the effects of transitional justice mechanisms need to be studied in the long term. Now that the ICTY is closed, its performance can no longer change, its activities can no longer add anything. The only thing that can – and will – change are the perceptions of the Tribunal and its long-term role in the domestic societies of the countries under its jurisdiction. My study therefore serves as a starting point for research on the ICTY's long-term impact. At the same time, on a practical level, during its last years, the institutional know-how was still present in The Hague, and I was able to interview many representatives of the Tribunal with inside knowledge.

76 The ICTY's website lists the Chambers, the Office of the Prosecutor, and the Registry as ICTY organs: ICTY, Organisational Chart, http://www.icty.org/en/about/tribunal/organisational-chart (last accessed 01/08/2019).

My research focusses on the ICTY's impact on the rule of law. I thereby study the unintended side effects of an international judicial institution on specific parts of a domestic legal system. The ultimate goal is to provide those who set up courts such as the ICTY with insights on what matters when broader effects *are* intended. Or to warn those who wish to avoid certain effects.[77]

77 Recommendations in this respect are spelled out in Chapter 10, section 2.2.

Part I
Conceptual, Theoretical, and Methodological Framework

2 The Rule of Law in Transitional Justice

The rule of law – a political ideal, legal institution, centrepiece of any viable political system, current reality, or a distant aspiration.[78] What is the rule of law?

Since the collapse of the bipolar system in the 1990s, the rule of law seems to be "*the* preeminent legitimating political ideal in the world"[79]. It is described as "good for everyone"[80], as an "elixir"[81], which caused, supported, and endorsed transitions, whether of institutional, structural, or economic nature.[82] The notion of the rule of law is associated with stronger economies, safer societies, open and predictable politics,[83] or freedom under the law, as well as with the preservation of order.[84]

Adhering to the rule of law is globally accepted as a measure of governmental legitimacy.[85] According to leading rule of law scholar Brian Tamanaha, in "Western States"[86], this belief epitomises an "orthodoxy". Although support for the rule of law is not exclusive to the 'West':[87] it has been endorsed by the heads of government of many societies, cultures, and economic and political systems around the world; also by those rejecting democracy and individual rights, some of which disapprove of capitalism, and many of which oppose liberalism and are explicitly anti-'Western'.[88] Motives for promoting the rule of law do indeed differ: conservatives see it as a desirable development objective, as the concept entails elements that they specifically value, such as property rights, fair treatment of investors, a strong police force, or a general emphasis on law and order. Those on the left instead focus on rights and on fair and equal treatment for all, which helps alleviate disadvantaged people and empower citizens generally. Centrists see the rule of law as a

78 Cf. R. Mani (1998). Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies. *International Peacekeeping, 5*(3), 1–25, p. 8.

79 B. Z. Tamanaha (2004). *On the Rule of Law – History, Politics, Theory*. Cambridge: Cambridge University Press, p. 4, emphasis in original.

80 Tamanaha, 2004, p. 1.

81 T. Carothers (2009). Rule of Law Temptations. *The Fletcher Forum of World Affairs, 33*(1), 49-61, p. 49.

82 Cf. Carothers, 2009, p. 49.

83 Cf. R. E. Carlin (2012). Rule-of-Law Typologies in Contemporary Societies. *Justice Systems Journal, 33*(2), 154-173, p. 169.

84 Tamanaha, 2004, p. 2f.

85 Cf. Tamanaha, 2004, p. 4; Carothers, 2009, p. 50; J. Møller & S. E. Skaaning (2012). Systematizing Thin and Thick Conceptions of the Rule of Law. *Justice Systems Journal, 33*(2), 136-152, p. 136; and B. Z. Tamanaha (2001). *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, p. 98.

86 Without specifying what exactly that term means: Tamanaha, 2004, p. 1.

87 See for a similar view: R. Grote (1999). Rule of Law, Rechtsstaat and "Etat de droit". In C. Starck (Ed.), *Constitutionalism, Universalism and Democracy: a comparative analysis* (p. 269-306). Baden-Baden: Nomos, p. 270.

88 Cf. Tamanaha, 2004, p. 2.

technocratic ideal that encompasses key elements that contribute to good governance, such as governmental accountability, transparency, and anti-corruption.[89] Needless to say that affirmations in favour of the rule of law do not always translate into real action,[90] although the restoration of the rule of law is often a key element in electoral campaigns, especially with regard to the fight against corruption.[91]

Despite this seemingly overwhelming agreement on the rule of law as a political ideal that needs to be achieved,[92] very few practitioners[93] have expressed precisely what it means to them.[94] Even if its advocates support the assumption that individuals are better off when they can resort to rules and institutions that safeguard these rules, rather than having to rely on transitory personal relations and situations,[95] there is no common understanding regarding the content of the rule of law.[96] Scholars of almost all social sciences – philosophy, politics, law, economics, sociology, history, cultural science – have attempted to fill this gap, resulting in a large amount of literature on the subject, which is impossible to review in its entirety.

The task of defining the rule of law in the context of transitional justice is arguably an even more difficult endeavour.[97] Of course, not everyone will agree that there are indeed different views as to what the rule of law means for stable democracies on the one hand, and societies transitioning from war to peace on the other hand. Those who do agree will need to justify their stance, and subsequently find a conception of the rule of law that acknowledges the peculiar context of transition. This requires identifying tangible aspects of the blurred philosophical concept of transitional justice, and analysing them in light of another blurred concept: the rule of law. Not many authors have embarked on this adventure and many of those who did, remained either too vague, were too precise, or proposed something too general to actually be applicable, or too specific to be applicable in more than one context. More contributions in this area would therefore be welcomed.

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89 Cf. Carothers, 2009, p. 52.

90 Cf. R. Sarsfield (2010). What is the Rule of Law (And Is Not)? *SSRN Working Paper Series*. Retrieved from https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1667682_code1170442.pdf?abstractid=1667682&mirid=1, p. 3.

91 Cf. Carothers, 2009, p. 52.

92 Cf. P. McAuliffe (2013). *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*. London/New York: Routledge.

93 Meaning political, economic, social, cultural, religious leaders.

94 Cf. Møller & Skaaning, 2012, p. 136; D. S. Caudill (1981-1982). The Rechtsstaat: Magic Wall or Material Necessity. *Houston Journal of International Law, 4*(2), 169-188, p. 169; Tamanaha, 2004, p. 3f.; or United Nations Secretary General, 23 August 2004, p. 4.

95 Cf. Kirchheimer, The Rechtsstaat as Magic Wall, in The Critical Spirit, at 429, quoted in: Caudill, 1981-1982, p. 179.

96 Cf. Møller & Skaaning, 2012, p. 136; Caudill, 1981-1982, p. 169; or Tamanaha, 2004, p. 3f.

97 Cf. V. L. Taylor (2009). Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter). *Hague Journal on the Rule of Law, 1*(1), 46-52, p. 46.

In contrast, when it comes to identifying the rule of law in the transitional justice context, an "I know it when I see it" approach is enjoying great popularity among transitional justice practitioners and scholars –[98] and the "And I certainly know when I *don't* see it" even more so. This approach is acceptable in the context of a theoretical debate, but unhelpful when translating conceptions into policy decisions.[99]

In this Chapter, I attempt to go beyond the "I know it when I see it approach", and to propose a conception of the rule of law in a transitional justice context. This is the first step in developing a framework for analysing the impact of the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) on Bosnia and Herzegovina and Serbia, which were both still in a state of war when the Tribunal was established in 1993, and are now recognised as being on their way to becoming stable democratic states.[100] This first step remains abstract. In a next step (Chapter 3), an impact theory will be developed that will clarify the possible areas of the rule of law on which an international criminal tribunal can potentially have an impact. In Chapter 4, a more tangible rule of law conception will be proposed, which will then also serve as the framework for assessing the ICTY's impact throughout this book.

After an introduction of the origins of the rule of law in the first section, and a presentation of existing ordinary rule of law conceptions in section 2, in the third section, it will be argued that the rule of law in transitional justice contexts is inherently different from ordinary rule of law. Drawing conclusions from the nature of such a context – which is typically characterised by destruction of the political and legal system that needs to be rebuilt – and from the role of structuring the transition that the law plays in such contexts, two main characteristics of the rule of law will be distilled: firstly, the rule of law needs to develop a response to the conflict situation that was in place before the transition, typically marked by heinous injustice. Secondly, depending on the scope of destruction, the political and legal system, including the legal culture, will need to be re-established step by step. A rule of law conception formulated specifically for times of transition can therefore only be an interim compromise that will, in the long run, lead to ordinary rule of law. Hence, such a conception will be only provisional, meant to be enriched with continually raising standards. Therefore, this conception of the rule of law will be named the 'transitional rule of law'.

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98 Cf. S. Beaulac (2012). Lost in Transition? Domestic Courts, International Law and Rule of Law *'A la Carte'*. In E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (Eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (p. 17-34). Cambridge: Intersentia, p. 25. The phrase was first used by Martin Krygier, criticising E. P. Thompson; cf. M. Krygier (2004). False Dichotomies, True Perplexities, and the Rule of Law. In A. Sajó (Ed.), *Human Rights with Modesty: The Problem of Universalism* (p. 251-277). Leiden & Boston: Martinus Nijhoff.

99 Cf. J. E. Stromseth, D. Wippman & R. Brooks (2006). *Can Might Make Rights? Building the Rule of Law after Military Interventions*. Cambridge, p. 56f.

100 See section 4 of Chapter 1.

After analysing which purposes the transitional rule of law will serve, in order to better understand its function in transitions, the conceptualisation will be developed. Based on existing contributions on the rule of law in transitional justice, this research will put forward the notion that each conception consists of two pillars: the first pillar refers to the necessity for each conception to depict a normative, institutional, and cultural component in order to function effectively. The second pillar reflects the fact that the transitional rule of law is a comprehensive principle, as it encompasses the whole of a society, meaning the executive, legislature, judiciary and the civil society.

This Chapter will be concluded by sketching the content of a definition of the transitional rule of law by suggesting minimum normative standards that should be enshrined in the law, as well as principles that each of the above-named actors (executive, legislature, judiciary, civil society) need to comply with in both institutional and cultural terms. Thereby, a comprehensive conception will emerge that is carried by the two pillars described and that reflects the two main characteristics that stem from a transitional justice context.

1 A Short History of the Rule of Law

1.1 Ancient Roots, the Medieval Period, and Liberalism

While it is still being debated what constitutes the rule of law, the first evidence of a normative discussion on the rule of law originates from ancient Athens and dates back to the sixth and fifth centuries before Christ and later. For the ancient Greeks – among them Aristotle and Plato – the rule of law served as a protection mechanism against arbitrary rule and popular tyranny, by providing safeguards such as courts and assemblies acting as guardians of the law, restrictions that prevented people from modifying existing laws, or consistency assessments for new laws against existing laws. Laws needed to be written down, accessible and stable, which included the view that retrospective and arbitrary laws were illegitimate. The rulers and those ruled should be subject to the same laws, which should be fair, just and equitable between parties.[101] With this understanding, the principle of 'popular sovereignty' was subordinated to the principle of 'sovereignty of the law', reconciling the rule of law with democracy.[102]

101 Cf. C. May (2012). The Rule of Law: Athenian Antecedents to Contemporary Debates. *Hague Journal on the Rule of Law, 4*(2), 235-251, p. 246.

102 Cf. Tamanaha, 2004, p. 8; C. May, 2012, p. 241.

As citizens were free to operate as they pleased outside what the law prohibited, the Athenians achieved a form of "liberty under the law"[103]. Although their influence must be questioned, as ancient Greek views were lost for many centuries while (legal) history continued to be written, and its normative elements were developed using different intellectual resources, the ancient ideas nevertheless show that the views on the rule of law are not recent introductions to political considerations of the law.[104]

The Roman contribution introduced the notion of natural law into the debate regarding the rule of law: in Cicero's view, the law should be for the good of the community, it should also be just and safeguard the happiness and safety of its citizens. He asserted that the supreme status of laws hinged on their consistency with natural law, which he believed to be the rule of reason, and to stand above all positive law and all human conduct. Law therefore meant drawing a distinction between unjust and just, formulated in accordance with nature. Harmful or unjust rules did not qualify as 'law' and hence were not supreme. The most educated and wise citizens ought to hold the power to rule, as they are the ones who can discern the requirements of the natural law.[105]

In medieval times, the principle foundation on which political theory was built was the principle of the supremacy of law. It came about in several ways that were intertwined and influenced one another: by monarchs taking oaths to abide by divine, natural, customary, and positive laws; by a pervasively shared understanding that everyone – kings included – operated within a framework of such laws; by Romanic, Germanic, and Christian ideals that good kings abide by the law; by kings entering into agreements (voluntarily or under duress) to accord to others protections against ordinary legal processes; by others having an interest in tethering kings within legal restraints; and by monarchs recognising that they obtained legitimacy by claiming to be bound by – and to be acting consistent with – the law.[106]

Nowadays, the rule of law is strongly associated with and understood in terms of the political idea of liberalism. Notwithstanding the variety and complexity of notions of liberalism, they all reserve a place for the rule of law.[107] Four types of liberty, linking liberalism to the rule of law, can be distinguished: first, within 'political liberty', freedom is to obey a law one prescribes to oneself. It refers to two elements: Jean-Jacques Rousseau's notion that "a people, since it is subject to laws, ought to be the author of them" (now also understood as democracy or democratic participation), and the fact that citizens wouldn't

103 Tamanaha, 2004, p. 11.
104 Cf. C. May, 2012, p. 246.
105 Cf. Tamanaha, 2004, p. 11.
106 Cf. Tamanaha, 2004, p. 27.
107 Cf. Tamanaha, 2004, p. 32; similar: S. Hobe (1999). Constitutions and Corruption. In C. Starck (Ed.), *Constitutionalism, Universalism and Democracy: a comparative analysis* (p. 227-237). Baden-Baden: Nomos, p. 232.

enact laws to oppress themselves. Their power to make laws is therefore the best way to protect themselves.[108] Second, the freedom of the individual, being guaranteed to the extent that government officials are required to act in accordance with pre-existing law, is described as 'legal liberty'. It goes back to Montesquieu.[109] This form of protection from arbitrariness entails that laws be declared publicly in clear terms in advance, be applied equally, and be interpreted and applied with certainty and reliability. Third, within the understanding of 'personal liberty', an individual is free insofar as the government is restricted from infringing upon an inviolable realm of personal autonomy, i.e. civil rights or liberties formulated in bills of rights or human rights declarations. These rights or liberties, which can be substantive or procedural, represent the minimum degree of autonomy that individuals retain – even after they consent to live under the rule of law. The fourth concept, 'institutionalised preservation of liberty', refers to a separation of powers, which prevents the accumulation of total power in one single institution, enhancing the likelihood of securing liberty for all citizens.[110] Modern liberal democracies offer the right combination of these four liberties, although the four liberties don't necessarily always come together.[111]

Locke (in *Second Treatise of Government* of 1690), Montesquieu (in *Spirit of the Laws* of 1748) and Hamilton, Madison, and Jay (in *The Federalist Papers* of 1787/1788), cemented the integral place of the rule of law in liberal systems.[112] In their theories, elements such as the separation of powers (Locke, Montesquieu, the Federalist Papers), in particular, with a strong and independent judiciary (Montesquieu), that, among others, reviews laws (Federalist Papers), but also accompanied by a certain legal culture among the people (Montesquieu), figure prominently. Most importantly, this allows citizens to do whatever is permitted under the law, and prevents arbitrary actions of the government. The Bill of Rights, later inserted into the United States (US) Constitution, also guaranteed certain individual rights.[113]

Today, elements such as a written constitution, democratic elections, explicitly articulated individual rights, the separation of powers, and a judicial review of legislation, are thought to be essential for liberalism and the rule of law. In modern liberal democracies, the binding constitution replaces the role formerly fulfilled – during the classical Greek and Roman or the medieval periods – by divine or natural law. Divine or natural law

108 Cf. Tamanaha, 2004, p. 34.
109 Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, cf. Hobe, 1999, p. 232.
110 Cf. Tamanaha, 2004, p. 35.
111 Cf. Tamanaha, 2004, p. 36f.
112 Cf. Tamanaha, 2004, p. 47.
113 Cf. Tamanaha, 2004, p. 48ff.; Grote, 1999, p. 277.

formerly provided legal constraints on the sovereign, as the same way a constitution now provides a framework for each new law – with the constitution being difficult to amend.[114]

1.2 *Which* Essentialia *Can Be Distilled for a Modern Rule of Law Conception?*

The ideas associated with the rule of law are very old and date back to Plato and Aristotle. However, the emergence of the rule of law as a "mighty discursive tool within political and legal circles"[115] is relatively recent.[116] The expression itself was coined by 19th century author Dicey.[117]

The very purpose of the rule of law has always been the preservation of order through the prevention of arbitrariness.[118] This element dates back to Aristotle and the ancient Greeks, and comes back in different 'disguises' throughout legal history. Liberalists simply call it 'liberty' (under the law), meaning to be free to do whatever is not prohibited (by law) and not to be hindered by (arbitrary) governmental activity. The views on what qualifies as law differ from Plato who advocated for a consensus requirement, to Cicero stating that law is law when it is in accordance with natural law, and Aquinas similarly asserting that only 'just' law is 'law', and back to liberalist representatives who join Plato in saying that law is what has been decided by the people to be law, thereby hinting at democratic procedures.

Since the medieval period, there seems to be agreement over the question as to whether those in power will be restricted: while the Roman emperors were not at all, Aquinas introduced the notion that even if the lawmaker could logically not be bound by the positive law that s/he him/herself made, they were at least subjected to divine and natural law. And so were the oath-giving kings in the Medieval Age. Later, positive law was added to that

114 Cf. Tamanaha, 2004, p. 54ff.; England, for most of its history, had no written constitution, no explicit bill of individual rights, and no judicial review. Law was found, not made, being the product of custom from time immemorial, emanation from the culture or nation, "reflecting a widely shared conviction that it was the highest expression of natural reason developed and expounded by the collective wisdom of many generations" (Grote, 1999, p. 274), and represented the working out of legal principles through the application of reason by judges; cf. Møller & Skaaning, 2012, p. 140. A slight shift was only brought about with the Enlightenment: since then, law is seen as a product of the sovereign legislative will – law is made, not found. By parliamentary sovereignty, any part of the common law could be altered by ordinary legislation. For many, common law systems can still adhere to the rule of law, despite the absence of formal limits, as the crucial point remains that even the unlimited law-maker is hemmed by a legal framework that cannot be violated or easily altered. What matters is not whether these limits are legal, constitutional or moral – but their effectiveness; cf. Tamanaha, 2004, p. 56ff.

115 Beaulac, 2012, p. 26.

116 Cf. Beaulac, 2012, p. 26.

117 In: A. V. Dicey (1885). *Introduction to the Study of the Law of the Consitution*. London: Macmillan.

118 See also: Beaulac, 2012, p. 26.

list. Nowadays, the notion that those in power (whether executive, legislature, judicial or other) are subject to the law, is the very core of the rule of law theory. This relates to the principle of equality before the law; another essential concept specifying that everyone, whatever be his/her rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals.[119]

Factors that prevent arbitrariness, i.e. the essential substance of rule of law theories, range from informing citizens of the existing laws by making them accessible (Aristotle), to formulating basic procedural characteristics of laws (Ancient Greece), to first notions of due process (Magna Charta) and making the law hard to change (Germanic customary law or the *Federalist Papers* protecting law through a constitution), or requirements regarding the separation of powers (liberalism, notably Locke and Montesquieu).

Some liberal theorists have also advocated for a more substantive protection from arbitrariness, namely by protecting personal liberty through fundamental rights and freedoms.[120] This is, however, a relatively new notion, rarely found in earlier history of the rule of law.

Plato was the first to stress the importance of citizens being educated or socialised in a culture of law. Since then, this has been one of the main requirements for the rule of law to function properly.

All these elements have found their way into current, partly competing, theories on the rule of law. The following pages will briefly present these theories.

2 Formal Versus Substantive Conceptions of the Rule of Law

In the literature, a distinguishment is made between formal (or 'minimalist')[121] and substantive (or 'maximalist') theories on the rule of law.[122] Formal theories focus on the sources and form of legality:[123] the manner in which the law was made and promulgated, as well as its essential attributes, such as the clarity of the ensuing norm, and the temporal dimension of the enacted norm.[124] They do not give judgment on the content of the law,[125]

119 Cf. Beaulac, 2012, p. 26.

120 See also: Beaulac, 2012, p. 26.

121 Also "instrumental"; cf. R. Barros (2003). Dictartrship and the Rule of Law: Rules and Military Power in Pinochet's Chile. In J. M. Maravall & A. Przeworski (Eds.), *Democracy and the Rule of Law* (p. 188-219). Cambridge: Cambridge University Press, p. 188.

122 For a fundamental critique, see: L. McDonald (2001). Positivism and the Formal Rule of Law: Questioning the Connection. *Australian Journal of Legal Philosophy, 26*, 93-126.

123 Cf. Tamanaha, 2004, p. 92.

124 Cf. P. P. Craig (1997). Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework. *Public Law*, 467-487; and P. P. Craig (2003). Constitutional Foundations, the Rule of Law and Supremacy. *Public Law, 1*, 92-111.

125 Cf. Craig, 1997, p. 467.

whereas substantive theories also include requirements about the content of the law that must comport with certain individual rights, justice, or moral principles.[126]

The definitional controversy is attributable to the centuries-old dichotomy in legal philosophy between the traditions of natural law and positive law: natural lawyers hold that law must be moral, and that unjust law simply is not law. Legal positivists stress the source and formal criteria, asserting that immoral or bad law is nevertheless law, as long as it fulfils the established criteria of legality.[127]

2.1 Formal Conceptions of the Rule of Law

The rule of law in the minimal sense is understood as a "magic wall"[128] separating individual freedom from arbitrary government action,[129] and therefore also as a means of protection from the arbitrariness or rule by man, and from the abuse of power by the state.[130] It concerns the mode of government rather than its substance.[131] The main purpose is to subject human conduct to rules, thereby affording predictability in legal relationships and in the interactions that occur within the framework of law.[132] The main representatives of this notion of the rule of law are Fuller,[133] Finnis,[134] and Raz.[135]

Tamanaha distinguishes between three different theories that all fall under the minimalist or formal conceptions of the rule of law: first, the rule by law conception, which entails the single requirement that law be the instrument of government action. It is the minimalist version of the rule of law *par excellence*.[136] Rule *by* law, meaning that the government is legally limited,[137] is the *sine qua non* of the rule of law tradition.[138] Although, according to Lord Bingham, the rule by law is the "core" of the existing principle of the rule of law,[139] among scholars, this notion has been largely rejected as too thin.[140] A radical

126 Cf. Tamanaha, 2004, p. 92; and Craig, 1997, p. 467.
127 Cf. Mani, 1998, p. 8.
128 Kirchheimer, *The Rechtsstaat as Magic Wall*, referred to in: Caudill, 1981-1982, p. 170.
129 Cf. Caudill, 1981-1982, p. 170.
130 Cf. Mani, 1998, p. 8f.; similar: M. Bergman (2012). The Rule, the Law, and the Rule of Law: Improving Measurements and Content Validity. *The Justice System Journal, 33*(2), 174-193, p. 174; or Møller & Skaaning, 2012, p. 140.
131 Cf. R. S. Summers (1992). The Formal Character of Law. *The Cambridge Law Journal, 51*(2), 242-262, p. 257.
132 Cf. Mani, 1998, p. 8f.
133 L. Fuller (1969). *The Morality of Law*. New Haven: Yale University Press.
134 J. Finnis (1980). *Natural Law and Natural Rights*. Oxford: Clarendon Press.
135 J. Raz (1977). The Rule of Law and its Virtue. *Law Quarterly Review, 93*, 195-211.
136 Cf. Møller & Skaaning, 2012, p. 139.
137 Cf. Hobe, 1999, p. 231.
138 Cf. Tamanaha, 2004, p. 92.
139 Cf. Lord Bingham (2007). The Rule of Law. *Cambridge Law Journal, 66*(1), 66–85, p. 69.
140 See for example: J. Jowell (2012). The Rule of Law: Rhetoric or Universal Principle. *Asia Pacific Law Review, 20*(1), 3-16, p. 13f.; or Craig, 1997, p. 469.

version of this understanding is that all utterances of the sovereign are law, solely due to the fact that they are utterances of the sovereign. The rule of law thereby loses its meaning, as it becomes 'rule by government' – if the government is, by definition, government authorised by law, the concept becomes an empty tautology, not a political ideal. *De jure*, virtually all modern states abide by the rule of law in this sense.[141]

Second, the conception of formal legality sets out formal characteristics of the law. The two main representatives of this line of thought – Dicey and von Hayek – were mostly concerned with arbitrary actions of the government.[142] Countering arbitrariness, the rule of law understood as formal legality, furthers individual autonomy and dignity, by allowing people to plan with fair certainty their activities with advance knowledge of their potential legal implications –[143] which is clearly impossible if power is exerted through context-specific *ad hoc* decisions by an administrative apparatus. In the tradition of Montesquieu's conception of liberty, under the law people are free to do what the law permits.[144] Law must thus be capable of guiding the behaviour of its subjects, and therefore be public, general, clear and certain, prospective and relatively stable.[145] By 'generality', Hayek means that the law must be set out in advance in abstract terms not aimed at any particular individual, and consequently applied to everyone whose conduct falls within the scope of application. The certainty requirement implies that those who are subject to the law must be able to predict reliably, which legal rules will govern their conduct, and how these will be interpreted and applied.[146] Fuller, a legal theorist, added that rules and the actual conduct of legal actors must be consistent, and that contradictions and retroactivity, as well as 'requiring the impossible', will be prohibited.[147] In order to guarantee these formal characteristics of laws, the powers need to be separated:[148] only a separation of the legislature from the judiciary can guarantee that laws be set out in abstract terms in advance of their application to any particular individual.[149] The judiciary, and more specifically, ordinary courts, are the sole appropriate institutions to decide upon possible restrictions on the individual's liberty.[150] Furthermore, this judiciary must be independent, accessible to all, provide for open and fair hearings without bias, exercise reviews of legislative and

141 Cf. Møller & Skaaning, 2012, p. 139; Tamanaha, 2004, p. 92; similar: McAuliffe, 2013, p. 42.
142 Cf. Caudill, 1981-1982, p. 174; Tamanaha, 2004, p. 65.
143 Cf. J. Raz (1979). *The authority of law: Essays on law and morality*. Oxford: Oxford University Press, p. 214; Tamanaha, 2004, p. 65f.; also similar: M. J. Radin (1989). Reconsidering the Rule of Law. *Boston University Law Review, 69*(4), 781-819, p. 795.
144 Cf. Tamanaha, 2004, p. 94.
145 Cf. for instance Møller & Skaaning, 2012, p. 139; see also: Bergman, 2012, p. 175.
146 Cf. Tamanaha, 2004, p. 66 and 93.
147 Cf. Tamanaha, 2004, p. 93.
148 Cf. Bergman, 2012, p. 174.
149 Cf. Tamanaha, 2004, p. 66; see also the fourth element of liberalist theory, the institutionalised preservation of liberty (section 1.1 above).
150 Cf. Tamanaha, 2004, p. 63f.

administrative officials, and set limitations on the discretion of the executive.[151] States that are unable to provide for these supporting mechanisms – weak states – fail to deliver rule of law.[152] The main criticism of the formal legality conception of the rule of law is that it is compatible with a wide variety of political systems besides liberal democracy,[153] including ruthless authoritarian regimes;[154] due to the absence of criteria of the good or just with respect to the content of the law,[155] a government can do as it pleases, so long as it is able to abide by the legal form.[156]

In order to avoid these shortcomings, the notion of democracy, understood in a narrow sense as an agreement on procedures regarding how to determine the law as a competitive struggle for people's vote,[157] has been added to formal legality in the third formal conception of the rule of law (the conception of legality and democracy). This concept goes back to the philosophical thoughts of Habermas, who asserts that, given the contemporary loss of faith in natural law and moral pluralism, legitimacy of the positive law is conceived as procedural rationality. In the absence of higher standards against which to judge the moral rightness of the law, justice of the law is guaranteed by the particular procedure by which it comes about: law is good, if it is made by way of good procedures. For Habermas, this meant that anyone affected by the law must have an equal opportunity to participate in the law-making process, which is based upon the strive for consent.[158] Consent will determine the content of the law.[159] Indicators for a democratic system are free elections and the effective power to govern.[160] The problem is, that even where democracy as a procedural mode of legitimation for law is implemented, the core of the limitation of the formal legality concept remains;[161] even systems that use democratic procedures to determine the content of the law can produce 'evil laws'.[162]

151 Cf. Tamanaha, 2004, p. 93; and Craig, 1997, p. 469.
152 Cf. Bergman, 2012, p. 174.
153 Cf. Mani, 1998, p. 9.
154 One example would be Chile under the dictator Augusto Pinochet; cf. Tamanaha, 2004, p. 95. For a detailed examination of the military dictatorship in Chile from 1973 till 1990 that shows that the rule of law was operative within the regime, see: Barros, 2003. See also: D. H. Cole (2001). 'An Unqualified Human Good': E.P. Thompson and the Rule of Law. *Journal of Law and Society, 28*(2), 117-203, p. 187.
155 Cf. Tamanaha, 2004, p. 93.
156 Cf. Tamanaha, 2004, p. 96.
157 Cf. Møller & Skaaning, 2012, p. 140.
158 J. Habermas (1996). *Beyond Facts and Norms*. Cambridge: MIT Press, referred to in: Tamanaha, 2004, p. 99f.
159 Cf. Tamanaha, 2004, p. 91; for a similar typology see: Møller & Skaaning, 2012, p. 150.
160 Cf. Møller & Skaaning, 2012, p. 148.
161 Cf. Møller & Skaaning, 2012, p. 141.
162 Cf. Tamanaha, 2004, p. 100.

2.2 Substantive Conceptions of the Rule of Law

The rule of law in the maximalist sense serves as a "chapeau", encompassing structural, procedural as well as substantive elements. It understands the minimalist conception as the necessary starting point, but sees it as incomplete,[163] and adds certain substantive rights that are based on, and derive from, the rule of law,[164] which are then used to distinguish good laws – which comply with those rights – from bad ones – which do not.[165] The main promoters of a substantive rule of law conception are Sunstein,[166] Shklar,[167] and Lord Bingham.[168]

Again, Tamanaha distinguishes between several different conceptions that have been established in the literature. First, the individual rights conception is based on the understanding of the rule of law as limiting the government, with the purpose of restraining tyranny and not for granting individual liberty. It consists of two elements: firstly, the notion that the government must abide by the existing law, and secondly, that it is not entirely free to change it.[169] Formerly, this boundary was established through divine, natural or customary law (which is still the case in some countries), for instance in countries where the Sharia is part of the adjudicated law). Nowadays, human rights mostly constitute the legal limits for changes of the positive law.[170] This understanding of the rule of law recognises a moral component and incorporates a role for justice: the rule of law is where justice is understood, first and foremost, though not exclusively, as the realisation of human rights.[171] According to one of the main representatives of the individual rights conception, Dworkin, it is judges who have an important role in cases of lacking or conflicting rules; it is in their discretion to determine which decision fits best, assuming that the law is structured by a coherent set of principles about justice and fairness, which must be applied in every case, to ensure everyone is treated fairly and according to the same standards. The decisions of the judges will be constrained by – or taken in the light of – the community's history and overarching rules and political principles – so that the emphasis on their personal convictions is kept to a minimum.[172] The problem of Dworkin's approach is that it can often be disputed which overarching rules and political principles govern a given

163 Cf. Mani, 1998, p. 9.
164 Cf. Mani, 1998, p. 12.
165 Cf. Tamanaha, 2004, p. 92.
166 C. Sunstein (2001). *Democracy's Constitution*. Oxford: Oxford University Press.
167 J. Shklar (1998). *Political Thought and Political Thinkers*. Chicago: University of Chicago Press.
168 Bingham, 2007.
169 See also: Møller & Skaaning, 2012, p. 141.
170 See also: Møller & Skaaning, 2012, p. 140.
171 Cf. L. May & S. Fyfe (2017). *International Criminal Tribunals: A Normative Defense*. Cambridge: Cambridge University Press, p. 170.
172 Cf. Tamanaha, 2004, p. 102; and T. R. S. Allan (1988). Dworkin and Dicey: The Rule of Law as Integrity. *Oxford Journal of Legal Studies, 8*(2), 266-277, p. 266.

community, especially when they are not fixed by positive law. This is a general problem of all substantive theories that incorporate individual rights: general ideas like equality, liberty, privacy, the right to property, freedom of contract or from cruel punishment, are all contestable in meaning and in reach.[173]

The second substantive rule of law conception is the theory of the *Rechtsstaat*. After the Second World War, in the light of Hitler's rise in Germany and the atrocities committed by the Nazi regime, the prevailing legal positivist understanding of the law was pointed out as being the main culprit for the law failing to act as a barrier against the Nazi terror.[174] In order to find a legal answer,[175] two issues that are fundamentally connected to the rule of law had to be addressed: firstly, when people govern by following the laws that they make themselves, the rule of law becomes a "mockery",[176] as the law may just coincide with the arbitrary will of a collective sovereign.[177] Secondly, laws can be modified by the legislator creating laws *ad personam*, establishing a state where there are no fundamental and stable laws.[178] Both are to be avoided.[179] The *Rechtsstaat* conception[180] therefore relies on a strict separation of powers, where the enforcement of laws does not lie in the hands of the same people who make the laws.[181] In order to tackle the second issue, and introduce a stable constitutional system, substantive content was introduced into the German Basic Law besides formal and procedural aspects, namely fundamental rights that are universal and extra-legal, and which existed prior and irrespective of their official recognition by the state. Core guarantees that shape the liberal character of the state, as well as its federal structure, cannot be abolished by way of future constitutional amendment. As a result, a

173 Cf. Allan, 1988, p. 276; Tamanaha, 2004, p. 103f.

174 Cf. Grote, 1999, p. 285; or Tamanaha, 2004, p. 108.

175 Cf. Grote, 1999, p. 284f.

176 P. Pasquino (2012). Introduction to the Articles: On Rule of Law and Devided Powers. *The Justice System Journal, 33*(2), 131-135, p. 132; such a case can be observed in Russia under Putin, whose party "United Russia", holding a comfortable majority in the Russian Federal Parliament, simply converts all his policies into law; cf. Pasquino, 2012, p. 132.

177 Cf. Pasquino, 2012, p. 132.

178 Italy under Berlusconi would be an example; cf. Pasquino, 2012, p. 132.

179 Cf. Caudill, 1981-1982, p. 181.

180 Note that the term '*Rechtsstaat*' is normally used in two different ways. It refers to either a state that is submitted to the law, or to a state whose organs act according to laws made by other organs. The former conception presupposes that there is a law that has not been created or posited by the state, with that law either being external and superior to the state because it is natural law, or being positive law, that is law made by men but prior to the state's foundation, for example a bill of rights. Within the latter theory, although the state is not limited by law that it did not make or that it cannot change, liberty is guaranteed if the organs of the state apply superior norms. For a deeper analysis, see: M. Troper (2003). Obedience and Obligation in the *Rechtsstaat*. In J. M. Maravall & A. Przeworski (Eds.), *Democracy and the Rule of Law* (p. 94-108). Cambridge: Cambridge University Press, p. 97ff.

181 Pasquino, 2012, p. 132; in the case of the system introduced by the German Basic Law this separation of powers is not only horizontal, distinguishing the legislative, executive and judicial branch, but also vertical, introducing a separation between municipal, regional and federal level. All these units are interdependent.

monopolistic power can no longer impose its own will as a commandment. A special constitutional court, the fragmentation of political power within the framework of a parliamentary democracy, and a strong role for the judiciary, all represent additional safeguards.[182] The rule of law in this sense no longer serves merely as a formal regulative concept for state theory, but functions as a constitutive notion that helps to ensure substantive justice in any form of state.[183] At the same time, the *Rechtsstaat* conception also attempts to avoid absolute legal stability, which would freeze society, making it impossible to change what is needed and useful to modify. One way to counter this risk are regular elections of the political elite.[184]

In liberal democracies, the rule of law is understood to include formal legality, democracy, and individual rights clustered together as a unified complementary package,[185] making up the third substantive rule of law conception. In the final declaration of the 1990 Conference on Security and Cooperation in Europe, it was stated that

> "the rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression."[186]

The authors saw "democracy [as] an inherent element of the rule of law."[187] The precondition for finding a balance between formal legality, democracy, and individual rights is a certain culture of law among the public, among judges, and among government officials: the population will exercise a degree of vigilance over government officials, is prepared to rise up for the protection of individual rights, democracy and the idea that everyone, including the government, is bound by law. Judges must be dedicated to preserving the integrity of law, accepting the fact that the interpretation, utilisation, and application of legal rules is their mission, while also committing to the proposition that the making of legal rules in a democratic society is allocated to the political arena. Government representatives should be in agreement with these notions.[188]

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182 Cf. Tamanaha, 2004, p. 109.
183 Cf. Caudill, 1981-1982, p. 181.
184 Cf. Pasquino, 2012, p. 132ff.
185 Cf. Tamanaha, 2004, p. 110.
186 OSCE (1990). *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.* Paper presented at the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, para. 2.
187 OSCE, 1990, para. 3; for a similar conception, see: T. Carothers (1998). The Rule of Law Revival. *Foreign Affairs, 77*(2), 95–106, p. 96f.
188 Cf. Tamanaha, 2004, p. 112.

The fourth substantive rule of law conception is the thickest: it includes social welfare rights next to formal legality, democracy, and individual rights.[189] It is concerned with the establishment by the state of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realised. Next to the traditional liberal view of the rule of law that sets limits on the government freeing individuals to do as they please, this conception thus imposes a positive obligation on the government:[190] to help make life better for people, to enhance their existence, including effectuating measures of distributive justice.[191]

2.3 The Rule of Law: An Essentially Contested Concept

Although the rule of law might be the "defining characteristic for Western political tradition"[192], and its glamour shines well beyond the Western world, the plethora of rule of law typologies presented here demonstrates that it is an "essentially contested concept."[193] It has been claimed that "there are almost as many conceptions […] as there are people defending it."[194] It is certainly true to say that

> "[t]he rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it shouldn't be indulged."[195]

According to Carothers, there is sometimes "uncritical" and "wishful thinking" about the rule of law.[196]

Being mindful of the origins of modern rule of law definitions, and understanding the wide range of rule of law conceptions, is paramount in order to recognise the parameters of the ICTY's rule of law conception, which will ultimately serve as a proxy for assessing its impact on the Bosnian and Serbian criminal justice systems under a rule of law framework. In the following sections, I will further develop existing rule of law conceptions by placing them into the context of transitional justice. Eventually, a transitional justice

189 See also: Mani, 1998, p. 12.
190 Cf. Møller & Skaaning, 2012, p. 141.
191 Cf. Tamanaha, 2004, p. 112f.
192 Tamanaha, 2004, p. 2.
193 W. B. Gallie (1956). *Essentially contested concepts.* Paper presented at the Meeting of the Aristotelian Society, London.
194 O. Taiwo (1999). The Rule of Law: The New Leviathan. *Canadian Journal of Law and Jurisprudence, 12*(1), 151-168, cited by many, including: McAuliffe, 2013, p. 42.
195 Tamanaha, 2004, p. 113.
196 Cf. Carothers, 2009, p. 51.

rule of law conception will be developed that will serve as the basis for explaining the ICTY's benchmark.

3 Ordinary Rule of Law Versus Transitional Rule of Law

3.1 The Rule of Law as Core Transitional Business

The paradigm of the rule of law was revived in the 1990s in the course of a changing legal world order that triggered transitions also at the national level. It gained renewed importance – particularly in societies in transition – because it was believed to allow states to move beyond the first stage of political and economic reform, allowing it to consolidate both democracies and market economies. Strenghtening a generally weak rule of law appeared to be a way of pressuring patronage-ridden government institutions to improve their performance and curb the continued violation of human rights that has characterised many new democracies.[197] With this belief came the wish to treat human rights as justifiable claims, and consequently an increased demand for law.[198] Hence, for backsliding systems, strengthening the rule of law seemed an appealing safeguard against the ever-present threat of authoritarianism and sabotage of constitutional order.[199]

Building on this internal function, a role was attributed to the rule of law also in foreign politics. It became a "foreign policy mantra"[200] as it was rediscovered as a "solution to the world's troubles"[201], a "panacea"[202]: its implicit promise of stability and an aphoristic sense that law is a prerequisite for peace, have imbued the concept with an enduring appeal as being a mechanism for restoring long-term stability, as well as short-term order in post-conflict societies.[203]

As such, the rule of law has conquered the world of peacebuilding after conflict. Most policy-makers and practitioners began to see the rule of law as something everyone needs in post-conflict and post-intervention societies, something that is clearly worth pursuing, even through a variety of more or less coercive projects.[204] The rule of law is now firmly

197 Cf. Carothers, 1998, p. 98.
198 Cf. Stromseth *et al.*, 2006, p. 59.
199 Cf. Carothers, 1998, p. 98.
200 Stromseth *et al.*, 2006, p. 57.
201 Carothers, 1998, p. 95; Stromseth *et al.* submit that this assumption is still widespread almost ten years later; cf. Stromseth *et al.*, 2006, p. 58. Judging on modern rule of law promotion literature, even twenty years later the situation might not have changed.
202 Mani, 1998, p. 2.
203 Cf. Mani, 1998, p. 2.
204 Cf. Stromseth *et al.*, 2006, p. 56.

entrenched in the broader architecture of transition from conflict,[205] and the *promotion* of the rule of law therefore emerged as a "*leitmotiv*"[206] in transitional justice programmes.[207] De Greiff, for instance, argues that strengthening the democratic rule of law, which establishes "social relations mediated by means of *rights*",[208] is a "final aim" of transitional justice.[209]

Holistically, transitional justice has been defined as the "full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[210] In my understanding, 'transitional justice' therefore refers firstly, to a period in time, typically after an (armed) conflict, in which a society actively strives for peace,[211] secondly, to all societal, political and legal processes that are associated with this aspiration, and thirdly, to all mechanisms employed for these purposes.[212] As such, transitional justice is connected to fundamental questions, such as how societies should deal with their evil pasts, or the relation of the state's past to its future.[213] Transitional justice understands that holistically, it is dependent on its operation through the actions of many actors: policy-makers who plan and implement institutions, victim groups, the larger citizenry,

205 Cf. K. McEvoy (2007). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society, 34*(4), 411-440, p. 439; the United Nations (UN) were one of the main promoters of intertwining the rule of law into and transitional justice. This is not only manifested in the UN Secretary General's report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, which was the outcome document of the 2005 United Nations World Summit. There was also an uninterrupted string of resolutions by the United Nations General Assembly from 2006 to 2010, which were all entitled "The Rule of Law at the National and International Levels" (A/RES/61/39 from 18 December 2006, A/RES/62/70 from 8 January 2008, A/RES/63/128 from 15 January 2009, or A/RES/64/116 from 15 January 2010). Furthermore, a rule of law unit was created within the Executive Office of the UN Secretary General, and the UN has issued a series of reports on the rule of law since 2006 (for instance, the *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law* report by the UN Secretary General (A/61/636-S/2006/890 from 2006); cf. Beaulac, 2012, p. 18.

206 J. Wouters & N. Hachez (2010). Transitional Societies and the Rule of Law: A Benchmarks Approach. *Working Paper*. Retrieved from https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1774749_code1616973.pdf?abstractid=1767873&mirid=1, p. 4.

207 Cf. Wouters & Hachez, 2010, p. 4; according to Ostojić, re-establishing the rule of law in post-authoritarian and post-conflict states is the most tangible and significant contribution of transitional justice policies to democratisation processes; cf. Ostojić, 2014, p. 165.

208 Emphasis in original.

209 Cf. P. De Greiff (2011). Some Thoughts on the Development and Present State of Transitional Justice. *Journal for Human Rights/Zeitschrift für Menschenrechte, 5*(2), 98-128, p. 115f.

210 United Nations Secretary General, 23 August 2004, p. 4.

211 For leading transitional justice scholar Teitel, transitional justice refers to any type of political transition; cf. R. Teitel (2000). *Transitional Justice*. New York, N.Y.: Oxford University Press.

212 Teitel suggests: striving for criminal justice through trials, for historical justice through truth commissions, for reparatory justice through various forms such as compensation and tribute, for administrative justice through exclusion and lustration, and for constitutional justice through constitutional change; cf. Teitel, 2000.

213 Cf. Teitel, 2000, p. 3.

or experts who work for nongovernmental organisations that reflect on the possible manner of transition.[214]

In pre-Cold War times,[215] more often than not, transitional justice was associated with a transition to democracy,[216] if not to say Western-style democracy:[217] a society moving from war to peace, from a state of injustice to justice, from oppressive government to government that respects the rule of law, from authoritarianism to democracy.[218] Justice, peace and democracy were considered mutually reinforcing imperatives.[219] Whereas, since the Cold War ended, references to 'transition' are considerably less political; 'transition' henceforth simply refers to a post-conflict situation that requires resolution and the establishment of authority bound by the rule of law.[220]

Making the pursuit of rule of law an objective of transitional justice was generally welcomed: not only does it seem to be a non-ideological, value-neutral and technical solution, but in addition, hardly anyone will admit being against the rule of law.[221] Its potential to gain the agreement of a large public is significant. In times of considerable political change, marked by strong opposition from different stakeholders, uniting these

214 Cf. Z. Miller (2008). Effects of Invisibility: In Search of the 'Economic' in Transitional Justice. *International Journal of Transitional Justice, 2*(3), 266-291, p. 271.

215 Cf. B. A. Leebaw (2008). The Irreconcilable Goals of Transitional Justice. *Human Rights Quarterly, 30*(1), 95-118, p. 102; and R. Teitel (2005). The Law and Politics of Contemporary Transitional Justice. *Cornell International Law Journal, 38*(3), 837-862, p. 838.

216 For example, in its seminal report on the rule of law and transitional justice, the United Nations Secretary General claims that building democracy and the rule of law are essential goals of transitional justice; cf. United Nations Secretary General, 23 August 2004, p. 9.

217 Cf. McAuliffe, 2013, p. 83; or Teitel, 2000, p. 5; McAuliffe critically remarks that in transitional justice literature, one can observe a great willingness to prefer foreign experts, foreign models and foreign-conceived solutions when national capacity is low; cf. McAuliffe, 2013, p. 59.

218 Cf. McAuliffe, 2013, p. 83; and R. Kerr & E. Mobekk (2007). *Peace and Justice: Seeking Accountability After War*. Cambridge: Polity Press, p. 3; see also Beaulac who defines 'transition' as jurisdictions that have gone through violent conflicts or have moved out of authoritarian regimes; cf. Beaulac, 2012, p. 32. The insistence on transition to democracy goes back to Huntington, who – himself referring to Schumpeter – claimed that 'transition' means to reach a state in which the most powerful collective decision makers are selected through fair, honest and periodic elections; cf. Teitel, 2000, p. 5. These are the basic principles of democracy.

219 Cf. United Nations Secretary General, United Nations Secretary General, 23 August 2004, p. 1; for a critique, see: P. McAuliffe (2010). Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows? *Hague Journal on the Rule of Law, 2*(2), 127-154, p. 127; or G. Bassu (2008). Law Overruled: Strengthening the Rule of Law in Postconflict States. *Global Governance, 14*(1), 21-38, p. 21.

220 Cf. Leebaw, 2008, p. 103; however, as Leebaw notes, the transitional justice discourse continues to judge political violence, and is thereby implicated in political judgments. A tension with transitional justice mechanisms' aspiration to political impartiality hence persists. She suggests to be honest about the fact that "transitional justice policies are political questions, rather than merely technical decisions"; cf. Leebaw, 2008, p. 106 and 117. In any case, one can still observe a certain interchangeability of the terms 'transition' and 'democratisation' in various writings; cf. F. DuBois & A. Czarnota (1999). The Transitional Rule of Law. *Alternative Law Journal, 24*(1), 9-11, p. 9. Certainly, 'transition' refers to a shift into a more liberalising direction as before; cf. Teitel, 2000, p. 5.

221 Cf. Carothers, 1998, p. 99.

stakeholders behind a concept that everybody can agree upon can serve as a key factor in maintaining peace but also as a basis for productive political progress.

In addition, reasserting the authority of the state is often viewed as paramount in the transition from conflict. Since respect for the rule of law is frequently seen as the benchmark for such authority, (re-)constructing institutions designed to deliver justice is considered "core transitional business."[222]

According to some, this element demonstrates that the field of transitional justice is dominated by lawyers. Given that lawyers, policy makers, or state officials often appear to think of justice as belonging to the institutions which make up a justice system, and the people who staff it, state-like models of justice are prone to replication.[223] The dominance of 'legalism' can be observed not only in scholarship but also in the practice of transitional justice:[224] nowadays, programmes designed to promote the rule of law in local criminal justice mainly present what international donors at supranational, bilateral or international nongovernmental organisation levels are willing to pay for.[225]

3.2 Transitional Justice and Its Goals

Other authors attest a growing tendency to adopt a holistic understanding of the problems faced – and solutions required – by societies in transition. They observe a common practice of defining transitional justice very broadly. Such definitions may include processes and mechanisms such as prosecutions, reparations, commemorative practices, truth-seeking, institutional reform, vetting and dismissals, educational reform, reconciliation initiatives, and more.[226] According to those authors, these definitions thus move beyond legal responses by including wider political and social processes, integrating official, top-down mechanisms, and unofficial, bottom up, community or grass-root initiatives. This approach foresees interventions at multiple levels of society – state, community, and individual – and spans across fields as diverse as the rule of law and justice, security, education for democracy, economic development, and reconciliation.[227]

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222 Cf. McEvoy, 2007, p. 422.

223 Cf. McEvoy, 2007, p. 423.

224 McEvoy, 2007, p. 412.

225 Cf. McAuliffe, 2013, p. 1f.; and McEvoy, 2007, p. 412; in scholarship it has been criticised that this emphasis on the formal, instrumental aspects of a legal system, assuming the rightness of the rule of law, renders the field of study highly theorised and disconnected from the real life of those affected by justice systems; cf. McEvoy,2007, p. 414.

226 See also: United Nations Secretary General, 23 August 2004, p. 4.

227 Cf. P. Gready (2009). Telling Truth? The Methodological Challenges of Truth Commissions. In F. Coomans, F. Grünfeld, & M. T. Kamminga (Eds.), *Methods of Human Rights Research* (p. 159-185). Antwerp: Intersentia, p. 161f.; the question is: should transitional justice be taking on more when it is far from clear that it can successfully achieve its original, far more modest, remits (truth, justice)? Holism is characteristic of

The definition adopted by the United Nations Secretary General, which is referred to above,[228] embraces this holistic understanding of transitional justice. As such, it unifies different aspirations: ending violence and conflict-resolution, nation-building, reconciliation, restoring the dignity of victims by providing justice, creating a common history of the pre-transition era, addressing the need for accountability, fostering a normative regime change, and establishing legitimacy of the new regime, liberalisation, and the rule of law.[229] Not all of the goals and aspirations of transitional justice are mutually reinforcing: some of them are contradictory, or even work against each other, and transitional justice mechanisms must find the right context-specific balance between them on a case-by-case basis.

As transition is defined as the phase during which a society transitions from war to peace, and from lawlessness to the rule of law, one of the primary goals of transitional justice is to counter denial and promote accountability for crimes committed in times of lawlessness.[230] The aim of establishing a historical record of political violence is to bring to light the extent and impact of systematic violence, and to establish the responsibility of individuals or organisations for possible offences. It is Habermas who claimed, within the *Historikerstreit*,[231] that confronting and remembering past abuses reinforces a commitment to democratic values and reforms. Awareness regarding abuses that were previously hidden or denied must be created in order to challenge conventional understandings of the past.[232] At the very least, transitional justice mechanisms will provide facts related to past violence, wich will serve as the basis for a shared history, even where people continue to dispute factual and causal claims.[233]

In practice, however, officials of transitional justice mechanisms – especially of tribunals – have tended to frame their work for audiences consisting of international lawyers, rather than the affected local populations. In those cases, their findings have been ignored, rejected or were not even disseminated within the societies most affected by the respective transitional justice mechanism. Subsequent successful challenges of the legitimacy of these mechanisms undermined their whole transitional justice mission and its impact.[234]

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the expansionary phase of transitional justice in that its criticisms are of the 'more work' variety. In other words, they anticipate transitional justice doing more not less. As such, holism is both a reaction to past shortcomings, and runs the risk of reproducing them on a broader canvas; cf. Gready, 2009, p. 162.

228 See section 3.1 above.

229 Cf. R. Teitel, 2005, p. 838 and 846; McAuliffe, 2013, p. 89; Kerr & Mobekk, 2007, p. 3; or United Nations Secretary General, 23 August 2004, p. 9.

230 Cf. Leebaw, 2008, p. 98.

231 The *Historikerstreit* (dispute of historians) was a political-historical debate between German historians and philosophers on the singularity of the Holocaust and the question which impact it would have on the German historical identity.

232 Cf. Leebaw, 2008, p. 107f.

233 Cf. Leebaw, 2008, p. 109.

234 Cf. Leebaw, 2008, p. 108.

In many cases, the ambition of creating a *common* record of the past has hardly been achieved.

Individualising guilt is another goal of transitional justice mechanisms. This minimises feelings of vengefulness and stereotyping, and reinforces respect for the law. However, picking out a few perpetrators, and declaring them guilty, rests on the premise that widespread participation in systematic political violence either is – or should be – portrayed as a product of elite manipulation of the masses. This is in conflict with the goal of countering denial of widespread complicity in systematic political violence: it offers the opportunity to deny one's own responsibility for crimes committed in one's name on a large scale.[235] Determining the guilt of a specific number of persons, may lead to others hiding behind the determined guilt of those persons. Thereby, individualising guilt will in many cases be irreconcilable with the goal of creating a truthful historical record.

Above all, holding leaders accountable conveys a message to the broader public that in the new regime, no one is above the law. In addition, as trials are the only civilised alternative to revenge, they bring justice to victims, and thereby ensure that feelings of hatred and resentment seething below the surface do not erupt and lead to renewed violence.[236] Transitional justice seeks to alleviate emotions associated with trauma and the desire for revenge.[237]

These two goals (individualising guilt and holding leaders accountable) reflect the latest trend in transitional justice: the "juridicization of transitional issues"[238], manifested by vesting courts with the authority to deal with the judicial aspects of political problems, and the feeling that the rule of law can only be strengthened through this process. Atrocity trials play an important role in this respect. They give courts the opportunity to show their ability to act independently and impartially, even though there is considerable potential for social turbulence, whatever the outcome of the trials is. Thus, the responsibility of courts is arguably more substantial than in regular cases, where courts may allow themselves to learn over time.[239]

As such, national courts are expected to solve quite a difficult paradox: while the level of brutality of crimes they need to deal with exceeds the regular criminal justice system,[240] courts must nevertheless fit them into the formalistic criminal justice system. At the same time, courts are somewhat expected to include historical, political, and sociological frameworks in order to achieve other goals of transitional justice: truth, reconciliation,

235 Cf. Leebaw, 2008, p. 110.
236 Cf. Leebaw, 2008, p. 113.
237 Cf. Leebaw, 2008, p. 98.
238 S. Đajić (2007). Serbian Judiciary and Transition: Recent Jurisprudence. *Transition Studies Review, 14*(1), 81-90, p. 84.
239 Cf. Đajić, 2007, p. 85.
240 Cf. Đajić, 2007, p. 87f.

and education.[241] They are therefore expected to bring about something bigger than the trial itself: move beyond legal formalism, and "avoid the trap of evil's banality by capturing the whole symbolism of the trial"[242]. The "storytelling at trial" bears the risk of turning it into a show trial, which can then become the starting point for a historical record. There are, however, doubts as to the potential of trials being able to contribute to a historical truth, as the legal truth (what is established at trial) might differ considerably from the material truth.[243]

In addition, some claim that in practice, criminal trials have been ineffective as a response to vengeful or volatile emotions. Examples are the reprisal killings in Kosovo and Rwanda, following the establishment of the ICTY and the International Criminal Tribunal for Rwanda respectively. Individual accountability requires guarantees regarding the adherence to due process. Consequently, justice will be slow in being implemented, and those who are in fact guilty might be released on technicalities. In addition, victims often find that the experience of testifying at international criminal tribunals exacerbates painful or volatile emotions associated with past violence. Usually, sentences are perceived as too lenient, and since some are even overturned on appeal, judgments might cause frustration. For some, this also undermines the message of ending impunity.[244] Thus, administering legitimate justice by abiding to due process rules might – paradoxically – hinder individual healing and the perception that justice is rendered to the victims.[245]

Furthermore, transitional justice aims to expand dialogue and open political space to previously marginalised or silenced people.[246] Reconciliation is promoted by fostering dialogue across lines of political and social conflict. A non-judgmental truth commission, for instance, can support this process. However, this goes against the goal of criminalising past political violence, by labelling acts – once considered legal or politically appropriate – as human rights violations that deserve punishment. Furthermore, an uncritical presentation of varying perspectives on past violence events may legitimise the views of supporters for the old regime, instead of functioning as a neutral listening exercise. The goal of condemning past abuses, versus the goal of facilitating inclusive dialogue during transition, is another example of irreconcilable goals of transitional justice.[247]

In summary, and to provide a few examples of the differing goals of transitional justice, it can be said that accountability might hinder reconciliation, reconciliation might run counter the goal of establishing a common history that is close to the factual truth, and

241 Cf. Đajić, 2007, p. 88.
242 Đajić, 2007, p. 88.
243 Cf. Đajić, 2007, p. 88.
244 Cf. Leebaw, 2008, p. 110f.
245 Cf. Leebaw, 2008, p. 114.
246 Cf. Leebaw, 2008, p. 98.
247 Cf. Leebaw, 2008, p. 111f.

providing justice to victims through trials might in fact cause the outbreak of more violence on the side of those who are being tried, which in turn might inhibit nation-building. These contradictions might well be the downside of a holistic approach to transitional justice, which McAuliffe critically qualifies as following the "'do everything, engage everyone' hypothesis"[248] – clearly an impossible thing to do.

Alternatively, it has been suggested that it is more profitable to think of transitional justice as "a process in which the outcome is uncertain, but the undertaking is valued in itself",[249] as opposed to the predominant conception of it being a means to an end.[250] In doing so, transitional justice processes associated with each of its goals would be appreciated as having an impact by their sheer existence, even if those goals are not – or hardly – achieved.

Accepting the contradiction within the various goals associated with transitional justice also means accepting that it is, as such, not a coherent concept; transitional justice is torn between transitional compromises that stabilise on the one hand, and addressing the past of political violence – a sometimes hurtful and potentially destabilising process – on the other. Transitional justice aims to maintain some degree of order, while simultaneously advancing political transformation.[251] It can thereby be both an element of stability and of change.[252]

Logically, transitional justice mechanisms are also faced with this dilemma: in their operation, they have to embrace and stick to local practices in order to be perceived as legitimate, while at the same time rejecting and transforming these very traditions and practices, since they formed the basis of political legitimacy for systematic political violence.[253] This is a challenging balancing act.

Transitional justice must be described as conflicting and paradoxical, sometimes counter-intuitive. It is not necessarily linear and progressive. Because a balance between the conflicting goals must be constantly searched for, transitional situations are dynamic. Compromises can therefore only serve temporary rather than permanent goals.[254]

In fact, this is exactly where the tension between transitional justice and the rule of law generally lies: transitional justice mechanisms usually assume a short-term mediation role between a specific type of regime and a more liberal alternative. Using that mechanism to exemplify, catalyse and establish institutions guided by the rule of law is, in contrast, a

248 McAuliffe, 2013, p. 89.
249 A. J. McAdams (2011). Transitional Justice: The Issue that Won't Go Away. *International Journal of Transitional Justice, 5*(2), 304-312, p. 312.
250 Cf. McAuliffe, 2013, p. 110.
251 Cf. Leebaw, 2008, p. 97.
252 Cf. McAuliffe, 2013, p. 100.
253 Cf. Leebaw, 2008, p. 116f.
254 Cf. Leebaw, 2008, p. 117f.

long-term process. Transitional justice and the reconstruction of the rule of law might therefore have different emphases, and in fact work according to different time scales.[255] The question thus arises as to how the reconstruction of the rule of law can be reconciled with transitional justice.

3.3 The Law in Transition: Enabling and Softening the Transition

Having explored the nature of the context of transitional justice for the reconstruction of the rule of law, the function of the law in that context will subsequently be analysed.

Law has a different nature and plays different roles in different circumstances.[256] Its ordinary function is to provide order and stability. It is largely autonomous from politics, apart from some input from one domain to another.[257] By virtue of the independent nature of the judiciary, and the distinctive sources and characters of legal reasoning, the law has an autonomous logic of interpretation and application.[258]

In transitional times, everything is up for grabs. There is "politics about politics"[259], a process that is open-ended in a way that ordinary politics is not: ordinary politics takes place in accordance with 'the rules of the game', which forecloses certain outcomes. Transitional politics, however, seek fundamental change of these very rules; they are challenged, dissolved and ultimately, re-formulated. Transitional politics can therefore by definition not be subject to limitations originating from 'the rules of the game'.[260] Thus, "politics about politics", characterised by the uncertainty of its outcome, implies disorder and legal instability.[261]

"Politics about politics" involves the search for a new conception of justice.[262] The United Nations Secretary General defines 'justice' as an "ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs."[263] It implies regard for the well-being of a society at large, the interests of victims, as well as for the rights of perpetrators. He claims that this broad conception is universal, as it is rooted in all national cultures and traditions. Justice is administered through formal

255 Cf. McAuliffe, 2013, p. 85f.
256 Cf. DuBois & Czarnota, 1999, p. 10; or McAuliffe, 2013, p. 100; as DuBois and Czarnota note, this claim is more obvious for social scientists and sociologists than for lawyers; cf. DuBois & Czarnota, 1999, p. 10.
257 DuBois & Czarnota, 1999, p. 11.
258 Cf. DuBois & Czarnota, 1999, p. 11.
259 DuBois & Czarnota, 1999, p. 10.
260 Cf. DuBois & Czarnota, 1999, p. 10 and 11.
261 Cf. Teitel, 2000, p. 11.
262 Cf. R. Teitel (2003). Transitional Justice Genealogy. *Harvard Human Rights Journal, 16*, 69-94, p. 69.
263 United Nations Secretary General, 23 August 2004, p. 4.

judicial mechanisms just as much as through traditional dispute resolution mechanisms.[264] The new justice conception will, essentially, determine the 'new rules of the game' that shall govern a specific society in transition.

Accordingly, this new conception of justice can only be contextualised and partial; what is deemed just is contingent on, and informed by, the particular legacy of past repression or war – in short, prior injustice.[265] As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.[266] The approach to justice should be tailored in a way that allows an adequate response to these injustices, as well as to the society's political traditions or legal culture.[267]

Ideally, and in order to guarantee its effective administration, a society's justice conception finds its way into substantive and procedural law. However, this is not an easy task; as explained, the fact that transitional justice aims to maintaing order while advancing political transformation presents a specific dilemma.[268] The law itself needs to be dynamic and transformative by, for instance, symbolically drawing lines between regimes, or rendering certain political acts outside the realms of legitimate choice. That said, the law must also be static when progressive change needs to be negotiated or sacrificed in the interests of securing peace.[269]

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264 Cf. United Nations Secretary General, 23 August 2004, p. 4; Ramiji-Nogales stresses that it is paramount to include local morality notions into a transitional justice mechanism so that it is viewed as more legitimate; cf. Ramji-Nogales, 2010, p. 61ff.

265 Cf. Teitel, 2000, p. 6; and McAuliffe, 2013, p. 100.

266 Cf. Teitel, 2000, p. 6.

267 Cf. McAuliffe, 2013, p. 100; Teitel illustrates this argument with two examples of transitions: Germany and Hungary in the 1990s. In Germany, border guards were convicted for shooting on people illegally crossing the Berlin Wall, which was legal at the time (the shooting). After the fall of the Communist regime in Eastern Germany, German courts considered such shootings manifestly unjust, hence inherently illegal, despite the positive legality. As Teitel argues, the contemporary adjudication in the transitions out of Communist rule continued to be guided by a natural law approach that was developed in response to World War II injustices. Back then, recurrence to natural law was deemed necessary in response to the role positive law and the legal machinery played under Nazi rule: its only function was to serve the evil purposes of the regime. It seemed just logical to revise the meaning of the rule of law from strict legality (as under the Nazis) to the rule of what was seen as "morally right". When adjudicating the Berlin Wall border control cases, the Berlin trial court was confronted with a dilemma of "right" versus "formally right". It decided that "not everything is right that is formally right", thereby asserting that evil legislation lacked the status of law altogether. These rulings manifest an understanding of the rule of 'law' as the rule of *substantive justice*. On the other hand, in Hungary, after the political changes of 1991, Parliament passed a law allowing for prosecutions for offences related to the brutal Soviet suppression of the country's uprising in 1956. With regard to statute of limitations for prosecutions of the predecessor regime, the Hungarian Constitutional Court held that the law was unconstitutional. Here, the principle of the rule of law required *prospectivity* and *predictability* in lawmaking, even if it meant the worst criminal offences of the prior regime would go unpunished; cf. Teitel, 2000, p. 15ff. These examples show that the particular approach to the rule of law can be very different depending on the society's past legal traditions and moral convictions.

268 Cf. Leebaw, 2008, p. 97.

269 Cf. McAuliffe, 2013, p. 100.

Ordinary intuitions and predicates about law derived from stable states usually prove to be inapplicable during times of transition; the law is then caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective, as well as between static and dynamic. The law's function in extraordinary times of transition is therefore deeply and inherently paradoxical.[270] It can maintain order, just as it can enable – and structure – the transformation.[271] Hence, it has been claimed that "[i]n dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law."[272]

This paradigm is characterised by the new justice conception that is to be implemented into the law. Hence, through the law, justice is "alternately constituted, and constitutive of, the transition."[273]

3.4 The Rule *of Law in Transition*

What does this mean for the meaning of the *rule* of law in transitional justice contexts?

In ordinary times, the rule of law stands for adherence to known rules, as opposed to arbitrary government, as well as regularity and stability.[274]

In contrast, in transitional times, as explained in the previous section, what needs to be perpetuated in the law is no less than a new normative value scheme that is historically and politically contingent and elaborated in response to past political repression.[275] Consequently, the rule of law concerns law, that is informed by a new conception of justice, which is itself informed by past legacies of injustice. The rule of law will in itself reflect responses to past repressive rule.[276]

The perceived need to rebuild a broken community, or to prevent its further destruction, may be the reason for supplementing ordinary dictates of the rule of law, by means of novel rules or by revising it temporarily. It has been advocated that due to the extraordinary circumstances of transitions, as well as the paradoxical role of law and the reformulation of justice predicates, there should be a flexible, differentiated and context-specific understanding of the rule of law in post-conflict states.[277] Here, however, the risk arises

270 Cf. Teitel, 2000, p. 6 and 11.
271 Cf. Leebaw, 2008, p. 100; and Teitel, 2000, p. 6.
272 Teitel, 2000, p. 6.
273 Teitel, 2000, p. 6.
274 Cf. Leebaw, 2008, p. 100.
275 Cf. Teitel, 2000, p. 7.
276 Cf. Teitel, 2000, p. 6.
277 There is another argument to keep the rule of law flexible in transitional times. It relates to the fact that rule of law promotion in societies in transition is often dominated by the interests of its donors (foreign states, companies, institutions, or just generally, the 'international community'). In the eyes of Turner, relying on a narrow and pre-defined course of action for peace-building and equating peace with a partic-

that the rule of law becomes conceptualised to the extent that it becomes so elastic that it loses its value.[278]

The rule of law is also stuck in its own paradoxical nature; it has to be both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms.[279] As a result, the question arises as to how to reconcile normative legal change with adherence to conventional legality?[280] This is what the rule of law in transitional justice is essentially about.

4 The Rule of Law in Transitional Justice

4.1 The Two Main Characteristics: Maximalist and Interim

From the analysis above, it can be inferred that the rule of law in transitional justice contains two main characteristics: firstly, it has to reflect a society's new conception of justice, and secondly, it needs to be flexible and differentiated.

What follows from this?

As to the first characteristic, it is claimed that the rule of law in transitional justice is not as politically neutral as ordinary rule of law. In fact, it has been advocated that transitional justice is "inescapably maximalist"[281] in its approach to the rule of law.[282] As it reflects and implements a society's values, law is rendered an instrument of harmony, both with formal and substantive elements.[283] The transitional justice context manifests the belief that law must be about justice, and cannot be separated from morality and substantive norms; the only way to break from the past – a time when human rights were routinely abused – is to establish the rule of law, with the protection of human rights at its core.[284]

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ular set of political norms and beliefs bears the risk of restricting the options open to countries in transition and might ultimately undermine their progress towards peace and stability. This does not mean that there should not be certain standards, in particular, regarding international human rights norms. She warns though that imposing an entirely rigid and internationalised system would impede "transculturation of rights". According to Turner, it is precisely this local engagement with rights that will lead to the emergence of an embedded human rights culture; cf. C. Turner (2008). Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law. *The International Journal of Transitional Justice, 2*(2), 126–151, p. 133.

278 Cf. McAuliffe, 2013, p. 100ff.

279 Cf. Teitel, 2000, p. 7.

280 Cf. McAuliffe, 2013, p. 100.

281 McAuliffe, 2013, p. 49.

282 Cf. McAuliffe, 2013, p. 49.

283 Cf. Wouters & Hachez, 2010, p. 11.

284 Cf. McAuliffe, 2013, p. 49.

From the second characteristic, which is that the approach of transitional justice to the rule of law shall be flexible and differentiated, it follows that such rule of law will in itself be no more than an interim compromise.[285] Due to the nature of the transitional justice context, which is by definition limited and selective, pointing to a different societal order in the future, while not *delivering* it, but merely being the starting point,[286] the rule of law will be transitional as well. The rule of law in transitional justice shall indeed lead to ordinary rule of law, which remains the ideal to be strived for.[287] In the meantime, as the transition advances, the rule of law itself will change, constantly raising its standards. It is therefore called the 'transitional rule of law'.

4.2 Purposes of the Transitional Rule of Law

In order to identify the content of the transitional rule of law, it is necessary to take a closer look at its purposes.

Similar to ordinary times, in transitional times, the rule of law remains an ideal. It must be continuously and creatively sustained, it is never 'achieved' in the common sense of the word.[288] At first sight, the transitional rule of law does not serve purposes that differ significantly from ordinary rule of law. However, as demonstrated, due to its interim nature and the fact that it is essentially a response to previous injustice, its focus can be different.

After conflict, for instance, the rule of law serves to (re-)establish law and order. This essentially means to build a functioning justice system,[289] and to create widespread support for the rules of the respective society. This requires not only the setting up of institutions but also the (re-)building of a culture of law.

In order to enable people to resolve conflicts non-violently and consistently from that moment onwards, they must be ensured of a principled and efficient justice. Therefore,

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285 Baylis refers to a "partial solution", which is still better than no solution; cf. E. Baylis (2009). Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks. *Boston College Law Review, 50*(1), 1–85, p. 8f.

286 Cf. Nettelfield, 2010, p. 276.

287 This is advocated for by E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (2011). Importing International Law in Post-Conflict States: The Role of Domestic Courts. *Amsterdam Law School Legal Studies Research Paper*. Retrieved from www.jur.uva.nl/acil, p. 23 and 32. They advocate for a "thick conception" of the rule of law that incorporates "substantive rule of law standards of procedural fairness, equity, and judicial review […], aside from such obvious principles as accountability, formal legality (including the prohibition of retroactive application of the law), and the limitation on the discretionary exercise of power." They concede that this "theoretical approach does not answer acute questions as to what precisely those rule of law standards mean at the micro-level in domestic court proceedings in transitional societies. The suggested standards are open-textured and amenable to widely varying interpretations"; Kristjánsdóttir *et al.*, 2011, p. 32.

288 Cf. Stromseth *et al.*, 2006, p. 82.

289 Cf. Stromseth *et al.*, 2006, p. 181.

the components of the justice system – especially courts – must pronounce principled and predictable decisions.[290] Creating the assurance that conflicts can be settled within a framework of rules, and with the help of specialised institutions, is indispensable in transitions from conflict to peace.

Arguably, and depending on the approach adopted, the rule of law also aims to support the protection of human rights, such as fair trial rights, the prohibition of torture, or the right to freedom of opinion and belief.[291] As demonstrated, the (re-)introduction of human rights is widely considered part of the notion of justice, or at least as part of the response to previous injustice. This is therefore also an important role of the rule of law in transitions.

There is the general notion that the law protects everybody, against everyone. Related to this is another value of the transitional rule of law: equality before the law. The law should be 'blind' and treat everyone equally, regardless of whether one is a political leader or an ordinary citizen, whether they are rich or poor, irrespective of which ethnic group or minority status one belongs to, without considering their gender, etc.[292] Impartial law and an impartial justice system are of paramount importance, particularly after a political conflict during which lines were drawn between those in power and those against whom that power was used.

This also means that the rule of law aims to ensure that the government is bound by law, which requires that it is prepared to enforce the law against its own leaders, and that officials abide by the law, rather than using their power to seek preferential treatment for themselves and their allies. This requires putting in place accountability and oversight mechanisms.[293]

Protecting people against arbitrariness and anarchy, and allowing them to plan their affairs with confidence – because they know the legal consequences of their actions – are the ultimate goals of the rule of law.[294] This is particularly challenging in transitional times, given that transitions are characterised by political flux and legal instability. Which legal principles are to be adhered to in order to protect societies from arbitrariness?[295]

290 Cf. Stromseth *et al.*, 2006, p. 182.
291 Cf. Stromseth *et al.*, 2006, p. 181 and 182.
292 Cf. Stromseth *et al.*, 2006, p. 182.
293 Cf. Stromseth *et al.*, 2006, p. 181f.
294 Cf. Stromseth *et al.*, 2006, p. 69.
295 Consider the examples of Hungary and Germany described above in fn. 267. During the transitions of the 1990s, both countries opted for a completely different approach: in Hungary, the rule of law was interpreted as adhering to those rules established by the previous regime, *even if* they were considered substantially wrong. In Germany, the rule of law meant *not* to adhere to the established rules *because* they were considered substantially wrong. The same context can hence lead to completely different choices.

4.3 Existing Proposals for a Rule of Law in Transitional Justice Contexts

The main characteristics of the transitional rule of law, as well as the purposes it shall serve, have been established above. In the following section, proposals for a definition of the rule of law in transitional justice will be evaluated in light of the question whether these definitions depict these two characteristics and serve the described purposes. Ultimately, it will be examined whether existing suggestions can serve as inspiration for the conceptualisation outlined below.

According to Weiffen, a formal conception of the rule of law in transitional justice includes a list of normative standards and legal principles: the universality of laws, a ban on retrospective laws, the relative stability of laws, a ban on excess (proportionality of law), laws should neither be contradictory nor demand impossible behaviour in order to adhere to them, in addition to impartiality and equality before the law, which refers to the universal application of law – irrespective of the social or political status of those concerned, including the state itself.[296]

A substantive understanding would also require a specific institutional set-up, such as separation of powers and independence of the judiciary, and the assurance that the public administration is bound by law, as well as inviolable basic rights enshrined in the laws.[297]

Weiffen identifies a number of institutional preconditions for the practical realisation of the rule of law: awareness of the law on the part of those concerned, a clear and comprehensive formulation of laws, independence and effective controlling power of the courts – as well as their accountability, including professionalism and honesty of judges. Criminal procedure must guarantee the inadmissibility of arrest and sentencing without trial, the efficacy of justice and limitation of trial duration, the right to legal representation, appropriate punishment, recourse to appeal, access to the legal system for those belonging to various social classes or living in different regions, equal treatment of all parties, and transparency of procedure.[298]

Although this is only a short description of what Weiffen proposes, it seems that the distinction between "formal" and "substantive understandings" as well "institutional preconditions" is not entirely clear. For instance, what is the difference between the independence of the judiciary as a substantive element of the rule of law, and the independence of courts as an institutional precondition? Or, why are fair trial rights listed as institutional preconditions not simply labelled to denote what they truly are – i.e.

296 Cf. B. Weiffen (2012). The forgotten factor - the impact of transitional justice on the development of the rule of law in processes of democratization. *Zeitschrift für Vergleichende Politische Wissenschaft, 6*(2), 125-147, p. 131.

297 Cf. Weiffen, 2012, p. 131.

298 Cf. Weiffen, 2012, p. 131.

substantive elements that must be included in law? These are just a few confusions that arise and that make the proposed definition appear rather poorly justified.

It is, furthermore, unclear whether this conceptualisation is indeed any different from what one could propose for an ordinary context. Although Weiffen clearly aims to introduce a conception that reflects the context of transitional justice,[299] it lacks the specific characteristics of the rule of law in transition that are imposed by this context. The first characteristic, which sets out that such a definition must consider the fact that in times of transitional justice, it should be established what will be deemed new just 'rules of the game', elements such as basic rights, fair trials rights or even principles establishing the institutional set-up of the justice system (such as independence of the courts), point in the right direction. The second characteristic, which sets out that the transitional rule of law shall be interim and lead towards ordinary rule of law, seems, however, to be ignored. No measure is proposed to facilitate the introduction of the rule of law after times of violent conflict and serious political chaos. This conception might therefore be unrealistic, considering the context of transitional justice. The standards Weiffen employs are generally associated with stable democracies, and might therefore be too high for volatile political and legal systems.

Beaulac bases his conception on the assumption that the extraordinary nature of transitional justice situations requires compromise as to the application of rule of law values, while the question as to which values can – or should – be compromised will normally depend on the context of the transition. He warns against the temptation to formulate a supposedly neutral formal conception of the rule of law that is robbed of substantive content regarding human rights. Such a thin conception might weaken popular support for the rule of law, and ultimately, impede societies from leaving behind their authoritarian past. Beaulec therefore proposes that the substantive rule of law standards of procedural fairness, equity, and judicial review should govern domestic procedure, aside from evident principles such as accountability, formal legality (including the prohibition of retroactive application of the law), and the limitation on the discretionary exercise of power.[300]

This theoretical approach deliberately does not answer the question as to what exactly those rule of law standards mean at the micro-level in transitional societies. Instead, the suggested standards are open textured, amenable to widely varying interpretations, and allow people to easily differ as to what these standards mean in a concrete court case.[301]

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299 Note for instance the title: "The forgotten factor – the impact of transitional justice on the development of the rule of law in processes of democratization".

300 Cf. E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (2012). Concluding Observations. In E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (Eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States*. Cambridge: Intersentia, p. 332.

301 Cf. Kristjánsdóttir *et al.*, 2012, p. 332.

While the conscious decision for a thick conception complies with the first characteristic that rule of law conceptions should feature in a transitional justice setting, it disregards the interim character of this rule of law.

Stromseth *et al.* come closer to this; they formulate a pragmatic definition of the rule of law in transitional societies. In their contributions, the rule of law is seen as a state of affairs in which the state successfully monopolises the use of violence, in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, universally applicable rules, and in a manner that respects fundamental human rights norms, such as prohibition of discrimination, torture, slavery, arbitrary detentions or extrajudicial killings. It is clear that this definition does not apply in times of extreme insecurity, such as during war.[302] The fact that people voluntarily choose to comply with the rules of the justice system is a matter of cultural commitment, as well as ensuring that the appropriate institutions and codes are in place; both private and public actors must accept the legitimacy of legal institutions and rules, and internalise these rules into their everyday behaviour and expectations. This is a long-term project and always remains aspirational.[303] Conflict resolution in the shadows of the law is condemned by this approach.[304]

Considering the reference to human rights, this definition is clearly substantive. The reason for this is, as Stromseth *et al.* claim, the fact that respect for human rights is a goal that is associated with most rule of law reconstruction programmes. At the same time, they claim to be minimalist within the substantive conception by including only those human rights norms that have gained almost universal acceptance. Through the Universal Declaration of Human Rights and other customary international law human rights are first and foremost, binding on all states. Secondly, they assert that these norms are only the "bare bones", and still leave enough room for each society's individual interpretation.[305]

This understanding of the rule of law in transitional societies incorporates many of the above-mentioned[306] goals and thereby acknowledges the specific context of transitional justice. In addition, Stromseth *et al.*'s approach seems to respect the two main characteristics of depicting a conception of justice and being interim, due to its substantive nature, and due to the limited number of standards associated with stable democracies. However, although it claims to be "pragmatic" in the sense of context-specific and at the same time potentially widely applicable, Stromseth *et al.*'s conception remains ambiguous and therefore not practical.

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302 Cf. Stromseth *et al.*, 2006, p. 78.
303 Cf. Stromseth *et al.*, 2006, p. 78f.
304 Cf. Stromseth *et al.*, 2006, p. 78.
305 Cf. Stromseth *et al.*, 2006, p. 79.
306 See section 3.2.

The UN Secretary General's report on the rule of law in transitional societies construes the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It also lists a number of preconditions for the rule of law to function: it requires adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[307]

This definition also comes close to what the rule of law in transitional justice shall be according to the main characteristics established. However, equally to Stromseth *et al.*'s definition, it is incomplete, as will be further elaborated in the following.

Without further defining the content of the definition for the rule of law in transitional justice, McAuliffe instead designs a pattern for its conceptualisation. He suggests that any rule of law in transitional justice conception shall be carried by three limbs: an institutional thin/formalistic/minimalist component, a norm-based thick/substantive/maximalist component, and a cultural component.[308]

These components are evaluated differently by transitional justice scholars and rule of law reformers, presenting arguments from their respective perspectives: rule of law institutions represent permanent national judicial institutions for rule of law reconstructors. Whereas transitional justice practitioners are also open to temporary measures, or circumventing those institutions by establishing special tribunals, internationalising accountability processes, or pursuing convictions through processes against the defendant that are otherwise unsustainable in terms of ordinary crime.[309]

In terms of norms, human rights are paramount for those speaking from a transitional justice perspective. For rule of law reconstructors, the substance of the law is just one building block of the rule of law understood broadly.[310] Consequently, it does not need to be further outlined.

Culture embodies anything that relates to the support of, and the adherence or commitment to the law – either by the rulers or the ruled. It is an agreement between both groups on the need to foster a commitment to the rule of law. Transitional justice has historically been characterised by distrust of – and often, antagonisms towards – rulers for their reluctance to address past crimes. Its constituents are victims and survivors to be restored through discrete, localised, and exceptional programmes, rather than just state

307 Cf. United Nations Secretary General, 23 August 2004, p. 4.
308 Cf. McAuliffe, 2013, p. 53.
309 Cf. McAuliffe, 2013, p. 54.
310 Cf. McAuliffe, 2013, p. 54.

institutions and political elites. On the other hand, rule of law reconstructors believe in the need to engage with the national political elite to foster adherence to the law in the future. Their constituents are the ruled, namely the citizens entitled to justice in functioning state institutions.[311] Incorporating a culture of law component is important because society needs to accept the law as a basis for social coordination. This "takes time and has to be developed piece by piece in different contexts."[312]

4.4 The First Pillar: Three Components of the Transitional Rule of Law

Drawing from existing rule of law in transitional justice conceptions, and considering its purposes as well as its two main characteristics, the transitional rule of law shall be conceptualised in the following section.

The recommendation to design any rule of law in transitional justice conception out of McAuliffe's three components is appealing. It will be advocated that this essentially avoids the positioning within the minimalist-maximalist-dichotomy of rule of law conceptions. However, both types of conceptualisations come with advantages and disadvantages.

Maximalist conceptions of the rule of law are attractive because they are described in idealistic terms.[313] In addition, formal conceptions are reconcilable with horrific regimes that are considered 'unjust' by most in some fundamental way. For many, injustice seems incompatible with the rule of law, and thin conceptions are often rejected. Substantive conceptions, on the other hand, are associated with the purpose the rule of law is intended to serve within society, such as human rights, law and order, or equality. The problem is, however: who decides which substantive values must be embodied in the law, for the rule of law to be satisfied? Which neutral principle can settle disputes about competing conceptions of justice and rights?[314] In peace-building, the usefulness of substantive conceptions is often questioned, because they are abstracted from the inherently non-ideal conditions that emerge in post-conflict and post-authoritarian states.[315]

In contrast, thin conceptions seem unsatisfying, as they do not necessarily incorporate the human rights guarantees deemed necessary to build peace. Minimalist views underscore the institutional attributes believed necessary to actuate the rule of law: a competent

311 Cf. McAuliffe, 2013, p. 54.
312 D. J. Galligan (2003). Legal Failure: Law and Social Norms in Post-Communist Europe. In D. J. Galligan & M. Kurkchiyan (Eds.), *Law and Informal Practices: The Post-Communist Experience*. Oxford: Oxford University Press, p. 22.
313 Cf. McAuliffe, 2013, p. 43.
314 Cf. Stromseth *et al.*, 2006, p. 71f.
315 Cf. McAuliffe, 2013, p. 43.

judiciary, a law enforcement apparatus, as well as clear and prospective laws.[316] However, even the most formal definition of the rule of law requires a normative commitment to the project of law itself, commitment to the orderly, to non-violent resolution of disputes, and to a willingness to be bound by the outcome of legal rules and processes.[317]

In the eyes of the layman, it makes no sense to have rules just for the sake of having them, unless they are good in themselves. Formal conceptions are so modest that the core value of the concept seems to vanish.[318] It is no longer 'good'. Quite to the contrary, when the rule of law is invoked by oppressive regimes in order to claim respectability for their actions, it becomes an instrument of oppression and contradiction in itself. It can then no longer be regarded as the ideal of "non-oppression or non-arbitrariness."[319]

On the other hand, once too many theoretical/philosophical/moral notions are incorporated into the rule of law,[320] it is divested of its singular meaning. This dilemma is by no means new, it just becomes particularly apparent in the search for a rule of law conception in transitional justice.

It has been asserted that maintaining the divide between thin and thick – or minimalist and maximalist – conceptions is necessary, because a combination of the two may trigger the mistaken belief that one follows from the other.[321] Although this might be true, the added value of this dichotomy can be questioned.

No matter how minimalist a rule of law conception is, even if it is understood in the narrowest way possible, as rule *by* law, the definition will be incomplete; *which* law rules? *How* does it rule? *Does* it really rule? These questions will need to be addressed, otherwise the definition will remain an empty phrase, void of any practical meaning or consequence. Arguably, it is of no importance whether these questions are answered through the definition itself – by enriching it with an increasing number of substantive notions deriving from other maximalist conceptions – or whether certain prerequisites are attached to it in order for the rule of law to function properly in practice. Only if these three questions are addressed by – in relation to – the conceptualisation, the rule of law will be properly implemented. If not, it will be easily undermined; if the content of the laws is unknown – how can it rule? If no institutional set-up supports the law to actually rule, for instance through an administration and a functioning judiciary, how can it rule? And lastly, if the vast majority of people refuse to abide by the law most of the time, again – how can it rule?

McAuliffe's pattern for each conceptualisation is of great use here – conceptualisations are complete if they depict a normative component, and hence provide a response to the

316 Cf. McAuliffe, 2013, p. 43f.
317 Cf. Stromseth *et al.*, 2006, p. 75.
318 Cf. Wouters & Hachez, 2010, p. 10.
319 Wouters & Hachez, 2010, p. 10.
320 Cf. Wouters & Hachez, 2010, p. 12.
321 Cf. McAuliffe, 2013, p. 49; similar: Stromseth *et al.*, 2006, p. 73.

question '*which* law rules?'; an institutional component, answering the question as to how the law rules; and a cultural component, stating whether the law actually rules through acceptance and support across society. Other authors, including Weiffen and the UN Secretary General, who have been referred to earlier,[322] acknowledge the same need to enrich each rule of law conception with certain prerequisites as they, too, attach institutional safeguards to their understanding of the rule of law.

The following three components will make up the first pillar that each transitional rule of law conception shall feature:

Table 1 The first pillar: the three components of the transitional rule of law

Normative component
Institutional component
Cultural component

4.5 The Second Pillar: Implicating the Whole of Society

The second pillar of the transitional rule of law conception will refer to the fact that such a conception needs to embrace the whole of society. This warrants some explanation.

As has been explained above,[323] transitional justice is "politics about politics"; everything is up for grabs and new rules for cohabitation are established within the respective society. This process has been defined as the search for a new justice conception. In order to be comprehensive, it needs to consider all actors, meaning defining new rules for all actors involved.

Therefore, it is argued here that the transitional rule of law conception needs to 'spread', in order to embrace the entirety of political and legal society. In the tradition of a separation of powers, this will include the executive, the legislature, and the judiciary, at the very least. In my view, the civil society will also need to be considered here.

Table 2 The second pillar: the transitional rule of law embracing the whole of society

Executive	Legislature	Judiciary	Civil society

Similar to the first pillar, this second pillar of the transitional rule of law conception also serves the purpose of guaranteeing its functioning in practice. As Koh argues, effective rule of law requires action by all branches, legislation, adjudication, as well as executive

322 See section 4.3.
323 See section 3.3.

action; it necessitates prosecutors, statutes, judges, police officers, and penalties that interact, interpret legal norms, and work to internalise those norms into the belief systems of citizens.[324] If not all actors involved in the functioning of a society are required to follow the law, those who are not can easily undermine the rule of law as a whole.

4.6 The Transitional Rule of Law

In summary, a conceptualisation of the transitional rule of law has two pillars: it shall embrace the whole of political and legal society by implicating the executive, the legislature, the judiciary, as well as the civil society. It has to include a normative, an institutional and a cultural component. In addition to that, it has been established that the approach towards the transitional rule of law characteristically depicts a justice conception and is interim.

On the basis of this pattern, the content of the transitional rule of law conceptualisation shall be established in the following section.

As a precondition, rule *by* law is the basis of the rule *of* law. Law should constitute the instrument of governance in all transition societies.[325]

As demonstrated earlier,[326] the two main characteristics of the transitional rule of law have a clear impact on its content, particularly on the content of its normative component. It cannot be as politically neutral as ordinary rule of law conceptions might be.

In substantive terms (the normative component of the transitional rule of law), laws must incorporate and ensure human rights, especially fair trial rights.[327] Fair trial rights will serve to demonstrate that even manifesting a break with a previous regime (for instance, in criminal trials for previous political crimes) is possible under the law, and with respect for the human dignity of the accused. This stands as a universal element, next to other normative aspects that each society might incorporate in its positive law.

In formal terms, similar to ordinary rule of law, laws must be public, general, and clear.[328] However, notions of certainty, stability, consistency and prospectivity are less evident in transitions. If the law is to have a transformative function, it can hardly be completely foreseeable, certainly not completely stable, as normative convictions reflected

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324 Cf. H. H. Koh (1998-1999). How Is International Human Rights Law Enforced. *Indiana Law Journal, 74*(4), 1397-1417, p. 1399.

325 Cf. Beaulac, 2012, p. 33.

326 See section 4.1.

327 Beaulac recommends the inclusion of fundamental human rights, including human dignity as well as fairness, equity, justice (restorative, retributive, and distributive); cf. Beaulac, 2012, p. 33.

328 Beaulac suggests that laws should be general, prospective, clear and certain. He concedes that "in transition, however, these features will certainly have to be assessed case-by-case, and are thus fully à la carte"; Beaulac, 2012, p. 33. He acknowledges that this idea would be fundamentally rejected by Justice Antonin Scalia and like-minded authors: A. Scalia (1989). The Rule of Law as a Law of Rules. *The University of Chicago Law Review, 96*(4), 1175-118, p. 1175.

in law might still be volatile, and therefore not always consistent. The focus of a transitional rule of law conception is hence not on formal legality.

In strictly theoretical terms, the definition of transitional rule of law ends here; it means rule *by* laws that are public, general, and clear, and which incorporate human rights (and other normative notions). Yet, as demonstrated, such a definition has no added value in practice. Hence, the transitional rule of law conception proposed here will also include institutional and cultural components, which, technically, only *ensure* or *support* the rule by law.

The following framework is therefore suggested. The idea is that each component comprises certain principles that must be followed in order to guarantee the rule by law. These principles include those that are ordinarily associated with the rule of law (the principles are listed in the left column, see table 3).[329] They have been specified for each actor playing a key role in upholding the rule of law in a society. At the same time, they are adapted in a way that results in a mix of negative principles (e.g. "no excess") and normative notions (e.g. "well-reasoned decisions, referring both to positive law as well as normative conceptions"), reflecting the provisional and interim character, as well as the normative nature of the transitional rule of law.

Table 3 The institutional and cultural components of the transitional rule of law

	Executive	**Legislature**	**Judiciary**	**Civil society**
Institutional				
Independence	Political independence, no corruption	No influence from the executive	Absence of politisation	No guiding influence from any of the three political branches
Accountability	Accountability to the people, manifested in a well-functioning electoral system; Explaining politics in normative terms; Accountability under the law for misconduct	Accountability to the people, manifested in a well-functioning electoral system; Explaining politics in normative terms; Accountability under the law for misconduct	Accountability under the law for misconduct	Accountability under the law for misconduct
Transparency	Political transparency, such as concerning the bases of decision-making	Political transparency, such as concerning the bases of decision-making	Accessible proceedings and accessible decisions; Well-reasoned decisions, referring to both	- *(the civil society is under no obligation to be transparent)*

329 See in particular sections 1. and 2 of the present Chapter in order to find back these principles.

	Executive	Legislature	Judiciary	Civil society
			positive law as well as normative conceptions	
Predictability and stability	No excess: "political certainty" (as opposed to legal certainty)	No excess: "political certainty" (as opposed to legal certainty)	After setting new precedents, consistent jurisprudence evolves	- *(the civil society is under no obligation to be predictable)*
Competence	Well-trained administrative staff	- *(the people are under no obligation to elect competent members of the legislature)*	Well-trained legal staff	- *(the civil society is under no obligation to be competent)*
Efficiency	No damaging blockade of the government's work	No damaging blockade of the legislature's work	Smooth processes, small/no backlog	- *(the civil society is under no obligation to be efficient)*
Cultural				
Commitment	Voluntary subordination under the law	Voluntary subordination under the law	Promise to adhere only to the law; Voluntary subordination under the law	Voluntary subordination under the law
Fairness	No excess in political unfairness	No excess in political unfairness	Granting each party its respective rights	No excess in unfairness
Impartiality	- *(the executive is under no obligation to be impartial)*	- *(the legislative is under no obligation to be impartial)*	Equality before the law	- *(the civil society is under no obligation to be impartial)*

5 Conclusion

In this Chapter, a framework for the transitional rule of law was formulated, after having conceptually distinguished transitional rule of law from ordinary rule of law. A number of premises form the basis of this distinction.

The first basic assumption is that the context of transitional justice poses challenges of a substantive nature; war and peace are substantive concepts that guide the entire analysis. The problem warranting an answer in transitional justice is not whether laws are public, clear, or prospective. The problems associated with war, which need to be addressed in transition, are human rights abuses. This imposes a substantive notion on the entire conception of the rule of law in transitional justice. Even if I argue that the distinction

between formal and substantive conceptions is not essential (as useful rule of law notions would always need to go beyond the 'rule *by* law', since this does not answer the questions as to *which* law rules and *how* it rules)[330], this last bit of the dichotomy of formal versus substantive conceptions remains.

Another basic assumption underlying the claim that ordinary rule of law and transitional rule of law are different, is that the law adopts different functions in different contexts. It is asserted that law in the transitional context has to be both static and dynamic. This is not necessarily something very special. One can argue that the law posseses both features also in ordinary times; in stable democracies, law is settled, allowing it to serve as guidance for behaviour. At the same time, it is dynamic – or, in this setting, 'open' – as to allow for progress, as well as for a change in values and convictions. However, within transitions, these features are not merely an observation, but a normative requirement. Law *must* be static and dynamic, because it *has to* ease and guide the transition, and provoke it at the same time. The rule of law in transitional justice will therefore represent an interim compromise.

Of course, this assumption is susceptible to criticism. The underlying precondition for '*transitional* justice' can be contested. As one of my interview partners put it: "[t]here is no such thing as 'transitional justice' – justice is justice. If it's not, it's not justice."[331] The same can be said for the rule of law; either the law rules, or it does not. If it does not, there is no rule of law. There is hence no such thing as the '*transitional* rule of law'. While I would like to agree with this stance of no compromise when it comes to justice and the rule of law, the reality is different. There is also no such thing as one universal concept of 'justice' or of the 'rule of law' that is independent from contexts, cultural traditions, or political beliefs. This is demonstrated by the multitude of existing rule of law conceptions, to which one could probably add many more, in particular from the perspective of different cultural backgrounds (indigenous, Islamic, etc.) and legal traditions (civil law, common law, Islamic law, etc.). The rule of law is and *must* be context-specific, otherwise it is not effective, which ultimately means that it does not exist.[332] A transitional rule of law conception reflects this reality; it sets certain minimum standards, while also accepting domestic approaches and solutions, and not claiming to provide exact and rigid universal rules.

The two main characteristics following from the two basic assumptions described above guide what will be the content of the transitional rule of law. They have been integrated into the framework that emerged; the standards that the law will have to incorporate as

330 See section 4.4.

331 Interview with Appeals Court Belgrade judge, Belgrade, 20 January 2017, I-29.

332 This is why so many rule of law promotion programmes of foreign donors have no lasting impact. In most cases, foreign elements were simply inflicted in another justice system, without preparing the ground for these new elements. Hence, they remain alien and in many cases are not accepted by the locals.

the normative component are limited in terms of quantity and quality. Laws shall be public, general, and clear, and incorporate basic human rights. The same applies to the institutional and cultural standards that each actor within society needs to comply with. At the same time, most of the principles listed have a clear substantive notion, which shall reflect the fact that the context of transitional justice is about finding a new conception of justice. The principles are not empty, but reflect that after all, politics – as well as the law resulting from politics – is about ideas one has to stand for and defend.

The result is a framework for the transitional rule of law (see section 4.6), developed on the basis of existing rule of law conceptions, placed into the context of transitional justice. The aim of establishing such a framework was to define a starting point for analysing the impact of the International Criminal Tribunal for the former Yugoslavia on the rule of law in Bosnia and Herzegovina and Serbia, in the aftermath of the Yugoslav wars. As will be demonstrated in Chapter 3, the framework developed here is still too broad for this analysis. The following Chapter will define what impact is, and in particular, how international criminal courts and tribunals influence the rule of law. In Chapter 4, it will be established at what (parts of the broad rule of law in transitional justice conception developed in the present Chapter) their influence can realistically be targeted. This will prove useful in refining the rule of law framework, which will ultimately be the subject of this research.[333] The new refined framework will be narrowed down to the judiciary, but otherwise adopt the general structure of the rule of law in transitional justice conception developed here, as it will equally consist of a normative, an institutional, and a cultural limb. The framework will likewise reflect those elements that are commonly associated with the rule of law: independence, accountability, transparency, predictability and stability, competence, efficiency, commitment, fairness, and impartiality. Furthermore, the new framework will establish what these elements signify from the point of view of the ICTY.

333 See Chapter 4, section 2.

3 The Impact Model: How War Crimes Courts Influence the Domestic Rule of Law*

As demonstrated in Chapter 1,[334] it has been frequently claimed that international criminal courts and tribunals influence the rule of law in the country – or countries – of their jurisdiction. A rule of law in transitional justice conception was offered in the preceding Chapter 2. However, in view of their limited mandate of adjudicating international criminal law, and prosecuting and trying individuals for the commission of crimes during war, the question arises *how* post-conflict war crimes courts affect that rule of law. A model that explains the impact of a war crimes court on a domestic justice system will be proposed here. Ultimately, it will be shown under which circumstances an international criminal tribunal can have an impact on the domestic transitional rule of law, in a country under its jurisdiction. The impact model will also help to establish which parts of the rule of law international criminal courts and tribunals can in fact influence. These findings will be used to narrow down the rule of law conception developed in Chapter 2 to one that will provide the basis for the empirical research presented in Chapters 5 to 8.

The impact model that will be developed in this Chapter is based on several premises: firstly, it will be shown that much depends on the performance of the war crimes court itself. In the literature, most prominently by Stromseth,[335] it has been asserted that war crimes courts can have "capacity building effects" and "demonstration effects" – to be more precise, I would refer to them as 'capacity building *abilities*' and 'demonstration *abilities*', as these features describe the court's performance potential rather than its outcomes. Through capacity building and mentorship programmes, local actors can be trained to conduct criminal proceedings. In addition, capacity building also means targeted advice on legislative or institutional reforms. This represents a direct influence of the war crimes court on the justice system in the country under its jurisdiction. Demonstration effects, in turn, constitute an indirect influence. These concepts largely refer to the character

* Parts of this Chapter have been published in: K. H. Brodersen (forthcoming: 2020). "We learnt that from The Hague": How the ICTY influenced the fairness of criminal trials in the former Yugoslavia. In C. Stahn, C. Agius, S. Brammertz, & C. Rohan (Eds.), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Account*. Oxford: Oxford University Press; and in: Brodersen, 2014.

334 Section 2.3.

335 Most notably in: Stromseth, 2006; J. E. Stromseth (2008). Post-Conflict Rule of Law Building: The Need for a Multi-Layered. *William and Mary Law Review, 49*(4), 1443–1471; and Stromseth *et al.*, 2006.

and credibility of the proceedings themselves, or, in short, to the "legitimacy"[336] of a court. These impact factors will be described in section 1.

As a next step, this Chapter will establish how capacity building and demonstration effects then affect a domestic justice system (section 2). What mechanisms come into play? The basic assumption about demonstration and capacity building effects, posited by Stromseth, is that the 'message' of accountability sent out by these tribunals will spill over into the ordinary justice system.[337] This phenomenon has been described (by others) as the "norm cascade"; if "norm advocates", including "transnational [advocacy] networks"[338], make active efforts at persuasion, at some point in the development of the new norm of accountability, a "tipping point" is reached, as of which the norm enjoys acceptance and "cascades" into society.[339] This norm cascade model mainly follows the 'logic of appropriateness' within constructivist theories of international relations, in which a norm is seen as a standard of appropriate behaviour for actors with a given identity.[340] Another view on norm internalisation is represented by the 'logic of consequentialism', which claims that choices and actions are shaped by pragmatic bargaining,[341] and are driven by expectations of consequences.[342] In most cases, for there to be impact, one must observe elements from both approaches: the logic of appropriateness and of consequentialism.

Indeed, domestic conditions that influence the readiness to internalise a certain norm play a role in both logics. Theories of Europeanisation[343] have shown that it is important

336 L. Helfer & A.-M. Slaughter (1997). Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal, 107*(2), 273-391, p. 287; T. M. Franck (1990). *The Power of Legitimacy among Nations*. Oxford: Oxford University Press, p. 24; and others.

337 Cf. Stromseth, 2006, p. 256; same idea posited by: C. Ryngaert (2010). Transitional Justice and the Rule of Law: Atrocity Trials in Domestic Criminal Courts. Retrieved from https://ghum.kuleuven.be/ggs/publications/working_papers/2010/40Ryngaert, p. 3.

338 J. I. Turner (2006). Transnational Networks and International Criminal Justice. *Michigan Law Review, 105*(5), 985–1032.

339 Model developed and terms used by: M. Finnemore & K. Sikkink (1998). International Norm Dynamics and Political Change. *International Organization, 52*(4), 887-917, p. 895ff. As mentioned, Stromseth has used the norm cascade model in order to explain how war crimes courts can have an impact on accountability processes at the national level. See: Stromseth, 2006. Also Bosco has used the norm cascade to explain the impact of war crimes courts: D. Bosco (2014). *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford: Oxford University Press, p. 15 and 187f.

340 Cf. J. Snyder & L. Vinjamuri (2003-2004). Trials and Errors: Principle and Pragmatism in Strategies of International Justice. *International Security, 28*(3), 5-44, p. 8; see also: J. G. March & J. P. Olsen (2009). *The logic of appropriateness*. ARENA Working Papers. University of Oslo. Oslo, p. 4.

341 Cf. Snyder & Vinjamuri, 2003-2004, p. 7.

342 Cf. J. G. March & J. P. Olsen (1998). The Institutional Dynamics of International Political Orders. *International Organization, 52*(4), 943-969, p. 949.

343 Radaelli defines Europeanisation as a "[p]rocess of (a) construction, (b) diffusion, (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies;" C. M.

to take into account the following two factors when assessing whether a rule will be adopted, applied, and diffused at the national level: firstly, how high the adoption costs are, meaning how much there is to lose in adopting this particular rule; and secondly, whether particular actors spoil the adoption of this rule.[344] A similar account is made by Snyder and Vinjamuri in the context of war crimes trials, when they assert that trials are most effective when the domestic infrastructure of justice is reasonably well established before trials begin, and when spoilers are weak.[345] Almost cynically, they find that "trials work best when they are needed least."[346]

Here, the norm cascade model is used as a basis to show how war crimes courts can affect the rule of law within a society. The original impact model of war crimes courts, with capacity building and demonstration effects that lead to a norm cascade, was developed by Stromseth to describe the courts' impact on *accountability*. Her research is focused on the abilities of courts to trigger accountability proceedings in the countries of the courts' jurisdictions.[347] Here, it is posited that the impact of war crimes courts can go beyond the adoption of the norm of accountability at the national level, and that the norm cascade model is still a good model to illustrate this impact. The idea behind the impact model developed in the present Chapter is therefore not only that in order to have impact, a war crimes court needs to have the ability to build capacity in the domestic justice system for accountability proceedings, and to credibly demonstrate these accountability proceedings at the international level. Rather, the question should be: under what circumstances can a war crimes court have capacity building and demonstration effects for the development of the rule of law at the national level. The underlying premise is that "[t]he rule of law is the principle that law should govern a state, an institution, or individuals, as opposed to the arbitrary decisions of officials of that state or institution."[348] Hence, it is presumed that courts (in their capacity as institutions) are governed by the rule of law. They can therefore also demonstrate the rule of law. And they can potentially foster domestic capacities relevant for the rule of law. When a tipping point is reached, as a result of an interplay between domestic conditions determining the readiness to accept the norm, and international

Radaelli (2003). The Europeanization of Public Policy. In K. Featherstone & C. M. Radaelli (Eds.), *The Politics of Europeanization* (p. 27-56). Oxford: Oxford University Press, p. 30.
For him, the concept thus mainly describes a process in which norms, practices or beliefs trickle down from the European to the national level.

344 Cf. F. Schimmelfennig & U. Sedelmeier (2004). Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe. *Journal of European Public Policy, 11*(4), 661–679, p. 664ff.

345 Cf. Snyder & Vinjamuri, 2003-2004, p. 19.

346 Snyder & Vinjamuri, 2003-2004, p. 20.

347 Mainly in: Stromseth, 2006; but she comes back to it in many of her other contributions (which are cited throughout this Chapter) as well.

348 L. May & Fyfe, 2017, p. 168.

conditions determining the court's – and its allies' abilities – to promote it, the rule of law will trickle down into the domestic society under the court's jurisdiction.[349]

The impact model proposed here is based on (the scarce) existing research on impact factors, impact mechanisms and different outcomes of the impact of war crimes courts on domestic justice systems. Indeed, three different scholarly attempts to theorise on impact exerted by international criminal tribunals on the rule of law in their target societies can be identified: first, there are scholars who describe different impact factors,[350] such as the capacity building efforts of war crimes courts. The previously mentioned contributions of Stromseth have provided the most comprehensive theory on impact factors to date. Second, other authors develop impact mechanisms of war crimes courts and describe how their messages are embraced by local societies.[351] Third, there are those who focus on specific parts of the rule of law that are influenced:[352] for instance, what role these courts have in triggering war crimes prosecutions and other accountability mechanisms at the national level. A last category of authors writes on impact exercised by war crimes courts in target countries – but without (or with no apparent) theoretical basis.[353]

The impact model proposed in this research must be seen in the context of the aforementioned lines of research. It is an attempt to synthesise the existing interdisciplinary scholarly work on impact factors, impact mechanisms, and on the outcomes of war crimes courts' impact. The result will be a comprehensive model on how war crimes courts influence the transitional rule of law in their target countries.

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349 While this is the language of the model, it should not be understood in these simplistic and paternalistic sounding terms: that all is good at the international level and all is bad at the national level and the countries under jurisdiction of a war crimes court need help in establishing the rule of law. In particular, this could not be said for the two countries that will be examined further throughout this book, where good rule of law bases already existed prior to the ICTY – and where it was not the ICTY that 'brought' the rule of law to Serbia and Bosnia and Herzegovina. However, what is of interest here, and in the impact model, is the potential for a war crimes court's influence on the rule of law.

350 For instance, on capacity building, see, among others: Chehtman, 2011a; Chehtman, 2011b; Chehtman & Mackenzie, 2009; Barria & Roper, 2008; or V. Hussain (2005). Sustaining Judicial Rescues: The Role of Outreach and Capacity Building Efforts in War Crimes Tribunals. *Virginia Journal of International Law, 45*(02), 547–583.

351 See for instance: W. W. Burke-White (2008b). Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice. *Harvard International Law Journal, 49*(1), 53–108; W. W. Burke-White (2007). The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina. *Columbia Journal of Transnational Law, 46*(2), 279–350; or A.-M. Slaughter & W. W. Burke-White (2002). An International Constitutional Moment. *Harvard International Law Journal, 43*(1), 1-21.

352 For instance: W. W. Burke-White (2003a). A Community of Courts: Toward a System of International Criminal Law Enforcement. *Michigan Journal of International Law, 24*(1), 1–101.

353 For instance: Mégret, 2011; A. Trapanani, 2011; Orentlicher, 2010; Akhavan, 2009; Orentlicher, May 2008; Kandić, 2005; Akhavan, 2001; Akhavan, 1998.

1 Impact Factors: War Crimes Courts' Capacity Building and Demonstration Abilities

1.1 Theoretical Origins

As explained, domestic impact theories rely on the assumption that war crimes courts, which have "jurisdiction only over individuals – not states – can strengthen, backstop, and compel domestic governance."[354] So, although their primary function is to conduct trials for international crimes, in doing so, war crimes courts have certain – intended or unintended – side effects. These side effects result from the courts' "didactic mission"[355] and its nature as "self-consciously expressive penal institutions"[356], meaning that such institutions send out a message that triggers a reaction at the national level.

Burke-White posits the view that the domestic impact depends on the strategic choices regarding the design and operation of the court.[357] In other words, what matters is *what* the court does and *how* it does it. Stromseth would call this phenomenon "demonstration effects"[358].[359] In her view, whether a court has "demonstration effects", depends on whether trials help to remove perpetrators of atrocities from positions in which they can control and abuse others (*what* the court does)[360], and on the character and credibility of the proceedings (*how* it does it).[361] The concept of "demonstration effects" also sums up what other authors describe as the "legitimacy"[362] of a war crimes court. Only if the court is legitimate, operates legitimately, and is perceived as legitimate, will its message be received at the national level.[363]

In addition to its expressivist role, Stromseth proposes that impact also depends on the "capacity building effects" of a war crimes court.[364] Capacity building effects ensue

354 Burke-White, 2007, p. 284.

355 Ostojić, 2014, p. 111.

356 R. D. Sloane (2007). The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law. *Stanford Journal of International Law, 43*(1), 39-94, p. 44.

357 Cf. Burke-White, 2007, p. 284.

358 Stromseth, 2009a, p. 91; Ryngaert uses the same term: Ryngaert, 2010, p. 14.

359 Others have called these effects "messaging effects" (in the context of truth telling): M. A. Drumbl (2007). *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press, p. 17; see also: Orentlicher, 2018, p. 98.

360 Cf. Stromseth, 2006, p. 262.

361 Cf. Stromseth, 2006, p. 263.

362 Helfer & Slaughter, 1997, p. 287; Franck, 1990, p. 24.

363 See section 1.3.4.

364 A similar statement is made by Fletcher and Weinstein when they advocate for linking criminal trials with capacity building efforts; cf. L. E. Fletcher & H. M. Weinstein (2002). Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation. *Human Rights Quarterly, 24*(3), 573-639, p. 580; and McAuliffe, 2013, p. 88. Also the United Nations Secretary General stresses the need for capacity building in order to

from a court's activities that aim to foster national capacities to deliver justice,[365] such as training programmes for local practitioners or advice on legal reforms.

Following Shany,[366] the capacity building effects of a war crimes court are direct impact factors, as they are almost fully in the hands of the court. Capacity building is a direct channel between the court and the justice system it targets. On the other hand, demonstration effects are indirect impact factors. The war crimes court can only serve as a role model through its activities and how it carries out those activities. Whether that has any effects on the ground, however, lies not (fully) in the hands of the court. It depends rather on how the demonstration effects of the court are communicated, as well as on the local target societies (i.e. the 'impact receivers').

1.2 Direct Impact Factors: Capacity Building Abilities

In most post-conflict societies, justice systems are decimated, minimally functional, and dominated and controlled by factions for their own purposes.[367] There is thus a need for three things: firstly, decent constitutions, laws, and formal authority; secondly, institutions

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strengthen the rule of law; cf. United Nations Secretary General, 23 August 2004, p. 3. Others have equally stressed the importance of capacity building, not only for criminal courts, but more generally, relating to the ability of local actors to comply with international standards set by international courts. See for instance: Helfer & Slaughter, 1997, p. 287; A. Chayes & A. H. Chayes (1995). *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press, p. 22-28.

365 Stromseth, 2009a, p. 91; her theory is based on the claim that war crimes courts need a "domestic impact strategy". This entails three components: firstly, the court needs to understand the local terrain it is adjudicating about "deeply and fully". Secondly, it is necessary to be aware of the court's demonstration effects and use them effectively. Thirdly and lastly, it needs to be proactive about capacity building – capacity to deliver justice within the national legal system. For the implementation of its capacity building efforts, the respective court might need to search for synergies with other international or national organisations; cf. Stromseth, 2009a, p. 90f. Arguably, this goes beyond the classical model of a set-up for war crimes courts that focusses solely on pursuing accountability for past atrocities and thereby deterring future atrocities. The classical model, which assumes that the mere existence of accountability mechanisms leads to a change in social behaviour and thus to the implementation of the rule of law, has been proven ineffective. It would be over-simplistic to say that there is a "linear causal link between the introduction of formal legal mechanisms and changes in social behavior". Hence, the mere establishment of law enforcement mechanisms (such as tribunals) doesn't lead to a cultural change towards respecting the law; cf. Hussain, 2005, p. 555ff. Hussain hence similarly holds that war crimes courts need to focus on other goals than pursuing accountability and deterrence as well, in order to link up their work with the domestic legal system. She points out that capacity building in particular would contribute to promoting a rule of law culture in the country. In noting the establishment of hybrid tribunals, she welcomes a shift towards greater commitment to building a domestic rule of law; cf. Hussain, 2005, p. 551f. She explains that something like a proactive "impact strategy", proposed by Stromseth, is thus important.

366 Cf. Y. Shany (2013a). How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings: Lessons from the First Two Decades of International Criminal Justice in Operation. *Israel Law Review, 46*(3), 431-453, p. 443.

367 Cf. Stromseth, 2009a, p. 95.

that can *actually* guarantee rights, protect citizens, and enforce laws. This entails institution building through the establishment of courts, prosecution services, bar associations, the police, prison personnel and relevant civil society actors. And thirdly, a "culture change"[368]: a change in the mind-set among the legal profession and amidst the institutions themselves. Otherwise, the relevant actors, who were trained in the old system, will simply reproduce judgments based on their previous habits, hierarchies and – possibly – privileges.[369] Building justice institutions worthy of public trust and confidence is therefore a difficult and long-term process.[370]

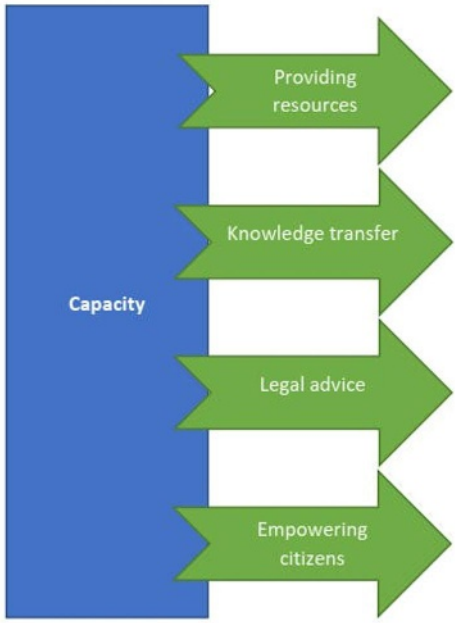
'Capacity building' generally refers to (re-)building a justice system. 'Capacity' is understood as the "ability of people, organisations and society as a whole to manage their affairs successfully."[371] Specifically in the context of war crimes, this primarily concerns the ability and capacity at the national level "to investigate, prosecute, defend and try cases for war crimes"[372].

Capacity building needs to be carefully planned and embedded in the judicial activities of war crimes courts. Lack of focus on oversight, inadequate strategic management capacities, lack of basic skills, insufficient funding, and poor use of existing resources, are easily identifiable challenges for effective capacity building.[373]

According to Stromseth, there are two main ways to improve the capacity of domestic justice systems: firstly, there is the supply side, where meaningful and direct contributions are made. Three types of capacity building efforts can be distinguished herein: the very basic activity of providing materials, advising on specific legislative or institutional reforms, and training or mentoring colleagues from the region. Here lies the potential for synergies, as war crimes courts can contribute concretely to domestic legal capacity building while doing their own every-day work.[374] Secondly, there is the demand side, where a war crimes court can contribute to empowering the civil society (individuals and groups) to insist upon justice and accountability from domestic legal and political institutions.[375]

368 Chehtman & Mackenzie, 2009, p. 13.
369 Cf. Call, 2007, p. 396f.
370 Cf. Stromseth, 2009a, p. 95.
371 OECD, 2008, p. 244.
372 Chehtman, 2011a, p. 1.
373 Cf. Chehtman & Mackenzie, 2009, p. 8f.
374 Cf. Stromseth, 2009a, p. 95.
375 Cf. J. E. Stromseth (2009b). Strengthening Demand for the Rule of Law in Post-Conflict Societies. *Minnesota Journal of International Law, 18*(2), 415–424, p. 415.

Figure 1 Capacity building abilities



1.2.1 Providing Material Resources

When it comes to providing material resources, war crimes courts sometimes have the possibility to provide supplies, equipment, and infrastructure to national legal justice systems, such as computers or specialised court devices.[376] They might also be involved in fundraising for new equipment for national institutions. In addition, handing over evidence that can be used in domestic proceedings,[377] even full indictments concerning suspects who should be tried at the national level,[378] or giving access to records of the court, and to its legal practice, is also a way of providing material resources.[379] This can lead to enhanced organisational capacity and expeditious case management,[380] and hence increases the efficiency of domestic accountability proceedings. In particular, new courthouses and

376 Cf. Stromseth, 2009a, p. 95.

377 Cf. E. Kirs (2011). Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina. *Goettingen Journal of International Law, 3*(1), 397–416, p. 404; or Shany, 2013a, p. 443.

378 As has been practiced within proceedings according to Rule 11*bis* of the ICTY's Rules of Procedure and Evidence.

379 Cf. Robinson, 2011, p. 22f.

380 Cf. Kirs, 2011, p. 404; and Chehtman & Mackenzie, 2009, p. 21.

equipment or technologies might be used by the national justice systems beyond national war crimes trials.

1.2.2 Advice on Legal Reform

Another possibility to directly influence the domestic justice system, is to provide specific targeted advice on domestic legislative and institutional reforms. This can relate to the inclusion of certain crimes, modes of liability, penalties, fair trial rights, or witness participation and protection provisions into domestic criminal law. Likewise, providing advice on rules and practices that enhance judicial efficiency and fairness, while simultaneously safeguarding independence and impartiality, is possible. It can, however, even go as far as advising to establish certain specific institutions or bodies within the domestic justice system.[381]

Advising on legal and institutional reforms can lead to an alignment of domestic rules and practices with international standards. This should lead to better protection of human rights (of the victims but also of the perpetrators), as well as increased independence and accountability of the judiciary, transparency and predictability, competence and efficiency, commitment, fairness and impartiality.

1.2.3 Transfer of Knowledge

The transfer of knowledge refers to different types of activities:[382] firstly, it can pertain to collaboration between international and national institutions, such as is the case in victims and witness programmes.[383] Collaboration can become a 'learning from the experts' experience regarding good practices and international standards.[384]

Secondly, part of the staff of war crimes courts can be recruited from the country under their jurisdiction, or can work at least temporarily at the respective court, for instance in the context of an internship or fellowship.[385] The idea is that these employees gain

381 This has happened, for instance, with regard to the inclusion of a war crimes department within the State Court of Bosnia and Herzegovina; cf. ICTY (19 June 2002), *Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, provided to the United Nations Secretary General and the United Nations Security Council, S/2002/678, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf (last accessed 13/08/2019), p. 20ff.; and Chehtman, 2011a, p. 8; or Barria & Roper, 2008, p. 328; and Burke-White, 2007.

382 For an examination of best practices in knowledge transfer, see: OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2009), *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer,* Final Report, Warsaw, https://www.osce.org/odihr/68108?download=true (last accessed 10/09/2019).

383 Cf. Stromseth, 2009a, p. 95.

384 Cf. Kirs, 2011, p. 405; Hussain, 2005, p. 568; Shany, 2013a, p. 443.

385 Cf. Chehtman & Mackenzie, 2009, p. 17; Shany, 2013a, p. 443; or interviews with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15 and with an OWCP expert assistant, Belgrade, 26 January 2017, I-55.

knowledge both on law and practice within the war crimes court, and then later return to their domestic justice system.[386] The "peer-to-peer"[387] mentoring works the other way round as well, namely, that international war crimes personnel temporarily work within national institutions.[388] International staff can thereby, in addition, compensate for lacking national capacity.[389]

Thirdly, training programmes for judges, prosecutors, lawyers, registrars, and other legal or administrative staff, police officers, as well as for students from the domestic justice systems can be organised. This includes workshops, lectures, and mutual visits.[390] The content of the training can be diverse, but will mostly focus on topics that are either substantive (e.g. international criminal and international humanitarian law), procedural (e.g. basic rights of the accused), technical, or practical (e.g. case management or investigation techniques).[391] 'Study visits' from the region to war crimes courts are short visits by a small number of professionals who meet their counterparts, attend trials, and hold meetings and informal discussions. They are meant to be "useful in terms of making individuals aware of procedures or mechanisms that are in place in a more developed jurisdiction."[392]

Fourthly and lastly, war crimes courts can exercise oversight over national investigations and prosecutions, preferably linked with the possibility to defer cases from the ordinary domestic court to the international war crimes court.[393] This should enable local judges, prosecutors, and defence counsel to gain better insight into the material standards required for complex prosecutions.[394] That said, it is also an incentive to improve local standards in order not to lose the case.

Within this context of exchange between the war crimes court and the domestic legal community, Chehtman underlines the importance of informal, horizontal contacts, which

386 Cf. Stromseth, 2009a, p. 95; and Kirs, 2011, p. 406.
387 Chehtman, 2011a, p. 21.
388 Cf. Chehtman & Mackenzie, 2009, p. 19; see likewise: Shany, 2013a, p. 443; Barria & Roper, 2008, p. 324; or Hussain, 2005, p. 568. This type of capacity building has been praised a lot by virtually all interviewees in Bosnia and Herzegovina, most notably by OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; by a Constitutional Court of BiH judge, Sarajevo, 7 February 2017, I-5; by an SCBiH judge, Sarajevo, 1 February 2017, I-19; by a POBiH prosecutor, Sarajevo, 9 February 2017, I-3; by a foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; and by an ICTY office BiH representative, Sarajevo, 30 January 2017, I-38.
389 Cf. Kristjánsdóttir *et al.*, 2011, p. 18.
390 Cf. Kirs, 2011, p. 405f.
391 Cf. Chehtman & Mackenzie, 2009, p. 14.
392 Cf. Chehtman, 2011a, p. 7.
393 Cf. Kirs, 2011, p. 399f.; Kristjánsdóttir *et al.*, 2012, p. 320.
394 Cf. Kirs, 2011, p. 400.

are naturally established between the relevant professionals. He argues that these contacts significantly impact the legal culture of these actors.[395]

The transfer of knowledge through personal contacts between legal practitioners of different jurisdictions ("judicial practitioners are globalizing"[396]), is, according to Slaughter, one of the features that characterises of the new trend of "judicial globalisation"[397].[398] In her view, this way of exchanging information and cross-referencing each other across courts and borders, strengthens judicial independence, which enhances the standing of the judiciary as a fundamental branch of the state. In addition, judicial globalisation can serve as a vehicle for entrenching international legal standards into a domestic legal system, without international treaties or customary law mandating their domestic implementation.[399]

In conclusion, training actors within national justice systems (especially in combination with oversight by the international war crimes court over domestic prosecutions), or, at the very least, interaction between the international and national level, can contribute to the improvement of judicial practice.[400] Collaboration, knowledge transfer and judicial monitoring thereby enhance the local justice system's independence, transparency, efficiency, quality, commitment, and fairness.[401] This, in turn, increases the level of public confidence in the rule of law.[402]

1.2.4 Empowering the Civil Society

It is important to engage with, empower, and build capacity among civil society organisations working on issues of justice and accountability;[403] they will act as important allies on the ground, and help bridge the gap between the war crimes court and the society

395 Cf. Chehtman, 2011a, p. 1f.; and Chehtman & Mackenzie, 2009, p. 20; this resonates with Turner's theory on transgovernmental networks which describes how actors from different institutions or states affect policy by coordinating with each other informally, without official or formal legal sanction; cf. J. I. Turner, 2006, p. 986.

396 A.-M. Slaughter (2000). Judicial Globalisation. *Virginia Journal of International Law, 40*, 1103–1124, p. 1103.

397 A "diverse and messy process of judicial interaction across, above, and below borders, exchanging ideas and cooperating in cases involving national as much as international law"; Slaughter, 2000, p. 1104.

398 Those categories are: firstly, relations between national courts and the European Court of Justice, secondly, interactions between the European Court of Human Rights and national courts, thirdly, the emergence of "judicial comity" in transnational litigation, fourthly, constitutional cross-fertilisation, and lastly, face-to-face meetings among judges around the world. This latter category comprises meetings face to face, exchange of information or common analysis of law, procedures, or courts. Thereby, Slaughter claims, judges would develop a "deep sense of participation in a common global enterprise of judging", which is the foundation for a "global community of law"; cf. Slaughter, 2000, p. 1104 and 1120f.

399 Cf. Slaughter, 2000, p. 1104 and 1120ff.

400 Cf. Kirs, 2011, p. 406.

401 See for similar claims: Kristjánsdóttir *et al.*, 2012, p. 320.

402 Cf. Barria & Roper, 2008, p. 318; Kristjánsdóttir *et al.*, 2011, p. 18.

403 Cf. Stromseth, 2009a, p. 96.

at large. At the same time, ordinary citizens should be kept informed about the work of the war crimes court,[404] including those who might otherwise have limited access to justice or political power.[405] Additionally, the war crimes court should reach out to the victims and their families.[406] As mentioned earlier in this Chapter,[407] this constitues capacity building on the demand side. The idea is that once domestic actors are informed about what is possible in terms of justice and accountability (through the example of the international war crimes court), they start demanding similar standards at the domestic level. In certain ways, the civil society, ordinary citizens, and especially victims and witnesses, can also contribute to improved criminal proceedings. Again, these demands for higher standards might go beyond the domestic adjudication of international crimes, but extend to other rule of law elements as well.

Outreach[408] efforts might include (but are not limited to): encouraging regular forums to engage with both organisations and ordinary citizens; offering workshops to local schools and organisations;[409] using local traditional media – but also new and alternative channels of communication – to provide information regarding the establishment, role, priorities and activities of the war crimes court;[410] maintaining an accessible website in local languages; and making information materials available in the region.[411] It is obviously helpful if the court itself is physically accessible, allowing all groups concerned to follow the proceedings and better understand the work of the court.[412]

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404 Cf. Hussain, 2005, p. 570.

405 Cf. Stromseth, 2009a, p. 96.

406 Cf. N. H. Pentelovitch (2007). Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals. *Georgetown Journal of International Law, 39*(3), 445–494, p. 450.

407 Section 1.2.

408 Pentelovitch follows the International Criminal Court (ICC) in defining "outreach" as a "process of establishing sustainable, two-way communication between the Court and communities affected by the situations […] and to promote understanding and support of the judicial process […] as well as the different roles of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials"; Pentelovitch, 2007, p. 446.
Interestingly, the ICC website (the source Pentelovitch provides in footnote 4 on page 446) no longer shows this definition. Instead, the website which is now called "Interacting with communities affected by crimes" explains how the ICC engages with 1) the affected communities, 2) the media, 3) legal communities, and 4) academic communities; cf. ICC, Interacting with affected communities affected by crimes, https://www.icc-cpi.int/about/interacting-with-communities (last accessed 07/08/2019).

409 Cf. Stromseth, 2009a, p. 96.

410 Cf. United Nations Secretary General (4 September 2007), *Report of the Secretary-General submitted pursuant to Security Council resolution 1757 (2007) of 30 May 2007*, S/2007/525, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S%202007%20525.pdf (last accessed 07/08/2019), p. 6.

411 Cf. Hussain, 2005, p. 574ff.; for similar ideas: Pentelovitch, 2007, p. 447; and V. Peskin (2005). Courting Rwanda. The Promises and Pitfalls of the ICTR Outreach Programme. *Journal of International Criminal Justice, 3*(4), 950–961, p. 953f.

412 Cf. Pentelovitch, 2007, p. 457.

Pentelovitch points out that there are several core components that are essential to creating an effective outreach programme: firstly, the focus on outreach from the start of the proceedings, in order to counter the politicisation of information regarding the war crimes court;[413] secondly, the creation of an outreach strategy from the outset of the establishment of the court (including envisaged funding); thirdly, the establishment of a feedback system to gauge effectiveness; fourthly, partnering with domestic organisations to gain expertise and local knowledge; and fifthly, the dissemination of consistent and accurate information by the war crimes court itself.[414] In this context, Peskin calls for outreach to be designed according to the "engagement model"[415], meaning that the war crimes court offers a comprehensive approach to outreach. This approach should go beyond informing the respective groups about the war crimes court, by engaging in extensive and frequent interactions and dialogues with them.[416]

The idea is that justice must not only be done, but it must also "be seen to be done"[417].[418] This should bring the conception of the rule of law closer to the targeted society, and allow it develop a sense of ownership over the accountability proceedings.[419] Outreach efforts should also help in establishing the truth by constructing a narrative record of the violence during the war, and the atrocities committed against victims.[420] All these elements should strengthen the public demand for – and the confidence in – justice among the population, making it more likely that citizens will resort to the justice system for resolving disputes and will be loyal to its rules.[421] This will also enhance the commitment and fairness of the civil society.

413 Cf. Pentelovitch, 2007, p. 452.
414 Cf. Pentelovitch, 2007, p. 448.
415 Peskin, 2005, p. 954.
416 Cf. Peskin, 2005, p. 954.
417 United Nations Secretary General, 4 September 2007, p. 6; in that sense, outreach activities can almost be seen within the framework of demonstration effects. As Pentelovitch puts it: "[o]utreach activities can further the goal of combatting impunity by *demonstrating* the benefits of a rule of law through a judicial process as it occurs" (emphasis added); Pentelovitch, 2007, p. 450. See next section on Demonstration Effects (1.3).
418 Outreach efforts are hence based on the belief that negative perceptions of a court are mainly driven by a lack of impartial information and that outreach can educate the population and thereby improve the perception of the court. Ford challenges this belief. He rather argues that due to confirmation biases (the tendency to interpret new evidence as confirmation of one's existing beliefs or theories), more and better outreach can actually have adverse effects on the perception of the war crimes court: the respective population would constantly be recalled information that goes against their attitude towards the court. That way, the court cannot be ignored or forgotten, which increases its rejection; cf. S. Ford (2012). A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms. *Vanderbilt Journal of Transnational Law, 45*, 405-476, p. 434ff.
419 Cf. Hussain, 2005, p. 570.
420 Cf. Hussain, 2005, p. 573, see also: Pentelovitch, 2007, p. 450.
421 Cf. Stromseth, 2009a, p. 96.

1.3 Indirect Impact Factors: Demonstration Abilities

What specific standards should be conveyed through capacity building? The idea of a war crimes court having demonstration abilities refers to its capacity to serve as a "role model"[422] for national justice systems,[423] to set an example of a suitable response to international crimes and to *demonstrate* how justice can be done. Not just legal professionals within the judiciary can draw inspiration from the court's demonstration effects;[424] it also constitutes an opportunity for citizens to demand a domestic judicial and political system that abides by the same standards.[425] Demonstration effects therefore follow when the court serves as an inspiration to domestic actors, but also when it is used as a reference point for people to express their demands.[426]

When the aim is to influence the development of the rule of law at the national level, war crimes courts must credibly demonstrate how they can ensure that the rule of law will be obeyed and credibly implemented in practice. Only then will there be a chance that the notion of the rule of law trickles down into domestic justice systems. In that sense, the impact of a war crimes court through demonstration effects is indirect. Without being in any way bound to follow them, the domestic justice system draws inspiration from the court's practices.[427]

How do war crimes courts become a role model? Legal and social psychologists, as well as political and social scientists, have argued that this is linked to the legitimacy of the war crimes court, more specifically to their *perceived* legitimacy.[428] Target audiences must

422 Several authors use this term without explicitly referring to demonstration effects (but the idea is still the same). Among others: Shany, 2013a, p. 440; or Snyder & Vinjamuri, 2003-2004, p. 15. This view has also been expressed by many interviewees. In one interview, the concept of demonstration effects has been paraphrased as "to just do it right" ("it" being the work of a war crimes court); interview with ICTY judge, Berlin, 20 December 2016, I-42. In the interview with OKO representatives, Sarajevo, 8 February 2017, I-36, one of the interviewees claimed that to "conduct war crimes trials with high standard" would re-establish trust into the judiciary.

423 Stromseth however warns that demonstration effects can also be negative, depending on the performance of the court; cf. Stromseth, 2009a, p. 92.

424 In some way, this is the basis to what Slaughter calls "transjudicial dialogue", which is dialogue and interaction between courts. This interaction, in her view, can take different forms, like common efforts in harmonising substantive rules, improving the quality of their decision making, or persuading their home governments. In that way, the transjudicial dialogue can shape domestic justice systems; cf. A.-M. Slaughter (1995). International Law in a World of Liberal States. *European Journal of International Law, 6*(4), 503-538, p. 524ff. The "transjudicial dialogue" concept is based on demonstration effects because it is precisely those effects that make courts willing to interact and that foster their visibility and authority.

425 Cf. Stromseth, 2006, p. 263: "demand […] in other areas of life as well".

426 Because: "Sustainable rule of law cannot be imposed – it must come from the inside"; Robinson, 2011, p. 22.

427 Cf. Kristjánsdóttir *et al.*, 2011, p. 19; and Kristjánsdóttir *et al.*, 2012, p. 321 (stating that this inspiration might trigger legal reform).

428 Max Weber made a distinction between sociological and legal legitimacy, the latter assuming that what is lawful is legitimate. Sociological legitimacy is connected to ethically normative beliefs which are beliefs to which people attribute a certain type of value and which, by virtue of these beliefs, they treat as a valid norm

perceive transitional justice mechanisms as legitimate prior to internalising the norms that these mechanisms represent.[429] The theoretical basis for this emphasis on perceived legitimacy is provided by numerous studies conducted by legal psychologists and sociologists, which found that legitimacy is important to political and legal institutions, due to the fact that individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when those institutions are perceived as legitimate.[430] For Tyler, legitimacy is the "key precursor of consent and voluntary acceptance" of the law and legal authorities.[431] Such legitimacy is achieved when the relevant public regards the institution as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.[432] Applying these findings to the question of how war crimes courts can impact the rule of law through demonstration effects, this would mean that if the court – by way of its 'rule of law performance' – is perceived as legitimate, the rule of law will be internalised more readily by the court's constituencies. Similarly, capacity building efforts will also only be fruitful

governing their action; cf. M. Weber (1978). *Economy and Society*. Berkeley: University of California Press, p. 36.

429 Arguing in that direction, among others: Ramji-Nogales, 2010, p. 3f.; and C. Alkon (2010). Plea bargaining as a legal transplant: A good idea for troubled criminal justice systems. *Transnational Law and Contemporary Problems, 19*, 355–418, p. 379; Stromseth, 2008, p. 1446; E. R. Higonnet (2006). Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform. *Arizona Journal of International and Comparative Law, 23*(2), 347–435, p. 359ff.; S. M. H. Nouwen (2006). Hybrid Courts: The Hybrid Category of a New Type of International Criminal Courts. *Utrecht Law Review, 2*(2), 180–214, p. 191; Stromseth, 2006, p. 251, 260, 268f., 281; T. R. Tyler (2006c). *Why People Obey the Law*. Princeton: Princeton University Press, p. 277; J. Cockayne (2004). The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals. *Fordham International Law Journal, 28*(3), 616–680, p. 638; L. A. Dickinson (2003). The Promise of Hybrid Courts. *American Journal of International Law, 97*(2), 295–310, p. 301ff.; W. W. Burke-White (2003b). Regionalization of International Criminal Law Enforcement: A Preliminary Exploration. *Texas International Law Journal, 38*(4), 729–762, p. 736f. Also many interviewees support this view, for instance: interviews with ICTY judges, The Hague, 2 December 2016, I-33; Berlin, 20 December 2016, I-42; The Hague, 13 December 2016, I-51; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; interview with ICTY defence counsel, The Hague, 9 November 2016, I-40; interviews with Appeals Court Belgrade judges, Belgrade, 20 January 2017, I-29; Belgrade, 20 January 2017, I-12; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17; interview with SCBiH judge, Sarajevo, 1 February 2017, I-19; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; interviews with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; Sarajevo, 6 February 2017, I-6; Sarajevo, 31 January 2017, I-21; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with OKO representatives, Sarajevo, 8 February 2017, I-36. They say that through the authority and respect war crimes courts gain, they become a role-model that is worth copying.

430 See T. R. Tyler (2006b). Psychological Perspectives on Legitimacy and Legitimation. *Annual Review of Psychology, 57*, 375-400, p. 76ff. (providing an overview of psychological research relating to legitimacy); and Tyler, 2006c, p. 161-169; similar claim: Shany, 2013a, p. 450.

431 Cf. Tyler, 2006c, p. 277.

432 Cf. R. H. Fallon Jr. (2005). Legitimacy and the Constitution. *Harvard Law Review, 118*(6), 1787-1853, p. 1795.

if they are made by an institution that is perceived as legitimate. Demonstration and capacity building abilities therefore always go hand in hand.

Ramji-Nogales posits that in order to increase institutional legitimacy, three components should be taken into consideration: the source/basis of the institution, the procedures it applies,[433] and the substance of the rules that the court uses.[434] Others add that the perceived legitimacy is also dependent on the court's institutional structure.[435]

The concept of legitimacy should be distinguished from a court's authority.[436] Contrary to legitimacy, as Alter, Helfer, and Madsen explain,[437] the notion of authority disregards subjective beliefs and motives.[438] The authors define the legal authority of a court as its power characterised by a content-independent response to a command or rule. In simple terms: even if the court's command is not in accordance with the recipient's interests, it will nevertheless be followed. This requires two components: firstly, that the court's

433 This element stems from procedural justice theories, repeatedly replicated (for an overview, see: J. A. Colquitt, D. E. Conlon, M. J. Wesson, C. O. L. H. Porter & K. Y. Ng (2001). Justice at the millennium: A meta-analytic review of 25 years of organizational justice research. *Journal of Applied Psychology, 86*(3), 425-445, p. 435). These theories are based on the assumption that authorities and institutions are viewed as more legitimate and, therefore their decisions and rules are more willingly accepted, when they exercise their authority through procedures that people experience as fair ("fair process effect", see: Ford, 2012, p. 456); cf. Tyler, 2006b, p. 379. People will defer to authority figures when they trust them and authorities earn that trust primarily by making decisions that follow the rules or laws; cf. T. R. Tyler (2006a). Does the American Public Accept the Rule of Law-The Findings of Psychological Research on Deference to Authority. *DePaul Law Review, 56*(2), 661-694, p. 674 and 679. Tyler also claims in this regard that the process is more important than the outcome; cf. Tyler, 2006c, p. 275ff. In that respect, Ford remarks, however, that a notion of legitimacy based on the procedural fairness theory is not suitable for every context. For instance, it can't account for the different views among Bosniaks and Serbs on the ICTY. Trials at the ICTY were conducted according to the same procedural rules, and yet, Bosniaks largely deem the ICTY as fair und Serbs as unfair; cf. Ford, 2012, p. 456ff. Here, the outcome might nevertheless matter more than the procedure.

434 Cf. Ramji-Nogales, 2010, p. 4; and I. Hurd (1999). Legitimacy and Authority in International Politics. *International Organization, 53*(2), 379-408, p. 381.

435 Cf. Dickinson, 2003, p. 303; generally speaking, many authors seem to advocate for solutions in which these court-characteristics are as close as possible to what is known and appreciated in their target societies. For instance, many claim that physical proximity of the court to its target society is advantageous for its perceived legitimacy (cf. Dickinson, 2003, p. 303; and Higonnet, 2006, p. 361ff.; Stromseth, 2006, p. 260ff.; Shany, 2013a, p. 450), or that similar procedures as within the relevant domestic legal systems should be applied and that local personnel should get involved (cf. Dickinson, 2003, p. 303; Shany, 2013a, p. 450). See generally: Ramji-Nogales, 2010, concerning the legal bases, applicable procedure and substantive law of courts.

436 Cf. K. J. Alter, L. Helfer & M. Madsen (2016). How Context Shapes the Authority of International Courts. *Law & Contemporary Problems, 79*(1), 1-36; and B. Peters & J. K. Schaffer (2013). The Turn to Authority beyond States. *Transnational Legal Theory, 4*(3), 315-335, p. 316.

437 In order to assess when courts' legal authority evolves into authority in fact, Alter *et al.* conducted a meta-analysis of the ten most active international courts on the basis of which they created a metric for analysing how legal, political, and social factors shape whether an international court has any *de facto* authority, the scope of that authority, and whether that authority encompasses the full range of its delegated jurisdiction; cf. Karen J. Alter *et al.*, 2016, p. 2. In doing so, they particularly look at the practices of key audiences; cf. Karen J. Alter *et al.*, 2016, p. 6.

438 Cf. Karen J. Alter *et al.*, 2016, p. 2.

command is acknowledged as such, and secondly, that consequential action is taken in accordance with the command.[439]

Somewhat merging the two concepts of legitimacy and authority, Føllesdal alleges that the "legitimate authority" of a court refers to why and when it has an influence on other actors in deciding what to do.[440] He believes that a court enjoys "normative legitimacy" when it is in fact effective (does the court solve the disputes it has been established for?) and complied with (which resonates with Alter's, Helfer's and Madsen's concept of authority: do people acknowledge the court's command and react accordingly?); when it is legal and adheres to the laws it has been established upon; and when it is perceived as authoritative (which resonates with the concept of perceived legitimacy described above).[441] Føllesdal's idea therefore encompasses both objective (effectiveness, compliance and legality) and subjective criteria (perception).

Of course, both concepts are intertwined. If a court is in fact ineffective and not complied with, it will hardly be perceived as legitimate. On the other hand, if it is not perceived as legitimate, it will not be complied with and will therefore be ineffective.[442] Having authority, in any case, seems to be a precondition for legitimacy.

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439 Cf. Karen J. Alter *et al.*, 2016, p. 3; Alter, Helfer, and Madsen assert that, in practice, five levels of authority can be observed: firstly, courts that have no authority, secondly, narrow authority, thirdly, intermediate, fourthly, extensive authority, and lastly, popular authority. Courts that have no authority in fact don't receive cases and its judgments are ignored, whereas as for courts that have narrow authority, the legal obligation stemming from the court and the need for consequential action is recognised only by the parties. Courts that enjoy intermediate authority are "able to cast a larger legal shadow that affects the behavior and decisions of other similarly-situated actors." This means that while at first, noncompliance with rules within the court's subject matter are rarely challenged in that court, its intermediate authority begins when the first cases are filed. It is solidified when laws and practices are revised to pre-empt litigation and when it's becoming more and more prominent in discussions between lawyers and clients. The last level of authority, extensive authority, can be observed when the international court's audience expands beyond its compliance partners to encompass a broader range of actors, including civil society groups, bar associations, industries, and legal academics. Here, the court shapes laws and politics for legal issues within its jurisdiction. The court's extensive authority is recognised in practices of the wider audience, yet although these actors acknowledge the court and its rulings as authoritative, they may still contest the precise meaning of the law. Extensive authority can be observed when textbooks and scholarly treatise are published on the international courts, when an established bar appears before the court, when nongovernmental organisations pursue international litigation, when a diverse range of judges, practitioners, and officials draw on the court's jurisprudence in their day-to-day activities, and when its decisions and potential litigation are regularly invoked in legal and policy discussions, with government officials referencing the prospects of the court's review as they debate and develop policy proposals. The last level of authority, popular authority, represents recognition of the court beyond the legal field, and hence by the general public; cf. Karen J. Alter *et al.*, 2016, p. 9ff.

440 Cf. A. Follesdal (2016). *Are Concepts of Legitimacy for International Courts Related, and How?* Unpublished article discussed (among others) at the iCourts Summer School 2016, p. 3.

441 Cf. Follesdal, 2016, p. 2.

442 In simple terms: "legitimacy enhances compliance and compliance enhances legitimacy"; C. J. Carrubba & M. J. Gabel (2013). Courts, Compliance, and the Quest for Legitimacy in International Law. *Theoretical Inquiries in Law, 14*(2), 505-541, p. 509. See also: Ramji-Nogales, 2010, p. 12.

For the purpose of explaining the idea of demonstration abilities, both concepts – (perceived) legitimacy and authority of a court – are important. Subjective beliefs regarding the legitimacy of a war crimes court are essential, because for everything that goes beyond their immediate mandate, these courts typically do not have anything other than "soft" persuasive powers.[443] It is inherent in the concept of demonstration effects that these effects are based only on beliefs: namely the perception that the performance of the war crimes court is something worth copying. In addition to that, however, the objective authority of a court is equally important, as it seems to be the precondition for subjective legitimacy: a court can only develop subjective legitimacy if it operates objectively, and in fact solves the disputes it has been established for, by adhering to its own rules, and is complied with (for instance, when it asks for the cooperation of states).

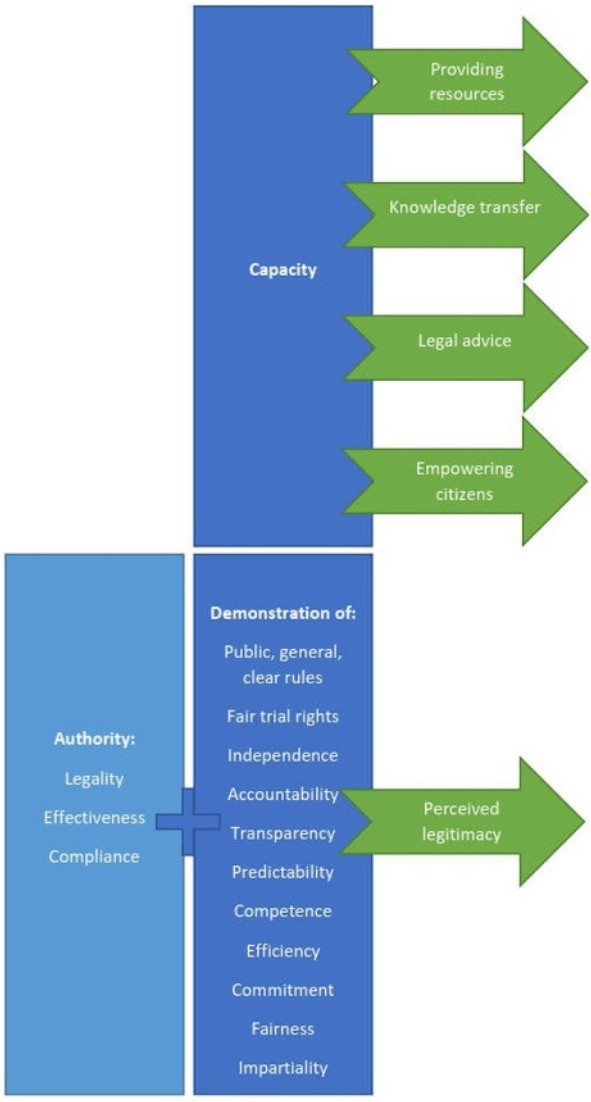
As a consequence, in order for a court to have demonstration effects, it firstly needs to be legally established and adhere to its own rules (stemming from Føllesdal's legitimate authority concept); secondly, be effective (Alter, Helfer, and Madsen's concept of authority and Føllesdal's concept of legitimate authority); thirdly, be complied with (same authors); and fourthly, be perceived as legitimate (Ramji-Nogales' and Tyler's perceived legitimacy concept).

Translated to the context of war crimes courts, this means that they must firstly be legally established and adhere to the laws that govern their functioning (commonly its statute and rules of procedure); secondly, be effective in fighting impunity for international crimes; thirdly, be complied with (for instance orders for cooperation, but this might also mean general deterrence); and fourthly, be perceived as legitimate and therefore credibly exemplify rule of law standards, in order for this norm to trickle down into – and be internalised within – national societies. Credibly exemplifying rule of law standards means that it must respect fair trial rights, be independent, accountable, transparent, predictable,

443 Some also say that even for fulfilling their core mandate, war crimes courts are "toothless tigers" (see for instance: J. R. Cencich (2013). *The Devil's Garden: A War Crime's Investigator's Story*. Washington D.C.: Potomac Books) as they lack their own enforcement mechanisms, such as a police force for arresting their suspects. Schabas notes that in the absence of a strong enforcement machinery, already state cooperation with war crimes courts often depends on acceptance of their legitimate authority by political and legal elites, as well as by the broader populace of the states most affected. War crimes courts' more ambitious goals – in particular, their aim of nurturing domestic processes of accountability and political transition – require even deeper levels of internalisation and acceptance by states and peoples of war crimes courts' legitimacy; cf. W. A. Schabas (2006). *The UN International Criminal Tribunals*. Cambridge: Cambridge University Press, p. 47ff.; see also: N. Grossman (2009). Legitimacy and International Adjudicative Bodies. *George Washington International Law Review, 41*, 107-180. This combination of institutional weaknesses and ambitious mandate compels international war crimes courts to strive for a particularly high and broad measure of political and social legitimacy – one that exceeds the efforts of domestic courts; cf. Y. Shany (2013b). The Legitimacy Paradox of Self-Representation. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 174-179). Oxford: Oxford University Press, p. 175.

competent, and efficient, as well as committed, fair and impartial. These parameters will be further explained in the next sections.

Figure 2 Capacity building and demonstration abilities



1.3.1 Legality: Legal Establishment

Courts usually need to be established by law.[444] Depending on the constitutional requirements, this can be done under international or under national law.

The matter of their legal establishment can create distinct problems for war crimes courts. Firstly, they are generally independent in the sense that they are not part of a legal system that has a legislature in place that passes laws, which are then interpreted and applied by the court.[445] In the absence of such a legislature that gives the court the authority to rule, it usually lacks the authority to rule.[446] However, the exact nature of the body granting the court the authority to rule can differ. It has therefore been widely accepted, for instance, that the United Nations can create international criminal tribunals, even though it is not a 'legislature' in the national understanding of the term. A second problem – until the establishment of the International Criminal Court (ICC), which solely works prospectively – has been the retroactive establishment of war crimes courts. The Nuremberg and Tokyo tribunals are the most illustrative examples in this regard, with their statutes being drafted only months before the trials began.[447] However, also here, it has widely been accepted that one does not need an explicit statute in order for certain acts to be seen as clearly criminal at a given time.[448]

In addition, the court needs to respect the laws that govern its functioning. For a war crimes court, this typically concerns its statute and rules of procedure and evidence, as well as any other official document. Of course, the court itself needs to act legally, otherwise its authority is undermined from the outset.

1.3.2 Effectiveness: Fighting Impunity

In order to be effective, the court must do what it has been established for. For war crimes courts, this primarily entails the fight against impunity for international crimes,[449] by way of conducting investigations into – and trials against – suspects of international crimes.[450]

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444 Article 6 (1) of the European Convention on Human Rights (ECHR); see generally: U. Muessig & N. Seif (2005). The Common Legal Tradition of a Court Established by Law: Historical Foundations of Art. 6 para. 1 European Convention on Human Rights. *The American Journal of Legal History, 47*(2), 161-182.

445 Cf. L. May & Fyfe, 2017, p. 9.

446 Cf. L. May & Fyfe, 2017, p. 11.

447 Cf. L. May & Fyfe, 2017, p. 9.

448 Cf. L. May & Fyfe, 2017, p. 11; see also the so-called "Nuremberg-exception" of Article 7 (2) ECHR.

449 Recital 5 of the Preamble to the Rome Statute of the International Criminal Court or Article 1 of the ICTY Statute; cf. N. J. Kritz (1999). War Crimes Trials: Who Should Conduct Them - and How. In B. Cooper (Ed.), *War Crimes: The Legacy of Nuremberg* (p. 168-182). New York: TV Books, p. 169.

450 See for instance United Nations Security Council Resolution 827, S/RES/827, 25 May 1993, recital 5; some war crimes courts also have other, ancillary goals, such as the ICTY which was established "[c]onvinced that [… it] would contribute to the restoration and maintenance of peace"; United Nations Security Council Resolution 827, S/RES/827, 25 May 1993, recital 6. However, being criminal courts, their main aim remains the fight against impunity.

For some, the fight against impunity includes removing perpetrators from positions in which they can control and abuse others (especially political posts), or even stigmatising or delegitimising those perpetrators in the eyes of the public.[451] They claim that this would send the message that "old patterns of impunity and exploitation are no longer tolerated."[452] In addition to this message, it is also important for the democratisation of a country that those who supported the violent conflict, will not remain those who decide on the political future of the country.

1.3.3 Compliance: Cooperation and Deterrence

Acknowledging and following the orders of a war crimes court (Alter's, Helfer's and Madsen's concept of authority)[453] primarily means that its convictions or acquittals are enforced.

However, in order for the court to fulfil its primary mandate of conducting investigations and trials with respect to international crimes, it needs the cooperation of state organs on a broader level. Depending on the legal regime established for that court, cooperation can refer to arresting and surrendering suspects, providing evidence or other documents, enforcing sentences, or any other request for cooperation.[454]

In addition, compliance with a war crimes court – and with the laws that underlie its jurisdiction – should equally mean that no more crimes are committed.[455] Potential perpetrators should follow the commands of the war crimes court in so far as they should be deterred from committing crimes. Deterrence has been described as the

> "capacity of prosecutions (or the work of the tribunals more broadly, including their mere existence) to elicit forbearance from committing further crimes on the part of those prosecuted, the 'similarly minded', and the general public."[456]

It therefore refers not only to suspects or accused persons but also to potential future perpetrators.

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451 Cf. Stromseth, 2009a, p. 92; see also: Milanović, 2016, p. 31f.; Kritz, 1999, p. 180.

452 Cf. Stromseth, 2006, p. 262; or C. Turner, 2008, p. 144; similar: Kritz, 1999, p. 169.

453 See section 1.3 above.

454 See for instance: United Nations Security Council Resolution 827, S/RES/827, 25 May 1993, #4 or Part 9 of the Rome Statute of the International Criminal Court.

455 See for instance: United Nations Security Council Resolution 827, S/RES/827, 25 May 1993, recital 5 and 7.

456 J. Schense (2016). Introduction. In J. Schense & L. Carter (Eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (p. 1-9). Nuremberg: International Nuremberg Principles Academy, p. 2.

1.3.4 Perceived Legitimacy: The War Crimes Court's Demonstration of the Rule of Law

The elements developed in the preceding sections (1.3.1-1.3.3) are indicators of a court's authority, which in itself is a precondition for the court's perceived legitimacy; an illegally established court (section 1.3.1 Legal Establishment), a weak court that is not functioning properly (section 1.3.2 Effectiveness), and a court that cannot enforce its decisions (section 1.3.3 Compliance) will most certainly also not be perceived as legitimate. As explained above, perceived legitimacy is, however, key in convincing the court's constituents to internalise the norms it represents.[457] Thus, only when the court credibly impersonates the rule of law itself, will it be seen as a legitimate role model in this respect. What elements make a court a credible rule of law role model will be explained in the following sections. In any case, as established in Chapter 2, the rule of law contains a normative, an institutional and a cultural component.

Normative Component

With regard to the normative component, the war crimes court needs to administer a coherent set of rules that are public and comprehensible (not secret and not obscure), general (not specific), and clear,[458] and which substance-wise incorporate human rights – specifically fair trial rights.

Procedural fairness, manifested in fair trial rights, fulfils a critical role in establishing and maintaining the institutional legitimacy of war crimes courts.[459] It is the "hallmark of legitimacy in courts"[460]; when fair trial rights are not respected, it delegitimises itself. At criminal courts, 'the means to the ends' are important – and a visibly just outcome is dependent on just processes,[461] i.e. due process.

For international war crimes courts in particular, Shany adds that

> "[b]y invoking internationally accepted standards of judicial practice, these courts project an image of fairness and procedural justice that alleviates some of the unique legitimacy deficits associated with having trials conducted by foreign judges who lack the usual connections with and accountability toward the people and polities over which they preside."[462]

457 See section 1.3 above.

458 Cf. L. May & Fyfe, 2017, p. 171.

459 Cf. Shany, 2013b, p. 175; A. J. Walker (2003-2004). When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees. *West Virginia Law Review, 106*(2), 245-304.

460 L. May & Fyfe, 2017, p. 7.

461 Cf. Aitchison, 2011, p. 110.

462 Y. Shany (2014). The Legitimacy Paradox of Self-Representation. In T. Waters (Ed.), *The Milosevic Trial: An Autopsy* (p. 174-180). Oxford: Oxford University Press, p. 174.

A war crimes court should – as a minimum – respect the fair trial rights codified in Article 14 of the International Covenant on Civil and Political Rights of 1966.[463] This refers to equality before the law, receiving a fair and public hearing, presumption of innocence, being informed promptly of the charges in an understandable language, the right to be present and defended, and to communication with a counsel of one's own choosing, the right to be informed of one's right to legal assistance at no cost, the right to an expeditious trial, the right to examine witnesses, and the right not to incriminate oneself.

Institutional Component

As for the institutional component, a war crimes court needs to embody a set of characteristics that essentially guarantee that the rules described above will in fact be respected by that court.

First, disputes regarding the interpretation of these rules must be resolved by independent judges and prosecutors.[464] General independence essentially means being free from external pressure and from political influence or manipulation.[465] In addition, judges should not be subject to supervision by their colleague-judges,[466] and *a fortiori* to any executive hierarchical power.[467]

Second, and related to that: the personnel of war crimes courts need to be accountable, both for their judicial decisions through appellate review,[468] and for personal misconduct through disciplinary review.

Third, war crimes courts and their prosecution services should be transparent. First and foremost, this means that the interpretation of rules must be resolved through public

463 The rights laid out in Article 6 ECHR are corresponding. See also generally: W. Schomburg (2009). The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights. *Northwestern Journal of International Human Rights, 8*(1), 1-29.

464 Cf. L. May & Fyfe, 2017, p. 171; see also Article 6 (1) ECHR.

465 In some systems, prosecutors are formally part of the executive branch, or at least, the executive has some form of supervisory powers over the prosecution. This should, however, not interfere with their general freedom to exercise their profession independently. See generally: European Commission for Democracy Through Law (Venice Commission) (3 January 2011), *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*, CDL-AD(2010)040, Strasbourg, https://rm.coe.int/1680700a60 (last accessed 07/08/2019), p. 6f. Four elements of judicial independence have been highlighted: manner of appointment, term of office, the existence of guarantees against outside pressure – including in budgetary matters – and whether a court appears as independent and impartial; cf. ECtHR, *Case of Campbell and Fell v. The United Kingdom*, Judgment, Chamber, 28 June 1984, para. 78.

466 The exception being an appeal to their judgment or decision.

467 Cf. European Commission for Democracy Through Law (Venice Commission) (18 March 2016), *Rule of Law Checklist*, CDL-AD(2016)007, Strasbourg, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e (last accessed 07/08/2019), p. 20ff.

468 Cf. L. May & Fyfe, 2017, p. 171.

hearings.[469] In addition, choices and decisions need to be explained in a language and manner that is accessible to the courts' constituencies.

Fourth, predictability is key. Predictability refers to several aspects of the legality principle, namely: foreseeability, stability and consistency, legitimate expectations, non-retroactivity, and *nullum crimen sine lege* as well as *nulla poena sine lege*.

Foreseeability in this context means not only that the law upon which judges and prosecutors decide must exist in advance of implementation, but also that it must be foreseeable as to its effects; it must therefore be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.[470]

Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself, law and jurisprudence must also be capable of adaptation to changing circumstances. They can be changed, but through public debate and notice, and without adversely affecting legitimate expectations.[471]

The principle of legitimate expectations expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of the law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes to frustrate legitimate expectations in exceptional cases. This doctrine traditionally applies not only to legislation but also to individual decisions by public authorities.[472]

The principle of non-retroactivity is, in this context, related to the doctrines of *nullum crimen sine lege* and *nulla poena sine lege*. People must be informed in advance of the consequences of their behaviour. In other words, they command that a person shall not be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the respective war crimes court. In addition, a person convicted by the court may be punished only in accordance with this law.[473]

Fifth, war crimes courts and their prosecution services should be staffed with competent personnel. Especially judges and prosecutors should be well-trained in the relevant subject matters.

Sixth, war crimes courts need to conduct trials efficiently. There should be no – or only a small backlog – and trials should be conducted within a reasonable time.[474]

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469 Cf. L. May & Fyfe, 2017, p. 171.
470 Cf. European Commission for Democracy Through Law (Venice Commission), 18 March 2016, p. 15.
471 Cf. European Commission for Democracy Through Law (Venice Commission), 18 March 2016, p. 16.
472 Cf. European Commission for Democracy Through Law (Venice Commission), 18 March 2016, p. 16.
473 See Articles 23 and 23 of the Rome Statute.
474 See for example Article 6 (1) ECHR.

Cultural Component

Institutional characteristics are insignificant when it comes to holding up the rule of law at the court, when they do not go hand in hand with a strong culture of law.

This means, firstly, that members of the war crimes court and the affiliated prosecution service should be committed to the law. This entails strict adherence to the law and their voluntary subordination to the law.

In addition, the rules of war crimes courts must be interpreted and administered fairly, and not selectively.[475] Persons on all sides of the proceedings, but also on all sides of the conflict, need to be treated fairly.

This also means equal treatment, which is a sign of impartiality of a war crimes court. Impartiality of the judiciary must not only be ensured in the law but also in practice. In addition, it must be visible in the public's eyes, as expressed for example in the case-law of the European Court of Human Rights, by stating that "justice must not only be done, it must also be seen to be done."[476]

1.4 'Impact Receivers': Key Constituents of War Crimes Courts

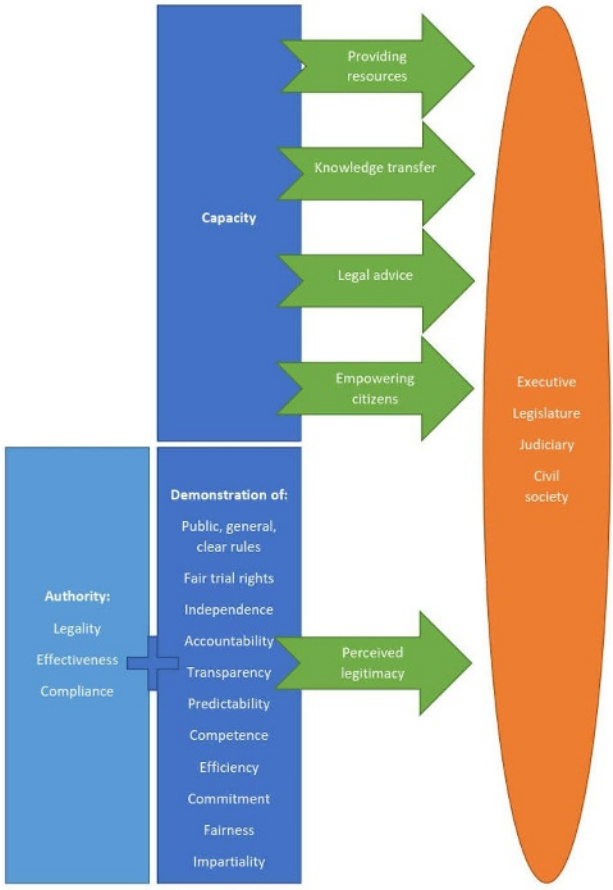
When it comes to the impact of war crimes courts on the rule of law in the countries under their jurisdiction, who are the groups targeted by the influence of courts? Generally, courts' "constituents" are all actors within a society: domestic courts, legislatures, the executive and administrations, and the civil society.[477]

In capacity building, depending on the measure, the main constituents of courts are primarily other courts (whether war crimes or ordinary criminal courts, and even beyond criminal courts) and their personnel. In addition, as capacity building can also address the civil society, civil society organisations or the public at large (including victims and perpetrators)[478] are targeted.

A war crimes court can however also have demonstration effects on a wider audience. This not only includes national courts and their personnel, but also the legislature, executive, and administration, as well as members of the civil society, and the general public. Ideally, war crimes courts that demonstrate rule of law standards, will also inspire this wider circle of addressees to abide by these standards.

475 Cf. L. May & Fyfe, 2017, p. 171.
476 ECtHR, *Case of De Cubber v. Belgium*, Judgment, Chamber, 26 October 1984, para. 26.
477 Cf. Follesdal, 2016, p. 3.
478 Cf. Ramji-Nogales, 2010, p. 16.

Figure 3 Impact factors of war crimes courts



2 Impact Mechanisms: The Rule of Law Cascade

2.1 Theoretical Origins

In the next section, it will be explained how capacity building and demonstration effects actually unfold. How do capacity building and demonstration *abilities* of a war crimes court become capacity building and demonstration *effects* in practice? Theories of norm penetration and internalisation will form the basis for the impact mechanisms that will be developed for that purpose. These theories stem from the research on international relations, which at first aimed to explain how international relations between states work and what role international law played therein, and later moved on to investigate how international law – and even later: international courts – influence the domestic sphere. The norm cascade model emerged in the latter context. This development, and the relevant underlying rationales, will be outlined in the following section.

2.1.1 Why Obey? Logic of Appropriateness Versus Logic of Consequentialism

Two main approaches on determining why people engage in certain actions have crystallised in political science literature: there are those who claim that action is rule-based,[479] following the right principles; and those who claim that action is based on a cost-benefit analysis, so calculating which action leads to the best outcome.[480] The former suggest that action follows a logic of appropriateness and the latter assert that action follows a logic of consequentialism.[481]

The logic of appropriateness is based on the core assumption that humans maintain a repertoire of roles and identities, each providing rules of appropriate behaviour in situations for which they are relevant.[482] So, they do what they see as appropriate for themselves in a specific type of situation.[483] Human action is then driven by rules of appropriate or exemplary behaviour, and rules are followed because they are seen as natural, rightful, expected, or legitimate.[484] People seek to fulfil the obligations encapsulated in a role, an

479 Cf. March & Olsen, 2009, p. 17.

480 See generally: E. T. Higgins (2000). Making a Good Decision: Value from Fit. *American Psychologist, 55*(11), 1217-1230.

481 Cf. March & Olsen, 2009, p. 17.

482 Cf. March & Olsen, 2009, p. 4.

483 Cf. March & Olsen, 2009, p. 2.

484 Cf. March & Olsen, 2009, p. 2; and March & Olsen, 1998, p. 951; this does, however, not mean that the logic of appropriateness has more conservative consequences. Quite to the contrary: reforms, changes, or revolutions often follow from identity-driven conceptions of appropriateness rather than from conscious calculations of costs and benefits. When rules prescribe the appropriate action, rules also tell actors where to look for precedents, or who are authoritative interpreters of different types of rules, and what the key

identity, a membership in a political community or group, and the ethos, practices, expectations of its institutions.[485] March and Olsen explain that although this logic carries a notion of morality, this does not mean that all actions are morally acceptable or technically efficient – it is just seen as the best thing to do considering the specific role, identity and situation.[486]

Consequentialism, on the other hand, follows the logic that actions are driven by expectations of consequences. Human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives, and they are conscious that other actors do the same. Under these conditions, a political order arises from negotiation among rational actors pursuing personal preferences or interests, in circumstances in which there may be gains to coordinated action. Individual preferences are aggregated into collective actions through bargaining, negotiation, coalition formation, or exchange. And hence, the only obligations recognised by individuals are those created through consent and contracts grounded in calculated consequential advantage.[487]

Most authors concede that both logics are usually at play in varying degrees, or that they compete.[488] Actors are usually driven both by their interests, upon which they evaluate expected consequences, and by the rules prescribed as part of their identities. They therefore calculate the consequences and follow the rules; which approach dominates often depends on the person and on the situation.[489]

2.1.2 Why States Obey International Law in their International Relations

In the first instance, the logics of appropriateness and consequentialism were relevant to explain the compliance of states with international law, i.e. in the context of international relations.[490] In this domain, these logics take the shape of more constructivist theories[491]

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interpretations are. So, by looking at others for inspiration, actors further develop their actions; cf. March & Olsen, 2009, p. 7.

485 Cf. March & Olsen, 2009, p. 2.

486 Cf. March & Olsen, 2009, p. 4.

487 Cf. March & Olsen, 1998, p. 950.

488 Cf. March & Olsen, 2009, p. 17; or March & Olsen, 1998, p. 952.

489 Cf. March & Olsen, 1998, p. 952.

490 For a summary, see: D. Armstrong, T. Farrel & H. Lambert (2012). *International Law and International Relations* (2 ed.). Cambridge: Cambridge University Press.

491 Constructivist theories, such as liberalism, are based on the assumptions: that primary actors in the international system are individuals and groups acting in a domestic and transnational civil society; that the state interacts with these actors in a complex process of both representation and regulation; and that the nature and intensity of state preferences, determined as the aggregation of the preferences of individual and group actors represented in a particular state, will determine the outcome of state interactions; cf. Slaughter, 1995, p. 508.

and more realist theories[492] respectively.[493] Realists, most prominently represented by Morgenthau, take the view that international law is irrelevant in international politics, because most states follow their national interests without giving a thought to what international law requires.[494] Making states comply with international law is therefore only possible through coercion. For constructivists, compliance grows more fundamentally from techniques of persuasion resting on the power of norms.[495] Within and across these two broad approaches, different models have been developed to explain why states comply with international law.[496]

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492 Realism is based on the assumptions: that states are the primary actors in the international system, that they are rational unitary actors who are functionally identical; that state preferences, ranging from survival to aggrandisement, are exogenous and fixed; that the anarchic structure of the international system creates such a degree of either actual conflict or perceived uncertainty that states must constantly assume and prepare for the possibility of war. In that context, outcomes of state interactions are typically zero-sum and thus are determined by relative power: power is the currency of the international system; cf. Slaughter, 1995, p. 507.

493 International law compliance is subject of a long list of research publications. See for a first generation of research: K. Danish (1997). Book Review: The New Sovereignty: Compliance with International Regulatory Agreements. By Abram Chayes & Antonia Handler Chayes. Cambridge: Harvard University Press (1995). *Virginia Journal of International Law, 37*(3), 789-810, fn. 3 and accompanying text. All these theories and studies aim to contribute to verifying or challenging the seminal claim by Henkin that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"; L. Henkin (1979). *How Nations Behave*. New York: Columbia University Press, p. 47. The overview provided here is highly simplified. There are also other approaches, for instance rational choice or communitarian explanations; among the liberal explanations, one may further distinguish between approaches based on rule legitimacy, on political identity, or on legal process explanations; cf. Koh, 1998-1999, p. 1401ff. Koh, believing that most processes will be a combination of these approaches, makes the following intuitive example of why, at some point, we started using seat belts in cars: At first, this was coerced due to high fines for not wearing it. Then it became our self-interest as we wanted to avoid the fine. In a third instance, the seat belt rule gained legitimacy and developed a compliance pull. Then it became part of one's sense of personal identity: "if I am a law abiding person, I ought to obey the seatbelt laws". Lastly, the seatbelt rule was inculcated via legal process: now you cannot not wear a seatbelt without even the car telling you to do so; cf. Koh, 1998-1999, p. 1407.

494 Cf. K. J. Alter (2003). Do International Courts Enhance Compliance with International Law? *Asian and Pacific Studies, 25*, 51-78, p. 53; this radical position has been falsified in the literature already. It focusses now on the research question whether, given that international law does matter, which are the social mechanisms that help make international law matter? And so the study goes more about international law internalisation; cf. H. H. Koh (2004-2005). Internalization through Socialization. *Duke Law Journal, 54*(4), 975-982, p. 976f.

495 Cf. Koh, 2004-2005, p. 976.

496 The most prominent constructivist models, which basically claim that voluntary obedience must be the preferred enforcement (cf. H. H. Koh (1997). Review: Why Do Nations Obey International Law? *Yale Law Journal, 106*(8), 2599-2659, p. 2645) have been formulated by Chayes and Chayes (mainly in: A. Chayes & A. H. Chayes (1993). On compliance. *International Organization, 47*(2), 175-205, p. 204f.; but see also: Chayes & Chayes, 1995, p. 3 and 230), Franck (mainly in: T. M. Franck (1998). *Fairness in International Law and Institutions*. Oxford: Oxford Unviersity Press; but see also T. M. Franck (1988). Legitimacy in the International System. *The American Journal of International Law, 82*(4), 705-759, p. 706), and Koh (Koh, 1997, p. 2603; H. H. Koh (1996). Transnational Legal Process. *Nebraska Law Review, 75*(1), 181-208; Koh, 1998-1999, p. 1399; and Koh, 2004-2005, p. 978ff.). For a "carrots and sticks" model (more of realist, logic

2.1.3 Why States Obey International Law Domestically

Research on the role of international law, however, has already gone one step further; it no longer solely focusses on how international law can influence state relations, but now also analyses how international law entered into the formerly exclusive field of domestic affairs to regulate the relationships between governments and their citizens.[497] While the constructivist tradition posits that through socialisation, international law can have a considerable domestic impact, the realist tradition – at the intersection of international relations and international law scholarship – is sceptical of the ability of international law to affect domestic society and politics, and to influence the behaviour of rational self-interested actors.[498]

In this context, theories of European Union (EU) external governance or Europeanisation,[499] and in particular of EU conditionality,[500] have contributed to insights on the domestic conditions that are conducive to international impact, and particularly on those that would inhibit it. Being an inherently incentive-based approach to policy, the effectiveness of EU rule transfer – the ultimate goal of conditionality – can best be explained as a rationalist bargaining strategy; the EU gives rewards – such as membership – if the target government complies with the conditions, and it withholds those rewards, or even enforces sanctions, if they fail to comply. The respective government will consequently balance EU, domestic, and other international pressures, in order to maximise its own political benefits; EU rules are adopted if the EU rewards exceed the costs for the government, even if it does not accept the normative argument underlying that specific rule. This cost-benefit analysis – and therefore the success of EU conditionality – depends on several factors: first, on the credibility of threats and promises as determined by the capacity to be open for new member states (capacity to pay the rewards), and consistency

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of consequentialism nature), see: D. George, D. Rocke & P. Barsoom (1996). Is the good news about compliance good news about cooperation? *International Organization, 50*(3), 379-406. For an approach, which must be situated between realist and constructivist models as it posits an intermediate way between coercion and persuasion, is developed by Goodman and Jinks and called "acculturation"; cf. R. Goodman & D. Jinks (2004). International Law and State Socialization: Conceptual, Empirical, and Normative Challenges. *Duke Law Journal, 54*, 983-998. It claims that nations obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience within a societal setting socialises them and remakes their interests so that they come to value rule compliance.

497 Cf. Slaughter & Burke-White, 2002.

498 Cf. Swimelar, 2013, p. 187.

499 See S. Lavenex & F. Schimmelfennig (2009). EU rules beyond EU borders: theorizing external governance in European politics. *Journal of European Public Policy, 16*(6), 791–812, p. 795 for a discussion of the notion "governance" grasping "this process of rule expansion beyond formal membership".

500 EU conditionality is a tool in preparing potential candidates for membership within the European Union. Haughton calls this process "EU-ization"; cf. T. Haughton (2007). When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe. *Political Studies Review, 5*(2), 233–246, p. 233f.

in relation to the target state (consistency of allocation of rewards); second, on the size of domestic adoption/compliance costs – specifically, public opinion on EU conditionality policy (ultimate reward of membership as well as the requirements that have to be fulfilled); and on the presence and power of veto players (actors whose agreement is necessary for a change in the status quo).[501] Domestic conditions conducive to impact are therefore low adoption costs and the absence of veto players (spoilers).

2.1.4 Norm Internalisation: The Norm Cascade Model and the Spiral Model

The "norm cascade" model, developed by Finnemore and Sikkink, while clearly a constructivist approach, precisely offers the opportunity to also take into account push and pull factors that generally feature in consequentialist models. It describes how a norm, coming from the international level, enters into a domestic justice system, exercising its influence on domestic structures and domestic norms.[502]

The basic idea of the norm cascade is that government officials and societal interest groups appeal an international rule or norm, in an effort to further specific objectives in the national arena. Through such appeals, international rules and norms can become incorporated into the policy debate, and, under some conditions, may ultimately affect national policy choices.[503] Finnemore and Sikkink argue that influencing norms at the domestic level involves a three-stage process:[504] the first stage is "norm emergence", the second stage involves broad norm acceptance and is called "norm cascade", and the third stage entails internalisation of the norm.[505] The point in time between the first and the

501 This paragraph stems from Brodersen, 2014, p. 223f., where I explain the ICTY's "conditionality" towards Serbia to adopt the rule of law. It is based on the following literature: F. Schimmelfennig (2008). EU political accession conditionality after the 2004 enlargement: consistency and effectiveness. *Journal of European Public Policy, 15*(6), 918–937; R. A. Epstein & U. Sedelmeier (2008). Beyond Conditionality: International Institutions in Post-Communist Europe after Enlargement. *Journal of European Public Policy, 15*(6), 795–805; Schimmelfennig & Sedelmeier, 2004; J. Kelley (2004). International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions. *International Organization, 58*(3), 425–457; Lavenex & Schimmelfennig, 2009.

502 Cf. Finnemore & Sikkink, 1998, p. 893.

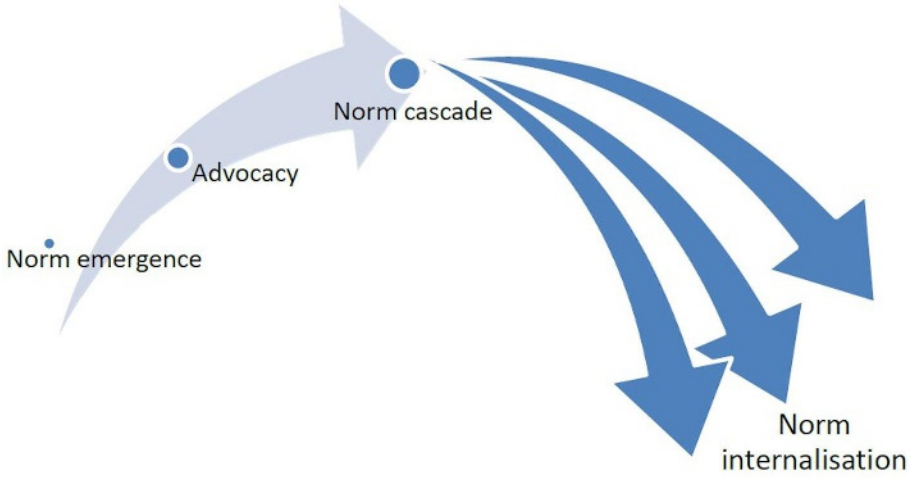
503 A similar idea is advocated in: A. P. Cortell & J. W. Davis (1996). How Do International Institutions Matter? The Domestic Impact of International Rules and Norms. *International Studies Quarterly, 40*(4), 451–478. Cortell and Davis add that the influence the international norm will have at the domestic level depends on two factors: the domestic salience of the norm and the domestic structural context; cf. Cortell & Davis, 1996, p. 452.

504 Finnemore's and Sikkink's theory was indeed developed in the context of international relations. In that sense, the norm is at first one that would emerge at the international, hence: inter-state level, and then further diffuse among states and then into each state's society.

505 Cf. Finnemore & Sikkink, 1998, p. 895; Koh's model of norm internalisation works similarly (see above and: Koh, 1998-1999, p. 1399): the three steps of interaction, interpretation and internalisation of a norm are almost equivalent to Finnemore's and Sikkink's triad of emergence – cascade – internalisation. Both models have been developed in the context of international human rights law enforcement. The dynamics at play in that legal field offer most inspiration for our purposes here, because international human rights

second stage is described as a "tipping" point, at which point a critical mass of relevant state actors adopt the norm and it consequently cascades into the rest of society.[506]

Figure 4 Norm cascade theory in a nutshell



Different logics of action may be at play at different stages of the life cycle of a norm.[507] The first stage ("norm emergence") is characterised by persuasion by "norm entrepreneurs"[508] who convince a critical mass of actors to embrace the new norm.[509] Burke-White, following Finnemore and Sikkink, calls this "norm leadership"[510]. These entrepreneurs act out of altruism, empathy, and ideational commitment; they believe in the ideals and values embodied in the norms.[511] Norm entrepreneurs work within

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emerge in the form of treaties (hence, law) in the international sphere. But whether they are enforced and respected is a domestic question. Two distinct characteristics of the issue of international human rights enforcement are important here: firstly, that coercion in this context is almost impossible. And secondly, that human rights are guaranteed through different actors within a state – for instance through parliament by passing relevant laws, the police, as well as courts. The so far rather abstract concept of a 'state' thereby becomes quite tangible as it transforms into various specific actors. And it is in fact these actors who each have to *internalise* human rights norms. This is similar to the topic discussed here, that of impact by war crimes courts on respect for the rule of law. As explained in section 1.4, also war crimes courts have various key addressees in this endeavour.

506 Cf. Finnemore & Sikkink, 1998, p. 895.
507 Cf. Finnemore & Sikkink, 1998, p. 895.
508 Term also used by Koh: Koh, 1998-1999, p. 1409f.
509 Cf. Finnemore & Sikkink, 1998, p. 895.
510 Burke-White, 2007, p. 306.
511 Cf. Finnemore & Sikkink, 1998, p. 898.

organisational platforms –[512] in what others have called "advocacy networks".[513] These networks can include states, international and local nongovernmental organisations (NGOs), and other relevant actors "working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services"[514]. A "tipping point" is reached once the norm entrepreneurs have persuaded a critical mass of actors to adopt the norm. A "critical mass" refers to both a certain quantity, and who the convinced actors are; for instance, their standing as important role models.[515]

At the second stage ("norm cascade"), a dynamic of imitation governs, as the "norm leaders" – i.e. those who have already adopted the new norm – attempt to socialise other actors to become norm followers.[516] The primary mechanism for promoting norm cascades is therefore an active process of international socialisation, intended to induce norm breakers to become norm followers.[517] Here, a combination of pressure to conform, the desire to enhance international legitimation, and the aspiration of state leaders to enhance their self-esteem, facilitate norm cascades.[518] Socialisation therefore represents the dominant mechanism of a norm cascade – the mechanism through which norm leaders persuade others to adhere.[519] A tipping point is the moment when sufficient actors and enough *critical* actors endorse the new norm to redefine appropriate behaviour for actors sharing their identity (among states: the identity "as a state"). Consequently, norm followers embrace the norms out of the desire for legitimacy, reputation and self-esteem;[520] they become part of a group of "peers" and comply with that group's norms, in order to demonstrate that they have adapted to the social environment that they now belong to.[521]

At the very end, norm internalisation occurs, where norms acquire a taken-for-granted quality and are no longer a matter of broad public debate. Internalised or cascading norms may eventually become the prevailing standard of appropriateness against which new norms emerge and compete for support.[522] At this stage, the most important actors are bureaucrats and professionals who adhere to – and apply – the norm.[523] Through

512 Cf. Finnemore & Sikkink, 1998, p. 899f.
513 For instance: J. I. Turner, 2006; or T. Risse & K. Sikkink (1999). The socialization of international human rights norms into domestic practices: introduction. In T. Risse, S. C. Ropp & K. Sikkink (Eds.), *The Power of Human Rights. International Norms and Domestic Change*. Cambridge: Cambridge University Press.
514 Risse & Sikkink, 1999, p. 18.
515 Cf. Finnemore & Sikkink, 1998, p. 901.
516 Cf. Finnemore & Sikkink, 1998, p. 902.
517 Cf. Finnemore & Sikkink, 1998, p. 902.
518 Cf. Finnemore & Sikkink, 1998, p. 895.
519 Cf. Finnemore & Sikkink, 1998, p. 902.
520 Cf. Finnemore & Sikkink, 1998, p. 902 and 898.
521 Cf. Finnemore & Sikkink, 1998, p. 903.
522 Cf. Finnemore & Sikkink, 1998, p. 895.
523 Cf. Finnemore & Sikkink, 1998, p. 898.

professions, people are actively socialised through habit and institutionalisation.[524] The peoples' primary motive is simple conformity.[525]

Table 4 Norm cascade theory: stages of norms[526]

	Stage 1 Norm Emergence	**Stage 2 Norm cascade**	**Stage 3 Internalisation**
Actors	Norm entrepreneurs with organisational platforms	States, international organisations, networks	Law, profession, bureaucracy
Motives	Altruism, empathy, ideational commitment	Legitimacy, reputation, esteem	Conformity
Dominant Mechanism	Persuasion	Socialisation, institutionalisation, demonstration	Habit, institutionalisation

The theory proposed by Risse and Sikkink, who investigate under what conditions international human rights norms are internalised in domestic practices, and what accounts for the variation in the degree to which they are implemented in different states,[527] is somewhat more complex. It complements the norm cascade model by specifying what happens at the norm cascade stage. In proposing the "spiral model" of norm diffusion,[528] they develop and present a theory on the stages and mechanisms through which international norms can lead to changes in behaviour.[529]

In summary, the authors argue that the extent to which norm diffusion takes place depends on the establishment and sustainability of networks among domestic and transnational actors advocating for human rights (as above: "advocacy networks"). These actors can include states, international and local nongovernmental organisations, and other relevant actors "working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services"[530]. These networks serve three purposes: firstly, they "put norm-violating states on the

524 Cf. Finnemore & Sikkink, 1998, p. 898 and 905.
525 Cf. Finnemore & Sikkink, 1998, p. 898.
526 Cf. Finnemore & Sikkink, 1998, p. 898.
527 Cf. Risse & Sikkink, 1999, p. 1.
528 Cf. Risse & Sikkink, 1999, p. 3; the 'spiral model' itself is based on another model – the "boomerang effect" – promoted by the same authors; cf. Risse & Sikkink, 1999, p. 18: a "boomerang" pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside. National actors then link up with international actors who then convince international human rights organisations, donor institutions, and/or great powers to pressure norm-violating states. Thereby, the pressure comes back to the national level, from which it initially started through the domestic groups. The spiral model, in turn, consists of several such "boomerang throws".
529 Cf. Risse & Sikkink, 1999, p. 2.
530 Risse & Sikkink, 1999, p. 18.

international agenda in terms of moral consciousness-raising."[531] Secondly, they empower and legitimate the claims of domestic opposition groups against norm-violating governments, and thereby mobilise domestic opposition. Thirdly, they challenge norm-violating governments by creating a transnational structure that puts pressure on such regimes from above and from below.[532]

Risse and Sikkink refer to the process by which international norms are internalised and implemented domestically as "socialisation"[533]. "Socialisation" is the process by which principled ideas held by individuals become norms in the sense of collective understandings about appropriate behaviour, which then lead to changes in identities, interests, and behaviour.[534] Three types of causal mechanisms are necessary for the long-term internationalisation of norms: firstly, processes of instrumental adaptation and strategic bargaining; secondly, processeses of moral consciousness-raising, argumentation, dialogue and persuasion; and thirdly, processeses of institutionalisation and habitualisation.[535] It is therefore clear that the theory presented by Risse and Sikkink also draws on social constructivism,[536] but incorporates rational choice elements.[537] More specifically, the spiral model tries to determine the transition points between the logic of instrumental rationality and strategic behaviour, on the one hand, and of argumentative rationality, moral discourse, and the like, on the other.[538]

The spiral model, which operationalises the theoretical framework of norm socialisation,[539] comprises five phases: the initial phase is one of repression in the state under investigation, where domestic societal opposition is too weak and/or too oppressed to present a significant challenge to the government. Here, transnational human rights networks put international human rights norm-violating states on the international agenda, in order to raise the international public's awareness of the situation in the "target state".[540] This marks the transition to the second phase of the spiral model, where the state in question will almost always deny the allegations of norm violations, as well as the validity of the international human rights norms themselves. In addition, the state will usually invoke the principle of non-interference in domestic affairs.[541] The government in the target state

531 Risse & Sikkink, 1999, p. 5.
532 Cf. Risse & Sikkink, 1999, p. 5.
533 Risse & Sikkink, 1999, p. 5.
534 Cf. Risse & Sikkink, 1999, p. 11.
535 Cf. Risse & Sikkink, 1999, p. 5.
536 Cf. Risse & Sikkink, 1999, p. 8.
537 Cf. Risse & Sikkink, 1999, p. 12.
538 Cf. T. Risse & S. C. Ropp (1999). International human rights norms and domestic change: conclusions. In T. Risse, S. C. Ropp & K. Sikkink (Eds.), *The Power of Human Rights. International Norms and Domestic Change*. Cambridge: Cambridge University Press, p. 273.
539 Cf. Risse & Sikkink, 1999, p. 19.
540 Cf. Risse & Sikkink, 1999, p. 22.
541 Cf. Risse & Ropp, 1999, p. 237.

might even be able to provoke some form of nationalist sentiment against foreign intervention and give rise to criticism, thereby solidifying domestic support.[542] In order to reach the third phase, the transnational network must now keep the pressure on the norm-violating state high.

Then, in the third phase, the respective state is coerced to make tactical concessions to the international human rights community.[543] Those are "cosmetic changes to pacify the international criticism"[544]. However, these concessions allow domestic opposition to gain courage and to start its own process of social mobilisation. If it increases its strength and links up with transnational networks, the government is under pressure "from above" (transnational actors) and "from below" (national actors),[545] and no longer controls the domestic situation; whenever the norm-violating government commits another serious violation of human rights, the domestic transnational network is activated.[546] This might involve public "shaming"[547], but also material sanctions, if necessary. This should trigger domestic leaders in the target state to start the debate with their opponents,[548] which implies that they start taking transnational advocacy networks seriously, which only further strengthens such networks. Faced with a fully mobilised domestic opposition linked up with transnational networks for whom human rights have achieved consensual status, norm-violating governments no longer have many choices.[549] At this stage, some national leaders start a process of "controlled liberalisation"[550] and begin implementing human rights norms domestically.[551] Others, however, continue to miscalculate the situation, as a result of which a regime change is likely to happen.[552]

The outcome of either regime change or controlled liberalisation, is the transition to the fourth phase of the spiral model. Here, international human rights norms gain prescriptive status in the target state; the norm is no longer contested, and governments start to institutionalise them domestically. Cortell and Davis describe this process as follows: at the outset,

> "a state's acceptance of the rule is limited to declaratory statements or ratifications of international agreements pertaining to the rule. Nonetheless,

542 Cf. Risse & Sikkink, 1999, p. 23.
543 Cf. Risse & Ropp, 1999, p. 238.
544 Risse & Sikkink, 1999, p. 25.
545 Cf. Risse & Ropp, 1999, p. 238.
546 Cf. Risse & Sikkink, 1999, p. 26.
547 Risse & Sikkink, 1999, p. 26.
548 Cf. Risse & Sikkink, 1999, p. 27.
549 Cf. Risse & Sikkink, 1999, p. 28.
550 Risse & Ropp, 1999, p. 238.
551 Cf. Risse & Sikkink, 1999, p. 28.
552 Cf. Risse & Ropp, 1999, p. 238.

> in adopting this strategy [making statements and adopting agreements] authoritative actors have begun to embrace the rule's prescriptions over other possible strategies, thereby enhancing the rule's legitimacy in the domestic political context. If such actions continue, the rule will attain prescriptive status: 'When actors regularly refer to the norm to describe and comment on their own behavior and that of others, the validity claims of the norm are no longer controversial, even if the actual behavior continues violating the rules.' […] The norm or rule comes to be embedded within the nation's own normative, juridical, or constitutional framework."[553]

If the domestic transnational networks keep up the pressure, prescriptive status is followed by the full implementation of human rights norms, which marks the final stage of the spiral model: "rule-consistent behaviour".[554] Here, norms are regarded as internalised in domestic practices, when actors comply with them irrespective of individual beliefs about their validity –[555] norm compliance is "depersonalised"[556]. They become "'standard operating procedures' of domestic institutions"[557], actors follow the norm, because "it is the normal thing to do."[558]

2.2 Mechanisms to Impact the Rule of Law by War Crimes Courts

The norm cascade and the spiral models describe how a norm, which emerges between states as the appropriate behaviour to follow, trickles down into the domestic sphere. Now, with the proliferation of international courts and tribunals since the end of the twentieth century,[559] the question also emerges as to how norms that develop at international *courts* trickle down into the domestic sphere. Burke-White and Slaughter opine that this represents a new challenge for international courts, namely to be able to influence the domestic policies of states and harness the power of national institutions in the pursuit of "global objectives".[560]

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553 Cortell & Davis, 1996, p. 456f.

554 Cf. Risse & Ropp, 1999, p. 238.

555 Cf. Risse & Sikkink, 1999, p. 16.

556 Risse & Sikkink, 1999, p. 17.

557 Risse & Sikkink, 1999, p. 17.

558 Risse & Sikkink, 1999, p. 17.

559 Cf. C. Romano (1998). The Proliferation of International Judicial Bodies: The Pieces of the Puzzle. *New York University Journal of International Law and Politics, 31*(4), 709-751, p. 709f.; Romano describes this transformation of the international judiciary as the "single most important development of the post-Cold War age"; Romano, 1998, p. 709.

560 Cf. A.-M. Slaughter & W. W. Burke-White (2006). The Future of International Law is Domestic (or, The European Way of Law). *Harvard International Law Journal, 47*(2), 327-352, p. 328 ("the future of interna-

The authors claim that the development of increased penetration of international law from international courts into the domestic sphere can best be observed in the field of international criminal law.[561]

In this context, the ultimate impact of international criminal law – and its enforcers, international criminal courts – would be deterrence, i.e. that international crimes are no longer committed. As formulated above,[562] the question, however, is how war crimes courts can influence the behaviour of a state and its individual actors regarding issues that go beyond their primary mandate (being the enforcement of international humanitarian and international criminal law). The question examined here is therefore how a norm that is merely *represented* by a court can penetrate into – and be internalised by – a society, as opposed to one that can actually be *enforced*.[563]

The theories presented above offer some clues to the answer; it becomes clear that norm penetration models that are rather based on the logic of appropriateness are more useful in explaining war crimes courts' abilities in this respect, as most of them would have no – or only very limited – means of coercion when it comes to issues that go beyond their primary mandate. It has also been claimed that pursuing more constructivist approaches is actually more effective, as in this very delicate context of addressing a country's past, a pure top-down approach might rather provoke resistance and even counteraction to norm

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tional law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors in domestic politics"; Slaughter & Burke-White, 2006, p. 350). They list three principle forms of engagement with domestic institutions: strengthening them, backstopping them where they fail to act, and compelling them to act; cf. Slaughter & Burke-White, 2006, p. 328. Strengthening domestic institutions can take different forms, such as through networks, through shared sovereignty with national institutions, or by providing international best practice and setting standards to give domestic institutions benchmarks for enhancing their own capability. In this context, Slaughter and Burke-White come back to the "managerial approach" to compliance, advocated by Chayes and Chayes, and apply it to the interaction between international law and domestic institutions. They posit that the task of maximising compliance with a given set of international rules is a task more of management than of enforcement, in the sense that it has to be ensured that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance; cf. Slaughter & Burke-White, 2006, p. 334ff. Backstopping domestic institutions in trying to comply with international rules can be done through overlapping jurisdictions, for instance; cf. Slaughter & Burke-White, 2006, p. 339ff. Again, the most effective approach is, however, some combination of these approaches; cf. Slaughter & Burke-White, 2006, p. 346.

561 Cf. Slaughter & Burke-White, 2006, p. 327.

562 In the introduction of this Chapter.

563 On war crimes courts' primary mandate, that can actually be *enforced* with the mechanisms provided in the court's statute and rules of procedure, see section 1.3.3 Compliance. Apart from those, in the context of their primary mandate, war crimes courts have a number of possibilities to influence state behaviour through certain functions of institutional influence, such as monitoring, imposing sanctions, and promoting norm socialisation: they monitor state behaviour and where that behaviour breaches underlying legal rules, sanction the state for it. At the same time, courts may socialise states through iterative interactions with the court. Through a number of push and pull factors courts make the costs of noncompliance greater than they would have been absent the tribunal or by acculturating states into the acceptance of new sets of norms and values; cf. Burke-White, 2007, p. 291.

penetration.[564] More realist models that follow – or incorporate – the logic of consequentialism are nevertheless useful to explain the specific dynamics of the norm cascade, as well as to outline the domestic conditions that must be in place, or be absent (such as high norm adoptions costs and players who veto the adoption of the norm).

As mentioned above,[565] Stromseth applies the norm cascade model to explain how pursuing accountability for war crimes becomes a domestic norm.[566] According to her, accountability proceedings can strengthen the fabric of a post-conflict society, by helping to build and expand domestic support for a norm of accountability. By putting the issue of accountability on the national agenda, the implementation of credible accountability proceedings can become a focal point for local and international nongovernmental organisations who advocate for related domestic reforms. Interveners involved in accountability proceedings can then stress the importance of accountability norms among local elites generally, and local and international NGOs can magnify these effects – both by informing and empowering ordinary citizens about the importance of accountability and fair justice, and by keeping the pressure on post-conflict governments. Thereby, pressure for change can be applied both from above and below. Eventually, a "tipping point" is reached where the norm of accountability, now enjoying broad acceptance, "cascades" into society.[567] Indeed, working towards an accountability cascade – in which expectations regarding accountability become the norm – is critical to overcome the legacy of a previous and pervasive impunity cascade in which order and accountability mechanisms simply collapsed. Ultimately, this would strengthen the domestic rule of law in the long term.[568]

The impact model proposed here goes one step further;[569] it posits that, it is the norm of the 'rule of law' that cascades into society, not merely that of 'accountability'.[570] A norm

564 Cf. J. I. Turner, 2006, p. 986; and J. I. Turner (2005). Nationalizing International Criminal Law. *Stanford Journal of International Law, 41*(1), 1–55, p. 24.

565 In the introductory part of this Chapter.

566 She writes: "Political scientists have developed various models of norm diffusion and human rights advocacy. These include a 'spiral model' through which local and international NGOs put pressure on domestic governments – from above and below – to abide by human right principles, and a process of 'norm cascades' as values gain credence broadly through a society after reaching a certain 'tipping point'"; Stromseth, 2006, fn. 27 at p. 264, citing Risse & Sikkink, 1999, p. 3 (spiral model) and Finnemore & Sikkink, 1998, p. 901 (norm cascade).

567 Stromseth here makes the reference to: Finnemore & Sikkink, 1998, p. 895ff.

568 Stromseth, 2006, p. 264f.; a similar claim is made by Shklar asserting that a deterrence effect created by trials trickles down to help fuel democratisation and the rule of law; in: J. Shklar (1964). *Legalism. Law, Morals, and Political Trials*. Cambridge, Massachusetts: Harvard University Press, p. 145.

569 Finnemore and Sikkink suggest that their norm cascade model be used within the context of democratisation research – a context, in which the study of the rule of law arguably falls. See: Finnemore & Sikkink, 1998, p. 891.

570 This thought was mainly triggered during my first round of interviews in The Hague, Belgrade, and Sarajevo. There, both 'impact senders' (people at the ICTY) and 'impact receivers' (people in the region) would, when

has been defined as "a standard of appropriate behavior for actors with a given identity"[571].[572] Ideally, war crimes courts thus adhere to the rule of law as the standard of appropriate behaviour. Using the court's capacity building and demonstration abilities, and with the help of advocacy networks, a tipping point can be reached where that norm diffuses into the society targeted by the court.

This process will be further explained in the next sections.

2.2.1 Advocacy Networks for the Rule of Law

Before explaining how the rule of law is internalised within domestic societies through capacity building and demonstration effects of war crimes courts, it should be clarified who, in this context, the respective advocacy networks are. Turner offers the most comprehensive analysis of these networks in the field of international criminal law, while an entire group of scholars likewise assumes their existence.[573]

Turner points out that both horizontal networks across borders and vertical ones between the international and the national level exist.[574] The assumption is that states in

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asked about how a war crimes court can be a "role model", or what it means "to do it right", mention elements that are commonly associated with rule of law standards (see Chapter 2, section 4.6), such as respect for fair trials rights, independence and impartiality of the court, efficiency, or fairness. For instance, in: interviews with ICTY judges, The Hague, 2 December 2016, I-33; Berlin, 20 December 2016, I-42; The Hague, 13 December 2016, I-51; interview with ICTY prosecutor, London, 21 November 2016, I-24; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; interviews with ICTY defence counsel, The Hague, 9 November 2016, I-40; Belgrade, 23 January 2017, I-27; Belgrade, 25 January 2017, I-60; interview with ICTY outreach officer, The Hague, 25 November 2016, I-7; interview with ICTY office BiH representative, Sarajevo, 30 January 2017, I-38; interviews with Appeals Court Belgrade judges, Belgrade, 20 January 2017, I-29; Belgrade, 20 January 2017, I-12; interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17; interview with Serbian defence counsel, Belgrade, 25 January 2017, I-16; interview with SCBiH judge, Sarajevo, 2 February 2017, I-45; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; interviews with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; Sarajevo, 6 February 2017, I-6; Sarajevo, 31 January 2017, I-21; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

571 Finnemore & Sikkink, 1998, p. 891.

572 See also section 2.1.1 and section 2.1.4.

573 The importance of advocacy networks has also been confirmed by virtually all my interview partners. According to Nettelfield, understanding the relationship between international networks and local capacity started in the context of transitions from authoritarian rule in Latin America: having observed local trials there, Lutz and Sikkink had argued that a justice cascade occurred as the result of the concerted efforts of a transnational justice advocacy network made up of connected groups of activist lawyers with expertise in international and domestic human rights law. This led to prosecutions of international crimes in Argentina and other countries. The networks had enabled domestic human rights advocates to reach outside of their own states to align themselves with foreign justice advocates, and later to use foreign courts to pursue cases they could not address at home. These efforts resulted in attitudinal and institutional change that led to the adoption of legislation and the ratification of international agreements on human rights, which ultimately facilitated domestic trials; cf. Nettelfield, 2010, p. 34f.

574 Cf. J. I. Turner, 2006, p. 986; Kristjánsdóttir, Nollkaemper, and Ryngaert assert that the collaboration between national and international actors within these networks strengthens both the legitimacy and the

which such advocacy networks operate become more porous and consequently open to norm penetration.[575] War crimes courts and their (affiliated) personnel are themselves the focal point for networks advocating for the penetration of the rule of law into the overall domestic society.[576]

The networks furthermore consist of the allies and supporters of war crimes courts. Those can include like-minded governments, international organisations such as the United Nations, the Council of Europe, the Organisation for Security and Co-operation in Europe, or the European Union, international and local NGOs, as well as other like-minded domestic actors.[577] They exert pressure from the outside (affiliates of war crimes courts and international friendly institutions and individuals) and from the inside (domestic actors).[578]

There are different dynamics that support the integration and strengthening of such advocacy networks. There is a substantial transfer of personnel, and therefore of information and skills from one conflict-setting to another ("tribunal hopping"). With each "hop", they bring along their experiences related to the norms and processes in operation in each tribunal and administration, and thereby spread this knowledge.[579] That way, war crimes courts may become increasingly connected, and therefore produce more coherent decisions and align their practices.[580] The effect is even more significant when war crimes court personnel moves to other posts – outside the war crimes domain – and recruits more norm supporters there as well. In that sense, hybrid courts play an important role in forming networks,[581] as local personnel is presumed to move to other positions within a criminal justice system at some point, taking with them their experiences and best practices from diverse environments.

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effectiveness of "international intervention", as grassroots-knowledge "weds up" with international law; Kristjánsdóttir *et al.*, 2011, p. 18. Similar views expressed in: Burke-White, 2008b. The idea of "judicial networks" goes back to Slaughter's extensive documentation of the operation of such networks in the context of constitutional courts: A.-M. Slaughter (2005). *A New World Order*. Princeton: Princeton University Press, p. 65ff.

575 See for instance: Slaughter, 1995 (describing networks as "transnational relationships among individuals and groups governed largely by rules of their own choosing"; Slaughter, 1995, p. 517).

576 Cf. Stromseth, 2009a, p. 96.

577 Cf. Stromseth, 2009a, p. 96.

578 Instead of following the terminology of the 'spiral model' and distinguishing between pressure from "above" and "below", the distinction between "outside", meaning international actors, and "inside", meaning national actors, is used here. It is decided that this terminology doesn't unnecessarily introduce any form of hierarchy between the international and the national level (which otherwise seems to be implied by "above" and "below") and is therefore more neutral.

579 Cf. Baylis, 2009, p. 63.

580 What emerges is a "transjudicial dialogue" that has already been described above; see section 2.2.1. See also: Baylis, 2009, p. 64.

581 Cf. J. I. Turner, 2005, p. 2.

The idea of a "community of courts"[582], which have the common endeavour of ensuring accountability according to certain fair standards, and which interact in numerous ways – through overlapping jurisdictions, by applying the same set of rules,[583] or through sharing the same pool of personnel – is another description of increasingly integrating networks.

Another way to extend and strengthen these networks is through capacity building,[584] as capacity building can be a subtle way to convince (mostly domestic) actors of the mission of war crimes courts.

On the other side, there are those who are targeted by the pressure exercised by advocacy networks, including relevant actors in the domestic executive, legislature, judiciary, and civil society. Those are the people already mentioned in section 1.4, the key addressees of war crimes courts.

In the international criminal law context, networks can take on several functions. They might, firstly, help to gradually nudge local authorities – who are generally reluctant to prosecute international crimes – towards action. Secondly, they might provide the necessary support to make prosecutions more efficient and cost-effective. Thirdly, they could subtly influence domestic norms by establishing connections with individual investigators, prosecutors and judges, who are ideally placed to advocate internally for war crimes prosecutions consistent with network standards.[585] But beyond that, and most importantly for the purpose of penetrating norms that go beyond accountability, networks could help to convey the standards of the rule of law that the war crimes court represents more generally.

2.2.2 War Crimes Courts' Rule of Law Cascade

Based on the foregoing, the following impact model is proposed:

The norm of the rule of law emerges (norm cascade theory, stage 1) at the respective war crimes court at the time of its establishment. It materialises through its operation, as the court conducts accountability proceedings while demonstrating rule of law standards. Norm entrepreneurs are therefore actors who are involved in the establishment of the court – they are the ones who "generate" the norms.[586] This includes, among others, those who take the decision to establish the court, those who finance it, those who write its

582 Burke-White, 2003a; this idea was initially raised in: Helfer & Slaughter, 1997; see also: Slaughter, 2005. Burke-White qualifies the emergence of different (international or hybrid criminal) courts as the emergence of an "international legal pluralism". He says that "[i]nstead of being undermined by fragmentation, the rules, the institutions, and practices of the international legal order can be strengthened by the emergence of an international legal pluralism"; W. W. Burke-White (2003-2004). International Legal Pluralism. *Michigan Journal of International Law, 25*(4), 963-979, p. 963.

583 Cf. Burke-White, 2003a, p. 3; and Burke-White, 2003-2004, p. 970.

584 Cf. Stromseth, 2009a, p. 96.

585 Cf. J. I. Turner, 2006, p. 988.

586 Similar views: Burke-White, 2007, p. 335.

statutes and official founding documents, and those who work within the court, or are affiliated to it.

Table 5 Stages of rule of law norm in the norm cascade[587]

	Stage 1 Norm Emergence	Stage 2 Norm cascade	Stage 3 Internalisation
Actors	Norm entrepreneurs with organisational platforms: war crimes courts and their collaborators	Networks of war crimes courts and their collaborators and allies (states, international organisations, NGOs, domestic bureaucrats) on the one hand; national executive, legislature, judiciary, civil society on the other hand	National executive, legislature, judiciary, civil society
Motives	Universal standards	Legitimacy, reputation, esteem, cost-benefit-calculations	Conformity
Dominant Mechanism	Codification and application	Demonstration effects, capacity building effects, jurisdictional regime	Habit, institutionalisation

Once the war crimes court becomes operational, networks in and around the court join forces to ensure that, firstly, the targeted country cooperates with it, secondly, the court's work is continued and complemented with war crimes trials within that country, and thirdly, the values and standards governing the war crimes court spread into the country's society.[588]

At this stage, it may well be that these advocacy efforts in fact have a "boomerang effect" in the sense of the spiral model presented above;[589] local actors from the executive, legislature, judiciary, or civil society appeal to war crimes court networks to put pressure on their peers to internalise rule of law standards. They might prefer to choose this type of advocacy – instead of calling on their peers directly – because they are generally weak or because they simply expect this type of pressure to be more powerful in triggering change. Then, the spiral of norm change starts. This process may well evolve according to the spiral model: first, denial of the validity of the mentioned universal standards, as well as claims of legal integrity and "legal non-intervention" (phase 2 of the spiral model).[590] This, in turn, increases the pressure from the outside and the inside, which leads domestic actors to make tactical concessions and implement some of the advocated rule of law

587 For the original by Finnemore and Sikkink, see section 2.1.4

588 However, Pentelovitch warns of both "under-reliance" and "over-reliance" on domestic NGOs in terms of communicating with the local population over the war crimes court. Thus, outreach must still also be performed by the court itself (countering the danger of "over-reliance"), but networks must be effectively used (countering "under-reliance"); cf. Pentelovitch, 2007, p. 489.

589 See fn. 528 in section 2.1.4.

590 Phase 1 of the spiral model refers to the activation of the network to advocate for norm change.

standards (phase 3 of the spiral model). For instance, they might agree to prosecute war crimes domestically, or initiate specific legal reforms that, for instance, criminalise international crimes or implement due process standards. They might also adhere to international human rights treaties, or the like. As these domestic actors are strategic, concessions will only be made if adoption costs are not too high. These concessions further mobilise the war crimes court networks. Advocacy networks now have the additional argument that by making concessions – through the implementation of some aspects of the rule of law as represented by the war crimes court – the domestic actors have implicitly recognised it as a norm that must be adhered to. These steps will only happen in the absence of powerful spoilers (veto players) who have the ability to hinder the internalisation of the rule of law.[591]

It must be noted that the courts themselves do not advocate politically in the strict sense of the term. Criminal courts are legal rather than political bodies. Their advocacy takes place through demonstration and capacity building effects.[592] Hence, their role within the network is to demonstrate how the rule of law works and to (collaborate with others to) build the capacity to imitate this.[593] This means that only if the war crimes court has been legally established, is effective, complied with, if it respects its rules and fair trial rights and works in an independent, accountable, transparent, predictable, competent, efficient, committed, fair, and impartial manner (demonstration abilities), and if it provides the necessary resources, gives advice on legal reform, transfers its knowledge and empowers the civil society (capacity building abilities) – only then is its role within the advocacy network fulfilled.

In addition, norm leadership can also be formally embedded in the jurisdictional relationships between the war crimes court and domestic tribunals.[594] The jurisdictional relationship between war crimes courts introduces a consequentialist element to the overall rather constructivist model of the norm cascade; broadly speaking, there are different possible jurisdictional relationships between a specialised war crimes court and the domestic justice system, which each give the war crimes court (or other actors) various options to monitor, sanction, or grant benefits to the actors at the national governance level, or which entail different costs and benefits for the national justice system.[595] At the same time, the

591 See the explanation of Europeanisation theories in section 2.1.3.

592 As described in section 1.

593 In a way, war crimes courts indicate 'credibility' in the sense of Europeanisation theories through demonstration and capacity building effects. Under Europeanisation theories, credibility is one factor (besides the absence of spoilers) for norm diffusion (see section 2.1.3 above).

594 Cf. Burke-White, 2007, p. 308.

595 Cf. Burke-White, 2007, p. 297; Burke-White distinguishes between 'domestic primacy', 'simple international primacy', 'absolute international primacy', and 'complementarity'. 'Domestic primacy' foresees that international war crimes courts can only adjudicate if domestic authorities refer a case to it. Under 'simple international primacy' domestic courts can only act when international courts do not do so. According to

jurisdictional regime may provide an incentive for adopting and internalising rule of law standards. For instance in the case where the referral or deferral of cases to the domestic justice system is at the discretion of war crimes courts, and depends on whether that system is prepared to manage these cases.[596] To the degree that domestic actors find it in their own self-interest to enhance the capacity and legitimacy of domestic institutions or have their domestic proceedings recognised as 'genuine', they may seek to adopt and internalise those international norms on which the war crimes court will determine whether a domestic prosecution was, in fact, genuine. The war crimes court and its network can provide a benefit to domestic proceedings or can sanction domestic actors who fail to adopt those norms by imposing the sovereignty costs of international intervention on them.[597] In that sense, the jurisdictional regime is a factor that can influence the advocacy phase of the norm cascade, because it alters the incentive structures to comply with war crimes courts' advocacy networks.[598]

If the advocacy efforts of the war crimes network is successful, rule of law standards will gain prescriptive status (phase 4 of the spiral model). This is the equivalent of a "tipping point", stipulated in the norm cascade theory; from here on, the rule of law penetrates and cascades into the whole of domestic society, and becomes institutionalised for all actors involved (the executive, legislature, judiciary, and civil society) (norm cascade theory, stage 2). These actors start adopting rule of law standards within the laws of the country and within the codes governing their profession, and they start applying the norm in practice.

Next, the rule of law becomes institutionalised (norm cascade theory, stage 3) not only within the practice of law but also – and most importantly – in the culture of the relevant domestic actors. This is when (rule of law) norm-consistent behaviour (phase 5 of the spiral model) becomes normal and no longer depends on individuals. Conformity with the rule of law is depersonalised. The norm becomes internalised within society as a whole,[599] owing to the war crimes court and its advocacy networks. Risse and Sikkink note,

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'absolute international primacy' international war crimes courts must expressly approve any domestic exercise of jurisdiction. Lastly, under the 'complementarity' regime, international war crimes courts only act where domestic courts fail to undertake genuine prosecutions on their own; cf. Burke-White, 2007, p. 297.

596 Cf. Shany, 2013a, p. 442; the Rule 11*bis* regime of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are, in theory, of this kind, as well as the complementarity regime of the ICC.

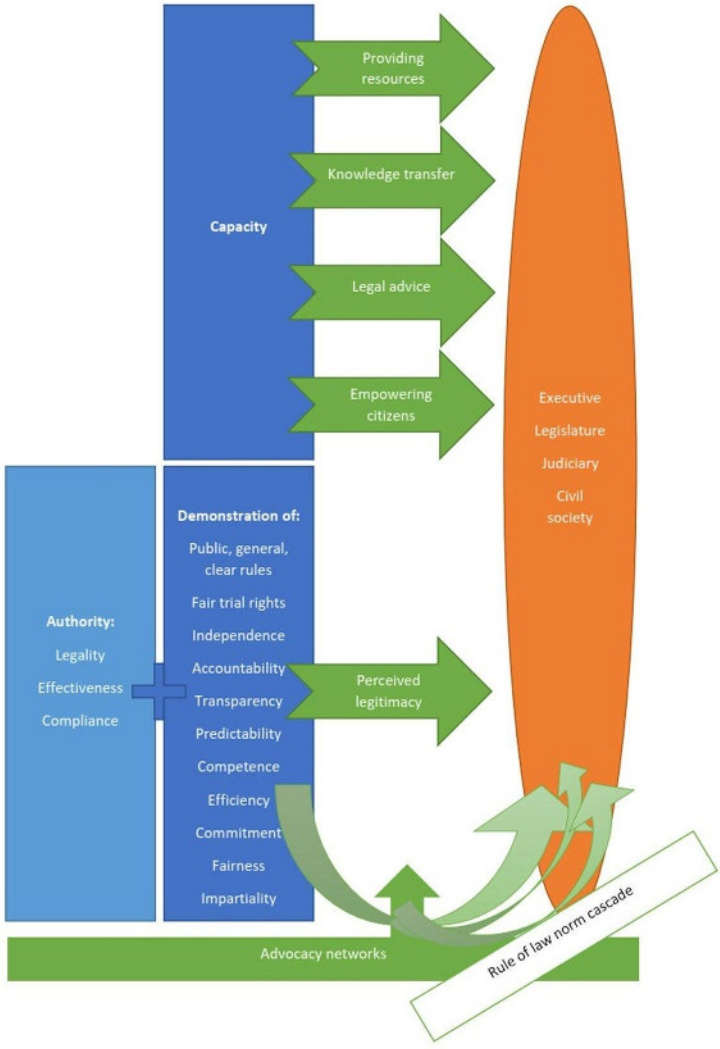
597 Cf. Burke-White, 2007, p. 308; and Slaughter & Burke-White, 2006, p. 339ff.; warning of the negative impact of such sovereignty costs: J. E. Alvarez (1999). Crimes of States/Crimes of Hate: Lessons from Rwanda. *Yale Journal of International Law, 24*(2), 365-483, p. 204; and C. Turner, 2008, p. 149.

598 Cf. Burke-White, 2007, p. 347.

599 In Europeanisation theories, a distinction between is made between norm adoption and norm diffusion: effective rule transfer from the EU to the domestic level is, pursuant Lavenex and Schimmelfennig, constituted through formal rule transfer – selecting, adopting and applying rules – as well as rule diffusion, measuring the public and elite acceptance of EU rules; cf. Lavenex & Schimmelfennig, 2009, p. 800. 'Diffusion' is thus a synonym for 'internalisation'.

with reference to their empirical findings, that this process can take a very long time – sometimes several decades from the moment of norm emergence.[600]

Figure 5 Impact model: The rule of law norm cascade



600 Cf. Risse & Ropp, 1999, p. 258.

3 Conclusion

In order to test the hypothesis that war crimes courts have an impact on the rule of law in the countries under their jurisdiction, a model is needed to analyse the dynamics at play for such impact. The rule of law cascade model presented here aims to provide such a model. While other models are conceivable, the rule of law cascade model is based on: firstly, existing research on advocacy networks in international criminal law (for war crimes courts' advocacy networks); secondly, on international relations and international law (with respect to the different logics at play in international relations and the adoption of international law, as well as the norm cascade and spiral models); thirdly, on transitional justice and social-legal psychology (for war crimes courts' demonstration abilities); and finally, on research on international criminal courts and tribunals (specifically war crimes courts' capacity building abilities).

The rule of law cascade model is based on the norm cascade and spiral models,[601] and supposes that both constructivist and realist factors explain war crimes courts' potential to influence the rule of law in the countries under their jurisdiction. The first premise is that the war crimes court embodies or exemplifies the rule of law through its operation. The 'norm' of the rule of law thus emerges at the war crimes court at the time of its establishment. Through their work, war crimes courts can therefore demonstrate the rule of law (demonstration abilities).[602] For this, it is paramount that the court establishes itself as an authoritative institution, as opposed to a weak 'toothless tiger'. Next, it needs to be perceived as legitimate, through the credible expression and implementation of rule of law standards. In addition, somewhere along the way, war crimes courts have the potential to build the capacities of others as well – especially with regard to prosecuting war crimes domestically (capacity building abilities).[603] Capacity building abilities mostly relate to a court's possibilities to provide material resources, advice on legal reform, to promote knowledge transfer, or to empower the domestic civil society. Vested with these abilities, and with the help of advocacy networks, war crimes courts can promote the rule of law domestically. Although this is not a linear process, it will most likely be met with resistance, and also with careful concessions and subsequent increased pressure –[604] which might ultimately lead to a tipping point, at which the norm of the rule of law cascades into society. This cascade represents the adoption of the norm in legislative procedures, institutional operation, and ultimately also in the cultural traditions governing a given society.

601 See section 2.1.4.
602 See section 1.3.
603 See section 1.2.
604 See, in particular, phase 2 of the spiral model, as described in section 2.2.2.

The above impact model has been developed with international criminal courts and tribunals in mind. It is also based on literature that mainly focusses on the possible effects of international accountability mechanisms. Of course, they are different from national and even from hybrid war crimes courts. International war crimes courts (the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda, and the ICC) are internationally established institutions; they are based on – and apply their own – statutes, and they are staffed with international personnel. National war crimes courts (for instance, the war crimes chambers at the Belgrade High Court and the Belgrade Court of Appeals, but examples also exist in Uganda or Congo) are usually just ordinary national criminal courts that might or might not concentrate all war crimes cases in one court or chamber. Lastly, there are different models for hybrid war crimes courts.[605] Generally speaking, their main distinguishing characteristics are the fact that they adjudicate international and national law, and that their staff is both local and from abroad (so-called "internationals"[606]). Most importantly, though, hybrid and national courts are usually situated in the respective country and somehow embedded in the national justice system.[607]

Although the dynamics at play are not quite the same, domestic – and in particular, hybrid – war crimes courts can potentially also have an impact on the rule of law in the country of their jurisdiction. Hybrid war crimes courts and tribunals have been praised for their potential for impact on local justice, reconciliation and nation-building.[608] Capacity

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605 For a short overview, see: R. Cryer, H. Friman, D. Robinson & E. Wilmshurst (2014). *An Introduction to International Criminal Law and Procedure* (3 ed.). Cambridge: Cambridge University Press, p. 181ff. For a more elaborate overview, see: S. Williams (2012). *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*. Oxford and Portland (Oregon): Hart Publishing, p. 58ff. See (among others) generally on hybrid courts: D. Cohen (2007). "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future. *Stanford Journal of International Law, 43*(1), 1–38; Nouwen, 2006; D. Luban, A. M. Danner, W. A. Schabas & P. M. Wald (2004). *Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?* Paper presented at the American Society of International Law. Proceedings of the Annual Meeting; Cockayne, 2004; Dickinson, 2003; D. Cohen (2002). Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future? *Asia Pacific Issues*(61); S. Linton (2001). Cambodia, East Timor and Sierra Leone: Experiments in International Justice. *Criminal Law Forum, 12*(2), 185–246.

606 Reference is often made to "internationals". This term is, in my view, misleading. In many cases, the non-domestic personnel is simply from other countries and does not always possess any specific knowledge in international criminal law, international humanitarian law, or related areas. Kristjándóttir *et al.* hence warn that knowledge transfer should not be taken for granted in hybrid models; cf. Kristjánsdóttir *et al.*, 2012, fn. 50 on p. 319.

607 This is, however, not always the case – note the Special Tribunal for Lebanon; for a commentary, see: G. Serra (2008). Special Tribunal for Lebanon: A commentary on its major legal aspects. *International Criminal Justice Review, 18*(3), 344-355.

608 For a critique, see: P. Kermani Mendez (2009). The New Wave of Hybrid Tribunals: A sophisticated Approach to Enforcing International Humanitarian Law or An Idealistic Solution with Empty Promises? *Criminal Law Forum, 20*(1), 53–95; Snyder and Vinjamuri cynically report that the expectation is that

building is one of their main rationales and thus inherent in their set-up.[609] First and foremost, the conditions to enable knowledge transfer are good, due to local staff working directly with international staff.[610] Hybrid courts have been called a "venue for interaction and mutual influence"[611] or a place for "on the job training"[612] and meaningful dialogue between domestic and international officials.[613] In addition, as hybrid courts are usually situated in the country, their material resources can often be used by the national justice system, including the court house, for instance. Outreach may also be facilitated by virtue of the war crimes court's location in the country, and easier access to key constituencies.[614] In that sense, hybrid courts also have the potential for demonstration effects, especially because they are presumed to be viewed as more legitimate than international war crimes courts.[615] Being a court embedded in the national justice system that applies national law, but with additional expertise from outside that guarantees the fairness, independence, and impartiality of the court,[616] hybrid courts are designed to harness the benefits from both the international and the national level.[617] It is asserted that hybrid courts can be more easily tailored to local needs, conditions, and even political constraints of the host state.[618] At the same time, some authors claim that the fact that different types of people with different backgrounds come together at hybrid courts requires intense deliberations, which might even ensure more uniform jurisprudence.[619] Some practical advantages also exist: they are easier to establish and less expensive than international tribunals, they might draw on resources already in place within the domestic judiciary, and they are closer to the crime

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international courts address violations of universal standards of justice, domestic courts change domestic attitude and hybrid courts "do both"; cf. Snyder & Vinjamuri, 2003-2004, p. 17.

609 Cf. Shany, 2013a, p. 444; or Burke-White, 2003a, p. 45.

610 Cf. Kristjánsdóttir *et al.*, 2012, p. 319.

611 Baylis, 2009, p. 18.

612 Shany, 2013a, p. 444.

613 Cf. Shany, 2013a, p. 444; the internationals are supposed to bring in expertise and experience on different matters, such as international criminal or humanitarian law, but also international criminal procedure or court management and handling of complex cases. Often, they would come from stable legal systems entrenched in societies that are based on the rule of law. As such, they import 'international norms' into the local justice system; cf. Shany, 2013a, p. 444. Aside from that, it has been stressed that in many cases, the contribution from people from outside can also simply be a fresh view on (maybe inefficient) long-established interpretations or practices. This was stressed in: interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

614 Cf. Pentelovitch, 2007, p. 447f.

615 Cf. Burke-White, 2003-2004, p. 978.

616 Cf. also Kritz, 1999, p. 170.

617 Cf. Ramji-Nogales, 2010, p. 24; Baylis, 2009, p. 17; or Burke-White, 2003a, p. 24.

618 Cf. Burke-White, 2003-2004, p. 979; and Pentelovitch, 2007, p. 448; decisions rendered might be better informed and more responsive to the communities they most directly affect; cf. J. I. Turner, 2005, p. 2 and 24f.

619 Cf. J. I. Turner, 2005, p. 22.

scenes and the evidence.[620] This might increase their efficiency.[621] These features might enhance hybrid war crimes courts' authority and legitimacy, and they are hence presumed to ensure the support of local populations and international justice proponents alike.[622] Norm penetration of the rule of law norm is therefore, to some extent, facilitated through hybrid courts.[623]

Most of the advantages of hybrid courts also feature in national criminal courts: they are embedded in the national justice system; as normal courts they have access to and are part of the ordinary judicial infrastructure, and as such, they can expect their orders to be more strictly enforced;[624] they enjoy the benefits of their proximity to the events,[625] crimes scenes and the evidence,[626] as well as to the affected local population, which might increase the court's visibility;[627] they are not so costly;[628] and they might be more efficient and prosecute more individuals.[629] Furthermore, as they are rooted in the domestic legal culture, they are potentially more readily perceived as legitimate and accepted, and can thereby better contribute to public debate and deliberation, but also heighten pedagogical initiatives to deter the future recurrence of violence, and to inculcate the rule of law and a culture of accountability.[630] National war crimes courts can even have capacity building effects. Through their proximity, and the potential for constant dialogue between the court and the society as a whole, their ability to reach out to its key constituencies is even greater than that of international courts. At the same time, their staff can gain valuable knowledge by working on war crimes related issues, which is useful for the overall justice system as well.[631] In summary, national courts can "reach deeper into society and cast a wider net

620 Cf. Burke-White, 2003a, p. 24.

621 Cf. Baylis, 2009, p. 17.

622 Cf. Ramji-Nogales, 2010, p. 24; or Baylis, 2009, p. 17.

623 Cf. Kristjánsdóttir *et al.*, 2011, p. 17.

624 Cf. Shany, 2013a, p. 433.

625 Cf. R. Rastan (2010). Complementarity: Contest or Collaboration? In M. Bergsmo (Ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (p. 83-132). Oslo: Torkel Opsahl Academic EPublisher, p. 99; and Burke-White, 2003a, p. 15.

626 Cf. Burke-White, 2003a, p. 15.

627 Cf. Baylis, 2009, p. 11; or J. I. Turner, 2005, p. 27 ("Local trials are more extensively covered in the media and more easily attended and monitored by the local population, they are more likely to stimulate public discussion and to foster the liberal virtues of tolerations, moderation and civil respect." As such, Turner claims that such trials are thus essential to rebuilding a system based on the rule of law.)

628 Cf. Shany, 2013a, p. 431.

629 Cf. Shany, 2013a, p. 433.

630 Cf. Rastan, 2010, p. 99; and Pentelovitch, 2007, p. 449.

631 This was explained in: interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17. This applies, above all, for defence counsel who of course mostly do not only defend in war crimes cases, but also in other cases. What they learn in complex cases, where fair trial rights for instance are particularly at stake, can be applied in other contexts as well. Within their law firms (and beyond), also defence counsel can train each other on these issues; mentioned in interviews with Bosnian defence counsel: Sarajevo, 9 February 2017, I-53; Sarajevo, 6 February 2017, I-6; and Sarajevo, 31 January 2017, I-21. But it also applies

than international criminal courts,"[632] and therefore facilitate a more fundamental change of norms (or norm reconstruction) and of values at the domestic level.[633] For these and other reasons, some authors prefer domestic solutions in war crimes matters.[634]

Having formulated a rule of law conception in Chapter 2 that will form the basis for analysing the ICTY's impact on the rule of law in Bosnia and Herzegovina and Serbia (dependent variable), and having developed a model outlining how this impact could unfold in the present Chapter (independent variable), the following Chapter will describe the methodology used for the analysis, and will make some precisions as to the dependent and independent variables.

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to judges who take the knowledge they gained in international crimes cases with them, if they, for instance, move to another chamber or court. Again there, they interact and influence their colleagues.

632 Shany, 2013a, p. 431.

633 Cf. Shany, 2013a, p. 433.

634 Burke-White for instance assumes that "the future of international criminal law enforcement will largely be at the domestic level" (Burke-White, 2003a, p. 3; and Slaughter & Burke-White, 2006, p. 350), although he also suggests regionalising international criminal law enforcement: Burke-White, 2003b. Other strong supporters of national solutions are: J. E. Alvarez (2004). Trying Hussein: Between Hubris and Hegemony. *International Criminal Justice, 2*(2), 319-329; Alvarez, 1999, p. 482f.; or M. A. Drumbl (2000). Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda. *New York University Law Review, 75*(5), 1221-1326. It must be conceded that even international criminal courts and tribunals seem to believe in the necessity to encourage national trials, rather than international. Arguably, Rule 11*bis* of the ICTY and ICTR Rules of Procedure and Evidence (which provides for the referral of cases from the international to the national level) as well as the ICC's complementarity regime (which lays down that the international court only becomes active if national courts fail to do so) are signs of this belief. Both principles encourage international criminal courts and tribunals to conduct their business in ways that will facilitate and foster, as much as possible, the operation of national proceedings; cf. Shany, 2013a, p. 433f.; W. W. Burke-White (2008a). Implementing a Policy of Positive Complementarity in the Rome System of Justice. *Criminal Law Forum, 19*(1), 59–85; Burke-White, 2008b; and J. I. Charney (2001). International Criminal Law and the Role of Domestic Courts. *American Journal of International Law, 95*(1), 120–124.

4 Methodology and Analytical Framework*

The objective of this research is to assess the impact of the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) on the rule of law in Bosnia and Herzegovina and Serbia. I therefore aim to explain changes in the domestic rule of law in these two countries, by analysing the ICTY's influence. For this purpose, in Chapter 2, a broad conception of the rule of law in a transitional justice setting was developed, and in Chapter 3, an impact model that displays the dynamics between a war crimes court and the domestic justice system was presented. The rule of law is hence the dependent variable and the ICTY's impact the independent variable in this research.

The following section will describe the methodology of this research. It will be demonstrated that in order to find answers to the question regarding the ICTY's impact, an interdisciplinary approach is necessary that incorporates not only legal but also political science research methods (section 1.1). Section 1.2 will then further lay out the sources used, with a particular emphasis on the interviews that I have conducted in various places in Europe with previous or current personnel of the ICTY, and the Bosnian, and Serbian justice system. In section 1.3, the choice for Bosnia and Herzegovina and Serbia as case studies for assessing the ICTY's domestic impact will be defended. For the sake of full transparency, I will use section 1.4 to inform the reader of my personal research process. This will clarify the adjustments that I made to the analytical framework that guides the empirical analysis (section 2). It will be demonstrated that the rule of law conception as developed in Chapter 2 needs to be narrowed down for the purposes of this research, as many of the elements incorporated in that conceptualisation are in fact out of reach for a war crimes court. It already transpired from the impact model developed in Chapter 3 that the influence of war crimes courts is mainly geared towards the judicial systems of the countries under their jurisdiction. As a proxy for a narrower rule of law conception, I will use – and establish in section 2.1 – the ICTY's own rule of law definition, which is limited to rule of law standards governing national judiciaries. In section 2.2, I will elucidate my approach to *assessing* (as opposed to *measuring*) impact on the rule of law.

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* Parts of this Chapter, in particular section 2, have been published in: Brodersen, 2018. This original article was also published in an edited volume: K. H. Brodersen (2019). The Rule of Law à la ICTY: What the ICTY Deemed Just Good Enough and How it Supported the Countries in the Former Yugoslavia to Become Better. In T. P. Holterhus (Ed.), *The Law Behind Rule of Law Transfers: On Rule Based Interactions of Legal Orders in a Globalized World* (p. 225-270). Baden-Baden: Nomos.

1 Methodology

1.1 Interdisciplinary Approach

The very term 'rule of law' suggests that it is a strictly legal subject matter, the 'law' being the very essence of legal studies, and to 'rule' being defined as "[p]ronounc[ing something] authoritatively and legally to be the case" by the Oxford Dictionaries.[635] In fact, however, the rule of law is not only a legal but also a political concept, a philosophical idea, and a social phenomenon. As such, it can be – or needs to be – examined from the perspective of all these disciplines. Drawing on the research field of transitional justice, as part of the social sciences, was necessary in order to formulate a useful rule of law conception in Chapter 2.

In fact, an analysis of the *impact* on the rule of law, where a variety of psychological, social, political, and legal dynamics are at play, will always remain incomplete when conducted from a mono-disciplinary angle.[636] Indeed, purely legal research techniques are usually not designed to explore the impact of legal systems on the ground, as legal scholarship barely gets further than making implicit assumptions in this regard.[637] In Chapter 3, it already became clear that approaches from the fields of international law, international relations, political science, and even legal psychology will need to be borrowed in order to illustrate the dynamics that lead to impact.

This is the case even though the ICTY – as the 'impact provider' – is a court. With a court being the primary focus of this study, one could think that this research is purely legal. But the ICTY is not just any court, it is an *international* court, embedded in a complicated system of international organisations where different state interests are at play. In addition, it is an international *criminal* court, equipped with a variety of competencies and competences. Lastly, the ICTY is also the first of its kind since the end of the Cold War, and the first to adopt various international human rights instruments that would prevent victors' justice – for which the Nuremberg and Tokyo tribunals were criticised. It is obvious that the ICTY operates in a field where different social, political, legal, and economic forces are at play, while the Tribunal itself also triggers different social, political, legal, and economic responses.

635 Oxford Dictionary Lexico, 'rule', https://www.lexico.com/en/definition/rule (last accessed 09/08/2019).

636 On the need for methods to flow logically from the project's research questions, see: F. Coomans, F. Grünfeld & M. T. Kamminga (2010). Methods of Human Rights Research: A Primer. *Human Rights Quarterly, 32*(1), 180-187, p. 185.

637 Cf. Coomans *et al.*, 2010, p. 182; similar: H.-O. Sano & H. Thelle (2009). The Need for Evidence-Based Human Rights Research. In F. Coomans, F. Grünfeld & M. T. Kamminga (Eds.), *Methods of Human Rights Research* (p. 91-109). Antwerp: Intersentia, p. 91ff.

While I do not claim to be able to draw a complete picture of these dynamics and responses, the aim is to provide a general overview. An interdisciplinary approach will therefore be necessary. This reflects the inherently interdisciplinary nature of all three subject matters (the rule of law, impact, the ICTY), as described in the preceding paragraphs. Of course, what is of most interest here are the legal changes that took place in the Bosnian and Serbian justice systems, as a consequence of the ICTY's influence. This will be the focal point of this research. However, as merely looking at the law does not explain the ICTY's impact on the rule of law in Serbia and Bosnia and Herzegovina anymore, I will resort to approaches stemming from other disciplines. For that reason, research methods from other disciplines – most notably from the social science – are employed as well.

1.2 Sources

1.2.1 Legal Sources, Policy Documents, IO and NGO or Media Reports, Academic Literature

A variety of sources have been used for the empirical part of this research. In order to understand the Serbian and Bosnian domestic legal systems, I have examined the relevant domestic laws; first and foremost, the different criminal codes and codes of criminal procedure, but also specific laws related to the respective subject of analysis – such as laws on the jurisdiction of the domestic war crimes courts or on witness protection. Similarly, the relevant international and domestic jurisprudence (see, in particular, Chapter 6) was scrutinised where necessary. Furthermore, policy documents, such as the Bosnian or Serbian national war crimes strategies, were analysed. Apart from that, there is a great variety of international and nongovernmental organisations (such as the European Union (EU), the Organisation for Security and Co-operation in Europe (OSCE), the nongovernmental organisations (NGOs) Amnesty International or TRIAL International, as well as several domestic NGOs in Bosnia and Herzegovina (BiH) and Serbia) who regularly or occasionally publish reports on topics that were of interest to my research. These sources have been complemented by press releases from organisations of interest, and by general media reports, especially from the Balkan Investigative Reporting Network. In addition, the relevant websites of the different justice systems (including the ICTY's own) have been regularly consulted for updates on their operation. Of course, academic literature has also been used. These sources complement each other and made it possible to compare different opinions and results.

As will be further decribed in section 2.2 below, the period I researched begins at the time of establishment of the ICTY in May 1993 and ends at the time of its closure in December 2017. Relevant sources that were published until August 2019 were still taken

into consideration, insofar as they describe the Tribunal's impact on Serbia and Bosnia and Herzegovina during that period.

The vast number of sources that I could potentially have consulted resulted in the need for selection. A systematic review of all available sources on all topics of interest was simply impossible.[638] A selection of sources was therefore made based on the following criteria: the availability of the sources, their relevance (based on their substance and date of publication), and the position of the authors in the debate (specifically in policy documents, media reports, and academic sources). In addition, the so-called snowball sampling technique was employed in order to gain access to further sources. In what concerns laws, jurisprudence, policy documents, and international or nongovernmental organisations' or media reports, I have mostly searched and gained access via the internet. Some reports, and especially academic sources, were, however, only available in libraries. I have consulted the library collections of Maastricht University (providing access to the collections of all libraries in the Netherlands through inter-library loan), Geneva University, Free University Berlin and Humboldt University Berlin. Furthermore, I had access to the collections of the *Narodna biblioteka Srbije* (People's Library of Serbia), the *Nacionalna i univerzitetska biblioteka Bosne i Hercegovine* (National and University Library of Bosnia and Herzegovina), and the library of the Humanitarian Law Center (an NGO in Belgrade). Whenever I searched using keywords (whether on the internet or in the library catalogues), I generally did so in English, but always translated my search terms into Bosnian/Croatian/Serbian (BCS), but often also into French or German. Rarely did the latter provide any additional results, as most of the laws, jurisprudence, policy documents, reports, and media reports are published in either English or BCS, and almost never in German or French.

Of course, not being able to conduct a systematic review carries the risks of both publication and selection bias. The terms 'publication bias' and 'selection bias' refer to the dilemma of the searcher never knowing which research was easy to find versus published, which research was published versus conducted, and which research was conducted versus could have been conducted.[639] The snowball sampling technique inherently involves citation bias, which refers to the phenomenon where sources that are frequently referred to will be cited even more often, since they are more easy to come across.

Partly to alleviate these biases, but primarily to gain a better understanding of the researched topics, I have also conducted semi-structured expert interviews. I will further elaborate on these interviews in the next section.

638 Generally on systematic literature reviews, see: R. Gomm (2008). *Social Research Methodology: A Critical Introduction* (2 ed.). Hampshire: Palgrave Macmillan, p. 344ff.

639 Cf. Gomm, 2008, p. 347f.

1.2.2 Semi-Structured Expert Interviews

Expert Interviews as a Source

According to the theory, qualitative interviews help to identify and understand attributes, characteristics, and traits of the objects of inquiry, as well as meanings, processes and contexts. They are particularly useful for identifying all the elements that are important in accounting for an outcome.[640] For the purpose of this study, expert interviews were paramount in understanding the causal relationships between the ICTY and the developments in the domestic justice systems in Bosnia and Herzegovina or Serbia. Impact can be quite indirect, making it difficult to establish what caused the impact by using official sources only. Some interrelations between happenings are only seen by people who have been directly professionally involved, or who have been observing the respective development closely and for a long time. Complementing official sources with the views of experts is therefore indispensable. In addition, for me, as a foreign researcher studying the rule of law in Serbia and Bosnia and Herzegovina, the research visits (where I, for instance, also attended court hearings) and interviews helped me tremendously in understanding the Bosnian and Serbian domestic justice systems. The research visits and interviews were also necessary to add local views to my study, which are often missing in the work of foreign participants and observers.[641]

The interviews were semi-structured, meaning that although a rough outline was used during the interview, the objective was for the conversation to evolve naturally. The aim of this approach was to enable the interviewees to express what they usually think/experience/feel, and to prevent them from feeling restrained by the structure or circumstances of the interview.[642]

Interview Partners

In total, I conducted 60 interviews during two rounds of interviews:[643] the first took place between November 2016 and February 2017, and the second between February and November 2018. During the first round, I conducted 37 interviews with 39 experts, and during the second round, I conducted 23 interviews with 24 experts, 10 of whom I had already interviewed during the first round (whom I met for the second, follow-up interview). I therefore interviewed 53 experts in total. Most of the interviews took place in Belgrade (Serbia) and Sarajevo (Bosnia and Herzegovina), some in The Hague, one in London

640 Cf. T. Landman (2009). Social Science Methods and Human Rights. In F. Coomans, F. Grünfeld, & M. T. Kamminga (Eds.), *Methods of Human Rights Research* (p. 19-44). Antwerp: Intersentia, p. 40.

641 Cf. Baylis, 2009, fn. 79, p. 27.

642 Cf. Gomm, 2008, p. 229ff.

643 For further explanations as to the two rounds, see section 1.4 below. The interview guidelines (consisting of topics and possible questions) are available upon request.

(United Kingdom), one in Berlin (Germany), and one in Nuremberg (also in Germany). Two interviews took place in German, two in French, thirteen in BCS, and the rest in English. The interviews usually lasted between one and three hours.

The desired interview partners were selected based on an estimation of their potential knowledge and insights on the relevant topics, and hence of their potential contribution to my research. While I had heard about (or met) some of my interview partners personally, I gained access to others via snowballing or through their respective organisation. Hence, while I contacted some of the interviewees personally, I also contacted institutions (e.g. courts) or organisations (e.g. NGOs) who then suggested one (or more) of their employees for the interview. For instance, in prosecutors' offices and courts, it was usually the organisation's president who decided whom I would be allowed to meet.

This means that the selection of interview partners was not always strategically planned, but also depended on who was available and whom the organisation selected. In addition, the contacts I established through snowballing were generally not planned in advance, and were sometimes even spontaneous. This selection procedure is customary in social science empirical research, but it involves the bias that the choice of interview partners is neither random, nor carefully selected in view of representing all sides or views. I can also not exclude that the selection of interview partners by organisations were made based on that person's ability and likelihood to represent the organisation in a desired way, which may or may not correspond to reality.

But also in the case of the individuals that I specifically contacted, as well as of those who were suggested to me by other individuals (snowballing), there is a selection bias one has to be aware of: those who have a neutral or positive stance towards the ICTY will be more likely to make themselves available for an interview with a (in most cases: foreign) researcher on the broader effects of the ICTY, than those who have a negative view of the Tribunal. While I did interview a few people whom I believe to fall into the latter category (having a negative view), and many of my interviewees expressed a very nuanced and critical opinion regarding the ICTY and its impact on domestic justice systems, the feeling that prevailed during these interviews was that the ICTY was a good idea. There were some instances where an interview could not be arranged, either because the person had postponed a meeting again and again, or because that person would not return my calls, or simply did not show up at the agreed place and time. While I cannot say this with certainty, I suspect that in these cases, the interviewee was unwilling to tell me in person that they had a negative view of the ICTY and/or its effects, which is why s/he avoided the interview situation.

Another – unexpected – selection bias for the second round of interviews materialised during the first round: 25 out of the 39 interviewees were male, out of which an unexpectedly high number demonstrated inappropriate behaviour towards me during or after the interview. The inappropriate behaviour ranged from telling me that next time I

am in town, "rather than having an interview, we should have some fun", to asking me – while pointing at the contours of my body – why "someone like me" would become a researcher. One of my interview partners, with whom the interview had taken place in the presence of two of his colleagues, accompanied me outside after the interview and told me that "[i]nside, I couldn't talk openly, but if you want to hear the *real* story, you can come over to my place tonight." While I never felt unsafe during or after the interviews, the consequence of this behaviour of some of my male interview partners was that I was not willing to meet them for a follow-up interview during the second round, even though in many cases, the interview had been very insightful, and a second interview would have been useful.

I conducted interviews with employees or previous employees of the:[644]

- Office of the Prosecutor of the ICTY (prosecutors, legal advisors)
- ICTY Chambers (judges)
- ICTY Registry
- Association of Defence Counsel at the ICTY (defence counsel)
- Office of the War Crimes Prosecutor of Serbia (prosecutors, legal advisors)
- Higher Court Belgrade (judges)
- Appeals Court Belgrade (judges)
- Serbian domestic defence counsel
- OSCE Mission to Serbia
- EU Delegation to Serbia
- Belgrade Centre for Human Rights (NGO)
- Humanitarian Law Center (NGO)
- Cantonal Prosecution Service of the Canton of Sarajevo (prosecutors)
- Prosecutor's Office of Bosnia and Herzegovina (prosecutors, legal advisors)
- State Court of Bosnia and Herzegovina (judges)
- Registry of the State Court of Bosnia and Herzegovina
- Constitutional Court of Bosnia and Herzegovina (judges)
- ICTY Office in Sarajevo
- Bosnian domestic defence counsel
- Criminal Defence Section
- OSCE Mission to Bosnia and Herzegovina
- EU Delegation to Bosnia and Herzegovina
- USAid
- Office of the High Representative

644 In the references, I refer to interviews with, for instance, a "Higher Court Belgrade judge". This does not mean that the person I interviewed is still working at the Higher Court Belgrade. S/he could also be a former judge at that court.

- TRIAL International BiH (NGO)
- Balkans Regional Rule of Law Network (NGO)

The 60 interviews with 53 different experts provided a detailed overview on the topics of this research. Nevertheless, the views of my interview partners are not necessarily representative in the quantitative sense of the term – partly due to the limited number of interviews, and partly due to the selection biases described. This is, however, also not the purpose of semi-structured expert interviews. As described above, they are rather intended to provide insights that would otherwise be impossible to gain, such as background information, insiders' knowledge, or clues regarding causal relationships. As such, they provide anecdotal evidence. Just as any other source, though, interviews need to be analysed with care, and, if possible, validated against other sources.

My interview partners do not necessarily endorse my conclusions and I am the only one responsible for possible errors in this book.

Ethical Considerations

The experts were asked for an interview via phone or e-mail, during which information was shared regarding the research project (i.e. the research subject and its overall purpose) and the purpose of the interview. Once they agreed to participate in the study, an interview was scheduled. At the beginning of the interview, the information about the research project was provided again and questions were answered (if the respondents had any). Prior to the interview, some of my interview partners asked for the list of questions. I never provided the exact questions (due to the semi-structured nature of the interviews), but only an overview of the topics that I wanted to address.

Most interviewees consented to the interview being audio-recorded. After the interview, I transcribed the conversation, and the transcripts remained with me. The transcripts were and will not be shared, unless the interviewee explicitly consented to this at the time of the interview. One interviewee asked me for the transcript, corrected it, and once he had sent it back to me, he gave permission to use it for whatever purpose. Some interviewees did not want to be recorded, and in some cases it was not possible as the interview took place in buildings where electronic equipment is not permitted (typically in courthouses). In those cases, I took notes during the interview, and put together a transcript immediately afterwards on the basis of these notes and my memory.

Although some of my interviewees explicitly agreed to be cited with their full name and their organisation, I promised anonymity to all my interview partners. They all agreed to be referred to by their profession. Therefore, this book does not disclose the names of

the interviewed experts when quoting them, but refers to them as 'ICTY judge', 'Serbian domestic defence counsel', or 'employee of a Bosnian NGO'.[645]

1.3 Comparative Approach

For the purpose of assessing the impact of an international war crimes court, it seemed most suitable to conduct a focused (few-country) comparison. A comparison of similarities and differences across a small number of countries is meant to uncover the empirical relationship between the presence of key explanatory factors and the observed outcome. Two types of research designs are possible: either the 'most-similar systems design' or the 'most-different systems design'. In most-different systems designs, similar policies, institutions, or events in very different contexts are studied. In contrast, the most-similar systems design compares countries that share certain common features, such as a similar history, language, religion, politics, or culture. By controlling for these common features, one can isolate the remaining – explanatory – factors that vary across the cases, in order to establish whether that variation is related to the variation in the outcome that is to be explained. This should allow the few-country comparison to achieve empirical control through the careful selection of cases.[646]

There were multiple reasons for choosing the ICTY as the object of analysis for this research, as opposed to any of the other international criminal courts or tribunals.

First, the ICTY is the first international criminal court or tribunal of the modern kind. The International Military Tribunals (IMTs) at Nuremberg and for the Far East in Tokyo, have operated under totally different conditions than their modern counterparts. In addition, they have been widely criticised for rendering 'victors' justice' due to their various legal shortcomings, including their selective and retroactive charges, and one-sided prosecutions.[647] Compared to the Nuremberg and Tokyo IMTs, which operated in the aftermath of the Second World War, the ICTY, established in 1993, had very different aspirations. Its mandate was

> "to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region."[648]

645 I am aware of the tension between anonymising the subjects of my research and the accountability of my study, since anonymous sources prevent the possibility to review its findings; cf. Gomm, 2008, p. 386.

646 Cf. Landman, 2009, p. 31 and 33ff.

647 For more details, see: K. Sellars (2010). Imperfect Justice at Nuremberg and Tokyo. *European Journal of International Law, 21*(4), 1085–1102.

648 ICTY, Mandate and Crimes under ICTY Jurisdiction, http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction (last accessed 09/08/2019).

This meant that it would look at all sides of the conflict and guarantee fair procedures for its defendants. Furthermore, ever since the end of World War II, international law had also progressed, which significantly reduced the risk of retroactive charges. Therefore, while the foundations of international criminal adjudication had been laid by the Nuremberg and Tokyo IMTs, the ICTY was the first to embody modern standards of the rule of law.

Second, the ICTY's mandate ended in 2017.[649] Analysing a closed institution has the advantage that the research object can no longer change. This is not the case for the International Criminal Court (ICC), which started its operations in 2002, and whose jurisdiction is potentially temporarily unrestricted.

Third, contrary to the ICC (and even compared to its sister-tribunal, the International Criminal Tribunal for Rwanda (ICTR)), the ICTY has a vast jurisprudence. The ICC has issued only a limited number of final judgments to date, whereas the ICTY has been instrumental in developing international humanitarian law, as well as substantive and procedural international criminal law. The ICTY dealt with 161 defendants, whereas the ICTR dealt with 'only' 93. In addition to that, the ICTY also has the richest experience in other matters that go hand in hand with carrying out its mandate of conducting criminal trials, such as in diplomatic affairs and gathering international support, or convincing and compelling states to cooperate, as well as in reaching out to local communities and collaborating with domestic counterparts. This broad legacy makes of it an interesting research subject, particularly with regard to the side effects of the Tribunal's operation.

Fourth, as a practical matter, the ICTR only had jurisdiction over crimes committed in the context of the Rwandan genocide in 1994. Crimes were almost exclusively committed in Rwanda itself, with only a few atrocities crossing the borders into neighbouring countries. This means that assessing the ICTR's domestic impact only makes sense in the context of Rwanda, and no comparison would be possible. While such an in-depth case study can also be insightful, it is often the comparison that brings to light explanatory factors.

For these reasons, the ICTY was chosen as the war crimes court whose domestic impact was to be assessed. This choice, in turn, explains the decision to conduct a most-similar systems comparison, as all countries under the jurisdiction of the Tribunal (more or less)

649 The ICTY's outstanding work, such as trials that could not be terminated before the end of the Tribunal's mandate or decisions on early release of defendants, on lifting witness protections, or on granting access to documents, or managing its archives is continued by a residual mechanism for the ICTY and the International Criminal Tribunal for Rwanda. The United Nations International Residual Mechanism for Criminal Tribunals (MICT) has partly functioned in parallel to the ICTY, namely since 1 July 2013; cf. MICT, About, https://www.irmct.org/en/about (last accessed 09/08/2019). The activities and effects of the MICT are outside the scope of this research. I only mention the MICT when it is unavoidable because the ICTY's and the MICT's activities cannot be disentangled.

share a common or similar history, culture, language, and political traditions: Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, North Macedonia, Serbia, and Slovenia.

The broad choice of similar target countries makes the former Yugoslavia a "laboratory for testing the impact of international criminal tribunals on target states"[650].

Out of these, Serbia and Bosnia and Herzegovina were selected, as most of the ICTY's case law and side activities were related to BiH, Croatia, Kosovo, and Serbia – and not Macedonia or Montenegro. Croatia was ruled out as a case study for two reasons: first, there are hardly any war crimes prosecutions at the domestic level, leaving little substance to assess the ICTY's impact. Second, Croatia became a member state of the European Union in 2013, which arguably affected the leverage of the ICTY on the country (diminishing it). Especially when it comes to influencing rule of law developments, the Tribunal clearly no longer is (if it ever was) the dominant institution in Croatia. The same applies to Kosovo, where it was first the United Nations Mission in Kosovo and then the EU's EULEX missions that practically governed the country for many years. Therefore, for a long time, it was not domestic actors who took the relevant decisions, but foreigners – calling into question whether Kosovo was truly a sovereign country in those years. Under these circumstances, assessing the ICTY's impact on Kosovo was not functional. In order to keep BiH and Serbia comparable, this research only takes into account the state level. This is particularly important for Bosnia and Herzegovina, where the entities and districts have important autonomies and competencies, also with respect to war crimes matters. Developments at entity and district level will only occasionally be mentioned.

In view of the impact model developed in Chapter 3, particularly its postulation that impact partly depends on a war crimes court's demonstration effects, meaning that it is perceived as authoritative and legitimate in the states under its jurisdiction, different outcomes concerning the Tribunal's impact on BiH and Serbia are expected. Most ICTY cases involve accused who are/were ethnic Serbs and victims who are/were Bosniaks, provoking in many observers the feeling that Serbs were the main perpetrators during the war, and Bosniaks the main victims. It is likely that this influences Serbia's and Bosnia and Herzegovina's receptiveness to impact from the Tribunal.

The chosen scope of this research is thus based on both theoretical and practical reasons which relate to specificity of the research project and its feasibility.

1.4 Chronology of the Research Process

The approach taken for this research was the following: as a first step, I developed the conceptual and theoretical basis for this research, meaning the rule of law in transitional

650 Ostojić, 2014, p. 6.

justice conception presented in Chapter 2, and the impact model presented in Chapter 3. I then conducted the first round of interviews in order to test the suitability of the impact model. The ultimate goal was to test the hypothesis (which had already emerged while developing the impact model) that realistically, a war crimes court can only have an impact on selected aspects of the rule of law. The aim was therefore to narrow down the dependent variable of this research. While I maintain that the conception presented in Chapter 2 is a valuable definition of the rule of law in transitional justice, my research does not assess the impact *on all of that*, but only on selected aspects of the rule of law in transitional justice. A refined framework for the dependent variable therefore had to be established, which will be presented in the following section.

At the same time, during the interviews conducted during the first round in Serbia and Bosnia and Herzegovina, I made an inventory of topics where – according to my interviewees – the ICTY had had an impact. I therefore adopted an explorative research approach, collecting information that would later guide the empirical part of my research. In general, there was great consensus among my interview partners regarding the most relevant areas – the same topics kept coming up. In addition, they corresponded with what I could find in the academic literature, policy documents, or reports.[651] The four topics are: 1) domestic war crimes prosecutions; 2) the definition of international crimes, both in the law and in the jurisprudence, as well as in procedural criminal law and court practice; 3) matters regarding witnesses and victims; and 4) the use of technology in the courtroom.

During the empirical research phase that followed, where I continued to use the explorative approach, my inquiries were not directed by the dependent variable – i.e. the ICTY's rule of law conception. Instead, I delved further into each of the four areas of ICTY impact that emerged during the conceptual research phase. My empirical research was aimed at: first, determining the Tribunal's impact in each of these four areas, and second, comparing the Tribunal's effects on BiH and Serbia respectively. I did this, as described in section 1.2, by making use of various types of written sources and through interviews. This second round of interviews took place mainly in Belgrade and Sarajevo, which allowed me to ask my interviewees in-depth questions about the domestic criminal justice systems (specifically concerning the four topics mentioned above), and the ICTY's role in their development. The resulting analysis of the four areas and the ICTY's impact on those areas will be presented in Chapters 5 to 9.

In Chapter 9, I will also come back to the dependent variable and determine whether impact on these four areas equals or leads to impact on the rule of law. The rule of law

651 Indeed, the criterion was to only look at areas that were mentioned by at least three interviewees and where other sources confirmed the ICTY's impact. In the end, considering the great consensus, this criterion was obsolete.

conception presented in section 2.1 will serve as a proxy for determining this. In Chapter 9, I link the findings of the explorative empirical research back to the conceptual framework.

2 Analytical Framework

Bearing in mind the impact model presented in Chapter 3 and the results of my interviews of round 1 (where I discussed that model in relation to ICTY personnel and domestic legal practitioners and observers), the hypothesis was made: *1) that the ICTY's main influence is confined to the adjudication of war crimes domestically, and that it could potentially contribute to enhancing respect for rule of law standards within that area; 2) that nevertheless, enhanced respect for the rule of law in adjudicating war crimes could have spill-over effects into other areas of the judiciary.* As a result, the ICTY's impact would, in any case, be limited to the judiciary. This means that it would not reach the executive, legislature, and civil society – the other branches which the rule of law in transitional justice conception developed in Chapter 2 and featured in its second pillar (see section 4.5 of Chapter 2). Therefore, the conceptual framework that I use to assess the ICTY's impact in Serbia and BiH needs to be narrowed down.

In addition, in order to be able to properly analyse the empirical results of the second interview round, a more detailed rule of law conception for the judiciary needed to be developed. In order to do so, I looked at the ICTY's own views on the rule of law. While some criticise the approach of using an institution's own goals as benchmark to measure their successes,[652] others acknowledge that in the literature on impact assessment, relevant benchmarks have commonly been derived from claims about a war crimes court's goals and functions put forth 1) in instruments formally creating the court, 2) by the court's leaders, or 3) by scholars who have developed arguments in support of international justice.[653]

The methodology used for *drawing up* the ICTY's rule of law conception – which, as such, clearly does not exist – was therefore the following:

Firstly, Rule 11*bis* case law was analysed. Rule 11*bis* was incorporated into the ICTY Rules of Procedure and Evidence in 1997, thereby providing the possibility to suspend an indictment at the ICTY if a national court could and would exercise its jurisdiction.[654] A

652 Cf. Nettelfield, 2010, p. 10; Nettelfield argues that an analysis of international criminal tribunals "should encompass more than the courts' declared achievements, which are often over-stated by their architects to justify the courts' existence"; Nettelfield, 2010, p. 12.

653 Cf. L. Vinjamuri (2010). Deterrence, democracy, and the pursuit of international justice. *Ethics & International Affairs, 24*(2), 191-211, p. 192; see also Nettelfield, 2010, p. 10. For a different approach, see: Orentlicher, 2018. She uses the ICTY's target societies' views as a benchmark.

654 See Rule 11*bis* in its original form here: ICTY Rules of Procedure and Evidence as revised 20 October and 12 November 1997, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev12

few years later, the Tribunal decided to use this rule to refer cases against low-level perpetrators to national courts in the countries of the former Yugoslavia,[655] albeit under certain conditions: a state that received a case had to be "adequately prepared"[656] to try sensitive cases relating to mass violence. "Adequately prepared" primarily meant that in the state of referral, the accused will receive a fair trial, and that the death penalty must not be imposed or carried out. In practice, however, the ICTY Referral Bench examined many other factors prior to agreeing to refer a case,[657] thereby designing a framework of minimum standards that national justice systems must comply with before the Tribunal deemed them "adequate" to receive a Rule 11*bis* case.[658] This was the reason for choosing 11*bis* jurisprudence to deduct the ICTY's rule of law conception; it contains the Tribunal's

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_en.pdf (last accessed 09/08/2019). For amendments, see the different versions provided here: ICTY, Rules of Procedure and Evidence, http://www.icty.org/en/documents/rules-procedure-evidence (last accessed 09/08/2019); M. Bohlander (2006). Referring an indictment from the ICTY and ICTR to another court - Rule 11bis and the consequences for the law of extradition. *International and Comparative Law Quarterly, 55*(01), 219-226, p. 219. Its current form was introduced in July 2004 with revision 32.

655 Cases could be referred to the authorities of states on whose territory the crime had been committed, where the accused had been arrested, or that otherwise have jurisdiction (Rule 11*bis* (A)). Paragraphs (A) and (B) also set out procedural safeguards that must be met before referral is permitted: a case can only be referred back to the national judiciary if an indictment had been issued and confirmed already, but the trial must not yet have begun. The accused must have had the opportunity to be heard. Only low- or mid-level perpetrators (in terms of the gravity of the alleged crime as well as their respective responsibility in its commission) are referred to the national justice systems.

656 Although the condition of "adequately prepared" is mentioned only in Rule 11*bis* (A) (iii) and on a plain reading, one would therefore think that it relates only to those states otherwise having jurisdiction, this condition must in fact be met in any event. This follows from the system of Rule 11*bis* that requires reading paragraphs (A) and (B) together. In other words, it must be ensured that in the state of referral, the accused will receive a fair trial and that the death penalty will not be imposed or carried out. The Appeals Chamber has held this view in *Stanković*: "as a strictly textual matter, Rule *11bis* (A) does not require that a jurisdiction be 'willing and adequately prepared to accept' a transferred case if it was the territory in which the crime was committed or in which the accused was arrested. But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a referred case is an explicit prerequisite for any referral to a domestic jurisdiction, as the Tribunal has no power to order a State to accept a transferred case. Thus, the 'willing and adequately prepared' prong of Rule *11bis*(A)(iii) is implicit also in the Rule *11bis* (B) analysis;" ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Appeals Chamber, 1 September 2005, para. 40.

657 It might be worth noting that the Referral Bench was the same in all cases, consisting of Judge Alphons Orie (presiding), Judge O-Gon Kwon, and Judge Kevin Parker. The composition of the Appeals Chamber varied, however always involving either Fausto Pocar, Theodor Meron, Mohamed Shahabuddeen, Mehmet Güney, Wolfgang Schomburg, Florence Ndepele Mwachande Mumba, Andrésia Vaz, or Liu Daqun.

658 Necessarily, this framework remains fragmented: the general scope is determined by Rule 11*bis* itself, which mentions some of the parameters to be appraised. What elements within these broad parameters the Bench specifically examines or what elements it analyses in depth depends on the questions at stake in each individual case, and often also on what the parties emphasize in their submissions. Consequently, the framework that emerges is more detailed on some elements (such as on impartiality and independence of national courts, the right to examine witnesses or humane detention conditions; see below) than on others. For instance, safeguards that an accused does not have to stand trial if s/he is mentally unfit (as part of the accused's fair trial rights) were only addressed in *Kovačević*, as this was not an issue in any other case.

view on standards that national justice systems must comply with, in order to be deemed sufficiently competent to try highly complex international crimes cases. A justice system deemed sufficiently competent to try such cases would necessarily abide by the rule of law. Rule 11*bis* case law is therefore a legal source hinting at the ICTY's rule of law conception.

Secondly, in order to complement the skeleton of minimum standards that transpires from Rule 11*bis* jurisprudence, a discourse and document analysis of official statements made by ICTY representatives[659] and official ICTY publications[660] was conducted. In a first step, the inquiry was purely quantitative as it was counted how many times the term 'rule of law' was mentioned in connection to the work of the Tribunal. This was done through a simple electronic search (control+F "rule of law").[661] In a second step, each mention was closely looked at in order to study 1) in what context the term 'rule of law' was used, 2) whether any precise clarification regarding the meaning of the term was given, or, in the absence of a definition: 3) what aspects were subsumed under the term 'rule of law' or considered to form part of it.

What emerges from the combined case law-, discourse-, and document analyses is a clear notion of what the Tribunal qualifies as a competent national judicial system under the rule of law.

It should be noted that strengthening the rule of law in the countries of the former Yugoslavia had not been a goal from the outset. However, the document and discourse analysis, and the increased domestic engagement of the Tribunal in that respect, reveal that it *became* one.[662]

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659 101 public statements and speeches given by the three ICTY officials (the ICTY presidents, chief prosecutors, and registrars), which can be found here: ICTY, Statements and Speeches, http://www.icty.org/en/press/statements-and-speeches-of-the-icty (last accessed 09/08/2019). In addition, the opening statements of the Prosecutor in every trial were considered. Those can be found in the respective trial transcripts.

660 Documents analysed up until 21 December 2017: the Tribunal's 24 annual reports (ICTY, Annual Reports, http://www.icty.org/en/documents/annual-reports (last accessed 09/08/2019)), 28 completion strategy reports (ICTY, Completion Strategy and MICT, http://www.icty.org/en/documents/completion-strategy-and-mict (last accessed 09/08/2019)), 2185 press releases (ICTY, Press Releases Archive, http://www.icty.org/en/press/press-releases-archive (last accessed 09/08/2019)), the 161 ICTY Digests (a publication that was distributed as of 2006 in order to inform the public about the Tribunal's work; ICTY, ICTY Digest, http://www.icty.org/en/press/icty-digest (last accessed 12/08/2019)), as well as the only three annual reports of the Outreach Programme from 2011, 2012, and 2013 (ICTY, Outreach Annual Reports, http://www.icty.org/en/outreach/outreach-annual-reports (last accessed 12/08/2019)), as well as the "15 years of Outreach at the ICTY" report (ICTY (2016), *Outreach – 15 years of Outreach at the ICTY*, The Hague, http://www.icty.org/x/file/Outreach/15-years-of-outreach/outreach-15_en_light.pdf (last accessed 13/08/2019)).

661 In total, there are 55 references to the 'international rule of law' in official ICTY statements or publications, 292 to the 'national rule of law', and for 18 references it was unclear whether the international or the national rule of law was meant. The 'international rule of law' refers to upholding and enforcing international law, while the 'national rule of law' refers to the rule of law within a country thus, which commonly sets out rules that govern a particular society.

662 This is part of the "latest trend in global transitional justice", namely the "juridicization of transitional issues": vesting courts with the authority to deal with judicial aspects of political problems and the feeling that the rule of law can be strengthened through this process; cf. Đajić, 2007, p. 84.

Over the years, references to the 'national rule of law' have increased dramatically (see figure 6 below). This started with the so-called completion strategy: in 2002/2003, when the ICTY was at the peak of its operation, with less than 20 out of 161 indictees remaining at large,[663] the ICTY judges – together with the judges of the International Criminal Tribunal for Rwanda – designed the completion strategy for their tribunals. The completion strategy was a plan to gradually discontinue the work of the Tribunal, while making sure that it "concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia."[664] At that same time, the political and legal systems in the former Yugoslav countries were consolidating, with Bosnia and Herzegovina becoming a member of the Council of Europe in April 2002 and Serbia in April 2003.[665] The Tribunal assumed an increasingly important role in assisting this consolidation process, especially by helping to rebuild their national justice systems. It even went as far as claiming that its own success depended on whether it would rebuild the rule of law in the countries under its jurisdiction –in the words of Serge Brammertz, the last Prosecutor of the ICTY:

> "[T]he 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 in the former Yugoslavia. Thousands of cases remain to be processed, particularly many complex cases against senior- and mid-level suspects in every country. So ultimately, I believe that the ICTY's legacy is not simply measured by our own work, but by whether the countries of the former Yugoslavia build the rule of law and demonstrate they can secure meaningful justice for the victims of serious crimes during the conflicts."[666]

The completion strategy report from 2009 is even more explicit in this regard as it stated: "The ultimate goal of the Tribunal's legacy strategy is entrenchment of the rule of law in the former Yugoslavia."[667]

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663 Cf. ICTY (20 August 2003), *Annual Report 2003*, provided to the United Nations General Assembly and Security Council, A/58/287-S/2003/829, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf (last accessed 13/08/2019), p. 10.

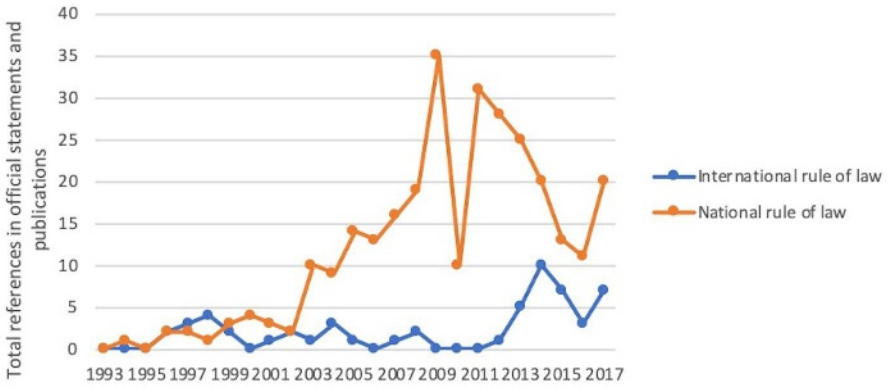
664 ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 13/08/2019); see also United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, #1.

665 See Council of Europe, Bosnia and Herzegovina, https://www.coe.int/en/web/portal/bosnia-and-herzegovina (last accessed 13/08/2019) and Council of Europe, Serbia, https://www.coe.int/en/web/portal/serbia (last accessed 13/08/2019); Croatia had been a member since November 1996; cf. Council of Europe, Croatia, https://www.coe.int/en/web/portal/croatia (last accessed 13/08/2019).

666 ICTY, #ICTY24: Commemoration held at United Nations Headquarters, Press release 5 December 2017, http://www.icty.org/en/press/icty24-commemoration-held-at-united-nations-headquarters (last accessed 13/08/2019).

667 ICTY, 13 November 2009, p. 21.

Figure 6 Time course of official references to the 'international rule of law' and the 'national rule of law'



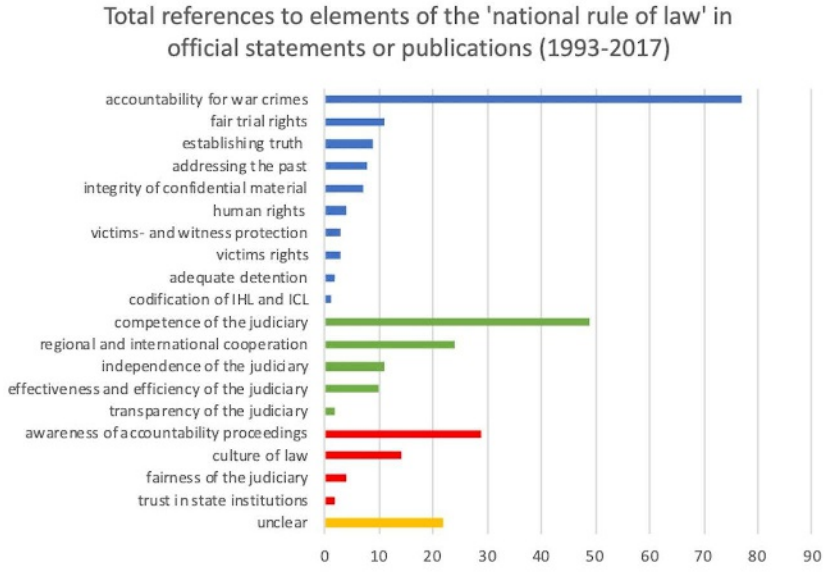
So, what does the ICTY's rule of law conception, as deduced from case law, discourse, and document analysis, consist of? This will be outlined in the next section.

2.1 The ICTY's Rule of Law Definition

Making use of the architecture of the rule of law in transitional justice conception developed in Chapter 2 will help to structure the ICTY's definition. As demonstrated, any rule of law conception must consist of a normative, an institutional, and a cultural component.[668] The normative component indicates *which* law rules, whereas the institutional and cultural dimensions *ensure that* this law rules through certain principles and standards. Indeed, as will be shown in the following sections, the ICTY follows this dichotomy. It also considers most of the principles that are commonly associated with the rule of law within each of the three dimensions,[669] such as independence, impartiality, competence, transparency, efficiency and effectiveness, or fairness. The content that the Tribunal attributes to these principles will be the subject of the following sections. The second pillar of the rule of law conception[670] is narrowed down in line with the ICTY's definition to the judiciary, as explained above (see section 2). Focusing on national justice systems, the Tribunal hardly develops views on rule of law principles that should govern the executive, the legislature, or the civil society.

668 See section 4.4 of Chapter 2.
669 See section 4.6 of Chapter 2.
670 See section 4.5 of Chapter 2.

Figure 7 Blue: normative dimension; orange: institutional dimension; red: cultural dimension; purple: unclear



2.1.1 Normative Dimension

According to the ICTY, in order for the societies in the countries of the former Yugoslavia to function under the rule of law, they need to acknowledge the past,[671] learn from it, reconcile with it, and move on.[672] Bearing that in mind, it is necessary that international crimes are addressed through criminal prosecutions. Perpetrators must be arrested,[673]

671 Cf. ICTY, Completion Strategy: Prosecutor Brammertz's address before the Security Council, Press release 7 December 2011, http://www.icty.org/en/press/completion-strategy-prosecutor-brammertz%E2%80%99s-address-security-council (last accessed 13/08/2019); this and subsequent references to different rule of law elements are only examples. Many references are repeated many times and it would be excessive to replicate all of them in the footnotes.

672 Cf. ICTY, Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly in Belgrade: The ICTY and the Legacy of the past, Press release 26 October 2007, http://www.icty.org/en/press/address-tribunal-prosecutor-carla-del-ponte-nato-parliamentary-assembly-belgrade-icty-and (last accessed 13/08/2019); in figure 7, these elements have been regrouped together under "addressing the past".

673 Cf. ICTY, ICTY President Gabrielle Kirk McDonald addresses the "Dayton" Peace Implementation Council, Press release 9 December 1997, http://www.icty.org/en/press/icty-president-gabrielle-kirk-mcdonald-addresses-dayton-peace-implementation-council (last accessed 13/08/2019); ICTY, Address by Carla del Ponte, Prosecutor of the ICTY, to the UN Security Council, Press release 23 November 2004, http://www.icty.org/en/press/address-carla-del-ponte-prosecutor-icty-un-security-council (last accessed 13/08/2019); ICTY, Completion Strategy Report: Prosecutor Brammertz's address before the Security Council, Press release 12 June 2013, http://www.icty.org/en/press/completion-strategy-report-prosecutor-brammertz%E2%80%99s-address-security-council-0 (last accessed 13/08/2019).

brought to justice,[674] held accountable,[675] and punished.[676] On the one hand, trials would help establish the facts about the violent past.[677] Moreover, and more importantly, they seek to establish individual criminal responsibility.[678]

Applicable Substantive Law

The legal framework within which prosecutions and trials should be conducted was clarified in Rule 11*bis* cases, where the Tribunal verified whether the domestic law was adequate for prosecuting, trying, and eventually (if found guilty) punishing the defendant.[679] In general, the ICTY deemed that in order to hold international crimes trials,[680] the domestic legal framework had to incorporate provisions of international humanitarian and international criminal law.[681] The availability of such provisions would represent an

674 Cf. F. Pocar (13 October 2008), Address of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, New York, http://www.icty.org/en/press/address-judge-fausto-pocar-president-international-criminal-tribunal-former-yugoslavia-united (last accessed 13/08/2019).

675 Cf. T. Meron (16 July 2015), Statement by President Meron on the occasion of International Justice Day, The Hague, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/150716-president_meron_international_justice_day_en.pdf (last accessed 13/08/2019), p. 1; ICTY, "The International Criminal Tribunal for the former Yugoslavia: Making a Difference or Making Excuses?", Press release 13 May 1999, http://www.icty.org/en/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses (last accessed 13/08/2019).

676 Cf. ICTY (29 August 1994), *Annual Report 1994*, provided to the United Nations General Assembly and Security Council, A/49/342-S/1994/1007, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf (last accessed 13/08/2019), p. 12; in figure 7, these elements have been regrouped together under "accountability for war crimes".

677 Cf. ICTY, The ICTY Digest Nr. 52, 17 February 2009, http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/icty_digest_52_en.pdf (last accessed 13/08/2019), p. 1; in figure 7, this element is called "establishing truth".

678 Cf. ICTY Prosecutor (28 January 2004), *Prosecutor v. Miroslav Deronjić*, Closing Statement, IT-02-61-S, http://www.icty.org/x/cases/deronjic/trans/en/040128IT.htm (last accessed 13/08/2019), p. 231.

679 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 37; see also: Burke-White, 2007, p. 323.

680 Cf. ICTY, OHR-ICTY Working Group on Development of BiH Capacity for War-crimes Trial Successfully Completed, Press release 21 February 2003, http://www.icty.org/en/press/ohr-icty-working-group-development-bih-capacity-war-crimes-trial-successfully-completed (last accessed 13/08/2019); ICTY, Statement by President Meron on Establishment of Special War Crimes Chamber in Bosnian State Court, Press release 13 June 2003, http://www.icty.org/en/press/statement-president-meron-establishment-special-war-crimes-chamber-bosnian-state-court (last accessed 13/08/2019); ICTY, Address of Judge Theodor Meron, President of the ICTY, to the UN Security Council, Press release 23 November 2004, http://www.icty.org/en/press/address -judge-theodor-meron-president-icty-un-security-council (last accessed 13/08/2019); ICTY (17 August 2005), *Annual Report 2005*, provided to the United Nations General Assembly and Security Council, A/60/267-S/2005/532, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2005_en.pdf (last accessed 13/08/2019), p. 38.

681 Cf. ICTY, 13 November 2009, p. 21; in figure 7, this element is called "codification of IHL and ICL".

"assertion of the rule of law over the law of the gun"[682], "breaking the cycle of impunity"[683].[684] The Referral Bench's focus, however, was on whether the material elements of the crime were covered by the criminal law applicable at the time of the offence,[685] whether it provided for appropriate modes of liability to reflect the accused's conduct, and whether an appropriate punishment existed.[686]

Although the ICTY recommended codifying international criminal law, it was satisfied as long as the material elements of the offences underlying international crimes were covered by the applicable ordinary criminal law.[687] It was important, however, that the legality principle, especially its components *nullum crimen-* and *nulla poena sine lege*, were respected and that no one was convicted or punished under law that was not applicable at the time of the offence.[688]

In addition, the ICTY underlined the importance of having those modes of liability available that most accurately mirrored the respective responsibility of accused in

682 ICTY, The Tribunal's first trial : another step in the fulfillment of the Tribunal's mandate, Press release 6 May 1996, http://www.icty.org/en/press/tribunals-first-trial-another-step-fulfillment-tribunals-mandate (last accessed 13/08/2019).

683 ICTY, Address to the United Nations General Assembly by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, Press release 8 November 1999, http://www.icty.org/en/press/address-united-nations-general-assembly-judge-gabrielle-kirk-mcdonald-president-international (last accessed 13/08/2019).

684 According to Edda Kristjánsdóttir *et al.*, attempts to strengthen the rule of law by importing international law often seek to replace the thin conceptions of the rule of law that served the outgoing authorities with a novel, thicker interpretation that is protective of individual rights and the separation of powers. The hope that an increased role of international law (notably international human rights law and international criminal law) may help stabilise the legal order, protect fundamental rights, and prevent a return to lawlessness; cf. Kristjánsdóttir *et al.*, 2011, p. 2 and 4. Kristjánsdóttir describes international human rights law and international criminal law as "agents of transitional justice" (Kristjánsdóttir *et al.*, 2012, p. 316), claiming that the central role of human rights and international criminal law standards is supported by the fact that as these bodies of law are aimed directly at individuals, they can be used to override or circumvent the existing legal system of the state; cf. Kristjánsdóttir *et al.*, 2011, p. 14.

685 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 46.

686 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 32. The exact same wording is also used in: ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 34; ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 43; ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 27; ICTY, *Prosecutor v. Paško Ljubičić*, Decision, IT-00-41-PT, Referral Bench, 12 April 2006, para. 31; ICTY, *Prosecutor v. Vladimir Kovačević*, Decision, IT-01-42/2-I, Referral Bench, 17 November 2006, para. 25; ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision, IT-98-32/1-PT, Referral Bench, 5 April 2007, para. 45.

687 Focus on the conduct means that it is not necessarily required that a particular offence is conceptualised as an international crime. It is sufficient that the conduct is covered by the law, whether as an ordinary crime or as an international crime.

688 Cf. ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 40-41; ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision, IT-98-32/1-PT, Referral Bench, 5 April 2007, para. 55.

international crimes trials.[689] This most prominently concerned the notion of command responsibility as established in Article 7 (3) of the ICTY Statute.[690]

Lastly, it was necessary to have an appropriate punishment available. For international crimes trials, appropriate punishment would often entail a prison sentence,[691] but the Tribunal did not specify the proper length of sentences. With regard to sanctions, the ICTY welcomed the fostering of the legality principle, specifically the principle of *lex mitior* (which provides that in the case of a change in the law between the time of commission of the offence and its adjudication, the law that is more favourable to the accused is to be applied). It should, however, not impede the trial and the punishment of a defendant.[692]

Human Rights

Publicly, the ICTY has always maintained that human rights need to be guaranteed at the domestic level.[693] Although this referred to all human rights as enshrined in the European Convention on Human Rights (ECHR) (including those that are not directly linked to prosecutions of international crimes, such as freedom of expression)[694], the focus naturally lies on whether the criminal procedural law of a country was in conformity with human rights standards.[695] An evaluation of whether the human rights of the defendant are respected if a case is handed over to the national level has occupied a prominent place in all referral cases, and in the time period of referrals, the Tribunal frequently recalled the importance of respecting fair trial rights. In Rule 11*bis* case law, different aspects were emphasised, depending on the specific characteristics of the case. Most importantly, the Tribunal needed to be assured that the accused would not face the death penalty and that s/he would receive a fair trial –[696] but also that national law provided for decent detention

689 Cf. ICTY, 19 June 2002, p. 19.

690 Cf. ICTY, *Prosecutor v. Vladimir Kovačević*, Decision, IT-01-42/2-I, Referral Bench, 17 November 2006, 43-47; ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 51; ICTY, *Prosecutor v. Paško Ljubičić*, Decision, IT-00-41-PT, Referral Bench, 12 April 2006, para. 34-35.

691 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 40 and 43.

692 Cf. ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision, IT-98-32/1-PT, Referral Bench, 5 April 2007, para. 55.

693 Cf. ICTY, Address of Judge Theodor Meron, President of the ICTY, to the UN General Assembly, 15 November 2004, Press release 17 November 2004, http://www.icty.org/en/press/address-judge-theodor-meron-president-icty-un-general-assembly-15-november-2004 (last accessed 13/08/2019); T. Meron (16 July 2015), Statement by President Meron on the occasion of International Justice Day, p. 1; in figure 7, this element is called "human rights".

694 Cf. ICTY, Statement by Judge Mcdonald, President of the International Criminal Tribunal for the Former Yugoslavia, Press release 5 November 1998, http://www.icty.org/en/press/statement-judge-mcdonald-president-international-criminal-tribunal-former-yugoslavia (last accessed 13/08/2019).

695 In figure 7, this element is called "fair trial rights".

696 This is required by Rule 11*bis* (B).

conditions. In that respect, the Tribunal welcomed accession to the ECHR and the International Covenant on Civil and Political Rights (ICCPR), as this would constitute an additional layer of protection of fair trial rights, next to possible national constitutional law provisions or safeguards provided for in national criminal law.[697] Lastly, the ICTY stressed that the domestic legal framework must ensure victim and witness support and protection,[698] as well as the integrity of confidential materials.[699]

In *Stanković*, the Referral Bench laid out a list of minimum fair trial rights which are largely replicated in Article 21 of the ICTY Statute – which in itself is a reproduction of fair trial rights as recognised by Article 14 of the ICCPR from 1966 and by Article 6 of the ECHR.[700]

Firstly, all persons are equal before the court.[701] In the Balkan context, this especially referred to equality regardless of ethnic or religious background.[702] Secondly, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[703] This not only signifies that due process standards must be respected,[704] but also that several institutional safeguards need to be provided in order to in fact ensure a fair trial.[705] The third right entails the presumption of innocence until proven guilty

697 Cf. ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 74.

698 In figure 7, this element is called "victims- and witness protection", and "victims rights" when statements refer to their right to compensation.

699 Cf. ICTY, Vojislav Šešelj Charged with Contempt of Court, Press release 22 January 2009, http://www.icty.org/en/press/vojislav-%C5%A1e%C5%A1elj-charged-contempt-court (last accessed 13/08/2019); ICTY (12 November 2007), *Completion Strategy Report November 2007*, provided to the United Nations Security Council, S/2007/663, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_12november2007_en.pdf (last accessed 13/08/2019), p. 10; in figure 7, this element is called "integrity of confidential material".

700 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55; this list was reiterated in ICTY, *Prosecutor v. Vladimir Kovačević*, Decision, IT-01-42/2-I, Referral Bench, 17 November 2006, para. 68; ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 72; ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 68; ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 62; ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision, IT-98-32/1-PT, Referral Bench, 5 April 2007, para. 71.

701 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

702 Cf. ICTY, Joint press statement visit to The Hague by delegation from Republika Srpska, Press release 31 July 1996, http://www.icty.org/en/press/joint-press-statement-visit-hague-delegation-republika-srpska (last accessed 13/08/2019).

703 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55; ICTY, Trial Chamber II hands down its Decision on the subpoena issue: the subpoena duces tecum issued to Croatia and its Defence Minister in January 1997 must be complied with by 18 August 1997, Press release 18 July 1997, http://www.icty.org/en/press/trial-chamber-ii-hands-down-its-decision-subpoena-issue-subpoena-duces-tecum-issued-croatia (last accessed 13/08/2019); see also: Burke-White, 2007, p. 323.

704 Cf. ICTY, Press release 23 November 2004.

705 This will be elaborated further down in section 2.1.2 (Institutional Dimension).

according to the law.[706] Fourthly, the accused has the right to be informed promptly and in detail in a language which s/he understands the nature and cause of the charge against him/her;[707] and the right to free assistance of an interpreter if s/he cannot understand or speak the language used in the proceedings.[708]

Fifthly, the accused's right to a defence comprises different elements that the Tribunal differentiates, but that are somewhat related: first, it contains the right of an accused to have adequate time and facilities for the preparation of his/her defence and to communicate with counsel of his/her own choosing; second, the right to be tried in his/her presence, and to defend him/herself in person or through legal assistance of his own choosing; and third, the right to be informed, if s/he does not have legal assistance, of this right, and to have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment by him/her in any such case if s/he does not have sufficient means to pay for it.[709] It is accepted by the ICTY that the right to counsel of one's own choosing is not without limitation; it extends only to counsel who are entitled to appear before the respective trial court and the accused must make his/her choice accordingly. In addition, it is also acceptable that if the accused cannot pay for the counsel, s/he may choose from a list of available defence counsel – and if s/he doesn't, a counsel will be appointed by the court.[710]

The sixth fair trial right, the right to an expeditious trial,[711] grants the accused the right to be tried without undue delay.[712] Any possible delay in proceedings must not be undue, unreasonable or unnecessary.[713] The Referral Bench accepts that a system that grants an accused the right to be brought before the court in the shortest reasonable time period, and to be tried without delay, and that requires that the duration of custody is reduced to

706 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

707 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

708 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

709 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

710 Cf. ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 88; ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 111; ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 77.

711 Cf. ICTY, Press release 18 July 1997.

712 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55; ICTY (1 August 2012), *Annual Report 2012*, provided to the United Nations General Assembly and Security Council, A/67/214-S/2012/592, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2012_en.pdf (last accessed 13/08/2019), p. 17.

713 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 77.

the shortest time necessary, is in accordance with the right to an expeditious trial. In addition, it was commended when incentives exist under the law to proceed without undue delay.[714]

Seventhly, an accused has the right to examine, or have examined, the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.[715] The Referral Bench indirectly related the issue of witness protection to the right of the accused to examine witnesses, as it may "promot[e] witness presence at trial by providing assurance to witnesses that legal measures exist for their protection."[716] While ICTY representatives repeatedly recalled the necessity of ensuring adequate victim and witness protection, the Appeals Chamber acknowledged in *Janković*[717] that "no judicial system, be it national or international, can guarantee absolute witness protection."[718] At the same time, the protection of witnesses can be somewhat detrimental to the right of the accused to properly defend him/herself, as s/he might need to know who is testifying against him/her. In this respect, the Referral Bench welcomed the implementation of specific safeguards to ensure that "a proper balance will be struck between the rights of an accused and the need to protect vulnerable witnesses and witnesses under threat."[719] The application of protective measures must therefore be carefully considered beforehand and only ordered after examining the views of the defence, and "sufficient details" should be disclosed to the accused to enable him/her to prepare his/her defence.[720] In addition, the accused must in any case be in the position to examine the protected witness by asking questions.[721]

As the eighth right enshrines the right not to incriminate oneself, the accused shall not be compelled to testify against him/herself or to confess guilt.[722]

Lastly, and although not mentioned in Article 21 of the ICTY Statute, or in the list of fair trial rights that the Referral Bench had reiterated since *Stanković*, the right not to stand trial in case of physical or mental unfitness was referred to as a "fair trial consideration

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714 Cf. ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 96 and 102.

715 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

716 ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 89.

717 And reiterated in: ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 65.

718 ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 49.

719 ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 91.

720 Cf. ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 100.

721 Cf. ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 101.

722 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55.

[…]"[723] in *Kovačević*. This right ceases to exist as soon as the accused is fit again and the trial should resume accordingly.[724]

According to Rule 11*bis* (B), a case could only be referred if the death penalty would not be imposed or carried out. Case law has clarified that through the ratification of Protocol 13 of the ECHR, which abolished the death penalty in all circumstances, this condition is fulfilled. That holds true even if the national law applicable at the time of the offence foresaw the death penalty as punishment, since Protocol 13 would nonetheless preclude its imposition.[725]

In addition to these rights, the ICTY held that adequate detention "touches upon the fairness of [a] jurisdiction's criminal justice system."[726] There must be decent detention facilities for remanded and convicted persons,[727] where their rights are respected by those responsible for detention at the pre-trial, trial, and post-trial stages,[728] and where detainees are treated equally, no matter their nationality, political views, or religious beliefs.[729] In addition, the length of detention during pre-trial and trial periods must be adequate.[730]

2.1.2 Institutional Dimension

Clearly, the ICTY's focus within the normative dimension of the rule of law, is that a legislative framework exists that enables the prosecution and processing of international crimes, while effectively ensuring that human rights, and especially fair trial rights, are respected. However, as mentioned earlier, this is not sufficient. The rule of law is only safeguarded if institutions exist that are capable of carrying out such proceedings. For that,

723 ICTY, *Prosecutor v. Vladimir Kovačević*, Decision, IT-01-42/2-I, Referral Bench, 17 November 2006, para. 50.

724 Cf. ICTY, *Prosecutor v. Vladimir Kovačević*, Decision, IT-01-42/2-I, Referral Bench, 17 November 2006, para. 50.

725 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55; ICTY, *Prosecutor v. Mitar Rašević and Savo Todović*, Decision, IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 56; ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 66 and 67; ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 47-48; ICTY, *Prosecutor v. Paško Ljubičić*, Decision, IT-00-41-PT, Referral Bench, 12 April 2006, para. 38-39; ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision, IT-98-32/1-PT, Referral Bench, 5 April 2007, para. 62.

726 ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Appeals Chamber, 1 September 2005, para. 34; in figure 7, this element is called "adequate detention".

727 Cf. ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Appeals Chamber, 15 November 2005, para. 69-76; see also: ICTY, 12 November 2007, p. 11.

728 Cf. ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Appeals Chamber, 15 November 2005, para. 69-76.

729 Cf. ICTY, 19 June 2002, p. 25.

730 Cf. ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 109; that the law of Bosnia and Herzegovina provided that the maximum period of pre-trial and trial detention does not exceed 1.5 years was mentioned as particularly suspect- and accused-friendly.

in the ICTY's view, judicial institutions must be independent[731] and impartial, and, most importantly, legal practitioners – including judges, prosecutors, support staff, and defence counsel – must be well-trained and competent.[732]

For the Tribunal, the independence of a judicial system[733] primarily refers to the absence of anything that is not judicial, such as political influences: the system as such must not be politicised,[734] political authorities should not be able to interfere in investigations,[735] and trials should not be used for political purposes,[736] or to "pleas[e] political pressure"[737].

A judicial system, especially courts, also need to be impartial. Although impartiality has not been explicitly defined, it entails several principles: firstly, in order to ensure the integrity of judges, i.e. that they are not corrupt, they must be "sufficiently remunerated and their independence guaranteed."[738] Secondly, a balanced composition of courts, particularly in terms of ethnicity, is helpful.[739] Impartiality heavily depends on appropriate selection standards and procedures for judicial personnel,[740] and on the availability of possibilities to disqualify a judge for a lack of impartiality.[741]

731 In figure 7, this element is called "independence of the judiciary".

732 In figure 7, this element is called "competence of the judiciary".

733 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 55; ICTY, Press release 18 July 1997; ICTY (31 July 2009), *Annual Report 2009*, provided to the United Nations General Assembly and Security Council, A/64/205-S/2009/394, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2009_en.pdf (last accessed 13/08/2019), p. 8; ICTY, Paddy Ashdown and Carla Del Ponte Call for BiH Parliament to Make War Crimes Chamber Operational by January 2005, Press release 20 October 2004, http://www.icty.org/en/press/paddy-ashdown-and-carla-del-ponte-call-bih-parliament-make-war-crimes-chamber-operational (last accessed 13/08/2019).

734 Cf. ICTY, 19 June 2002, p. 19.

735 Cf. ICTY, 19 June 2002, p. 25.

736 Cf. ICTY (23 November 2004), *Completion Strategy Report November 2004*, provided to the United Nations Security Council, S/2004/897, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23november2004_en.pdf (last accessed 13/08/2019), p. 3.

737 ICTY (14 May 2008), *Completion Strategy Report May 2008*, provided to the United Nations Security Council, S/2008/326, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_14may2008_en.pdf (last accessed 13/08/2019), p. 11.

738 ICTY, 19 June 2002, p. 25, fn. 24.

739 Cf. ICTY, 19 June 2002, p. 19.

740 Cf. ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 27-30; ICTY, *Prosecutor v. Gojko Janković*, Decision, IT-96-23/2-PT, Appeals Chamber, 15 November 2005, para. 53.

741 Cf. ICTY, *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision, IT-02-65-PT, Referral Bench, 20 July 2005, para. 86.

In addition to independence and impartiality, the ICTY also repeatedly highlighted judicial transparency,[742] efficiency and effectiveness,[743] and competence[744] as principles within the institutional dimension of the rule of law. To ensure efficiency, sufficient financial and logistical resources are paramount.[745] To ensure effectiveness, the Tribunal demanded international and regional judicial cooperation,[746] which requires not only an adequate legal framework for the transfer of suspects and accused persons, evidence, or proceedings, but also compliance with relevant request.[747] Lastly, to ensure competence, members of the justice system need to be well selected and well trained in conducting the relevant investigations and judicial proceedings,[748] including war crimes proceedings.[749]

2.1.3 Cultural Dimension

Apart from principles that relate to the functioning of the institutional set-up of a national justice system, a legal culture is indispensable for the rule of law to be properly anchored within a society. A "culture of law instead of violence"[750], and an "ideology of legality"[751] should govern societies. This applies to everyone, including ordinary citizens. But the ICTY of course also stressed the necessity for justice institutions that "entrench the rule

742 Cf. ICTY, The ICTY Digest Nr. 63, 14 September 2009, http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/icty_digest_63_en.pdf (last accessed 13/08/2019), p. 1; in figure 7, this element is called "transparency of the judiciary".

743 Cf. ICTY, 12 November 2007, p. 10; in figure 7, this element is called "effectiveness and efficiency".

744 Cf. ICTY, 19 June 2002, p. 19; ICTY, 17 February 2009, p. 1; ICTY, 13 November 2009, p. 21; see also: Burke-White, 2007, p. 323.

745 Cf. ICTY, 19 June 2002, p. 19.

746 Cf. ICTY (31 July 2011), *Annual Report 2011*, provided to the United Nations General Assembly and Security Council, A/66/210-S/2011/473, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2011_en.pdf (last accessed 13/08/2019), p. 15; in figure 7, this element is called "regional and international cooperation".

747 Cf. ICTY (23 May 2012), *Completion Strategy Report May 2012*, provided to the United Nations Security Council, S/2012/354, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2012_en.pdf (last accessed 13/08/2019), p. 34.

748 Cf. ICTY, 19 June 2002, p. 19; ICTY, 13 November 2009, p. 21; see also: Burke-White, 2007, p. 323.

749 Cf. ICTY (16 May 2014), *Completion Strategy Report May 2014*, provided to the United Nations Security Council, S/2014/351, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16may2014_en.pdf (last accessed 13/08/2019), p. 7; ICTY, Press release 21 February 2003; ICTY, 17 August 2005, p. 38.

750 ICTY, Address by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs. Carla del Ponte, to the United Nations Security Council, Press release 30 October 2002, http://www.icty.org/en/press/address-prosecutor-international-criminal-tribunals-former-yugoslavia-and-rwanda-mrs-carla-del (last accessed 13/08/2019).

751 ICTY, Statement of Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Delivered at the Inauguration of the War Crimes Chamber of the State Court of Bosnia and Herzegovina, Press release 9 March 2005, http://www.icty.org/en/press/statement-theodor-meron-president-international-criminal-tribunal-former-yugoslavia-delivered (last accessed 13/08/2019).

of law"[752] and that are an "articulation of shared values and moral imperatives"[753].[754] Thus, state organs, especially judicial institutions, need to work in a fair[755] manner and treat everyone equally, regardless of their ethnic or religious background.[756]

In order for citizens to develop trust in state institutions,[757] respect for the judicial process,[758] and trust in "judicial accountability"[759,760] they need to be properly informed about the work of criminal justice institutions,[761] especially about international criminal proceedings that address a country's violent past.[762]

2.1.4 Comparison Between the Rule of Law in Transitional Justice and the ICTY's Rule of Law Conception

As mentioned above,[763] the Tribunal's rule of law definition can be structured in the same way as the rule of law in transitional justice conception of Chapter 2. While it is limited to setting rule of law standards in a national justice system, it does largely adopt the same principles for the normative, institutional, and cultural components of the rule of law. How these standards are defined differs slightly, as demonstrated in table 6.

752 ICTY, Tribunal President Welcomes Support for Bosnia and Herzegovina's Judicial Institutions, Press release 31 March 2006, http://www.icty.org/en/press/tribunal-president-welcomes-support-bosnia-and-herzegovinas-judicial-institutions (last accessed 13/08/2019).

753 T. Meron (5 June 2014), Address to the U.N. Security Council Judge Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia, President, Mechanism for International Criminal Tribunals, New York, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/140605_president_meron_un_sc_en.pdf (last accessed 13/08/2019), p. 2.

754 In figure 7, these elements have been grouped together under "culture of law".

755 Cf. G. Kirk McDonald (7 May 1996), *Prosecutor v. Duško Tadić*, Opening Statements, IT-94-1-T, http://www.icty.org/x/cases/tadic/trans/en/960507IT.htm (last accessed 13/08/2019), p. 9; T. Meron (5 June 2014), Address to the U.N. Security Council Judge Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia, President, Mechanism for International Criminal Tribunals, p. 2.

756 Cf. ICTY, Press release 31 July 1996; in figure 7, these elements have been grouped together under "fairness of the judiciary".

757 Cf. ICTY, Press release 13 May 1999.

758 Cf. S. Brammertz (21 November 2012), Statement of the ICTY Prosecutor Serve Brammertz in Relation to the Gotovina and Markac Appeal Judgment, The Hague, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/121121_prosecutor_brammertz_en.pdf (last accessed 13/08/2019), p. 1.

759 S. Brammertz (8 December 2016), Address of Mr. Serge Brammertz, Prosecutor, International Criminal Tribunal for the Former Yugoslavia and Mechanism for International Criminal Tribunals to the United Nations Security Council, New York, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/161208_prosecutor_brammertz_un_sc_en.pdf (last accessed 13/08/2019), p. 3.

760 In figure 7, these elements have been grouped together under "trust in state institutions".

761 Cf. ICTY, 13 November 2009, p. 21.

762 Cf. ICTY, Support from European Union to the ICTY, Press release 7 December 2000, http://www.icty.org/en/press/support-european-union-icty (last accessed 13/08/2019); in figure 7, these elements have been grouped together under "awareness of accountability proceedings".

763 Introductory part to section 2.

Table 6 The rule of law in transitional justice versus the ICTY's rule of law conception

	Transitional rule of law standards for the judiciary[764]	**ICTY's rule of law conception**
Normative		
Accountability[765]	Accountability under the law for misconduct	Accountability for war crimes
Substantive characteristics	Human rights, especially fair trial rights	Availability of international crimes in national criminal law Availability of appropriate modes of liability in national criminal law Availability of appropriate punishment in national criminal law Absence of death penalty Fair trial rights Adequate detention
Formal charateristics	Public, general, clear laws	Legality principle (*nullum crimen, nulla poena sine lege, lex mitior*)
Institutional		
Independence	Absence of politisation	Absence of anything that is not judicial, such as political influences: the system as such must not be politicised, political authorities should not be able to interfere in investigations, and trials should not be used for political purposes, or to "please political pressure"
Impartiality[766]	Equality before the law	Integrity of judges
Transparency	Accessible proceedings and accessible decisions; Well-reasoned decisions, referring both to positive law as well as normative conceptions	*Not further defined*
Predictability and stability	After setting new precedents, consistent jurisprudence evolves	*Not mentioned*
Competence	Well-trained legal staff	Members of the justice system need to be well selected and well trained
Efficiency	Smooth processes, small/no backlog	Smooth processes: financial and logistical resources are paramount
Effectiveness	*Not mentioned*	Effective proceedings that bring the required results: international and regional judicial cooperation is paramount
Cultural		
Culture of law	*Not mentioned*	Culture of law instead of violence Ideology of legality

764 See Chapter 2, section 4.6.

765 In the rule of law in transitional justice conception, this is an institutional principle of the rule of law.

766 In the rule of law in transitional justice conception, this is a cultural principle of the rule of law.

	Transitional rule of law standards for the judiciary[764]	**ICTY's rule of law conception**
Commitment	Promise to adhere only to the law; Voluntary subordination under the law	*Not mentioned*
Fairness	Granting each party its respective rights	Equality before the law
Trust in state institutions	*Not mentioned*	Faith in state institutions: awareness of accountability proceedings is paramount

2.2 Analysing Impact

Having outlined the Tribunal's view on the rule of law – even if this rule of law conception has never been an explicit policy of the ICTY, but is 'merely' created on the basis of its official statements and publications – the next step is to establish a benchmark (i.e. dependent variable) for the subsequent analysis of the ICTY's impact on the rule of law in Bosnia and Herzegovina and Serbia.

'Impact' refers to something changing (the rule of law) as a consequence of something else (the ICTY). But how is impact assessed? This involves a two-step process. The first step consists of determining where a causal relationship between an observed development (in the rule of law of BiH or Serbia) can be attributed to the ICTY. This is achieved by: 1) determining a timely relationship between an action of the ICTY and a reaction at the domestic level (e.g. the ICTY's completion strategy and the establishment of domestic war crimes institutions); 2) identifying explicit references to the ICTY in the respective domestic act (e.g. in case law); and/or 3) analysing to what extent the ICTY played a role in the public debate on the respective domestic act (e.g. the laws for establishing domestic war crimes proceedings). Lastly, the counterfactual question is asked whether the respective domestic development would have happened without the ICTY.

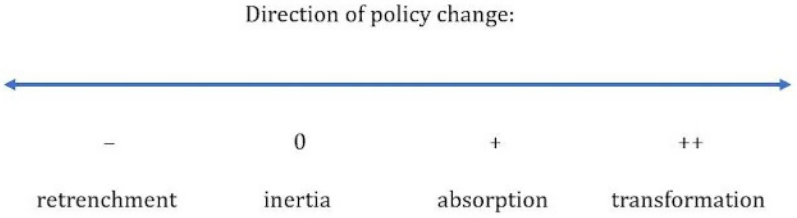
The second step consists of an evaluation of the Tribunal's impact. In a social science setting, it is impossible to 'measure' impact numerically.[767] It is therefore not practical to evaluate whether something is 'better' or 'worse' than something else, or than before; for example, attempting to determine whether the rule of law is now 'better' respected today than it was in the past. Instead, what is of interest here are the following categories: 1) whether there was an impact or not, i.e. whether the ICTY triggered a certain domestic development or not; 2) the form of impact, i.e. whether it was legislative, jurisprudential,

764 See Chapter 2, section 4.6.

767 Although certain rule of law indices do exactly that, for instance the World Justice Project Rule of Law Index or the World Bank's World Governance Index.

concerned material resources, or whether it led to a change in domestic practice; 3) the type of impact; and 4) whether the Tribunal's impact on domestic developments in the field of war crimes adjudication had spill-over effects to other areas.

The third category, the type of impact, warrants an explanation. It is based on Radaelli's definition of impact, developed to assess the effects of Europeanisation. He distinguishes between inertia, absorption, transformation, and retrenchment.[768]



Inertia means lack of change. This is the case, for example, when the norm that is supposed to be internalised at the domestic level is too different from domestic norms and practices for there to be a potential for impact. Inertia is characterised by delays in – or even resistance to – change. In the case of absorption, change takes place in the form of adaptation. One can observe a mixture of resiliency and flexibility; certain non-fundamental changes are made, but the 'core' of previous practices and norms is maintained. In the war crimes context, this would mean that advocacy networks and their requests are accommodated, but without real modification of the essential structures and changes in the 'logic' of behaviour.[769] Transformation, in contrast, represents such a fundamental change in logic. In the case of retrenchment, domestic norms and practices are even further removed from the respective international norm than before impact was exerted. Instead, the advocacy for change strengthens coalitions of domestic actors opposing norm internalisation and change.[770]

Chapter 9, using the impact model developed in Chapter 3, will analyse the ICTY's impact on the following areas: 1) domestic war crimes prosecutions, 2) the definition of international crimes (both in the law and in the jurisprudence) and of procedural criminal law and court practice, 3) matters regarding witnesses and victims, and finally, 4) the use of technology in the courtroom. Chapter 9 will also determine whether the Tribunal's influence on these four areas actually meant that it influenced the rule of law in Bosnia and Herzegovina and Serbia (see section 3 of Chapter 9).

768 Cf. Radaelli, 2003, p. 35.
769 Cf. Radaelli, 2003, p. 37.
770 Cf. Radaelli, 2003, p. 38.

It should be noted that the goal was not to assess the *changes in* impact over time. Rather, what will be examined is the ICTY's impact on the Bosnian and Serbian domestic justice systems between the Tribunal's establishment in 1993 and its closure at the end of 2017.[771] What happened in the meantime? The time element is only relevant and will therefore only be referred to when impact could indeed be observed, whereas it could not be at first, or – even more interestingly – when impact could initially be observed, whereas it could not be at a later stage.

3 Conclusion and Challenges

Apart from those already mentioned,[772] a few challenges faced during this research need to be discussed.

First, the empirical part of this research is largely based on insights gained through conducting extensive interviews. As mentioned earlier, the selection of my interview partners was neither completely random, nor could it be purposefully planned in a way that allowed for all possible views to be represented.[773] Apart from that, another type of research bias inevitably occurs in interviews, namely the so-called 'interviewer effects'. They refer to the phenomenon where respondents answer differently because they know they are being questioned. These effects can include social desirability (or the opposite: the desire to shock), meaning answering questions in a way the interviewee thinks is socially acceptable. Furthermore, the characteristics (e.g. gender, ethnicity, social class, accent, demeanour, etc.) or behaviour of the interviewer, as well as the interview location (e.g. private versus professional setting, 'safe' versus public area), and many more factors further influence the interviewee. Interviewer effects can hardly be avoided. Keeping questions unambiguous and easy to understand, behaving professionally, not adjusting one's own behaviour too much to the demeanour of the interviewee, acting in a similar way in each interview, and not disclosing one's personal views are merely a few strategies to minimise these effects.[774] The ICTY is a very polarising topic in the countries of the former Yugoslavia, and interview effects were therefore generally expected. During my interviews, I had the impression that in Serbia, the Tribunal's influence on domestic matters was often downplayed, whereas in Bosnia and Herzegovina, it was exaggerated by some. This is

771 Relevant developments from afterwards (until August 2019) that still relate to the ICTY's impact in that period are still taken into account.

772 In particular, see the challenges posed by selection biases in selecting sources, including interview partners described above in section 1.2.

773 See section 1.2.2 above.

774 Cf. Gomm, 2008, p. 222f.

certainly related to the ICTY's standing in each of these societies – while in BiH, the ICTY is generally viewed positively, in Serbia, it is generally despised.[775]

Another challenge I encountered while conducting interviews relates to the fact that loosely structured interviews bear the risk that respondents may turn facts into interesting stories, using their personal experiences as a starting point. Because of that – or because of different prevailing beliefs – some of my interview partners disagreed on fundamental questions. Collecting data through different sources helps in deciding whom to believe – when an interviewee was clearly in a minority position with his/her opinion, or when written sources existed that proved him/her wrong. However, deciding on what to take on board was not always that evident. I tried not to take sides and in obvious cases of diverging opinions, I made the disagreement explicit. However, I cannot rule out the possibility that there were more subtle cases where I myself did not even realise that I was taking sides. I therefore add my own biases to this research. I might be in favour or against particular people, based on a set of assumptions about which people are in the best position to be more credible, without even being aware of it.[776]

Two forms of what will be referred to as "comprehension bias" might pose additional difficulties: firstly, parts of the qualitative research were conducted in the original languages of the document or in the native language of the interview partner, notably in Bosnian/Croatian/Serbian. I am a German native speaker and I studied BCS to the best of my abilities in order to conduct this research. I cannot exclude occasional misunderstandings. Besides, as this research is presented in English, key concepts must be translated with great care. Nuances might get lost in the process of interpretation.

Secondly, with regard to responses to open-ended questions in qualitative interviews, there is no guarantee that the interviewee, first of all, has an accurate memory,[777] and then actually expresses what s/he wishes to express on the one hand, and that the researcher interprets his/her answers correctly on the other. Indeed, as the period of time that I have been researching (1993-2017) is quite long, some of my interview partners could not remember events that took place in earlier years, or how exactly those events unfolded. In most cases, this lack of information could be overcome with the help of written resources. Of course, what could not be found out cannot be presented here.

The biggest challenge relates to the overall research, which poses a question regarding cause and effect: namely, how do war crimes courts influence rule of law developments. Researching causation is genuinely complex; anything that has already happened might be among the causes of anything happening later, everything is likely to have multiple

775 See Chapter 9.
776 Cf. Gomm, 2008, p. 243
777 "Retrospective or recall bias"; Gomm, 2008, p. 242.

causes, many things happen at the same time.[778] In political science, this problem can lead to what is commonly referred to as "too many variables, too few observations" in few-country studies.[779] In the real world, there are many explanatory variables whose full variation exceeds the number of countries under investigation. Relevant factors to the development of the rule of law in Bosnia and Herzegovina and Serbia include, for instance, the general political climate, the economic situation, culture and traditions, international relations generally, and cooperation in the region – for instance with the European Union, the Council of Europe and other international organisations. Another layer of complexity is added by the fact that some of these institutions, and also states, have at times had a significant impact on the ICTY's leverage in the region.[780] One could make the case that (an) additional independent variable(s) is/are therefore needed to properly demonstrate what influenced the rule of law in Bosnia and Herzegovina and Serbia. My research is, however, focused on the *ICTY's impact* on the rule of law – as opposed to the rule of law in Serbia and BiH generally. I am not interested in the rule of law in Serbia and BiH as a whole, but merely in the ICTY's influence on it.

Of course, I cannot isolate that single factor. As Tim Haughton put it: "Unlike our colleagues from chemistry, as political scientists we are not afforded the luxury to isolate and remove individual ingredients and then re-run experiments to see if the results change."[781] He therefore suggests to "pose the counterfactual [question] as to what would have happened"[782] – in this case: what would have happened if the respective courts had not existed and exerted impact. As explained,[783] I adopted this approach. However, as Marko Milanović notes:

> "measuring the *causality* of the ICTY's impact poses a counter-factual question – what would the situation look like had there never been the ICTY, or had it done things differently – questions which are necessarily difficult to answer. The best thing we can do is speculate, if in an informed way."[784]

Despite these challenges, it is expected that the results of the comparison between BiH and Serbia are – to a limited extent – generalisable to similar situations (other countries

778 Cf. Gomm, 2008, p. 3; making the same claim specifically with regard to the impact of transitional justice mechanisms: McAuliffe, 2013, p. 112.
779 Cf. for instance: Landman, 2009, p. 34f. For a strategy to address this methodological weakness, Landman suggests either raising the number of observations (for instance by including a time component, sub-national units, or more countries) or very precise theoretical specifications; cf. Landman, 2009, p. 35.
780 Cf. Orentlicher, 2018, p. 4.
781 Haughton, 2007, p. 234.
782 Haughton, 2007, p. 234.
783 See section 2.2.
784 Cf. Milanović, 2016, p. 30.

recovering from war). Generalisations in the field of cause and effect, especially as the outcomes of few-country comparisons are of course prone to criticism: they involve the risk of overstretching the significance of the results obtained in one very specific study by applying those results to other situations.[785] This applies all the more to the role of international war crimes courts, due to the very specific post-war context of each country in which they operate. Generalisations about these courts will not necessarily be applicable in any given situation.[786]

Generalising means relying on the convinction that "[t]his happened here under these specific circumstances and it will likely happen *generally* where something like these *specific* circumstances obtain."[787] The key to producing generalisable knowledge therefore lies in identifying the specifications – in this case, the specific circumstances prevailing in post-war Bosnia and Herzegovina and Serbia, as well as the specific mandate and functioning of the ICTY.

It is the inherent nature of case studies that the generalisation of the research results will have to be based on 'informed speculation', as there is not much information as to the specific circumstances, due to the limited number of units of analysis. However, this study can at the very least serve as an example of a scenario in which an international war crimes court influences the rule of law in the countries under its jurisdiction. More generally, this research presents the case of an international institution interacting with the domestic level, and leaving a footprint as a result.

In the next Chapters, the results of my empirical study will be presented: Chapter 5 examines the establishment of domestic war crimes institutions; Chapter 6 assesses the ICTY's impact on domestic substantive and procedural criminal law (both in law and in practice); Chapter 7 explores matters related to witnesses and victims; and Chapter 8 looks at the use of technology in the courtroom. Chapter 9 summarises these findings and analyses the ICTY's role in these developments. It will be demonstrated that the impact model developed in Chapter 3 is indeed suitable for assessing the Tribunal's role. Ultimately, the ICTY has contributed to the development of the rule of law in Bosnia and Herzegovina and Serbia, as defined in this Chapter under section 2.1 – even if not to the same extent in both countries. The impact factors presented in Chapter 3 play an important role in accounting for the difference.

785 Generalisations will be drawn very carefully, as it has been warned that human rights scholarship is prone to "wishful thinking and sloppy legal analysis", with sloppiness meaning to draw far-reaching conclusions based on, for instance, only one case study; cf. J. R. Crook (2003). The International Court of Justice and Human Rights. *Northwestern Journal of International Human Rights, 1*(1), 2-8, p. 8.

786 Cf. Baylis, 2009, p. 13; see also: Stromseth, 2006, p. 256; and Orentlicher, 2018, p. 3.

787 Gomm, 2008, p. 103, emphasis in original.

Part II
ICTY-Triggered Changes in Serbia and Bosnia and Herzegovina

The ICTY, the Catalyst

How the ICTY Contributed to Re-Establishing the Rule of Law by Triggering the Domestic Adjudication of War Crimes

This Chapter examines the most visible and tangible impact of the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) on the domestic criminal justice systems in Bosnia and Herzegovina and Serbia, namely the establishment and work of domestic war crimes institutions.

That the ICTY would catalyse domestic war crimes prosecutions was a side effect of the Tribunal that no one had considered as part of its mission, and that no one had anticipated when the ICTY was launched.[788] But indeed, both countries established specialised war crimes institutions and Serbia began its first war crimes trial in 2004, and Bosnia and Herzegovina (BiH) in 2005. The fact that the ICTY has "encouraged, if not triggered" these trials is undisputed among observers. By that, the Tribunal has made "significant contributions to the rule of law locally"[789].

The first section of this Chapter will explain the dynamics that led to the establishment of Bosnian and Serbian war crimes institutions. The main trigger for setting in motion the process of advocating for domestic war crimes institutions was the ICTY's own completion strategy. Simply put, as the Tribunal wanted to get rid of cases in order to terminate its mandate in time; it was looking for courts to which these cases could be transferred. As these courts did not yet exist, they needed to be established. It will become evident that the ICTY's role in BiH is much more apparent. However, also in the case of Serbia, had it not been for the ICTY, there would probably not be any specialised war crimes institutions today. Section 2 will provide a brief overview of the most important institutions in both BiH (section 2.1) and Serbia (section 2.2), and section 3 will present an outline of the applicable law at the respective institutions. Section 4 is dedicated to the ICTY's impact on the work of these institutions. It will be demonstrated that the court has made significant contributions to their capacity. However, as section 5 – in which the challenges to an effective and efficient prosecution and adjudication of war crimes will be outlined – will show, Bosnian and Serbian war crimes institutions have operated – and continue to operate – under very difficult conditions. Also, the ICTY was not able to alleviate these problems through its measures aimed at boosting the work of the domestic war crimes institutions. The ICTY's record and appraisal are therefore mixed. This becomes particularly visible in

788 Cf. Orentlicher, 2018, p. 6.
789 Nettelfield, 2010, p. 18; similar: Ostojić, 2014, p. 183.

section 5.1, which provides the number of prosecuted and adjudicated cases. Section 6 concludes this Chapter.

1 Explaining Impact: Establishing Domestic War Crimes Institutions

Several factors related to the ICTY led to the establishment of domestic institutions for the prosecution and adjudication of war crimes. Arguably, it all began with the Tribunal's own jurisdictional regime, as laid down in Article 9 of the ICTY Statute, which provided for parallel competencies of the international tribunal and national courts. However, the real impetus was the ICTY's completion strategy, which foresaw enhanced engagement of the Tribunal in Bosnia and Herzegovina, to ensure that domestic courts would continue the work that the ICTY had started. Although there were no similar efforts in Serbia, even there the ICTY was involved in setting up domestic institutions. The following sections will explain the chain of events that led to the establishment of domestic war crimes institutions.

1.1 The Jurisdictional Regime of the ICTY Statute

It was former Secretary-General of the United Nations (UN) Boutros Boutros-Ghali who proposed the establishment of an international criminal tribunal that would adjudicate war crimes committed in the course of the wars in the former Yugoslavia. For the envisaged tribunal, he proposed a jurisdictional regime that would be concurrent with national courts. This implied that the proposed tribunal was not meant to prosecute *all* persons responsible for serious violations committed in the territory of the former Yugoslavia.[790] Rather, he suggested that instead of precluding and preventing national courts to exercise their jurisdiction, they should be encouraged to prosecute and try perpetrators of violations of their national law.[791]

1.2 Completion or Continuation Strategy

For about a decade, the concurrent jurisdiction did not have any implications for the work of the ICTY – on the contrary, its officials were worried about getting cases to The Hague

790 See also Article 9 (1) of the ICTY Statute.

791 Cf. United Nations Secretary General (3 May 1993), *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (last accessed 13/08/2019), p. 16.

rather than encouraging prosecutions in the former Yugoslavia.[792] Partly because of that, the ICTY prosecutor applied for deferrals under Article 9 (2) of the ICTY Statute; a number of cases for international crimes were consequently taken away from national courts and deferred to the Tribunal in The Hague.[793] The ICTY's main priority with regard to national authorities was that they would arrest the Tribunal's suspects.[794]

This considerably changed as of 2002/2003, when the Tribunal proposed its "completion strategy", which was drafted by the judges of the ICTY in their *Judicial Status Report*.[795] The goal of the completion strategy was to gradually terminate the Tribunal's work, while making sure that it "concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia."[796] The completion strategy was mainly meant to reduce the caseload of the Tribunal so that it could close in a timely manner.[797] However, making sure that its work would be properly continued in the region was also increasingly seen as a "key aspect" of the Tribunal's legacy.[798] Former ICTY President Fausto Pocar therefore preferred calling it the "continuation strategy"[799]. He submits that it was "a strategy for the continuation by domestic actors of those activities that were initiated by the ICTY", with the aim of

> "upholding the international rule of law, preventing impunity and widely sharing the Tribunal's institutional knowledge and jurisprudence […]. [T]he Completion Strategy is an unprecedented attempt to contribute to the development of the rule of law, both in the region of the former Yugoslavia and beyond."[800]

792 Cf. Orentlicher, 2018, p. 324.

793 The two most prominent cases concerned the Tribunal's very first defendant Duško Tadić who was deferred from Germany, and Dražen Erdemović who was deferred from Yugoslavia.

794 Cf. Orentlicher, 2018, p. 328.

795 ICTY (19 June 2002), *Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, provided to the United Nations Secretary General and the United Nations Security Council, S/2002/678, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf (last accessed 13/08/2019).

796 ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 13/08/2019); see also: United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, recital 10 and # 1.

797 ICTY, 19 June 2002, p. 5 and 7.

798 Cf. C. Garbett (2012). Transitional Justice and 'National Ownership': An Assessment of the Institutional Development of the War Crimes Chamber of Bosnia and Herzegovina. *Human Rights Review, 13*(1), 65-84, p. 65.

799 Cf. F. Pocar (2008). Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY. *Journal of International Criminal Justice, 6*(4), 655–665.

800 Pocar, 2008, p. 655f.

In the subsequent UN Security Council Resolution 1503 of August 2003, which endorsed the proposed completion strategy, the countries of the former Yugoslavia were reminded of their "obligation […] to investigate those accused whose cases would not be tried by the […] ICTY"[801]. At the same time, the Tribunal was explicitly called upon to "strengthen[…] the capacity of [the national] jurisdictions"[802] in the former Yugoslavia, as this was considered "crucially important to the rule of law"[803].

1.3 The Incentive: Transferring Cases

The central measure of the completion strategy proposed by the judges in their *Judicial Status Report* was to transfer certain cases concerning low- and intermediate-level perpetrators from the ICTY to national courts in the former Yugoslavia, and to concentrate on those crimes "most prejudicial to international public order"[804] in The Hague.[805] A case would, however, only be referred if certain requirements were satisfied, and most importantly, if the national court was able to fully comply with internationally recognised standards of human rights and due process.[806] The judges proposed to amend Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RPE) in such a way that it could become the legal basis for the envisaged referrals.[807] Rule 11*bis*, which was amended accordingly in December 2002, foresaw the possibility to refer a case (either with or without the accused already being arrested) to any state which could and would exercise jurisdiction over it.[808]

In order for a referral to be permissible, certain requirements needed to be met.[809] It needed to be ensured that: first, the justice system in the country receiving the case was adequately prepared;[810] second, the accused would receive a fair trial; and third, the death

801 United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, recital 9.

802 United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, recital 7.

803 United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, recital 10; the same was reiterated in operative part point 9 of United Nations Security Council Resolution 1534, S/RES/1534, 26 March 2004, #9.

804 ICTY, 19 June 2002, p. 5.

805 Cf. ICTY, 19 June 2002, p. 13.

806 Cf. ICTY, 19 June 2002, p. 14.

807 Cf. ICTY, 19 June 2002, p. 15; before the subsequent amendment, Rule 11*bis* only allowed for suspending an indictment in the case of proceedings at the national level. The judges considered that in order to implement a truly effective referral process, its scope needed to be broadened.

808 In the beginning, the amendments only comprised states that would have territorial jurisdiction, or where the accused would be arrested, but this was extended in July 2004. See Rule 11*bis* (A). A Referral Bench can decide to refer a case either *proprio motu* or upon application of the prosecutor (Rule 11*bis* (B)).

809 See also Chapter 4, section 2.1.

810 As mentioned above, in Chapter 4, section 2.1, although the condition of "adequately prepared" is mentioned only in Rule 11*bis* (A) (iii) and on a plain reading, one would therefore think that it relates only to those states otherwise having jurisdiction, it must in fact be met in any event. This follows from the system of Rule 11*bis* that requires reading paragraphs (A) and (B) together. In other words, it must be ensured that

penalty would not be imposed or carried out.[811] Because high profile cases were to remain in The Hague, the Referral Bench also had to consider the gravity of the crimes at stake and the level of responsibility of the accused.[812] When a decision for referral of a case was taken, the accused, together with all necessary material supporting the indictment had to be transferred to the competent national authorities.[813] It could be ordered that protective measures for witnesses or victims remain in force.[814]

An important element of Rule 11*bis* was the possibility for the ICTY Prosecutor to monitor the national proceedings,[815] and if s/he deemed it necessary, for instance because of insufficient respect for fair trial rights, s/he could apply to the Referral Bench to revoke the referral.[816] This deferral mechanism was supposed to encourage national judiciaries to do particularly well in complying with international standards and to threaten them if they would not.[817] A deferral would have meant for the national justice system to lose face both, towards their own population as well as towards the 'international community' – a situation, which all countries of the former Yugoslavia wanted to avoid at all costs in order to restore their reputation. So, it was in the interest of both the ICTY and the national authorities to establish the conditions for a fair handling of these cases.[818] Indeed, the State Court of Bosnia and Herzegovina (SCBiH) saw the referral of six cases to its jurisdiction as a "recognition" of its professionality and its compliance with high standards in adjudicating war crimes.[819]

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in the state of referral, the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

811 Rule 11*bis* (B).

812 Rule 11*bis* (C).

813 Rule 11*bis* (D) (i) and (iii).

814 Rule 11*bis* (D) (ii).

815 Rule 11*bis* (D) (iv).

816 Rule 11*bis* (F).

817 In the words of Carla del Ponte: "The mere existence of such a provision [that would enable the ICTY to defer back the case] should act as a strong incentive for the relevant domestic judicial authorities to handle the case in accordance with accepted international standards."; ICTY OTP (24 May 2004), *Completion Strategy Report May 2004*, provided to the United Nations Security Council, S/2004/420, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_24may2004_en.pdf (last accessed 13/08/2019), p. 45.

818 ICTY OTP (29 November 2017), *Completion Strategy Report November 2017*, provided to the United Nations Security Council, S/2017/1001, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/171129-completion-strategy-report-icty.pdf (last accessed 13/08/2019), p. 76.

819 "*Priznanje profesionalnog rada i poštivanje visokih standarda u krivičnim procesima pred Sudom BiH ogleda se i u odlukama Međunarodnog krivičnog suda za bivšu Jugoslaviju, koji je, u skladu sa Pravilom 11* bis*, Sudu BiH na dalje postupanje ustupio 6 predmeta sa 10 osumnjičenih. To su bile prve odluke o ustupanju predmeta jednom sudu u regionu, što je za Sud BiH bilo veliko priznanje.*" (in English: "The recognition that the State Court of Bosnia and Herzegovina [(SCBiH)] works professionally and respects high standards in its criminal trials is reflected in the decisions of the ICTY to refer six cases concerning ten accused to be adjudicated at the SCBiH. Those were the first decisions to transfer cases to a court in the region, which represents for the

At the same time, monitoring the adjudication of Rule 11*bis* cases provided the opportunity for targeted capacity building; monitoring activities permitted the Organisation for Security and Co-operation in Europe (OSCE) – responsible for implementing the monitoring programme on behalf of the ICTY Office of the Prosecutor (OTP)[820] – to directly draw conclusions on deficiencies in the prosecution and adjudication of war crimes trials. These deficiencies were then addressed through tailor-made trainings for the local actors involved.[821] That way, monitoring provided "essential and effective assistance to national systems involved in a difficult judicial reform process and ensures the smooth and fair continuation of proceedings, which were initiated in The Hague"[822].

The idea was therefore to reduce the Tribunal's caseload by triggering domestic prosecutions, while at the same time supporting them through a mix of pressure for high standards and support to achieve these high standards. A welcome side effect was the fact that when these trials were conducted within the countries of the former Yugoslavia, their adjudication became more transparent to the local population.[823]

Ultimately, six cases involving 10 accused were transferred to Bosnia and Herzegovina and one case involving one defendant was transferred to Serbia.[824] For a long time, it had not been envisaged to refer any cases to Serbia due to the country's lack of cooperation with the ICTY,[825] and concerns about the national judiciary's capacity to conduct such trials "in accordance with universally adopted standards."[826] The Tribunal did, however, commit to supporting the country in achieving these standards through "a number of

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SCBiH a huge appreciation." (my own translation)); Sud Bosne i Hercegovine, Istorijat Suda BiH, http://www.sudbih.gov.ba/stranica/86/pregled (last accessed 13/08/2019).

820 For the agreement and the progress reports of the Organisation for Security and Co-operation in Europe (OSCE) on each case, see ICTY, Status of Transferred Cases, http://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases (last accessed 13/08/2019). See also: ICTY OTP (25 May 2005), *Completion Strategy Report May 2005*, provided to the United Nations Security Council, S/2005/343, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_25may2005_en.pdf (last accessed 13/08/2019), p. 10.

821 Interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; similar: ICTY OTP (16 May 2007), *Completion Strategy Report May 2007*, provided to the United Nations Security Council, S/2007/283, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16may2007_en.pdf (last accessed 14/08/2019), p. 16.

822 ICTY OTP, 16 May 2007, p. 16.

823 Cf. M. Bohlander (2004). *The Transfer of Cases from International Criminal Tribunals to National Courts.* Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals, Arusha, p. 3.

824 Cf. ICTY, Status of Transferred Cases, http://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases (last accessed 14/08/2019).

825 Cf. B. Ivanišević & J. Trahan (October 2004), *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, Human Rights Watch, https://www.hrw.org/sites/default/files/reports/icty1004.pdf (last accessed 12/09/2019), p. 8.

826 ICTY (24 May 2004), *Completion Strategy Report May 2004*, provided to the United Nations Security Council, S/2004/420, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_24may2004_en.pdf (last accessed 14/08/2019), p. 8.

initiatives"[827] –[828] even though fewer efforts were made than in BiH. An example of such an initiative was to host a week-long visit from Serbian judges in The Hague, which was supposed to promote the transfer of knowledge and practical experience, and establish channels of communication between Serbian judges and the ICTY.[829]

1.4 Conducting Necessary Judicial Reforms

In Bosnia and Herzegovina, two elements also needed to be addressed before the Tribunal would transfer cases: first, an appropriate court where these cases would be tried, and second, comprehensive reforms of the domestic judiciary.[830]

Hence, when the ICTY judges proposed the new referral system, they recommended that the countries in the former Yugoslavia carry out certain reforms of its justice system – especially Bosnia and Herzegovina, as this was the country that was supposed to receive the majority, if not all, cases.[831] A justice system that complies with international standards is not only generally beneficial to society, but from the ICTY's perspective, it was also considered necessary in view of transferring cases;[832] the Tribunal needed to be convinced that the national courts had the necessary resources to conduct these trials, "in particular, that they operate[d] fairly and with respect for the principles of international humanitarian law and the protection of human rights."[833]

For BiH, the judges mainly observed the following obstacles: lack of independence, impartiality, and integrity of the judiciary; lack of or ineffective witness protection; lack of experience and training in prosecuting and adjudicating war crimes; insufficient financial and logistical resources affecting the effectiveness of the judicial system; slowness of the judicial system, particularly concerning appeals; and lack of compatibility of national substantive law with international law, for instance concerning modes of liability such as command responsibility.[834]

In order to rectify these deficiencies, the judges advised: to fully ensure the independence and impartiality of the judiciary, and in particular to prevent the political authorities from

827 ICTY, 23 November 2004, p. 4.
828 Cf. ICTY, 24 May 2004, p. 8.
829 Cf. ICTY, 23 November 2004, p. 5.
830 Cf. Orentlicher, 2018, p. 337.
831 Cf. ICTY, 19 June 2002, p. 18.
832 Cf. ICTY, 19 June 2002, p. 18; at the same time the judges welcomed reforms that were already underway, in particular, to incorporate international crimes into the criminal codes (CC); to bring the codes of criminal procedure in line with international standards on the protection of human rights, especially the rights of suspects, accused, and convicts; to harmonise also the rules of evidence with the requirements of a fair trial; to reinforce the independence of the judiciary; and to adopt a code of professional conduct of the judiciary.
833 ICTY, 19 June 2002, p. 5.
834 Cf. ICTY, 19 June 2002, p. 19.

being able to interfere with investigations; to make sure that arrest and pre-trial detention comply with international standards, such as Article 5 (1) (c) of the European Convention on Human Rights (ECHR); to ensure that trials are fair, and that all defendants are treated equally regardless of their ethnicity, political or religious convictions; to fulfil the minimum criteria with regard to detention conditions of detainees and convicted persons; and to abolish the death penalty and preclude its re-introduction.[835] In addition, the ICTY judges advised to train legal practitioners in international criminal law, to adapt the criminal procedure to international standards (particularly in the field of witness protection), and to ensure that the substantive criminal law mirrors the ICTY Statute concerning crimes and modes of liability.[836] But most importantly, they advised to establish a specialised court that would conduct war crimes cases.

Together with the Office of the High Representative (OHR), the ICTY President, ICTY Prosecutor and ICTY Registrar formulated a plan of action for judicial reform in Bosnia and Herzegovina.[837] At the heart of this plan was a war crimes department at the State Court.

1.5 A Joint Initiative: Establishing the State Court of Bosnia and Herzegovina

Already in 2001, the ICTY prosecutor had contacted the authorities in BiH to reflect on the possibility of establishing an "international court composed of a prosecutor and international judges"[838] within the country. At that time, the Office of the High Representative, – the institution responsible for overseeing the implementation of the civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina (Dayton Peace Agreement, DPA) – was making wider efforts to modernise BiH's judiciary while ensuring its independence, integrity, competence, and ethnic balance.[839] Its key preoccupation was tackling organised crime and corruption,[840] rather than war crimes.[841] For that purpose, and in the hope to de-fragmentise the country's judiciary, the OHR established the State Court of BiH, the first state-level court in Bosnia and Herzegovina, and the Prosecutor's Office of Bosnia and Herzegovina (POBiH), in 2002.[842] The ICTY

835 Cf. ICTY, 19 June 2002, p. 25.
836 Cf. ICTY, 19 June 2002, p. 25.
837 Cf. Bohlander, 2004, p. 4; see also: ICTY OTP, 24 May 2004, p. 44.
838 ICTY, 19 June 2002, p. 20.
839 Cf. Orentlicher, 2018, p. 337.
840 Cf. Orentlicher, 2018, p. 337.
841 Interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; see also: Nettelfield, 2010, p. 247f.
842 Office of the High Representative, Decision establishing the BiH State Court, 12/11/2000, http://www.ohr.int/?p=67132 (last accessed 14/08/2019) and Law on Court of Bosnia and Herzegovina, Official Gazette of BiH No. 29/00; see also: Orentlicher, 2018, p. 337f. In fact, the idea for a state court dates back to 1998, when

judges,[843] who were mainly preoccupied with fighting impunity for war crimes (also domestically),[844] came to the conclusion that using the SCBiH to try intermediate-profile and sensitive cases, complemented by the efforts of district and cantonal courts in trying low-profile cases,[845] would be most conducive to reconciling the particular challenges of prosecuting and adjudicating international crimes, and the particularities of the BiH judicial system.[846] Thus, on the initiative of the ICTY, it was under the High Representative Lord Paddy Ashdown that the SCBiH's mandate was expanded to include a war crimes department.[847]

Importantly, this development would contribute to a uniform application of national law in war crimes cases, which would not have been the case if different cantonal/district courts had had exclusive jurisdiction. Furthermore, it would give BiH national ownership over war crimes trials, providing the opportunity to apply the country's own legal tradition, thereby potentially increasing the acceptance of the court by the local population and their confidence in the judiciary, but also providing the opportunity to serve as a starting point for broader reforms of the judiciary.[848] Ashdown claimed that the experience that local prosecutors and judges would gain at the war crimes department of the new court would "carry over to their work in other areas of law enforcement."[849] In order to ensure that prosecutions and trials conform to international standards, however, the ICTY judges also

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the then-High Representative asked the Venice Commission of the Council of Europe for an opinion on the necessity for a state-level judicial body next to the existing Constitutional Court. The Venice Commission indeed confirmed the necessity, although more for administrative law, less for criminal law; cf. Aitchison, 2011, p. 128. Establishing a court had been made possible by the new so-called "Bonn powers" of the High Representative, conferred upon him in 1997 by the Peace Implementation Council after two years of obstructionism by Bosnia and Herzegovina's (BiH) leaders. The Bonn powers most notably included the competency to impose laws and to remove individuals from public office who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation. The High Representative later also imposed the new criminal code and the new code of criminal procedure (see Chapter 6); cf. Orentlicher, 2018, p. 50.

843 They conducted a study of the different advantages and disadvantages of the five possible solutions to the problem of the BiH judicial system being inadequately prepared to receive cases on the one hand, and the ICTY needing to refer cases on the other hand in order to reduce its workload. The five possibilities considered were: first, to use the current national system together with training of the local judiciary in international criminal law; second, use of the current system together with the sending of international observers; third, use of the current national system together with the addition of international judges to the local courts; fourth, use of the State Court; fifth, establishment of a special international court; see: ICTY, 19 June 2002, p. 21f.

844 Cf. Orentlicher, 2018, p. 337.

845 They also advised the SCBiH to be competent to hear appeals of the cantonal and district courts in war crimes cases; cf. ICTY, 19 June 2002, p. 24. A recommendation that was not taken up.

846 Cf. ICTY, 19 June 2002, p. 23.

847 Cf. ICTY, 19 June 2002, p. 20; see also: Orentlicher, 2018, p. 50.

848 Cf. ICTY, 19 June 2002, p. 23.

849 ICTY, Statement of Judge Theodor Meron, President of the ICTY, to the UN Security Council, Press release 9 October 2003, http://www.icty.org/en/press/statement-judge-theodor-meron-president-icty-un-security-council (last accessed 14/08/2019).

advised to incorporate international judges into the State Court of BiH,[850] and to have international observers monitor the work of district and cantonal courts.[851]

Together with the overall completion strategy, these recommendations were endorsed by the UN Security Council in August 2003,[852] and eventually, nearly all of them were implemented in the region; in 2002, the war crimes department within the State Court of Bosnia and Herzegovina was set up as a "joint initiative"[853] between the two institutions, following a decision of the High Representative,[854] and an agreement between the OHR and the ICTY in 2003.[855] ICTY officials participated in several working groups established by the OHR to examine issues that needed to be addressed for the BiH State Court to succeed – ranging from the building itself to procedural issues.[856] This allowed the ICTY to fulfil an important role with regard to the future work of the new court.[857] In particular, they prepared the legal framework for the transfer of indicted cases from the Tribunal to the SCBiH.[858] In addition, while the OHR had initially entrusted the creation of the war crimes department to a French diplomat with no legal experience (which did not lead to progress), the project only really started with the arrival of Michael Johnson, former head of Prosecutions at the ICTY. He spearheaded the process of mapping out the institutional structure of a soon-to-be-created registry for the SCBiH.[859] The war crimes department eventually became operational in January 2005.[860]

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850 Contrary to the organised crimes department, which was initially completely run by foreigners, the war crimes department was to be run by mixed teams, foreigners and Bosnian practitioners. The goal was to give it a more "Bosnian face" towards the communities observing its work; cf. Nettelfield, 2010, p. 248.

851 Cf. ICTY, 19 June 2002, p. 24.

852 See for instance: "Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber') and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber […]"; United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, recital 11.

853 United Nations Security Council, Security Council Briefed on Establishment of War Crimes Chamber Within State Court of Bosnia and Herzegovina, Press release 8 October 2003, https://www.un.org/press/en/2003/sc7888.doc.htm (last accessed 14/08/2019).

854 Cf. L. Rüedi (2015). *War Crimes Trials in Bosnia and Herzegovina: Selected Aspects of Transitional Justice Mechanisms*. Zurich/St. Gall: DIKE, p. 87 and 88.

855 Cf. ICTY, Press release 21 February 2003; ICTY, 24 May 2004, p. 7; Rüedi, 2015, p. 88; Ivanišević & Trahan, October 2004, p. 6; Bohlander, 2004, p. 18f.

856 Cf. Nettelfield, 2010, p. 253.

857 Cf. Burke-White, 2007, p. 336.

858 Cf. Orentlicher, 2018, p. 339; see also: ICTY, 23 November 2004, p. 4. The legal framework, among others, contained the new criminal code and the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina, Official Gazette of BiH No. 61/04; cf. Orentlicher, 2018, p. 339f.

859 Cf. Nettelfield, 2010, p. 253.

860 Cf. Sud Bosne i Hercegovine, Istorijat Suda BiH, http://www.sudbih.gov.ba/stranica/86/pregled (last accessed 14/08/2019).

The ICTY thus had substantial influence on the establishment of the war crimes section of the State Court.[861] In fact, the Tribunal not only provided expertise in establishing these institutions, but also exerted pressure.[862] Furthermore, in addition to other foreign judges, some former ICTY judges moved to the Special Department for War Crimes of the BiH State Court. The cases subsequently referred to BiH (but also to Serbia and Croatia) under Rule 11*bis*, were meant to launch the work of these specialised institutions, with the help – and under supervision – of the ICTY Office of the Prosecutor. The prediction was that Rule 11*bis* cases would serve as a "catalyst for the strengthening of competent national judicial systems"[863] and that after their successful completion, prosecutions and trials for international crimes would become the norm.[864] Reforms of the domestic justice system – especially of the criminal justice system – were also carried out, as will be demonstrated in the current and subsequent Chapters.

1.6 No Comparable Efforts in Serbia

The ICTY's involvement in setting up specialised war crimes institutions in Serbia was much less significant. In fact, it had made no comparable efforts in that respect.[865]

A small democratic revolution drove President of Yugoslavia Slobodan Milošević out of office in October 2000. One of the main focuses of the democratic changes that subsequently took place, and a key priority for Prime Minister Zoran Đinđić, was preventing organised crime and war crimes.[866] However, without thorough reforms of the domestic judiciary and the police, which remained staffed with Milošević-era executives and crippled by inertia, local courts were reluctant and unable to carry out domestic organised or war

861 See for instance: M. Kreso (27 November 2013). *Assessing 20 Years of the Tribunal.* Paper presented at the 20 Years of the ICTY, Sarajevo, p. 34; this view was also confirmed by virtually all my Bosnian interview partners.

862 Cf. Burke-White, 2007, p. 335-344; interview with OHR representative, Sarajevo, 8 February 2017, I-46.

863 ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 14/08/2019).

864 Interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

865 Cf. Bohlander, 2004, p. 21; see also: Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

866 Cf. Orentlicher, 2018, p. 388.

crimes trials.[867] This led to Đinđić's idea to establish specialised institutions to tackle both –[868] independent of ordinary criminal institutions to provide extra credibility.[869]

Similar to Bosnia and Herzegovina, Đinđić's focus certainly was on the fight against organised crime. But incorporating war crimes departments within specialised institutions presented the unique opportunity to "reclaim the transitional justice agenda"[870], to reassert Serbia's judicial sovereignty, and to reclaim its jurisdiction over war crimes proceedings from the ICTY.[871] Prevailing anti-Hague sentiments therefore certainly also played a role; an opinion poll from 2004 showed that although only 57% of Serbs thought that domestic courts were ready to prosecute war crimes cases, 71% believed it would be better to institute such prosecutions in Serbian courts than in The Hague.[872] The hope was therefore that cases would be received from the ICTY,[873] or that domestic war crimes cases would substitute the surrender of Serbian war crimes suspects (Serbian authorities were concerned that surrendering their citizens to The Hague could jeopardise the stability of the country).[874] According to Ostojić, the specialised war crimes institutions were therefore "to a great extent created in reaction to the Hague tribunal"[875].

As Orentlicher recounts from an interview with the first War Crimes Prosecutor, Vladimir Vukčević, proving that Serbia could capably prosecute war crimes was also a "matter of professional pride" for Vukčević. In his view,

867 Cf. Ostojić, 2014, p. 62.

868 Cf. Orentlicher, 2018, p. 388; ultimately, the organised crimes and the war crimes departments also mutually depended on one another, at least in the beginning. For instance, after Đinđić was assassinated by organised crime groups in 2003, there was a massive purge of the judiciary and thousands of people were arrested. The organised crimes institutions subsequently spurred investigations into political murders under Milošević, which, in turn, greatly increased the ability of the domestic judiciary to tackle war crimes; cf. Ostojić, 2014, p. 42f.; see also: S. Weill & I. Jovanović (2012). War Crimes Prosecutions in a Post-Conflict Era and a Pluralism of Jurisdictions: The Experience of the Belgrade War Crimes Chamber. In E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (Eds.), *International Law in Domesitc Courts: Rule of Law Reform in Post-Conflict States* (p. 241-268). Cambridge: Intersentia, p. 244f.

869 Cf. Ostojić, 2014, p. 170; although this did not quite work out: the War Crimes Prosecutor depended heavily on the Serbian police, and the validity of verdicts on approval from the higher courts; cf. Ostojić, 2014, p. 176.

870 Ostojić, 2014, p. 80.

871 Cf. Ostojić, 2014, p. 198; similar: interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

872 See Beogradski centar za ljudska prava (December 2006), *Javno mnenje u Srbiji: Stavovi prema domaćem pravodudju za ratne zločine i Haškom tribunalu*, bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2006.ppt (last accessed 14/08/2019), p. 53f.

873 Cf. Orentlicher, 2018, p. 391.

874 Cf. Weill & Jovanović, 2012, p. 244f.

875 Ostojić, 2014, p. 171.

> "the fact that war crimes associated with Serbia were prosecuted before an international court placed his country in the same column as war-ravaged countries whose judiciaries he reckoned to be far less developed than Serbia's"[876].

Linked to that, demonstrating to the world that the country was prepared to prosecute war crimes suspects and was capable of doing so, also played a key role in restoring Serbia's legitimacy.[877] With the new institutions, Serbia intended to demonstrate its commitment to the rule of law.[878] That way, ultimately, establishing war crimes institutions also became a way for Serbia to further (or rather: begin) its integration with the West.[879]

In addition, Weill and Jovanović report that after the fall of Milošević, war crimes became less of a taboo subject, and the Serbian public became less hostile towards the notion of accountability for war crimes among their co-nationals.[880]

There is a great consensus that if the ICTY had not existed, specialised war crimes institutions would not have been established.[881] Partly, as described above, the leverage to create these institutions stemed from the fact that people in Serbia did not want to have these cases tried by a foreign institution in The Hague – but partly also because the ICTY subtly encouraged the establishment of domestic institutions.[882] In addition, prominent ICTY staff members, including President Cassese and Prosecutor Goldstone, also participated in the expert group that assisted the Serbian government (at the instigation of the International Bar Association and the OSCE) in the drafting of the Law on War Crimes. Some of the expert group's recommendations found their way into this law – including the recommendations to better utilise the limited resources of the Serbian judiciary and to establish specialised war crimes institutions.[883] Furthermore, the Tribunal worked to strengthen these institutions in myriad ways,[884] in particular, through partnerships and close collaboration in several respects.[885]

Most importantly, though, Orentlicher claims that the Tribunal helped to "creat[e] a political space for Serbia" to deal with war crimes, in particular after Đinđić's death. On the one hand, the Tribunal's very existence and operation brought the issue of war crimes prosecutions and trials to the table, which became the focal point of the domestic demands

876 Both quotes: Orentlicher, 2018, p. 392.
877 Cf. Ostojić, 2014, p. 198; similar: interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.
878 Cf. Weill & Jovanović, 2012, p. 244f.
879 Cf. Orentlicher, 2018, p. 389.
880 Cf. Weill & Jovanović, 2012, p. 244f.
881 Cf. Orentlicher, 2018, p. 388f.
882 Cf. Ostojić, 2014, p. 213.
883 Cf. Rüedi, 2015, p. 86.
884 Cf. Orentlicher, 2018, p. 123.
885 Cf. ICTY, 24 May 2004, p. 8; see also: Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018; see also section 4 below.

for trials. In addition, foreigners ensured a substantial level of autonomy in relation to domestic political elites.[886] On the other hand, the ICTY was also instrumental in effectuating outside pressure – or even coercion –[887] from other states and international organisations on Serbia.[888] At the same time, the international prominence of these institutions largely contributed towards its acceptance at home.[889] Ostojić concludes that the establishment of specialised institutions came about "as a result of the interplay between external incentives and domestic political circumstances."[890]

There had been serious concerns about the proper conduct and fairness of the few war crimes trials that had taken place between 1991 and 2003.[891] These concerns considerably diminished with the establishment of specialised war crimes institutions in 2003,[892] which were established through the Law on Organization and Competences of Government Authorities in War Crimes Proceedings:[893] the Office of the War Crimes Prosecutor (OWCP), the War Crimes Department within the Higher Court Belgrade, and the War Crimes Investigation Service (WCIS) within the police.[894]

The suggestion by the 'international community' to include foreign judges and prosecutors in these institutions was rejected by Serbian authorities. Besides wanting to show that the Serbian judiciary was capable of conducting trials according to the highest judicial standards with its own human resources, one of the counter-arguments was that such an internationalised structure could be perceived as another ICTY-like court and be seen as imposing justice, prompting animosity among the public in Serbia.[895]

886 Cf. Ostojić, 2014, p. 173.

887 Cf. Michaeli, 2011b, p. 59; coercion was exerted most notably through the European Union (EU) with its conditionality policy. I have elaborated on the EU's conditionality policy elsewhere: Brodersen, 2014.

888 Cf. Orentlicher, 2018, p. 390; Ostojić, 2014, chapter 3, p. 57ff.

889 Cf. Ostojić, 2014, p. 173.

890 Ostojić, 2014, p. 171.

891 Cf. OSCE Mission to Serbia (2015), *War Crimes Proceedings in Serbia: An analysis of the OSCE Mission to Serbia's monitoring results*, Belgrade, https://www.osce.org/serbia/194461?download=true (last accessed 13/09/2019), p. 21; Weill & Jovanović, 2012, p. 243.

892 Cf. Michaeli, 2011b, p. 59.

893 Law on Organization and Competences of Government Authorities in War Crimes Proceedings, Official Gazette of the Republic of Serbia No. 67/2003.

894 For more information on the Office of the War Crimes Prosecutor, see: http://www.tuzilastvorz.org.rs/sr/ (accessed 14/08/2019), and on the Higher Court Belgrade war crimes department, see: https://www.bg.vi.sud.rs/ (last accessed 14/08/2019).

895 Cf. Weill & Jovanović, 2012, p. 245f.

2 The War Crimes Institutions

2.1 Bosnia and Herzegovina

In the Socialist Federal Republic of Yugoslavia (SFRY), military courts had jurisdiction over offences committed by military personnel, and over certain criminal offences committed by other persons relating to national defence and the security of the country, as well as over other legal matters relating to disputes in connection with serving in the Yugoslav People's Army. In cases of crimes committed by a military and a non-military person together, ordinary courts had jurisdiction over the case as well.[896] A limited number of trials have taken place before such military courts in Bosnia and Herzegovina during the 1992-1995 armed conflict, albeit under questionable circumstances, which resulted in several verdicts getting revoked in the post-war period. Problems related to, in particular, the imposed penalties (the SFRY Criminal Code foresaw the death penalty), and the independence and impartiality of the courts.[897] Military courts were abolished after the war.[898] Several judges who had served at military courts later served in the war crimes chambers of the State Court of Bosnia and Herzegovina.[899]

2.1.1 Courts

As pointed out, both the Bosnian state structure and its judiciary are very fragmented. At the state level, there is the State Court of Bosnia and Herzegovina and the BiH Constitutional Court. Cases are argued by prosecutors from the Prosecutor's Office BiH. However, in BiH, most power lies at the entity/district level: the Republika Srpska (RSBiH), the Federation (FBiH), and the Brčko District (BDBiH). The court system in the Federation, which consists of several cantons, is comprised of ten cantonal courts, each of which stands at the top of the hierarchy of at least one or several municipal courts; for instance, there are five municipal courts in the canton of Bihać, six in Zenica, and only one in Sarajevo. Furthermore, there are the FBiH Supreme Court and the FBiH Constitutional Court which have jurisdiction over the whole Federation. In FBiH, there are ten prosecutors' offices, one for each canton. The prosecutors act before the municipal and cantonal courts. In addition, the FBiH Prosecutor's Office acts before the FBiH Supreme Court. In Republika Srpska, there are five District Courts, each of which stands at the top of the hierarchy of

896 Cf. Rüedi, 2015, p. 72.
897 Cf. Rüedi, 2015, p. 73.
898 They ceased to exist on 15 July 1996; see: Human Rights Chamber for Bosnia and Herzegovina, *Sretko Damjanović against The Federation of Bosnia and Herzegovina*, Decision, CH/96/30, 5 September 1997.
899 This concerns at least judges Davorin Jukić, Ljubomir Kitić, Šaban Maksumić, and Davor Žilić; cf. Rüedi, 2015, p. 73f.

at least two (e.g. in Trebinje) – and in some districts seven (Banja Luka) – Basic Courts. The RSBiH also has a High Commercial Court and five Commercial Courts, one for each district, a Supreme Court, and a Constitutional Court. There are five prosecutors' offices, one for each district acting before the Basic and District Courts, plus a Special Prosecutor's Office competent for the entire territory of the RSBiH and responsible for "organised and most severe forms of crimes". In addition, there is the RSBiH Prosecutor's Office, acting before the RSBiH Supreme Court. The court system in the Brčko District only consists of the Basic Court Brčko and the Appellate Court, as well as one Prosecutor's Office.[900] Considering that BiH only has 3.5 million inhabitants, one can easily understand that this structure is inefficient and leads to a myriad of problems. However, not all courts are competent to try war crimes. The relevant competencies will be outlined in the sections below.

State Court of Bosnia and Herzegovina (SCBiH)

As mentioned above, the primary competency for war crimes cases lies with the State Court of Bosnia and Herzegovina. It deals with the more complex cases.[901]

The SCBiH consists of three divisions, a criminal, an administrative[902] and an appeal division. The criminal division has three sections: Section I for War Crimes; Section II for Organised Crime, Economic Crime, and Corruption; and Section III for all other crimes under the jurisdiction of the Court.[903] The panels within each section consist of three judges.[904] Appeals against judgments of the Criminal Division are heard by the Appellate Division.[905] The ICTY's experience was used in the process of drawing up specific rules of procedure for the specialised war crimes section of the SCBiH.[906]

Trials for war-related crimes took place at the SCBiH as of 9 March 2005, prior to that, they had been held only in the courts of the entities of the Federation of Bosnia and Herzegovina, and the Republika Srpska.[907]

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900 See: European Commission for Democracy Through Law (Venice Commission) (9 December 2011), *The Judicial power in Bosnia and Herzegovina (BiH) – Background Paper*, CDL(2011)096rev*, Strasbourg, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)096rev-e (last accessed 14/08/2019).

901 See section 1.1.

902 The Administrative Division will not be dealt with any further.

903 Cf. Sud Bosne i Hercegovine, Organizaciona struktura Suda BiH, http://www.sudbih.gov.ba/stranica/40/pregled (last accessed 14/08/2019); Section II and III will not be dealt with any further. Section III relates to all other crimes that require state level jurisdiction, such as international agreements or border issues.

904 Cf. Rüedi, 2015, p. 88.

905 Cf. Sud Bosne i Hercegovine, Organizaciona struktura Suda BiH, http://www.sudbih.gov.ba/stranica/40/pregled (last accessed 14/08/2019).

906 Cf. ICTY, Press release 21 February 2003.

907 Cf. Y. Ronen (2014). The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina. *Penn State Journal of Law and International Affairs, 3*(1), 113-160, p. 124.

There are 48 judges at the SCBiH[908] – in the war crimes and the organised crimes section, they are supported by law clerks.[909] Judges have life tenure until the mandatory retirement age of 70, unless they are removed in connection with criminal or disciplinary sanctions.[910] In order to become a judge at the SCBiH, applicants need to pass a bar examimation, or must have been a law professor with at least 15 years of teaching experience. Judges from other courts require at least eight years of experience in order to be accepted at the SCBiH.[911]

Entity/District Courts

In both entities, the Federation and Republika Srpska, and the Brčko District, there are no specialised departments for war crimes cases.[912] War crimes cases are adjudicated by judges who are not specialised in international humanitarian law and who also deal with cases other than war crimes.[913]

Both in FBiH and RSBiH, lower level courts (the 28 Municipal Courts[914] in FBiH and the 19 Basic Courts in RSBiH[915]) adjudicate less serious cases, punishable with a prison sentence of up to 10 years.[916] The higher-level courts (the Cantonal Courts in FBiH[917] and the District Courts in RSBiH[918]) hear appeals coming from the lower-level courts, and are furthermore competent to try cases punishable by a sentence of imprisonment of 10 years or more. Generally speaking, war crimes cases are heard before these Cantonal and District Courts.[919] Appeals coming from the FBiH Cantonal Courts are heard by the FBiH Supreme Court, and appeals coming from the RSBiH District Courts are heard by the RSBiH Supreme

908 Cf. Sud Bosne i Hercegovine, Organizaciona struktura Suda BiH, http://www.sudbih.gov.ba/stranica/40/pregled (last accessed 14/08/2019).

909 Cf. Sud Bosne i Hercegovine, Pravno odjeljenje, http://www.sudbih.gov.ba/stranica/63/pregled (last accessed 14/08/2019).

910 Article VI (1) (c) of the BiH Constitution.

911 Cf. Rüedi, 2015, p. 108f.

912 Cf. Rüedi, 2015, p. 90.

913 Cf. Rüedi, 2015, p. 91.

914 Bihać, Bosanska Krupa, Bugojno, Cazin, Čaplijina, Goražde, Gračanica, Gradačac, Kakanj, Kalesija, Kiseljak, Konjic, Livno, Ljubuško, Mostar, Orašje, Sanski Most, Sarajevo, Široki Brijeg, Tešanj, Travnik, Tuzla, Velika Kladuša, Visoko, Zavidovići, Zenica, Žepče, Živinice.

915 Banja Luka, Bijeljina, Derventa, Doboj, Foča, Gradiška, Kotor Varoš, Modriča, Mrkonjić Grad, Novi Grad, Prijedor, Prnjavor, Sokolac, Srebrenica, Teslić, Trebinje, Višegrad, Vlasenica, Zvornik.

916 Cf. Rüedi, 2015, p. 90 and 92.

917 The cantonal courts are in Bihać, Odžak, Tuzla, Zenica, Goražde, Novi Travnik, Mostar, Široki Brijeg, Sarajevo, Livno.

918 Banja Luka, Bijeljina, Doboj, Istočno Sarajevo, Trebinje.

919 Cf. Rüedi, 2015, p. 90f.

Court. The supreme courts are mandated to ensure a uniform application of entity laws across the respective entity.[920] The decisions of these courts are final and binding.[921]

In the Brčko District, the Brčko Basic Court and the Brčko Appellate Court have jurisdiction over war crimes cases, even though also they lack specialised departments and the equivalent expertise.[922]

It becomes obvious that the State Court of BiH does not act as an appellate court to the entity/district courts. In fact, there is no connection between these courts whatsoever.[923]

In order to be appointed a judge at an entity supreme court, applicants need to have at least 10 years of experience as a law professor, or have served as a judge for a minimum of eight years elsewhere. For an appointment at entry level positions at municipal or basic courts, three years of experience suffice, and for an appointment at cantonal or district courts, 5 years of experience are required.[924] Judges have life tenure unless they are removed following criminal or disciplinary sanctions.[925]

Constitutional Court

The Constitutional Court of Bosnia and Herzegovina has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.[926] Appellants, who believe that the judgment or other decision of any court is in violation of their rights, therefore have the right to lodge an appeal to the Constitutional Court after all legal remedies have been exhausted.[927] This can also concern war crimes cases, if the defendant alleges a violation of his or her fundamental rights in the course of the trial.

2.1.2 Prosecutors' Offices

Prosecutor's Office of Bosnia and Herzegovina (POBiH)

920 Cf. Rüedi, 2015, p. 92.

921 Although the FBiH Constitutional Court has jurisdiction to review whether FBiH law is compatible with the FBiH Constitution. It furthermore decides on disputes between cantons, between cantons and the Federation, between municipalities and cantons or the Federation, or between FBiH institutions and on vital national interests at the entity level; cf. Rüedi, 2015, p. 91. The same applies analogously to the Republika Srpska of BiH (RSBiH).

922 Cf. Rüedi, 2015, p. 93.

923 See section 4.1 below.

924 Cf. Rüedi, 2015, p. 108f.

925 Articles IV.6 (3)-(4) and V.11 (3), of the FBiH Constitution; Art. 127 RSBiH Constitution, Article 73 (1) BD Statute.

926 Article VI (3) (b) of the Constitution of BiH.

927 Cf. Ustavni Sud Bosne i Hercegovine, Apelaciona jurisdikcija, http://www.ccbh.ba/o-sudu/nadleznosti/?title=apelaciona-jurisdikcija (last accessed 14/08/2019); see also Article VI (3) (b) of the Constitution.

The Prosecutor's Office of Bosnia and Herzegovina was established in January 2003.[928] It investigates and prosecutes cases within the competency of the SCBiH,[929] including war crimes.[930] This task is fulfilled by the Special Department for War Crimes (next to the Special Department for Organised Crime, Economic Crime, and Corruption)[931], which started its activities in March 2005.[932] The war crimes department of the POBiH is divided into sections, each dealing with different regions.[933] At the time of writing, there are 30 prosecutors in the War Crimes Department.[934]

The state prosecution has various agencies at its disposal for the investigation of war crimes: the State Investigation and Protection Agency,[935] the State Border Service, the Judicial Police, the Financial Police, the customs and tax authorities, the military police, expert associates, and investigators working directly within the Prosecutor's Office.[936]

Entity/District Level Prosecutors' Offices

The FBiH Prosecutor's Office, the RSBiH Prosecutors' Office and the BD Prosecutor's Office, all of which were created as autonomous state bodies by the High Representative,[937] have a supervisory function over their respective lower level prosecutors' offices.[938] They

928 It was established by the Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No 42/03, which was enacted by the High Representative in August 2002, and adopted by the Bosnian parliament in October 2003.

929 Article 12 (1) of the Law on the Prosecutor's Office of Bosnia and Herzegovina.

930 Article 12 (3) of the Law on the Prosecutor's Office of Bosnia and Herzegovina.

931 Article 3 (3) of the Law on the Prosecutor's Office of Bosnia and Herzegovina; this department will not be dealt with any further.

932 Cf. Prosecutor's Office of Bosnia and Herzegovina, About PO BiH – History, http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=1&id=2&jezik=e (last accessed 14/08/2019).

933 Cf. Kirs, 2011, p. 405.

934 Cf. Tužilaštvo Bosne i Hercegovine, Tužioci – Tužioci Odjela I, http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=15&id=63&jezik=b (last accessed 14/08/2019); and POBiH, Glavna Tužiteljica Sastala Se Sa Novoimenovanim Tužiteljima Tužiteljstva BiH, Press release 10 June 2019.

935 This unit was established in 2002; Ivanišević & Trahan, October 2004, p. 16. For the smooth cooperation between the Prosecutor's Office BiH and State Investigation and Protection Agency in war crimes investigations, the two agencies concluded a Memorandum of Cooperation as well as so-called Instructions on the professional basis for cooperation between the Prosecutor's Office of Bosnia and Herzegovina and the SIPA; cf. Prosecutor's Office of Bosnia and Herzegovina, Legal cooperation – Cooperation with Domestic Institutions, http://tuzilastvobih.gov.ba/index.php?opcija=sadrzaj&kat=5&id=10&jezik=e (last accessed 14/08/2019).

936 Cf. Rüedi, 2015, p. 190.

937 See Office of the High Representative, Decision Enacting the Law on the Federation Prosecutor's Office of the Federation of Bosnia and Herzegovina, 21/08/2002, http://www.ohr.int/?p=66258 (last accessed 14/08/2019); Office of the High Representative, Decision Enacting the Law on the Prosecutor's Offices of the Republika Srpska, 21/08/2002, http://www.ohr.int/?p=66252 (last accessed 14/08/2019).

938 Articles 1 and 9 of the Law on the Prosecutor's Office of FBiH, Articles 1 and 9 Law on the Prosecutor's Office of RSBiH, Article 4 of the Law on the Prosecutor's Office of BD.

are tasked with guaranteeing the legality and constitutionality of criminal prosecutions.[939] War crimes are, however, dealt with by the prosecutors at cantonal (FBiH) and district (RSBiH) level.

Most prosecutors' offices throughout the country do not have specialised prosecutors for war crimes, and it is the exception that prosecutors are assigned to work exclusively on war crimes.[940]

There is only one Prosecutor's Office in the Brčko District that is in charge of prosecuting war crimes. There is a special department for war crimes within the Brčko Public Prosecutor's Office.[941]

Relationship between the Prosecutors' Offices

The Special Department for War Crimes at the Prosecutor's Office BiH provides support to the cantonal and district prosecutors with regard to requests for information and evidence from the ICTY Office of the Prosecutor or the ICTY Registry.[942] Moreover, the POBiH can issue instructions to the prosecutors' offices in the various entities/district, even though they are not binding.[943] However, cooperation between the prosecutors' offices at the two levels seems more or less non-existent. Ivanišević noted that "cooperation between cantonal/district prosecutor offices and Prosecutor office of BiH is far less good than that of the Prosecutor's Office of BiH with the ICTY."[944] In addition, conflicts of jurisdiction arise repeatedly, either between the state or the entity/district level (parallel investigations are frequent), or between the prosecutors' offices at the entity/district level who do not always respect their territorial jurisdiction – especially when investigating members of a minority ethnic community within their entity/district.[945]

939 Article 1 of the Law on the Prosecutor's Office of FBiH, Article 1 of the Law on the Prosecutor's Office of RSBiH, Article 1 of the Law on the Prosecutor's Office of BD.

940 In FBiH, there are specialised prosecutors in the offices in Tuzla, Bihać, Zenica, Mostar, and Sarajevo; cf. Rüedi, 2015, p. 99; there are also specialised judges at the respective courts; Rüedi, 2015, p. 111f. In the RSBiH, specialised offices only exist in Banja Luka and Doboj; cf. Rüedi, 2015, p. 100.

941 Cf. Rüedi, 2015, p. 100.

942 Cf. Rüedi, 2015, p. 101.

943 Article 37 of the Criminal Procedure Code (CPC) BiH.

944 Cf. B. Ivanišević (2008), *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (2008)*, International Center for Transitional Justice, Prosecutions Case Studies Series, New York, http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf (last accessed 12/09/2019), p. 31.

945 Cf. Rüedi, 2015, p. 101.

2.1.3 Registry

The Registry is the support organ for the domestic judicial institutions. Initially, this had been an entirely international institution, established in 2004 based on an agreement between the OHR and the state of BiH,[946] and headed by a foreigner.[947]

The Registry was responsible for the administration and provision of support services (e.g. the organisation and coordination of activities related to detention, defence, as well as witness protection and support) to Sections I and II of the Criminal and Appellate divisions of the SCBiH, as well as to the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the BiH Prosecutor's Office. Until 2006, the Registry managed the recruitment and selection process of international judges for the war crimes and organised crimes sections of the SCBiH and of the POBiH, by proposing candidates for appointment to the High Representative. It equally recruited and managed national and international support staff to assist international judges and prosecutors.[948]

Initially, it was foreseen that this Registry as such would only exist for five years, a period that was prolonged in 2006 until 2012.[949] Its tasks and responsibilities (especially funding, administration and personnel) were nevertheless slowly but surely transferred to the national institutions of BiH as of 2006.[950] The old (international) Registry was divided into a new (national) Registry for the SCBiH, a support office for the POBiH, and a Criminal Defence Section (*Odsjek Krivične Odbrane*, *OKO*).[951]

The new Registry within the SCBiH has an Administrative Department, a Legal Department, a Court Management Section, a Witness Support Section, a Public Information and Outreach Section, an IT Department, and an Internal Control Department.[952] Since the transition, the new SCBiH court registrar has become responsible for determining the number of foreign judges (as long as they were still present in BiH), and continues to, *inter alia*, provide administrative support services to Sections I and II of the Criminal and

946 Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organise Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, Sarajevo, 1 December 2004.

947 Interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

948 Cf. Rüedi, 2015, p. 112f.; on the international element in the SCBiH and Prosecutor's Office of Bosnia and Herzegovina (POBiH), see section 2.1.5 below.

949 Cf. ICTY OTP (23 May 2012), *Completion Strategy Report May 2012*, provided to the United Nations Security Council, S/2012/354, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2012_en.pdf (last accessed 14/08/2019), p. 33.

950 Cf. Rüedi, 2015, p. 114f.

951 See section 2.1.4 below.

952 Cf. Sud Bosne i Hercegovine, Organizaciona struktura, www.sudbih.gov.ba/files/docs/Organizaciona%20struktura/Organizaciona%20struktura%20-%20finalna%20bos.pdf (last accessed 14/08/2019).

Appellate divisions of the SCBiH, provide legal support to judges, manage the Witness Support Section that provides support and assistance to witnesses appearing before the court, and to liaise with the ICTY and the United Nations International Residual Mechanism for Criminal Tribunals (MICT) chambers and registry (regarding the transfer of cases and other topics). Furthermore, the prosecution's registrar determined the number of foreign prosecutors, and continues to provide administrative support services to the special departments of the Prosecutor's Office BiH, to provide prosecution teams with support staff, and to liaise with the ICTY and MICT prosecution offices.[953]

Much of the organisational structure and many of the tasks of the SCBiH Registry resemble the ICTY's Registry, which suggests that the set-up of the former was inspired by the latter, as registry structures are not at all typical for national courts. In fact, many of their functions, such as outreach for example, either do not exist at all in most national courts,[954] or are carried out by separate structures within the criminal justice sector, such as witness protection. In addition, the name, which has been taken over into the local language ("*ured registrara*" meaning "registry", and "*registrar*" meaning "registrar") alludes to the international example.

2.1.4 Criminal Defence Section (*Odsjek Krivične Odbrane,* OKO)

The Criminal Defence Section is the institution in charge of assisting defence counsel appearing before the war crimes chambers of the SCBiH, but if needed, it also provides support to those appearing before the court in relation to organised crime, economic crime, and corruption cases.[955] The Criminal Defence Section had previously been part of the Registry, but was incorporated into the Sector for Judicial Bodies within the BiH Ministry of Justice in July 2009.[956] The director of the Criminal Defence Section, who had been a foreign lawyer since the establishment of the institution, was replaced in May 2007 by a national lawyer.[957] The office also hosted foreign interns for several years.[958] No such institution currently exists at the entity level.[959]

The OKO organises trainings, offers legal advice, conducts research, drafts motions, prepares witnesses, provides transcript summaries, and assists in obtaining evidence from the ICTY and other international bodies. While the staff cannot represent defendants, OKO staff is usually granted with a power of attorney from defence counsel in order to be

953 Cf. Rüedi, 2015, p. 115; see also: Tužilaštvo Bosne i Hercegovine, Odjeli u Tužilaštvu BiH – Uprava Tužilaštva, http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=46&jezik=b (last accessed 14/08/2019).

954 To date, the SCBiH is the only court in the region that has a registry; cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.

955 Cf. Rüedi, 2015, p. 118.

956 Cf. Rüedi, 2015, p. 119.

957 Cf. Ivanišević, 2008, p. 41f.

958 Cf. Kirs, 2011, p. 405.

959 Cf. Rüedi, 2015, p. 118.

able to receive files, sit in the courtroom, and attend closed trial sessions. Most importantly, defence counsel can access the Judicial Database and Evidence Disclosure Suite of the ICTY solely through the OKO. In addition, the OKO maintains a list of defence counsel who are authorised to appear before the war crimes and organised crimes sections of the SCBiH, and who are therefore obliged to follow a certain number of professional training sessions per year.[960] (Former) ICTY staff or defence counsel with Hague experience from all over the region regularly participate in these trainings as lecturers.[961]

In its early years, the biggest problem of the Criminal Defence Office was a lack of funding. Also, it was criticised for not carrying out vetting procedures, as a result of which some defence counsel were accused of having committed international crimes themselves.[962]

2.1.5 International Element

As mentioned above,[963] all state-level war crimes institutions included foreigners[964] for a certain period of time:[965] foreign judges and law clerks worked at the State Court of Bosnia and Herzegovina alongside their national colleagues; the Prosecutor's Office of BiH included foreign prosecutors (including, in the beginning, the Chief Prosecutor, whereas his deputy – who was at the same time the head of the Special War Crimes Department – was a national) and legal advisors; the Registry was staffed with foreigners (including, in the beginning, its head), and so was the OKO.[966] For this reason, the State Court of Bosnia and Herzegovina is commonly referred to as a "hybrid court", which transformed into a fully national court when the foreigners had left.[967]

Foreign judges needed to have at least eight years of experience as a judge, prosecutor, or defence attorney working with complex criminal matters, as well as a proven record of impartiality and an excellent performance record in previous employment.[968] Specific

960 Cf. Rüedi, 2015, p. 118.

961 Cf. Kirs, 2011, p. 405; interviews with ICTY defence counsel, Belgrade, 23 January 2017, I-27; Belgrade, 25 January 2017, I-60.

962 Cf. Rüedi, 2015, p. 119; for example the defence counsel of Momčilo Gruban and Vinko Kondić.

963 In particular, see section 1.5.

964 They are generally referred to as "international" judges, prosecutors, and personnel, which is, in my view (as explained in fn. 606), misleading. They were simply foreigners, most of them from Europe and the United States, who had worked in their domestic justice systems before.

965 So did the specialised organised crimes organs of these state institutions.

966 Interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

967 Cf. for instance: Ivanišević, 2008.

968 Until July 2006, the foreign judges and prosecutors were appointed by the High Representative. Later, the High Judicial and Prosecutorial Council (HJPC) took over this task; cf. Rüedi, 2015, p. 105. The HJPC selects and appoints all national judges and prosecutors except those for the entity constitutional courts, which are under the oversight of the respective entity legislature (Article 17 (1) of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 25/04). Criteria for selection are: education, experience, professionalism, reputation (Article 22 of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina).

experience with war crimes, economic, and fraud cases, as well as knowledge of international criminal law was desired, but not a precondition. They were appointed for a maximum term of two years, with the possibility to extend for another two years.[969] Upon arrival, the foreign judges received a short introduction to BiH national law,[970] and each of them were assigned a national judge as mentor.[971] Regular trainings that are mandatory for national staff were not mandatory for foreign judges.[972]

At the war crimes department of the SCBiH, panels were initially composed of two international judges and one local judge, who served as the presiding judge of the panel. In 2008, this balance was reversed.[973] At the POBiH, foreign prosecutors were incorporated into the office and managed their individual cases just as any other (national) prosecutor.[974]

There were several rationales for inviting foreigners to join the Bosnian domestic war crimes institutions. First, international involvement was considered necessary in order to overcome the stagnation that still marked – even several years after the conflict – many local institutions in BiH, caused notably by their reluctance to initiate reforms. Criminal justice institutions, in particular, seemed unwilling to trigger prosecutions. There were also serious shortcomings in the justice system as a whole, which suffered from a lack of personnel and a lack of personnel trained in handling complex cases.[975] Second, the foreign judges and prosecutors in particular were seen as an important means to safeguard independent and impartial prosecutions and punishment of crimes.[976] Third, and related to that, ICTY officials and other actors believed that the participation of foreign jurists would increase the *perception* of fair handling of cases and ethnic impartiality of the judges and prosecutors, and thereby help ensure confidence in the war crimes department. Fourth and finally, it was envisaged that the foreigners would create a bridge between local legal tradition and global standards.[977] It was expected that with the help of the foreigners, the

969 Article 8 of the Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption, Sarajevo, 26 September 2006.

970 Cf. Rüedi, 2015, p. 107.

971 Cf. Ivanišević, 2008, p. 40.

972 Cf. Rüedi, 2015, p. 107; national judges and prosecutors need to follow regular trainings which are provided at entity level. Most seminars are organised together though, and judges and prosecutors from both entities as well as from the BDBiH attend the same seminars. It had been a political decision to duplicate the competencies for trainings, although the common execution shows that the separation among legal professionals is almost absent. Teachers of these seminars are professors or experienced judges and prosecutors; cf. Rüedi, 2015, p. 110.

973 Cf. Kirs, 2011, p. 405.

974 Interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

975 Cf. K. Uhlířová (2012). War Crimes Chamber of the Court of Bosnia and Herzegovina: Seeding "International Standards of Justice"? In E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (Eds.), *International Law in Domesitc Courts: Rule of Law Reform in Post-Conflict States* (p. 195-220). Cambridge: Intersentia, p. 206.

976 Cf. Uhlířová, 2012, p. 206 and 208.

977 Cf. Orentlicher, 2018, p. 347.

capacity of Bosnian judges to try complex war crimes cases would be enhanced.[978] Some of the judges and prosecutors, as well as legal advisors or law clerks had previous ICTY experience.[979] The most prominent example is former ICTY judge Almiro Rodrigues,[980] who came to work as a judge in Sarajevo. Others, however, were in similar positions as domestic judges in what concerns their knowledge of international humanitarian law.[981] Ultimately, their aim was to advance the "weak rule of law tradition" in Bosnia and Herzegovina.[982]

At the State Court and the Prosecutor's Office of BiH, the collaboration with foreigners is viewed very positively.[983] On its website, the SCBiH explains that owing to the foreigners' experience and expertise, they "contributed to building a modern and efficient court which respects the highest international standards" in relation to its work of adjudicating international crimes.[984] Indeed, foreign prosecutors and judges played a key role, especially in investigating and prosecuting serious cases that probably would have remained unaddressed because of their sensitivity.[985] It is also widely believed that the judges and prosecutors boosted the public's confidence. A former foreign judge noted that they were a "firewall" between the national judges and the controversies of the day.[986] For instance, as a former foreign prosecutor told me, the foreigners argued all Rule 11*bis* cases coming from the ICTY.[987] Those were the most high-profile cases and therefore (and because they came from the ICTY) also the most sensitive cases, prone to attract outside pressure and strong reactions among the communities. The prosecutor also recounted that in the shadow of the foreign prosecutors, domestic prosecutors had the space to quietly get their work done, without being at the forefront of attacks from outside. And in case of pressure, they

978 Orentlicher, 2018, p. 367.

979 Cf. Orentlicher, 2010, p. 124; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

980 Cf. Orentlicher, 2018, p. 368.

981 Cf. Orentlicher, 2018, p. 368.

982 Cf. Uhlířová, 2012, p. 206.

983 Interviews with SCBiH judges, Sarajevo, 15 November 2018, I-57; Sarajevo, 1 February 2017, I-19; interviews with POBiH prosecutors, Sarajevo, 9 February 2017, I-3; Sarajevo, 23 November 2018, I-32; interview with ICTY judge, Berlin, 20 December 2016, I-42.

984 "*Važno je istaći i veliki doprinos Međunarodne zajednice, kroz angažman međunarodnih sudija, koji su svojim iskustvom i znanjem doprinijeli izgradnji modernog i efikasnog Suda koji u svom radu primjenjuje najviše međunarodne standarde*" (my own translation); cf. Sud Bosne i Hercegovine, Istorijat Suda BiH, http://www.sudbih.gov.ba/stranica/86/pregled (last accessed 14/08/2019).

985 Cf. Orentlicher, 2018, p. 347.

986 Cf. Orentlicher, 2018, p. 347.

987 Another reason for this was that the case files arrived from The Hague in English – which many of the domestic staff members did not yet understand or speak to a sufficient extent; cf. Rüedi, 2015, p. 97.

could literally refer the matter to the foreigners. Not being part of the local community left the foreigners much less affected by outside pressures.[988] In his words:

> "So, we had to make a decision, and in those cases, I chose to make the decisions, because they could criticise me all they wanted, and they could come after me all they wanted but I wasn't going to live there forever and I wasn't affected. And I gave the national prosecutors a cushion, they had done all the work, but they left all of the decisions to me. And that was important."[989]

According to the initial time plan, the foreign judges and prosecutors were meant to leave by January 2009. The phasing out indeed began in January 2008, when many – including ICTY judges, ICTY Prosecutor Serge Brammertz, and SCBiH President Meddžida Kreso – called for the transition process to slow down and even review the judges' mandates. The concern was that the departure of the foreigners would give rise to political pressure, funding cuts for court activities and human resources, and that it would lead to decreased capacity of national prosecutors who were suspected to be unable to fulfil their role without international assistance.[990] In addition, the phasing out was meant to take place precisely at the time when the SCBiH was under strong attacks from Republika Srpska, which included allegations of ethnic bias against Bosnian Serbs directed at the judges and prosecutors.[991] The High Representative therefore took the decision to extend the foreigners' mandate until December 2012, whilst judges were asked to stay until the completion of the cases they were involved in at the time.[992] The problem was that the High Representative took that decision at the last minute, on the very last day of the judges' mandate. By that

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988 Interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; a former foreign judge told me a similar story; cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

989 The former foreign prosecutor particularly emphasised the ethnic question when it came to outside pressure: "I mean they had to live, where they live. They came from those communities. Those communities were not eager to see them do things, that might not have reflected the narrative of that community. So, if I was a Croat prosecutor and I was assigned a case with a Croat perpetrator, I did my investigation and decided that I had to prosecute that Croat perpetrator. There would be a discussion over, you know, I want to do this, I think it needs to be done. But if I do it, my family is going to suffer, my kids are going to suffer, my wife is going to suffer, I am going to be uncomfortable, after all people have memories. They are going to make sure I don't get promoted to be a judge, I just don't know how I can do this. With a lot of cases there was nothing like that even though they were Croats. But if you got up further in those who had larger responsibilities for things, it became a little bit more difficult. There were a couple of those cases where internationals ended up taking the decisions because they could do whatever they wanted. And they did, I mean they took us on in the media, they took us on personally, just every way they could. But it didn't matter"; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

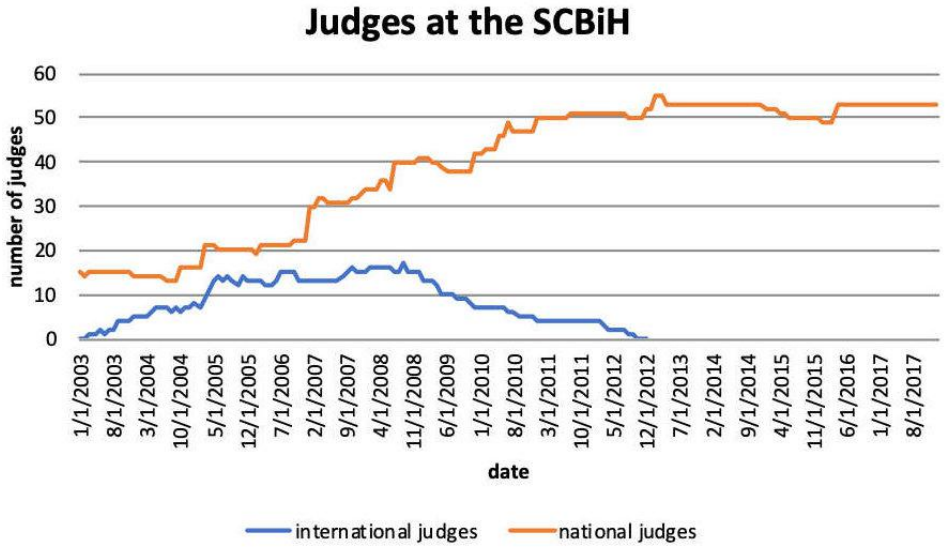
990 Cf. O. Martin-Ortega (2012). Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina. *International Criminal Law Review, 12*, 589-628, p. 595.

991 Cf. Orentlicher, 2018, p. 347ff.

992 Cf. Martin-Ortega, 2012, p. 595f.

time, many had already left, as they had not been given any security as to whether they would be able to stay or not.[993] Since 2009, all panels of first instance have been exclusively composed of national judges, while four foreign judges remained in the appellate division until 2012 (see figure 8 below). By December 2009, the foreign head of the war crimes department of the Prosecutor's Office of Bosnia and Herzegovina had left.[994] Already in March 2006, a Bosnian national had taken over the position of Chief Registrar at the SCBiH and by December of the same year, the Registry was mainly run by national staff and financed by national budget. By March 2008, there were no longer any foreigners in the Witness Support Section, nor in the Public Information and Outreach Office.[995]

Figure 8 Phasing out of foreign judges at the SCBiH



As mentioned earlier, although the overall evaluation of the mix between domestic and foreign staff is positive, collaboration was not always smooth. According to a former foreign judge at the SCBiH, two main issues caused anger among the local personnel: first, the feeling of being regarded (or even treated) as inferior and less professional or knowledgeable *vis-à-vis* their foreign colleagues, and getting the feeling of being told what to do by

993 Cf. Orentlicher, 2018, p. 349f.; Office of the High Representative, Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina, 14/12/2009, http://www.ohr.int/?p=66793 (last accessed 14/08/2019); the mandate of foreign judges in the organised crime section was terminated in 2009 already.

994 Cf. Martin-Ortega, 2012, p. 596.

995 Cf. Martin-Ortega, 2012, p. 595.

outsiders; and second, the fact that some of his colleagues seemed to perceive their stay in Sarajevo as a prolonged and very well-paid holiday: "good for motorcycling in the Bosnian mountains."[996] In other words, they did not put in the work they were being paid for. Some observers argue that as a response, local judges created obstacles for their foreign colleagues in the courtroom (while publicly arguing that these obstacles were needed), for instance by overturning their judgments on the basis of the slightest technicalities at the appellate level, in order to demonstrate that they do not wish to be told how to do their job in their home country.[997] My interview partner, the former foreign judge, as well as all Bosnian judges I spoke with, emphasise, however, that there was a good and collegial atmosphere among most judges most of the time.[998] They recount that Bosnians learned from foreigners, and foreigners learned from Bosnians. The latter point out that the foreigners, particularly the Americans and Brits, were especially helpful in assisting local personnel in working with the new Bosnian Code of Criminal Procedure, which incorporated common law elements.[999]

Although the Criminal Defence Section was headed by a foreigner in the early years of its existence, it has been criticised that defence counsel lacked the international mentorship that was available to the SCBiH judges and POBiH prosecutors. Compared to the number of defendants and cases, few defence counsel had experience in representing clients before the ICTY. As has been argued, defence counsel faced an imbalance in court – as the judges and prosecutors potentially had more experience in dealing with complex cases, including cases from the Tribunal, and in handling common law procedures.[1000]

2.2 Serbia

In Serbia, between 1996 and 2003, the competency to try war crimes cases was with ordinary criminal law jurisdictions in all district courts in the country. Only a handful war crimes

996 Interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; see also: Orentlicher, 2018, p. 368, claiming that some foreign judges lacked both, experience, and commitment.

997 Cf. Nettelfield, 2010, p. 249f.; Orentlicher, 2018, p. 370.

998 Interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; interviews with SCBiH judges, Sarajevo, 1 February 2017, I-19; Sarajevo, 2 February 2017, I-45; Sarajevo, 15 November 2018, I-57; Sarajevo, 23 November 2018, I-58. The same was said by Bosnian and foreign prosecutors; cf. interviews with POBiH prosecutors, Sarajevo, 9 February 2017, I-3; Sarajevo, 23 November 2018, I-32; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

999 See Chapter 6.

1000 Interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

trials took place during that period.[1001] These trials raised serious fair trial rights concerns,[1002] with the notable exception of the trials conducted at the Belgrade District Court, which was much more professional than other courts.[1003] Only members of the Serbian security forces, usually ordinary soldiers or lower-ranking officers, were tried –[1004] the top ranking officials "were often bountifully awarded and promoted after the war"[1005]. The serious concerns as to the proper conduct and fairness of these trials considerably diminished with the establishment of specialised organs within the judicial system.[1006] Cases that commenced (i.e. where indictments had been filed) before the specialised war crimes institutions were in operation, had to be completed before the court where the indictment was filed.[1007] As Ostojić holds, it was

> "only after the creation of specialised institutions for prosecuting war criminals and the adoption of the ICTY's Completion Strategy in 2003 that the Serbian judiciary took on the task of systematically prosecuting war crimes suspects"[1008].

In July 2003, the Serbian Assembly passed the Law on Organization and Competence of State Authorities in War Crimes Proceedings (Law on War Crimes)[1009].[1010] This law established the various structures that would focus on investigating, prosecuting and trying war crimes, partly within existing institutions,[1011] the Office of the War Crimes Prosecutor,[1012] the War Crimes Investigation Service within the Ministry of Interior,[1013] a War Crimes Department within the Belgrade District Court having first instance jurisdiction (a court restructuring reform in 2010 renamed this court as Higher Court Belgrade),[1014] a

1001 Cf. OSCE Mission to Serbia and Montenegro (October 2003), *War Crimes before Domestic Courts: OSCE Monitoring and empowering of the domestic courts to deal with War Crimes*, Belgrade, https://www.osce.org/serbia/13494?download=true (last accessed 26/09/2019), p. 7-10; OSCE Mission to Serbia, 2015, p. 19; for more information on these first war crimes cases in Serbia, see OSCE Mission to Serbia and Montenegro, October 2003, p. 8f.

1002 Cf. OSCE Mission to Serbia, 2015, p. 19.

1003 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 42ff.

1004 Cf. OSCE Mission to Serbia, 2015, p. 19; OSCE Mission to Serbia and Montenegro, October 2003, p. 47.

1005 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 47.

1006 Cf. OSCE Mission to Serbia, 2015, p. 21; see also: Weill & Jovanović, 2012, p. 243; Ostojić, 2014, p. 167; Orentlicher, 2018, p. 384f.

1007 Cf. OSCE Mission to Serbia, 2015, fn. 14.

1008 Ostojić, 2014, p. 168.

1009 Law on Organization and Competences of Government Authorities in War Crimes Proceedings, Official Gazette of the Republic of Serbia No. 67/2003.

1010 Cf. Michaeli, 2011b, p. 59.

1011 Cf. M. Majić & D. Ignatović (2012). Deset smerica zasnovanih na iskustvu Srbije vezanom za pitanja ratnih zločina. *FICHL Policy Brief Series, 9*, p. 2.

1012 See Articles 4-7.

1013 See Article 8.

1014 See Articles 9-10.

Special Department within the Belgrade District Court responsible for administrative and technical tasks, tasks related to witness and victim protection and facilitating conditions for the application of procedural provisions of the Law War Crimes,[1015] and a Special Detention Unit in the District Prison in Belgrade.[1016] In addition, a special chamber for war crimes was founded within the Supreme Court of Serbia that would have second instance jurisdiction over war crimes.[1017] The second instance jurisdiction was moved to the newly founded Court of Appeal in Belgrade after the court restructuring reform in 2010.[1018] The Supreme Court of Cassation has third instance jurisdiction, and violations of fundamental rights are dealt with by the Constitutional Court of Serbia.[1019]

2.2.1 Higher Court Belgrade and the Court of Appeal in Belgrade

The War Crimes section of the Belgrade District Court was set up in October 2003.[1020] It started off with the nomination of six judges and two investigating judges in 2004.[1021] The first trials started in March 2004.[1022]

Today, the Serbian National Assembly elects the judges, and the president of the Higher Court in Belgrade subsequently assigns them to a specific division for a six-year term.[1023] There is no open competition to become a war crimes judge,[1024] and the appointment procedure is not transparent. These decisions are fully at the discretion of the court president (except for some legal guidelines regarding preferential criteria for selection).[1025] There are currently between six and nine judges in the war crimes department.[1026] The

1015 See Article 11.

1016 See Article 12.

1017 Cf. B. Ivanišević (2007), *Against the Current: War Crimes Prosecutions in Serbia (2007), International Center for Transitional Justice*, Prosecutions Case Studies Series, New York, https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Crimes-Prosecutions-2007-English_1.pdf (last accessed 12/09/2019), p. 4.

1018 Cf. OSCE Mission to Serbia, 2015, fn. 20.

1019 Cf. M. D. Ivanović & M. Lukić (2015). Judicial Application of International Law in Serbia. In S. Rodin & T. Perišin (Eds.), *Judicial Application of International Law in Southeast Europe* (p. 243-263). Berlin/Heidelberg: Springer, p. 247; see also: Republika Srbija Apelacioni sud u Beogradu, Šematski prikaz položaja Apelacionog suda u Beogradu, http://www.bg.ap.sud.rs/lt/articles/o-apelacionom-sudu/polozaj/ (last accessed 14/08/2019); as the latter two have not played a significant role in the adjudication of war crimes in Serbia, they are not further dealt with here.

1020 Cf. Ivanišević, 2007, p. 2.

1021 Cf. Ivanišević, 2007, p. 15.

1022 Cf. Orentlicher, 2018, p. 388.

1023 Articles 10 and 10a of the Law on Organization and Competence of State Authorities in War Crimes Proceedings; cf. OSCE Mission to Serbia, 2015, p. 10.

1024 Cf. OSCE Mission to Serbia, 2015, p. 10.

1025 Articles 10 (4) and 10 (5) of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings; see also: OSCE Mission to Serbia, 2015, p. 20f.

1026 Cf. Viši sud u Beogradu, Sudije, https://www.bg.vi.sud.rs/tekst/320/sudije.php (last accessed 14/08/2019).

chambers consist of three professional judges (unlike non-war crimes chambers, which also include lay judges) and there is no fixed composition.[1027]

The war crimes chamber at the Court of Appeal consists of six judges, who are supported by law clerks.[1028] Also at the Court of Appeal, judges are assigned to the war crimes chamber by the president of the court.

2.2.2 Office of the War Crimes Prosecutor (OWCP)

The Office of the War Crimes Prosecutor became fully operational in January 2004.[1029] Its first chief prosecutor, elected by the National Assembly,[1030] was Vladimir Vukčević, at that time Deputy Public Prosecutor of the Republic of Serbia. He remained in office until 2015.[1031] The office furthermore consists of several deputies and staff,[1032] and is organised in teams based on the geographical areas where the war crimes occurred – Croatia, BiH, and Kosovo.[1033] As a rule, deputy prosecutors work in one team only, but some work across several teams.[1034]

The Chief War Crimes Prosecutor is elected by Parliament from among candidates selected by the Government. The parliament decides on reappointment after six years.[1035]

Deputy prosecutors are initially elected for a three-year period, followed by an evaluation of their professional competence, overall results, and quality of performance. Once re-elected, they are granted lifetime tenure.[1036]

While war crimes judges receive salaries that are twice as high as that of their colleagues at the Higher Court Belgrade, the salaries of war crimes prosecutors are at an equally high level as that of the highest placed prosecutors in the country. Police officers who work on war crimes investigations, however, do not receive higher salaries than their colleagues not working on war crimes.[1037]

1027 Cf. Ivanišević, 2007, p. 15.

1028 Cf. Republika Srbija Apelacioni sud u Beogradu, Odeljenje za ratne zločine, http://www.bg.ap.sud.rs/lt/articles/o-apelacionom-sudu/uredjenje/odeljenja/odeljenje-za-ratne-zlocine.html (last accessed 14/08/2019).

1029 Cf. Ivanišević, 2007, p. 2.

1030 Article 5 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1031 Cf. M. Ristic (15 January 2015), Serbia's War Crimes Crusader Leaves the Battlefield, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2015/01/15/serbia-s-war-crimes-crusader-leaves-the-battlefield/ (last accessed 14/08/2019).

1032 Article 4 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1033 Cf. J. Vladisavljev (3 December 2016), OWCP expert assistant and former Serbian liaison officer at the ICTY, speaker at: ADC-ICTY Annual Conference; see also: Ivanišević, 2007, p. 5.

1034 Cf. Ivanišević, 2007, p. 5.

1035 Cf. OSCE Mission to Serbia, 2015, p. 20.

1036 Cf. B. Vekarić (2013). *Office of the War Crimes Prosecutor - Ten Years Later: Serbia on Its Way Towards Justice and Reconciliation*. Belgrade: Republic of Serbia, Office of the War Crimes Prosecutor, p. 30.

1037 Cf. Ivanišević, 2007, p. 5-15.

In 2018, there were eight deputy war crimes prosecutors in addition to the chief prosecutor, and three more were to be elected before the end of the year.[1038] Staff members of the OWCP have expressed the hope that there would soon be eleven legal advisors at the office.[1039]

Prior to the reform of the Serbian Code of Criminal Procedure in 2006, the OWCP was supposed to initiate investigations and then hand them over to an investigating judge. The prosecutor had the sole authority to issue indictments in war crimes cases.[1040] S/he was duty-bound to initiate criminal prosecutions when a reasonable suspicion existed that a specific person had committed a war crime.[1041] According to the new Code of Criminal Procedure, the prosecutor is fully in charge of the investigation and prosecution; there are no investigating judges anymore. S/he may also conclude plea agreements or abandon charges.[1042] The War Crimes Prosecutor is, unlike other prosecutors in Serbia, entitled to pursue cases at first and appellate instance.[1043]

Within the Office, there is also a Witness Support Unit, which aims to replicate the ICTY's Victims and Witnesses Support and Operations Unit. In practice, however, it is run by only one person (at the time of writing: a legal advisor, who is also the personal assistant of the Chief Prosecutor) and the Office's services therefore depend on her capacities.[1044]

2.2.3 War Crimes Investigation Service (WCIS)

The OWPC has the War Crimes Investigation Service at its disposal, established within the Ministry of Interior. The WCIS is placed under the Criminal Police Directorate, which forms part of the General Police Directorate as the larger organisational unit within the Ministry. It is organised into a department for criminal investigations and missing persons, and a department that deals with the cooperation with the ICTY, analytical and intelligence affairs, and documentation. The WCIS is in charge of executing all arrests in war crimes cases, and it was responsible for arresting ICTY fugitives.[1045] It acts in compliance with the

1038 Interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56.
1039 Interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56.
1040 Cf. Ivanišević, 2007, p. 5.
1041 Cf. Ivanišević, 2007, p. 8.
1042 Article 43 Serbian CPC.
1043 Cf. Vekarić, 2013, p. 33.
1044 Cf. interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56; for further information on witness support, see Chapter 7.
1045 Cf. OSCE Mission to Serbia, 2015, p. 38.

OWPC's orders. Its head is appointed by the Minister of Interior, upon proposal of the Chief War Crimes Prosecutor.[1046]

3 Applicable Law

Although all specialised institutions described above deal with the same armed conflicts that took place in the former Yugoslavia in the 1990s, almost all of them apply different laws when adjudicating war crimes committed during those conflicts.

At the State Court of Bosnia and Herzegovina, the 2003 BiH Criminal Code (the first state-level criminal code) is applied for the purpose of defining crimes – at least, when it concerns a charge of crimes against humanity[1047] and in most genocide cases. For war crimes charges[1048] and for determining the sentence, the old Criminal Code of the Socialist Federal Republic of Yugoslavia from 1976 is applied. This code was in force at the time of the wars, although it did not include the crime of crimes against humanity. For sentences for crimes against humanity, the new 2003 BiH Criminal Code is applied. The chambers are, however, not consistent in this regard.[1049]

The entity and district courts in Bosnia and Herzegovina apply the 1976 SFRY Criminal Code in all cases. However, some Cantonal Courts in the Federation of BiH apply the 1998 FBiH Interim Criminal Code in some instances.

The Serbian courts also apply the old 1976 SFRY Criminal Code, as well as the 1992 Criminal Code of the Federal Republic of Yugoslavia (FRY), which substituted the SFRY Criminal Code, incorporating the SFRY Criminal Code's provisions in their entirety.[1050]

The criminal law and the reasons for applying different codes will be further elaborated upon in Chapter 6 and, in particular, Chapter 9. In short, some courts hold that the prohibition of retroactive application of the law and the principle of *lex mitior* – the application of the most lenient law (both part of the legality principle) – call for the application of the old 1976 SFRY Criminal Code.[1051] The 1976 SFRY Criminal Code

1046 Article 8 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1047 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Branko Vlačo*, Judgment, S1 1 K 007121 14 Krž 9, First instance, 25 February 2015.

1048 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mensur Memić, Dževad Salčin, Senad Hakalović, Nedžad Hodžić, Nihad Bojadžić*, Judgment, S1 1 K 003369 10 Krl, First instance, 1 September 2015, p. 108.

1049 Interview with EU Delegation to BiH representative, Sarajevo, 20 November 2018, I-11.

1050 Cf. Michaeli, 2011b, p. 22.

1051 Cf. G. Pantović (2016), Co-Perpetration in the War Crimes Cases in Serbia, In *Analysis of current issues in war crimes proceedings: Collection of papers*, OSCE Mission to Serbia, Belgrade, p. 45-81, http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2016/11/Analiza-ratnih-zlocina-Book-ENG.pdf (last

prescribes lower mandatory maximum and minimum sanctions for war crimes.[1052] Both the *nullum crimen, nulla poena sine lege* and the *lex mitior* principle had long been part of the Yugoslav criminal legal tradition.[1053]

4 How the ICTY Boosted the Performance of Domestic Institutions

The ICTY not only – directly (BiH) or indirectly (Serbia) – spurred the establishment of national war crimes institutions, it also had an influence on their operation and performance. This latter impact is much less tangible though, but the different dynamics that facilitated it can be identified. The most relevant factors will be described in sections 4.1-4.6 below.

4.1 Jurisdictional Regime and Division of Labour

First and foremost, the jurisdictional regime of the ICTY fostered close relationships between the international Tribunal and domestic courts, as they were forced to cooperate in many respects.

Pursuant to Article 9 (1) of the ICTY Statute, the Tribunal and national courts have concurrent jurisdiction, although the Tribunal retains primacy.[1054] The ICTY Statute therefore envisaged a "two-tiered mechanism" for the prosecution of alleged war crimes.[1055] In practice, and although not prescribed by law, the ICTY OTP's policy has been to concentrate on those most responsible for crimes and on the gravest crimes.[1056] Since the announcement of the completion strategy and the UN Security Council calling upon the ICTY to terminate its investigations by 2004,[1057] the Bosnian and Serbian national institutions took over the lead in the prosecution and adjudication of war crimes.

In terms of territorial jurisdiction, the ICTY covers the whole territory of the former Yugoslavia,[1058] including what constitute Bosnia and Herzegovina and Serbia today. The

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accessed 26/09/2019), p. 54; similar: interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

1052 Cf. Martin-Ortega, 2012, p. 607.

1053 Cf. M. Škulić & J. Rinceanu (2004). Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Serbien und Montenegro. In A. Eser, U. Sieber & H. Kreicker (Eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen* (p. 211-327). Berlin: Duncker & Humboldt, p. 270f.

1054 Article 9 (2) of the ICTY Statute; according to former ICTY President Fausto Pocar, this regime effectively equals complementarity, without the need to do a case-by-case assessment; cf. Pocar, 2008, p. 659.

1055 Cf. J. Manuell & A. Kontić (2002). Transitional Justice: The Prosecution of War Crimes in Bosnia and Herzegovina under the 'Rules of the Road'. *Yearbook of International Humanitarian Law, 5*, 331-343, p. 332.

1056 Cf. Manuell & Kontić, 2002, p. 332.

1057 United Nations Security Council Resolution 1503 (August 2003), p. 1.

1058 Article 9 (1) of the ICTY Statute.

SCBiH has jurisdiction over crimes committed in Bosnia and Herzegovina,[1059] and the entity and district courts have jurisdiction over their respective territories. The SCBiH also has some sort of universal jurisdiction, having the competency to adjudicate crimes committed outside the territory of BiH, and regardless of the nationality of the defendant or the victims – if there is a link between the crime and the state of BiH, or if the defendant is present in BiH.[1060] The Higher Court Belgrade has jurisdiction over crimes committed in what used to be the Socialist Federal Republic of the Yugoslavia.[1061]

At the national level, the BiH Criminal Code, which entered into force on 1 March 2003, established state-level jurisdiction over certain crimes, in particular war crimes. Therefore, as a rule, the SCBiH has jurisdiction over war crimes cases. Prior to 1 March 2003, the cantonal courts of the Federation of Bosnia and Herzegovina, the district courts of the Republika Srpska, and the basic court of the Brčko District had exclusive jurisdiction to hear first instance war crime trials in BiH. Appeals were heard by the supreme courts in the respective entity, and by the Brčko Appellate Court. Until this very day, entity courts have jurisdiction over cases with indictments that were confirmed before the new code of criminal procedure of BiH, which entered into force on 1 March 2003.[1062] If the indictment was not confirmed prior to that date, the SCBiH can take over the case *ex officio* or on motion from any of the parties working on the case.[1063]

As mentioned,[1064] there is no formal hierarchy between the state and the entity institutions. The State Court is not the appellate level to the entity/district courts.[1065] It cannot overrule decisions of these courts.[1066] However, the SCBiH can issue practice directions as pertains to

> "substantive criminal law on genocide, crimes against humanity and violations of the laws and practices of warfare and individual criminal responsibility related to those crimes, *ex officio* or at the request by any court of the Brčko District of Bosnia and Herzegovina"[1067],

1059 Article 7 (1) of the Law on Law on Court of Bosnia and Herzegovina in conjunction with Article 1 (2) CC BiH.

1060 Cf. OSCE Mission to Serbia, 2015, p. 27f.

1061 Article 2 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings in conjunction with Articles 6 and 8 of the Serbian Criminal Code.

1062 Cf. Rüedi, 2015, p. 89.

1063 Article 449 (2) BiH CPC.

1064 In section 2.1.1 above.

1065 Cf. Martin-Ortega, 2012, p. 603f.; the ICTY had advised otherwise before the establishment of the war crimes department at the SCBiH; cf. ICTY, 19 June 2002, p. 24; and Bohlander, 2004, p. 6f.

1066 Cf. Barria & Roper, 2008, p. 325.

1067 Article 7 (3) (b) of the Law on Court of Bosnia and Herzegovina.

the entity/district courts are not bound by these practice directions or the SCBiH's jurisprudence.[1068] There is currently no mechanism in place to *ensure* that precedents set at the state level are subsequently incorporated into entity/district practice.[1069] Furthermore, judges at the entity/district level *do not feel bound* to obide by such instructions, nor by the SCBiH's jurisprudence.[1070] This has resulted in different court practices and a general lack of harmonised case law in relation to war crimes proceedings, which is problematic from the perspective of legal certainty. Not only do victims suffer from the lack of harmonised law and practice (as the outcome of a case very much depends on the court that adjudicates it), but also the defendants whose fair trial rights cannot be fully guaranteed in such circumstances.[1071] Cooperation between the entity/district courts and the SCBiH is only sporadic.[1072] Judges from the SCBiH pointed out to me that they wished that their practice was followed more by other courts dealing with war crimes throughout the country, and deplored what they see as a general lack of respect by the entity/district courts towards the SCBiH.[1073] They suspect judges at the entity/district courts do not even read the SCBiH's

1068 Cf. Martin-Ortega, 2012, p. 603f.

1069 Cf. Aitchison, 2011, p. 138; In that respect, it is particularly unfortunate that there is no state-level supreme court in BiH, who usually ensures harmonisation of court practice (Manfred Dauster, former foreign judge at the SCBiH, has written extensively on this, for instance here: M. Dauster (2011). Vrhovni sud za Bosnu i Hercegovinu: razmišljanja o njegovoj neophodnosti / Supreme Court for Bosnia and Herzegovina: Reflection on its necessity / Ein Oberstes Gericht für Bosnien und Herzegowina: Einige Überlegungen zu seiner Notwendigkeit. *Sveske za javno pravo / Blätter für Öffentliches Recht*(4), 4-14). The 'international community' active in BiH has undertaken numerous efforts to change this situation, as was pointed out by one representative (cf. interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10). The compromise, suggested by the Venice Commission, now is to have thematic panels who meet regularly in order to exchange experience in how to interpret and apply the law. Since 2015, there are a criminal law panel, a civil law, and an administrative law panel, composed of the highest judicial instances of all state, entity and district levels. According to the representative, "[t]his helps a little bit to fill these gaps that exist because of the four systems and four different codes, with different penalties, etc. They are trying little by little to balance and equalise this application." It has been pointed out that due to a lack of supreme court at the state-level of BiH, the BiH Constitutional Court more and more acts as an appellate court, which makes it difficult for the Constitutional Court to fulfil its basic function of protecting constitutional rights. The appellate function of the Constitutional Court is limited to Article VI/3 (b) of the Constitution; cf. Z. Meškić & D. Samardžić (2015). The Application of International and EU Law in Bosnia and Herzegovina. In S. Rodin & T. Perišin (Eds.), *Judicial Application of International Law in Southeast Europe* (p. 109-134). Berlin/Heidelberg: Springer, p. 127.

1070 Cf. Ivanišević, 2008, p. 30; this was repeatedly mentioned during interviews in BiH, e.g. in: interview with SCBiH judge, Sarajevo, 1 February 2017, I-19; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with cantonal prosecutor, Sarajevo, 6 February 2017, I-4; interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1071 Defence lawyers pointed out that it is "easier" to defend a client in front of the SCBiH because judges and prosecutors there are much more "professional" than at the entity/district level. This was mentioned in: interviews with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6; Sarajevo, 31 January 2017, I-21.

1072 Cf. Ivanišević, 2008, p. 29.

1073 Cf. interviews with SCBiH judges, Sarajevo, 1 February 2017, I-19; Sarajevo, 2 February 2017, I-45.

case law.[1074] At the same time, the interviewed judges mentioned that they actually never meet in order to exchange experience.[1075]

A similar division of labour as seen between the ICTY on the one hand and domestic courts on the other, exists between the State Court of Bosnia and Herzegovina and the BiH entity/district courts. This division of labour was formalised with the adoption of the National War Crimes Strategy in 2008.[1076] The strategy was necessary in order to first, get an overview of the workload related to war crimes cases; second, define criteria for the distribution of cases among the state and the entity/district level; and third, establish a timeline for their adjudication.[1077] Essentially, the idea was that the SCBiH would handle the most complex cases, and that the entity/district courts would deal with all other cases, in accordance with their respective territorial jurisdiction.[1078] According to the timeline, the most complex and top priority cases had to be completed by 2015, and all other cases by 2023.[1079] The 2015 deadline was not met for a variety of reasons,[1080] including the fact that the workload was underestimated,[1081] the progress on adjudication was slow,[1082] there

1074 Cf. interview with SCBiH judge, Sarajevo, 1 February 2017, I-19.

1075 Cf. interview with SCBiH judge, Sarajevo, 1 February 2017, I-19.

1076 Cf. Rüedi, 2015, p. 126; see also: Ministry of Justice of Bosnia and Herzegovina, National Strategy for Processing of War Crimes Cases Adopted, Press release 30 December 2008, http://www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US (last accessed 14/08/2019). Drafting the National War Crimes Strategy was first recommended by the High Judicial and Prosecutorial Council in 2006. The following year, the Ministry of Justice set up a working group, consisting of representatives of the BiH State Court, the BiH State Prosecutor's Office, the HJPC, the BiH Justice Ministry, and the Finance Ministries of the two entities, to draft it. The working group also received strong support from the OSCE Mission to Bosnia and Herzegovina; cf. OSCE Mission to Bosnia and Herzegovina (1 January 2012), *Factsheet on Accountability for War Crimes*, http://www.osce.org/bih/108141?download=true (last accessed 12/09/2019), p. 1.

1077 Cf. among others: Martin-Ortega, 2012, p. 598.

1078 Cf. Government of Bosnia and Herzegovina (December 2008), *Državna Strategija za Rad na Predmetima Ratnih Zločina (National War Crimes Strategy)*, http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf (accessed 14/08/2019), p. 11-12.

1079 Cf. Government of Bosnia and Herzegovina, December 2008, p. 4 and 26.

1080 Cf. N. Muižnieks, Commissioner for Human Rights of the Council of Europe (7 November 2017), *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Bosnia and Herzegovina from 12 to 16 June 2017*, CommDH(2017)28, Strasbourg, https://rm.coe.int/report-following-the-visit-to-bosnia-and-herzegovina-from-12-to-16-jun/16807642b1 (last accessed 14/08/2019), p. 5.

1081 Cf. OSCE Mission to Bosnia and Herzegovina (September 2018), *Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road "Category A" cases*, Spot Report, Sarajevo, https://www.osce.org/mission-to-bosnia-and-herzegovina/397541?download=true (last accessed 12/09/2019), p. 7; see also: Rüedi, 2015, p. 127f.

1082 Cf. ICTY OTP (16 May 2014), *Completion Strategy Report May 2014*, provided to the United Nations Security Council, S/2014/351, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16may2014_en.pdf (last accessed 14/08/2019), p. 24; ICTY OTP, 23 May 2012, p. 33; ICTY OTP, 19 November 2012, p. 29; ICTY OTP (18 May 2011), *Completion Strategy Report May 2011*, provided to the United Nations Security Council, S/2011/316, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2011_en.pdf (last accessed 14/08/2019), p. 39; ICTY OTP (16 November 2011), *Completion Strategy Report November 2011*,

was a lack of resources,[1083] the mechanisms and criteria for transferring cases from the state- to the entity/district level (or the other way round) did not work or were unclear,[1084] as well as political unwillingness.[1085] In 2018, the draft for a revised strategy was presented, for which the ICTY Office of the Prosecutor acted as an advisor,[1086] which foresees that all cases will be terminated by 2023.[1087] The new War Crimes Strategy also redefines the complexity criteria as a two-fold gravity assessment with respect to the crime and the role of the perpetrator, which has been deemed easier to apply than previous criteria.[1088] It furthermore addresses the problem of inconsistent case law and proposes a plan for improved utilisation of existing mechanisms to harmonise judicial practices. Importantly, it enhances the supervision of the implementation of the strategy by the so-called Supervisory Body, and introduces accountability mechanisms for judges and prosecutors in case of failure to implement the goals and measures determined in the Strategy.[1089]

Pursuant to Article 2 of the Law on Organization and Competence of State Authorities in War Crimes Proceedings, the Higher Court Belgrade has jurisdiction first, over offences referred to in Articles 370 through 386 of the Serbian Criminal Code (genocide, crimes against humanity, various war crimes, crime of aggression); second, over "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 as stipulated in the Statute of the International Criminal Tribunal

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provided to the United Nations Security Council, S/2011/716, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16nov2011_en.pdf (last accessed 14/08/2019), p. 32.

1083 Cf. Rüedi, 2015, p. 128; and United Nations Development Programme Bosnia and Herzegovina (2007/2008), *Solving War Crime Cases in Bosnia and Herzegovina: Report on the Capacities of Courts and Prosecutor Offices' within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases*, http://www.justice-report.com/en/file/show//Documents/Publications/UNDP%20ENG.pdf (last accessed 14/08/2019), p. 7.

1084 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 7; ICTY OTP (18 November 2013), *Completion Strategy Report November 2013*, provided to the United Nations Security Council, S/2013/678, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18nov2013_en.pdf (last accessed 14/08/2019), p. 26; ICTY OTP, 23 May 2012, p. 33; ICTY OTP, 19 November 2012, p. 29; ICTY OTP, 18 May 2011, p. 39; ICTY OTP, 16 November 2011, p. 32.

1085 Cf. ICTY OTP, 23 May 2012, p. 33; ICTY OTP, 16 November 2011, p. 32.

1086 Cf. ICTY OTP (17 May 2016), *Completion Strategy Report May 2016*, provided to the United Nations Security Council, S/2016/454, www.icty.org/sites/icty.org/files/documents/160517_icty_progress_report_en.pdf (last accessed 14/08/2019), p. 21.

1087 Cf. H. Rovcanin (3 October 2018), War Criminals Used as Campaign Tool in Bosnia Election, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/10/03/war-criminals-become-campaign-tool-in-bosnia-elections-10-02-2018/ (last accessed 14/08/2019); on the new strategy see also: D. Brkanic (23 February 2018), Bosnia Hopes to Complete War Crimes Cases in 2023, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/02/23/bosnia-hopes-to-complete-war-crimes-cases-in-2023-02-23-2018/ (last accessed 14/08/2019).

1088 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 7.

1089 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 8.

for the former Yugoslavia";[1090] third, over aiding and harbouring persons sought by the ICTY;[1091] and fourth, since 2007, over crimes committed under Article 333 (acting as an accessory after the fact) of the 2006 Serbian Criminal Code,[1092] which essentially criminalises assistance provided to perpetrators of war crimes. It is doubtful that crimes against humanity committed in the 1990s will ever be tried as such, because unlike genocide or war crimes, crimes against humanity did not exist as a distinct category in the domestic legislation at the time.[1093] A near consensus exists among Serbia's legal community on the fact that the principle of *nullum crimen sine lege* would preclude prosecutions on that basis.[1094]

Serbia also has a war crimes strategy in order to systematically prosecute war crimes. The first strategy was adopted in 2016 and pertained to the time period 2016-2020.[1095] It expressed the country's commitment to accountability irrespective of nationality, ethnicity, religion or status of the perpetrator or victim, as well as its aim of rendering war crimes prosecutions and trials more efficient, and of increasing their acceptance among the domestic population.[1096] The strategy furthermore envisaged that the War Crimes Prosecutor would define criteria for the selection of cases and would create a list of priority cases to be processed. More complex cases (according to the number of victims, rank of the perpetrators, availability of evidence) had to be prioritised.[1097] As this strategy was never really implemented, and following pressure from the European Union (EU), Serbia drafted a new strategy for the period 2018-2023. However, also this strategy was criticised for not addressing the continuing failure to prosecute high-level suspects, the lack of concrete deadlines and indicators for measuring whether the strategic goals are being achieved, and for the fact that the criteria for case selection from the previous strategy were not elaborated but merely repeated and even downgraded.[1098]

The overlapping jurisdiction and the division of labour between the different domestic courts in the countries of the former Yugoslavia and the ICTY, with some courts focusing on the most complex cases and other courts on less complex or sensitive cases, made

1090 Cf. Weill & Jovanović, 2012, p. 247; see also Articles 2 (1), 4 (1), and 9 (1) of the Law on Organization and Competence of State Authorities in War Crimes Proceedings.

1091 Cf. OSCE Mission to Serbia, 2015, p. 20.

1092 Article 2 (3) of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1093 The relevant provisions were in Chapter XVI of the Yugoslav criminal code ("Criminal Offences against Humanity and International Law").

1094 Cf. Ivanišević, 2007, p. 2; see section 3 above.

1095 Cf. ICTY OTP, 17 May 2016, p. 22.

1096 Cf. ICTY OTP, 17 May 2016, p. 22.

1097 Cf. F. Rudic (19 March 2018), Serbia's New War Prosecutions Strategy 'Flawed', NGOs Claim, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/03/19/serbia-s-war-crimes-strategy-seriously-flawed-ngos-say-03-16-2018/ (last accessed 14/08/2019).

1098 Cf. Rudic, Balkan Investigative Reporting Network, 19 March 2018.

cooperation necessary. The rules for cooperation and the practice will be outlined in the following section.

4.2 Cooperation between Domestic Courts and the ICTY

Pursuant to Article 29 of the ICTY Statute, cooperation with the Tribunal is mandatory for all states.[1099] Bosnia and Herzegovina has a comprehensive legislative framework in place that regulates its obligations to cooperate and provide judicial assistance concerning cases that take place in The Hague.[1100] Serbia's legislation in that regard is less elaborate, although it does implement Article 29 of the ICTY Statute.[1101] The legislation obliges domestic authorities to comply with the ICTY's requests for assistance, such as locating certain individuals and providing materials, court records, and information regarding possible witnesses or victims.[1102] Moreover, Serbia established a so-called Cooperation Council at the highest government level that was responsible for the cooperation with the Tribunal.[1103]

1099 These powers derive from the fact that the ICTY was established under Chapter VII of the United Nations Charter, extending the binding powers of the Security Council to the ICTY. How well or badly states complied with this obligation, especially Serbia (especially concerning arrests of fugitives), is beyond the topic of this contribution.

1100 Pursuant to Article II (8) of the BiH Constitution, "[a]ll competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: […] the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law."
According to Article 203 of the 2003 BiH Criminal Code, any civil servant in BiH's institutions (both at state- and entity-level) who fails, prevents, or refuses to enforce an ICTY order is punishable with one to ten years of imprisonment, and Article 231 of the 2003 BiH Criminal Code holds that the failure to report the whereabouts of a person indicted by the ICTY is punishable by up to three years imprisonment (except for family members and some distinct professional groups). Article 233 of the 2003 BiH Criminal Code criminalises assistance to a person indicted by the ICTY. The Decree with Force of Law on Extradition at the Request of the International Tribunal (Decree with Force of Law on Extradition at the Request of the International Tribunal, Official Gazette of Bosnia and Herzegovina No. 12/95) regulates extradition procedures of indicted persons to the ICTY. In addition, and remarkably, pursuant to the BiH Election law and Article IX of the BiH Constitution, persons who either served a sentence imposed by the ICTY or are indicted by the ICTY as well as persons who fail to appear before the ICTY cannot stand as candidate or hold a public office in BiH nor hold a party position. There is also the 2004 Law on transfer of cases from ICTY and the use of evidence collected by the ICTY in the courts in BiH (see section 4.4 below).

1101 Law on Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991, Official Gazette of FRY No. 18/2002 and Official Gazette of Serbia and Montenegro No. 16/2003; also the Law on War Crimes contains certain provisions on cooperation with the ICTY.

1102 Cf. OSCE Mission to Serbia, 2015, p. 29.

1103 Serbian cooperation followed a two tracks set-up: first, there was the so-called Action Team, headed by the War Crimes Prosecutor and comprised of security services, backed by the Ministry of Interior. The Action

However, assistance and cooperation also increasingly went the other way, from the ICTY to national courts, especially since the ICTY started implementing its completion strategy and preparing for its legacy, which primarily consisted of enabling national judiciaries to continue the war crimes prosecutions and trials. Most importantly, the Tribunal put in place various mechanisms to grant domestic actors access to its vast stock of materials that could still be useful for domestic proceedings, as many domestic proceedings shared the same crime base with cases at the ICTY.

First, the ICTY Office of the Prosecutor responded to many specific requests from national prosecutors for information or evidence relating to their ongoing investigations against suspects of international crimes. This responsibility has now been taken over by the MICT OTP.[1104]

During that time, cooperation with Bosnia and Herzegovina was the most intense. Representatives of the two courts (ICTY and SCBiH) were in contact almost on a daily basis, mostly in relation to sharing evidence and witness protection.[1105] Of course, as the majority of cases handled by the ICTY related to crimes committed in Bosnia and Herzegovina, much of the same evidence could be used. And if the same witnesses were testifying, witness protection was coordinated between the two courts. In order to formalise the cooperation between the BiH Office of the Prosecutor and the ICTY Office of the Prosecutor, the offices concluded a Memorandum of Understanding on 2 September 2005. It became the legal basis for mutual cooperation between the two offices, regulating, *inter alia*, requests for assistance, access to documents, access to witness statements, contacts with witnesses and witnesses with protective measures, and access to expert reports.[1106] Assistance was mainly provided by the ICTY (now from the MICT) to the SCBiH. There

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Team was responsible for apprehending fugitives. The second track was the National Council for Cooperation with the ICTY which took care of all other aspects of cooperation with the Tribunal, such as providing documents, giving witnesses permission to testify, etc. It was formally headed by a minister. During the busy years, the National Council had an office, the administrative organ of the National Council, whose head was formally directly liable to the Prime Minister of Serbia, but practically working for the head of the National Council. The head of this office also regularly reported to the United Nations Security Council on cooperation with the ICTY; cf. interview with Serbian defence counsel, Belgrade, 25 January 2017, I-16; see also: OSCE Mission to Serbia, 2015, p. 29.

1104 Cf. ICTY, Working with the Region, http://www.icty.org/en/about/office-of-the-prosecutor/working-with-the-region (last accessed 14/08/2019).

1105 This has been pointed out in almost all my interviews, most importantly with an ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

1106 Cf. Rüedi, 2015, p. 121; see also: Memorandum of Understanding Between the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina, http://tuzilastvobih.gov.ba/files/docs/MOU-POBH-OTP_English-RevisedFinal250805_.pdf (last accessed 14/08/2019).

was little cooperation with the district or cantonal courts in BiH,[1107] as despite their enhanced responsibility regarding the prosecution of war crimes cases, entity/district-level courts do not seem to send assistance requests to The Hague.[1108]

Assistance was also provided the other way around. For instance, between September 2007 and February 2008, the SCBiH granted the ICTY trial chamber the possibility to conduct hearings in the case against Rasim Delić in the courtrooms of the SCBiH.[1109] In fact, virtually all interviewees in Bosnia underlined that through the frequent professional contact, the ICTY was remarkably present in Bosnia and Herzegovina. That way, strong mutual confidence was built, which enhanced respect for the Tribunal.

Cooperation with Serbia was much less intense, especially in the beginning. For many years, at least until 2011, when the last ICTY fugitive Goran Hadžić was arrested, Serbia was perceived as noncompliant with the Tribunal. Although cooperation in other areas (access to documents, witnesses, etc.) had improved, compliance with the ICTY was still very much focused on arresting fugitives – which Serbia was reluctant to do.[1110] If and when Serbia cooperated with the Tribunal, it did so mostly for practical reasons: for a full reintegration into the 'international community' and for the receipt of foreign aid.[1111] Since the 2000s, Serbian compliance with ICTY demands would mostly be secured by Western pressure, with EU conditionality being the most important leverage for securing arrests.[1112]

Apart from the political conditions which made such interaction difficult, the mutual mistrust between the judiciaries, and the prevailing opinion among ICTY judges that this was not part of the mandate of the Tribunal, contributed to the professional disconnect between the two systems.[1113] Once the ICTY began to realise the necessity of identifying the local needs of the Serbian judicial system, and of cultivating a positive working relationship with Serbian institutions entrusted with war crimes prosecutions, it managed

1107 Cf. Rüedi, 2015, p. 78; ICTY OTP (23 May 2013), *Completion Strategy Report May 2013*, provided to the United Nations Security Council, S/2013/308, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2013_en.pdf (last accessed 14/08/2019), p. 32.

1108 Cf. ICTY OTP, 23 May 2013, p. 32.

1109 Cf. Rüedi, 2015, p. 122.

1110 For the problems in particular in terms of arresting and handing over accused to the ICTY; see: Ostojić, 2014, p. 57ff.

1111 Cf. Ostojić, 2014, p. 62.

1112 Cf. Orentlicher, 2018, p. 64; even Prime Minister Zoran Đinđić did not want to justify his sending of Milošević to The Hague in the language of moral obligation, but chose to explain that surrendering him would advance Serbia's economic prosperity and integration into the West; cf. Orentlicher, 2018, p. 66.

1113 Cf. Michaeli, 2011b, p. 49f.

to transfer both evidentiary material[1114] and its expertise to Serbia.[1115] Today, the contact is described as respectful and professional.[1116]

A Memorandum of Understanding between the former Serbian War Crimes Prosecutor Vladimir Vukčević and the MICT prosecutor Hassan Jallow, was concluded on 8 September 2014 concerning mutual cooperation requests under Articles 27 and 28 (3) of the MICT Statute.[1117] This cooperation is invaluable, also for Serbia's domestic prosecutions and trials.[1118] Their requests mostly relate to: certified copies of public court documents, such as transcripts, audio and video recordings, evidentiary items, submissions, orders, or judgments;[1119] amendments or abolition of protective measures,[1120] including access to confidential court documents; obtaining witness testimony or information about protected witnesses;[1121] and to taking statements from detained persons under the ICTY/MICT competency under Rules 75*bis* ICTY RPE and 87 MICT RPE.[1122]

Nevertheless, according to accounts of domestic actors, professional contact between the Serbian judiciary and the ICTY/MICT seems to be much less frequent.[1123] Whereas in BiH, proceedings seem to be almost intertwined, trials in Serbia are conducted in a way which is much more detached from the ICTY. As one prosecutor put it: "The ICTY was supposed to prosecute the high-level accused. And we are now conducting trials against the mid- and low-level accused. Every institution does its own job. We are independent."[1124]

1114 In July 2006, the ICTY Office of the Prosecutor (OTP) and the Serbian Office of the War Crimes Prosecutor (OWCP) signed an agreement providing for access to ICTY evidence; cf. Ivanišević, 2007, p. 28.

1115 Cf. Michaeli, 2011b, p. 5; in a few cases, where ICTY and Serbian indictments concerned the same events, exchange of evidence was extensive; cf. Ivanišević, 2007, p. 27.

1116 Cf. Michaeli, 2011b, p. 55f.; this has been confirmed in interviews with an ICTY OTP legal advisor, The Hague, 25 November 2016, I-15, and with an OWCP prosecutor, Belgrade, 19 January 2017, I-52, as well as by Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.

1117 Article 27 is about management of the MICT archives and Article 28 about mutual cooperation and judicial assistance.

1118 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.

1119 Those may be directly used in domestic proceedings, according to Article 14a (4) and (5) of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1120 Under Rule 86 (H) and Rule 75 (H) MICT Rules of Procedure and Evidence.

1121 In principle, the ICTY established protective measures for victims/witnesses and levels of evidence confidentiality remain in force and an alteration by national courts is subject to ICTY/MICT approval. See also Article 14a (6) of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1122 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.

1123 By way of example, see the number of cooperation requests from BiH, compared to those from Serbia, as listed in the ICTY's completion strategy reports. For instance, between May and November 2008, the ICTY OTP responded to 46 requests from BiH, and to four from Serbia (cf. ICTY OTP (24 November 2008), *Completion Strategy Report November 2008*, provided to the United Nations Security Council, S/2008/729, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/Completion_Strategy_24nov2008_en.pdf (last accessed 14/08/2019), p. 23) or between November 2010 and May 2011, 55 requests came from BiH and 14 from Serbia; cf. ICTY OTP, 18 May 2011, p. 42.

1124 Cf. Interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52.

And so, in Serbia, the ICTY has not developed the omnipresence that can be observed in the work and minds of the local judicial actors in Bosnia and Herzegovina.

As the ICTY had started transferring cases to the domestic judiciaries,[1125] requests for access to documents and evidence increased. In response, domestic prosecutors were granted remote access to the Electronic Disclosure Suite, the electronic archive of ICTY material, giving them access to non-confidential evidence and redacted witness statements. Although this was described as very useful by domestic investigators,[1126] it still required interaction with the ICTY OTP, for instance, when access to non-redacted versions – or to the witness directly – was requested.[1127] Local prosecutors subsequently started travelling to and from The Hague. In order to alleviate the travel costs, the ICTY OTP started the Visiting National Prosecutors Programme,[1128] through which the ICTY OTP welcomed domestic prosecutors in The Hague.[1129]

The goal of the Visiting National Prosecutors Programme was to "strengthen the capacity of national prosecutors to deal with the large number of war crimes cases stemming from the conflict in the former Yugoslavia through 'on the job' training"[1130]. As of mid-2009, Bosnia and Herzegovina, Croatia, and Serbia have been sending liaison officers to The Hague on a regular basis.[1131] Over the years, cooperation between the national prosecution offices and the ICTY/MICT OTP has almost entirely become the responsibility of the liaison officers; they are the contact persons at the ICTY for national prosecutors.[1132] Their presence has strengthened the working relationships between the ICTY OTP and the domestic prosecution offices.[1133]

These national liaison prosecutors have direct access to the ICTY/MICT OTP electronic database and can directly use this resource for investigations and prosecutions at the

1125 See sections 1.3 above and 4.4 below.

1126 Cf. Orentlicher, 2018, p. 398f.; Rüedi, 2015, p. 97f.

1127 Cf. Orentlicher, 2018, p. 356f.

1128 Cf. Orentlicher, 2018, p. 358.

1129 The programme has transitioned to the United Nations International Residual Mechanism for Criminal Tribunals (MICT) since January 2017; cf. ICTY OTP (17 November 2016), *Completion Strategy Report November 2016*, provided to the United Nations Security Council, S/2016/976, www.icty.org/sites/icty.org/files/documents/161117_icty_progress_report_en.pdf (last accessed 15/08/2019), p. 30.

1130 ICTY, Office of the Prosecutor of the ICTY Welcomes Liaison Prosecutors from Bosnia and Herzegovina, Croatia and Serbia to the Tribunal, Press release 1 July 2009, http://www.icty.org/en/press/office-prosecutor-icty-welcomes-liaison-prosecutors-bosnia-and-herzegovina-croatia-and-serbia (last accessed 15/08/2019).

1131 Roughly 15 liaison prosecutors have been to The Hague so far; cf. ICTY OTP, 29 November 2017, p. 79. The current Serbian War Crimes Prosecutor Snežana Stanojković was herself a liaison prosecutor in The Hague; cf. Orentlicher, 2018, p. 401.

1132 Cf. ICTY OTP (19 November 2010), *Completion Strategy Report November 2010*, provided to the United Nations Security Council, S/2010/589, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_19nov2010_en.pdf (last accessed 15/08/2019), p. 41.

1133 Cf. ICTY OTP, 18 May 2011, p. 40.

national level.[1134] This grants national prosecutors access to evidence that they would otherwise not have had or found.[1135] The evidence found in the ICTY's database has led to numerous cases at the domestic level,[1136] although domestic prosecutors more often use the archive to search for supplementary evidence related to ongoing investigations.[1137] According to the current Serbian War Crimes Prosecutor Snežana Stanojković, the ICTY's evidence database remained the "most important and the most relevant and significant" aspect of OWCP's relationship with the Tribunal.[1138]

This initiative is also seen as one of the Tribunal's most important capacity building initiatives, as their physical presence allows the liaison officers to meet with ICTY experts and consult with them on concrete cases or general issues of international humanitarian and international criminal law.[1139] In addition, they were specifically trained by the OTP on prosecution search methodologies and procedures.[1140]

Likewise, the collaboration and mutual understanding and confidence built with the equally present liaison prosecutors from other Western Balkan jurisdictions is valued. The liaison officers in The Hague have thereby also become the contact persons for other national prosecutors working on war crimes throughout the region. Furthermore, the colocation of the Bosnian, Croatian, and Serbian prosecutors encourages cooperation on bilateral issues.[1141] This side effect of the Visiting National Prosecutors Programme is gaining more and more weight, as regional cooperation on war crimes cases is becoming more important due to the fact that the ICTY has closed down and the engagement of the 'international community' has downsized.[1142]

A third cooperation initiative worth mentioning is that the ICTY is producing transcripts of its key proceedings in Bosnian/Croatian/Serbian (BCS). It is hoped that this will drastically improve the ability of legal practitioners in the region to access and search through testimony given before the ICTY for the purpose of their domestic proceedings.[1143] Representatives of the domestic war crimes prosecution offices have expressed the hope that this translation project will also be extended to other types of documents, such as

1134 Cf. ICTY, Capacity Building, http://www.icty.org/en/outreach/capacity-building (last accessed 15/08/2019).
1135 Cf. Orentlicher, 2018, p. 400.
1136 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.
1137 Cf. OSCE Mission to Serbia, 2015, p. 31.
1138 Interviewed in: Orentlicher, 2018, p. 401.
1139 Cf. interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016; see also: ICTY OTP, 19 November 2010, p. 41.
1140 Cf. ICTY OTP (1 June 2010), *Completion Strategy Report June 2010*, provided to the United Nations Security Council, S/2010/270, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_01june2010_en.pdf (last accessed 15/08/2019), p. 39.
1141 Cf. ICTY OTP, 19 November 2010, p. 41.
1142 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.
1143 Cf. ICTY, Capacity Building, http://www.icty.org/en/outreach/capacity-building (last accessed 15/08/2019).

prosecution strategies or guidelines on decision making for judges.[1144] The Tribunal's Appeals Chamber Case Law Research Tool, which contains a compilation of summaries of the most important Appeals Chamber decisions, is also being translated into BCS. Specially tailored trainings are provided to lawyers in the region in order to assist them in accessing the Tribunal's records.[1145]

It is clear that the ICTY Office of the Prosecutor, especially from the moment Serge Brammertz assumed office as Chief Prosecutor, was deeply invested in the success of the Bosnian and Serbian domestic war crimes institutions – and it had been since the very beginning of their operation.[1146] Even though the Tribunal played a less active role in setting up these institutions (at least in Serbia), once they were up and running, the ICTY embraced every opportunity to establish close relationships with their counterparts in the region.[1147] Over the years, a good direct working relationship developed between the ICTY – especially the ICTY OTP – and the domestic institutions,[1148] which some would describe as a "partnership"[1149]. Reportedly, for the domestic institutions, both in BiH and Serbia, the partnership also demonstrated the high level of trust and respect towards them among ICTY representatives.[1150]

What has been criticised though, is that cooperation takes place mainly between prosecutors, and – to a lesser extent – between judges. On the defence side, no structural cooperation exists. In contrast to the prosecutors, the defence also does not have access to the ICTY's databases. In Bosnia and Herzegovina, this problem is alleviated through the work of OKO, an office which makes cooperation requests to The Hague on behalf of defence counsel. In Serbia, no such structure exists and defence counsel report that their individual requests for access to material are not taken seriously by the Tribunal.[1151] Defence counsel interested in access to evidence or witness testimony must therefore submit their requests via the Serbian authorities.[1152] In terms of equality of arms, this raises questions.

4.3 The ICTY's Rules of the Road Programme

In addition to this mutual practical cooperation, that was – and is – supposed to boost domestic prosecutions and trials, the ICTY (OTP) also offered its expertise and supervised

1144 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.
1145 Cf. ICTY, Capacity Building, http://www.icty.org/en/outreach/capacity-building (last accessed 15/08/2019).
1146 Cf. Orentlicher, 2018, p. 395.
1147 Cf. Orentlicher, 2018, p. 395; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.
1148 Cf. ICTY OTP, 16 November 2011, p. 33.
1149 Cf. Orentlicher, 2018, p. 401.
1150 Cf. Ostojić, 2014, p. 201.
1151 Cf. interview with ICTY defence counsel, The Hague, 25 November 2016, I-26.
1152 Cf. Ivanišević, 2007, p. 28.

Bosnian prosecutions in their early years. This initiative was meant to enhance the new institutions' legitimacy.

One important project in that regard was the Rules of the Road Programme: in the very beginning of domestic war crimes investigations in Bosnia and Herzegovina, the ICTY was tasked with overseeing them. When the signatories to the Dayton Peace Agreement met again on 18 February 1996 in Rome, and agreed on certain measures for strengthening the peace process in BiH, they held that

> "[p]ersons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal."[1153]

After the agreed measures were signed, then ICTY Prosecutor Richard Goldstone agreed to assume responsibility for the administration of the supervision.[1154] The goal of the review process, which was subsequently developed by the ICTY and named the "Rules of the Road" procedure, was to prevent arbitrary arrests on the basis of war crimes allegations after the conflict.[1155]

The procedure required the relevant BiH authorities to submit every war crimes case that was meant to be prosecuted (including the evidence that formed the basis of the proposed indictment)[1156] to the Rules of the Road Unit within the ICTY OTP.[1157] The Unit then examined whether the evidence was *prima facie* sufficient and whether the allegations

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1153 Cf. NATO Implementation Force (IFOR), Agreed Measures, https://www.nato.int/ifor/general/d960218b.htm (last accessed 15/08/2019); item 5, para 2 of the Rome Agreement; see also: ICTY (16 August 1996), *Annual Report 1996*, provided to the United Nations General Assembly and Security Council, A/51/292-S/1996/665, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1996_en.pdf (last accessed 15/08/2019), p. 26.

1154 Cf. Manuell & Kontić, 2002, p. 335.

1155 Cf. Rüedi, 2015, p. 80; prior to the initiation of the programme, arbitrary and political arrests were quite the norm, threatening the unstable peace in the region. In addition, freedom of movement between the two entities (Republika Srpska as predominantly ethnically Serb and the Federation of Bosnia and Herzegovina as predominantly ethnically Croat and Muslim) was jeopardised by the risk of arbitrary arrests; cf. Manuell & Kontić, 2002, p. 333. Indeed, the background to the whole idea was a serious dispute that ensued between Bosnian Serbs and the Bosnian government after two senior RSBiH army officers who had taken a wrong turn into FBiH territory after misreading a signpost were arrested for war crimes charges, which led to arbitrary and retaliatory arrests and detentions on both sides; cf. Orentlicher, 2018, p. 328. Arbitrary arrests were seen as a "threat to Dayton itself", as freedom of movement was fundamental to Dayton's conception of a single, if divided, country and crucial to holding free and fair municipal elections in September 1996, especially as candidates and voters were being encouraged to stand and vote in their pre-conflict constituencies; cf. Orentlicher, 2018, p. 328f.

1156 Cf. Manuell & Kontić, 2002, p. 335.

1157 This specialised unit was created as the number of files increased; cf. Manuell & Kontić, 2002, p. 335.

were credible, prior to arresting a suspect.[1158] In doing so, the Rules of the Road Unit applied international evidentiary standards, which in practice meant that the same evidentiary standards that were applied to ICTY prosecutions were applied to legal reviews done by the Rules of the Road Unit.[1159] Upon receipt, the ICTY OTP would mark the cases with a letter from A to G, with most of them belonging to the categories A, B, or C. Category A indicated that the evidence against the suspect was sufficient to justify the indictment. Category B indicated that the evidence did not meet international standards. Category C indicated that the OTP was unable to evaluate whether there was sufficient evidence, in which case the entity authorities could gather additional evidence and resubmit the case.[1160] Any other categorisation than A meant that the case was not viable for indictment at the time of review.[1161]

The programme started off in 1996 with a request from the High Representative of Bosnia and Herzegovina to review 40 cases of individuals who were being held as prisoners of war or suspected war criminals by the parties to the Rome Agreement. As early as spring of 1996, the government of BiH informed the ICTY Prosecutor that they had approximately 1,500 cases to be reviewed by the ICTY Office of the Prosecutor.[1162] The number of cases sent to the OTP increased every year, and so did the number of reviewed files.[1163] In 2000, this situation exacerbated even further, when the Supreme Court of the Federation of

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1158 Cf. Rüedi, 2015, p. 80; other considerations such as past or present political positions of suspects or the ethnicity of witnesses or suspects were irrelevant and not considered; cf. Manuell & Kontić, 2002, p. 336.

1159 Cf. Manuell & Kontić, 2002, p. 336.

1160 D: The ICTY prosecutor sought deferral of the case to the ICTY; E: The alleged crime was not within the jurisdiction of the ICTY, but an alternative crime within the domestic jurisdiction of BiH was specified; F: The evidence was insufficient for the specific charge, and the suspect was required by the ICTY as a witness; G: The evidence for the charge specified by the local prosecuting authorities was insufficient, but it was sufficient for another crime. For further explanation on the steps taken in the review procedure, see Manuell & Kontić, 2002, p. 336f.

1161 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 3.

1162 To compare: at the same time, Croatia had submitted approximately 100 cases and Serbia none; cf. ICTY, 16 August 1996, p. 26.

1163 In 1997, the OTP had received about 400 cases, the majority from Bosnia and Herzegovina, and it managed to review over 40 cases (cf. ICTY (18 September 1997), *Annual Report 1997*, provided to the United Nations General Assembly and Security Council, A/52/375-S/1997/729, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1997_en.pdf (last accessed 15/08/2019), p. 24); in 1998, it reviewed 65 cases (cf. ICTY (10 August 1998), *Annual Report 1998*, provided to the United Nations General Assembly and Security Council, A/53/219-S/1998/737, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1998_en.pdf (last accessed 15/08/2019), p. 34); in 2001, 190 files involving 1055 suspects were reviewed (cf. ICTY (4 September 2002), *Annual Report 2002*, provided to the United Nations General Assembly and Security Council, A/57/379-S/2002/985, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf (last accessed 15/08/2019), p. 41); and in 2002, 192 filed involving 1134 suspects (cf. ICTY, 20 August 2003, p. 56); in 2004, it reviewed 80 files involving 456 suspects (cf. ICTY (16 August 2004), *Annual Report 2004*, provided to the United Nations General Assembly and Security Council, A/59/215-S/2004/627, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2004_en.pdf (last accessed 11/09/2019), p. 71).

Bosnia and Herzegovina in Sarajevo ruled that the Rules of the Road agreement was legally binding for all courts within the FBiH. This decision appeared to have had a considerable effect in generating even more cases for review.[1164] The Unit received the first files from the Republika Srpska only in March 2001.[1165]

The Unit stopped reviewing cases on 1 October 2004. Until then, it had reviewed 1,419 files against 4,985 persons, while approval for arrest was issued for merely 848 persons.[1166] Towards the end of its existence, ICTY OTP staff of the Rules of the Road Unit assisted domestic institutions in establishing a prosecutorial review division within the State Court of Bosnia and Herzegovina.[1167] The goal was to hand over the review process to the Prosecutor's Office BiH, which would confirm entity/district-level prosecutions.[1168] This never happened though.[1169]

The Unit had always lacked proper funding and staff, as it depended on voluntary financial contributions from states,[1170] which led to stagnation of its work.[1171] The problem with this was that the review process slowed down – or even stopped – the prosecution of domestic war crimes cases, as domestic prosecutors could not continue a case without the consent from the ICTY (although not all prosecutors always waited for the approval).[1172] Moreover, the ICTY failed to review approximately 3,000 cases that it received.[1173] Reportedly, ICTY officials failed to keep their BiH colleagues informed about the status

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1164 Cf. ICTY (7 August 2000), *Annual Report 2000*, provided to the United Nations General Assembly and Security Council, A/55/273-S/2000/777, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf (last accessed 15/08/2019), p. 30.

1165 ICTY (17 September 2001), *Annual Report 2001*, provided to the United Nations General Assembly and Security Council, A/56/352-S/2001/865, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2001_en.pdf (last accessed 15/08/2019), p. 36.

1166 Cf. F. Pocar (10-12 May 2006), Keynote Address by the President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Fausto Pocar, Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems, Office for Democratic Institutions and Human Rights (OSCE), Warsaw, http://www.osce.org/odihr/19033?download=true (last accessed 15/08/2019), p. 5.

1167 Cf. ICTY, 16 August 2004, p. 71.

1168 Cf. Human Rights Watch (February 2006), *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, https://www.hrw.org/reports/2006/ij0206/ij0206web.pdf (last accessed 26/09/2019), p. 6.

1169 On the problems to coordinate state-level and entity/district-level prosecutions, see section 4.2 above.

1170 Because the Rome Agreement was negotiated separately from the Dayton Peace Agreement, the United Nations had taken the view that the review function exercised by the Rules of the Road unit was not part of the ICTY's formal mandate. That was why funding for the unit was not included in the ICTY's annual budget, and it had to be raised directly from other sources through a trust fund; cf. Manuell & Kontić, 2002, p. 335.

1171 Cf. ICTY, 16 August 2004, p. 71; ICTY (25 August 1999), *Annual Report 1999*, provided to the United Nations General Assembly and Security Council, A/54/187-S/1999/846, http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1999_en.pdf (last accessed 15/08/2019), p. 35; ICTY, 18 September 1997, p. 24.

1172 Cf. Orentlicher, 2018, p. 332.

1173 Cf. C. P. DeNicola (2010). Criminal procedure reform in Bosnia and Herzegovina: between organic minimalism and extrinsic maximalism. In: University of Pennsylvania Law School, p. 30.

of the reviews, even when receiving direct inquiries.[1174] Ultimately, this was at times detrimental to the BiH courts' ability to conduct war crimes trials,[1175] or in any case, its ability to encourage domestic initiatives.[1176] In addition, some argue that the Rules of the Road review process had a demoralising effect, as prosecutors and judges experienced a loss of face having to seek international approval through a process they found shameful.[1177]

Despite these problems, the supervisory function of the ICTY OTP arguably had several positive effects: firstly, evidenced by the number of applications on the one hand, and granted requests on the other, it clearly was a necessary filter for selecting only those cases that should be pursued further. Members of the Rules of the Road Unit claim to have contributed to a greater degree of political stability in BiH, and to the abolishment of show trials in war crimes matters.[1178] Secondly, for the domestic prosecutors, although they were upset with the backlog,[1179] the review process was an assurance that they could pursue a case further.[1180] That way, they could learn which cases to pursue, and how to pursue them. Upon rejection of an indictment, the local prosecutors received notification letters from the ICTY OTP, indicating which legal and evidentiary issues had to be readdressed. The local prosecutor could then resubmit an application and get it reviewed again. This process clearly had an educational effect. In addition, in order to complement this case-by-case capacity building approach, the ICTY Rules of the Road Unit also held conferences in Bosnia and Herzegovina, which were attended by several hundreds of judges, prosecutors, lawyers, and investigators, on how war crimes indictments should be prepared. Thirdly, although this is difficult to measure, it has been claimed that the review process provided the domestic population with the assurance that an institution which enjoyed much higher credibility, legitimacy, and support than domestic judicial institutions had approved the process. On the whole, therefore, the review process was nevertheless beneficial for initiating domestic war crimes trials, and assisted in developing the war crimes adjudication system in a credible and legitimate way.[1181]

No such programme existed for Serbia or any of the other former Yugoslav countries.

1174 Cf. Kirs, 2011, p. 400.
1175 Cf. Orentlicher, 2010, p. 112.
1176 Cf. Burke-White, 2007, p. 312ff.; DeNicola, 2010, p. 30.
1177 Cf. Orentlicher, 2018, p. 332.
1178 Cf. Manuell & Kontić, 2002, p. 337.
1179 Cf. interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.
1180 As then-Prime Minister of BiH Adnan Terzić said: the work of the Rules of the Road unit was "ensuring the legality of the criminal proceedings"; cf. Manuell & Kontić, 2002, p. 337.
1181 Cf. Manuell & Kontić, 2002, p. 337f.; Orentlicher, 2018, p. 330f.

*4.4 Transferring Rule 11*bis *and Category II Cases from The Hague to the former Yugoslavia*

The Rules of the Road programme was implemented when the war crimes department of the State Court of Bosnia and Herzegovina did not yet exist. The first ICTY-initiated boost for prosecutions and state-level trials was therefore the transfer of cases from The Hague to Sarajevo, and, to a lesser extent, to Belgrade.[1182]

As pointed out above,[1183] in order to reduce its caseload, the ICTY decided to focus solely on high-profile cases and referred 13 cases to national judiciaries. Six cases involving ten accused were transferred to the State Court of Bosnia and Herzegovina, one case involving two accused to Croatia,[1184] and one case concerning one accused was transferred to Serbia, but the defendant was never tried because he was unfit to stand trial for medical reasons.[1185]

Cases could be referred to a national judiciary upon the decision of a Referral Bench, and provided that a number of criteria were met. The ICTY Office of the Prosecutor had concluded agreements with the OSCE, who would monitor the trials and regularly report back to the OTP.[1186] If a case was not dealt with properly, it could be taken back to The Hague.[1187] The Referral Bench could therefore limit itself to verifying whether the domestic law in place in the referral state was in line with the highest human rights standards, and defer the 'practice-check' to a later point in time.

The indictment prepared by the ICTY, and subsequently transferred to the national judiciary, already contained the relevant facts, charges, and most of the evidence, and could not – at least, not according to BiH's national legislation –[1188] be amended, and charges could not be removed. At best, charges and accused could be added.[1189] The Serbian Law on Organization and Competence of State Authorities in War Crimes Proceedings also provides in its Article 14a that the original indictment – as well as the evidence it was based

1182 See also section 1.3 above.

1183 In section 1.3.

1184 Cf. ICTY, Status of Transferred Cases, http://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases (last accessed 14/08/2019).

1185 Cf. OSCE Mission to Serbia, 2015, p. 30.

1186 For the agreement and OSCE progress reports on each case, see ICTY, Status of Transferred Cases, http://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases (last accessed 15/08/2019). See also: ICTY OTP, 25 May 2005, p. 10. For further details on the working model of the OSCE and the OTP ICTY, see: OSCE Mission to Bosnia and Herzegovina (January 2010a), *The Processing of ICTY Rule 11*bis *cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring*, A report of the Capacity Building and Legacy Implementation Project, Sarajevo, http://www.osce.org/bih/118964?download=true (last accessed 12/09/2019), p. 9-11.

1187 Rule 11*bis* (F) ICTY RPE.

1188 Article 2 (1) of the Bosnian Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina.

1189 Cf. Rüedi, 2015, p. 203.

on – must be maintained, but the charges can be amended if necessary.[1190] In the beginning, Rule 11*bis* (D) provided that only evidence that was considered relevant needed to be transferred, and that additional evidence had to be requested, which led to delays. Later, the ICTY OTP made electronic copies of files available.[1191]

It was expected that the Rule 11*bis* referrals would promote the rule of law.[1192] If the experience from dealing with these cases was passed on to the rest of the national justice system, the rule of law would be strengthened in a sustainable manner. In addition, solutions found within Rule 11*bis* trials constitute important examples for the future. Conversely, a failure of the domestic jurisdiction to properly prosecute and adjudicate such high-profile cases could cause embarrassment to the state before its citizens and at the international level.[1193]

At the ICTY, the process of Rule 11*bis* case referrals was viewed as very positive and effective,[1194] mostly with respect to its "capacity-building impact"[1195]. First, ICTY personnel point out that the referral process led to domestic reforms that would ensure that prosecutions and trials would be conducted in accordance with international standards.[1196] In what concerns Serbia and Croatia,[1197] the ICTY engaged in a number of initiatives designed to assist both countries in making their criminal justice systems suitable for the eventual referral of cases, including through knowledge and experience transfer, and establishing stable channels between international and domestic courts.[1198] Second, new concepts such as command responsibility and joint criminal enterprise were taken up by domestic institutions and successfully adjudicated. As such, Rule 11*bis* cases were very useful learning ground, both for developing legal expertise and skills in practical matters such as witness protection.[1199] Third, actors in The Hague are convinced that the threat of

1190 Cf. Weill & Jovanović, 2012, p. 248f.

1191 Cf. Rüedi, 2015, p. 204.

1192 Cf. ICTY, 23 November 2004, p. 3; Meron held that by transferring cases, "the Tribunal will enhance the essential involvement of national Governments in bringing reconciliation, justice and the rule of law to the region"; ICTY (25 May 2005), *Completion Strategy Report May 2005*, provided to the United Nations Security Council, S/2005/343, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_25may2005_en.pdf (last accessed 14/08/2019), p. 3; similar: ICTY, 23 May 2012, p. 11; and ICTY (16 November 2011), *Completion Strategy Report November 2011*, provided to the United Nations Security Council, S/2011/716, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16nov2011_en.pdf (last accessed 14/08/2019), p. 13.

1193 Cf. Katsaris, 2007, p. 185f.

1194 Cf. interview with ICTY judge, The Hague, 2 December 2016, I-33; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; see also: ICTY OTP, 29 November 2017, p. 77.

1195 ICTY OTP, 29 November 2017, p. 77.

1196 Cf. ICTY OTP, 29 November 2017, p. 77.

1197 For a long time, it had not been envisaged to refer cases to Serbia and Croatia, due to their lack of cooperation with the Tribunal; cf. Ivanišević & Trahan, October 2004, p. 8.

1198 Cf. ICTY, 23 November 2004, p. 4f.

1199 Cf. ICTY OTP, 29 November 2017, p. 77.

reclaiming the case if it is not dealt with properly – the OSCE monitoring would provide proof for that – would have made national actors particularly cautious in handling these cases.[1200] In dealing with Rule 11*bis* cases, knowledge and expertise was gained that could later also be used in other cases. In addition, the direct lines established between the ICTY OTP and local prosecutors in the course of the referral programme contributed to strengthening the contact between international and national offices. This led to further capacity building as it made assistance on an *ad hoc* basis easier.[1201] In order to support national prosecutions, initially only the adjudication of the Rule 11*bis* cases, but later more generally, the ICTY OTP established a small special unit, the Transition Team, in 2004.[1202]

In Bosnia and Herzegovina, however, the domestic practitioners reveal mixed views in relation to the impact of Rule 11*bis* cases.[1203] While some agree that the referred cases had the catalyst effect that the ICTY was hoping for,[1204] others maintain that too few cases were referred. In addition, the threat to revoke the referral was too unrealistic to actually make a difference, as everyone knew that the initial rationale for Rule 11*bis* had been to get rid of cases in the context of the completion strategy.[1205] Indeed, no case was ever revoked, despite numerous deficiencies reported upon by the OSCE Mission to Bosnia and Herzegovina.[1206] Lastly, considering the fact that Rule 11*bis* cases were argued by foreign prosecutors, their educational value for Bosnians may be questioned – at least for the prosecutors.

Two other factors were in fact more decisive in terms of capacity building: the first was the presence of foreign judges and prosecutors during the first years of the Bosnian specialised institutions, some of whom had ICTY experience,[1207] and the second was the

1200 Cf. interview with ICTY judge, The Hague, 2 December 2016, I-33; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

1201 Cf. ICTY OTP, 24 November 2008, p. 22; ICTY OTP, 29 November 2017, p. 77.

1202 Cf. ICTY OTP, 29 November 2017, p. 76.

1203 In addition, it should be noted that the Rule 11*bis* referral process was not well understood by victims' communities in BiH and their reaction was rather negative. They could not understand that 'their' cases would not be adjudicated by the international tribunal in The Hague, but by domestic institutions which enjoyed much less support among victims' associations in the beginning; cf. ICTY OTP (31 May 2006), *Completion Strategy Report May 2006*, provided to the United Nations Security Council, S/2006/353, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_31may2006_en.pdf (last accessed 15/08/2019), p. 34f.

1204 Cf. interview with SCBiH judge, Sarajevo, 1 February 2017, I-19; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

1205 Cf. interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; see also: Orentlicher, 2018, p. 344f.

1206 The deficiencies concerned issues ranging from custody, to witness protection and support, transparency of proceedings, injured party compensation claims, plea bargaining, use of evidence from the ICTY, effectiveness of defence, or clarity of judgments. However, to be fair, the OSCE concluded that no case suffered from deficiencies sufficient to warrant revocation of transfer; cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 7f.

1207 See section 2.1.5 above.

tailor-made training provided, organised, or financed by the OSCE. These trainings directly addressed the needs of the local judiciary, which were observed and assembled in the OSCE's trial monitoring of Rule 11*bis* referral cases.[1208] The OSCE monitoring indeed made it possible to identify weaknesses early on and to take the necessary steps to address them.[1209] In addition, it is certain that the international community – the ICTY included – was watching how Bosnia and Herzegovina dealt with the Rule 11*bis* referrals. People who were involved at the time, claim that everyone was therefore doing their very best to "do it right"[1210].[1211]

In addition to the referral of ready-made cases, case files were transferred regarding suspects investigated by the ICTY OTP but where no indictments were ever issued (so-called Category II cases). In those cases, national judiciaries were enabled to quickly bring these investigations to a conclusion on the basis of the evidence received from the ICTY and to raise indictments where appropriate.[1212] In Serbia, this resulted in two cases, the Ovčara and Zvornik cases.[1213] The Ovčara materials resulted in trials against 21 defendants, and the Zvornik case against 10 defendants.[1214] Materials for 13 cases against approximately 38 suspects were transferred to Bosnia and Herzegovina.[1215] Together with the case files, the ICTY OTP Transition Unit prepared and sent summaries of the cases outlining the principal factual and legal issues and an accompanying analysis.[1216]

In addition, the ICTY Office of the Prosecutor engaged with domestic prosecutors to ensure they could make full use of the vast and unique evidence gathered by ICTY investigators,[1217] through extensive preparation and follow-up work, in close cooperation with local prosecutors.[1218] The Unit oversaw the identification, preparation, and transfer of files to national prosecutors, including assembling, organising and summarising available

1208 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

1209 Cf. Orentlicher, 2018, p. 345.

1210 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

1211 Note also then-HJPC President Branko Perić saying that "judges and prosecutors [were] well aware of the Hague's ability to take back cases", which "motivated [them] to show that they [were] just as capable of trying cases as the ICTY"; cited in: Orentlicher, 2018, p. 345.

1212 Cf. ICTY, Completion Strategy, http://www.icty.org/en/about/tribunal/completion-strategy (last accessed 15/08/2019).

1213 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016; see also: OSCE Mission to Serbia, 2015, p. 10 and Ivanišević, 2007, p. 26f.

1214 Cf. OSCE Mission to Serbia, 2015, p. 30.

1215 Cf. ICTY OTP, 29 November 2017, p. 77.

1216 Cf. Orentlicher, 2018, p. 355.

1217 Cf. Orentlicher, 2018, p. 355.

1218 E.g. ICTY OTP (14 May 2008), *Completion Strategy Report May 2008*, provided to the United Nations Security Council, S/2008/326, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_14may2008_en.pdf (last accessed 14/08/2019), p. 17.

evidence, providing thorough legal and criminal analyses, contacting witnesses, handling witness protection, and other confidentiality issues. During and after the transfer, the Team remained available to assist national prosecutors by providing them with information and documents, handling their requests for assistance and answering questions, not only in relation to the transferred files, but also to any other cases of relevance to the work of national prosecutors handled by the Tribunal.[1219]

Apart from Rule 11*bis* and Category II cases, the ICTY Office of the Prosecutor also sent over other evidence and materials to the region regarding thousands of individual perpetrators who might have been involved in war crimes.[1220]

Not only did transferring case materials facilitate prosecutions and thereby boost the number of domestic prosecutions and trials, it was also another valuable opportunity for cooperation and on-the-job training. For instance, in the Serbian Ovčara case, indictments were issued against the direct perpetrators, whereas the commanders (the "Vukovar Three" Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin) were charged by the ICTY. The work on the same crime led to fruitful cooperation between Serbia and ICTY on this case.[1221]

While for Bosnia and Herzegovina, the Rule 11*bis* cases were the main trigger for the initiation of the domestic prosecutions and trials, for Serbia, it was the transfer of case files and evidence –[1222] even though there had been doubts as to whether the transferred materials were being used and whether evidence to which local prosecutors had access was being followed up.[1223] Especially the extensive materials alleviated the problems the OWCP experienced in getting evidence. The reasons for this included the fact that the police (on which it depended to gather evidence) was unwilling to cooperate, or because it did not have access to evidence in other countries in the region (a problem caused by the fact that most crimes by Serbian defendants had been committed outside Serbia).[1224]

4.5 ICTY Oversight over Investigations and Trials

According to the Serbian Law on War Crimes, the ICTY was entitled to be informed of – and to attend – all phases of domestic proceedings, including closed sessions, in Serbia.[1225]

1219 Cf. ICTY OTP, 29 November 2017, p. 78.
1220 Cf. ICTY OTP, 24 May 2004, p. 45.
1221 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 10.
1222 Cf. Orentlicher, 2018, p. 395.
1223 Cf. F. Rudic, D. Brkanic & S. Milekic (13 March 2018), Suspects Evade Justice as Prosecutors Ignore UN War Files, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/03/13/suspects-evade-justice-as-prosecutors-ignore-un-war-files-03-12-2018/ (last accessed 15/08/2019).
1224 Cf. Orentlicher, 2018, p. 398.
1225 Cf. Weill & Jovanović, 2012, p. 247f.; see Article 14a (5) and (7) of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

Although this supervisory mechanism was much less formal and extensive than the Rules of the Road Programme, or than its powers in the Rule 11*bis* process through its right to revoke a case, it nevertheless allowed the Tribunal (and particularly the ICTY OTP) to retain a certain level of oversight or overview over domestic activities. In some instances, Tribunal personnel even conducted direct inspections. In the Zvornik case, for instance, which was largely based on evidence provided by the ICTY, a Tribunal representative attended the investigative hearings conducted by the Serbian investigating judge in BiH.[1226]

In the early years, the Tribunal closely monitored the trials conducted by the Serbian war crimes department at the Belgrade District Court in view of assessing its capabilities to receive transferred cases.[1227] As only one case was transferred and this case was not dealt with, the goal increasingly shifted towards identifying the needs of domestic institutions for capacity building. For this purpose, the ICTY collaborated with the OSCE – also in Serbia. The OSCE Mission to Serbia had been monitoring domestic trials anyway.[1228] Again, the monitoring activities made it possible to develop targeted training programmes which were directly useful for domestic practitioners.[1229]

4.6 Capacity Building

All initiatives described above were geared towards handling concrete cases and thereby boosted domestic war crimes proceedings.[1230] However, as previously hinted at, the ICTY also strived to make its expertise in prosecuting complex criminal cases available to the local judiciaries.

In that endeavour, the Tribunal engaged in various capacity building initiatives in the former Yugoslavia.[1231] To be sure, capacity building was never part of the ICTY's mandate, no budget was allocated to it,[1232] and there was no strategy.[1233] It was only in 2008, in the course of developing a programme in relation to its legacy, that the Tribunal systematised

1226 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 17; Ivanišević, 2007, p. 29.

1227 Cf. M. Freeman (October 2004), *Serbia and Montenegro: Selected Developments in Transitional Justice*, International Center for Transitional Justice, Caste Study Series, New York, https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Serbia-Developments-2004-English.pdf (last accessed 12/09/2019), p. 6.

1228 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 17.

1229 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1230 See sections 4.2 to 4.5.

1231 A short overview on the activities can be found under ICTY, Overview of Capacity Building Activities, http://www.icty.org/en/outreach/capacity-building/overview-activities (last accessed 15/08/2019).

1232 Cf. ICTY, 13 November 2009, p. 22.

1233 Cf. Orentlicher, 2018, p. 365.

its capacity building efforts, as this was the focus of its legacy ambitions.[1234] It allocated the responsibility for capacity building efforts to the ICTY's Outreach Office – which was also not financed through the Tribunal's budget, but through voluntary contributions from states.[1235] Consequently, the interaction between the Tribunal and the local judiciaries intensified, and the efforts to transfer knowledge and expertise shifted from a more academic paradigm to direct interactions between ICTY staff and its counterparts.[1236] Notably, it started assessing the local needs and responded to them directly –[1237] as mentioned, generally in collaboration with the respective local OSCE mission.[1238] Another goal has also always been to encourage local actors to adopt the ICTY's standards and best practices.[1239] Ultimately, according to former ICTY President Pocar, through capacity building, "[t]he Tribunal remains committed to doing its utmost to assist the development of the rule of law in the former Yugoslavia."[1240]

The Tribunal's Office of the Prosecutor was particularly eager to establish effective partnerships with prosecutors and courts in the region in order to facilitate transfer of their expertise,[1241] and to share information and best practices with them.[1242] They were almost in daily contact with the prosecutors and courts in the region,[1243] and held regular meetings.[1244] However, all organs of the ICTY, the chambers and judges, the Office of the Prosecutor, as well as the Registry, were involved in capacity building, and the initiatives are literally uncountable. ICTY staff attended conferences, round tables, symposia and meetings with members of the legal community, the media, ministries, university and high

1234 Cf. ICTY OTP, 29 November 2017, p. 75; ICTY (24 November 2008), *Completion Strategy Report November 2008*, provided to the United Nations Security Council, S/2008/729, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/Completion_Strategy_24nov2008_en.pdf (last accessed 14/08/2019), p. 12f.

1235 For an overview on the outreach programme, see: ICTY, Outreach Programme, http://www.icty.org/en/outreach/outreach-programme (last accessed 15/08/2019).

1236 Cf. Michaeli, 2011b, p. 57

1237 The kick-off of this approach was a study conducted together with the United Nations Interregional Crime and Justice Research Institute: an in-depth analysis of outstanding judicial needs and evaluation of the effectiveness of past efforts to strengthen domestic capacity to prosecute war crimes cases; cf. ICTY, 13 November 2009, p. 21f.

1238 Cf. ICTY (18 May 2009), *Completion Strategy Report May 2009*, provided to the United Nations Security Council, S/2009/252, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2009_en.pdf (last accessed 15/08/2019), p. 15.

1239 Cf. Michaeli, 2011b, p. 57; see also: ICTY OTP, 17 May 2016, p. 18.

1240 ICTY (14 December 2005), *Completion Strategy Report December 2005*, provided to the United Nations Security Council, S/2005/781, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_14december2005_en.pdf (last accessed 15/08/2019), p. 9.

1241 Cf. ICTY OTP, 29 November 2017, p. 75; ICTY OTP, 16 November 2011, p. 35.

1242 Cf. ICTY OTP, 16 May 2014, p. 29; ICTY OTP, 23 May 2012, p. 41; ICTY OTP, 23 May 2012, p. 36; ICTY OTP, 16 November 2011, p. 35; ICTY OTP, 14 May 2008, p. 18.

1243 Cf. ICTY OTP, 16 May 2007, p. 17.

1244 Cf. ICTY OTP, 14 May 2008, p. 18.

school students, nongovernmental organisations (NGOs), etc.[1245] The ICTY has also shared its expertise with judges, prosecutors, and lawyers through organising and participating in numerous training programmes, and study visits – either in The Hague or in the region.[1246] Numerous peer-to-peer meetings took place, and representatives of the Tribunal gave lectures and presentations in the region.[1247]

In addition, the ICTY OTP drafted several legacy papers and manuals on different topics, such as best practices regarding the prosecution of sexual violence crimes,[1248] tracking fugitives, the use of intercepted conversations as evidence, the development and progress of investigations through the use of multidisciplinary teams of experts, and on other issues.[1249] Together with prosecutors from the Special Court for Sierra Leone, the Special Tribunal of Lebanon, and the Extraordinary Chambers in the Courts of Cambodia, the Office published a Compendium of Lessons Learned and Suggested Practices with the aim of sharing experiences regarding the prosecution of mass atrocities, and of sharing insights with other international and national prosecutors.[1250] Earlier, the Tribunal had already

1245 Cf. Michaeli, 2011b, p. 57; see also: ICTY OTP, 17 May 2016, p. 24; ICTY OTP (19 November 2014), *Completion Strategy Report November 2014*, provided to the United Nations Security Council, S/2014/827, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_19nov2014_en.pdf (last accessed 15/08/2019), p. 36; ICTY OTP, 16 May 2014, p. 29; ICTY OTP, 18 November 2013, p. 30; ICTY OTP, 23 May 2012, p. 36; ICTY OTP, 16 November 2011, p. 35; ICTY OTP, 18 May 2011, p. 43; ICTY OTP, 19 November 2010, p. 41; ICTY (1 June 2010), *Completion Strategy Report June 2010*, provided to the United Nations Security Council, S/2010/270, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_01june2010_en.pdf (last accessed 15/08/2019), p. 27; ICTY OTP, 16 May 2007, p. 17; ICTY OTP (12 November 2007), *Completion Strategy Report November 2007*, provided to the United Nations Security Council, S/2007/663, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_12november2007_en.pdf (last accessed 14/08/2019), p. 18; ICTY (16 May 2007), *Completion Strategy Report May 2007*, provided to the United Nations Security Council, S/2007/283, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16may2007_en.pdf (last accessed 14/08/2019), p. 9; ICTY (16 November 2006), *Completion Strategy Report November 2006*, provided to the United Nations Security Council, S/2006/898, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_15december2006_en.pdf (last accessed 15/08/2019), p. 6; ICTY (31 May 2006), *Completion Strategy Report May 2006*, provided to the United Nations Security Council, S/2006/353, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_31may2006_en.pdf (last accessed 15/08/2019), p. 12f.

1246 Cf. OSCE Mission to Serbia, 2015, p. 29; ICTY, 24 November 2008, p. 11; ICTY, 31 May 2006, p. 13; ICTY, 14 December 2005, p. 8; ICTY, 25 May 2005, p. 3.

1247 Cf. ICTY, 16 November 2011, p. 20; ICTY (18 May 2011), *Completion Strategy Report May 2011*, provided to the United Nations Security Council, S/2011/316, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2011_en.pdf (last accessed 14/08/2019), p. 26; ICTY (19 November 2010), *Completion Strategy Report November 2010*, provided to the United Nations Security Council, S/2010/589, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_19nov2010_en.pdf (last accessed 15/08/2019), p. 25; ICTY, 14 December 2005, p. 9.

1248 See also: ICTY OTP, 19 November 2012, p. 32.

1249 Cf. ICTY OTP, 16 May 2014, p. 28.

1250 Cf. ICTY OTP, 23 May 2013, p. 33.

published a comprehensive guide on its "developed practices", including operational procedures in areas such as investigations, judgment drafting, management of the Detention Unit, and legal aid policies.[1251]

Also seen as a capacity building initiative was the ICTY's project to translate designated ICTY proceedings and the Appeals Chamber's Case Law Research tool into local languages, and to train local professionals on how to access and search the ICTY's records.[1252]

Capacity building was mostly for judges, prosecutors, defence counsel,[1253] other judicial staff or students,[1254] witness support staff,[1255] or even security guards,[1256] but also for journalists (to acquire skills for reporting on war crimes trials at the ICTY and local courts),[1257] as well as for information technology staff from the region (on the ICTY's delay broadcast system or on access to ICTY documents and the exchange of documents between the domestic war crimes departments and the Tribunal).[1258]

Most capacity building initiatives were geared towards practitioners from Bosnia and Herzegovina, Croatia, and Serbia, but there were also activities for Kosovo or Macedonia.[1259] In BiH, most ICTY efforts were focused on the SCBiH, and not the entity/district courts,[1260] creating what many perceived as "double standards for justice" in BiH.[1261]

Topics that were addressed included the work and functioning of the ICTY,[1262] the use and admissibility of evidence between courts,[1263] the application of substantive and procedural criminal law, the collection and use of evidence,[1264] investigative techniques and analysis, prosecutorial strategy, building a case and case management, witness protection and support,[1265] trial efficiency, drafting judgments, researching international humanitarian law and ICTY jurisprudence,[1266] cooperation between jurisdictions for access to confidential materials,[1267] and many more.

1251 Cf. ICTY & UNICRI (2009), *ICTY Manual on Developed Practices*, Turin, http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (last accessed 12/09/2019).
1252 Cf. ICTY, 19 November 2010, p. 24f.
1253 Cf. ICTY, 12 November 2007, p. 10; ICTY, 16 November 2006, p. 6; ICTY, 31 May 2006, p. 13.
1254 Cf. ICTY, 12 November 2007, p. 10.
1255 Cf. ICTY, 24 November 2008, p. 11.
1256 Cf. ICTY, 24 November 2008, p. 11.
1257 Cf. ICTY, 31 May 2006, p. 13.
1258 Cf. ICTY, 14 December 2005, p. 8f.
1259 Cf. ICTY, 12 November 2007, p. 10; ICTY, 16 May 2007, p. 9.
1260 Cf. Kirs, 2011, p. 412f.
1261 Cf. Orentlicher, 2018, p. 380; however, other international organisations have been more active in the entities; cf. Orentlicher, 2018, p. 381.
1262 Cf. ICTY, 14 December 2005, p. 8.
1263 Cf. ICTY, 16 May 2007, p. 9.
1264 Cf. ICTY, 14 December 2005, p. 8.
1265 Cf. Weill & Jovanović, 2012, p. 252.
1266 Cf. ICTY, 12 November 2007, p. 10.
1267 Cf. ICTY, 16 May 2007, p. 9.

One important component of the ICTY OTP's capacity building efforts was the Visiting Young Professionals Programme, initiated in 2007.[1268] The idea was to

> "invest in the education and training of young legal professionals from the former Yugoslavia with a special interest in working on war crimes cases and by doing so, to invest in the future capacity of the countries in the former Yugoslavia to deal effectively with complex war crimes cases."[1269]

Through internships at the ICTY OTP, young legal professionals were given the opportunity to assist the Tribunal in basic case work involving evidentiary as well as legal matters (e.g. preparing examinations-in-chief and cross-examinations, drafting motions and briefs, conducting legal research, preparing memos, drawing up minutes and correspondence, reviewing and preparing evidence for trial),[1270] and to attend lectures and presentations on various topics related to the work of the OTP and the ICTY in general. Participants have praised the programme for improving their knowledge of international criminal law and their professional skills. In addition, being exposed to ICTY proceedings provided a crucial perspective on their own countries' experiences.[1271] An incidental benefit of the programme was that the young lawyers were able to see that the Tribunal was just a normally functioning institution, which did not receive instructions from the Americans or whomever, and that people were doing their best to serve justice.[1272] That way, they learned by doing. Over a hundred young professionals completed their five-month internships (roughly one third coming from BiH, one third from Serbia, and one third from Croatia).[1273] The downside of the programme was that there was no guarantee that its participants would be placed in war crimes related work after returning to their home countries.[1274] In many cases, this did happen, however.[1275] All assistant prosecutors and investigators, as well as one deputy war crimes prosecutor employed at the Serbian Office of the War Crimes Prosecutor in 2016, participated in the ICTY's internship programme.[1276] Many SCBiH staff members also completed the internship, who were often already

1268 Cf. ICTY, The Outreach Programme Welcomes Interns from the Former Yugoslavia, Press release 25 February 2011, http://www.icty.org/?q=en/press/outreach-programme-welcomes-interns-former-yugoslavia (last accessed 12/09/2019); see also: ICTY OTP, 1 June 2010, p. 39.

1269 Cf. ICTY, Assessing the Legacy of the ICTY – Background Paper, http://www.icty.org/en/features/legacy-conferences/international-conference-2010/background-paper (last accessed 12/09/2019).

1270 Cf. ICTY OTP, 1 June 2010, p. 39.

1271 Cf. Orentlicher, 2018, p. 366.

1272 ICTY Prosecutor Brammertz interviewed in: Orentlicher, 2018, p. 367.

1273 Cf. ICTY OTP, 29 November 2017, p. 80.

1274 Cf. Orentlicher, 2018, p. 367.

1275 Cf. Orentlicher, 2018, p. 405.

1276 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.

employed by the State Court, and returned to it afterwards.[1277] The Visiting Young Professionals Programme came to an end in 2016.[1278]

In Serbia, the NGO Youth Initiative for Human Rights developed a similar internship programme for young professionals from Serbia, Montenegro and Kosovo. This programme allowed interns to spend three to eight months at the ICTY, followed by a two to three-month internship at a national war crimes court or prosecutor's office, or at an NGO that works on war crimes issues.[1279]

While cooperation was always closer with Bosnia and Herzegovina than with Serbia,[1280] capacity building was also focused mostly on BiH. First, as pointed out earlier,[1281] since the very beginning of the Tribunal's existence, Bosnia and Herzegovina was more cooperative. This made establishing close ties much easier. This was not so much the case with Serbia, which was generally less willing to cooperate with the ICTY. In addition, daily contact between The Hague and Sarajevo was much more necessary than with Belgrade, as most of the ICTY's own cases related to crimes committed in BiH – whose adjudication required access to crime scenes, witness, or documents. Lastly, as the Tribunal had transferred most of its Rule 11*bis* cases to BiH and was not eager to take them back (as the very purpose of those transfers was to reduce the ICTY's workload), it undertook a variety of initiatives to make sure that they would be handled properly at the domestic level.[1282] It therefore made sense that the Tribunal's capacity building efforts were also directed mostly at Bosnia and Herzegovina.[1283]

1277 Cf. Kirs, 2011, p. 406.

1278 Cf. ICTY OTP, 17 November 2016, p. 30.

1279 Cf. Orentlicher, 2018, p. 405.

1280 See sections 4.2-4.5 above.

1281 See section 4.2.

1282 The fact that capacity building was first geared towards keeping Rule 11*bis* cases in the region, and later pursued more general capacity strengthening goals is evidenced by the reporting of the ICTY Prosecutor over the years. See for instance: ICTY OTP, 24 May 2004, p. 44; ICTY OTP, 25 May 2005, p. 10; ICTY OTP, 14 May 2008, p. 18; ICTY OTP (18 May 2009), *Completion Strategy Report May 2009*, provided to the United Nations Security Council, S/2009/252, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2009_en.pdf (last accessed 15/08/2019), p. 38; ICTY OTP, 18 May 2011, p. 42; ICTY OTP, 23 May 2012, p. 35; ICTY OTP, 19 November 2012, p. 29; ICTY OTP, 23 May 2013, p. 29; ICTY OTP, 18 November 2013, p. 25; ICTY OTP, 16 May 2014, p. 23 and 27; ICTY OTP, 19 November 2014, p. 29 and 34; ICTY OTP (15 May 2015), *Completion Strategy Report May 2015*, provided to the United Nations Security Council, S/2015/342, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_15may2015_en.pdf (last accessed 15/08/2019), p. 20 and 26; ICTY OTP (16 November 2015), *Completion Strategy Report November 2015*, provided to the United Nations Security Council, S/2015/874, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/151116_icty_progress_report_en.pdf (last accessed 15/08/2019), p. 19; ICTY OTP, 17 May 2016, p. 18.

1283 By way of example, see the War Crimes Justice Project, a capacity building programme implemented in cooperation with the OSCE. See, among others, the project's calendar of activities: eleven out of twelve initiatives related to Bosnia and Herzegovina; cf. OSCE, War Crimes Justice Project – Calender of activities, http://www.icty.org/x/file/Outreach/capacity_building/wcjp_activity_calendar.pdf (last accessed 15/08/2019).

There is another reason for this focus on BiH: due to budgetary constraints and although the Tribunal's activities were numerous, they remained sporadic and of course, as a criminal court, the ICTY could not open a training centre for domestic legal practitioners. Instead, the OSCE, United Nations Development Programme, International Committee of the Red Cross, the EU Commission, or the Council of Europe, and other organisations have led the efforts to provide training and related programmes to domestic jurists in BiH. The ICTY in one way or the other participated in most of them.[1284] The Tribunal's strength, on the other hand, was capacity building through collaboration on specific cases – which is anyhow seen as more effective than general discussions aimed at sharing experiences.[1285] Hence, the greater impact on Bosnia and Herzegovina than on Serbia.

In addition, as former and current employees of the OSCE Mission to Serbia (the most active international organisation in terms of capacity building in war crimes matters in Serbia) pointed out, staff members of the Serbian domestic war crimes institutions are generally reluctant to participate in the Mission's training programmes or initiatives to bring together domestic practitioners with ICTY representatives. The exception being judges from the Court of Appeal in Belgrade, who are – according to my two interviewees – those who need it the least.[1286] Indeed, none of the judges at the Higher Court Belgrade that I spoke with had ever had any direct contact with the ICTY, let alone participated in capacity building programmes. When asked for reasons, they pointed at their own experience and professionalism.[1287]

1284 Cf. Orentlicher, 2018, p. 365; see also: ICTY OTP, 23 May 2012, p. 36; ICTY OTP, 14 May 2008, p. 18. As Orentlicher notes, the ICTY's participation did not always enhance those programmes. At times, the nature of its engagement exacerbated local perceptions of The Hague arrogance. For instance, in one training organised by and for SCBiH judges, the ICTY sent legal officers as lecturers, which was perceived as a "real insult"; cf. Orentlicher, 2018, p. 365.

1285 Cf. Chehtman, 2011a, p. 553

1286 Cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1287 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; contrary to my impressions, Orentlicher reports that also for Serbia, the ICTY's capacity building initiatives were among the most important elements of the Tribunal's legacy. Serbian judges, prosecutors, and defence counsel have participated in a myriad of training programmes or peer-to-peer meetings, and some of these meetings also related to similar or common cases; cf. Orentlicher, 2018, p. 404.

5 Appraisal of Domestic War Crimes Cases

5.1 Numbers of War Crimes Cases

It is extremely difficult to obtain reliable numbers on ongoing or completed war crimes prosecutions and trials. Most sources I consulted give differing accounts, for no obvious reasons.

According to the OSCE Mission to Bosnia and Herzegovina, Bosnian war crimes institutions (including cantonal/district courts) had dealt with 473 war crimes cases by December 2017.[1288] According to the State Court of Bosnia and Herzegovina, they finalised 205 cases between 2005 and 2018, having convicted 223 individuals and acquitted 106.[1289] The most recent analysis dating from December 2018, conducted by the Balkan Investigative Reporting Network (BIRN), claims that during the course of the year 2018, the Bosnian war crimes prosecutor's office charged 73 people, which is twice as many as in 2017 – they were indicted in 22 separate cases.[1290] A total of 28 prosecutors dealt with these cases, but some of them failed to file a single indictment in 2018.[1291] I could not find statistics on the ethnicity of defendants, but according to SCBiH judges, members of all ethnic groups have been prosecuted at the state-level.[1292]

In Serbia, in March 2018, according to BIRN, 53 defendants stood trial in 19 cases before the Higher Court Belgrade and the Appeals Court in Belgrade. A total of 42 cases had been completed, with 72 people convicted and 43 acquitted.[1293] The account of the OSCE Mission to Serbia states that by 2015, less than three investigations per year resulted in trials. Thus, on average, each prosecutor generated one new investigation resulting in one trial every three years. This number includes investigations transferred from the ICTY, BiH, or Croatia, which were nearly completed and then brought to trial in Belgrade.[1294] In 2016, there were seven indictments, each against a single suspect.[1295] Institutions that monitor Serbian war crimes trials have been increasingly and uniformly troubled by the small number of cases prosecuted relative to the large number of potential war crimes

1288 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 1.
1289 Cf. Sud Bosne i Hercegovine, Statistika – Odjel I, www.sudbih.gov.ba/files/docs/statistika/Statistika%202018/Zavrsna%202018/Statistika%20web%20Odjel%20I%20bos%20po%20spolu.pdf (last accessed 15/08/2019).
1290 Cf. M. Tausan (28 December 2018), Some Bosnian Prosecutors File No War Indictments in 2018, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/12/28/some-bosnian-prosecutors-file-no-war-indictments-in-2018-12-28-2018-1/ (last accessed 15/08/2019).
1291 Cf. Tausan, Balkan Investigative Reporting Network, 28 December 2018.
1292 Cf. interview with SCBiH judge, Sarajevo, 1 February 2017, I-19.
1293 Cf. Rudic, Balkan Investigative Reporting Network, 19 March 2018.
1294 Cf. OSCE Mission to Serbia, 2015, p. 40.
1295 Cf. Orentlicher, 2018, p. 410.

suspects subject to Serbia's jurisdiction.[1296] Nevertheless, what deserves to be mentioned is that most trials in Serbia were held against individuals of Serb ethnicity.[1297]

The number of crimes adjudicated in BiH and in Serbia are not necessarily comparable, as the capacity in BiH is much greater than in Serbia. However, as Ivanišević noted, the contrast is so stark that it can almost not be explained by the different circumstances in which trials take place.[1298]

5.2 Challenges and Problems

Observers' assessments of the work of Serbian and Bosnian war crimes institutions have generally been positive. They have often been cited as models for other post-conflict countries.[1299] Judges and prosecutors have been widely praised for their independence, impartiality, professionalism, and respect for the rights of the victims and suspects,[1300] and for handling cases "generally in line with international law and standards"[1301]. The institutions in BiH have been particularly hailed for their approach towards war crimes cases involving sexual violence, due to steadily increasing numbers of sexual violence cases and due to qualitative improvements in the judicial and prosecutorial approach – making BiH one of the countries with the most advanced case law related to sexual violence in the world.[1302]

Nevertheless, the war crimes prosecutions and trials in the region have not been an unqualified success. On the contrary: despite its accomplishments, when compared with the huge task, many observers believe that there has been too little progress.[1303] Particularly in Serbia, comments have therefore gone "[f]rom [u]nqualified [p]raise to [d]eserved [c]riticism"[1304]. The reasons for this are manifold. Regular (comprehensive) appraisals

1296 Cf. Orentlicher, 2018, p. 409.
1297 Cf. Orentlicher, 2018, p. 411; OSCE Mission to Serbia, 2015, p. 10 and 15.
1298 Cf. Ivanišević, 2007, p. 5.
1299 Cf. Orentlicher, 2018, p. 324; labelled as "the best in the region"; cf. Ostojić, 2014, p. 184.
1300 Cf. OSCE Mission to Bosnia and Herzegovina, September 2018, p. 5; ICTY OTP, 16 November 2015, p. 19; Ostojić, 2014, p. 184; Ivanišević, 2007, p. 6; T. Hammarberg, Commissioner for Human Rights of the Council of Europe (20 February 2008), *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Bosnia and Herzegovina 4-11 June 2007*, CommDH(2008)1, Strasbourg, https://rm.coe.int/16806db72f (last accessed 15/08/2019), p. 6; ICTY OTP, 12 November 2007, p. 17; ICTY, 16 May 2007, p. 8; ICTY OTP, 16 May 2007, p. 16; ICTY, 16 November 2006, p. 5f.; ICTY OTP, 25 May 2005, p. 10.
1301 OSCE Mission to Bosnia and Herzegovina, September 2018, p. 1.
1302 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 5f.
1303 See for instance: ICTY OTP, 17 May 2016, p. 18; ICTY OTP, 16 November 2015, p. 19; ICTY OTP, 15 May 2015, p. 20; ICTY OTP, 19 November 2014, p. 30.
1304 Ivanišević, 2007, p. 16.

regarding the progress of war crimes proceedings have been given by others.[1305] A few factors will nevertheless be highlighted in the following section, without the aim of being comprehensive.

5.2.1 Lack of Will

In both Serbia and BiH, the specialised war crimes institutions have operated – and currently operate – under particularly difficult circumstances. One of the main problems in both countries has been a lack of political will to address war crimes. At times, the lack of political backing turned into outright discreditation and attacks.[1306] Bosnian war crimes prosecutor Ibro Bulić deplores the

> "lack of political support in certain circles for the prosecution of war crimes, which manifests itself in campaigns attacking judicial institutions,[1307] interfering

1305 See, for instance, the biannual completion strategy reports of the ICTY and the annual progress reports of the ICTY and the MICT (each, both from the Tribunal President and the Chief Prosecutor), which always contain a section about the progress of domestic war crimes cases; see http://www.icty.org/en/documents/completion-strategy-and-mict (last accessed 15/08/2019) (for the ICTY completion strategy reports), http://www.icty.org/en/documents/annual-reports (last accessed 15/08/2019) (for the ICTY annual reports), and http://www.irmct.org/en/basic-documents/reports (last accessed 15/08/2019) (for the MICT annual reports). Apart from that, the EU Commission's progress reports on Serbia (https://ec.europa.eu/neighbourhood-enlargement/news_corner/key-documents_en?f%5B0%5D=field_file_country%3A108 (last accessed 15/08/2019)) and its reports on Bosnia (https://ec.europa.eu/neighbourhood-enlargement/news_corner/key-documents_en?f%5B0%5D=field_file_country%3A75 (last accessed 15/08/2019)) often contain sections on domestic war crimes cases. The OSCE Missions in BiH and Serbia regularly report on progress or selected aspects related to war crimes adjudication (see for the OSCE's publications: https://www.osce.org/resources/publications (last accessed 15/08/2019)). The Commissioner for Human Rights also reports on war crimes prosecutions and trials in her country monitoring (for BiH: https://www.coe.int/de/web/commissioner/country-monitoring/bosnia-and-herzegovina (last accessed 15/08/2019); for Serbia: https://www.coe.int/de/web/commissioner/country-monitoring/serbia (last accessed 15/08/2019)). For Serbia, the Humanitarian Law Center publishes regular evaluations of domestic war crimes trials (http://www.hlc-rdc.org/?cat=291&lang=de (last accessed 15/08/2019)). The Belgrade Centre for Human Rights' *Human Rights in Serbia* generally contain a section on domestic war crimes prosecutions and trials (http://www.bgcentar.org.rs/bgcentar/eng-lat/publikacije/izvestaji-o-stanju-ljudskih-prava-3/ (last accessed 15/08/2019)).

1306 Cf. Balkan Investigative Reporting Network (2019), *After the ICTY: Accountability, Truth and Justice in the Former Yugoslavia*, www.birn.eu.com/wp-content/uploads/2018/12/After-the-ICTY-Report-2018.pdf (last accessed 26/09/2019), p. 9f.; Ivanišević, 2007, p. 2; European Commission (8 November 2006b), *Commission Staff Working Document: Serbia 2006 Progress Report*, COM (2006) 649 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/nov/ sr_sec_1389_en.pdf (last accessed 15/08/2019), p. 16.

1307 See also T. Hammarberg, Commissioner for Human Rights of the Council of Europe (29 March 2011), *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Bosnia and Herzegovina on 27-30 November 2010*, CommDH(2011)11, Strasbourg, https://rm.coe.int/16806db71c (last accessed 15/08/2019), p. 27.

> with the cases and undermining the reform of the judiciary, and in denying war crimes that have been established in final decisions."[1308]

The underlying problem of the lack of political will seems to be twofold: first, ethnic nationalism is still strong in Serbia[1309] (and partly also in Bosnia and Herzegovina, especially in the Republika Srpska), diminishing the general eagerness to address the past.[1310] Second, domestic actors have perceived the domestic war crimes institutions as an extension of the (in certain circles) much-hated ICTY.[1311] In 2011, a survey revealed that almost 50% of Serbian citizens believe that war crimes institutions are not independent, and that no war crimes trials should take place in Serbia after the end of the mandate of the ICTY.[1312]

In Serbia, the legislative and executive branch have seized many opportunities to restrict the OWCP's and war crimes courts' capacities.[1313] Especially the Serbian Ministry of Justice is renowned for its negative views on the Office of the War Crimes Prosecutor. In fact, there has been pressure on the Office not to pursue specific cases (namely, against Serbs),[1314] and to prosecute others.[1315] This was done by reducing the OWCP's budget,[1316] attempting to force Vladimir Vukčević's (the first War Crimes Prosecutor) into early retirement,[1317] and refusal by the Ministry and Parliament to appoint prosecutors.[1318] Members of Parliament have filed espionage and other charges against Vukčević and other deputy war crimes prosecutors.[1319] Furthermore, then President Tomislav Nikolić demonstrably met with a war crimes suspect one day after the OWCP had announced the investigation and

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1308 I. Bulić (6 November 2012). *Dealing with the past beyond the Tribunal - The role of the Mechanism for International Criminal Tribunals (MICT), national judiciaries and non-judicial accountability mechanisms.* Paper presented at the Legacy of the ICTY in the former Yugoslavia, Sarajevo, p. 44.

1309 Cf. Ivanišević, 2007, p. 2.

1310 Cf. Ivanišević, 2007, p. 3.

1311 Cf. Ostojić, 2014, p. 174; the ICTY is hated because it is perceived as anti-Serb; cf. Ivanišević, 2007, p. 3.

1312 Cf. OSCE Mission to Serbia, 2015, p. 10.

1313 Cf. Ostojić, 2014, p. 174.

1314 Cf. Orentlicher, 2018, p. 416.

1315 Cf. Orentlicher, 2018, p. 416; Humanitarian Law Center (17 May 2017), On the occasion of the election of the Prosecutor for War Crimes of the Republic of Serbia: No discussion on the future of war crimes prosecution, http://www.hlc-rdc.org/?p=33598&lang=de (last accessed 15/08/2019); OSCE Mission to Serbia and Montenegro, October 2003, p. 48.

1316 Cf. K. Todorović (2016), Media Reporting on Crimes in Srebrenica and Indictment of the War Crimes Prosecutor's Office in the Proceedings, In *Analysis of current issues in war crimes proceedings: Collection of papers*, OSCE Mission to Serbia, Belgrade, p. 83-98, http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2016/11/Analiza-ratnih-zlocina-Book-ENG.pdf (last accessed 26/09/2019), p. 97.

1317 Cf. Orentlicher, 2018, p. 417.

1318 Cf. Orentlicher, 2018, p. 415; it would take 1.5 years to elect Vukčević's successor and with Snežana Stanojković a person has been appointed War Crimes Prosecutor whose campaign was based on her promise to prosecute crimes against Serbs; cf. Orentlicher, 2018, p. 418. According to ICTY Prosecutor Brammertz, the whole competition for the position raised concerns as inexperienced candidates had been rated more highly than proven candidates with decades of prosecutorial experience; cf. ICTY OTP, 17 May 2016, p. 23.

1319 Cf. Orentlicher, 2018, p. 416.

awarded him a prize for his contributions to the country. The president also ominously warned Vukčević that "every prosecutor has complete autonomy in Serbia, but no independence"[1320]. Other high-level officials who were suspected of being responsible for war crimes were publicly declared innocent before investigations and trials had been completed.[1321] ICTY convicts, after their return to Serbia, have participated in election campaigns, proving that parties can (again) get an electoral advantage through the support of convicted war criminals.[1322]

In BiH, attacks on domestic war crimes institutions mostly came from Republika Srpska politicians, and specifically from its former President Milorad Dodik.[1323] In 2011, for instance, the RSBiH Parliament voted on his proposal to hold a referendum challenging the existence of the State Court of Bosnia and Herzegovina and the Prosecutor's Office of BiH. According to Dodik, both institutions are biased against Orthodox Serbs.[1324]

Not only political actors have often and long failed to support war crimes institutions – lack of will is also a problem within the police in both countries. The Serbian OWCP has suffered from the police's unwillingness to investigate war crimes,[1325] especially when those implicated are other fellow police officers (which is often the case when it comes to war crimes committed in Kosovo, as the police was employed there as a sort of paramilitary force) or individuals holding prominent positions in the political and economic spheres.[1326]

1320 Orentlicher, 2018, p. 416f.

1321 Cf. ICTY OTP, 15 May 2015, p. 25.

1322 Cf. ICTY OTP, 17 May 2016, p. 23.

1323 Cf. interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.

1324 Cf. Deutsche Welle (16 July 2015), Bosnian Serbs to vote on state court system, https://www.dw.com/en/bosnian-serbs-to-vote-on-state-court-system/a-18589788 (last accessed 15/08/2019).

1325 Cf. European Commission, 8 November 2006b, p. 16; European Commission (9 November 2005), *Serbia and Montenegro: 2005 Progress Report*, COM (2005) 561 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/2005/package/sec_1428_final_progress_report_cs_en.pdf (last accessed 15/08/2019), p. 23.

1326 Cf. Ivanišević, 2007, p. 12; Ivanišević & Trahan, October 2004, p. 3 and 15; much has been written about the problems between the OWCP and the War Crimes Investigation Service or within the WCIS. As mentioned, one of the main challenges was that members of the police had committed many war crimes during the Yugoslav conflicts and now, the OWCP depends on the same police to investigate these crimes; cf. Ivanišević & Trahan, October 2004, p. 15. Furthermore, as mentioned in section 2.2.2, there is no financial incentive to join the WCIS, despite the risks that come with the job of investigating colleagues and tracking down ICTY fugitives; cf. Ostojić, 2014, p. 176; Ivanišević, 2007, p. 12. Above all, in 2006, Slobodan Borisavljević was appointed as head of the WCIS (who had been Deputy Chief of the Public Security Department under Milošević). Considering his position, he must have known about war crimes – his superior (Đorđević) was prosecuted for war crimes in Kosovo by the ICTY. He clearly had vested interest in obstructing war crimes investigations. Following ICTY Prosecutor Carla del Ponte's protest, his appointment was reversed; cf. Ostojić, 2014, p. 177. Nevertheless, overall, observers also report a lack of initiative within the police, although taking the initiative instead of waiting for directions of the OWCP is their task; cf. Ivanišević & Trahan, October 2004, p. 16. According to a previous employee of the OSCE Mission to Serbia, "the police is the weakest link" in war crimes prosecutions; cf. Orentlicher, 2018, p. 397. Since 2007, cooperation between the OWCP and the WCIS have improved; cf. European Commission (6 November 2007b), *Commission Staff Working Document: Serbia 2007 Progress Report*, Communication

In BiH, a similar situation unfolds in rural areas where the police is unwilling to investigate crimes against the minority population where the suspects are members of the ethnic majority and may hold positions of influence in the local area.[1327]

Generally speaking, the specialised war crimes institutions in Serbia operate in a socio-political environment that is not conducive to the proper investigation and adjudication of war crimes cases.[1328] The preconditions are not such that police, prosecutors, and judges can carry out their duties independently, and it prevents witnesses from coming forward.[1329] In both BiH and Serbia, war crimes judges and prosecutors need or have needed (either temporarily or permanently) physical protection.[1330] They are frequently threatened, with threatening messages attached to their cars or slashed car tires being popular methods.[1331] For some time, these threats – and the fact that they felt that their careers suffered from working on these cases – meant that Bosnian judges and prosecutors did not want to work on war crimes.[1332]

These conditions obviously have repercussions on the work of the Serbian (and sometimes Bosnian) war crimes institutions. It also seems that at times, these institutions have partly yielded to the political pressure. The OWCP is reported to fear negative reactions from the public if they continued to systematically indict former members of Serbian forces.[1333] As a consequence, it appears that the OWCP pursued cases involving Serbian victims even in the absence of solid evidence:[1334] the vast majority of non-Serbian defendants prosecuted were acquitted because of lack of evidence.[1335] Furthermore, war crimes judges

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from the Commission to the European Parliament and the Council, COM(2007) 663 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/serbia_progress_reports_en.pdf (last accessed 15/08/2019), p. 17; see also: Orentlicher, 2018, p. 397; Ivanišević, 2007, p. 12.

1327 Cf. Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 27; Ivanišević & Trahan, October 2004, p. 16.

1328 Cf. OSCE Mission to Serbia, 2015, p. 10.

1329 Cf. OSCE Mission to Serbia, 2015, p. 23.

1330 Cf. Rüedi, 2015, p. 102; similar: interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52.

1331 Cf. European Commission (5 November 2008), *Commission Staff Working Document: Serbia 2008 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, COM(2008)674, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/press_corner/key-documents/reports_nov_2008/serbia_progress_report_en.pdf (last accessed 15/08/2019), p. 21; Ivanišević & Trahan, October 2004, p. 11 and 17; similar: interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52.

1332 Cf. Rüedi, 2015, p. 102.

1333 Cf. N. Muižnieks, Commissioner for Human Rights of the Council of Europe (8 July 2015), *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Serbia from 16 to 20 March 2015*, CommDH(2015)14, Strasbourg, https://rm.coe.int/16806db7fa (last accessed 15/08/2019), p. 5.

1334 It should be mentioned, however, that observers emphasise that ethnic bias is generally not visible in Serbian war crimes prosecutions. Most trials are conducted against ethnic Serbs. Anyhow, most non-Serb suspects reside outside Serbia and are therefore unreachable for the Serbian war crimes institutions (see also section 5.2.5 below); cf. Ivanišević & Trahan, October 2004, p. 9 and 13.

1335 Cf. OSCE Mission to Serbia, 2015, p. 23.

are suspected of deliberately delaying war crimes proceedings through lengthy periods between hearings, averaging 47 days between hearings in first instance.[1336] In addition, as has been criticised, contrary to the ICTY, the Serbian war crimes courts generally tend to focus exclusively on the specific crimes imputed to the defendants, and do not look at the broader political and historical context.[1337]

While political pressure might occasionally have led to ethnic bias in the prosecution or adjudication of war crimes in Serbia, in BiH, the problem is – according to external observers – only visible at the entity/district level. In BiH, courts were – and remain – dominated by members of the majority ethnic group in the respective region. At the outset, judges were often appointed on ethnic or political grounds.[1338] Today, although all courts are supposed to be staffed in compliance with ethnic quota systems. However, these criteria are not always met as it is difficult to attract candidates from a minority group to come and work in another entity – especially in Republika Srpska.[1339] And thus, at the entity/district level, suspects of the same ethnicity have only rarely been investigated or prosecuted.[1340]

All these factors undermine the legitimacy and credibility of the work of war crimes institutions,[1341] as well as the truth-telling capacity of domestic war crimes trials.[1342]

5.2.2 Lack of Resources

Another significant problem in both Serbia and Bosnia and Herzegovina – partly resulting from the lack of political will – is a lack of resources.[1343]

Considering the caseload that still needs to be handled by the Bosnian authorities, even the decently equipped State Court and Prosecutor's Office would benefit from further staffing.[1344] The main problem, however, lies at the entity/district level, where courts and

1336 Cf. Orentlicher, 2018, p. 408f.; indeed, when I was doing field research in Serbia and BiH, I was struck by the fact that hearings at the SCBiH would generally be adjourned to the next day, and hearings at the Higher Court Belgrade to in several weeks or even months.

1337 Cf. Ostojić, 2014, p. 197.

1338 Cf. S. Popovic (2012). Prosecution of War Crimes in Bosnian Cantonal and District Courts: The Role of the Rule of Law. In E. Kristjánsdóttir, A. Nollkaemper & C. Ryngaert (Eds.), *International Law in Domesitc Courts: Rule of Law Reform in Post-Conflict States* (p. 221-240). Cambridge: Intersentia, p. 225.

1339 Cf. interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1340 Cf. Ivanišević & Trahan, October 2004, p. 2f.; Manuell & Kontić, 2002, p. 341.

1341 Cf. OSCE Mission to Serbia, 2015, p. 23.

1342 Cf. Ostojić, 2014, p. 198.

1343 Cf. Balkan Investigative Reporting Network, 2019, p. 10; Amnesty International (2018), *Amnesty International Report 2017/18: The State of the World's Human Rights*, London, https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF (last accessed 12/09/2019), p. 96; Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 27.

1344 Cf. ICTY OTP, 23 May 2013, p. 30.

prosecutors' offices have very limited resources,[1345] both in terms of staff and equipment.[1346] The problem is so severe that the basic material conditions are affected: some entity/district courts have occasionally been closed in winter due to a lack of heating or office supplies. At the entity/district level, the working conditions are very different from those at the state level, as a result of which the lower-level courts are often unable to carry out complex war crimes proceedings.[1347]

Dreadful conditions also seem to be the norm at Serbia's Office of the War Crimes Prosecutor, where concerns exist regarding staffing,[1348] the training of staff,[1349] as well as regarding offices and equipment.[1350] At times, the budget of the OWCP was so low that they did not have access to basic office supplies such as paper and staples. In those times, the daily operations of the office relied on foreign donations and support from the ICTY.[1351] There is not enough budget to cover the travel expenses of prosecutors who need to travel to BiH, Croatia or Kosovo for investigations. Similarly, the office only has three vehicles available for such trips. To cover such costs, the OWCP relies on financial assistance from the OSCE or embassies.[1352] The staffing with deputy war crimes prosecutors has been unstable, with five deputy prosecutors in 2005,[1353] seven in 2007,[1354] nine in 2010, eight in 2014,[1355] and eleven today.[1356] Legal assistants and support staff are also lacking, with just four assistants, three investigators, and no military analysists or other experts in 2015.[1357] The enhanced role for prosecutors after the adoption of the new Code of Criminal Procedure in 2011[1358] was not backed up with increased resources for the OWCP.[1359] The war crimes department of the Higher Court Belgrade also does not have enough judges

1345 Cf. Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 27.
1346 Cf. Rüedi, 2015, p. 89; ICTY OTP, 18 November 2013, p. 26; ICTY OTP, 23 May 2013, p. 30; Nettelfield, 2010, p. 258.
1347 Cf. Nettelfield, 2010, p. 258.
1348 Cf. OSCE Mission to Serbia, 2015, p. 45f.; Ivanišević, 2007, p. 6.
1349 Cf. European Commission (9 November 2016b), *Commission Staff Working Document: Serbia 2016 Report*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf (last accessed 15/08/2019), p. 57f.; OSCE Mission to Serbia, 2015, p. 45f.; Ivanišević, 2007, p. 15.
1350 Cf. Ivanišević, 2007, p. 16.
1351 Cf. Ostojić, 2014, p. 172.
1352 Cf. Ivanišević, 2007, p. 6.
1353 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 5.
1354 Cf. Ivanišević, 2007, p. 6.
1355 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 5.
1356 See section 2.2.2 above.
1357 Cf. OSCE Mission to Serbia, 2015, p. 37.
1358 See Chapter 6.
1359 Cf. OSCE Mission to Serbia, 2015, p. 46.

and staff.[1360] Furthermore, there are not enough offices and courtrooms in the building of the Higher Court Belgrade.[1361]

Also in Serbia, the caseload is high, but the capacities are limited,[1362] which renders an increase in efficiency (necessary to handle the caseload) impossible.[1363]

5.2.3 Lack of Competence

The lack of material resources and staff is exacerbated by the lack of expertise and skills that are vital for prosecuting and adjudicating war crimes.

Observers note a lack of knowledge of international criminal law and international humanitarian law, and of the necessary skills related to investigating, prosecuting, and adjudicating war crimes, including, for instance, witness protection and support. Problems exist in both Serbia and BiH,[1364] mainly at the entity/district level.[1365]

In both countries, judges and prosecutors have therefore often had (and still have) difficulties in presenting and evaluating evidence that supports certain theories of participation[1366] or in applying the correct international standards of criminal law and humanitarian law,[1367] resulting in deficiencies of fairness and impartiality of the legal process,[1368] or inconsistent outcomes.[1369]

In the beginning, a distinct problem was the lack of experience, which is understandable and to be expected, as legal practitioners in most countries do not and cannot have experience in dealing with war crimes. During the starting phase of the Serbian war crimes institutions, for instance, only the Chief War Crimes Prosecutor Vukčević had experience in prosecuting war crimes (albeit only from a single case), while the deputy prosecutors

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1360 Cf. Ivanišević, 2007, p. 15.

1361 Cf. Ivanišević, 2007, p. 16.

1362 See for instance: European Commission (14 October 2009), *Commission Staff Working Document: Serbia 2009 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, COM(2009) 533, Brussels, http://europa.rs/upload/documents/key_documents/2009/sr_rapport_2009_en.pdf (last accessed 15/08/2019), p. 20; European Commission, 5 November 2008, p. 21; European Commission, 6 November 2007b, p. 17.

1363 Cf. European Commission, 9 November 2016b, p. 57f.

1364 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 5; Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 5f.; Rüedi, 2015, p. 89-90; Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 27; Ivanišević, 2007, p. 5.

1365 Cf. Manuell & Kontić, 2002, p. 341.

1366 Cf. Ivanišević, 2007, p. 11; Ivanišević & Trahan, October 2004, p. 14.

1367 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 5f.; OSCE Mission to Serbia, 2015, p. 11.

1368 Cf. Rüedi, 2015, p. 108; OSCE Mission to Serbia, 2015, p. 9 and 11; ICTY OTP, 24 May 2004, p. 46.

1369 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 5; OSCE Mission to Serbia, 2015, p. 9; Popovic, 2012, p. 236f.; Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 27.

did not have any.[1370] Likewise, the president of the war crimes department of the Belgrade District Court Siniša Važić had adjudicated only a single war crimes trial in the past. The other judges had merely attended seminars on international humanitarian law organised by the OSCE, the United Nations, or the Humanitarian Law Centre.[1371] At the Bosnian State Court, the problem of a lack of experience had been alleviated by way of including foreign jurists, some of whom had experience in adjudicating war crimes, and some of whom at least had experience in dealing with complex criminal cases, related to organised crime for example.

A lack of expertise and experience is also a problem for Serbian defence counsel. As mentioned earlier, no specialised criminal defence support body exists to provide legal assistance to defendants who appear before the war crimes departments of Serbian courts. In addition, defence counsel with Hague experience rarely participate in trials in Belgrade.[1372] In the beginning, this was partly due to the fact that they had ongoing commitments to the ICTY.[1373] Today, many of them are frustrated with the international criminal justice system,[1374] or focus on other areas of law because of higher earnings.[1375] This problem is less virulent in Bosnia and Herzegovina as this country has more defence counsel with experience related to the ICTY, and because defence counsel are generally supported by OKO.[1376]

Reportedly, the problem of a lack of expertise continues to persist – especially in Serbia. This development is more worrying than the lack of experience.[1377] Several factors are likely to account for this: first, particularly at the Higher Court Belgrade, the turnover of judges is higher than needed (experienced judges have been replaced by inexperienced judges, even though the formers' mandate had not yet expired),[1378] again resulting in a lack of experience. Furthermore, prosecutors and judges are unwilling to participate in capacity building initiatives,[1379] they refuse to look at international or foreign experience when interpreting domestic law (notably, ICTY case law),[1380] there is insufficient training in international humanitarian law at law schools,[1381] and there is little domestic academic

1370 Cf. Ivanišević, 2007, p. 5.
1371 Cf. Ivanišević, 2007, p. 15.
1372 Cf. Ivanišević, 2007, p. 34.
1373 Cf. Ivanišević, 2007, p. 35.
1374 Cf. interviews with ICTY defence counsel, The Hague, 25 November 2016, I-26; Belgrade, 23 January 2017, I-27; Belgrade, 25 January 2017, I-60.
1375 Cf. Ivanišević, 2007, p. 35; interview with ICTY defence counsel, Belgrade, 25 January 2017, I-60.
1376 See section 2.1.4 above.
1377 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.
1378 Cf. Orentlicher, 2018, p. 408.
1379 See section 4.6 above.
1380 See Chapter 6 for more.
1381 Cf. OSCE Mission to Serbia, 2015, p. 13.

literature on war crimes matters, and no local commentaries on international criminal law and international humanitarian law.[1382]

As a consequence of the lack of expertise, many indictments are – in both countries – returned to the prosecutors, and many first instance judgments are quashed by the higher instances.[1383]

5.2.4 Lack of Regional Cooperation

Another factor hampering the effectiveness and efficiency of domestic war crimes cases is the lack of cooperation between prosecutors' offices and courts of the region, despite steady progress in this area. Regional cooperation is crucial in war crimes cases, as suspects and perpetrators, witnesses and victims, as well as evidence, will often be located outside the country of prosecution.[1384]

The issues underlying the lack of regional cooperation seem to be of political, financial, and technical nature –[1385] which the relevant war crimes institutions from all involved states deplore,[1386] but for which they blame each other.

Through pressure exercised by the 'international community', especially by the EU, several agreements regarding cooperation in war crimes matters could nevertheless be concluded. Regional cooperation began with the so-called Palić process,[1387] a meeting of judicial and state representatives organised by the OSCE Mission to Serbia and Montenegro in 2004 in Palić, Serbia.[1388]

1382 Cf. Kirs, 2011, p. 413; similar in: interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1383 Cf. Martin-Ortega, 2012, p. 624; T. Hammarberg, Commissioner for Human Rights of the Council of Europe (11 March 2009), *Report by the Commissioner for Human Rights Thomas Hammarberg on his visit to Serbia 13-17 October 2008*, CommDH(2009)8, Strasbourg, https://rm.coe.int/16806db70b (last accessed 15/08/2019), p. 9; Ivanišević, 2007, p. 18f.; ICTY OTP, 16 May 2007, p. 16; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; it must be mentioned that some observers have noted the suspicion that in the early years of Serbian war crimes institutions, the Supreme Court of Serbia overturned judgments not for lack of quality, but for political reasons; cf. Ostojić, 2014, p. 181. Reportedly, the Supreme Court was "full of Milošević appointees" and many judges seemed to be affiliated to the Serbian Radical Party that continuously attacks the war crimes institutions; cf. Ostojić, 2014, p. 182; and Ivanišević, 2007, p. 18f. Overturning judgments apparently happened particularly often when the defendant was a Serb; cf. ICTY OTP, 16 May 2007, p. 16. Right now, the Court of Appeal in Belgrade, however, presents a necessary safeguard in preventing unjust verdicts; cf. Pantović, 2016, p. 55; Ostojić, 2014, p. 182.

1384 Cf. Rüedi, 2015, p. 122.

1385 Cf. Rüedi, 2015, p. 123.

1386 The exception might be one of the Serbian war crimes prosecutors I spoke to who claimed that there are "no problems in regional cooperation". To demonstrate this, he once invited me to attend a trial on which he had cooperated with a Bosnian prosecutor, who was also present during the hearing (albeit in the public gallery).

1387 Cf. Vekarić, 2013, p. 46.

1388 Cf. OSCE Mission to Serbia, 2015, p. 18.

Most of them relate to the exchange of evidence or the transfer of cases. In 2005, the Serbian War Crimes Prosecutor signed cooperation agreements with the state prosecutors of Croatia and BiH, simplifying procedures for the exchange of evidence and other data in war crimes prosecutions.[1389] In 2006, Serbia and Croatia signed an agreement on cooperation with regard to the exchange of evidence and the transfer of cases.[1390] Furthermore, a memorandum of understanding was signed in October 2007 between the Serbian special prosecutors and the supreme State prosecutor of Montenegro.[1391] While this had long been planned,[1392] Serbia's and Bosnia and Herzegovina's war crimes prosecutors signed a protocol on cooperation regarding the exchange of information and evidence only in January 2013.[1393]

The main purpose of the agreements on the exchange of evidence or the transfer of cases is to pursue investigations and prosecutions in instances where the suspect does not live in the country where they allegedly committed the crime, but, owing to the legal impediments to extradition, the trial can take place only in the country where the suspect now resides. This would, for instance, enable a prosecutor in Serbia to prosecute individuals who may have committed war crimes in Croatia and then moved to Serbia.[1394]

Cooperation between the three countries has improved since the conclusion of these agreements.[1395] Nevertheless, the implementation of the cooperation agreement is not always flawless. For instance, the agreement between Serbia and BiH provides that prosecutors inform each other of investigations of suspects holding the other country's nationality within three months of signing. Nine months later, the OWCP announced that they had been investigating former Bosnian Army commander Naser Orić since 2011, which ruined the sense of good faith around the protocol of cooperation.[1396]

1389 Cf. Ivanišević, 2007, p. 30.

1390 Cf. European Commission, 6 November 2007b, p. 17.

1391 Cf. European Commission, 5 November 2008, p. 21.

1392 Cf. ICTY OTP, 16 November 2011, p. 33.

1393 Cf. European Commission (16 October 2013b), *Commission Staff Working Document: Serbia 2013 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/brochures/serbia_2013.pdf (last accessed 15/08/2019), p. 11f.; an earlier bold attempt of the Serbian and Bosnian prosecutors to conclude an agreement on the exchange of evidence and establishment of joint investigation teams had been stopped by the BiH High Judicial and Prosecutorial Council. Such an agreement was concluded between the Serbian War Crimes Prosecutor and the cantonal prosecutor in Tuzla in January 2007, but the BiH HJPC also ended that agreement, citing reasons of non-conformity with national legislation or BiH's international obligations; cf. Ivanišević, 2007, p. 31.

1394 Cf. Ivanišević, 2007, p. 30.

1395 Cf. European Commission, 16 October 2013b, p. 11f. and 13; ICTY OTP, 16 May 2014, p. 27; ICTY OTP, 23 May 2013, p. 30; ICTY OTP, 18 May 2011, p. 40; Ivanišević, 2007, p. 30f.

1396 Cf. Orentlicher, 2018, p. 423.

A distinct problem remains that there are no extradition agreements between Serbia, BiH, Croatia and Kosovo, which leads to impunity gaps.[1397] The authorities of BiH, Croatia, and Serbia are extremely reluctant to extradite suspects,[1398] and extradition of their own nationals is prohibited altogether in all three countries –[1399] a situation which exacerbates problems for effective war crimes proceedings, as many suspects hold dual nationality due to the state building history of the Balkan countries.[1400] Their dual citizenship permits them to reside in another country (for instance Serbia), instead of where proceedings against them are initiated (for instance Bosnia and Herzegovina), and to be exempted from extradition.[1401]

In cases where extradition is not an option, the prosecuting authority may decide to assist the state in which the defendant resides in prosecuting the case – either by transferring to that state the evidence collected in a case, or the entire criminal proceeding.[1402] In 2009 and 2010, BiH concluded agreements with Serbia and Croatia respectively, for the mutual recognition and execution of court decisions in criminal matters, which especially concerned the execution of sentences.[1403] The new agreements introduced the possibility of forced transfers of convicted persons to serve a sentence. The agreements were supposed to put an end to the possibility of avoiding imprisonment, particularly for persons holding dual nationality.[1404] However, with some countries of the region, problems of extradition and recognition of sentences continued in the following years. This was partly due to the fact that Serbia activated indictments of war crimes issued by military courts during the conflicts of the 1990s against citizens of Croatia and of Bosnia and Herzegovina, which occasionally

1397 Cf. European Commission, 14 October 2009, p. 20.

1398 Cf. Rüedi, 2015, p. 123; until 2008, the Bosnian CPC even foreclose the extradition in cases of a criminal offence that foresees imprisonment of 10 years or more (former Article 412 (4) BiH CPC). See also: European Commission (9 November 2010), *Commission Staff Working Document: Serbia 2010 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, COM(2010) 660, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf (last accessed 15/08/2019), p. 18; European Commission, 14 October 2009, p. 20.

1399 Article 415 (1) (a) BiH CPC as well as Article 40 BiH of the Law on Mutual Assistance in Criminal Matters, Official Gazette of Bosnia and Herzegovina No. 53/09, Article 9 of the Croatian Constitution, and Articles 1 and 16 of the Law on Mutual Assistance in Criminal Matters, Official Gazette of Serbia No. 20/09 all prohibit extradition of their own nationals (for Croatia with exceptions within the European Union framework of cooperation in criminal matters).

1400 Cf. E. Mackic (11 June 2009), Balkan Prosecutors Act to Ease Dual Citizenship Dilemma, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2009/06/11/balkan-prosecutors-act-to-ease-dual-citizenship-dilemma/ (last accessed 15/08/2019); Ivanišević, 2007, p. 30.

1401 Cf. European Commission, 9 November 2010, p. 20.

1402 Cf. OSCE Mission to Serbia, 2015, p. 31.

1403 Cf. Rüedi, 2015, p. 124f.

1404 Cf. European Commission, 9 November 2010, p. 20.

had a negative impact on relations with these countries.[1405] A review of the 1990s indictments by military courts in the case of Croatia was completed in 2012, and findings were shared with Croatia.[1406]

In 2015, under the auspices of the UN, state prosecutors from BiH, Croatia, and Serbia signed the guidelines for enhancing regional cooperation in war crimes processing, the search for missing persons and the establishment of a coordination mechanism.[1407]

In light of these numerous agreements, cooperation is good on paper, but in practice it is not yet.[1408] Especially the cooperation with Croatia is difficult for BiH institutions, as Croatia does not cooperate in cases where joint criminal enterprise is at stake, since this concept of participation does not exist in Croatian law and practice.[1409] In addition, ever since Croatia became a member of the European Union, and even more so since the ICTY closed in December 2017, the country has become increasingly reluctant to work on war crimes issues generally, but in particular, to cooperate with its neighbours.[1410] Furthermore, there is no cooperation between Serbia and Kosovo, as Serbia does not recognise Kosovo as a sovereign state.[1411]

Several international organisations, including the ICTY, have been particularly active in pressuring for and facilitating regional cooperation through a number of measures.[1412]

1405 Cf. European Commission (12 October 2011b), *Commission Staff Working Paper: Analytical Report*, Communication from the Commission to the European Parliament and the Council, Commission Opinion on Serbia's application for membership of the European Union, COM(2011) 668, Brussels, http://www.europa.rs/upload/Report%202011.pdf (last accessed 15/08/2019), p. 33.

1406 Cf. European Commission (10 October 2012), *Commission Staff Working Document: Serbia 2012 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf (last accessed 15/08/2019), p. 19.

1407 Cf. United Nations in Bosnia and Herzegovina, Guidelines for enhancing regional co-operation in war crimes processing, search for missing persons and establishment of a coordination mechanism, signed in Sarajevo, Sarajevo, 20 April 2015, http://ba.one.un.org/content/unct/bosnia_and_herzegovina/en/home/presscenter/u-sarajevu-potpisane-smjernice-za-unaprijeenje-regionalne-suradn.html (last accessed 16/08/2019); see also: Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 4.

1408 Cf. D. Džidić, BIRN Conference Highlights War Crimes Cooperation Problems, Balkan Investigative Reporting Network, Balkan Transitional Justice, 3 October 2018, https://balkaninsight.com/2018/10/03/birn-conference-highlights-war-crimes-cooperation-problems-10-03-2018/ (last accessed 16/08/2019).

1409 Cf. Džidić, Balkan Investigative Reporting Network, 3 October 2018; E. Mackic (1 October 2018), Poor Cooperation Leaves Balkan War Crime Suspects at Large, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/10/01/poor-cooperation-leaves-balkan-war-crime-suspects-at-large-09-26-2018/ (last accessed 16/08/2019).

1410 Cf. Mackic, Balkan Investigative Reporting Network, 1 October 2018.

1411 Cf. Ivanišević, 2007, p. 33f.; although the OWCP did cooperate with United Nations Mission in Kosovo and EULEX; cf. OSCE Mission to Serbia, 2015, p. 34.

1412 See for instance: ICTY OTP, 29 November 2017, p. 82; ICTY OTP, 18 November 2013, p. 27; ICTY OTP, 19 November 2012, p. 30; ICTY OTP, 16 November 2011, p. 30; ICTY OTP, 18 May 2009, p. 38; ICTY OTP, 24 November 2008, p. 22; ICTY OTP, 31 May 2006, p. 35f.; ICTY OTP (23 November 2004), *Completion*

In Bosnia and Herzegovina, however, the increasing withdrawal of the 'international community' seems to pose a problem for regional cooperation. One war crimes prosecutor, for instance, said to me that he can no longer cooperate with his Serbian colleagues, as the OSCE does not organise the regional cooperation round table anymore.[1413] Apparently, many of the initiatives of international organisations have not been taken up by the locals after they ceased.

In addition, positive trends following the conclusion of cooperation agreements might be reversed due to political tensions between Serbia, Croatia and Bosnia and Herzegovina and because of nationalist pressures that are not conducive to regional cooperation. Another reason for this development is the fact that in the absence of binding obligations, cooperation is viewed as a political rather than a judicial matter.[1414]

The fact that cooperation and the implementation of cooperation agreements is still lacking means that parallel investigations and prosecutions continue to take place,[1415] that no formal framework exists to identify strategic priorities for war crimes prosecutions at the regional level to govern the allocation of cases between jurisdictions,[1416] that war crimes fugitives continue to travel between countries without fearing arrest,[1417] and that countries issue or maintain unknown numbers of international arrest warrants, without necessarily informing the country of nationality or prosecutorial counterparts.[1418]

This is particularly unfortunate as the time available to conduct domestic war crimes prosecutions and trials is running out. In the absence of documentary evidence, witnesses are usually the main source of evidence in these trials – also because the Yugoslav wars took place at a time when photo and video documenting was not yet widely used. However, witnesses and suspects are now – 25 years after the war ended – dying. Having access to those witnesses and suspects, even when they reside in other countries, is therefore a crucial and urgent matter, in order to successfully conduct the remaining war crimes proceedings.[1419]

Strategy Report November 2004, provided to the United Nations Security Council, S/2004/897, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23november2004_en.pdf (last accessed 14/08/2019), p. 26; see also: Vekarić, 2013, p. 49.

1413 Cf. interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.

1414 Cf. ICTY OTP, 17 May 2016, p. 19; A. Vladisavljevic (9 October 2018), Hague Prosecutor: War Crimes Cooperation Deteriorating, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/10/09/hague-prosecutor-asked-croatian-justice-minister-about-war-crimes-processing-10-09-2018/ (last accessed 16/08/2019).

1415 Cf. ICTY OTP, 23 May 2012, p. 34; ICTY OTP, 16 November 2011, p. 33; ICTY OTP, 18 May 2011, p. 40; ICTY OTP, 19 November 2010, p. 40.

1416 Cf. ICTY OTP, 17 May 2016, p. 20.

1417 Cf. ICTY OTP, 16 November 2011, p. 33.

1418 Cf. ICTY OTP, 17 May 2016, p. 19.

1419 Cf. Balkan Investigative Reporting Network, 2019, p. 10; F. Rudic (7 November 2018), Serbian Army Hospitals 'Helping Delay Kosovo War Trial', Balkan Investigative Reporting Network, Balkan Transitional

5.2.5 Lack of Structured Approaches

Proper adjudication of war crimes is also hampered by poor case selection and prosecutorial strategy. The main point of criticism is that prosecutors' offices in the region do not focus on the most serious cases, but have a track record of going after low-level perpetrators and prosecuting crimes that involve few victims.[1420] There is also rarely coordination between – or joinder of – related cases, and there are gaps in accountability for known groups of crimes, notorious events and campaigns of criminal behaviour.[1421]

There are several reasons for this: the first and main explanation is probably the distorted historical narrative, which – as mentioned in section 5.2.1 – hinders prosecutors in investigating the broader context of crimes and in revealing that many crimes were committed pursuant to high-level political or even state policy.[1422] Political pressures might well have been decisive here, too.[1423] Ivanišević notes that security concerns might have played a role as well, as neither the police nor the army have been properly vetted in Serbia.[1424] In addition, the military has long failed to produce documents that may have been necessary to establish Serb commanders' criminal responsibility.[1425]

The second reason, at least according to a few Serbian war crimes prosecutors, might be a questionable understanding of their roles and tasks. When asked for his response to the criticism that the OWCP is not prosecuting high-level perpetrators, a deputy war crimes prosecutor replied that these cases fell under the jurisdiction of the ICTY, whereas lower-level cases would be persued at the domestic level. If the Hague Tribunal had not managed to prosecute all high-level suspects, that would not be his (the Serbian prosecutor's) responsibility.[1426] On the website of the Prosecutor's Office BiH, it is also stated that the office's mandate consists of prosecuting "intermediate and lower-ranked

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Justice, https://balkaninsight.com/2018/11/07/serbian-army-hospitals-helping-delay-kosovo-war-trial-11-07-2018/ (last accessed 16/08/2019).

1420 Cf. Orentlicher, 2018, p. 412; ICTY OTP, 17 May 2016, p. 20; OSCE Mission to Serbia, 2015, p. 12; ICTY OTP, 16 November 2015, p. 21; European Commission (10 October 2015), *Commission Staff Working Document: Serbia 2015 Progress Report*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Enlargement Strategy, COM(2015) 611 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_serbia.pdf (last accessed 16/08/2019), p. 19; ICTY OTP, 15 May 2015, p. 24; Ostojić, 2014, p. 188; ICTY OTP, 19 November 2014, p. 31; European Commission, 16 October 2013b, p. 12; Ivanišević, 2007, p. 8; European Commission, 8 November 2006b, p. 16; Freeman, October 2004, p. 5.

1421 Cf. ICTY OTP, 15 May 2015, p. 21f.; in BiH, the situation of Srebrenica is an exception. This is approached in a very systematic manner; cf. ICTY OTP, 15 May 2015, p. 22.

1422 Cf. Ivanišević, 2007, p. 8 and 10.

1423 Cf. Ostojić, 2014, p. 190; similar: Orentlicher, 2018, p. 413.

1424 Cf. Ivanišević, 2007, p. 8.

1425 Cf. Orentlicher, 2018, p. 413.

1426 Cf. interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52.

suspects"[1427]. In addition, as Ivanišević notes, some prosecutors of the Serbian OWCP first wanted to build up public legitimacy before engaging in more sensitive efforts to bring influential individuals to justice.[1428] Neither the first, nor the second step have happened, however.

The third reason, mostly relevant in BiH, has been quotas, requiring prosecutors to pursue a certain number of cases per year, motivating them to split up their multi-suspect cases with a comprehensive and coherent prosecutorial theory into individual indictments.[1429]

As a fourth reason, the mentioned lack of resources certainly plays a role as well, as pursuing high-level perpetrator and multiple victims cases is more complex and requires more resources than simple cases.[1430]

Lastly, there is simply no strategic approach for the investigation and prosecution of war crimes within the relevant prosecutors' offices, despite the Bosnian and Serbian national war crimes strategies.[1431]

6 Conclusion: Re-Establishing Accountability

As has become evident in section 1 of this Chapter, the ICTY has been instrumental in the establishment of Bosnian and Serbian war crimes institutions. They are the Tribunal's "most important legacy".[1432]

When the ICTY was looking for different measures to implement its completion strategy, one of its ideas was to transfer cases to the domestic courts in the countries of the former Yugoslavia. It anticipated that most cases would be referred to Bosnia and Herzegovina as that would be the country holding territorial jurisdiction and would therefore be best placed to adjudicate these cases. The Tribunal partnered up with the High Representative of BiH and developed a concept that would ultimately confer jurisdiction for war crimes to the newly established State Court of Bosnia and Herzegovina. The court structure that emerged strongly resembled the ICTY's institutional structure. During the first years of the SCBiH's operation, foreigners supported the court and the Prosecutor's Office of BiH. They would be crucial in guaranteeing the independence and integrity of

1427 Cf. Prosecutor's Office of Bosnia and Herzegovina, Legal cooperation – Cooperation with The International Criminal Tribunal For The Former Yugoslavia, http://tuzilastvobih.gov.ba/index.php?opcija=sadrzaj&kat=5&id=12&jezik=e (last accessed 16/08/2019).

1428 Cf. Ivanišević, 2007, p. 8; referring to interview with former OWCP spokesperson; see also: Ostojić, 2014, p. 192.

1429 Cf. Rüedi, 2015, p. 238; ICTY OTP, 19 November 2014, p. 30f.

1430 Cf. interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52; see also: Ostojić, 2014, p. 190f.

1431 Cf. ICTY OTP, 15 May 2015, p. 21; OSCE Mission to Serbia, 2015, p. 48.

1432 Orentlicher, 2018, p. 377.

these institutions, by literally protecting it from outside attacks. This allowed war crimes prosecutions and trials to get started.

There is consensus on the notion that the Tribunal also helped catalyse "a serious, if plainly incomplete, process of judicial reckoning in Serbia, which would not have taken place without the ICTY"[1433].[1434] Undoubtedly, the Tribunal was not as involved in the decision-making process in Serbia as in BiH. And in fact, the motivation to establish Serbian war crimes institutions was partly the anti-Hague sentiment prevailing in Serbia, rather than admiration for the Tribunal. In BiH, the intent of the domestic war crimes proceedings was to continue the good work of the ICTY. In Serbia, the purpose was to reclaim judicial sovereignty over what had been under the jurisdiction of the Tribunal until then, because it had – in the opinion of Serbs – *not* been done well. At the same time, among another layer of the population, the ICTY was regarded as being helpful in creating a more positive attitude towards accountability and the need for trials in general –[1435] leading to more conducive conditions for the establishment of domestic war crimes institutions.

Once up and running, the Bosnian and Serbian war crimes institutions received significant input from The Hague. On the one hand, the ICTY's jurisdictional regime, foreseeing shared competencies with national courts regarding war crimes, was favourable for the cooperation between the international Tribunal and domestic courts. However, the ICTY, and particularly the Office of the Prosecutor, also forced and strengthened cooperation through a number of initiatives. Of course, as soon as domestic institutions started dealing with their first cases, cooperation on common matters became a necessity – for instance in order to protect witnesses who had testified or who were going to testify at both courts. But beyond that, the ICTY also boosted the operation of the Serbian and Bosnian prosecutors' offices and courts, by transferring to them evidence, materials, and even complete cases – including the defendants. At the same time, the ICTY partly acted as a supervisory body that would reclaim jurisdiction if the cases were not dealt with properly at the domestic level. In addition, Tribunal representatives organised and participated in trainings for domestic practitioners that were aimed at addressing the problems on the ground directly. These dynamics have significantly contributed to the capacities of domestic war crimes institutions, and have thereby led to increased effectiveness and efficiency of prosecutions and trials, and to improved competences of legal practitioners. As Orentlicher put it, taking the example of Serbia: "[i]n limited, but meaningful ways it bolstered the professionalism and independence of its Serbian partner"[1436]. Former ICTY Prosecutor Serge Brammertz claims that the national war crimes

1433 Orentlicher, 2018, p. 424.
1434 Cf. Michaeli, 2011b, p. 62.
1435 Cf. Nettelfield, 2010; similar: Swimelar, 2013, p. 201.
1436 Orentlicher, 2018, p. 424.

institutions are now, despite all criticism, in a "much stronger position" than they would have been were it not for the ICTY.[1437]

As will be shown in the next Chapter, the Tribunal also led to domestic institutions adopting laws and practices that emerged with the ICTY, or that it had developed.[1438]

Nevertheless, the ICTY's support for national institutions could not completely prevent or even alleviate the challenges that domestic war crimes institutions faced in Serbia and Bosnia and Herzegovina, ranging from difficult political environments, a lack of resources, a lack of experience, expertise, knowledge and skills, to conditions inhibiting regional cooperation between war crimes institutions in Serbia, Croatia and BiH. In addition, the institutions are criticised for not indicting (enough) high-level perpetrators and not pursuing sufficient high-profile cases, which is partly due to the challenges mentioned above.

This Chapter has demonstrated that an international criminal tribunal, that, on its own, can deal only with a limited number of cases, can still achieve a lot: with a clear strategy and concerted commitment over a certain period of time, it can leverage its work in such a manner that it can trigger domestic prosecutions and increase domestic capacities. Ultimately, by catalysing domestic war crimes proceedings, the ICTY contributed to the re-establishment of the rule of law that collapsed during the wars. Not only does this potentially prevent future crimes and atrocities, but it also provides justice for victims, and can lead to an improved judiciary overall.[1439] As has been reported in this Chapter and as will be further explained in the next Chapters, competences that local jurists have developed in the course of prosecuting and adjudicating war crimes have also "expanded" to other types of crimes and to other courts, for instance in terms of techniques in pursuing complex cases, in terms of respecting ECHR-stipulated human rights, or in terms of witness protection and support for victims.[1440]

1437 Cf. Orentlicher, 2018, p. 376f.

1438 See former president of the Belgrade District Court Siniša Važić who is cited by Orentlicher, saying that "we took a lot of provisions" from the ICTY, and sought to emulate the "skills, knowledge and technical gadgets" of ICTY facilities and techniques. He described the war crimes department as the ICTY's "embryo": "[e]veryone learned from [the ICTY both] as an idea and as know-how"; Orentlicher, May 2008, p. 48. See also: Nettelfield, 2010, p. 255.

1439 Cf. Orentlicher, 2018, p. 381.

1440 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

6 "We Learned That from The Hague"

How the ICTY Contributed to Compliance with International Law and Standards through Impact on Domestic Criminal Law and Practice

As described in the previous Chapter, the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) triggered the establishment of domestic specialised war crimes institutions. In the years that followed, the Tribunal became a role model for these institutions – albeit more for some than for others. Today, the ICTY's traces can be found in codified national criminal law, in the jurisprudence of local war crimes courts, and in the practice of domestic war crimes institutions all over the region of the former Yugoslavia. These changes caused by the ICTY, and the dynamics that led to this impact, will be outlined in this Chapter. It will become clear that the measures taken by the Tribunal to boost the domestic war crimes institutions[1441] were not only useful in order to get their work started and to increase and improve their output. They also allowed the Tribunal to manifest itself as an authority and as a reliable partner vis-à-vis its domestic counterparts. This, in turn, in addition to a few other decisive facts, led to conditions conducive for spreading the law and practices developed by the ICTY.

A somewhat logical influence are the ICTY's footprints in war crimes trials jurisprudence. This is the most visible and tangible impact, which does not only concern the legal interpretation of certain international crimes, but also the facts that were established in trials in The Hague, and subsequently accepted as such in trials in the region.

At the same time, there is a clear response to the novelties introduced through the Tribunal's Statute, and its jurisprudence in the newly adopted criminal codes (CC) in the countries of the former Yugoslavia. This holds true not only for adapted definitions of international crimes, but also for modes of liability. As such, the ICTY has influenced not only the factual outcomes of war crimes trials in Bosnia and Herzegovina and Serbia, but it has also shaped the body of substantive (international) criminal law.

In addition to that, some impact also exists on the procedural aspects of criminal law. Both Bosnia and Herzegovina (BiH) and Serbia have adopted new codes of criminal procedure since the end of the Yugoslav wars. Interestingly, while the Yugoslav criminal procedure was firmly entrenched in a civil law inquisitorial tradition, both countries have moved towards a common law approach of adversarial procedure. Many have claimed that this shift was partly due to the ICTY's model as a mixed system.

1441 See section 4 of Chapter 5.

While this view is contested, it is clear that the Tribunal was a model for innovations in court practice[1442] and for interpreting certain new legal provisions. For instance, many prosecutors and defence counsel learned how to cross-examine a witness through practicing before the Tribunal, or watching its trials' broadcasts.

In the end, some of the innovations that commenced by making and applying international criminal law and by conducting war crimes trials in Serbia and Bosnia and Herzegovina also spilled over to other areas of criminal law or were applied in ordinary criminal trials.

The importance of the ICTY has, however, changed over time and is also not the same in both countries. In fact, the Tribunal's impact on substantive and procedural criminal law, and its interpretation and application, is probably the area where the difference between Bosnia and Herzegovina and Serbia is the most obvious.

There are multiple reasons for these differences. In Bosnia and Herzegovina, international law generally played an important role in the aftermath of the wars. This is most obviously demonstrated by the fact that the country's highest authority is an office of the 'international community'. The Office of the High Representative (OHR) itself is rooted in international law, namely in the Dayton Peace Agreement and BiH's constitution, which was an annex to the DPA. Through the OHR, international law has become an integral part of the Bosnian legal system.[1443] Decades after the war, BiH still counts many international institutions, organisations, and other actors who all – directly or indirectly – influence the country's functioning. When it comes to the reform and application of criminal law, the ICTY was the obvious reference point for these international actors active in Bosnia and Herzegovina.[1444] It had established itself as *the* expert institution in that area. In addition, foreigners who were part of the Bosnian criminal justice system as judges, prosecutors and legal advisors, naturally brought a certain variety into the system, purely by virtue of their diverse backgrounds and knowledge. Some of them had specific knowledge of international (criminal) law through previous experiences. The strong presence of the international community stands in stark contrast to Serbia's isolation in the immediate aftermath of the Yugoslav wars. Until today, not nearly as many institutions are present and active in Serbia as in BiH – and they would not necessarily be welcomed by the Serbian population anyway. This provides another important explanation for differences in the extent to which the ICTY has influenced the development of criminal law in the Yugoslav countries: namely, the attitudes towards the Tribunal and towards foreign or international influence in general. Of course, the rather hostile stance of the Serbian public and of the

1442 The term 'practice' refers to developed routines, procedures, habits by prosecutors, defence counsel, and judges.

1443 The OHR is the institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina (BiH). See also Chapter 5, section 1.

1444 Cf. interview with OHR representative, Sarajevo, 20 November 2018, I-47.

political and intellectual elites towards the ICTY is widely known. However, many influential legal professionals do not have a particularly positive opinion about the Tribunal either. In Bosnia and Herzegovina, the views are more mixed, with many legal practitioners expressing great respect for the ICTY.[1445] My research has shown that even among critics of the ICTY, the willingness to adopt, for instance, certain elements of its jurisprudence, is much stronger in BiH than in Serbia. One of the reasons is probably that adopting solutions proposed by the ICTY is generally more easily accepted in Bosnia and Herzegovina than in Serbia – and there is even a strong movement of civil society and international community actors pushing for precisely that. Its jurisprudence and developed practices are therefore regarded as highly authoritative, and ICTY solutions can be found throughout Bosnian domestic legislation, jurisprudence, and criminal practice.

In addition to that, the Tribunal exerted direct influence on the new developments within the Bosnian and Serbian criminal justice systems, mostly through consultations and capacity building. The initial motivation for engaging with domestic criminal justice systems was to pave the way for referring cases under Rule 11*bis* to them.[1446] Reformed criminal codes and codes of criminal procedure, as well as adopted jurisprudence and practice, were regarded as the basis for "internationally acceptable proceedings"[1447].

What should not be forgotten is that the possibility to adopt solutions developed by another court – even more so when it is a foreign/international court – is also governed by a legal framework. Most importantly, it should be mentioned that the legal systems of the former Yugoslav countries do not know the principle of legal precedent. Thus, there cannot be an automatic takeover of non-national jurisprudence. In fact, judges can only critically reflect on foreign/international solutions through the lens of the national blackletter law.

In the following section, the factors that did (in Bosnia and Herzegovina) or did not (in Serbia) lead to impact will be explained in more detail. Section 2 will then address Bosnian and Serbian substantive (international) criminal law by laying out the relevant sections of the new criminal codes of both countries. In addition, by way of examples related to selected areas, the ICTY's impact on war crimes jurisprudence will be demonstrated. Section 3 is dedicated to procedural law and certain domestic novelties will be traced back to the Tribunal. Section 4 will conclude this Chapter.

1445 This was underlined by virtually all legal practitioners interviewed in Bosnia and Herzegovina, and by many in Serbia, during field research in January and February 2017 and November 2018.

1446 See also Chapter 5, section 1.

1447 Kirs, 2011, p. 401.

1 Explaining Impact: The Role of the ICTY and International Law in Serbia and BiH

1.1 Presence and Absence of the International Community

When it comes BiH's and Serbia's approach to foreign and international influence, particulary to the question whether domestic jurisprudence takes into account international case law, but – for Bosnia and Herzegovina – also as to whether legislation has changed as a result of international influence, one important aspect was the (lack of) exposure to these influences. In BiH, the strong presence of international institutions, and also of international judges and prosecutors within key executive and judicial institutions had several effects. In addition to the State Court of Bosnia and Herzegovina (SCBiH) and the Prosecutor's Office BiH where international judges and prosecutors dealt with both war crimes and organised crimes, international judges were also present in the BiH Constitutional Court.

The first and most visible effect is reflected in the laws imposed by the High Representative. According to its website, the OHR

> "is an ad hoc international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement, that was negotiated in Dayton, Ohio, and signed in Paris on 14 December 1995. The High Representative is working with the people and institutions of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina evolves into a peaceful and viable democracy on course for integration in Euro-Atlantic institutions."[1448]

Due to systematic obstructionism by the political leaders of BiH, two years after its establishment, the Peace Implementation Council augmented the OHR's authority by conferring on it the so-called 'Bonn powers'. In accordance with these competencies, the High Representative had the possibility to remove individuals from public office who are found by the High Representative to be in violation of legal commitments made under the

1448 OHR, General Information, http://www.ohr.int/?page_id=1139 (last accessed 16/08/2019).

Dayton Peace Agreement or the terms for its implementation –[1449] and to impose laws.[1450] The law establishing the SCBiH was imposed following the Bonn powers, and shortly after that, a new criminal code and a new code of criminal procedure (CPC) were likewise imposed.[1451]

It is needless to say that as an "international institution" with extensive powers (which was only opened to domestic staff members in 2002)[1452], the OHR brought all kinds of external influences into Bosnia and Herzegovina.[1453]

However, apart from this very tangible influence of the omnipresent and powerful OHR, various types of international organisations settled in Bosnia and Herzegovina after the war, many of which were active in the judicial sector. Many saw themselves as allies of the ICTY and were committed to supporting it and facilitating its success. This concerns first and foremost various United Nations (UN) bodies, such as the United Nations Development Programme (UNDP), which were very active in BiH. As the ICTY itself is a UN institution, the alliance is not surprising. Another example is the Organisation for Security and Co-operation in Europe (OSCE), which even had formal agreements on cooperation with the ICTY, such as for monitoring the adjudication of Rule 11*bis* cases in Bosnia and Herzegovina.[1454] Both organisations facilitated regular trainings for legal professionals, during which they transferred knowledge from the ICTY on topics such as witness protection and support, but also on legal standards concerning international crimes, or criminal procedure and prosecutorial techniques.[1455] Apart from that, the ICTY itself had a considerable presence in BiH, with one office in Banja Luka (Republika Srpska) and one in Sarajevo.[1456] These international organisations (including the ICTY), were regularly consulted for advice on the topic of reforms of the judiciary. One OHR staff member

1449 Apart from that, between 2002 and 2004, the High Representative made a serious effort to vet the Bosnian judiciary (concerning prosecutors and judges). Commissions were established where judges and prosecutors would assess the performance of their peers. However, "the process was never adequately resourced and ended in failure"; J. Finci (2007). Lustration and Vetting Process in Bosnia and Herzegovina. In V. Dvořáková & A. Milardović (Eds.), *Lustration and Consolidation of Democracy and the Rule of Law in Central Eastern Europe* (p. 217-222). Zagreb: centar za politološka istraživanja, p. 219.

1450 Cf. Orentlicher, 2018, p. 50.

1451 Although they were later also adopted by parliament.

1452 Cf. OHR, General Information, http://www.ohr.int/?page_id=1139 (last accessed 16/08/2019).

1453 To date (August 2019), the High Representatives have been one Swede, two Austrians, one Spaniard, one Brit, one German, and one Slovak.

1454 See Chapter 5, sections 1.3 and 4.4.

1455 Cf. interviews with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17 and Belgrade, 12 November 2018, I-18; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; see Chapter 5, section 4.6.

1456 As long as cases concerning crimes committed in that country/region were ongoing at the ICTY, the Tribunal had offices in Croatia, BiH, Serbia, Kosovo. However, only in BiH it held two offices for a certain period of time.

explained to me that especially during the first years, it was common practice for any new law to be submitted – with a request for comments – to those international organisations present in BiH with expertise in the relevant field. For criminal law, it was the ICTY – both for substantive and procedural questions. The ICTY was seen as a role model in many respects.[1457] In addition, for any legal reform, the OHR would reflect on how this innovation would affect the operation of the Tribunal and its cooperation with it.[1458] That way, the ICTY had considerable direct and indirect influence on judicial reforms in Bosnia and Herzegovina.

This presence of international institutions, including the ICTY, is much weaker in Serbia. There is no High Representative, the ICTY only has one small office in Belgrade, and even the UNDP and OSCE have much smaller representations in Serbia than in BiH – even though they also facilitate trainings for interested legal professionals in Serbia.[1459]

With respect to innovations that were introduced – indirectly or directly – into the national legal system by the ICTY, one Serbian judge commented somewhat cynically:

> "BiH is different in every way. It's a country where every kind of influence exists. What is it, is it a country or an international experiment? I am not saying whether this is good or bad, but it's not a properly sovereign state. They have an international representative and he can say tomorrow that this is law, this is how your court should work. Which they do. […] I think it's much easier to go with any kind of experiment there than here."[1460]

While this certainly is an extreme view, it illustrates the core difference between Serbia and Bosnia and Herzegovina, explaining in part why Bosnian policy and lawmakers, as well as legal professionals, are more open to the Tribunal's influence: due to the fact that outside influence is now very normal in BiH, while it is not in Serbia.[1461]

1457 Also the ICTY saw itself as a role model. Take, for instance, former president Theodor Meron writing: "The ICTY's jurisprudence has given new life and strength to international humanitarian law and establishes an important foundation upon which other criminal tribunals, both international and national, in The Hague and elsewhere, can build as they join in the common mission of bringing the long era of impunity for mass atrocities to an end." Meron also commented that while the Tribunal's contributions to substantive international criminal law are widely acknowledged, the ICTY had also made significant steps to craft a procedural framework for international criminal prosecutions, which is less considered; cf. T. Meron (2004). Procedural Evolution in the ICTY. *Journal of International Criminal Justice, 2*(2), 520-525, p. 520.

1458 Cf. interview with OHR representative, Sarajevo, 20 November 2018, I-47.

1459 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1460 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1461 In fact, at times, this seems to tip over into outright dependence on the 'international community'. Take, for instance, the example already mentioned in Chapter 5, section 5.2.4 of the Bosnian war crimes prosecutor complaining that the Organisation for Security and Co-operation in Europe (OSCE) no longer organises

Concerning the question of incorporating ICTY jurisprudence in the criminal code or applying it within the domestic legal order, for instance, the judge further explained:

> "[…] I am a huge supporter of direct implementation of [international criminal law (]ICL[)] and I am very lonesome in that idea. Almost maybe the only one who openly speaks about that. [...] Maybe there are more, but I am sceptical. But in order from there, to put it as a legal standard, or as a court practice, is a long long way. When you have something where you have international representative who can enact laws, it's much easier. It's much easier than to go through the government, parliament, working groups, etc. It's definitely different. That's why I think they have more possibilities to try to experiment. It's easier, which doesn't mean that I believe that we shouldn't do something about it."

In general terms, it is clear that people, policy makers, decision-makers, and legal practitioners in BiH have been greatly exposed to – and have become used to – international and foreign influence since the Yugoslav wars ended. Naturally, the consequence is that they therefore also more readily accept foreign and international influence on their domestic laws and practices. The same is not true for Serbia, which was – in the aftermath of the wars – quite isolated from the 'international community'.

1.2 International Law in Bosnia and Herzegovina and Serbia

Besides exposure to outside influences, the legal framework and associated traditional approaches towards international law certainly play a role in whether legal professionals are, for instance, open to addressing and incorporating jurisprudence from the ICTY in their domestic cases.

1.2.1 Legal Framework

In this context, it is important to know that Serbia and Bosnia and Herzegovina inherited a system from the pre-war socialist Yugoslavia that was rather conducive to being influenced by international law.[1462]

round tables with other war crimes prosecutors from the region, in order to enhance regional cooperation. He commented that regional cooperation was since then no longer possible. That he could himself continue the initiative did not seem to come to his mind; cf. interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.

1462 Cf. Weill & Jovanović, 2012, p. 264.

Serbia follows the monist approach,[1463] with its constitution stipulating that international treaties and generally accepted rules of international law (the domestic legislative synonym for customary international law) are part of the internal legal order and superior to national laws[1464] although they cannot overrule constitutional provisions.[1465] Human and minority rights guaranteed by the constitution,[1466] as well as international law is furthermore directly applicable by courts, as they are required to adjudicate on the basis of the Constitution, general laws, ratified international treaties and generally accepted rules of international law.[1467] Judges can invoke international law *proprio motu*.[1468] The monist framework is only limited by the constitutional principle of legality (notably the *nullum crimen* and *nulla poena sine lege* principles), requiring that both the crime and the penalty be defined at the time of the commission of the crime.[1469] This excludes the possibility of directly construing a criminal offence on the basis of an international source, if such offence was not previously incorporated in the domestic criminal legislation.[1470]

The Constitution of Bosnia and Herzegovina does not explicitly provide for a monistic or dualistic approach towards international law. However, Articles II and III seem to follow a monistic approach of a unified legal system consisting of international law and national law which apply directly within the national legal system.[1471] Article III (3) (b) foresees that general principles of international law are an integral part of the law of Bosnia and Herzegovina and its entities. While rights and freedoms set forth in the European Convention on Human Rights (ECHR) and its Protocols shall apply directly and have priority over all other law,[1472] many international treaties (such as the Genocide Convention, the Geneva Conventions (GC) and their Additional Protocols) "have a status equal to that

1463 Cf. Ivanović & Lukić, 2015, p. 243f.; Weill & Jovanović, 2012, p. 250 and 264.

1464 Articles 16 (2) and 194 (4) of the Constitution of Serbia.

1465 Cf. Weill & Jovanović, 2012, p. 249; in 2018, the Serbian government had made a proposal for significant amendments of the Constitution. At the time of writing, the Serbian Parliament was still discussing the proposal. According to a war crimes judge, one of the suggested amendments would foresee eliminating customary international law from the sources of law as stipulated in this provision. According to him, the reason for this suggestion was the ICTY: "*Moi, je crois qu'ils ont éliminé la coutume internationale à cause des crimes de guerre. Parce que vous savez que les décisions de la cour de La Haye représentent une coutume internationale. Ils ont dit, 'on ne veut pas cela. Ce ne sera plus une source.'*" ("I think they eliminated customary international law because of the war crimes. Because as you know, the decisions of the court in The Hague are a form of customary international law. They said, 'we don't want this. This won't be a source anymore.'" (my own translation)); interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-13.

1466 Article 18 of the Constitution of Serbia.

1467 Article 142 (2) of the Constitution of Serbia; the 2010 Law on Judges provides for a similar provision in Article 1 (2).

1468 Cf. Weill & Jovanović, 2012, p. 249f.

1469 Article 34 (1) of the Constitution of Serbia.

1470 Cf. Weill & Jovanović, 2012, p. 250.

1471 Cf. Meškić & Samardžić, 2015, p. 112.

1472 Article II (2) of the Constitution of BiH.

of constitutional principles and are directly applied in Bosnia and Herzegovina."[1473] Thus, BiH applies a predominantly monist approach, with a moderate dualistic understanding concerning international law, but in the field of human rights.[1474]

The standing of international law within a national legal order is, arguably, an indicator of a country's openness to international and foreign influence. In the adjudication of war crimes, this question becomes particularly pertinent, as the relevant fields of law – international humanitarian law and international criminal law – have mostly been developed by international courts and tribunals. When it comes to interpreting international crimes, as enshrined in the domestic criminal codes, can – or *should* – the case law of international criminal courts and tribunals (such as the ICTY) guide this interpretation? Legal practitioners in Serbia and Bosnia and Herzegovina have very different answers to that question.[1475]

1.2.2 Customary International Law

One interpretation of the prominent standing of international law in the constitution is that international law is simply a source of law, just like any other source. Hence, if there is a gap in the national law, this gap can be filled by international law norms – either by resorting to ratified treaties, such as the Geneva Conventions, or to customary international law.[1476] As the ICTY identified customary international law as it stood at the time of the commission of the crimes (not *making* the law, but merely *pronouncing* it)[1477], analysing its jurisprudence could be one way of identifying the law with which to fill the gaps within national law. The basis for ICTY jurisprudence must have been the very same legal principles that the Yugoslav constitution – and now the constitutions of Serbia and BiH – declared to be a legal source and directly applicable.[1478]

Those who argue in favour of referencing ICTY jurisprudence have an additional argument. Both the Socialist Federal Republic of Yugoslavia (SFRY) and the Federal Republic of Yugoslavia (FRY) Criminal Code – which is the basis for war crimes prosecutions in Serbia (FRY Criminal Code) and in most Bosnian cantonal and district

1473 Constitutional Court, *Case of Abduladhim Maktouf*, Decision on Admissibility and Merits, AP 1785/06, 30 March 2007, para. 71.

1474 Cf. Meškić & Samardžić, 2015, p. 112f.; as for dualistic elements, see for instance Article IV, which requires the implementation of international agreements by the Parliamentary Assembly.

1475 One of my interviewees even took this as far as claiming that following ICTY jurisprudence was "legally binding on national courts"; cf. interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8.

1476 So explained by Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1477 Cf. Y. Tan (2018). The Identification of Customary Rules in International Criminal Law. *Utrecht Journal of International and European Law, 34*(2), 92-110.

1478 So argued, for instance, in: interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

courts (SFRY Code) –[1479] introduced international law as a source in the respective war crimes articles itself: Article 142 ("War crime against the civilian population"), for instance, begins with the phrase "[w]hoever in violation of rules of international law effective at the time of war, armed conflict or occupation […]". The introduction to Article 144 ("War crime against prisoners of war") states: "[w]hoever, in violation of the rules of international law […]". According to the State Court of Bosnia and Herzegovina, this means first and foremost that the basis for criminal jurisdiction – according to these articles of the Criminal Code – are the Geneva Conventions: in its *Bjelić* case, it explained that "[t]he existence of an element of 'violation of the rules of international law' incorporates the principles of that law [the Geneva Conventions] into both articles [142 and 144]."[1480] It further notes that

> "the obligation to respect the international rules, which include the Geneva Conventions, has a long tradition in the territory of the former Yugoslavia and it was part of domestic legislation long before armed conflicts took place in these territories during the period from 1992 to 1995."[1481]

Many of my interviewees interpret the general reference to "international law" as including an invitation to apply customary international law (one judge called it the "window to customary international law"[1482]). Furthermore, the State Court of Bosnia and Herzegovina held that the domestic criminal law "brings with it as persuasive authority its international legal heritage, as well as the international jurisprudence that interprets and applies it."[1483]

However, according to my interview partners,[1484] not everyone is aware of the possibility of applying international law directly. One Serbian war crimes prosecutor pointed out that "especially in the beginning, it was difficult for Serbian legal practitioners to understand the relationship between international law and Serbian law."[1485]

In addition, as a Serbian judge explained: "In continental systems, [the positition that international law is directly applicable] has a lot of opposition because continentals are – if [something] is not in the written law, it doesn't exist."[1486] A war crimes prosecutor added

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1479 See Chapter 5, section 3.

1480 SCBiH, *Case of Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 6.

1481 SCBiH, *Case of Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 8; see also: Weill & Jovanović, 2012, p. 251.

1482 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1483 Noted with respect to BiH Criminal Code Article 171 (genocide): SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.*, Verdict, X-KR-05/24, First instance, 29 July 2008, p. 53.

1484 For instance: interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

1485 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1486 Interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

that many of his colleagues, as well as judges, "[s]till […] think that only the blackletter law can be applied."[1487] This is precisely the argument that was given to me by Serbian war crimes judges who explained that their mandate was to apply the Yugoslav Criminal Code and nothing more.[1488]

1.2.3 Principle of Legal Precedents

Indeed, it is important to note that traditionally, in Yugoslavia, and also in Serbia and Bosnia and Herzegovina, jurisprudence is not a source of law, and the principle of following legal precedents is unknown in these countries. Hence, judges, and even more so prosecutors and defence counsel, do not have the professional habit to make reference to anything else but domestic legislation. One of my interviewees therefore argued that the lack of proper recognition of ICTY jurisprudence was also due to this tradition of judgment drafting, even in cases where ICTY case law had clearly been used as an inspiration for a particular conclusion.[1489] As will be shown later in this Chapter, this has changed in BiH (in practice, but not in the law).[1490] In Serbia, the only reference to jurisprudence is the one to the case law of the European Court of Human Rights (ECtHR).[1491] Partly, this is due to Article 18 of the Serbian Constitution, which stipulates that human rights are to be interpreted in line with the interpretation provided by international human rights organs in charge of monitoring the implementation of international human rights law – "which the ECtHR definitely is"[1492], as explained by a Serbian transitional justice and international humanitarian law expert. He furthermore states that:

> "[D]efinitely the ECtHR is the highest authority, as recognised in practice. With the ICTY it's not the case. Its legal origin and its legal position towards countries is quite different from the ECtHR and on top of that, there is also a negative sentiment about the ICTY, which […] definitely influences legal practitioners in war crimes cases to be even more hesitant to refer to the ICTY jurisprudence."[1493]

Another interview partner, a judge at the Court of Appeal Belgrade, nevertheless attributed some of the (slow and mild) change in legal culture also to the ICTY:

1487 Interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.
1488 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.
1489 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.
1490 See sections 1.2.4 and 2.2 below.
1491 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.
1492 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.
1493 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

> "[I]t is something that was very difficult to imagine 20 years ago. It was almost impossible to imagine a situation in which you are talking in a domestic decision about any other court's decision. It was considered silly to do. With ICTY and especially with the ECtHR it became more and more possible and more and more used in every day court practice. So, I think it is now something that is considered – yes, maybe not *that* frequent, but it is frequent."[1494]

Ultimately, whether one follows the invitation of the Yugoslav, Serbian and Bosnian constitutions, and of the Yugoslav Criminal Code, to apply international law directly – and therefore also to address ICTY jurisprudence – seems to be a question of mentality.[1495] During my interviews with legal practitioners in Serbia and Bosnia and Herzegovina, I observed clear differences in mentality in approaching international law in general, and of ICTY case law in particular – with Serbia being more sceptical and BiH being more open. There are many reasons for these differences, as will be demonstrated in the next sections (1.2.4, 1.2.5, and 1.3).

1.2.4 International Judges and Prosecutors

The legal mentality and views on international law in general, and towards the ICTY in particular, were also very much influenced by the presence of foreign judges and prosecutors in Bosnia and Herzegovina.[1496] Coming from all over the world, the foreign legal practitioners brought along not only their own legal culture, their experience in either common law or civil law oriented proceedings, their language skills, but also their sometimes diverse legal knowledge, including that of international law. Some of them also had ICTY experience, and most of them came from countries where legal pracitioners had many years of experience of working with ECHR law (such as in Germany, United Kingdom, or Italy).[1497]

While some recount that the initial reason for bringing in foreign judges and prosecutors was to "teach and train"[1498] domestic legal practitioners, all accounts share the view that this was not necessary. In fact, the foreigners worked side by side with their domestic

1494 Interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1495 This opinion was shared by a war crimes prosecutor: cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1496 This position was shared by many of my interlocutors, for instance in: interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

1497 Cf. interview with Constitutional Court of BiH judge, Sarajevo, 7 February 2017, I-5.

1498 Interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

colleagues.[1499] Arguably, exerting influence is even more effective in this collegial model than following a top-down approach,[1500] because it is mutual.[1501]

A former legal advisor in the Prosecutor's Office BiH remembers:

> "When the prosecutor from England would have filed an indictment charging crimes against humanity in a way that had not been done so far, and the court has praised it, then the other colleagues would read that indictment, would start thinking about it and then would come and knock at your door and ask you questions about how you did it and how they can copy it. I think that made a great difference, created a break-through in the culture."[1502]

In addition, not being under the same pressures from their local ethnic or religious communities as domestic prosecutors and judges, the foreigners had more leeway to also take unpopular decisions, including those that would go beyond the confines of the Bosnian legal culture.[1503]

All in all, the foreigners brought legal innovations into the Bosnian criminal justice system that would otherwise have taken much longer to get there. Considering their expertise, and the fact that most of them had no or less of a problem with legal sources in English or French, much of the impetus to use international (case) law came from them. Serbia did not have this kind of catalyst. In Serbia, as mentioned, all actors involved in the

1499 Cf. interviews with SCBiH judges, Sarajevo, 15 November 2018, I-57; Sarajevo, 23 November 2018, I-58; interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43.

1500 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; a former foreign legal advisor in the Bosnian Prosecutor's Office explained: "there were attempts in the beginning to do some sort of formalised training: a group of international prosecutors, judges will have lectures for national colleagues on [joint criminal enterprise (]JCE[)] or war crimes. That kind of initiatives didn't work […]. Because you would always face a certain degree of resistance from professionals who were already in the late years of their careers, sometimes they were senior, more senior than the persons giving the training. […] You need both, traditional training and peer-to-peer contacts. But the problem with traditional trainings is that a person can only learn as much as he/she is motivated and willing to learn. If someone goes to a training just to tick a box, there won't be much effects"; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

1501 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; indeed, according to one foreign judge, the foreigners learned as much from their Bosnian colleagues as did the Bosnians from them; cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

1502 Interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

1503 Cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; interview with foreign POBiH prosecutor, The Hague, 7 December 2016, I-43; see also section 2.1.5 of Chapter 5.

adjudication of war crimes were – and still are – Serbian citizens with little experience in international (humanitarian/criminal) law.[1504]

1.2.5 Attitudes Towards International Law: Lack of Experience, Knowledge, and Access

Whether a system and its actors are open to outside influence is of course also a matter of tradition and of objective factors, such as access to foreign sources or material resources.

Despite the Yugoslav system being relatively open towards international law, lawyers in the former Yugoslavia generally had little knowledge of international law,[1505] and were unaccustomed to invoking international law in their decision making.[1506] Practitioners from both countries report that international law does not play a big role in university curricula,[1507] and that there had been no trials involving international legal sources until war crimes trials began.[1508] One observer also commented that the correct application of international law in domestic proceedings is also a matter of proper methodology, including knowing which sources to consult and having access to them – knowledge that legal practitioners socialised in the Yugoslav system would not necessarily have.[1509] So, there was generally little experience with international law, particulalry with international criminal law and international humanitarian law.[1510]

This anecdote recounted by a Serbian defence counsel at the ICTY perfectly summarises the situation:

> "I had a co-counsel from Serbia who had no experience at the ICTY and he didn't even know English. He called me one night and said '[Name of my interlocutor], I am reading these Geneva Conventions, they are very interesting.' I said: 'Yes.' He said: 'I am thinking tomorrow to introduce them as evidence.' I said: 'Come on, that's part of the law!' That shows how we didn't have

1504 Cf. Ivanišević, 2007, p. 18; one of my interviewees formulated this drastically: "Because all the people who came, for example, to Bosnia or to other tribunals, these are people who know international law. Here [in Serbia], people don't know that, people don't read in English, they don't know anything. Our judges, our prosecutors, I like to joke but it is not a joke, they are like plumbers"; interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25.

1505 Cf. interview with Serbian defence counsel, Belgrade, 25 January 2017, I-16; interview with Bosnian defence counsel, Sarajevo, 16 November 2018, I-54.

1506 Cf. Ivanišević, 2007, p. 18.

1507 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27; interviews with Humanitarian Law Center representatives, Belgrade, 24 January 2017, I-25; Belgrade, 2 November 2018, I-59; interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.

1508 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

1509 Cf. interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17; similar: interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.

1510 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-13.

> experience with international criminal law and international humanitarian law!"[1511]

Consequently, in the beginning, practitioners had a hard time understanding the relationship between international and domestic law, especially in relation to the relevant war crimes articles in the Yugoslav and new domestic criminal codes.[1512] In addition, up until now, international legal sources are still scarcely used in domestic trials,[1513] although their application is increasing, especially that of ECHR law.[1514]

One major obstacle in accessing international legal sources is language. In both countries, many of my interview partners pointed out that – except for the young generation – legal professionals do not speak or read in English or French, which are the original languages of most of these international texts.[1515]

As to the ICTY, while its judgments are nowadays available in the local Yugoslav languages, it took many years until all of them were translated. Still today, not all decisions (e.g. on procedural matters) of the Tribunal are translated and nor are all pieces of evidence, such as transcripts.[1516] At the same time, it is also true that since ICTY judgments are now available on its website, the effort needed to use jurisprudence is minimal.[1517]

However, as one Serbian judge points out, real knowledge of international criminal and humanitarian law can no longer be gained by only studying the ICTY:

> "[T]here are many decisions now in international criminal law, especially with the ICTY, the other tribunal in Arusha and some other *ad hoc* tribunals. In order to find a proper reference, you really need to understand international criminal law as a whole and to follow what is going on there. Then there is now the [International Criminal Court (]ICC[)] which has some useful court case law. So, in that sense, still in this country we do not have… First of all, it's a language problem, a language barrier. In order to use fully international resources, you need to speak, to read, to write a foreign language. If you don't, you need to rely on translations which are still very rare. And even if they do

1511 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.
1512 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.
1513 Cf. interviews with Humanitarian Law Center representatives, Belgrade, 2 November 2018, I-59; Belgrade, 24 January 2017, I-25.
1514 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.
1515 Cf. interviews with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17 and Belgrade, 12 November 2018, I-18; similar: interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25; interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; see also: Ronen, 2011, p. 49.
1516 Cf. interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.
1517 Cf. Ivanišević, 2007, p. 18.

> exist, you can find them sometimes in some publication of some [nongovernmental organisations], etc. But in order to use it frequently, you need to have a database where you can go and look through key words or something which you are looking for. It is very difficult, before internet, before data bases, it was very difficult to find decisions of foreign courts. And most of our judges are still in that age because they don't use English in the proper sense. So, they have to rely on some publication where they are translated here which are not always up to date […]. But yeah, they are finding ways. It would be much easier if there would be – or general knowledge of English among judges, or that most of the decisions were translated. […] On the other hand, it is, yes, it is translated. But, for some judges, especially the older generation, even using the internet is a problem. So, it's for them difficult to find it. But, I think it's becoming better and better."[1518]

As a consequence, a former staff member of the OSCE Mission to Serbia observes that "[s]ometimes judges do not have time to research for jurisprudence. They prefer some digested version." In 2007, the OSCE published a handbook (the *Vodič kroz Haškog Tribunala*)[1519], which is a guide through the Tribunal's jurisprudence. He noticed that the contents of this book appear more often in Serbian war crimes judgments than direct references to the ICTY:

> "So, it also speaks of inclination of many legal professionals to embrace or refer to legal literature much more than to judgments, […] they are more comfortable with referring to that than to jurisprudence of an international court, especially if that court is the notoriously unpopular Hague Tribunal."[1520]

In addition, in Serbia, it is still not common for courts to have rich legal libraries that would, for instance, include commentaries on the Geneva Conventions. Serbian practitioners explain that there is no commentary on the Geneva Conventions in Serbia.[1521] One of the Serbian judges attributes this to the fact that Serbia is still a relatively poor country. As he commented:

1518 Interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1519 *Guide through the Hague Tribunal.*

1520 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1521 In fact, during my research visit in November 2018, the OSCE Mission to Serbia was translating the most relevant parts of the most recent ICRC commentary in order to make it available to legal practitioners; cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

> "It's like in every poor country. In your country [Germany], I am sure everybody who deals with war crimes would have immediately five commentaries, libraries. That's how it works. Here, it's impossible. […] [J]udges who deal with this don't have that. And without commentaries of Geneva Conventions it is very difficult to understand them. The commentaries are more important than the text itself. […] It's very difficult, I keep saying this, this world is so ironic. […] [Y]ou're asking the standards, 'you need to go for standards' at trials, but we still keep you at an income from someone who is a door man in a normal court and you're a judge of the supreme court. So, it's unrealistic. You have to see what is possible under the given circumstances. And I think that the goal for Serbia should be to have in, I don't know, the near future, a judiciary that is operational, that would be fair as much as possible, as much as possible left out of the political influence – but to have some high standards, it will be very difficult. I don't see any judiciary in a poor country with high standards. […] So, it's... the world we're living in."[1522]

The State Court of Bosnia and Herzegovina is in a favourable position in this respect. As it was established by the 'international community', it was – at least in the beginning – much better funded than Serbian courts, including, for instance, by the ICTY which distributed legal materials to it.[1523] It has a fully equipped library that contains, for instance, the complete ICTY jurisprudence,[1524] and judges have been briefed about it.[1525] But judges and prosecutors individually also have ICTY jurisprudence in their offices,[1526] and they all point out that they study it regularly.[1527] In addition, the SCBiH Registry regularly prepares written memoranda for judges, prosecutors, and defence counsel on international case law, including ICTY and ECtHR jurisprudence.[1528] Judges at the State Court also have regular retreats during which they discuss challenging questions related to their work, either legal matters or operational issues. A staff member of the OSCE Mission to Bosnia and Herzegovina noted that

1522 Interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1523 Cf. interview with ICTY outreach officer, The Hague, 25 November 2016, I-7; for instance, the *Manual on Developed Practices*, which was disseminated in BiH in local languages and which is available on the ICTY website; cf. Kirs, 2011, p. 407.

1524 Cf. interviews with SCBiH judges, Sarajevo, 1 February 2017, I-19; Sarajevo, 2 February 2017, I-45.

1525 Cf. Kirs, 2011, p. 408f.

1526 Cf. interviews with SCBiH judges, Sarajevo, 1 February 2017, I-19; Sarajevo, 2 February 2017, I-45; Sarajevo, 15 November 2018, I-57; and Sarajevo, 23 November 2018, I-58.

1527 Cf. interviews with SCBiH judges, Sarajevo, 1 February 2017, I-19; Sarajevo, 2 February 2017, I-45; Sarajevo, 15 November 2018, I-57; and Sarajevo, 23 November 2018, I-58; interview with POBiH prosecutors, Sarajevo, 9 February 2017, I-3; and Sarajevo, 23 November 2018, I-32.

1528 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44.

> "[t]hat is also a good opportunity for all of them since it is also an opportunity to invite foreign experts on the matter. For example, on the last SCBiH retreat there was a judge of the ECtHR with whom they openly discussed some concepts and pending issues they have with the application of the ECHR, namely articles 5, 6, 7 and that is something that was really a fruitful experience for them. So, it depends on each individual holder of a judicial function how much s/he is ready to learn, no matter whether it is law, war crimes law or criminal law in general."[1529]

While the latter sentence is true, Serbian courts do not seem to have these types of resources. They do not even have the ICTY's jurisprudence physically available. The president of the war crimes department at the Higher Court Belgrade possesses only two ICTY judgments, besides the complete compilation of transcripts of the *Milošević* trial.[1530]

Bosnian legal practitioners working on war crimes trials do not only have better access to materials, they also have a generally more favourable attitude towards working with international law. One of my interviewees attributed this to BiH's multi-ethnic composition: "We are less conservative. We are open to new things. The Serbs are closed to others in general, not only to the Tribunal."[1531]

As a consequence, in court, references to international law are seen as favourable. In the words of a staff member of the Criminal Defence Section:

> "[Judges] are quite open to lawyers who are representing their cases in the manner of the situation and elaborated with the practice, with different practice, like ICTY, Cambodia, Rwanda, European Court. They usually pay more attention to these lawyers who are elaborating their cases in this way than the cases that are just represented very poorly with only practice of domestic courts."[1532]

She further elaborates that invoking international law since the beginning is also a strategic choice that many Bosnian jurists have embraced at this stage:

> "I think that is generally better for the defence counsel, no matter if it's... at the end, if the decision of the State Court of BiH is not in your favour […], you are going to appeal. And after that, you have to elaborate and appeal to the breach

1529 Interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.
1530 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; to be fair though, Serbian judges do state that they know where to find ICTY jurisprudence on the internet.
1531 Interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.
1532 Interview with OKO representative, Sarajevo, 20 November 2018, I-44.

> of the ECHR to the Constitutional Court. If your appeal is not admitted, you are going to the ECtHR. So, in any way, it's better to elaborate from the very beginning with all the practice. So that you have all the arms in your hands. So, it's better to elaborate as much as possible as more with different kinds and practices."[1533]

Another factor that explains why – despite the common Yugoslav history and many shared problems – the minds of people in BiH are more open to outside (including ICTY) influence, is that a larger number of legal professionals in this country have ICTY experience. Roughly 40 (out of 150) lawyers who are certified to defend cases at the State Court of Bosnia and Herzegovina have also defended in The Hague.[1534] That is in addition to all those who have completed internships or similar programmes at the Tribunal. In Serbia, about ten lawyers have ICTY experience, although the majority of them are no longer active in war crimes cases.[1535] Although there are less cases before Serbian courts, ten lawyers is arguably not enough to build a critical mass for influencing colleagues. Furthermore, as will be demonstrated in the next section, these defence counsel do not necessarily have a favourable view of the Tribunal and its jurisprudence anyway.[1536]

1.3 Legal Professionals' Attitudes Towards the ICTY

As has become obvious, in Serbia, there is general scepticism regarding international law. According to some, this is related to the attitude of legal professionals towards the Tribunal – they equate the ICTY with international law, and international law with the Tribunal.[1537] As one defence counsel put it: "they see international law mostly through Tribunal. Mostly."[1538] And attitudes towards the Tribunal are not positive.

In fact, many Serbian legal practitioners (especially defence counsel) contribute to the one-sided image of the ICTY in the Serbian public discourse by delivering "problematic

1533 Interview with OKO representative, Sarajevo, 20 November 2018, I-44.
1534 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44.
1535 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.
1536 Turner notes that many of the Serbian defence counsel think that particular practices at the ICTY have been unfair; cf. J. I. Turner (2007). Defense Perspectives on Law and Politics in International Criminal Trials. *Virginia Journal of International Law, 48*(3), 529-594, p. 529 and 531.
1537 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6.
1538 Interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

interpretations"[1539].[1540] Indeed many of them are very vocal in their criticism – and they have received extensive publicity in Serbia.[1541]

Toma Fila, for instance, who appeared in five cases before the ICTY and is considered one of the most experienced ICTY lawyers in Serbia, said in an interview in 2011 that the ICTY renders 'victor's justice' ("trial of the victor over the loser"). To the question whether he agrees that the Tribunal's justice is selective, he answered:

> "The amateurism of the court is sufficiently explained by the fact that judges are selected individuals who have never before adjudicated any case. The second instance chamber has no judges who had judged before, not even a football match! They were humanitarian workers and postmasters. The first rules of procedure were written by the New York bar association with the intention, as the president of that association told us, that no one be acquitted. And that 'no one' are Serbs! Peter Galbraith [former US diplomat] once said that Serbs are responsible for 80% of the crimes, Croats for 15% and Muslims for 5%. When you divide the number of indictments in The Hague, you will see that it coincides with these percentages."[1542]

1539 Orentlicher, 2018, p. 221.

1540 Similar: interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.

1541 Cf. E. Gordy (2013). *Guilt, Responsibility, and Denial: The Past at Stake in Post-Milošević Serbia*. Philadelphia: University of Pennsylvania Press, p. 141.

1542 My own translation; in the original: "*O amaterizmu tog suda dovoljno govori činjenica da su za sudije odabrani pojedinci koji nikada ranije nisu sudili. Drugostepeno veće nema sudija koje su sudile čak ni fudbalsku utakmicu! Bilo je tu humanitarnih radnika i direktora pošte. Prva pravila rada napisala je njujorška advokatska komora sa željom, kako nam je rekao predsednik te komore, da niko ne bude oslobođen. A taj 'niko' su Srbi! Piter Galbrajt je jednom kazao da su za 80 odsto zločina krivi Srbi, za 15 odsto Hrvati i za pet odsto Muslimani. Kada podelite broj optužnica u Hagu, videćete da se poklapa sa ovim procentom.*"); V. C. Spasojević (23 July 2011), Toma Fila: Zatvoriću Haški tribunal, Večernje Novosti Online, http://www.novosti.rs/vesti/naslovna/aktuelno.69.html:339102-Toma-Fila-Zatvoricu-Haski-tribunal (last accessed 19/08/2019).
Also one of my interviewees, another lawyer who had defended at the ICTY, was harsh and somewhat unnuanced in his criticism calling the Tribunal "an experiment", "El Dorado for the prosecution", and "mutant court" – and also: "victor's justice". On my question how the ICTY could be victor's justice if it wasn't either of the former Yugoslav communities running the Tribunal, but the United Nations, he answered: "But we know from the war that the whole international community, the Western world, was against Serbs. That's why I tell you we have to go deeper. At that time, Russia was withdrawing. And there was empty space and that empty space had to be taken by the other power. But Serbs were in the way of the Americans who wanted to take that space. Because the Serbs objected. So, they were proclaimed to be enemies. Stoltenberg didn't want to testify because of his son who is the head of [the North Atlantic Treaty Organization (]NATO[)] now. It's not easy for a father to testify against an organisation of which your son is the head now. But in his book, he said that if you were not against the Serbs during the war, and you were in the UN, you would be fired very soon. So that was the culture that was built during the war by the internatioal community. And that same was kept till today. You see even today, they push Serbia to introduce sanctions against Russia. They don't want to do that. And again, they are an obstacle. Even today. So, this is the culture and the pattern that was going on for 25/26 years now. And you have to know that the judges are also human beings. And you can see from them that they cannot comprehend facts. They are so poisoned by media.

Indeed, there are many – also in the legal community – who think that Serbs have been disproportionately targeted by the Tribunal, and members of other communities have been unjustly acquitted.[1543]

Others – who do not share the harsh criticism of the Tribunal and who do not *attack* it – have trouble *defending* the ICTY. One of my interviewees, another lawyer who defended in The Hague, estimates that about 10% of the professional legal community "in some way find some good consequences, good legacy of tribunal"[1544], himself included.

> "When I speak with judges, as a friend, with prosecutors, they ask me usually, what's my opinion. And I try to explain them some good – of course, because I have been in some way been criticising some parts of Tribunal's legacy, for example [joint criminal enterprise (]JCE[)] which I think is something which is not following the law. But I always want to support it. You have to be aware that there will be, the biggest legacy of Tribunal is first of all that it found that crimes were committed."[1545]

But he further explains that although he and many of his colleagues within the legal community would not agree with the rather trivial allegation of ethnic bias, he became, over the years, increasingly disappointed with the Tribunal – for legal reasons: "I think that the legal legacy of the ICTY on its interpretation of some concepts is not so impressive."[1546] The problems that the local legal community has with the ICTY – many of which are shared by the international legal and academic community – can be categorised

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And by the propaganda. I lived propaganda from CNN"; interview with ICTY defence counsel, The Hague, 25 November 2016, I-2.

1543 The judges of the Higher Court Belgrade that I talked to shared this criticism; cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; see also: I. Rangelov (2006). EU Conditionality and Transitional Justice in the Former Yugoslavia. *Croatian Yearbook of European Law and Policy, 2*(2), 365–375, p. 371f.

1544 Interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1545 Interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1546 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

in the following way: first, prosecutorial strategy; second, the procedure used at the Tribunal;[1547] and third, the legal concepts developed by the chambers.[1548]

On the first point, prosecutorial strategy, for instance, instead of making trivial allegations of ethnic bias, one of my interviewees goes one step further and asks:

> "If you see all those judgments against Croats [for instance against Ante Gotovina], Muslims [for instance against Naser Orić], Macedonians, Albanians [for instance against Ramush Haradinaj] – in almost all of those judgments they found that crimes were committed, but those people [the respective accused] were not guilty. Okay, so someone else is guilty. So, why did you charge the wrong person?"[1549]

The underlying facts – namely that in some cases, the accused were acquitted although the trial chambers had made findings regarding crimes committed – of the criticism is the same as the rather blatant allegations made by populists or people with no understanding of the Tribunal. However, the interviewee does not care about the fact that the acquitted people happen to be non-Serbs. Instead, he criticises the Prosecutor for not charging the right people, although the evidence s/he had gathered on crimes was compelling enough for the chambers: "Now you have evidence and must find who did that crime. They are still here among us. And that is a problem for us, when it comes to supporting the Tribunal."[1550]

On the second point, almost all my interview partners criticised the fact that the procedural model followed by the ICTY was so far removed from the Yugoslav procedure. As will be explained in section 3, Yugoslavian criminal procedure followed the continental civil law model of criminal procedure, whereas the ICTY's Rules of Procedure and Evidence (RPE) were predominantly adversarial, following the common law procedure. According to accounts of several defence counsel that I interviewed (not only those coming from

1547 Besides the points mentioned below, there are yet other points of critique of the procedural system which would remain difficult to understand for continental lawyers: for instance, that in the beginning, judges could at the same time be a member of the Trial and of the Appeals Chamber; or that the Appeals Chamber does not deal with facts at all, no matter how absurd the Trial Chamber's factual findings would be (one defence counsel described this like that: "Today is Friday. But if the first instance chamber establishes that today is Wednesday, the second instance chamber would tell you 'I don't want to deal with that at all. We don't deal with facts. We are not interested in facts.' What are you then? What are you checking? They are just interested in some legal matters. But what can you talk about like a legal issue, when it is established that today is Wednesday although it is Friday?!"; interview with ICTY defence counsel, The Hague, 25 November 2016, I-2.

1548 There is much more criticism. But since these were the points that frequently came up in interviews, I further elaborate on them here.

1549 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

1550 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

countries of the former Yugoslavia, but also others confirmed this view), the consequence was that local legal professionals depended on teaming up with other defence counsel (mostly coming from common law countries).[1551] While many Bosnian or Serbian lawyers experienced the team work with their international colleagues as enriching, for some, it left the uncomfortable feeling of essentially not being good enough to defend their compatriots in a trial that concerned crimes that had happened in their country.[1552]

In addition, the fact that more and more inquisitorial procedure elements were introduced into the ICTY Rules of Procedure and Evidence over the years, inevitably led – in the eyes of some ICTY defence counsel – to unfair trials.[1553] By way of example, one Serb defence counsel stated:

> "[The ICTY] is some kind of experiment. And it is a mutant court […] since it is a mixture of two legal systems. […] But still it is predominantly common law system without boundaries that the prosecution in those systems have to follow. And that they are bound by. So, this is pretty much an El Dorado for the prosecution. They can do whatever they want. They can hide evidence. And there is no sanction for them ever. Once when we asked from the Court to sanction the prosecution since they obviously hid evidence from us, the judge decided that he will punish the defence. And we were really stunned because it was not our request to punish us, but to punish the prosecution! But that is actually the mind-set in this Tribunal where everything is on the side of the prosecution. The whole Court, the whole system. And the defence has nothing to do during the investigation. And you do not know about a case before your client is indicted. Because a lot of indictments were even closed, sealed, secret. So, everything would be done before you being involved with the case. And it's not that big of a problem if you have the time, resources and what to investigate. Time and resources at the beginning of this Tribunal were not that restricted. But the problem is that there is very little to investigate. Since the whole archives, documents, audio, video materials, everything was taken away and brought

1551 For instance: interview with ICTY defence counsel, Belgrade, 25 January 2017, I-31; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.

1552 As Waters mentions, early on, instances of defence attorneys appearing before the Tribunal who were demonstrably unprepared to deal with its mixed but predominantly adversarial system were proverbial. These were generally from the former Yugoslavia and therefore steeped in a civil law tradition in which the role of counsel in the courtroom proceedings is much less active than in the common law; cf. Waters, 2013, p. 41.

1553 Former Prosecutor Carla del Ponte shares this view, as she was advocating for a "comprehensive revision of the RPE to reconcile significant differences between the civil law and common law approaches to criminal procedure"; C. del Ponte (2013). Difficulties of the Participants. Indictment Correct, Trial Impossible. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 136-149). Oxford: Oxford University Press, p. 140.

> here to the Tribunal. So, I had some cases at the beginning from the [*omitted*] area. And everything what we wanted to search and investigate was taken away and wasn't there. So, you are at the mercy of the prosecution. Whether they want or do not want to disclose material to you."[1554]

Another element of criticism expressed by Serbian legal practitioners is the excessive length of pre-trial detention and trials, which, according to them, gives the impression of lacking professionalism and of "not [being] so effective"[1555]. In addition, the Tribunal would thereby not adhere to the 'international standards' it is claiming to promote.[1556]

As to the third point, the liberty with which the Tribunal developed legal concepts, this criticism concerns, first and foremost, the concept of joint criminal enterprise, especially in its forms JCE I and JCE III.[1557] Others also referred to the ICTY's standard of aiding and abetting as established by the Appeals Chamber in *Šainović et al.* as problematic (particularly to the fact that the required *mens rea* is not intention, but mere awareness).[1558] One of my interviewees saw this as a problem of "pressure from humanitarian law on criminal law",

1554 Interview with ICTY defence counsel, The Hague, 25 November 2016, I-26.

1555 Citing a Higher Court Belgrade judge: Orentlicher, May 2008, p. 130.

1556 Cf. Orentlicher, May 2008, p. 130.

1557 Among others: interviews with ICTY defence counsel, Belgrade, 23 January 2017, I-27; and Belgrade, 5 November 2018, I-28; interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52; Waters opines that joint criminal enterprise is a "misnomer", as the enterprise – the common plan – need not itself be criminal, so long as there are crimes even incidentally but foreseeably involved in its realisation; cf. Waters, 2013, p. 38. As to JCE III, which he would call "theatre JCE", "[t]he potential for conceptual slippage between the idea that the modalities of the enterprise are criminal, and that the enterprise itself is criminal, is considerable. It has been observed that theoretically, all the Serb cases could be joined to the single JCE identified with Milošević – logically, all were in fact a part of it. At some point, this becomes indistinguishable from a claim of collective liability"; Waters, 2013, p. 38. He contends that the flexible nature of JCE claims allows a prosecutor to shape the case to fit by alleging a narrower or more expansive JCE, or even multiple JCEs that cover different aspects of a larger transaction; cf. Waters, 2013, p. 38. Indeed, the criticism towards JCE is best summarised by the title of Badar's article: M. E. Badar (2006). "Just Convict Everyone!" – Joint Perpetration: From Tadic to Stakic and Back Again. *International Criminal Law Review, 6*(2), 293-302. Bassiouni finds that JCE comes with "relaxed evidentiary standards compared to the locus classicus of perpetration"; M. C. Bassiouni (2013). Real Justice or *Realpolitik*? The Delayed Indictment of Milošević. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 92-105). Oxford: Oxford University Press, p. 103. One of my interviewees commented on JCE this way: "But this Tribunal mostly was an experiment. As such it might bring something good. But, I don't think that any serious country in the world would accept these rules to be accepted for trying their nationals"; interview with ICTY defence counsel, The Hague, 25 November 2016, I-26. All in all, JCE "still remains one of the most contentious issues in [the ICTY and ICTR's] jurisprudential life and its contours have fluctuated a great deal over the years"; Mettraux cited in: J. Meierhenrich (2013). Beyond the Theater of International Justice: The Rule 98*bis* Decision in *Milošević*. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 316-325). Oxford: Oxford University Press, p. 321.

1558 Cf. interviews with ICTY defence counsel, Belgrade, 23 January 2017, I-27; and Belgrade, 23 January 2017, I-27.

with the Tribunal conceding in favour of humanitarian law, and loosening the standards of criminal law.[1559]

In view of these points of criticism, the defence counsel recounts that "when I speak with students or with some professionals here in Serbia", and "I want to support some positions of Tribunal", these fundamental shortcomings of the ICTY are "very difficult to explain".[1560] This illustrates the dilemma of the Serbian legal community: while many of them might *want* to promote the Tribunal towards their compatriots, because they support its mission of establishing accountability for crimes that were committed, they feel that they increasingly lack the necessary arguments to do so.[1561] Despite all of this, the perception of the ICTY within the local legal community in Serbia might still be better than among the general population.[1562]

Of course, legal professionals are also human beings and are influenced by the general atmosphere within their countries, or even directly or indirectly influenced by politics.[1563]

1559 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1560 All quotes: interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1561 The story another Serbian defence counsel told me illustrates this: "Well, I had initially, I thought it was fantastic. I thought it was needed and it is going to be a proper way to deal with this unfortunate and tragic events in the former Yugoslavia. But having spent 15 years at the ICTY, I came to the conclusion that this wonderful opportunity was lost due to political pressures... Unfortunately, as I say, the opportunity was / is lost. Because what the Tribunal did is, it became too political, I think. […] I think that at a certain point in time the ICTY was not patient enough. Because for I don't know the reasons – but at a certain point in time, the Tribunal maybe it is a harsh word - panicked. […] [T]he Tribunal and the judges were not patient enough. And perhaps at the time, I guess the Tribunal and the Office of the Prosecutor and the whole international community that stood up behind the Tribunal felt that there is a very slim chance or perhaps no chance at all that the Tribunal will be able to conduct cases against the most important persons at that time. And I think they understood that what they wanted to do would not be possible without inventing such a concept as JCE. Inventing... Just giving it a certain understanding. Because the concept exists in some domestic systems, including the former Yugoslavia, in the cases of organised crime and stuff like that. But in this situation, the understanding and the jurisprudence which was created around it is, in my opinion, not well thought of. Because it was done on an impulse. And the judges, I firmly believe, that they at the moment when they were deciding on that concept in the *Tadić* appeal, they just didn't see the bigger picture of what would be the effects of it. […] So, and that, I think, unfortunately, brought the ICTY to a side-track and in my firm opinion, if we will have another 20 years distance from this day now, there is going to be a serious criticism in scholar circles of that concept and the whole legacy of this Tribunal, just because of that. And that's a sad story because I feel sad about it because when I entered over there, I thought it would be a leap forward in a sense that we will move the boundaries of criminal law to international criminal law. And for me it was fascinating to be a part of that. But after all this time and now looking back at it, I cannot say I am sorry that I lost 15 years of my career for that, but I am sad it didn't produce the concept that I wanted and felt is needed"; interview with ICTY defence counsel, Belgrade, 25 January 2017, I-60.

1562 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1563 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; similar: interview with Appeals Court Belgrade judge, Belgrade, 20 January 2017, I-12; interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23; politics can arguably exert pressure on Serbian judges and prosecutors through their respective election models; cf. interview with Bosnian defence counsel, Sarajevo, 16 November 2018, I-54; see also Chapter 5, section 5.2.1. In Bosnia, the appointment procedure of legal practitioners is completely detached from the executive branch; cf. interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

In Serbia, the general view of the ICTY is not positive, whereas in BiH, it is much more nuanced, with opponents of the Tribunal, but also many proponents.[1564]

Bosnian legal professionals also share much of the criticism mentioned above.[1565] Some of my interview partners even went beyond the Serbians' points of contention and deplored, for instance, that the ECHR is not applicable to the ICTY. As a result, in their view, the fair trial rights at the ICTY do not even meet the standards of Bosnian courts.[1566] Nevertheless, Bosnian legal practitioners have a much more favourable view of the Tribunal – regardless of their ethnic background.[1567]

In fact, a study conducted in the early years of war crimes proceedings in Bosnia and Herzegovina (before the SCBiH existed) found that there were differences in attitudes towards the ICTY between Bosnian Croat and Bosnian Serb judges on the one hand and Bosniak judges on the other.[1568] Back then – and this might no longer be valid today –[1569], many of the former group did not regard the ICTY as an "embodiment of neutral justice"[1570]. They have, however, been embedded in the new legal culture reigning in BiH, which emerged thanks to all the factors described in section 1, and have therefore – voluntarily or involuntarily – gone along with the new mentality.

Indeed, the majority of Bosnian legal professionals literally view the ICTY as an authority and have great respect for the institution.[1571] When asked for the reasons for that respect, they most often mention the fact that it was established by the United Nations and thereby inherently adheres to higher standards.[1572] Ironically, this was in fact one point of criticism of a Serbian interviewee towards the Tribunal, as many believe that the United Nations

1564 See Chapter 9, section 2.3.2; in BiH, society would also exert pressure on the domestic legal professionals. However, contrary to Serbia, where the expectancy would usually be to reject the Tribunal, Bosnians would sometimes expect from their jurists to go more into the direction of the ICTY; cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

1565 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 16 November 2018, I-54; similar: interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1566 For instance, in terms of expediency of proceedings or compensation claims after acquittals; cf. interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.

1567 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 16 November 2018, I-54; interview with OKO representatives, Sarajevo, 8 February 2017, I-36; and Sarajevo, 20 November 2018, I-44; similar: interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1568 For the study, see: L. E. Fletcher & H. M. Weinstein (2000). Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors. *Berkeley Journal of International Law, 18*(1), 102-164, p. 104.

1569 Although it confirms my impression that the Bosnian Serb judge to whom I spoke was more critical than his colleagues Bosniak or Bosnian Croat judges whom I met, without being able to pinpoint it to a particular statement of his.

1570 Cf. Stromseth, 2006, p. 269.

1571 Literally all my Bosnian interviewees expressed this in one way or the other.

1572 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44; similar: interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.

Security Council did not have the authority to establish a court.[1573] Furthermore, the quality of the Tribunal's jurisprudence was also regarded as superior, mainly in terms of research methodology, legal analysis and reasoning, but also in terms of the structure of judgments.[1574] In the view of one Serbian observer, Bosnians almost exaggerate their admiration for the Tribunal,[1575] assuming it could and would solve any problem.

In addition to their respect for the Tribunal, Bosnian judges and prosecutors are also open to ICTY influence for utilitarian reasons: they insist that making reference to the ICTY is simply very useful, as many of its judgments are based on extensive analyses of the national laws of states of the most important representatives of the existing legal cultures and traditions, including those of Yugoslavia. That way, the national judge or prosecutor can spare him/herself the work of doing the same customary law analysis.[1576] In the Tribunal's jurisprudence, they would find valuable interpretations and examples of application of what would be considered the same legal basis (namely, customary international law) – both for trials at the ICTY and in BiH. As one Bosnian defence counsel put it:

> "[T]his was all new for them. So, practically, what was an advantage for the State Court of Bosnia and Herzegovina, they have already been served with jurisprudence which they could simply copy and adopt. Because, what else could they do? You don't have war crimes jurisprudence, there is no such jurisprudence except for Nuremberg from World War II and after that we had the ICTY and International Criminal Tribunal for Rwanda (]ICTR[)] and there is not very much jurisprudence which you could rely on. And the law itself, the code, no matter whether the Criminal Code or the Criminal Procedure Code, this is not regulated so well. So, you don't have other choices but to rely on the ICTY. I think this is a question of history. Because the ICTY relied so much on Nuremberg war crimes trials and now the national courts in BiH are relying on ICTY and this is sort of creating history in war crimes trials."[1577]

1573 Cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57.

1574 Cf. interviews with POBiH prosecutors, Sarajevo, 9 February 2017, I-3; and Sarajevo, 23 November 2018, I-32; interviews with SCBiH judges, Sarajevo, 2 February 2017, I-45; and Sarajevo, 15 November 2018, I-57; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.

1575 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1576 Cf. interviews with SCBiH judges, Sarajevo, 2 February 2017, I-45; and Sarajevo, 15 November 2018, I-57.

1577 Interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6; similar: interview with SCBiH judge, Sarajevo, 15 November 2018, I-57.

In contrast, although Serbian judges do state that they know where to find ICTY jurisprudence on the internet,[1578] they claim that they never need it, as "we judge upon our own law, not the ICTY Statute"[1579], and that there was no lack of domestic practice.[1580]

It seems intuitive that those who have a more favourable opinion about the ICTY are also more inclined to, for instance, study its jurisprudence and make use of it when necessary and possible. Conversely, those who do not believe that the Tribunal conducted fair trials and rendered good judgments will have little reason to do so. As will be illustrated in section 2.2 below, this can be observed in Bosnia and Herzegovina's and Serbia's jurisprudence.[1581]

While the differences in perception of the ICTY among the legal communities in Serbia and Bosnia and Herzegovina cannot be fully explained, the biggest factor most certainly is the general perception of the ICTY. As will be explained in Chapter 9, there is no one-sided image of the Tribunal in Bosnia and Herzegovina the way it exists in Serbia. Not only because of the presence of different ethnic communities that have, in their perception, profited differently from – or suffered under – the Tribunal. But also because, as explained above,[1582] a wider variety of actors is – or has been present – in BiH that sees the Tribunal as their ally. In addition, there is an active civil society sector that is very powerful – especially compared to the one in Serbia. A few other factors that influenced domestic practitioners' use of ICTY experiences still need to be discussed.

1.4 ICTY- and Other Measures Paving the Ground for ICTY Impact

As described earlier,[1583] ICTY actors had more intensive contact with Bosnia and Herzegovina than with Serbia. This was true both at the political level (which had, as

1578 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

1579 Interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

1580 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; this statement is astonishing as war crimes had never been adjudicated in Serbia before the war crimes trials concerning the Yugoslav wars in the 1990s.

1581 Cf. interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55; in fact, as one defence counsel reported, even Serbs' opinion can change, once they actually start reading ICTY jurisprudence. He recounted: "And some of my colleagues – that was a good experience for me. Here in Serbia, there is now a big case in relation to Srebrenica, the Kravica case, in the war crimes chamber. And there is 10 of my colleague lawyers who represent clients there. And they were absolutely, initially, with some prejudice against Tribunal. Now, when they read the judgments of Srebrenica – Popović, Krstić – they said 'Wow, it's impressive how the Tribunal carefully evaluated the evidence and the facts'. So, people are not interested in reading the ICTY's judgments, but when they read, they don't have so much prejudice, they can find that good consequences come from the Tribunal and that parts of its legacy are good"; interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1582 See section 1.1 above.

1583 See Chapter 5, section 4.

explained,[1584] a great influence on the criminal legislation in BiH), and among the legal community. One of the reasons for the intensive contact were the Rule 11*bis* case referrals, as a result of which the ICTY had an inherent interest in proper adjudication of war crimes in BiH.[1585] Conversely, the Rule 11*bis* referrals played an important role in acquainting domestic prosecutors and judges with ICTY sources, law, and practice. Solutions found within Rule 11*bis* trials constituted important examples to follow in the future.[1586]

Bosnia and Herzegovina also adjudicates many more war crimes cases than Serbia – not only at the State Court, but also at its cantonal and district courts. Therefore, daily contact with ICTY representatives is much more common for Bosnians, as they communicate regarding shared evidence or common witnesses.[1587] Conversely, due to the experience that was built up together with domestic legal professionals throughout the adjucation of these numerous cases, they can arguably better evaluate what facilitates their work and what does not.[1588] Obviously, many Bosnian legal practitioners have come to the conclusion that ICTY jurisprudence is useful to them.

The ICTY's capacity building efforts were also focused on Bosnia and Herzegovina. Bosnian legal professionals involved in the adjudication of war crimes follow more formal training in international criminal law and international humanitarian law than their Serbian counterparts. Apart from the Tribunal's initiatives, there are also many local training programmes – contrary to the situation in Serbia. For instance, defence counsel have to follow regular (two times per year) one-day seminars provided by the Criminal Defence Section (OKO) in order to keep their accreditation for defending war crimes (or organised crimes).[1589] At these occasions, the OKO would also distribute books (to the lawyers) that serve as summaries of – and guidelines for – international criminal law and international humanitarian law.[1590] Furthermore, prosecutors and judges participate in regular trainings – to some of which they invite ICTY representatives in order to exchange experiences.[1591] Conversely, these trainings have a

1584 See Chapter 5, sections 1.2-1.5 and section 1.1 of this Chapter.

1585 Cf. Rüedi, 2015, p. 157f.

1586 Cf. Katsaris, 2007, p. 186.

1587 See Chapter 5, section 4.2 in particular.

1588 Cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

1589 Cf. interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

1590 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44; apart from that, the Criminal Defence Section (OKO) generally supports defence counsel in their practice, including searching for and providing them with ICTY jurisprudence or evidence; cf. interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

1591 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with SCBiH judge, Sarajevo, 1 February 2017, I-19; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; see also: Ivanišević, 2007, p. 29.

> "cross-fertilisation effect of building a pool of judges and prosecutors which would further expand to people who work with them who are then more aware and are more keen to follow and apply the developments in international law."[1592]

Serbia does not have an institution like the OKO.[1593] While the OSCE Mission to Serbia organises trainings, they report that especially judges from the Higher Court Belgrade are not very interested in participating –[1594] possibly for reasons of professional pride, busy schedules, or feelings of inferiority.[1595] In addition, just one of the judges of the first generation still works in the war crimes department of the Higher Court Belgrade.[1596] Thus, the judges who currently work there have not experienced the years when contact between their court and the Tribunal was more intensive, and when the exchange was more frequent and vibrant due to the fact that more cases were still going on at the ICTY (2005-2012/2013).[1597] As an observer put it:

> "Whereas all the other judges, I think they never had a chance to visit the ICTY, to sit with the ICTY judges. So, their understanding from the ICTY, their understanding of the relevance of the ICTY is equal to the understanding of an average lawyer who reads newspapers. And 99% of the press reporting on the ICTY has been complete bullshit."[1598]

Indeed, during those years of more frequent exposure to their ICTY colleagues, the number of references to ICTY jurisprudence was rising also in Serbian case law.[1599]

1592 Interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

1593 Although Serbian defence counsel have suggested establishing it within the Serbian bar association; cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

1594 The same is not true for judges from the Court of Appeal Belgrade. At the same time, a representative of the OSCE Mission to Serbia notes that they are the ones who need these trainings and exchange of experiences the least as they already are mostly on top of the current developments in international (criminal) law; cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1595 Cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1596 In fact, the judges' mandate had been revoked before their term had ended. Some suspect that they were removed because they had started taking uncomfortable decisions; cf. interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1597 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1598 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1599 Cf. Weill & Jovanović, 2012, p. 265; Michaeli, 2011b, p. 71f.

1.5 Summary: Factors Leading to ICTY Impact on Criminal Law in BiH and Serbia

The factors outlined above illustrate the different dynamics that are – or have been – going on in Serbia and Bosnia and Herzegovina and that have an impact on the respective legal system's openness to outside influence – particularly from the ICTY. Most of them concern the likelihood that ICTY jurisprudence will be used in domestic courts. Whether or not the Tribunal will have any effect on newly drafted legislation can also partly be explained through general analyses of a system's openness to outside influence.

It has become clear that the legal tradition in both countries implies a generally favourable stance towards international law. International law is part of the domestic legal system and some even argue that customary international law can be directly applied in the criminal process. In BiH, the positive attitudes towards outside influence was reinforced by the presence of the 'international community' and of foreign judges and prosecutors. Their continuous presence and input influenced the general mentality, in which it became increasingly normal to look outside BiH's legal system for inspiration. Serbian experts and legal practitioners have remained more sceptical towards international law, and they were not exposed to foreign and international influences on a daily basis in the same way as their Bosnian colleagues. In addition, when it comes to the ICTY in particular, Serbs generally have a more negative attitude towards the Tribunal. This is the general tendency within the population and legal professionals are not necessarily different. Those who know the ICTY well because they have had personal experiences in The Hague (i.e. the Serbian defence counsel), have increasing difficulties in finding arguments to defend and support the Tribunal vis-à-vis their compatriots. And hence, a potentially influential voice of support is missing in Serbia, whereas in Bosnia and Herzegovina, there are many: victims' associations, the 'international community', as well as the legal community. Lastly, initiatives of the ICTY and other organisations, such as close collaboration with their domestic counterparts, transferring cases, or capacity building, have contributed to familiarising domestic legal professionals with the Tribunal's Statute, case law, and court practice, while at the same time reinforcing the ICTY's standing as an authoritative institution in the field of criminal law.

These factors explain the ICTY's influence on domestic jurisprudence and practices. However, particularly the presence of the 'international community' (especially the OHR and UN institutions) also led to ICTY influence on the Bosnian criminal legislation.

The effects that these impact factors had on domestic legislation and jurisprudence will be outlined in the following sections. First, substantive (international) criminal law will be addressed, followed by a focus on procedural criminal law.

2 Substantive Criminal Law

2.1 Legislation

The reform process of the substantive and procedural criminal codes in the countries of the former Yugoslavia began in Bosnia and Herzegovina in 2002, when a report was submitted to the OHR by four international consultants (one of whom was a former ICTY judge and one a former ICTY prosecutor) on issues relating to war crimes prosecutions that might take place in BiH.[1600] The report recommended that existing domestic legislation should serve to the furthest possible extent as a basis for new or amended legislation. Where existing legislation – both substantive and procedural – required revision, amendments should also take into account developments in the law as applied within the ICTY.[1601]

The new criminal codes entered into force in 2003 (in BiH)[1602] and in 2006 (in Serbia). They included new substantive criminal law provisions deriving from international law,[1603] the most important ones being crimes against humanity, the crime of aggression, as well as the mode of liability of command and superior responsibility. The new laws were

1600 Described in detail in: M. Bohlander (2003). Last Exit Bosnia: Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts. *Criminal Law Forum, 14*(1), 59-99, p. 66ff.

1601 Bohlander, 2003, p. 78.

1602 It should be noted that until that point, Bosnia and Herzegovina did not even have a state level criminal code. The competence for enforcing criminal law lied solely with the entities. This only changed with the establishment of the State Court of Bosnia and Herzegovina. The new Criminal Code took over a number of crimes from existing entity codes, particularly where such laws involved a significant international element (cross-border crimes or acts prescribed by international law and conventions). Such crimes were subsequently removed from the entity level codes, or were redefined in domestic terms; cf. Aitchison, 2011, p. 132. The result is, as explained in Chapter 5, section 3, that different criminal codes govern in both entities and the Brčko District and at the state level. All are influenced by and took their inspiration from the criminal law of the former Yugoslavia, but still, all took different paths. Also, different understandings of the legality principle (that the applicable law must be the one in force at the time of the offence unless the more recent law is more lenient for the accused) govern at state and entity level; cf. Uhlířová, 2012, p. 205; and Popovic, 2012, p. 229f. In the area of war crimes adjudication, which is shared between both levels, this leads to the situation in which the state level applies the 2003 Criminal Code for war crimes prosecutions, whereas the entity/district courts mostly apply the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), which was the law in force at the time of the Yugoslav conflicts. Several convicts have complained to the Constitutional Court (and up until to the European Court of Human Rights (ECtHR) in Strasbourg) about their convictions (e.g. for crimes against humanity which were not explicitly criminalised in the SFRY Criminal Code) and/or penalties respectively. In the infamous *Maktouf* decision, the Constitutional Court held that while the numeric penalties provided for in the 2003 BiH Criminal Code were indeed higher than those of the 1976 SFRY Criminal Code, the 2003 BiH Criminal Code is nevertheless the more lenient law as it no longer foresees the death penalty. It also called on the entity/district courts to apply the 2003 BiH Criminal Code when adjudicating war crimes cases; cf. Uhlířová, 2012, p. 205; see also section 2.2.1 below. It has held that the lack of uniformity undermines the rule of law and equal treatment of citizens before the law; cf. Popovic, 2012, p. 230.

1603 Cf. Uhlířová, 2012, p. 211f.; Škulić & Rinceanu, 2004, p. 283.

intended to prepare the domestic judiciaries for conducting trials in line with international standards.[1604] Overall, it is asserted that the Tribunal has been "a catalyst" for countries in the region to adopt legislation implementing their human rights and international humanitarian law treaty obligations.[1605] While both codes are also clearly influenced by the Rome Statute (RS) of the International Criminal Court,[1606] which Serbia ratified in 2001 and Bosnia and Herzegovina in 2002,[1607] they do take into account developments in international criminal law that were mostly shaped by the ICTY's case law.[1608]

As such, several ICTY elements can be identified (also see the table 7 below), particularly in the Criminal Code of Bosnia and Herzegovina.[1609] For instance, while Article 172 ("Crimes against Humanity") reproduces almost verbatim Article 7 of the Rome Statute ("Crimes against humanity"), and thereby also replicates its structure with a list of prohibited acts in the first paragraph and their definitions in a second paragraph,[1610] when it comes to war crimes, the BiH Criminal Code follows a entirely different logic than the Rome Statute. Instead of listing all war crimes in one article, and distinguishing between prohibited acts in international and non-international armed conflicts (as does the Rome Statute), the BiH Criminal Code largely maintains the structure of the 1976 Yugoslav Criminal Code that listed different war crimes in distinctly defined articles (implementing several grave breaches of the 1949 Geneva Conventions). At the end, Article 148 of the SFRY Criminal Code generally criminalised "the use of means or practices of warfare prohibited by the rules of international law", as provided for most importantly in the Hague Conventions of 1907 and the 1977 Additional Protocols to the Geneva Conventions.[1611] Apparently, the drafters of the new 2003 BiH Criminal Code considered it more appropriate to replace this catch-all article by a more precise provision. In doing so, they chose Article

1604 Cf. Rüedi, 2015, p. 133f.

1605 Cf. Freeman, October 2004, p. 2.

1606 While in Serbia, by virtue of Article 16 (2) of the Serbian Constitution, it would be legally possible to directly apply the Rome Statute, as it has become part of the Serbian legal order, this was considered to be unpractical. That is why, a new code was necessary. To be precise, amendments of the Criminal Code that reflected the Rome Statute had already been made in 2001; cf. Škulić & Rinceanu, 2004, p. 217. The 2006 Criminal Code is the one in force at the time of writing.

1607 Cf. Burke-White, 2007, p. 338.

1608 Cf. OSCE Mission to Bosnia and Herzegovina (August 2008), *Moving towards a Harmonized Application of the Law: Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, Sarajevo, http://www.osce.org/mission-to-bosnia-and-herzegovina/314846?download=true (last accessed 12/09/2019), p. 6.

1609 Cf. Uhlířová, 2012, p. 211f.

1610 The only difference is that the BiH Criminal Code does not seem to require that the crime be committed pursuant to a state or organisational policy, which would be a departure from the Rome Statute's provision and rather in compliance with the ICTY's definition of crimes against humanity.

1611 See: International Committee of the Red Cross, Methods and means of warfare, https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/methods-means-warfare/overview-methods-and-means-of-warfare.htm (last accessed 19/08/2019).

3 of the ICTY Statute ("Violations of the laws and customs of war") as a model, and not for the equivalent Article 8 (2) (b) and (e) of the Rome Statute.

Traces of the ICTY are even more obvious in Article 180 of the BiH Criminal Code, which is an evident legal transplant from the Tribunal's Statute. It replicates Article 7 of the ICTY Statute ("Individual criminal responsibility"), which defines the modes of liability applicable at the ICTY.[1612] A commentary on the BiH Criminal Code notes with regard to Article 180 that "it is obvious that the legislator followed the basic rules of criminal liability deriving from International Criminal Law and from the provisions in the ICTY Statute."[1613] Notably, it avoids the distinctions made in the ICC Statute regarding the responsibility of military commanders and civilian superiors. In following the ICTY, it also does not expressly provide for the joint criminal enterprise mode of responsibility. However, similar to the ICTY, Bosnian courts have interpreted the article as entailing JCE.[1614] From a systematic point of view, the incorporation of this article in the Criminal Code of Bosnia and Herzegovina is remarkable, as it makes a general statement about individual and command responsibility for the crimes mentioned in Articles 171-175 and 177-179 of the BiH Criminal Code. This is noteworthy as each of these articles already states the applicable modes of individual criminal responsibility, coupled with respective applicable penalties. It is a clear transplant in the BiH legal system and remains somewhat alien. This article is used to depict the participation of the accused in international crimes and is always combined with traditional modes of liability (which has led to confusion).[1615] It was included in order to properly address the modes of liability of joint criminal enterprise and command responsibility.[1616]

Orentlicher claims that the 2003 BiH Criminal Code was designed this way in order to make it possible to prosecute the full range of offences subject to ICTY jurisdiction – partly in order to ensure the transfer of cases under Rule 11*bis*.[1617] At the same time, Bosnian actors tried to reconcile the traditions stemming from the former Yugoslav code with the new international law standards emanating from the statutes of all war crimes tribunals, including Nuremberg, Tokyo, the ICTY, and the ICTR. This was a difficult task and therefore occasionally led to somewhat strange outcomes, not only because the definition of crimes often differs in these statutes, but also because the Yugoslav code was civil law

1612 In its initial version, even the article's title was the same as its equivalent in the ICTY Statute ("Individual Criminal Responsibility"). The title was changed to its current version "Individual and Command Responsibility" with an amendment to the criminal code in 2010.

1613 As cited in: Uhlířová, 2012, p. 212.

1614 Kreso, 27 November 2013, p. 35; Ronen, 2011, p. 47.

1615 Cf. Kristjánsdóttir *et al.*, 2011, p. 20.

1616 Cf. interview with Bosnian defence counsel, Sarajevo, 16 November 2018, I-54; interview with OHR representative, Sarajevo, 20 November 2018, I-47; see also: Uhlířová, 2012, p. 212.

1617 Cf. Orentlicher, 2018, p. 339f.

oriented, and the statutes of the international criminal courts and tribunals were rather common law oriented.[1618]

Table 7 will show the different origins of and influences on the current 2003 BiH Criminal Code.

Table 7 Origins of and influences on 2003 BiH Criminal Code provisions

2003 BiH Criminal Code	ICTY Statute	1976 SFRY Criminal Code	Analysis and comparison → main influence
Art. 171 Genocide	Art. 4 Genocide	Art. 141 Genocide	The three provisions are almost exactly the same, employing the same wording, reproducing almost verbatim the Genocide Convention; absence of the words "as such" both in the Bosnian and English version. → Genocide Convention
Art. 172 Crimes against humanity	Art. 5 Crimes against humanity	Did not exist	Art. 172 reproduces almost verbatim Art. 7 of the RS and replicates its structure, although it makes no mention of a state policy, following instead the ICTY jurisprudence. → RS
Art. 173 War crimes against civilians	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 142 War crime against the civilian population	No apparent inspiration; this article is quite different from its predecessor in the SFRY Criminal Code (CC), from the ICTY Statute and from the RS. Codifying partly GC IV. → GC IV
Art. 174 War crimes against the wounded and sick	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 143 War crime against the wounded and sick	In principle, Art. 174 of the BiH CC draws on Art. 143 of the SFRY CC, but spells out the prohibited acts in more detail, using wording from Art. 8 (2) (a) of the RS. Codifying partly GC I+II. → RS
Art. 175 War crimes against prisoners of war	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 144 War crime against prisoners of war	In principle, Art. 173 of the BiH CC draws on Art. 144 of the SFRY CC, but spells out the prohibited acts in more detail, partly using language from Art. 8 (2) (a) of the RS. Codifying partly GC III; covered partly by Art. 8 (2) (a) of the RS. → GC III and RS
Art. 177 Unlawful killing or wounding of the enemy	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 146 Unlawful killing or wounding of the enemy	Paragraphs 1 and 2 of Art. 177 of the BiH CC repeat almost verbatim Art. 146 of the SFRY CC, whereas paragraph 3 draws on the wording of Art. 8 (2) (b) of the RS. Geneva law.

1618 Cf. Orentlicher, 2018, p. 341; Martin-Ortega, 2012, p. 607.

2003 BiH Criminal Code	**ICTY Statute**	**1976 SFRY Criminal Code**	**Analysis and comparison → main influence**
			→ SFRY CC and RS
Art. 178 Marauding the killed and wounded at the battlefield	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 147 Marauding	Art. 178 of the BiH CC draws on Art. 147 of the SFRY CC, replicating it almost verbatim. Geneva law. → SFRY CC
Art. 179 Violating the Laws and Practices of Warfare	Art. 3 Violations of the laws and customs of war	≈ Art. 148 Making use of forbidden means of warfare	Art. 179 reproduces almost verbatim Art. 3 of the ICTY Statute, drastically departing from Art. 148 of the SFRY CC, although the topic remains the same. While Art. 148 of the SFRY CC remains general (generally prohibiting the violation of the laws of warfare), Art. 179 of the BiH CC spells out the particular means and practices of warfare that are prohibited. Hague law. → ICTYSt
Art. 180 Individual and command responsibility	Art. 7 Individual criminal responsibility	Did not exist	Art. 180 of the BiH CC replicates almost verbatim Art. 7 (1)-(4) of the ICTY Statute. → ICTYSt

The same level of ICTY influence cannot be seen in the 2006 Serbian Criminal Code. Instead, it maintained previous legal structures, while including therein some of the provisions of the ICC Statute,[1619] most notably crimes against humanity in Article 371. Indeed, the opinion that Yugoslav criminal law – as it stood before ratification of the Rome Statute – already covered all crimes found in the Rome Statute, was widely spread among Serb academics at the time.[1620] Interestingly, the Serbian Criminal Code did not follow either court (ICC or ICTY) in codifying command and superior responsibility as a mode of liability, but classifies a commander's or superior's "failure to prevent crimes against humanity and other values protected under international law" in Article 384 as a distinct crime.[1621] Commanders and superiors are responsible for the crimes of their subordinates only if they knew about their crimes,[1622] and not already at the stage when they had reasons to know (which is the ICTY's interpretation). In addition, only the failure to prevent, not the failure to punish, is criminalised – in contrast to the ICTY and Rome Statute

1619 Cf. Škulić & Rinceanu, 2004, p. 217f.
1620 See for instance Škulić & Rinceanu, 2004, p. 244.
1621 Cf. Škulić & Rinceanu, 2004, p. 260.
1622 Cf. Michaeli, 2011b, p. 79.

provisions.[1623] The drafters also chose not to incorporate a new provision providing for joint criminal enterprise. That way, the 2006 Serbian Criminal Code follows the previous Yugoslav traditions in terms of systematics and definitions of the crimes, rather than adopting foreign concepts.[1624] The European Commission has nevertheless concluded that the legislative framework has significantly improved through the revision of criminal laws, particularly in the realm of prosecuting war crimes.[1625]

Table 8 traces back the origins of – and influences on – the 2006 Serbian Criminal Code.

Table 8 Origins of and influences on 2006 Serbian Criminal Code provisions

2006 Serbia Criminal Code	ICTY Statute	1976 SFRY Criminal Code	Analysis → main influence
Art. 370 Genocide	Art. 4 Genocide	Art. 141 Genocide	The three provisions are almost exactly the same, employing the same wording, reproducing almost verbatim the Genocide Convention;[1626] the 2006 CC adds the words "as such" both in the Serbian and English version. → Genocide Convention
Art. 371 Crimes against humanity	Art. 5 Crimes against humanity	Did not exist	Art. 371 CC replicates almost entirely the list of prohibited acts of Art. 7 of the RS,[1627] although it makes no mention of a state policy, following instead the ICTY jurisprudence. → RS
Art. 372 War crimes against civilian population	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 142 War crime against the civilian population	No apparent inspiration; this article is quite different from its predecessor in the SFRY CC, from the ICTY Statute and from the RS. Codifying partly GC IV. → GC IV
Art. 373 War crimes against the wounded and sick	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 143 War crime against the wounded and sick	In principle, Art. 373 of the 2006 CC draws on Art. 143 of the SFRY CC, but spells out the prohibited acts in more detail, without apparent inspiration. Codifying partly GC I+II. → SFRY and GC I+II

1623 See also: European Commission, 9 November 2005, p. 23; the failure to punish is specified elsewhere in the Criminal Code under Chapter 30 titled "Criminal offences against the Judiciary" (see Article 332 (3), which deals with the failure to report preparation of a criminal offence); cf. Michaeli, 2011b, p. 80.

1624 Cf. Michaeli, 2011b, p. 71f.

1625 Cf. European Commission, 8 November 2006b, p. 16.

1626 Cf. Škulić & Rinceanu, 2004, p. 220.

1627 Cf. Škulić & Rinceanu, 2004, p. 222 and 223.

2006 Serbia Criminal Code	**ICTY Statute**	**1976 SFRY Criminal Code**	**Analysis → main influence**
Art. 374 War crimes against prisoners of war	Partly covered by Art. 2 Grave breaches of the Geneva Conventions	Art. 144 War crime against prisoners of war	Copying almost verbatim Art. 144 of the SFRY CC; codifying partly GC III; covered partly by Art. 8 (2) (a) of the RS. → SFRY
Art. 376 Employment of prohibited means of warfare	Partly covering Art. 3 Violations of the laws and customs of war	Art. 148 Making use of forbidden means of warfare	Drawing on Art. 148 of the SFRY CC. → SFRY
Art. 377-383 and 385 specific war crimes	Partly covered by Art. 2 and 3	Partly covering art. 149-151	Codifying specific war crimes from GC I-IV and Art. 8 of the RS. → GC and RS
Art. 384 Failure to prevent crimes against humanity and other values protected under international law	Somewhat partly covering Art. 7 (3)	Did not exist	Art. 384 of the 2006 CC codifies command and superior responsibility as a crime, not as a mode of liability. In contrast to the international statutes, this article only criminalises the failure to prevent, not to punish. It takes over the "knew or should have known" test from the international statutes and the causation element from the RS. → RS
Art. 386 War of aggression	Does not exist	Art. 152 Instigating an aggressive war	Art. 386 of the 2006 CC draws on Art. 152 of the SFRY CC.[1628] → SFRY

ICTY impact on both the Serbian and Bosnian criminal codes is necessarily limited by the fact that the domestic codes follow a different structure, marked by the legal tradition they are based on: while the ICTY predominantly adheres to the Anglo-Saxon concept of criminal law providing for general rules that are more closely defined through case law, BiH and Serbia inherited the continental European tradition of criminal law from Yugoslavia, where definitions of criminal acts are provided in a special part of the criminal code, alongside a general part outlining the generally applicable principles of criminal law. The BiH and Serbian criminal codes are therefore necessarily somewhat more detailed than the rather narrow ICTY Statute.[1629] The different logics and structures also make transpositions from the ICTY into domestic criminal law more difficult.[1630] In many ways, however, both criminal codes are now elaborated in a clearer and more systematic way.[1631]

1628 While a few minor amendments were made after the ratification of the Rome Statute, Article 386 remains very different from Article 8*bis* of the Rome Statute; cf. Škulić & Rinceanu, 2004, p. 240f.

1629 Cf. G. Šimić (2008a). *The Influence of the Hague Tribunal on the Criminal Legislation of Bosnia and Herzegovina*. LAP LAMBERT Academic Publishing, location 935.

1630 Cf. Šimić, 2008a, location 963.

1631 Cf. Šimić, 2008a, location 630-639.

Generally speaking, however, one can identify stronger ICTY impact on the 2003 BiH Criminal Code than on the 2006 Serbian Criminal Code. According to Burke-White, the Bosnian legislation was a "joint effort of domestic and international officials, who, respectively, offered and embraced international norms and legal rules regarding the prosecution of war crimes"[1632]. The new code thus confirms the general tendencies described in section 1 that BiH is generally more open to outside and international influence. The Serbian Criminal Code depicts no ICTY influence. This can partly be explained by the country's general scepticism towards outside influence, and partly by the fact that the ICTY itself did not put the same pressure on Serbia as it did on BiH, mainly because transferring cases from The Hague was mostly planned for Bosnia and Herzegovina.[1633]

2.2 Jurisprudence

The international experts that were mandated by the High Representative to make recommendations for the conduct of domestic war crimes trials had recommended that ICTY jurisprudence should become the persuasive authority in the interpretation of domestic laws, both procedural and substantive.[1634] The consultants therefore did not only recommend to adapt criminal legislation, but also that domestic courts align their jurisprudence and court practice.

Indeed, the former president of the SCBiH described ICTY case law as one of the "most important sources" for her court.[1635] According to legal practitioners and observers in Bosnia and Herzegovina, both at the State Court of BiH and at cantonal and district courts,[1636] ICTY jurisprudence is extensively used.[1637] For instance, in order to: establish

1632 Burke-White, 2007, p. 338.

1633 Cf. Michaeli, 2011b, p. 71.

1634 Cf. Bohlander, 2004, p. 9.

1635 Cf. Kreso, 27 November 2013, p. 35.

1636 At the cantonal and entity courts, the practice is still inconsistent, however; cf. Rüedi, 2015, p. 110; Popovic, 2012, p. 223 and 231; Kirs, 2011, p. 409. Although the State Court of Bosnia and Herzegovina (SCBiH) shall issue practice directions on the application of substantive law on genocide, crimes against humanity, war crimes, and violations of the laws and practices of warfare and individual criminal responsibility related to those crimes, either *ex officio* or upon request from the entity or district courts, this did apparently, not have great effects to date; cf. Šimić, 2008a, location 1248-1257.

1637 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with cantonal prosecutor, Sarajevo, 6 February 2017, I-4; interviews with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; Sarajevo, 6 February 2017, I-6; and Sarajevo, 31 January 2017, I-21; interview with OKO representative, Sarajevo, 20 November 2018, I-44; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8; interview with BRRLN representative, Sarajevo, 1 February 2017, I-41; interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25; Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016; see also: Kreso, 27 November 2013,

that certain provisions of the criminal codes reflected customary international law at the time of the offence;[1638] find guidance on the status and interpretation of international humanitarian law;[1639] determine the legal elements of crimes for individual offences (such as murder, rape, enforced disappearances, or persecution, or the like);[1640] determine the definition of an armed conflict or the status of civilians or prisoners of war for the purpose of war crimes;[1641] or determine the requirements for the modes of liability command and superior responsibility[1642] or joint criminal enterprise.[1643] Often, the State Court does not necessarily quote ICTY case law in its analysis, but from the wording used, it nevertheless becomes clear that it adheres to the Tribunal's jurisprudence.[1644] At the same time, it leaves some questions unanswered for which there is no ICTY precedent,[1645] and in which cases ICTY jurisprudence might not be sufficiently developed or even inconclusive.[1646]

Some of my interview partners stressed the utility of the Tribunal's jurisprudence particularly with regard to complicated legal issues, such as modes of liability – especially when the legal concept (such as joint criminal enterprise)[1647] had been authoritatively

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p. 35; Uhlířová, 2012, p. 212; Weill & Jovanović, 2012, p. 264; Ronen, 2011, p. 49; Pocar, 2008, p. 662; Ivanišević, 2007, p. 18; Burke-White, 2007, p. 337.

1638 Cf. Ronen, 2011, p. 42f.

1639 Cf. Orentlicher, 2010, p. 125; Ronen, 2011, p. 43f.; Kreso, 27 November 2013, p. 35

1640 Cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; similar: Rüedi, 2015, p. 181; OSCE Mission to Serbia, 2015, p. 64; Kreso, 27 November 2013, p. 35; Bulić, 6 November 2012, p. 45; Uhlířová, 2012, p. 212; Ronen, 2011, p. 43f.; more generally, the SCBiH also follows the ICTY in holding that crimes can be punished even if they are not specifically defined in the law that was in force at the time of commission, and if the accused was aware of his/her acts at the time of the commission and of the consequences of the acts – for instance with regard to crimes against humanity; cf. Bulić, 6 November 2012, p. 45.

1641 Cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; and Sarajevo, 6 February 2017, I-6.

1642 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Ferid Hodžić*, Judgment, X-KRŽ-07/430, First instance, 29 June 2010, para. 63; and similar: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Predrag Kujundžić*, Judgment, X-KRŽ-07/442, First instance, 30 October 2009, para. 410-452.

1643 Cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with cantonal prosecutor, Sarajevo, 6 February 2017, I-4; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22; see also: Orentlicher, 2018, p. 370; OSCE Mission to Serbia, 2015, p. 64; Rüedi, 2015, p. 181; Ronen, 2014, p. 153f.; Kreso, 27 November 2013, p. 35; Uhlířová, 2012, p. 212; Bulić, 6 November 2012, p. 45; Ronen, 2011, p. 43f.

1644 Cf. A. Trapani (2013). Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Courts of the Democratic Republic of Congo. *Israel Law Review, 46*(2), 233-248, p. 242f.; see also: Ronen, 2011, p. 44: while many, but not all, cases mention ICTY case law as explicit references, many decisions reflect ICTY case law so closely that given that they concern identical events, it is undisputed that the Tribunal's case law influenced the decisions of national war crimes courts.

1645 For instance on the question of the required level of intent of a commander, charged with genocide under command responsibility; cf. Trapani, 2013, p. 247.

1646 Cf. Trapani, 2013, p. 247; Uhlířová, 2012, p. 218.

1647 Cf. Trapani, 2011, p. 57-68.

developed by the ICTY,[1648] and/or when it did not have a "national history" in Bosnian legislation.[1649] Others insisted on its general importance, even for concepts that are traditionally known in Bosnian law. One Bosnian judge even said that the SCBiH strives for consistency in the jurisprudence of the SCBiH and the ICTY, and that "[f]or all legal questions, we follow the ICTY"[1650] – even though they of course do not feel bound by the Tribunal's jurisprudence and insist on their independence.[1651] One judge described the SCBiH's approach to ICTY jurisprudence in these words: "[w]e use it 'liberally'"[1652], meaning that they do not slavishly follow ICTY case law, but instead canvass all relevant sources and assess their value,[1653] while respecting that their jurisprudence must, of course, first and foremost be based on the domestic legislation.[1654] He also stressed that, as the Tribunal's case law is not always uniform, it cannot simply be copy-pasted into national jurisprudence. Rather, it must be carefully examined and then creatively used.[1655] Perhaps the best

1648 Cf. interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; the same goes for the requisite elements of genocide: the SCBiH has heavily relied on the ICTY in its genocide jurisprudence; see for instance for the customary status of the crime of genocide: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, Judgment, X-KRŽ-05/24-1, First instance, 29 July 2008, p. 44; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miladin Stevanović*, Judgment, Case X-KRŽ-05/24-2, First instance, 29 July 2008, p. 42-43; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.*, Verdict, X-KR-05/24, First instance, 29 July 2008, p. 52-53; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić*, X-KRŽ-07/386, First instance, 16 October 2009, p. 62-64. For the definition of the acts constituting the *actus reus* of the crime of genocide, including the definition of members of a group: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miladin Stevanović*, Judgment, Case X-KRŽ-05/24-2, First instance, 29 July 2008, p. 44; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.*, Verdict, X-KR-05/24, First instance, 29 July 2008, p. 54; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić*, X-KRŽ-07/386, First instance, 16 October 2009, p. 65-66; for the definition of the mental element of the crime, including proof of genocidal intent: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, Judgment, X-KRŽ-05/24-1, First instance, 29 July 2008, p. 46-49; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al.*, Verdict, X-KR-05/24, First instance, 29 July 2008, p. 56; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić*, X-KRŽ-07/386, First instance, 16 October 2009, p. 66ff.; cf. Martin-Ortega, 2012, p. 621. See also: Trapani, 2011, p. 32-42. Also for command responsibility, the SCBiH has heavily relied on the ICTY; cf. Trapani, 2011, p. 52-55.

1649 Cf. Trapani, 2013, p. 247; confirmed in: interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32. By looking at the ICTY, Bosnian legal professionals find "legal solutions" for concepts that had thereto been unfamiliar to them; cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32.

1650 Cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; a Bosnian defence counsel also confirmed that "[i]n every single judgment of the court you will find both ECHR and ICTY jurisprudence"; interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; similar: interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6; and interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

1651 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

1652 Interview with SCBiH judge, Sarajevo, 23 November 2018, I-58.

1653 Cf. Orentlicher, 2018, p. 370.

1654 Cf. interview with SCBiH judge, Sarajevo, 23 November 2018, I-58, this was also said by one foreign judge who had formerly worked at the SCBiH; cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

1655 Cf. interview with SCBiH judge, Sarajevo, 23 November 2018, I-58; this judge criticised a too extensive use of ICTY jurisprudence by the Bosnian State Prosecution, in particular, regarding JCE, suspecting that the prosecutors charge JCE when they lack evidence to prove their case.

description of the interaction between the SCBiH and the ICTY was given to me by a former foreign SCBiH judge: "We didn't run parallel. We in Sarajevo would always look towards the ICTY and check: what did they say? And is this suitable for our case? If so, we addressed their jurisprudence."[1656] The same applies to prosecutors and defence counsel, who also rely on the ICTY in their submissions. As one Bosnian defence counsel explained: "our starting point is always the ICTY."[1657]

Several of my interviewees stressed that the ICTY's jurisprudence had its most important and most tangible effect on the development of Bosnian jurisprudence on sexual violence crimes.[1658] This concerned most notably the fact that the ICTY (and the ICTR, followed by the ICC) do not require force or threat of force as an element of rape – contrary to most national legal systems, including that of Bosnia and Herzegovina. The judges at the Bosnian State Court were aware of the fact that the international standard diverges from the national standard, and several chambers applied the international definition of rape, although the national legislation incorporated the element of force or threat of force.[1659] Eventually, this led to a change of the legislation in 2015,[1660] removing the element of force or threat of force from sexual violence as a crime against humanity and rape as a war crime,[1661] which many of my interview partners attribute to the ICTY's normative influence.[1662] In the meantime, the SCBiH has further developed the jurisprudence on gender crimes.[1663] It is,

1656 Interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9 (my own translation; in its German original: „*Wir liefen nicht parallel. Also, man hat schon geschaut – wir jedenfalls in Sarajevo: Was haben die gemacht? Und passt es zu unserem Fall? Dann haben wir uns auf die bezogen.*")

1657 Interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6.

1658 Cf. interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25; see also: Orentlicher, 2018, p. 371; and Orentlicher, 2010, p. 125; or Trapani, 2011, p. 26-32.

1659 Cf. OSCE Mission to Bosnia and Herzegovina (2017), *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016*, Sarajevo, https://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true (last accessed 12/09/2019), p. 16f.; S. Brammertz, S. & M. Jarvis (Eds.). (2016). *Prosecuting Conflict-Related Sexual Violence at the ICTY*. Oxford: Oxford University Press, p. 368.

1660 See: Law on Changes and Amendments to the Criminal Code of BiH of 19 May 2015, Official Gazette of Bosnia and Herzegovina No. 40/15. See Articles 9 and 10 on relevant changes to the Articles 172 (crimes against humanity) and 173 (war crimes against civilians) defining underlying offences of sexual violence. See also: TRIAL International (22 May 2015), BiH: Criminal Code finally up to International Standards following TRIAL's Recommendations, https://trialinternational.org/latest-post/bih-criminal-code-finally-up-to-international-standards-following-trials-recommendations/ (last accessed 20/08/2019).

1661 Cf. Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 6-29 March 2017, 13 February 2017, https://www.amnesty.org/download/Documents/EUR6355542017ENGLISH.pdf (last accessed 20/08/2019), p.5.

1662 Cf. interviews with TRIAL International representatives, Sarajevo, 1 February 2017, I-8; and Sarajevo, 22 November 2018, I-23; see also: OSCE Mission to Bosnia and Herzegovina, 2017, p. 16.

1663 Cf. Orentlicher, 2018, p. 373.

for instance, believed to be the first court worldwide to find defendants guilty of gender-based persecution as a crime against humanity.[1664]

Next to that, the State Court of Bosnia and Herzegovina, which applies the 2003 BiH Criminal Code, also looks at the Tribunal's jurisprudence for establishing the elements of joint criminal enterprise. This appears to be a logical choice, given the fact that Article 180 on modes of liability for international crimes is a verbatim copy of Article 7 of the ICTY Statute.[1665] Although not all chambers agree,[1666] the *Rašević and Todović* Chamber held that when Article 7 of the ICTY Statute was copied into the law of BiH, it came with its "international origins, definitions and its international judicial interpretation"[1667]. Hence, domestic courts would have to consider the parent norms of the national provisions within international law and their interpretation by international courts.[1668]

In general terms, it is therefore "difficult to imagine it [the SCBiH] without the [T]ribunal's influence."[1669]

This is not the same in Serbia. While Serbian courts sometimes also use ICTY jurisprudence, they do so much more rarely.[1670] It has been noted that citations of ICTY case law are usually only made to the extent that ICTY cases support existing interpretations of laws rather than to introduce new ones.[1671] In addition, guidance sought from the Tribunal is not always made explicit.[1672] As examples of concepts where ICTY case law was obviously consulted, my interviewees have mentioned the definition of armed conflicts,[1673] of civilians for the purpose of war crimes,[1674] or elements of crimes of individual

1664 Cf. OSCE Mission to Bosnia and Herzegovina (February 2014), *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges. An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013*, Sarajevo, https://www.osce.org/bih/117051?download=true (last accessed 12/09/2019), p. 61.

1665 Cf. Uhlířová, 2012, p. 212; see above, section 2.1 on legislation.

1666 Cf. Uhlířová, 2012, p. 217.

1667 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mitar Rašević and Savo Todović*, Judgment, X-KR/06/275, First instance, 28 February 2008, p. 103.

1668 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mitar Rašević and Savo Todović*, Judgment, X-KR/06/275, First instance, 28 February 2008, p. 103; cf. Uhlířová, 2012, p. 215.

1669 Cf. Trapani, 2013, p. 247; Trapani even questions whether the SCBiH can at all be seen as independent from the ICTY.

1670 Cf. interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56; interview with OSCE Mission to Serbia representative, Belgrade, 26 January 2017, I-2; interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; see also: Weill & Jovanović, 2012, p. 264.

1671 Cf. Michaeli, 2011b, p. 71f.

1672 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-13; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; this point will be demonstrated below in the analysis of domestic case law on the contextual elements of war crimes (see section 2.2.2).

1673 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55.

1674 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

offences (such as inhumane treatment, rape).[1675] With regard to modes of liability, in the case law analysis, I detected one reference to ICTY jurisprudence on "ordering".[1676]

The reluctance to consult and refer to Tribunal jurisprudence is a general trend among judges,[1677] prosecutors,[1678] and defence counsel –[1679] although some of the defence counsel appearing before Serbian courts have ICTY experience,[1680] which they could use – as selectively as they wish – to their advantage. Few defence counsel (although more than judges and prosecutors)[1681], however, do.

In fact, according to the accounts of one Bosnian prosecutor, Serbian courts reject parts of the Tribunal's jurisprudence to the extent that they will block regional cooperation when Bosnian courts follow it. He gave the example of situations in which a defendant is indicted with joint criminal enterprise (which has been, as described above, incorporated in the BiH Criminal Code)[1682] and extradition to BiH is sought from Serbia or through Interpol.[1683] In those cases (where JCE is charged), Serbia does not extradite the requested individual and does not give access to required documents.

Two examples that illustrate the differences between Bosnia and Herzegovina and Serbia in approaching international law in general, and ICTY case law specifically, will be outlined in the following sections. The first example addresses (in section 2.2.1) the choice whether or not to prosecute for crimes against humanity, or command responsibility, when handling cases where crimes are at stake that were committed during the Yugoslav wars. The different choices made in both countries reveal that BiH is much more willing to rely on international law than Serbia. The second example (outlined in section 2.2.2)

1675 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55.

1676 See: Higher Court Belgrade, *Case of Radojko Repanović*, Judgment, K-PO2 49/2010, 15 December 2010, p. 46.

1677 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; I had the same impression from: interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50. Several observers as well as judges of the Court of Appeal Belgrade attest that the Belgrade Court of Appeal is more likely to use ICTY jurisprudence for guidance than the first instance, the Higher Court Belgrade; cf. interviews with Appeals Court Belgrade judges, Belgrade, 9 November 2018, I-30; and Belgrade, 9 November 2018, I-13; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18. My case law analysis did not confirm this observation.

1678 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1679 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1680 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

1681 Cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1682 See section 2.1.

1683 Cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32; the same applies to Croatia which also does not extradite for charges of joint criminal enterprise, see Chapter 5, section 5.2.4.

refers to the contextual elements of war crimes – a concept that has been extensively developed and explained by the Tribunal. Using its jurisprudence when establishing whether a particular crime was committed in the context of an armed conflict, and in which kind of conflict (international or national), seems intuitive. Again, Serbian domestic practitioners have been more reluctant to look at ICTY case law than Bosnians.

2.2.1 Prosecuting for Crimes Against Humanity and Command Responsibility

The choices made regarding whether or not to prosecute for crimes against humanity or command responsibility illustrates the different approaches to international law in Serbia and Bosnia and Herzegovina because both concepts were not foreseen by the Yugoslav criminal codes (neither in the 1976 SFRY Criminal Code, nor in the 1992 FRY Criminal Code).[1684] They were therefore not written law at the time of the commission of the crimes during the armed conflicts in the 1990s.[1685]

In Serbia, most legal practitioners[1686] and politicians reject the possibility of charging a defendant with crimes against humanity and under command responsibility due to the constitutional prohibition against retroactivity.[1687] While ratified international agreements and treaties (for instance, Additional Protocol I, with its Article 86 (2) on command responsibility) are directly applicable according to Article 10 of the Serbian Constitution, criminal proceedings may only be initiated for crimes regulated by law, and crimes may only be punished in accordance with the law (Article 121 (3) of the Serbian Constitution).[1688] As mentioned, some posit the view that this means that only "the blackletter law" can be applied, and that customary international law is not a proper source of law for invoking criminal responsibility.[1689]

As a consequence, high-level perpetrators are not prosecuted;[1690] and certain crimes cannot be addressed. However, many support a try-out of charging command responsibility – this was for instance mentioned to me by two judges of the Court of Appeal Belgrade.[1691]

1684 Cf. OSCE Mission to Serbia, 2015, p. 59.

1685 Cf. Ivanišević & Trahan, October 2004, p. 25.

1686 This is not true for judges of the Court of Appeal Belgrade; cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1687 Cf. Ivanišević & Trahan, October 2004, p. 25; confirmed in: interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with OSCE Mission to Serbia representative, Belgrade, 26 January 2017, I-2; interview with Humanitarian Law Center representative, Belgrade, 24 January 2017, I-25.

1688 Cf. Ivanišević & Trahan, October 2004, p. 25; see also: Trapani, 2011, p. 51, describing that in Serbia, there is a majority and a minority school of thought. The majority holds tight to the rule of legality and the application of the Criminal Code at face value, while the minority suggests that the direct application of command responsibility pursuant to Additional Protocol I of the Geneva Conventions is possible.

1689 While he was not supporting it, this standpoint was explained to me by a Serbian prosecutor; cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1690 See also Chapter 5, section 5.2.5.

1691 Cf. interviews with Appeals Court Belgrade judges, Belgrade, 9 November 2018, I-30; and Belgrade, 9 November 2018, I-13.

However, none of the war crimes prosecutors have done so to date, an unwillingness which some attribute to political pressure or incompetence.[1692]

In Bosnia and Herzegovina, on the other hand, at the state level, where the 2003 BiH Criminal Code is applied,[1693] defendants are charged with both.[1694] Practitioners arguably had the necessary will to find a solution to prosecute for crimes against humanity and command responsibility – and they did, although the story behind it created a major shock for the Bosnian legal system at first.[1695]

The Maktouf-Damjanović Bomb

The controversy was about whether the 2003 BiH Criminal Code could be the basis for convictions and penalties at the SCBiH – as opposed to the criminal code in force at the time of the offences. The 1976 SFRY Criminal Code and the 2003 BiH Criminal Code differ greatly. The 2003 BiH Criminal Code contains a more comprehensive definition of war crimes, as well as provisions on crimes against humanity and command responsibility, and it excludes the superior orders defence.[1696] The sentences also differ.[1697]

The question as to which code to apply has several implications. What became problematic are the differences in sentencing provided for in the codes.[1698] In the decision as to which code to apply, courts in BiH are bound by the *lex mitior* principle of Article 7 (1) ECHR, which is binding on Bosnia and Herzegovina. While the choice was anything but clear, there were arguments on both sides.[1699] There were those arguing that the 2003 BiH Criminal Code would be the more lenient law, as it did not contain the death penalty. Others held that since Bosnia and Herzegovina had adopted Protocol 13 to the ECHR concerning the abolition of the death penalty in all circumstances, this argument had become invalid. Consequently, the number of years of imprisonment, foreseen by the respective criminal codes, would have had to be decisive. The range of possible years of

1692 Cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

1693 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5.

1694 Cf. interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22; at entity courts, however, where the 1976 SFRY Criminal Code is applied, prosecutors do not charge defendants with command responsibility for omissions; cf. Rüedi, 2015, p. 173.

1695 Cf. interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1696 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5.

1697 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5; the 2003 BiH Criminal Code provides for 10 years (reducible to five years in extraordinarily mitigating circumstances) to 45 years, and no death penalty (Article 173 in conjunction with 42 (2) of the BiH Criminal Code). The 1976 SFRY Criminal Code foresees imprisonment for not less than five years or death penalty (Article 142 (1) of the SFRY Criminal Code). Alternatively to the death penalty, it provides for imprisonment for 20 years (Article 38 (2) of the SFRY Criminal Code). In sum, this makes up for a range of 5 to 20 years. For aiding and abetting war crimes, penalties as low as of one year are possible.

1698 Cf. Orentlicher, 2018, p. 373.

1699 Cf. interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

imprisonment for war crimes was lower in the 1976 SFRY Criminal Code than in the 2003 BiH Criminal Code. Hence, according to the principle of *lex mitior*, the 1976 SFRY Criminal Code would have had to be applied.

In the SCBiH's first case, against Abduladhim Maktouf, the panel decided to apply the 2003 BiH Criminal Code and sentenced Maktouf to five years imprisonment for aiding and abetting war crimes committed in central BiH in 1993. It had concluded that the 2003 BiH Criminal Code is the more lenient law due to the abolishment of the death penalty.

The appeal panel reached a similar conclusion, but for a different reason: it interpreted the ECHR as excluding the application of the *lex mitior* principle to crimes under international law, adding that this is fully justified considering the maximum prison sentence allowed under the 1976 SFRY Criminal Code

> "could not achieve the general purpose of punishment given the gravity of these criminal offenses and their consequences, in particular if we consider the cases referred by the ICTY to the Court of Bosnia and Herzegovina."[1700]

The defendant subsequently appealed to the Constitutional Court, arguing that the retroactive application of the 2003 BiH Criminal Code in his case violated Article 7 ECHR and that the 1976 SFRY Criminal Code should have been used instead.[1701]

In March 2007, the Constitutional Court found no violation of the ECHR,[1702] yet for a different reason: it argued that the application of the 2003 BiH Criminal Code to punish acts carried out during the conflict was permissible under Article 7 (2) ECHR because these acts, at the time when they were committed, were already criminal according to the "general principles of law recognised by civilised nations"[1703].

It was the Grand Chamber of the ECtHR which concluded in 2013 that BiH had violated Article 7 ECHR. However, it emphasised the narrowness of its holding, making it clear that it was limited to the specific facts of the cases of the two applicants (in the meantime, the SCBiH's second defendant, Zoran Damjanović, had joined the proceedings). For Maktouf, the key factors were that he was, in principle, eligible to be sentenced to as little as one year in prison under the 1976 SFRY Criminal Code. As a consequence, the BiH Constitutional Court quashed the sentences imposed under the 2003 BiH Criminal Code, as well as the underlying convictions in ten cases, albeit without making the kind of case-specific determination undertaken by the ECtHR. In response, the SCBiH ordered the defendants' release pending retrial. This led to the release of 14 men (half of whom

1700 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Abduladhim Maktouf*, Judgment, KPŽ 32/05, Second instance, 4 April 2006; see also: Orentlicher, 2018, p. 374.
1701 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5, fn. 1.
1702 Cf. Orentlicher, 2018, p. 375.
1703 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5, fn. 1.

had been found guilty of genocide), rather than them being recharged and detained pending trial,[1704] as well as subsequent further releases in almost 20 cases.[1705] Of course, the release of that many war crimes defendants seriously undermined confidence in the judicial system.[1706] In November 2014, the Constitutional Court reversed itself in two judgments, putting an end to the controversial releases.[1707]

Since then, different chambers of the SCBiH have applied different codes.[1708] According to my interviewees, while the issue is by far not settled yet,[1709] a trend can be observed: for sentencing purposes, the 1976 SFRY Criminal Code is applied to war crimes and genocide,[1710] while the 2003 BiH Criminal Code is applied to crimes against humanity. The rule is therefore that the 1976 SFRY Criminal Code is applied, but since that is not possible for crimes against humanity (as it didn't contain any provisions of crimes against humanity), the new code is used in those cases.[1711]

According to Orentlicher, the *Maktouf and Damjanović* episode is a "reminder that incorporating international standards into domestic practice is not invariably appropriate, and may carry risks"[1712]. Thus, despite the – according to some – great discouragement to apply the 2003 BiH Criminal Code by the ECtHR, most Bosnian legal professionals regard crimes against humanity to have been a crime under customary international law at the time of the conflicts, arguing primarily with Article 7 (2) of the ECHR (the so-called

1704 Cf. Orentlicher, 2018, p. 375.

1705 Cf. Orentlicher, 2018, p. 376.

1706 Cf. interviews with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10; and Sarajevo, 20 November 2018, I-11; in addition, the SCBiH was heavily accused of bias from all sides: from those who were against the release because they thought releasing suspected war criminals was outrageous – and from those who were against war crimes trials, because they thought that the ECtHR and the Constitutional Court had given them arguments that this should stop. The SCBiH was also defending itself in its choice to apply the 2003 BiH Criminal Code, which "was understood as a political inclination towards more severe sanctioning and more keeping certain situation that was imposed by the international community in 2003 being pro-Bosniak"; interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1707 Cf. Orentlicher, 2018, p. 376; D. Džidić & M. Tausan (16 January 2015), Bosnia Blocks Controversial War Crimes Convict Releases, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2015/01/16/bosnian-constitutional-court-changes-approach-to-quashing-war-crimes-verdicts/ (last accessed 20/08/2019).

1708 Cf. interviews with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10; and Sarajevo, 20 November 2018, I-11; interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6.

1709 Cf. interview with SCBiH judge, Sarajevo, 1 February 2017, I-19.

1710 In fact, according to one observer, prosecutors usually combine indictments for genocide with charges for crimes against humanity. That way, they avoid the low sentences that the old 1976 SFRY Criminal Code foresees even for genocide; cf. interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1711 Cf. interviews with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10; and Sarajevo, 20 November 2018, I-11.

1712 Cf. Orentlicher, 2018, p. 373.

"Nuremberg exception")[1713].[1714] That way, they make sure to comply with the ECHR, but at the same time to meet the high standards of protection of modern international criminal law and international humanitarian law.[1715]

In Serbia, the 1992 FRY Criminal Code is used for the prosecution and adjudication of war crimes – as that was the law in force in Serbia at the time of the conflict.[1716] In Serbia, there have been no attempts to use the new 2006 Criminal Code, which (partly) implements the Rome Statute of the International Criminal Court, and therefore provides for the most modern standards of international criminal law.

The Maktouf-Damjanović episode had major implications. Apart from an outcry among the population and great confusion among legal professionals,[1717] it also suddenly and unexpectedly rendered the European Convention on Human Rights – and thereby, international law – an important source to be used by Bosnian jurists in their daily professional life.[1718] The question as to which law to apply is nowadays addressed in every single war crimes judgment. Defence counsel have reported that they appeal to the Constitutional Court and to the ECtHR, in every case that is not tried under the old 1976

1713 It states that Article 7 (1) of the European Convention on Human Rights (ECHR), which codifies the *nullum crimen sine lege* principle, "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." Indeed, also academics argue that crimes against humanity have been rooted in customary international law since the Nuremberg trials. In addition, in 1946, the United Nations (UN) General Assembly adopted the Principles recognised by the Charter of the Nuremberg Tribunal (United Nations General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, A/RES/95, 11 December 1946, http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf (last accessed 20/08/2019)), including the criminalisation of crimes against humanity. The "Principles of Cooperation" adopted by the UN General Assembly in 1973 provide that "crimes against humanity, whereever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment" (United Nations General Assembly, Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, A/RES/3074, 3 December 1973, https://www.ohchr.org/EN/ProfessionalInterest/Pages/PersonsGuilty.aspx (last accessed 20/08/2019)); cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 7, fn. 4.

1714 Cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32; one judge mentioned to me that he opines that crimes against humanity cannot be charged as, even if it was criminalised under customary international law, customary international law did not foresee a penalty. A sentence for crimes against humanity would thus amount to a violation of the principle of *nulla poena sine lege*; cf. interview with SCBiH judge, Sarajevo, 23 November 2018, I-58.

1715 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; see also: OSCE Mission to Bosnia and Herzegovina, August 2008, p. 6. It must be noted that the same is not true for courts at the entity and district level. They mostly apply the 1976 SFRY Criminal Code, which creates serious questions about equal treatment of citizens before the law, as both codes lead to very different outcomes; cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 5 and 10ff.

1716 Cf. OSCE Mission to Serbia, 2015, p. 64; this code is also used for the crimes committed during the first year of the conflict 1991, as it was more lenient than the 1976 SFRY Criminal Code which foresaw the death penalty; cf. Weill & Jovanović, 2012, p. 250f.

1717 Cf. interview with ICTY office BiH representative, Sarajevo, 30 January 2017, I-38.

1718 Cf. interview with Constitutional Court of BiH judge, Sarajevo, 7 February 2017, I-5.

SFRY Criminal Code.[1719] This demonstrates that a growing number of lawyers is aware of law outside the confines of the Bosnian blackletter law and is adept to apply it.

2.2.2 The Contextual Elements of War Crimes

Illustrative of the difference in impact of the ICTY on Bosnian and Serbian jurisprudence is the domestic case law on the contextual elements of war crimes – arguably one of the Tribunal's most important contributions to international humanitarian and international criminal law. Indeed, following – or at least addressing – its jurisprudence seems to be an intuitive choice, as the ICTY was the first body to systematically interpret and apply the Geneva Conventions in this respect.[1720]

The ICTY's Jurisprudence

The most instrumental case at the ICTY in this regard was the *Tadić* case. Tadić, who had been the Tribunal's first defendant, challenged its subject matter jurisdiction, alleging that "there did not exist a legally cognizable armed conflict – either internal or international – at the time and place"[1721] that the offences he had been charged with were committed. This gave the Appeals Chamber the opportunity to clarify the contextual elements of war crimes – as it is this context that triggers jurisdiction over international crimes, as opposed to ordinary crimes.[1722]

As a first contextual element of war crimes, the Appeals Chamber confirmed the defendant's claim that there must be a war.[1723] The Appeals Chamber held

> "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[1724]

On the distinction between international and internal armed conflict, the *Tadić* Appeals Chamber asserted:

1719 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; Sarajevo, 6 February 2017, I-6; and Sarajevo, 9 February 2017, I-53.

1720 Cf. K. Roberts (2009). The Contribution of the ICTY to the Grave Breaches Regime. *Journal of International Criminal Justice, 7*(4), 743-761, p. 743.

1721 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 66.

1722 Cf. ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 58.

1723 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 67.

1724 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 70.

> "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."[1725]

Faced with the context of the conflict in what is now Bosnia and Herzegovina, the Appeals Chamber needed to determine under which conditions an armed conflict that is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power. In so doing, it established the so-called "overall control" test, according to which a foreign state exercises control over a belligerent party to an otherwise non-international armed conflict (NIAC).[1726] This interpretation of how conflicts may be rendered international was hugely significant, having the practical effect of broadening the scope of application of grave breaches to include situations which might otherwise have been interpreted solely as civil wars.[1727]

As a factual finding, the Appeals Chamber established that "the conflicts in the former Yugoslavia have both internal and international aspects"[1728] and that – relevant to the *Tadić* case – the Yugoslav Army exercised overall control over the Army of the Republika Srpska in 1992.[1729]

The subsequent question was which set of laws applies to which type of armed conflict and how these laws relate to the ICTY Statute, which stipulated individual criminal responsibility. Individual criminal responsibility for war crimes as grave breaches of the Geneva Conventions (as enshrined in Article 2 of its Statute) can be invoked only for crimes committed in the context of an international armed conflict (IAC).[1730]

In NIACs, Article 3 (Violations of the laws or customs of war) of the ICTY Statute is applicable, as it reflects violations of the article that are common to all Geneva Conventions and that set mandatory minimum rules applicable to both international and internal armed

1725 ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 84.
1726 For a discussion, see: Roberts, 2009, p. 747ff.
1727 Cf. Roberts, 2009, p. 749.
1728 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 77.
1729 Cf. ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 147 and 162.
1730 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 84.

conflicts (common Article 3).[1731] The conditions that must be fulfilled for a violation of international humanitarian law to be subject to criminal responsibility under Article 3 of the ICTY Statute are:[1732] 1) the violation must constitute an infringement of a rule of international humanitarian law; 2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; 3) the violation must be "serious";[1733] 4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

As a second contextual element, the *Tadić* Appeals Chamber stated that the criminal acts in question need to be "closely related to the hostilities"[1734]. This so-called 'nexus requirement' was further developed in the ICTY's *Kunarac et al.* case, in which the Appeals Chamber suggested factors that can be taken into account in order to assess whether the criminal conduct is related sufficiently closely to the armed conflict.[1735]

Furthermore, the third contextual element stipulates that the perpetrator needs to be "aware" of the armed conflict, and more precisely, of the factual circumstances making up the armed conflict.[1736] However, s/he does not need to be able to make a correct legal evaluation as to the international or non-international character of the conflict.[1737]

1731 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 91 and 102; ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 298.

1732 See ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 94.

1733 Meaning that it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. The Appeals Chamber clarifies this point in saying that the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory; see ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 94.

1734 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 70 and 67.

1735 It suggested factors such as: the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties; cf. ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 59. The list of factors is not exhaustive. The International Criminal Court's Elements of Crimes clarify this requirement somewhat more systematically in stipulating that the conduct must be committed "in the context of" an armed conflict and be "associated with" it, see the "Introduction" to Article 8. "In the context of" refers to the temporal and geographical dimension of the nexus, whereas the "association" with the armed conflict refers to elements such whether the existence of the armed conflict played a substantial role in the perpetrator's decision or ability to commit the crime.

1736 Cf. ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgment, IT-98-34-A, Appeals Chamber, 3 May 2006, para. 112-116 and 121.

1737 Cf. ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment, IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 311.

According to the fourth contextual element, the crime needs to be committed against persons defined as "protected" by any of the four Geneva Conventions. The ICTY's jurisprudence has been concerned primarily with whether civilians could be considered as protected persons.[1738] This has required the interpretation of Article 4 (1) of Geneva Convention IV, which defines "protected persons" as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". While the interpretation of the first aspect of this definition proved to be relatively uncontroversial, the phrase "of which they are not nationals" was subject to numerous challenges by parties and comprehensive analysis by the chambers[1739] – as one could have anticipated in view of the contested understandings of "state", "nation", and "people" that led to the wars in the first place. The Appeals Chamber found that the phrase "of which they are not nationals" should not be defined strictly by the formal requirement of nationality.[1740] Instead, protected status should be seen as "hinging on substantial relations more than on formal bonds"[1741]. The Appeals Chamber recognised that where ethnicity rather than formal nationality could effectively be determinative of national allegiance, allegiance to a party to the conflict and, correspondingly, control by this party over persons in a given territory may be regarded as the crucial test.[1742] This was a highly significant decision given that, as recognised by the Chamber, modern international conflicts are more likely to be inter-ethnic conflicts – such as in the former Yugoslavia – rather than conflicts between well-established states. Had the Appeals Chamber adopted a restrictive approach to the phrase "of which they are not nationals", the qualification as grave breaches of the Geneva Conventions of crimes committed by Bosnian Serbs against Bosnian Muslims and Bosnian Croats, would have been incommensurably more difficult. On the facts of the *Tadić* case, the Appeals Chamber found that the Bosnian Muslim victims were in the hands of armed forces of a state of which they were not nationals (namely, the Army of the Republika Srpska, the Bosnian Serb Army), despite sharing the same formal nationality.[1743]

It becomes clear that the jurisdiction over violations of international humanitarian law, as enshrined in the Geneva Conventions, is by no means a straightforward exercise. Rather, it requires a meticulous analysis of the factual circumstances on the ground, in order to determine the nature of the conflict in question, the nexus between the crime and the conflict, the alleged perpetrator's awareness of the conflict, and the status of the victims of the crime. In addition, a legal analysis as to whether the violation of international law is serious enough to trigger individual criminal responsibility, as well as a determination

1738 Cf. Roberts, 2009, p. 753.
1739 Cf. Roberts, 2009, p. 753.
1740 Cf. ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 165.
1741 ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 166.
1742 Cf. ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 166.
1743 Cf. ICTY, *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 167.

of the correct sets of applicable laws, are necessary. It is clear that even for this well-staffed and well-equipped court, these questions pose significant challenges – although it is worth noting that the context of war crimes is probably one of the most consistently adjudicated issues of the ICTY's jurisprudence. In the following sections, it will become clear that courts in the region have struggled with properly establishing the context of war crimes.

Bosnia and Herzegovina

Since the very beginning of the operation, the State Court of Bosnia and Herzegovina chose to closely follow the ICTY's jurisprudence – both concerning the legal criteria of the contextual elements of war crimes, and the Tribunal's factual findings about whether in a particular place and time, there was an armed conflict.

The following analysis of the jurisprudence of the State Court of Bosnia and Herzegovina regarded all first, second and third instance verdicts rendered by the court's war crimes department between the years 2005-2008, 2012-2013, and 2015-2018. In total, 244 judgments were analysed. This selection made it possible to detect patterns in the SCBiH's jurisprudence throughout its development during the first four years of the department's operation. It also allowed to check whether the jurisprudence had changed between these initial years and the last four years of the department's operation. Lastly, by analysing the last year of the foreign judges' and prosecutors' mandates at the State Court (2012), and the first year of operation without them (2013), it was possible to assess whether the foreigners' absence had any significant effects.

In numerous cases, the SCBiH used Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in Bosnia and Herzegovina, which allows for accepting "as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY". Very often, this mechanism was used by the court in BiH to establish that an armed conflict was going on at the time and in the place of the crimes at stake, as established by the ICTY.[1744] As the cases at the State Court of BiH often concern the same events as cases at the ICTY (with the ICTY dealing with higher profile offenders and the State Court with mid-profile perpetrators), an analysis of the broader context of these events would often lead to the same results (more specifically, the same factual findings).

1744 By way of example, see: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Abduladhim Maktouf*, Judgment, K-127/4, First instance, 1 July 2005, p. 12 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zijad Kurtović*, Verdict, X-KR-06/299, First instance, 30 April 2008, p. 9 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Sreten Lazarević et al.*, Verdict, First instance, 29 September 2008; p. 21 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Andrun Nikola*, Verdict, X-KR-05/42, First instance, 14 December 2006, p. 12 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zrinko Pinčić*, Verdict, X-KR-08/502, First instance, 28 November 2008, p. 6-7 (English version).

While the benefits in terms of judicial economy and coherence of jurisprudence are obvious, following the ICTY to this extent was, as will be shown below,[1745] by no means self-evident: Serbian courts chose to make their own analyses and indeed sometimes came to very different conclusions.

In its legal analyses of the contextual elements, the State Court of Bosnia and Herzegovina equally followed the ICTY, even though they were often less vigorously conducted than at the ICTY.[1746]

As mentioned above,[1747] the State Court established the relationship between the Geneva Conventions and the war crimes articles of the 2003 BiH Criminal Code, with reference to the introductory phrase of the relevant article which reads "in violation of the rules of

1745 See next section on Serbia.

1746 While the contextual elements of war crimes is a suitable legal issue to show the ICTY's influence on the SCBiH's jurisprudence, this is by far not the only legal issue where the State Court drew inspiration from the Tribunal. In particular, the SCBiH also relied on the ICTY for establishing the elements of individual criminal offences under international criminal law. See for instance the following judgments: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Rasema Handanović*, Verdict, S 1 1 K 009162 12 Kro, First instance, 30 April 2012, p. 18-21 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zurahid Mujčinović and Sulejman Hrustić*, Verdict, S1 1 K 00 3302 10 Krl, First instance, 2 October 2012, p. 16-22 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Muhidin Bašić and Mirsad Šijak*, Verdict, S1 1 K 007209 12 Kri, First instance, 18 January 2013, p. 26-33 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Nisvet Gasa et al.*, Verdict, S1 1 K 003485 12 Kžk, Second instance, 18 December 2013, p. 52-54 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mirko Pekez and Milorad Savić*, Verdict, S1 1 K 014267 13 Kžk, Second instance, 18 December 2013, p. 14-20 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milan Perić et al.*, Verdict, S1 1 K 002798 13 Kžk, Second instance, 12 November 2013, p. 24-33 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Albina Terzić*, Verdict, S1 1 K 005665 13 Krž 2, Second instance, 5 July 2013, p. 19-26 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veselko Raguž and Ivo Raguž*, Verdict, S1 1 K 005528 14 Kžk, Second instance, 15 June 2015, p. 20-27 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Slavko Savić*, Verdict, S1 1 K 017213 14 Kri, First instance, 29 June 2015, p. 36-44 (English version); *SCBiH, Prosecutor's Office of Bosnia and Herzegovina v. Indira Kamerić*, Verdict, S1 1 K 010132 15 Krž, Second instance, 15 December 2015, p. 26-29 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Mrđa et al.*, Verdict, S1 1 K 018013 15 Kri, First instance, 19 May 2017, p. 49-62 (English version).

1747 Section 1.2.2.

international law"[1748]. It further held that Article 173 ("War Crimes against Civilians")[1749] is applicable to armed conflicts, without any distinction between internal and international armed conflicts.[1750]

The second verdict rendered by the war crimes department of the State Court of BiH is exemplary of the court's jurisprudence on war crimes matters, as other verdicts have closely followed both its structure and its legal findings.[1751] The brothers Goran and Zoran Damjanović were accused of, among others, war crimes against civilians under Article 173 (1) (c)[1752] of the BiH Criminal Code, for – as soldiers of the Army of Republika Srpska (the VRS) – beating up a group of 20-30 prisoners of Bosniak ethnicity who were *hors de combat*

1748 See, for instance, Article 173 (1) ("War Crimes against Civilians"):
(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:
a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;
b) Attack without selecting a target, by which civilian population is harmed;
c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;
d) Dislocation or displacement or forced conversion to another nationality or religion;
e) Coercing another to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration;
f) Forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or the unlawful issuance of money, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

1749 The same applies to Article 175 ("War Crimes against Prisoners of War"). While Articles 174 ("War Crimes against the Wounded and Sick"), 177 ("Unlawful Killing or Wounding of the Enemy"), 178 ("Marauding the Killed and Wounded at the Battlefield"), and 179 ("Violating the Laws and Practices of Warfare") most certainly also fall into the category of war crimes, I could not find any SCBiH jurisprudence on these articles.

1750 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 6 (English version).

1751 The following analysis mentions, by way of examples, only a handful SCBiH judgments. However, numerous other judgments base their analyses on earlier ICTY jurisprudence in the same way. Again, by way of example, see: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Sreten Lazarević et al.*, Verdict, First instance, 29 September 2008, p. 35-41 (English version); *SCBiH, Prosecutor's Office of Bosnia and Herzegovina v. Zrinko Pinčić*, Verdict, X-KR-08/502, First instance, 28 November 2008, p. 20-27 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Slavko Šankić*, Verdict, X-KR-05/41-1, First instance, 29 October 2008, p. 8-13 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Idhan Sipić*, Verdict, X-KR-07/457, First instance, 22 February 2008, p. 8-9 (English version); SCBiH, Pr*osecutor's Office of Bosnia and Herzegovina v. Ivica Vrdoljak*, Verdict, X-KR-08/488, First instance, 10 July 2008, p. 14-19 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Šaban Đelibašić et al.*, Verdict, S1 1 K 007937 11 Kri, First instance, 22 June 2012, p. 13-14 (English version).

1752 Killing, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health.

(as they had been captured and were wounded), resulting in severe physical and mental pain, with the purpose of punishing the prisoners for offering resistance to the Serb attack on Ahatovici, and of discriminating against them on the ground of their Bosniak ethnicity.[1753]

Before holding that this was contrary to Article 3 (1) (a) of the Geneva Convention on the Protection of Civilian Persons in Time of War (GC IV),[1754] which is common to all Geneva Conventions, the court explained – among other thingss, with reference to the *Kunarac* appeal judgment –[1755] the customary nature of the Geneva Conventions and the fact that they were applicable to Bosnia and Herzegovina (and Yugoslavia) at the time of the commission of the offence.[1756] In other cases, the State Court of BiH relied on the ICTY's jurisprudence in the *Čelebići* and *Blaškić* cases, by asserting that while the Geneva Conventions are first and foremost applicable in international armed conflicts, common Article 3 contains the core of fundamental minimum standards, which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted,[1757] including in non-international armed conflicts.[1758] In addition, in relying on the ICTY's *Tadić* Decision on Jurisdiction,[1759] the SCBiH further explained in its *Bjelić* case that certain principles of international customary law, which are applicable to armed conflicts of an internal character, as such, incorporate individual criminal responsibility of persons who violated them.[1760] The *Bjelić* Chamber noted that

1753 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 2 (English version).

1754 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 1 (English version).

1755 Cf. ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 68.

1756 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 16-20 (English version).

1757 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 19f. (English version), quoting ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 149; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 7 (English version), quoting ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004, para. 170 and ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 143 and 150.

1758 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 12 (English version); similar in SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 6 (English version).

1759 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 96-127 and 128-134.

1760 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 7 (English version).

> "[t]he ICTY case law consistently shows that a number of principles of international humanitarian law from the war crimes field are applied in internal conflicts. This Panel completely agrees with the conclusion of the ICTY Appeals Chamber that maintenance of a distinction between the two legal regimes and their criminal consequences when equally serious offenses are at issue, only because of a difference in the nature of an armed conflict, would ignore the basic purpose of the Geneva Conventions, which is the protection of dignity of human beings."[1761]

After having established the customary law nature of common Article 3, the *Damjanović* Chamber went on to analyse the violations of common Article 3 at stake. It pointed out that "for a crime to be adjudicated under common Article 3 of the Geneva Convention"[1762], three preliminary requirements must be satisfied: 1) there must be an armed conflict (international armed conflict or non-international armed conflict); 2) there must be a close nexus between the armed conflict and the alleged offence (i.e. the acts of the accused must be closely related to the hostilities); 3) the offence must be committed against civilians or civilian property.[1763]

As to the first requirement,[1764] the SCBiH replicated the ICTY's definition of an armed conflict, defining it as "a resort to armed force between States or protected violence between governmental authorities and organized armed groups or between such groups within a State"[1765]. It further explained that for common Article 3, the nature of the armed conflict is irrelevant, as long as: 1) the violation constitutes an infringement of a rule of international humanitarian law; 2) the rule is customary in nature or the required conditions of treaty law are met; 3) and the violation is serious, meaning that the violation constitutes a breach of a rule protecting important values, the breach involves grave consequences for the victim, and the violation of the rule entails the individual responsibility of the person

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1761 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veiz Bjelić*, Verdict, X-KR-07/430-1, First instance, 28 March 2008, p. 8 (English version), referring to ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 172.

1762 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13 (English version).

1763 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13-14 (English version).

1764 The same reasoning can be found almost verbatim in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Momčilo Mandić*, Verdict, X-KR-05/58, First instance, 18 July 2007, p. 128f. (English version); or in SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Jadranko Palija*, Verdict, X-KR-06/290, First instance, 28 November 2007, p. 29 (English version).

1765 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13 (English version), citing ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 56; see also: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 19 (English version).

breaching the rule.[1766] These criteria had first been established in the *Tadić* Decision on Jurisdiction[1767] and have since then been consistently repeated in ICTY judgments.[1768]

On the second requirement,[1769] the *Damjanović* Chamber cited the ICTY's *Halilović* trial judgment[1770] by holding that there must be a nexus between the armed conflict and the alleged criminal offence,[1771] meaning that the crime must be "closely related to the armed conflict"[1772]. Following the *Kunarac* appeal judgment,[1773] the Chamber listed factors for the assessment of the existence of a nexus, such as the fact that the perpetator is a combatant, that the victim is a non-combattant, that the victim is a member of the opposing party, that the act may be said to serve the ultimate goal of a military campaign, or that the crime is committed as part of or in the context of the perpetrator's official duties.[1774] It explained that "[i]n this regard, the ICTY jurisprudence developed the notion of 'closed nexus'."[1775] The armed conflict need not to have been causal to the commission of the crime, but the existence of an armed conflict must have played a substantial part in the

1766 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13 (English version); the same criteria can be found in numerous other judgments, for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 20 (English version).

1767 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 137.

1768 See, for instance, ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 140, 147-150 or ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 66.

1769 Verbatim as in *Damjanović* also in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Momčilo Mandić*, Verdict, X-KR-05/58, First instance, 18 July 2007, p. 129f. (English version).

1770 Cf. ICTY, *Prosecutor v. Sefer Halilović*, Judgment, IT-01-48-T, Trial Chamber, 16 November 2005, para. 28.

1771 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13 (English version); see also SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 20 (English version), which referred to ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 193 on the same matter.

1772 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Jadranko Palija*, Verdict, X-KR-06/290, First instance, 28 November 2007, p. 31 (English version); here, the chamber quoted ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 55; ICTY, *Prosecutor v. Mitar Vasiljević*, Judgment, IT- 98-32-T, 29 November 2002; and ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 70.

1773 Cf. ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 59.

1774 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 13 (English version); such cited also in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Jadranko Palija*, Verdict, X-KR-06/290, First instance, 28 November 2007, p. 31 (English version).

1775 Referring to: ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004.

perpetrator's ability to commit it, his/her decision to commit it, the manner in which it was committed or the purpose for which it was committed.[1776] In addition,

> "there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. […] The requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting."[1777]

According to the third requirement for a crime to be adjudicated under common Article 3 of the Geneva Convention,[1778] the victim must be a protected person.[1779] In its *Šefik* case, the SCBiH referred to the ICTY's *Čelebići* case[1780] to claim that common Article 3 requires proof that a victim was a person not actively taking part in the hostilities at the time that the crime was committed.[1781] With reference to the *Blagojević and Jokić* case,[1782] it posited the view that this includes members of armed forces who have laid down their arms and/or those who are placed *hors de combat* –[1783] which includes, in turn, detained persons, who, prior to their detention, were members of the armed forces or were engaged in armed hostilities.[1784] The *Damjanović* Chamber also followed the ICTY's *Tadić* case by asserting

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1776 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 14 (English version); cited also in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Jadranko Palija*, Verdict, X-KR-06/290, First instance, 28 November 2007, p. 31 (English version), referring to ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 58. The same reasoning can be found, *inter alia*, in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 20 (English version).

1777 SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 14 (English version).

1778 Verbatim as in *Damjanović* also in: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Momčilo Mandić*, Verdict, X-KR-05/58, First instance, 18 July 2007, p. 130 (English version).

1779 See also: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zijad Kurtović*, Verdict, X-KR-06/299, First instance, 30 April 2008, p. 25 (English version).

1780 Cf. ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, IT-96-21-T, Appeals Chamber, 16 November 1998, para. 420.

1781 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 21 (English version).

1782 Cf. ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment, IT-02-60-A, Appeals Chamber, 9 May 2007, para. 544.

1783 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Niset Ramić*, Verdict, X-KR-06/197, First instance, 17 July 2007, p. 11 (English version); see also: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Nikola Andrun*, Verdict, X-KRŽ-05/42, Second instance, 19 August 2008, p. 15 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zijad Kurtović*, Verdict, X-KR-06/299, First instance, 30 April 2008, p. 25 (English version).

1784 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alić Šefik*, Verdict, X-KR-06/294, First instance, 11 April 2008, p. 21 (English version); here, the chamber cited ICTY, *Prosecutor v. Mladen Naletilić and*

that the nationality of the victims is not decisive, but rather the substantial relations of the victim and of the perpetrator, and their bonds with a foreign intervening state.[1785]

It should be noted that a former ICTY judge, Almiro Rodrigues, was sitting on the panel which adjudicated the *Damjanović* case. While it is impossible to know the extent of his influence on the final verdict, it is clear that the *Damjanović* Chamber relied heavily on the ICTY's case law in determining the contextual elements of its war crimes articles. However, the *Damjanović* Chamber was not alone. In fact, the judgments of the SCBiH that do not reference ICTY jurisprudence can be counted on the fingers of one hand.[1786]

When taking a holistic view of the case law of the State Court of Bosnia and Herzegovina in war crimes matters, several general observations can be made: first of all, it is worth mentioning that the State Court of BiH relied as much on ICTY jurisprudence when applying the new 2003 BiH Criminal Code as when applying the 1976 Yugoslav Criminal Code. Due to the fact that the SCBiH had established the customary nature of the Geneva Conventions in its early cases (just as the ICTY), and confirmed this in all its following cases, but also because Yugoslavia had nonetheless ratified the Geneva Conventions, and that the relevant war crimes articles were largely the same in the 2003 BiH and in the 1976 Yugoslavia criminal codes, the SCBiH saw no difference in law that would have to be followed when applying one or the other criminal code.[1787] The analysis shows how BiH takes an "internationalist approach" in interpreting international crimes and modes of liability, accepting also those concepts that existed under customary international law prior to the criminal code applied, and using international jurisprudence.[1788]

Throughout the years, first, second and third instance chambers all made extensive references to ICTY case law, and it endorsed all requirements established by the ICTY

Vinko Martinović, Judgment, IT-98-34-T, Trial Chamber, 31 March 2003, para. 229 and ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, para. 177.

1785 Cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 14 (English version); the chamber began its application of the law to the facts at stake in the *Damjanović* case by accepting as an established fact, stemming from the ICTY's *Galić* case that armed conflict existed in the territory of BiH at the time of critical events; cf. SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Damjanović*, Verdict, X-KR/05/107, First instance, 18 June 2007, p. 14f. (English version).

1786 Not for none, but for few references, see, for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Dražen Mikulić*, Verdict, S1 1 K 006127 121 Krl, First instance, 14 September 2012, p. 19-26 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Osman Brkan*, Verdict, S1 1 K 01 4243 13 Kri, First Instance, 6 December 2013 (English version).

1787 See for instance the following judgments which adjudicate the SFRY CC: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Slavko Savić*, Verdict, S1 1 K 017213 14 Kri, First instance, 29 June 2015, p. 36-44 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mato Baotić*, Judgment, S1 1 K 020032 17 Kžk, Second instance, 3 November 2017, p. 12-17 (English version); SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Goran Mrđa et al.*, Verdict, S1 1 K 018013 15 Kri, First instance, 19 May 2017, p. 49-62 (English version).

1788 Cf. Trapani, 2011, p. 55.

regarding the contextual elements of war crimes. According to one Bosnian defence counsel, these are called "*Tadićevi kriteri*" ("Tadić criteria") among Bosnian legal professionals.[1789]

This was independent of the composition of the chamber; whether judges with ICTY experience were on the panel, whether foreign judges made up the majority of the panel, or which local judges were sitting (including their ethnicity)[1790] seemed to have no significant influence on the use of ICTY case law.

Also, one cannot say that the same ICTY cases were referenced on the same recurring legal issues every time, which indicates that chambers often made their own independent legal analyses of the international Tribunal's jurisprudence, instead of simply copying an examination already carried out in an earlier case. At the same time, it is of course true that a certain routine in establishing the legal criteria for contextual elements of war crimes was reached. The effects were increasing references to the State Court's own jurisprudence –[1791] and decreasing references to the ICTY.[1792]

In addition, while the SCBiH's legal analyses were, in the beginning, often incomplete (for instance, by missing a step in the reasoning), they became more comprehensive and more "professional" as well. It is remarkable how the search for authorities for the judges' arguments increased, either in academic literature or commentaries of the Geneva Conventions, case law of international criminal tribunals (including the ICTR and ICC)[1793], or even national case law from the region.[1794]

1789 Cf. interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.

1790 This point was stressed by all four SCBiH judges I interviewed, two of whom were of Bosniak ethnicity, one of Croat, and one of Serb. Also virtually all observers I interviewed confirm that there is no difference between the ethnicities when it comes to referencing the ICTY.

1791 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Ratko Dronjak*, Verdict, S1 1 K 003420 10 Kri, First instance, 1 June 2012, p. 46 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Nisvet Gasa et al.*, Verdict, S1 1 K 003485 12 Kžk, Second instance, 18 December 2013, p. 52-54 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milan Perić et al.*, Verdict, S1 1 K 002798 13 Kžk, Second instance, 12 November 2013, p. 24-33 (English version).

1792 This was confirmed in my interviews with Bosnian judges (for instance: interview with SCBiH judge, Sarajevo, 23 November 2018, I-58), and prosecutors (for instance: interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32), and other observers (for instance: interview with OKO representative, Sarajevo, 20 November 2018, I-44).

1793 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Rasema Handanović*, Verdict, S 1 1 K 009162 12 Kro, First instance, 30 April 2012, p. 18 -21 (English version).

1794 See for instance SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Marko Škrobić*, Verdict, X-KR 07/480, First instance, 22 October 2008; or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Ivica Vrdoljak*, Verdict, X-KR-08/488, First instance, 10 July 2008; for decreased ICTY jurisprudence in a later verdict, see for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Bosiljko Marković and Ostoja Marković*, Verdict, S1 1 K 012024 14 Kri, First instance, 24 June 2015, p. 32-39 (English version).

Lastly, judgment drafting in general changed a lot over time.[1795] Here, the influence of foreign judges and of the ICTY seems obvious.[1796] Earlier verdicts were still, for instance, structured in a way which was apparently common in Yugoslavia (at least Serbian verdicts adopt the same structure),[1797] starting with an introduction that mentioned the panel members, the prosecutor, the accused and his/her defence counsel, the charge, followed by the verdict, a short summary of the facts related to the case, the penalty, and the closing with the reasoning. The reasoning was usually structured by listing all the pieces of evidence on which the judgment was based, summarising the closing arguments of the prosecution and the defence, listing all the procedural decisions of the court, prior to evaluating the evidence which was often more a summary of witness statements than a legal analysis. The judgment would close with a – if any, rather short – legal analysis and a decision on the punishment, on the expenses of the proceedings, and on the claims under property law. As Kirs put it: "analytical legal reasoning was formerly not a characteristic strength of the judiciary of Bosnia and Herzegovina."[1798] One of my interviewees, who used to work as a foreign legal advisor in the Prosecutor's Office BiH, recounted that in the beginning, the foreigners would even convince their colleagues of the benefit of using punctuation or bullet points when summing up the facts of the case, or when listing the evidence or procedural decisions.[1799] Subsequent verdicts closely followed the structure of ICTY judgments: they included a front page with basic information about the judgment, a table of contents, and the main body of the judgment had been structured according to the legal issues in question. This is particularly apparent in the first genocide verdicts of the State Court of Bosnia and Herzegovina,[1800] which supports the assumption that the SCBiH was

1795 One observer confirmed that the judgments of the State Court of Bosnia and Herzegovina look very different from judgments of other courts in BiH, in terms of structure, layout, length, their comprehensiveness and level of detail; or their legal reasoning; cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-37.

1796 Several judges and prosecutors have confirmed in interviews that they learned how to efficiently write briefs or judgments when reading the corresponding ICTY documents; cf. interviews with SCBiH judges, Sarajevo, 15 November 2018, I-57; and Sarajevo, 23 November 2018, I-58; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3. Also a former foreign legal advisor in the Prosecutor's Office BiH recounted: "when I first arrived here, I was puzzled by the fact that the factual description in the indictments didn't include punctuation. You would have extremely long passages, going on for pages, without a comma or dot. That's just what they did here, it was their tradition. We were asking, why don't you make it clearer, use bullet points or paragraph numbers. It's simply the way they have learned to do things. It's not necessarily right or wrong, but sometimes you can try to be more pragmatic"; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

1797 For an example, see SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mirko Pekez*, Verdict, X-KR/05/96-1, First instance, 15 April 2008.

1798 Kirs, 2011, p. 407.

1799 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

1800 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, Judgment, X-KRŽ-05/24-1, First instance, 29 July 2008 (first genocide verdict); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Miladin Stevanović*, Judgment, X-KRŽ-05/24-2, First instance, 29 July 2008; or SCBiH,

looking for guidance, especially in situations where no domestic precedent was available; while genocide had been criminalised in the Yugoslav Criminal Code, it had never been adjudicated before the first case was started at the SCBiH in 2008. The chambers also increasingly adopted the habit of working with footnotes and referencing not only doctrinal or academic authorities in establishing legal criteria, but also referencing the relevant pieces of evidence that the chamber saw as proving a particular conclusion.[1801] That way, the reasoning of judges would be traceable.

While on the face of it, the question as to how judgments are drafted might seem a trivial issue, the comprehensibility of jurisprudence obviously contributes to a professionalisation of the judiciary, and to its transparency and accessibility, as appeals become more effective as contentious points are easier to detect, and because understandable judgments contribute to the consistency of jurisprudence – making their contents easier to grasp for future chambers. Clear, well-reasoned and well-balanced judgments are also necessary in order to make them recognisable as fair and impartial.[1802] A Bosnian prosecutor confirmed that a shift in the legal culture of Bosnian professionals at the State Court had been taking place in this regard, largely triggered by the presence of foreign judges and prosecutors and by the ICTY's model.[1803]

Serbia

The impact of the ICTY's jurisprudence on Serbia's war crimes case law is – while not null – less tangible.

For the analysis of Serbian case law, all available Serbian judgments, regardless of the instance involved, were examined. The selection is merely limited by availability. As only the Court of Appeal Belgrade publishes its case law online, I relied on the uploads of all

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Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar et al., Verdict, X-KR-05/24, First instance, 29 July 2008; for non-genocide verdicts, see: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Boško Lukić and Marko Adamović*, Verdict, S1 1 K 003359 11 Krž5, Second instance, 11 October 2012; or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Velibor Bogdanović*, Verdict, S1 1 K 003336 11 Krž 3, Second instance, 21 June 2012.

1801 See for instance: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zurahid Mujčinović and Sulejman Hrustić*, Verdict, First instance, 2 October 2012, p. 22-26 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Alija Osmić*, Verdict, S1 1 K 003429 12 Kžk, Second Instance, 27 June 2012, p. 10-16 (English version); or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Osman Brkan*, Verdict, S1 1 K 01 4243 13 Kri, First Instance, 6 December 2013; or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Zemir Kovačević*, Judgment, S1 1 K 009588 14 Krž 8, First instance, 30 January 2015; or SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Slavko Savić*, Verdict, S1 1 K 017213 14 Kri, First instance, 29 June 2015.

1802 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 29.

1803 Cf. interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.

other judgments from the first and the third instance made available by the Humanitarian Law Center.[1804] The total number of examined judgments is 129.[1805]

Serbian judgment drafting did not change in the same way as in Bosnia and Herzegovina. They are still written according to the Yugoslav tradition and are, indeed, quite difficult to read. For instance, the facts of the case are usually summarised in one single long sentence.[1806] A legal analysis is often difficult to detect as there are few headings indicating the structure of the judgments.[1807] I could find only one judgment that includes a table of contents.[1808] What is remarkable are the lengthy recounts of all the considered evidence (mostly witness statements), coupled with the court's interpretation and weighing of this evidence, which seems to follow no apparent legal rules.[1809] Most judgments do not include footnotes.[1810]

In addition, very few judgments make explicit references to academic literature or to the case law of other courts, including the ICTY. Having said that, it is clear that Serbian courts have also followed the ICTY in many of its legal findings concerning contextual elements of war crimes, even though they rarely mention the Tribunal explicitly.[1811]

1804 The judgments (in Serbian only) can be found here: http://www.hlc-rdc.org/?cat=234 (in particular, for judgments of the Higher Court Belgrade) and http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/ (for the Court of Appeal Belgrade).

1805 Decisions (even those that annulled judgments or decisions on plea agreements) were not regarded. Also judgments from other courts (from before the specialised war crimes institutions were established) were also not analysed.

1806 See for instance: Higher Court Belgrade, *Case of Goran Šinik*, Judgment, K-PO2, 6/2014, 13 October 2016, p. 1-2.

1807 This is slightly different for the second instance verdicts, rendered by the Court of Appeal Belgrade. It works more with headings than the first instance, sometimes even structuring the verdict according to the legal issues examined; see for instance: Appeals Court Belgrade, *Case of Miodrag Živković*, Judgment, Kž1 PO2 1/16, 26 September 2016.

1808 Cf. Higher Court Belgrade, *Case of Goran Savić and Darko Janković*, Judgment, K-PO2 23/2010, 8 December 2011.

1809 See for instance: Higher Court Belgrade, *Case of Dragan Bajić and Marko Pauković*, Judgment, K PO2 6/17, 25 December 2017 (this first instance judgment was quashed by the Court of Appeal in Belgrade and sent back for retrial because "there are no clear reasons for the conclusion of the court that there is not enough evidence that the accused […] committed the crime of war crime against civilians as per art. 142(1) SFRY CC in conjunction with art. 22 SFRY CC" (see Appeals Court Belgrade, *Case of Dragan Bajić and Marko Pauković*, Judgment, Kž1 Po2 1/18, 1 June 2018, p. 2); or Higher Court Belgrade, *Case of Goran Šinik*, Judgment, K-PO2, 6/2014, 13 October 2016 (upheld by the Court of Appeal: Appeals Court Belgrade, *Case of Goran Šinik*, Judgment, Kž1 Po2 5/16, 22 February 2017); for the proportions, consider this judgment which consists of 78 pages of summaries of the evidence, and merely 5 pages of legal analysis: Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016 (legal analysis as of p. 78).

1810 For an exception that uses cross-references from different parts of the judgment to others and in order to indicate which piece of evidence proves a particular conclusion, see: District Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, K.V. 4/2006, 12 March 2009.

1811 This was also confirmed by my interviewees, including by judges from the Court of Appeal Belgrade: interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-13; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

In its *Sanski Most – Kijevo* case against Mitar Čanković, for instance, the Higher Court Belgrade examined two legal requirements in order to establish criminal responsibility for war crimes under Article 142 (1) of the SFRY Criminal Code ("War Crimes against Civilians"), violating Article 3 (1) (a) of the Geneva Convention IV in conjunction with Article 4 (1) and (2) (a) of Additional Protocol II for killing a civilian.[1812] First, under the heading "Status of the protected persons"[1813], it demonstrated the applicability of the Geneva Conventions and their Additional Protocols to the present situation. It held that war crimes essentially refer to different categories of inhumane treatment of different categories of persons, constituting serious violations of the "norms of international war and humanitarian rights" stemming from both customary and treaty law, which are subject to criminal responsibility.[1814] These norms are primarily incorporated in the Geneva Conventions and their Additional Protocols, to which the Former Yugoslav Republic was a state party, and which it had implemented into national legislation.[1815]

In consequence, according to the Higher Court Belgrade, the respective criminal act needs to be committed "at the time of the war or armed conflict"[1816].[1817] Subsequently, it defined an armed conflict as "any resort to armed force or protracted armed violence between government forces and organised armed groups or between such groups within a state"[1818]. While the court usually does not cite the ICTY's *Tadić* Decision on Jurisdiction explicitly, this is an almost verbatim repetition of the decision's definition.[1819] An explicit reference to the *Tadić* decision can be found only in a few judgments, such as in the one where the court brought forward the ICTY's definition of armed conflict for the first time.[1820] In post-*Ovčara* judgments, the ICTY's definition was consistenly repeated by the

1812 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 1 and 2; similar: District Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, K.V. 4/2006, 12 March 2009, p. 241; or District Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, K.v.1/2003, 12 December 2005, p. 131; or District Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, K.V. 02/2005, 30 January 2006, p. 46.

1813 Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 78-81.

1814 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 79.

1815 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 79.

1816 Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 79.

1817 Also held in, among others: Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015, p. 130.

1818 Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 80.

1819 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 70.

1820 Cf. Higher Court Belgrade, *Case of Petar Ćirić*, Judgment, K-Po2-14/2011, 1 July 2013, p. 35.

Higher Court Belgrade,[1821] while in pre-*Ovčara* cases, the court referred to the *Small encyclopedia of education* from 1986 when defining armed conflict.[1822]

According to the *Sanski Most – Kijevo* Chamber, the second requirement for establishing a war crime under Article 142 (1) of the SFRY Criminal Code is that there is a link between the criminal act and the armed conflict.[1823] While the Chamber does not mention an authority for its claim, it is again clear that it follows ICTY case law on this matter. The court found that there was a "close relation" between the criminal act and the armed conflict, as both took place at the same time and the criminal act was committed in close vicinity to the fighting.[1824] The *Ovčara* Chamber also explained that at times of armed conflict, humanitarian law is applicable to all of the territory under the control of the fighting parties, no matter whether the fights are taking place at a particular location or not –[1825] a finding stemming from the *Tadić* Decision on Jurisdiction.[1826] The *Sanski Most – Kijevo* Chamber established the fact that the victim was a civilian and that the perpetrator had the intention to kill the victim as an additional indicator for the fulfilment of the nexus criterion.[1827] It further held that it was not necessary for the accused to know that he was violating international law, but merely that he knew that he was violating "universal moral and civilised values as well as the principles of humanity"[1828].[1829]

1821 See for instance: Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015, p. 130; Higher Court Belgrade, *Case of Boban Pop Kostić*, Judgment, K-Po2 5/14, 20 March 2015, p. 26; Higher Court Belgrade, *Case of Đuro Tadić*, Judgment, K.Po2 5/2013, 6 February 2014, p. 109.

1822 Defining "war": "[w]ar is a conflict with which, by means of armed fighting, a state, people, or a class achieves certain political or economic goals. The important characteristic of every war is armed fighting. (…)", and defining "armed conflict": "civil war is armed fighting of opposing groups within a state"; cf. District Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, K.V. 4/2006, 12 March 2009, p. 241-242. The same definition was given in District Court Belgrade, *Case of Slobodan Medić et al.*, Judgment, K.V.6/2005, 10 April 2007, p. 87.

1823 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 81-82; also held in, among others: Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015, p. 130; other cases do not mention the nexus requirement (see for instance: District Court Belgrade, *Case of Nenad Malić*, Judgment, K.V.3/2009, 7 December 2009, p. 31; or District Court Belgrade, *Case of Dragan Slavković et al.*, Judgment, K.V. 5/2005, 12 June 2008, p. 180), or the nexus is mentioned but then not proven with evidence (see for instance: Higher Court Belgrade, *Case of Duško Kesar*, Judgment, K-Po2 37/2010, 1 October 2010, p. 27-28); cf. OSCE Mission to Serbia, 2015, p. 69.

1824 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 82.

1825 Cf. Higher Court Belgrade, *Case of Petar Ćirić*, Judgment, K-Po2-14/2011, 1 July 2013, p. 35.

1826 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 70.

1827 Cf. Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 82.

1828 Higher Court Belgrade, *Case of Mitar Čanković*, Judgment, K.Po2 7/2014, 18 May 2016, p. 82; similarly held in: Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015, p. 131; or Higher Court Belgrade, *Case of Boban Pop Kostić*, Judgment, K-Po2 5/14, 20 March 2015, p. 27; or Higher Court Belgrade, *Case of Đuro Tadić*, Judgment, K.Po2 5/2013, 6 February 2014, p. 113.

1829 Similar analyses can be found in Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015; or Higher Court Belgrade, *Case of Boban Pop Kostić*, Judgment, K-Po2 5/14, 20 March 2015.

On the status of protected persons, in the *Ovčara* case, the Chamber referred to the *Blaškić* appeal judgment,[1830] by holding that persons who had been soldiers do not become civilians just because they are no longer taking part in hostilities.[1831]

While some judgments do not specify any legal criteria applied by the judges in order to come to their conclusions,[1832] many judgments reason in a similar way as the *Sanski Most – Kijevo* judgment.[1833]

A few general observations regarding the ICTY's influence on Serbian jurisprudence can be made: first, Serbian courts do use its jurisprudence for guidance on selected international law issues. That being said, judgments rarely explicitly mention the Tribunal,[1834] and in fact, the number of references have decreased over the years. According to my interview partners, this trend can be explained by the fact that the current generation of judges (at least at first instance, the Higher Court Belgrade) did not have much (if any) contact with the ICTY, while for the judges who work at the Court of Appeal Belgade, the Tribunal is (still) very present. That is, in addition to the general legal culture of not relying on jurisprudence due to the lack of the concept of legal precedents in the Yugoslav tradition, and the general scepticism towards international law. While Bosnian judges had been

1830 The judgment refers to page 46, while the relevant conclusion can actually be found on page 48.

1831 Cf. Appeals Court Belgrade, *Case of Miroljub Vujović et al.*, Judgment, Kž1 Po2-2/2014, 24 November 2017, p. 42.

1832 See, for instance: Higher Court Belgrade, *Case of Dragan Maksimović*, Judgment, K-Po2 10/17, 6 June 2018; or Higher Court Belgrade, *Case of Brano Gojković*, Judgment, Spk.Po2 1/2016, 27 January 2016; or Higher Court Belgrade, *Case of Milan Škrbić*, Judgment, SPK-Po2-6/2013, 13 September 2013 (in the court's defence, these three cases were plea agreements). But see also: Higher Court Belgrade, *Case of Miroslav Gvozden*, Judgment, K-Po2 4/2014, 10 September 2015; or Higher Court Belgrade, *Case of Žarko Čubrilo*, Judgment, K.PO2 1/2012, 6 April 2015; Higher Court Belgrade, *Case of Željko Đukić*, Judgment, K-PO2-44/2010, 22 September 2010; Higher Court Belgrade, *Case of Marko Crevar*, Judgment, Spk.Po2 1/15, 18 February 2015; Higher Court Belgrade, *Case of Samir Hondo*, Judgment, K-Po2 8/13, 22 November 2013; this anonymised case: www.hlc-rdc.org/wp-content/uploads/2014/06/Treca_prvostepena_presuda_21_02_2013.pdf (last accessed 211/08/2019); and Appeals Court Belgrade, *Case of Samir Hondo*, Judgment, Kž1 Po2 3/14, 9 June 2014.

1833 Analysing 1) the application of the more lenient law; 2) the nexus between the criminal act and the armed conflict; and 3) forms of participation in the criminal act: Higher Court Belgrade, *Case of Neđeljko Sovilj*, Judgment, K.Po2 6/12, 11 March 2013; analysing 1) the status of the protected persons; 2) the application of the criminal code and international law; 3) the nexus between the criminal and the armed conflict; and 4) forms of participation in the criminal act: Higher Court Belgrade, *Case of Neđeljko Sovilj and Rajko Vekić*, Judgment at retrial, K-Po2 12/13, 30 June 2013; District Court Belgrade, *Case of Radojko Repanović et al.*, Judgment, K.V. 2/2006, 23 April 2009, p. 179-188; Higher Court Belgrade, *Case of Goran Savić and Darko Janković*, Judgment, K-PO2 23/2010, 8 December 2011, p. 112-123; or Higher Court Belgrade, *Case of Ilija Jurišić*, Judgment, K.Po2 53/10, 2 December 2013, p. 37-42.

1834 In those cases, as an observer points out, "you cannot be sure whether it came from the ICTY, the judges' own reading of the judgments and whether they knew that it's from the ICTY, but they just stayed short of quoting the ICTY. Or they learned it somewhere, from legal literature without knowing that it's from the ICTY. Or it's simply the way they think about some issues which coincidentally is in line with what the ICTY thinks, which would probably reflect a shared opinion among contemporary legal professionals in the world", interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

exposed to the influence of foreign judges, who are partly responsible for changes at the State Court of BiH, the same was not true for Serbian judges. In addition, as explained above,[1835] Serbian judges do not all share great respect for the Tribunal, probably substantially diminishing the likelihood to search for inspiration in its case law. In fact, this had led the OSCE Mission to Serbia to teach judges – during the regular trainings that they offer on a voluntary basis and through materials that they distribute to them – ICTY established legal criteria without mentioning the Tribunal, as this would improve the acceptance of the content of the training by the judges.[1836]

The result of the judges' rejection, and their fragmentary study of ICTY jurisprudence is, however, that legal analyses in Serbian judgments are often incomplete and sometimes incorrect –[1837] at least if measured against the standards of modern international criminal courts. Consequently, certain contextual elements of war crimes are systematically missing in the enumeration of legal criteria (for instance, I have not found a single judgment that addressed the perpetrator's awareness of the armed conflict), but legal criteria are often also not applied vigorously enough. Conclusions are often quickly drawn, missing out a few steps in the explanation, mostly introduced by the words "it is generally known that…"[1838], or "having said that, the court has no doubt that…"[1839].

In general, however, the practice of the war crimes department of the Higher Court Belgrade shows that if the parties to a case – and particularly the prosecutor in the indictment – are more expansive in referring to international law provisions in support of their case, especially when presenting the elements of crimes, the court appears more likely to deliver a judgment that includes more thorough deliberations on international law.[1840]

1835 See section 1.3.

1836 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1837 For instance, in several cases, the Higher Court Belgrade held that only members of military, political, administrative organisation of a party to the conflict can commit war crimes (see for instance: District Court Belgrade, *Case of Slobodan Medić et al.*, Judgment, K.V.6/2005, 10 April 2007, p. 97; or District Court Belgrade, *Case of Nenad Malić*, Judgment, K.V.3/2009, 7 December 2009, p. 30); cf. OSCE Mission to Serbia, 2015, p. 64. See also: (Weill & Jovanović, 2012, p. 264). A notorious example is the *Lekaj* case in which the court applied rules governing international and non-international armed conflicts simultaneously, although a criminal act can only be committed in the context of and associated with one of the two; cf. Kristjánsdóttir *et al.*, 2011, p. 20.

1838 See for instance: Higher Court Belgrade, *Case of Boban Pop Kostić*, Judgment, K-Po2 5/14, 20 March 2015, p. 26.

1839 See for instance: Higher Court Belgrade, *Case of Dragan Mitrović*, Judgment, K-Po2 2/14, 26 June 2015, p. 131.

1840 Cf. Weill & Jovanović, 2012, p. 250.

Also in its factual findings, Serbian courts significantly differ from ICTY judgments. Serbian courts consistely view the conflicts in Croatia[1841] and Bosnia and Herzegovina[1842] as non-international armed conflicts (while the ICTY finds both non-international and international armed conflicts)[1843].[1844] They do, however, concur with the ICTY's finding that in Kosovo, there was an international and a non-international armed conflict,[1845] although the courts have differing opinions on the exact time frames during which these conflicts took place.[1846] It seems intuitive that if a judge, prosecutor, or defence counsel considers that the ICTY has arrived at the wrong factual conclusions, they would also not trust the Tribunal's legal findings and hence not use or refer to it.

It is remarkable that the State Court of Bosnia and Herzegovina would usually adopt an established fact from the ICTY on the question of which conflict was going on where and at what time, while Serbian courts do not. This reflects another general trend: while the State Court of Bosnia and Herzegovina as well as cantonal and district courts[1847] in BiH, rely extensively on established facts from the ICTY,[1848] Serbian courts rarely use – or

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1841 See for instance: Higher Court Belgrade, *Case of Marko Crevar*, Judgment, Spk.Po2 1/15, 18 February 2015, p.2.

1842 See for instance: Higher Court Belgrade, *Case of Dragan Bajić and Marko Pauković*, Judgment, K PO2 6/17, 25 December 2017, p. 46.

1843 The ICTY held that the Kosovo Liberation Army and Serbian armed forces were in an armed conflict as of spring 1998, with NATO intervening as of 24 March 1999. The international armed conflict (IAC) between Serbia and NATO ended in June 1999; cf. ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, Judgment, IT-05-87-T, Trial Chamber, 26 February 2009, para. 1217. Serbian courts are split on the end date of the non-international armed conflict (NIAC), with some holding that it was 9 June, 10 June, 20 June, or even "end of 1999"; cf. OSCE Mission to Serbia, 2015, p. 67f.

1844 Cf. OSCE Mission to Serbia, 2015, p. 65; Ivanišević, 2007, p. 17f.; however, although the Higher Court Belgrade treated the conflicts in Croatia and BiH as NIACs, it did not always apply the appropriate body of IHL rules. For instance, the chamber in the *Lički Osik* case invoked common Article 3 of the Geneva Conventions (which is applicable to NIACs) alongside Article 4 of Geneva Convention IV (which is applicable to IACs); see: Higher Court Belgrade, *Case of Čedo Budisavljević et al.*, Judgment at retrial, K-Po2 17/2011, 16 March 2012 ("*Lički Osik case*"), p. 2-3; and Higher Court Belgrade, *Case of Milan Španović*, Judgment, K-Po2 32/2010, 25 June 2010 ("Stara Gradiška case"), p. 2; cf. OSCE Mission to Serbia, 2015, p. 65 and fn. 177.

1845 See for instance: District Court Belgrade, *Case of Anton Lekaj*, Judgment, K.V.4/05, 18 September 2006, p. 26.

1846 On this, see also: Weill & Jovanović, 2012, p. 257 and 261; Ivanišević, 2007, p. 17f.

1847 As was pointed out by staff of the OSCE Mission to Bosnia and Herzegovina, the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina was initially foreseen to be applicable only to the State Court of BiH. However, cantonal and district courts quickly ruled that it could also be applied at the cantonal and district court level. Hence, although these courts never received cases from the ICTY (which was the initial purpose of the law), they did make use of the provisions permitting to adopt adjudicated facts as well as admitted evidence; cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; see also: OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 26.

1848 Mostly in relation to the contextual elements of crimes; cf. Martin-Ortega, 2012, p. 602. See also: Pocar, 2008, p. 662. This starts with the prosecution. One Bosnian prosecutor told me that "[i]t wouldn't be possible

refer to – facts that were adjudicated in The Hague.[1849] This trend probably again underlines the varying attitudes towards the Tribunal's jurisprudence – especially its factual findings – in both countries. Consequently, Serbian practitioners also reject the utilitarian reasons for using established facts from the ICTY – judicial economy, effectiveness, coherence of jurisprudence, avoiding to make witnesses testify multiple times –[1850] that seem to be recognised by Bosnian professionals.[1851] One Bosnian war crimes prosecutor explained to

to work on any war crimes case until you familiarise yourself with the jurisprudence of the ICTY on that event." He explained that prosecutors at the SCBiH would always read ICTY judgments first, in order to learn about the events, the persons involved, and possible evidence; cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32. The SCBiH has established the conditions under which adjudicated facts from the ICTY can be adopted in Bosnian proceedings, which are based on Rule 94 (B) of the ICTY RPE, among others, in this judgment: SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Naser Orić and Sabahudin Muhić*, Judgment, S1 1 K 014977 15 Kri, First instance, 9 October 2017, p. 18-22 (English version). The OSCE Mission to Bosnia and Herzegovina notes that in the beginning, due to a lack of experience with the principle of judicial notice, trial chambers applied the criteria for adopting adjudicated facts differently, but that this became more consistent over the years; cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 26f.; similar: Martin-Ortega, 2012, p. 603.

1849 Attesting that BiH courts often use ICTY facts: interviews with SCBiH judges, Sarajevo, 2 February 2017, I-45; and Sarajevo, 23 November 2018, I-58; interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with OKO representatives, Sarajevo, 8 February 2017, I-36; interview with BRRLN representative, Sarajevo, 1 February 2017, I-41; interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22. For Serbia, only one of my interviewees, a legal advisor in the OWCP, pointed out that Serbian courts sometimes take over ICTY adjudicated facts; cf. interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55. I could not find any such reference in the case law analysis of the judgments that are publicly available.

1850 Cf. Rüedi, 2015, p. 206; Kreso, 27 November 2013, p. 36; Vučinić, 6 November 2012, p. 24; Nettelfield, 2010, p. 251.

1851 Vučinić, who is a judge at the SCBiH, notes that not only prosecutors ask the chambers to adopt adjudicated facts, but also the defence; cf. Vučinić, 6 November 2012, p. 24; similar: Kreso, 27 November 2013, p. 36; and interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21. Furthermore, the chamber can adopt adjudicated facts *proprio motu*, see Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina. For a critique of the principle of established facts, which was introduced by the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina, note the following quote from a staff member of OKO: "The war crimes trials in BiH almost destroyed our system in total. There was a law, the law on transfer of the cases and evidence from ICTY. It totally crashed the principles of our legal system. For instance, evidence which was presented before other courts, was impossible (according to our principles) to introduce that evidence without presenting it in the local court in the main trial. But at a certain point at the start, the principles of established facts (facts established at the ICTY) were introduced in the main trial by sending a list of established facts. That is totally opposed to our legal system and the way how our procedures function. You need the court to come to its conclusion on its own and you have to give the possibility to the other side to challenge the facts. But with this law, it doesn't work. But I understand the advantages of not losing time. For instance, on the issue whether we have an IAC or NIAC. OK – I have no problem with that. But in other cases, it can be really important, for instance whether we had a widespread or system attack and whether hence we have a crime against humanity or a war crime. So, the system was shaken by innovations in that law. […] I would have many reasons to challenge this

me the benefits in saying that while the ICTY could afford to call on all kinds of experts (historians, political scientists, forensic experts, etc.), the Bosnian judiciary does not have the same means. The Bosnian judiciary can therefore take advantage of the facts provided by this rich variety of experts, as they themselves would not be able to provide any better expertise.[1852] Serbian judges, on the other hand, claimed that they did not need outside expertise.[1853]

Somewhat related to this is the fact that the same phenomenon can be observed with regard to the use of evidence from the ICTY. Evidence which was gathered in accordance with the ICTY Statute and its Rules of Procedure and Evidence may be used in domestic proceedings in BiH[1854] and Serbia.[1855] The case law analysis shows that Serbian courts rely much less on evidence obtained by the ICTY Office of the Prosecutor than Bosnian courts[1856] – although they do cite ICTY evidence more frequently than ICTY law.[1857] While this possibility is not without controversy in BiH, again,[1858] Bosnian legal professionals, including the defence,[1859] use it to their benefit whenever suitable.[1860]

special law. And yes, war crimes are special crimes, but you cannot ignore the rules!"; interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

1852 Cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32.

1853 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

1854 Article 3 (1) of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina.

1855 Article 14a of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

1856 In fact, one of my Serbian interviewees explained that the Higher Curt Belgrade mostly uses ICTY evidence in cases that had been transferred for adjudication to Serbian by Bosnia and Herzegovina – and where, consequently, the Bosnian prosecutors had prepared the dossier, including the supporting evidence; cf interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59. One of the rare examples of the Higher Court Belgrade accepting evidence from the ICTY is this case: Higher Court Belgrade, *Case of Petar Ćirić*, Judgment, K-Po2-14/2011, 1 July 2013, see p. 12. On the State Court of Bosnia and Herzegovina and the BiH State Prosecutor's Office using ICTY evidence, see: Pocar, 2008, p. 662.

1857 Cf. Michaeli, 2011b, p. 74.

1858 One SCBiH judge for instance commented that while the ICTY is not bound by the ECHR, Bosnia and Herzegovina is. Through the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina, however, evidence that was not collected in accordance with the ECHR is admissible before Bosnian courts; cf. interview with SCBiH judge, Sarajevo, 23 November 2018, I-58.

1859 Searching the databases of the ICTY and the ICTY Office of the Prosecutor is one of the main tasks of OKO.

1860 Cf. interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; interview with OKO representative, Sarajevo, 20 November 2018, I-44; similar: interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32; and interview with cantonal prosecutor, Sarajevo, 6 February 2017, I-4.

3 Procedural Criminal Law

The ICTY's impact on domestic criminal procedure is much less clear. While in Bosnia and Herzegovina my interview partners had differing opinions on the question whether innovations in the criminal procedure (introduced in the early 2000s) could be traced back to ICTY influence, the Serbs mostly agreed that the Tribunal had nothing to do with their reform.

Over the past 500 years, the Yugoslav legal system was influenced by, among others, the Ottoman Empire, the Austro-Hungarian Empire and the Union of Soviet Socialist Republics (USSR) – often under duress.[1861] In BiH, a civil law approach to criminal justice was imposed on the country by the Austro-Hungarian rule. This approach prevailed in the country until 2003, surviving numerous wars and regime changes.[1862] In 1929, a Yugoslav kingdom-wide codification process was aimed at unifying the country's criminal laws and procedures. This reform did not noticeably change BiH's criminal procedures, as it was based on the same Austro-Hungarian codes that BiH had already been using.[1863] After two decades of USSR influence, the SFRY introduced new codes of criminal law and procedure that decisively brought the country back to its civil law roots in the 1950s. Subsequent reforms in the 1960s and 1970s continued to expunge Soviet influences and remodel the country's criminal procedures along continental lines. At the time of the country's breakup in 1991, the Yugoslav system of criminal procedure remained firmly within the civil law family.[1864] This approach to criminal procedure traditionally governed in continental Europe, and is marked by a neutral investigative judge in the initial stages, followed by inquisitorial hearings. In spite of some minor reforms in the Federation of BiH in 1998, the general model continued to be applied throughout the republics of the former Yugoslavia, until a series of reforms of the criminal procedure systems in several countries of the former Yugoslavia was initiated in 2001 in the Brčko District of Bosnia and Herzegovina,[1865] where elements of the Anglo-American common law tradition were introduced. In this model, the prosecutor is in the lead during the investigative phase and criminal hearings are adversarial, with the parties (the prosecution and the defence) competing to convince the neutral judge of their version of the truth.

The main trigger for criminal law reform throughout the former Yugoslavia was that the criminal procedure was considered inappropriate for prosecuting complex cases, such

1861 Cf. DeNicola, 2010, p. 8.
1862 Cf. DeNicola, 2010, p. 10.
1863 Cf. DeNicola, 2010, p. 12.
1864 Cf. DeNicola, 2010, p. 17.
1865 Cf. Aitchison, 2011, p. 143f.

as organised crime or war crimes cases,[1866] in accordance with international standards. The main aim was to find a new and fair balance between speeding up these complex trials and procedural rights.[1867] The then-High Representative of Bosnia and Herzegovina Paddy Ashdown, along with international experts and organisations, including the ICTY, considered that a "more party-driven, less judge-driven and less purely inquisitorial approach"[1868] would make local criminal justice more efficient and competent to prosecute war crimes.[1869] The same motivation was behind the reforms in Serbia,[1870] where one of the leading experts responsible for drafting a new Criminal Procedure Code (CPC) was a judge in the war crimes department of the Appeals Court Belgrade. The thereto governing "obligation to find the material truth" in both countries was excoriated because it "sends first instance courts on a seemingly endless quest for evidence, much of which will clearly contribute little to the resolution of the case."[1871] It was recommended that BiH and Serbia abolish investigative judges and adopt common law procedures so that parties, rather than courts, would carry the burden of producing evidence in criminal cases.[1872] Indeed, instead

1866 For instance, one aim was to speed up and thereby shorten the investigative phase by enabling the prosecutor to be fully in command of the facts and legal aspects of the case; cf. Rüedi, 2015, p. 183; European Commission, 10 October 2012, p. 11; Ivanišević, 2007, p. 38; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1867 Cf. DeNicola, 2010, p. 4.

1868 United Nations Mission in Bosnia and Herzegovina (November 2000), *Serving the Public: The Delivery of Justice in Bosnia and Herzegovina*, Thematic Report X, http://www.esiweb.org/pdf/bridges/bosnia/JSAP_RepX.pdf (last accessed 21/08/2019), p. 2; see also: "Court procedure should move towards a more party-driven, less judge-driven approach. The court should primarily rely on the parties to prepare their case and present the evidence to support it. Only in exceptional cases should the court itself ask for supplementary evidence."; United Nations Mission in Bosnia and Herzegovina, November 2000, p. 18. Among others, the "routinely" violation of individuals' rights was considered one of the problems; cf. DeNicola, 2010, p. 1.

1869 Cf. European Commission, 10 October 2012, p. 11; DeNicola, 2010, p. 32; Ivanišević, 2007, p. 38; see also Meddžida Kreso, former SCBiH president, who explained that adapting the legal framework had as one of the main goals establishing an "efficient Department for War Crimes at the Court of Bosnia and Herzegovina"; cf. Kreso, 27 November 2013, p. 35. Why Ashdown and others considered that a more common-law oriented system would be more efficient than the civil-law tradition is unclear. As one former foreign judge at the SCBiH, who had also worked within the OHR under Ashdown's commands for several years, told me, while pointing out that Ashdown had not been a jurist, he was firmly rooted in his own (the British) system which he sought to transplant in BiH and paid little attention to local traditions; cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

1870 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1871 DeNicola, 2010, p. 33.

1872 Cf. DeNicola, 2010, p. 33; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; also the international consultants hired in 2002 by the Office of the High Representative to support the criminal law reforms in BiH, had recommended shifting the system of criminal procedure towards a stronger role of the prosecutor and abandoning the material truth principle. They even suggested some concrete procedural innovations, as adopted from the ICTY, such as plea bargains, or reduction of sentences following admission of guilt and cooperation with the prosecutor (cf. Bohlander, 2003, p. 78), efficient ways to collect witness testimony, or guarantees of the rights of the suspect during investigations as stipulated by Rules 42

of drafting CPCs closely tailored to the old system,[1873] the new CPCs in both Serbia (2011) and Bosnia and Herzegovina (2003), as well as the Croatian CPC (2011),[1874] mirror the ICTY RPE to a significant extent.[1875] Similarities can be found with respect to, among others, abolishing investigative judges, introducing plea bargaining, making the presentation of evidence more adversarial, changing the rules of admissibility of evidence,[1876] introducing cross-examinations,[1877] banning subsidiary and private prosecutions.[1878]

In Bosnia and Herzegovina, the reforms in the Brčko District were led by the American lawyer Michael Karnavas, who has vast experience in defending clients in front of the ICTR and the ICTY. While there are clear indications that Karnavas was responsible for a relatively straightforward introduction of an American model of procedural law into the Brčko District, Karnavas himself claimed that this was not the case.[1879] According to him, while the new Code of Criminal Procedure was based on current entity laws, the primary inspiration for the court and trial procedure was the procedure governing at the ICTY,[1880] and the code was revised to resemble the ICTY's Rules of Procedure and Evidence.[1881] For instance, the rules on evidence, witness testimony, and on the lawyer-client privilege, show

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and 43 of the ICTY Rules of Procedure and Evidence; cf. Bohlander, 2003, p. 79. Bolander (himself a former legal advisor at the ICTY) calls this "legal colonialism, supplemented by ignorance of the civil law approach".

1873 The BiH Criminal Procedure Code (CPC) was adopted on 19 December 2002 by the Council of Ministers. It was then sent to the Parliamentary Assembly, which, however, did not immediately adopt the draft, which is why it was imposed by the High Representative by the Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina on 24 January 2003; cf. Rüedi, 2015, p. 185f.

1874 Cf. ICTY, Development of the Local Judiciaries, http://www.icty.org/en/outreach/capacity-building/development-local-judiciaries (last accessed 21/08/2019).

1875 Cf. Rüedi, 2015, p. 88, fn. 370; Kreso, 27 November 2013, p. 35; Vučinić, 6 November 2012, p. 24; Ronen, 2011, p. 47; Kirs, 2011, p. 402.

1876 Cf. Ronen, 2011, p. 44.

1877 In the way cross-examinations are regulated it becomes most clear that the new procedures do not merely mirror adversarial procedures as applied in countries that follow common law traditions, but that they resemble precisely the mixed model as applied at the ICTY. Contrary to the purely adversarial rules, in the ICTY's RPE and in the new BiH CPC, judges are still allowed to ask questions during cross-examinations. Under the purely adversarial procedure, judges merely exercise reasonable control over the mode and order of interrogating witnesses; cf. DeNicola, 2010, p. 53.

1878 Cf. DeNicola, 2010, p. 38f.

1879 Cf. Aitchison, 2011, p. 145; indeed, the US system does not seem to be the dominant influence on the new codes throughout the former Yugoslavia, as too many significant differences persist. Consider for instance the absence of lay participation in the trial; cf. Aitchison, 2011, p. 150.

1880 Cf. M. G. Karnavas (2003). Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries. *American Journal of International Law, 97*(1), 111-131, p. 123; V. Ikanović (2013). Plea Bargaining after Ten Years of Application in Bosnia and Herzegovina. In I. Jovanović & M. Stanisavljević (Eds.), *Simplified forms of procedure in criminal matters: regional criminal procedure legislation and experiences in application* (p. 195-211). Belgrade: OSCE Mission to Serbia, p. 195.

1881 Cf. DeNicola, 2010, p. 35.

some more or less direct and almost verbatim transplants from the ICTY RPE to the Brčko District CPC.[1882]

In 2001, the Brčko District was the only territory with a common law oriented criminal procedure in the former Yugoslavia. Anomalous as the Brčko District may have been at the time, the reforms there signalled the future direction of criminal procedure throughout Bosnia and Herzegovina, as well as in other former Yugoslav countries. They manifested a general shift from an inquisitorial to an adversarial procedure, and represented a significant discontinuity in the procedural law of all countries, with international actors playing a leading role in the reform processes.[1883]

The reform process at the state level started in 2002 when the OHR launched a serious overhaul of BiH's criminal justice system, triggered by the international community's commitment to make the establishment of the rule of law in Bosnia and Herzegovina "priority number one"[1884], and boosted by the arrival of High Representative Paddy Ashdown who was willing to make extensive use of the OHR's powers, as well as by the ICTY's completion strategy.[1885] As mentioned,[1886] in April 2002, the OHR hired international consultants to research the possibility of transferring war crimes cases to BiH.[1887] The consultants concluded that introducing specific common law procedures[1888] into BiH's civil law system, and taking into account developments at the ICTY,[1889] would increase the system's efficiency.[1890] Thereupon, the OHR established an international working group, led by Germany's Manfred Dauster, and comprising international lawyers from the US and the Council of Europe, in order to draft a new CPC. The draft code they produced was based on German criminal procedure, with elements of Swedish and US American criminal procedure. A similar draft was later submitted by a national working group,[1891] led by professor Zoran Pajić, and comprising national professors and judges. The aim of this draft was to introduce common law procedures, but at the same time keep some Bosnian inquisitorial traditions.[1892] For inspiration, it therefore looked into other

1882 For a word-per-word comparison, see: Aitchison, 2011, p. 145ff. For instance, Rule 89 ICTY RPE and Article 234 of the Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina are almost completely identical. The same applies to Rule 90 ICTY RPE and Article 236 of the Law on Criminal Procedure, as well as Rule 97 and Article 235 of the Law on Criminal Procedure.

1883 Cf. Aitchison, 2011, p. 144.

1884 DeNicola, 2010, p. 32.

1885 Cf. DeNicola, 2010, p. 39.

1886 See section 2.1 above.

1887 Cf. DeNicola, 2010, p. 33.

1888 Prosecutorial investigations, plea bargaining, and party-led trials.

1889 Cf. Bohlander, 2004, p. 9.

1890 Cf. DeNicola, 2010, p. 33f.

1891 Cf. DeNicola, 2010, p. 36.

1892 Cf. DeNicola, 2010, p. 35; DeNicola voiced scepticism whether the national working group was indeed free to choose which kind of code to draft, or whether it was not heavily influenced by international actors; cf. DeNicola, 2010, p. 60.

mixed codes, most notably the ICTY's RPE (with which judges, who were also members of the working group, had in the meantime had good experiences in the Brčko District)[1893], Italy's CPC, as well as the new CPC of the Brčko District.[1894] The new BiH CPC thus includes a new and unique set of rules, hybrid in nature and similar to those of the ICTY,[1895] transforming BiH into a mixed system, similar to that of the ICTY itself.[1896] It entered into force in March 2003.[1897] The entities adopted nearly identical CPCs the same year. Thus, overall, the introduction of the criminal procedure legislation led to a better, albeit not perfect, harmonisation of legislation throughout BiH,[1898] even though in practice there are considerable differences in the application of certain CPC provisions.[1899]

DeNicola sees the OHR and the ICTY as the two "main forces"[1900] behind the introduction of a new CPC in BiH, and describes it as a "joint effort" between the two organisations.[1901] The Tribunal's impact on the new BiH CPC can be identified at several levels: first, the ICTY requested the introduction of common law procedures in BiH, to enhance efficiency and competence of the judiciary in order to make war crimes prosecutions possible.[1902] It then also provided political support in the OHR's drafting process and backed the end result.[1903] During the drafting process, the ICTY provided "substantial input"[1904]. With the OHR, it concluded the agreement that the review of the CPC would take into account the Tribunal's experience.[1905] And indeed, as mentioned, its mixed Rules of Procedure and Evidence set an example for numerous legal concepts in the new BiH CPC.[1906] Through former ICTY personnel serving as temporary international judges at the SCBiH, or within the prosecution service, it was also ensured that the interpretation of common concepts would likewise resemble the Tribunal's approaches, and that the mixed procedural culture would be entrenched in the BiH system. Lastly, the ICTY sent personnel to conduct training programmes on the 2003 CPC's common law features for BiH judges, prosecutors and defence counsel.[1907] Reportedly, the main

1893 Cf. DeNicola, 2010, p. 35.
1894 Cf. DeNicola, 2010, p. 33.
1895 Cf. DeNicola, 2010, p. 28; Ivanišević, 2008, p. 13.
1896 Cf. DeNicola, 2010, p. 28.
1897 Cf. Rüedi, 2015, p. 133f.; following its promulgation on an interim basis, the Code was adopted by the Parliamentary Assembly of Bosnia and Herzegovina and published in the Official Gazette of Bosnia and Herzegovina No. 36/03.
1898 Cf. Rüedi, 2015, p. 186.
1899 Cf. OSCE Mission to Bosnia and Herzegovina, August 2008, p. 9ff.
1900 DeNicola, 2010, p. 40.
1901 Cf. DeNicola, 2010, p. 4.
1902 Cf. DeNicola, 2010, p. 32.
1903 Cf. DeNicola, 2010, p. 39.
1904 DeNicola, 2010, p. 32.
1905 Cf. DeNicola, 2010, p. 38.
1906 Cf. DeNicola, 2010, p. 36.
1907 Cf. DeNicola, 2010, p. 40.

motivation behind the Tribunal's efforts was to secure international standards in war crimes proceedings, which were required to satisfy the criteria for Rule 11*bis* referrals,[1908] and indeed, experts attest the 2003 BiH CPC overall consistency with ECHR and ICTY jurisprudence in that regard.[1909]

Generally speaking, also with regard to the legislation regulating criminal procedure, BiH's general openness towards foreign and international influences is obvious. This is not self-evident, as, contrary to the reforms of the Criminal Code aimed at introducing *international* criminal law offences and concepts (crimes against humanity, new war crimes provisions, and the crime of aggression, command and superior responsibility, joint criminal enterprise), criminal procedure is something inherently and traditionally *national*. And yet, decision-makers in Bosnia and Herzeovina chose to look at foreign and international codes – including the ICTY RPE – for inspiration. This demonstrates the 'international community's' strong influence and the Tribunal's standing as *the* authority in criminal law in general, not only in substantive criminal law. In addition, in view of the fact that the ICTY had insisted on adopting a more adversarial procedure, the developments demonstrate that Bosnians would generally listen when the Tribunal had something to say.

In Serbia, a few procedural novelties, copied from the ICTY, had already been introduced by the Law on the Organization and Jurisdiction of Government Authorities in Prosecution of Perpetrators of War Crimes, which was adopted in July 2003.[1910] Examples of such novelties include plea bargains,[1911] questioning witnesses via video-conference link, audio-recording the main hearing proceedings,[1912] and assigning protective measures to witnesses.[1913]

A broader revision of the Serbian Criminal Procedure Code was foreseen as of 2006. However, owing to a lack of financial resources and a lack of capacity to implement a more efficient model of police-prosecutorial investigation,[1914] it was only adopted in September 2011.[1915] In a first stage, as of January 2012, the revised Criminal Procedure Code was applied only in proceedings in the most complex criminal cases, namely for organised

1908 Cf. DeNicola, 2010, p. 39; "The ICTY experience will also be referred to […] in the review of the Criminal Procedure Code of BiH"; ICTY, Press release 21 February 2003.

1909 Cf. DeNicola, 2010, p. 63.

1910 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 48.

1911 Cf. Ivanišević, 2007, p. 40.

1912 Cf. OSCE Mission to Serbia and Montenegro, October 2003, p. 48.

1913 Article 15 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings; cf. Weill & Jovanović, 2012, p. 248.

1914 Cf. European Commission, 9 November 2010, p. 10; European Commission, 14 October 2009, p. 12; European Commission, 5 November 2008, p. 11; European Commission, 6 November 2007b, p. 10.

1915 Cf. European Commission, 12 October 2011b, p. 19.

crime and for war crimes, before it was extended to the whole system as of October 2013.[1916] Just as in Bosnia and Herzegovina, the new Criminal Procedure Code profoundly changed criminal proceedings by conferring the lead for investigations to the prosecution service both in the pre-investigative and investigative phases, and modifying the previously applicable role of the investigating judge.[1917] Effectively, an adversarial system of criminal procedure was introduced,[1918] obliging the prosecution to collect evidence and present it in court.[1919]

While its engagement in Serbia was much less active and direct, some legal practitioners report that the Tribunal's RPEs nevertheless provided the model for the new Serbian CPC:

> "If you're confronted with this model [the ICTY's mixed RPEs] for decades and you're looking for new solutions for your criminal procedure system, it is obvious to adopt a similar model as the one that has been in front of your nose this whole time."[1920]

However, this is contested, and during my research visits, I could not find sufficient proof for this claim.[1921] Instead, many asserted that Serbia's choice to move towards a more adversarial procedure followed a general trend in Europe and considerations of efficiency.[1922]

In both countries, abolishing essential elements of the Yugoslav legal tradition, and thereby essentially introducing a completely new approach to criminal procedure, did not go smoothly. Reactions among legal practitioners and other stakeholders (including victims and witnesses) to the new codes where overwhelmingly negative.[1923] It created confusion and frustration among judges, prosecutors, defence counsel, and victims.[1924] Many felt that the ICTY's use of common law procedures implied that their own procedures were inferior,

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1916 Cf. European Commission, 16 October 2013b, p. 40; although it was meant to start in January 2013; cf. European Commission, 12 October 2011b, p. 19.

1917 Cf. European Commission, 8 November 2006b, p. 9.

1918 Cf. European Commission, 12 October 2011b, p. 19.

1919 Cf. European Commission, 10 October 2012, p. 11.

1920 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

1921 Several of the major actors involved in the reform have stated the opposite towards me; cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

1922 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30.

1923 Cf. DeNicola, 2010, p. 37; interview with ICTY defence counsel, The Hague, 25 November 2016, I-26.

1924 Cf. European Commission, 9 November 2016b, p. 57; S. Lakić (2014). Experiences with and Problems Identified in the Prosecutorial Investigation in BiH. In I. Jovanović & A. Petrović-Jovanović (Eds.), *Prosecutorial investigation: regional criminal procedure legislation and experiences in application* (p. 97-116). Belgrade: OSCE Mission to Serbia, p. 99; Ronen, 2011, p. 47; DeNicola, 2010, p. 4, 31, 40 and 54. For victims, plea bargains and the ban on subsidiary and private prosecutions were a particular source of frustration as they now have fewer opportunities to participate in criminal proceedings as injured parties; cf. DeNicola, 2010, p. 49 and 55. Because of cross examinations, many are afraid to testify; cf. DeNicola, 2010, p. 53.

and introducing these very same procedures in their national justice systems was now also seen as an affront.[1925] In addition, during the first years, legal practitioners in both Bosnia and Herzegovina and Serbia struggled with their new roles and procedural novelties, such as plea agreements or cross examinations –[1926] to the point where observers even concluded that the new BiH and Serbia CPCs in some cases hindered justice for war crimes,[1927] and made proceedings more unfair.[1928] DeNicola furthermore criticises the international reformers' failure to understand and respect BiH's criminal justice traditions by claiming that ICTY procedures were a suitable source of inspiration,[1929] and by not involving domestic legal professionals more in the reform process.[1930] Nevertheless, he also concedes that war crimes proceedings were made possible with the new BiH CPC,[1931] and that it did increase their efficiency and effectiveness; abolishing investigative judges reduced duplicative pre-trial investigative efforts, plea bargains and the ban on subsidiary and private prosecutions reduced the number of pending cases, and abolishing participation of injured parties reduced the complexity of trials.[1932] The same positive effects (and the same reasons for these positive effects) can be observed in Serbia.[1933]

As always with legal reform, it takes at least one generation to adapt to the new laws, as university curricula, textbooks and commentaries need to be changed, and new skills to be learned. All of this will take a long time in BiH and Serbia,[1934] and until now, insufficient resources were allocated for this purpose,[1935] which further complicates the transition.

1925 Cf. DeNicola, 2010, p. 38.

1926 Cf. DeNicola, 2010, p. 4; European Commission, 9 November 2016b, p. 57; many legal professionals did not understand how to use the new procedures and some even continued to apply the old SFRY norms, to which they are used. For instance, cross examination techniques were either not understood or seen in light of their purpose under the SFRY CPC (where the term referred to a completely different technique); cf. DeNicola, 2010, p. 54. Complicating things even further, during a transitional period, practitioners in BiH were actually required to apply both the old SFRY CPC concerning indictments confirmed before the entry into force of the new CPC, and the new BiH CPC concerning indictments confirmed after that; cf. Rüedi, 2015, p. 188.

1927 Cf. DeNicola, 2010, p. 57; for instance, as defence lawyers were not trained to conduct their own investigations and to gather evidence, clients were not adequately represented and defended; cf. DeNicola, 2010, p. 62. Or, inexperience with plea bargaining has led many defendants to sign agreements that are fundamentally unfair or of questionable validity (agreements have been signed before the respective indictments were confirmed, without having the defendant fully informed, or after the defendant had pleaded guilty which raises the question what they were bargaining for); cf. DeNicola, 2010, p. 47f.

1928 Cf. DeNicola, 2010, p. 40 and 62; see also: European Commission, 10 October 2012, p. 11.

1929 Cf. DeNicola, 2010, p. 59

1930 Cf. DeNicola, 2010, p. 56

1931 Cf. DeNicola, 2010, p. 40

1932 Cf. Ronen, 2011, p. 47; DeNicola, 2010, p. 45.

1933 Cf. European Commission, 9 November 2016b, p. 57; European Commission, 12 October 2011b, p. 19.

1934 Cf. Rüedi, 2015, p. 187f.; European Commission, 16 October 2013b, p. 40; DeNicola, 2010, p. 44f.

1935 Cf. European Commission, 5 November 2008, p. 11.

In Bosnia and Herzegovina, however, initial problems with the new BiH CPC seem to have been largely overcome among the younger generation of lawyers. Reportedly, they are even rather positive about the changes; precisely due to the fact that the ICTY existed, they have the possibility to learn from the international example, and make use of the Tribunal's jurisprudence and court practice to find the best strategies for their respective role in the criminal trial, to fill gaps in the domestic procedure, and more generally, to solve domestic procedural problems.[1936] Domestic practitioners state that the ICTY's work has been "of great value" to the domestic judiciaries in demonstrating how procedural innovations can function in practice,[1937] and many novelties in BiH indeed originate from ICTY jurisprudence or court practice.[1938] As one Bosnian defence counsel explained:

> "Unfortunately, when our CPC was put in force, there were so many situations which haven't been regulated by the CPC, but they were happening in practice. But the problem was/is that the CPC has to be changed constantly to be adapted to the adversarial system. But meanwhile, while waiting to adapt the CPC, some changes have been made, some are still pending, it is really good to have such situations already solved by the ICTY and for us, for both parties, it is good that we have a solution already, we can see how one could deal with such a situation which is not regulated by the CPC by looking at the ICTY. This is very useful for the parties and for the court."[1939]

Especially judges in Bosnia and Herzegovina have made an effort to embrace – where possible – the work and experience of the ICTY.[1940] Despite the shift towards more adversarial procedures, and despite the lack of experience with this new model, in Serbia, judges asserted that the Tribunal's practice has no value to them.[1941] Defence counsel in

1936 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; Sarajevo, 6 February 2017, I-6; and Sarajevo, 16 November 2018, I-54; interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32; see also: Vučinić, 6 November 2012, p. 24; or Kirs, 2011, p. 402. One Bosnian judge mentioned the example of answering the question whether a defence counsel may contact a prosecution witness. The BiH CPC does not provide for guidance – so the judges looked towards the ICTY's practice; cf. interview with SCBiH judge, Sarajevo, 15 November 2018, I-57. Another example is how to conduct a cross-examination. Bosnian lawyers reportedly looked at ICTY recordings or transcripts in order to learn how cross-examinations need to be conducted; cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44. Or, Bosnian – and Serbian – courts nowadays also hold status conferences in order to manage bigger trials, although their CPCs do not provide for this; cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44; see also: Rüedi, 2015, p. 194. Status conferences are regulated in Rule 65*bis* of the ICTY RPE.

1937 Cf. Ivanišević, 2007, p. 29; confirmed in: interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.

1938 Cf. Vučinić, 6 November 2012, p. 24; similar: interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

1939 Interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6.

1940 Cf. Kreso, 27 November 2013, p. 35; Kirs, 2011, p. 408.

1941 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

BiH report to have profited enormously from the international Tribunal. They claim that they are successful in rendering the procedures fairer, thanks to the possibility of referring to ICTY jurisprudence and practice while making their case.[1942] Prosecutors in both Serbia and Bosnia and Herzegovina have reported to have profited from the Tribunal's transfer of knowledge in terms of prosecutorial techniques and working methods.[1943]

Therefore, in addition to shaping the new codes of criminal procedure, the practical solutions in criminal procedure developed by the Tribunal over the years, are also being integrated in domestic courts' practice. According to Theodor Meron, former president of the ICTY, crafting such practical processes, conducive to the application in domestic courts, is indeed one of the main elements of the Tribunal's legacy.[1944] At the same time, this development is conformist to the recommendation of international experts that new criminal legislation should take into consideration the developments at the ICTY, but also that ICTY jurisprudence should be the persuasive authority in the interpretation of domestic laws.[1945] In summary, the ICTY's influence extends over new criminal procedural legislation, jurisprudence on procedural law, and court practice during and around the proceedings. In many respects, the implemented innovations have increased the efficiency of court proceedings in Serbia and Bosnia and Herzegovina.[1946]

4 Conclusion: Compliance with International Law and Standards

This Chapter examined the Tribunal's influence on domestic criminal law, by looking at the new criminal codes and codes of criminal procedure, as well as on Bosnian and Serbian war crimes courts' jurisprudence and their practice. As demonstrated, the ICTY has had a significant impact on Bosnian domestic legislation and jurisprudence – both in substantive and procedural criminal law. The effects on Serbia are less extensive and also less clearly visible.

The 2003 Bosnian Criminal Code adopts not only innovations introduced by the Rome Statute of the International Criminal Court, but also those introduced by the ICTY. The most obvious example is that Article 7 of the ICTY Statute on modes of liability is reproduced verbatim in Article 180 of the 2003 BiH Criminal Code. The same is not true for the new 2006 Serbian Criminal Code, which still resembles the 1976 SFRY Criminal

1942 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 9 February 2017, I-53.

1943 Cf. Vladisavljev, ADC-ICTY Annual Conference, 3 December 2016.

1944 Cf. T. Meron (27 November 2013b). *Marking the Twentieth Anniversary of the Tribunal: Keynote Speech.* Paper presented at the 20 Years of the ICTY, Sarajevo, p. 27.

1945 Cf. Bohlander, 2004, p. 9.

1946 Cf. Orentlicher, 2018, p. 404.

Code, although implementing the Rome Statute where necessary – through which the Serbian legislator complied with its obligations as a state party to the Rome Statute.

In addition, the jurisprudence of the State Court of Bosnia and Herzegovina (and even of the entity courts) takes into account findings of the ICTY. To begin with, remarkably, the SCBiH followed the Tribunal in holding that crimes against humanity (and command responsibility) were concepts that existed under customary international law at the time of the Yugoslav wars, and are therefore permitted as a legal basis for criminal responsibility. Consequently, the very decision of applying the new code to proceedings on crimes committed at a time when another law was in force, arguably already demonstrates the influence of the Tribunal. Apart from that, the SCBiH's jurisprudence not only adopts legal concepts developed by the ICTY, but also extensively uses its evidence, and adopts facts established by the Tribunal. Ultimately, the factual and legal findings of the national and international court are in many cases similar or even identical. The SCBiH's jurisprudence clearly depicts influence from developments at the ICTY, as well as at the ICC, with the ICTY being one of the most persuasive bodies of international criminal law for the State Court.[1947] Serbia made a different choice on the applicable law, and strictly adheres to the legality principle by applying the old criminal code in force at the time of the commission of the crimes. It therefore closes the door to relying on customary international law. This is also visible in the reluctance of domestic courts to use ICTY case law – or to be explicit about its use of the Tribunal's jurisprudence as a source. Indeed, ICTY jurisprudence is also used by Serbian courts, and more extensively than judges dare to admit (both in their written judgments and during interviews with me). This might be due to the fact that one does not make friends in Serbia when acknowledging the Tribunal as a persuasive authority. While evidence from The Hague is referred to, established facts are rarely adopted, and the factual findings of Serbian domestic courts differ significantly from those of the ICTY.

The same tendencies are visible concerning criminal procedure. Both countries have adopted new codes of criminal procedure: BiH in 2003 and Serbia in 2011. Both were aimed at increasing the judiciary's efficiency and therefore introduced adversarial procedure elements, rendering Serbian and Bosnian domestic procedure a mix of common law and civil law approaches. For the BiH CPC, observers agree that the ICTY has had a profound influence on the new code, partly because it had pressed for a criminal procedure law reform, and partly because it had established itself as an important international actor in the field of criminal law. In Serbia, most observers assert that the Tribunal's Rules of Procedure and Evidence were not a decisive inspiration for the new provisions.

In BiH, domestic legal practitioners thankfully also look at how the ICTY RPEs are applied in practice when searching for solutions for gaps in the domestic CPC or

1947 Cf. Trapani, 2011, p. 69.

inconsistencies. While this is purely utilitarian, it yet again clearly shows the willingness of Bosnian actors to look beyond their own system. For many, the ICTY is an obvious first choice in that regard. As Orentlicher put it: ICTY jurisprudence and court practice "provided valuable guidance to the [war crimes practitioners] in [their] resolution of thorny legal issues"[1948]. In Serbia, even though this might have been different in the early years of war crimes institutions,[1949] nowadays, domestic actors prefer to concentrate on their own legal traditions and legislation. Only (war crimes) prosecutors report that they gained valuable inspiration for prosecutorial and investigatory techniques from their colleagues in The Hague.

Overall, Serbia has been rather resistant to outside influence, while Bosnia and Herzegovina has been receptive – to an extent that one war crimes prosecutor said to me: "Everything we do here, we learned that from The Hague"[1950].

A variety of factors account for the differences between Serbia and Bosnia and Herzegovina. Certainly, traditions and legal culture play a role.[1951] But more importantly, it seems that general exposure to outside influences makes the difference. Bosnia and Herzegovina, as a country where the 'international community' became very active in the aftermath of the wars, quickly became exposed to different types of influences. Also, the ICTY itself was very present there. Of course, the High Representative, who pushed for comprehensive criminal law reforms in the early 2000s, and who was a major ally of the ICTY, paved the way for new criminal legislation that resembled the Tribunal's Statute. Invoking the ICTY's jurisprudence is then obviously more intuitive when the legal basis (the domestic criminal law) is nearly the same as the basis of the ICTY's jurisprudence (the ICTY's Statute).

Another major factor influencing whether domestic legal practitioners look to the ICTY when searching for solutions for domestic criminal law problems, are attitudes towards the Tribunal. This probably explains, in part, the different pictures in Serbia and Bosnia and Herzegovina when it comes to the ICTY's impact on substantive criminal legislation – and even on procedural legislation. In BiH, the legislation was drafted with considerable input from foreigners and international institutions, including the ICTY and its closest allies. In Serbia, domestic legislators were responsible for designing a new criminal code. As the Serbian political elite is very critical of the Tribunal,[1952] it had no incentive to draw inspiration from the ICTY Statute.

1948 Orentlicher, 2010, p. 120.

1949 Take former Belgrade District Court President Siniša Važić saying "we took a lot of provisions" from the ICTY, and sought to emulate the "skills, knowledge, and technical gadgets" of ICTY judges and facilities; cf. Orentlicher, 2018, p. 402.

1950 Interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3.

1951 Cf. Weill & Jovanović, 2012, p. 264; Ivanišević, 2007, p. 18.

1952 See Chapter 5, section 5.2.1 and Chapter 9.

As for jurisprudence, it comes as no surprise that respect for the ICTY enhances the likelihood to regard it as a point of reference. The analysis of domestic jurisprudence on the contextual elements of war crimes illustrates this difference between Serbia and Bosnia and Herzegovina: while Serbian judgments rarely refer to the Tribunal's jurisprudence – in fact, they often contradict the ICTY's findings – Bosnian judgments cannot do without it. In both countries, as domestic practice is evolving, references to ICTY jurisprudence become less necessary and therefore less frequent. For BiH, this leads to consolidation of a more or less coherent body of jurisprudence between the Tribunal and domestic courts. And for Serbia, the divide between domestic courts and the international tribunal is getting bigger.[1953] This means that the divide between both countries concerning their respective understanding of what happened during the conflicts in the former Yugoslavia is also reinforcing. If both countries had followed the ICTY in their jurisprudence, a common narrative could have developed over time.[1954]

International legal transplants are not necessarily better or worse than the existing domestic traditions – in fact, considering the problems related to the introduction of new models of criminal procedure, this stark and somewhat coerced shift in legal culture must be seen critically.[1955] For instance, in both countries, introducing adversarial elements into the traditionally inquisitorial criminal procedure has led to great frustration, and, at least in the short run, also to less efficient and – more importantly – less fair proceedings.[1956] Bohlander opines that these types of reforms merely lead to "rule of law based on Western democratic thinking"[1957], while disrespecting local traditions. Also, domestic courts do not necessarily function better when their case law follows the jurisprudence of an international criminal tribunal.[1958] Following ICTY jurisprudence or court practice is not a must.

What is remarkable, however, is that most of my interviewees reported that the ICTY brought international law into the realm of the domestic legal systems – in both countries.[1959] There are three main reasons for this: first, the Tribunal itself – rightly so – is associated with international law. Most of its case law has become customary international law, and is therefore a source of law under both the Serbian and Bosnian constitutions. At the same

1953 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1954 Similar: Vasvija Vidović as quoted in: Mackic, Balkan Investigative Reporting Network, 1 October 2018.

1955 Cf. Bohlander, 2004, p. 25f.

1956 See section 3 above.

1957 Bohlander, 2004, p. 31.

1958 Cf. Orentlicher, 2018, p. 370.

1959 Cf. interview with Constitutional Court of BiH judge, Sarajevo, 7 February 2017, I-5; interview with OHR representative, Sarajevo, 20 November 2018, I-47; interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 16 November 2018, I-54; interview with OKO representatives, Sarajevo, 8 February 2017, I-36; interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; interviews with ICTY defence counsel, Belgrade, 25 January 2017, I-60; and Belgrade, 23 January 2017, I-27; interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; similar: Orentlicher, 2018, p. 370.

time, the law it adjudicated – international humanitarian law – is international law. For many domestic legal professionals, the ICTY was the first point of contact with international law. Familiarisation with the Tribunal therefore inevitably means familiarisation with international law. Secondly, the presence of the Tribunal, but also with the institutions that were established to continue its legacy, made many new networks available to domestic legal practitioners. Exposure to – and collaboration with – people from all over the world, with diverse legal and linguistic backgrounds, inevitably broadens one's horizon. Third, the legal challenges that war crimes trials entail, such as at times challenging fair trial right situations, have forced local legal professionals to look beyond the domestic legal system to find arguments for their proposed solutions. One powerful instrument in this regard is the ECHR, which is nowadays routinely applied in BiH,[1960] and considered increasingly often in Serbia.[1961] An OHR representative described the development by stating that:

> "at first, no one was interested in doing war crimes cases, they were fed up with the war, and didn't speak proper English. Then, they realised they couldn't do without reference to the ECHR and other international law instruments."[1962]

In BiH, a start was made with the *Maktouf-Damjanović* case, which provided valuable lessons for defence counsel, prosecutors and judges, in terms of fundamental rights, what the ECHR is, and what it means to apply it directly in domestic proceedings.[1963] However, according to all accounts, legal professionals also become more versed in researching and applying *other* sources of international law, such as the Geneva Conventions, or the case law of other international courts and tribunals.[1964]

Domestic observers note that this also has broader effects that go beyond war crimes. Although, for instance, invoking the ECHR started in the context of war crimes trials, this practice has continued in organised crimes trials, and now even in ordinary crimes trials.[1965]

1960 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44.

1961 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; see also (Ivanović & Lukić, 2015, p. 249ff.); Ronen, 2011, p. 42; see also, for instance: Appeals Court Belgrade, *Case of Boban Pop Kostić*, Judgment, Kž1 Po2 1/15, 10 June 2015, p. 3-4.

1962 Interview with OHR representative, Sarajevo, 20 November 2018, I-47.

1963 Cf. interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1964 Cf. interview with Appeals Court Belgrade judge, Belgrade, 9 November 2018, I-30; interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.

1965 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 16 November 2018, I-54; interview with OHR representative, Sarajevo, 8 February 2017, I-46; interviews with ICTY defence counsel, Belgrade, 23 January 2017, I-27; Belgrade, 5 November 2018, I-28; and Belgrade, 25 January 2017, I-60; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

Hence, in the words of one of my interviewees, the ICTY "broadened up the perspective of domestic practitioners in the region of the former Yugoslavia."[1966] "It create[d] a legal culture where there is not only a closed box of national legislation."[1967] Ultimately, the ICTY introduced the former Yugoslav countries to international law and triggered their alignment with international standards in many respects. While this was certainly not calculated, it is a valuable side effect of the Tribunal, increasing the effectiveness and fairness of the domestic judiciary in Serbia and Bosnia and Herzegovina.

1966 Interview with ICTY defence counsel, Belgrade, 25 January 2017, I-60.
1967 Interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

7 Bringing Novelties to the Region

How the ICTY Contributed to Justice and Effectiveness of the Criminal Process by Introducing Protection and Support for Witnesses and Victims

Previous Chapters have demonstrated how the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) has contributed to re-establishing accountability by triggering the establishment of domestic war crimes proceedings, and to Bosnia and Herzegovina's and Serbia's compliance with international law and standards in the context of criminal law, by assisting in the development of appropriate legislation and jurisprudence. Another major legacy of the Tribunal in the countries of the former Yugoslavia is that it introduced them to certain practices that would significantly improve the effectiveness, efficiency, and transparency of the criminal process, and that would bear the potential of enhancing justice for victims. This Chapter will present a selection of these practices, namely those that are related to matters involving victims and witnesses: witness protection and support, and compensation for victims. Chapter 8 will then focus on the use of technology in the courtroom.

Organising criminal proceedings in a way that allows victims and witnesses to participate is of utmost importance. First, because prosecutions may engender a sense of justice, or "closure" for victims – not only on the basis of seeing their persecutors being prosecuted, but also through the process of testifying.[1968] Vindicating the rights of the victims is one of the broader goals of (international) criminal justice; the ICTY mentions "bringing justice to victims and giving them a voice" as one of its most important achievements.[1969] Second, beyond the broader goal of providing a sense of satisfaction to victims and witnesses, there is also a more utilitarian reason for including them: criminal proceedings – and war crimes proceedings in particular – often depend on the testimonies of victims and other witnesses. It is the most important source of evidence in war crimes prosecutions, especially since other evidence, such as documentary or audio-visual material that can prove the crimes, is rarely available. It is therefore crucial that witnesses are given the possibility to testify freely.[1970]

Witness protection before, during, and after the trial is therefore key – not only to protect life and pillar of victims and witnesses, but also to ensure a successful criminal

1968 Cf. Cryer *et al.*, 2014, p. 37.
1969 Cf. ICTY, Achievements, http://www.icty.org/en/about/tribunal/achievements (last accessed 15/08/2019).
1970 Cf. Ivanišević, 2007, p. 19.

trial.[1971] In some cases, effective witness protection even requires a long-term witness protection programme or resettlement in another country.[1972]

Through its Victims and Witnesses Section (VWS), the ICTY had set up a comprehensive and very successful witness support and protection programme.[1973] The VWS and its practices served as a role model for similar institutions established at war crimes courts or prosecution offices in Bosnia and Herzegovina and Serbia. Indeed, almost all of my interviewees confirm that if they had to choose one area where ICTY's impact is the most explicit, it would be witness protection (and support).[1974] How domestic institutions developed under the influence of the ICTY, their practices, as well as their successes and current challenges will be outlined in section 1.

Another area where the ICTY's practice influenced domestic practice is reparations for victims. Interestingly, it was precisely the absence of jurisdiction over compensation claims at the ICTY – for which the Tribunal was heavily criticised –[1975] that motivated domestic actors in Bosnia and Herzegovina to provide victims with the opportunity to apply for compensation directly during the criminal trial.[1976] The ICTY Rules of Procedure and Evidence merely provide for the restitution of property or the proceeds thereof to victims, and in this context, a trial chamber may determine the rightful owner of the property at issue.[1977] Beyond this remedy for minor crimes, under Rule 106 of the Rules

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1971 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 74.

1972 Cf. Ivanišević & Trahan, October 2004, p. 19.

1973 For more information see: ICTY, Witnesses, http://www.icty.org/en/about/registry/witnesses (last accessed 21/08/2019); ICTY, Witnesses – FAQs, http://www.icty.org/en/about/registry/witnesses/faq (last accessed 21/08/2019); ICTY Victims and Witnesses Section, Information booklet for ICTY witnesses, 2007, http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf (last accessed 26/09/2019). On the Victims and Witnesses Section, see: K. King & J. Meernik (October 2016), *Echoes of testimonies, A Pilot Study into the long-term impact of bearing witness before the ICTY*, University of North Texas and Victims and Witness Section at the ICTY, http://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf (last accessed 13/09/2019), p. 11ff. The witness protection programme has not been immune to criticism though, see for instance Parliamentary Assembly of the Council of Europe, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, Report, Committee on Legal Affairs and Human Rights, adopted by the Committee on 21 June 2010, http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf (last accessed 21/08/2019), p. 10ff.

1974 Cf. for instance: interview with SCBiH judge, Sarajevo, 15 November 2018, I-57; interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

1975 Cf. C. Evans (2012). *Reparations for Victims in International Criminal Law*. Retrieved from http://rwi.lu.se/app/uploads/2012/04/Reparations-for-Victims-Evans.pdf, p. 2; L. Zegveld (2010). Victims' Reparations Claims and International Criminal Courts: Incompatible Values? *Journal of International Criminal Justice, 8*(1), 79-111, p. 88; V. Teršelič (2011). The Need for Large-Scale Victim Reparations. In R. H. Steinberg (Ed.), *Assessing the Legacy of the ICTY* (p. 95-98). Leiden, Boston: Martinus Nijhoff Publishers, p. 98; this was taken as a lesson learned and both the ICTY and the International Criminal Tribunal for Rwanda later advocated for a victims compensation scheme during the negotiations leading to the adoption of the Rome Statute of the International Criminal Court; cf. Zegveld, 2010, p. 88.

1976 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

1977 Cf. Zegveld, 2010, p. 87.

of Procedure and Evidence, the ICTY merely transmits to the competent authorities of a state its findings that an accused caused injury to a victim. The victim may then bring an action in the national court or other competent body to obtain compensation,[1978] in which the victim may avail him/herself of ICTY judgments.[1979] As this rarely led to a successful domestic follow-up,[1980] and because it was considered that detaching the criminal trial from compensation claims would have adverse effects on the victims, NGOs – and ultimately, judges at the State Court of BiH (SCBiH) – backed a new approach. In 2015, the State Court of Bosnia and Herzegovina for the first time, granted a victim reparations for the harm she had suffered. Here, the domestic justice system thus developed under the influence of the ICTY, with the Tribunal serving as a negative example, and domestic actors consciously deciding to depart from the ICTY's practice. How this evolved will be addressed in section 2.

1 Witnesses Protection and Support

1.1 Explaining Impact: The ICTY as a Role Model for Witness Protection and Support

1.1.1 Demonstrating Witness Protection and Witness Support

Witness protection and – even more so – witness support did not exist in Bosnia and Herzegovina and Serbia before the ICTY introduced both to the region.[1981] Domestic practitioners first came into contact with the topic in the course of cooperating with the Tribunal: many witnesses testifying in the ICTY proceedings in The Hague had been granted protection under Rule 69 of the Rules of Procedure and Evidence.[1982] After returning to their home countries, some of these measures needed to be upheld or even reinforced in order for the protection to remain effective.[1983] Especially in rural areas, where communities are tight, it would often not go unnoticed when someone would travel to the Netherlands – for many it was their first trip outside their own country ever. In Bosnia and Herzegovina, where (co-)perpetrators and victims often still lived side by side, travelling to The Hague for the purpose of testifying could pose a serious security risk for witnesses.

1978 Cf. M. S. Ellis & E. Hutton (2002). Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia. *Berkeley Journal of International Law, 20*(1), 342-354, p. 351.
1979 Cf. L. Zegveld (2003). Remedies for victims of violations of international humanitarian law. *International Review of the Red Cross, 85*(851), 497-527, p. 523.
1980 Cf. Ellis & Hutton, 2002, p. 351.
1981 Cf. interview with OHR representative, Sarajevo, 8 February 2017, I-46.
1982 For the possible measures of protection, see Rules 75 and 79 of the ICTY's Rules of Procedure and Evidence.
1983 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

The Tribunal, while doing exemplary work in The Hague in protecting and supporting witnesses – by way of good cooperation between the Office of the Prosecutor, the Chambers and the VWS – often relied on the witnesses' home countries to coordinate protection upon their return.[1984] In the Tribunal's early years, however, the experiences of some witnesses were far from ideal when they returned home (particularly if their home was BiH).[1985]

Over the years, as a response to the initial difficulties caused mainly by the fact that witness protection was not foreseen in the domestic criminal procedure, and know-how was therefore lacking, ICTY representatives had several working meetings and visits with their counterparts in the region in order to discuss witness protection.[1986]

In fact, in order to implement the protective measures imposed by the Tribunal, domestic legal practitioners and the national police effectively had to learn about the ICTY's practice.[1987] As such, for domestic actors, protecting the Tribunal's witnesses at home was a useful learning ground, whilst collaborating with – and being under the supervision of – the ICTY. Domestic war crimes practitioners report that until today, witness protection is the area of cooperation where contact with the ICTY is the most frequent and intensive.[1988]

In addition, the joint conclusions of the ICTY and the Office of the High Representative (OHR) on developing Bosnia and Herzegovina's capacity to adjudicate war crimes trials foresaw that "a witness protection program and a program to provide security for judges and prosecutors must be developed"[1989]. When BiH and Serbia established specialised war crimes institutions, the legal framework foresaw that protective measures for witnesses would remain in place, as granted by the ICTY, in case the Tribunal would refer a case or case file.[1990] Rule 11*bis* cases that had been transferred from The Hague to Sarajevo were

1984 Cf. L. May & Fyfe, 2017, p. 160.

1985 Cf. Orentlicher, 2018, p. 173.

1986 Cf. Freeman, October 2004, p. 6; interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1987 Cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

1988 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45; interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; as a side-note, they complain that ICTY witness protection is actually causing great problems nowadays for their own domestic proceedings. According to Rule 75 (H) ICTY RPE, domestic practitioners have to apply to the Tribunal when they want to know which witnesses have protection or in order to lift the protective measures. Until the ICTY approves, the domestic investigation can often not proceed. Approval, however, takes time or is often not given, because the witnesses refuse; cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56; interview with SCBiH judge, Sarajevo, 2 February 2017, I-45; interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.

1989 OHR and ICTY Joint Conclusions as recited in: Bohlander, 2004, p. 18.

1990 See for instance Article 14a of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings; cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-37.

therefore also an opportunity to gain experience:[1991] according to representatives of the Organisation for Security and Co-operation in Europe (OSCE) who monitored these trials, domestic legal practitioners learned how to balance witness protection and transparency of judicial proceedings.[1992]

It was therefore only logical that the legislation that was developed on witness protection closely followed the ICTY's model.[1993] As one of my interviewees from the ICTY Office of the Prosecutor (OTP) put it when asked about the Tribunal's most important legacies:

> "Also, very important is the attitude or relationship towards protecting witnesses. I believe that BiH really developed the whole issue of the witness protection. Much in the same way as it was done here at the ICTY. […] Basically, they are copying everything."[1994]

Indeed, as a former staff member of the witness protection department at the BiH Prosecutor's Office (POBiH) confirmed: "[i]t goes without saying that everything that we have been applying we learned from the ICTY."[1995]

The Tribunal also provided advice in the course of drafting the relevant legal framework by reviewing the proposed laws and commenting on them.[1996] A person who was involved in the drafting process in Bosnia and Herzegovina at the time told me that "[t]he ICTY's experience was 'crucial'."[1997] A representative of the ICTY OTP confirmed: "[Witness protection] didn't exist in BiH before. And we had developed jurisprudence and practice on the protection of witnesses. So, we were asked advice on this."[1998] The former president of the State Court of Bosnia and Herzegovina acknowledged that "of particular significance

1991 Cf. M. Brkić (27 November 2013). *Tribunal and Local Judiciaries: Lessons Learned in Victim and Witness Support and Protection.* Paper presented at the 20 Years of the ICTY, Sarajevo, p. 66.

1992 Cited in: Orentlicher, 2018, p. 346.

1993 Cf. Kreso, 27 November 2013, p. 35; cf. interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39; interview with OHR representative, Sarajevo, 8 February 2017, I-46; interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22. According to Vučinić, the protective measures provided in Bosnia and Herzegovina's (BiH) Law on Protection of Witnesses under Threat and Vulnerable Witnesses are "in essence, Rule 75 of the Rules of Procedure and Evidence of the ICTY"; Vučinić, 6 November 2012, p. 24. For the legal framework, see section 1.2 below.

1994 Interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

1995 Brkić, 27 November 2013, p. 66.

1996 Cf. interview with OHR representative, Sarajevo, 8 February 2017, I-46; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22; interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-37.

1997 Interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-37.

1998 Interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

to us were the legal solutions related to protection of witnesses, which were also created on the basis of the rules and practices of the ICTY."[1999]

Similar to its impact on witness protection is the ICTY's influence on witness support.

In September 2005, the ICTY's Victims and Witnesses Section held a conference in Sarajevo, "gathering representatives of war crimes courts to discuss the latest developments in war crimes proceedings and needs and issues facing victims and witnesses in the different jurisdictions in the region."[2000] According to all accounts, it was that conference that triggered "the idea to establish" a witness support unit at the Higher Court Belgrade in Serbia,[2001] and at the State Court of Bosnia and Herzegovina.[2002] As a representative of the Witness Support Section (WSS) at the State Court of Bosnia and Herzegovina put it: "without the ICTY, no one would have even thought of something like this unit"[2003]. The Bosnian WSS was established in 2005, and the Serbian Victims and Witnesses Support and Operations Unit (VWSU) in 2006.[2004] There is, in addition, a witness support unit (although at the time of writing it consisted of only one person) at the Office of the War Crimes Prosecutor,[2005] and a similar unit at the Prosecutor's Office of BiH.[2006] Usually, the units within the prosecutors' offices cover the time between the start of investigations and the confirmation of the indictment, which is the point at which the court takes over.[2007]

The Tribunal's main influence was therefore to spark the very idea of a unit that could support witnesses before, during, and after their testimony at war crimes trials. In addition, the ICTY's Victims and Witnesses Section provided an important model and a key source of expertise.[2008] In fact, the first director of the State Court's WSS had previously worked at the ICTY's VWS,[2009] whereas the first head of the VWSU at the Higher Court Belgrade had participated in trainings of the ICTY.[2010] Both could therefore bring in the lessons learned from The Hague.[2011]

The BiH WSS representative reports that the section was "established 'based on the model of the ICTY'". She recounts that witness support was something completely new

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1999 Kreso, 27 November 2013, p. 35.

2000 ICTY, 14 December 2005, p. 9.

2001 Cf. Orentlicher, 2018, p. 402, citing the then-spokeswomen of the court's war crimes department; similar: interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

2002 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.

2003 Interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.

2004 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.

2005 Cf. interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56.

2006 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.

2007 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.

2008 Cf. Orentlicher, 2010, p. 126; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17.

2009 Cf. Orentlicher, 2010, p. 126; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

2010 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

2011 Cf. Orentlicher, 2010, p. 126; similar: interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

in the region and that in order to establish a similar unit, domestic actors were looking for a model.[2012]

The former head of the Victims and Witnesses Support and Operations Unit at the Higher Court Belgrade said at the ICTY's 20 years anniversary conference that

> "[t]he ICTY service has been an ideal to all of us in the region. It was a model on which we tried to establish our own services to help the people coming before the court to share their most horrible experiences."[2013]

Since their establishment, the Bosnian and Serbian units have of course developed their own best practices and work on the basis of the laws and traditions in Serbia and Bosnia and Herzegovina. However, both the Serbian VWSU and the Bosnian WSS entertain "very good cooperation"[2014] with the ICTY's VWS,[2015] with the latter supporting the former two through regular consultations and exchange of experiences until today.[2016]

1.1.2 Capacity Building to Bolster Good Practices

The ICTY (particularly the VWS) also facilitated trainings or partnered up with other organisations in order to organise capacity building programmes on witness protection and victims coordination for local professionals.[2017] The Tribunal considers it part of its legacy to have crafted practical processes for, *inter alia*, the protection and support of victims and witnesses.[2018]

Among others, working meetings, briefings and roundtables took place between ICTY officials and the persons in charge of witness protection or witness support in Serbia and Bosnia and Herzegovina.[2019] Furthermore, the Tribunal organised meetings between NGOs, international organisations, and state officials, on witness protection and support,[2020] relevant domestic actors were welcomed in The Hague for on-site demonstrations of witness protection and support, and peer-to-peer meetings took place for judges and

2012 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.
2013 S. Peković (27 November 2013). *Tribunal and Local Judiciaries: Lessons Learned in Victim and Witness Support and Protection.* Paper presented at the 20 Years of the ICTY, Sarajevo, p. 62.
2014 Orentlicher, 2018, p. 402.
2015 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49.
2016 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49; activities taken up by the MICT.
2017 Cf. Michaeli, 2011b, p. 57; similar: Orentlicher, 2018, p. 402; Brkić, 27 November 2013, p. 66; Human Rights Watch (June 2007), *Unfinished Business: Serbia's War Crimes Chamber*, http://www.hrw.org/legacy/backgrounder/eca/serbia0607/serbia0607web.pdf (last accessed 26/09/2019), p. 8.
2018 Cf. Meron, 27 November 2013b, p. 27.
2019 Cf. ICTY, 31 May 2006, p. 13.
2020 Cf. ICTY, 16 November 2006, p. 6.

witness support services.[2021] The ICTY Victims and Witness Section also held a series of conferences for health and welfare professionals in order to practice in the areas where witnesses resided,[2022] with the aim of transferring knowledge and skills to professionals.[2023] In addition, in the early stages, the ICTY VWS was in contact with regional NGOs who supported its work by offering specialist care, legal expertise, and support for witnesses, once they returned to their country of residence.[2024]

The capacity building initiatives were not only aimed at improving witness protection, but also at supporting witnesses before, during or after their testimony, particularly if they were also victims-witnesses.[2025]

The following section (1.2) will outline the witness protection regime of BiH and Serbia, while section 1.3 will look at the witness support framework in both countries.

1.2 Witness Protection in Bosnia and Herzegovina

Witness protection and support in Bosnia and Herzegovina is based on a fragmented legislative framework, with different laws governing at the state and at entity/district level.[2026] At the state level, the BiH Code of Criminal Procedure (CPC) is the starting point,[2027] in addition to which there are several laws that are more focussed on the subject matter, including the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses,[2028] as enacted by the OHR on 24 January 2003, the 2004 Law on Witness Protection Programme,[2029] and the new Law on the Witness Protection Programme from April 2014.[2030] These laws apply to witnesses testifying at the State Court of BiH, and they

2021 Cf. ICTY (18 November 2013), *Completion Strategy Report November 2013*, provided to the United Nations Security Council, S/2013/678, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18nov2013_en.pdf (last accessed 14/08/2019), p. 14; ICTY (23 May 2013), *Completion Strategy Report May 2013*, provided to the United Nations Security Council, S/2013/308, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2013_en.pdf (last accessed 14/08/2019), p. 18.

2022 Cf. ICTY, 16 August 2004, p. 83f.

2023 Cf. ICTY, 16 August 2004, p. 83f.

2024 Cf. ICTY, 16 August 1996, p. 34.

2025 Cf. Orentlicher, 2018, p. 402.

2026 Cf. Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 28.

2027 In particular Article 91, which refers to the *lex specialis* on witness protection.

2028 Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Official Gazette of Bosnia and Herzegovina No. 3/03; it was adopted in order to ensure that the State Court of Bosnia and Herzegovina (SCBiH) can fight organised crime and corruption effectively; cf. OSCE Mission to Bosnia and Herzegovina (June 2015), *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges. An analysis of criminal proceedings before the courts of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District BiH between 2004 and 2014*, Sarajevo, https://www.osce.org/bih/171906?download=true (last accessed 12/09/2019), fn. 147.

2029 Law on Witness Protection Programme, Official Gazette of Bosnia and Herzegovina No. 29/04.

2030 Law on the Witness Protection Programme, Official Gazette of Bosnia and Herzegovina No. 36/14.

do effectively ensure that these witnesses are protected and supported,[2031] if applied correctly.[2032]

At the entity level, for a long time, there has not been any comprehensive witness protection legislation, and practices remain unstructured to this date. In addition to what is regulated in their respective CPCs, in 2003, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska adopted laws similar to the state Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.[2033]

Adding to the fragmented nature of witness protection and support in Bosnia and Herzegovina is the fact that both courts and prosecutors' offices have specialised units that deal with victims and witnesses, or run specific programmes on this matter.[2034] The 2008 BiH National War Crimes Strategy underscored the importance of witness protection,[2035] and foresaw a more structured approach, including the establishment of coordinating mechanisms at the state and entity-levels, in order to improve the exchange of information and prevent repeated interviewing of vulnerable witnesses. It also envisaged arranging separate rooms in courts that deal with war crimes for witnesses to testify under protective measures, and hiring psychologist witness support officers in all prosecutors' offices and courts.[2036]

Witness protection and support in Serbia was subject to constant modifications of the legislative framework,[2037] with several codes of criminal procedure and specialised laws being adopted within a few years. This led to overlaps and contradictions.[2038] In the beginning of Serbia's democratic era, the laws hardly provided any form of witness protection or support, which meant that prosecutors had to improvise to achieve at least some level of both.[2039] The first steps towards codified witness protection and support were made with the Law on Organization and Competence of State Authorities in War Crimes Proceedings, which introduced the first proper measures concerning witness protection

2031 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 6.

2032 Cf. OSCE Mission to Bosnia and Herzegovina (January 2010b), *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy or War Crimes Processing*, Sarajevo, https://www.osce.org/bih/118893?download=true (last accessed 12/09/2019), p. 11.

2033 Official Gazette of FBiH 36/03, and Official Gazette of RS 48/03.

2034 Cf. Peković, 27 November 2013, p. 64.

2035 Cf. Ministarstvo Pravde Bosne i Herzegovine (December 2008), *Državna Strategija za Rad na Predmetima Ratnih Zločina*, Sarajevo, http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf (last accessed 12/09/2019), p. 5.

2036 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 6; OSCE Mission to Bosnia and Herzegovina, 2017, p. 74.

2037 Cf. Humanitarian Law Center (September 2014), *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*, Belgrade, www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf (last accessed 11/09/2019), p. 65.

2038 Cf. OSCE Mission to Serbia, 2015, p. 81 and fn. 230.

2039 Cf. Ivanišević & Trahan, October 2004, p. 21f.

and support in war crimes proceedings. Since then, and especially with the incorporation of comprehensive provisions in the 2011 CPC and certain amendments to the Law on Organisation of Courts from November 2013,[2040] support for victims and witnesses became an integral part of the national judicial system.[2041]

There are several ways to protect witnesses in the context of a criminal trial: inside the courtroom while s/he is testifying, outside the courtroom (which usually starts after the trial), and through vigorous prosecution of threats and dangers against witnesses that could have a deterrent effect. The domestic practices on these three aspects will be outlined in the following sections.

1.2.1 In-Court Protection

In Bosnia and Herzegovina, judges can order one or more of the following measures of in-court witness protection:[2042] witnesses can get access to psychological and social assistance and professional help during investigations and during the trial (provided by social care centres);[2043] the usual sequence of examining witnesses can be altered if the witness is vulnerable;[2044] in order to protect him/her from harassment and confusion, judges can decide to control the examination of the witness, or, in exceptional circumstances, even conduct the examination themselves;[2045] the witness can give his/her testimony from a separate room, using technical assistance for image and voice transfer;[2046] the accused can be removed from the courtroom;[2047] records of the testimony given during the investigative stage can be read out in court (instead of examining the witness again);[2048] in exceptional cases, some or all personal details of the witness may be kept confidential after the indictment is issued, although the information must be released to the defence within a reasonable timeframe so that it can prepare the examination of the witness, and at the latest when the witness testifies at the main trial;[2049] the witness' personal data may be kept secret for 30 years; the witness may testify behind a screen and/or with voice and/or image distortion;[2050] the witness can give his/her testimony in a closed/confidential session;[2051] a

2040 Article 23, paragraph 3 and Article 51, paragraph 2 of the Law on Organisation of Courts, Official Gazette of Serbia No. 116/08.

2041 Cf. Humanitarian Law Center, September 2014, p. 57.

2042 Article 4 BiH of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses; the measures are found in chapter II of that law.

2043 Article 6 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2044 Article 7 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2045 Article 8 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2046 Article 9 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2047 Article 10 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2048 Article 11 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2049 Article 12 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2050 Article 13 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.

2051 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 11f.

special so-called witness protection hearing may be organised, during which special procedures on where to keep the record of that hearing apply. The witness' testimony given at that special hearing is later read out at the main trial, where the other party is given the possibility to ask additional questions to the witness via special procedures.[2052] Lastly, the court may issue pseudonyms for protected witnesses.[2053]

Since September 2008, the State Court of Bosnia and Herzegovina also has rules of procedure on witness protection, which assist judges in implementing witness protection measures in a coordinated manner that is effective and compliant with fair trial right standards. They also help to ensure that a witness can be duly protected, and that protection provided to that witness is not jeopardised at a later stage in the proceedings through misstep or oversight.[2054]

Many of the enumerated protective measures are also used in many entity/district courts, such as omitting the witness' full name from public court documents, excluding the public from the main trial hearings, and allowing vulnerable witnesses to testify from a separate room with audio-visual distortion.[2055]

While the old Serbian codes of criminal procedure provided only rudimentary rules for general witness protection,[2056] newer legislation ensures comprehensive protection of witnesses.[2057] Importantly, the move towards consideration for witness protection was initiated by the Law on Organization and Competence of State Authorities in War Crimes Proceedings, which established the specialised war crimes institutions in Serbia. There, the first measures for in-court protection were codified, namely the possibility to testify via video-conference link, and the protection of personal information relating to the witness or victim –[2058] two provisions inspired by the ICTY's rules and practices.[2059] In-court witness protection are now stipulated in the 2011 CPC in Articles 102-111, which apply not only to war crimes cases, but to all criminal trials. According to Michaeli, these articles were also inspired by the Tribunal's rules.[2060] A witness who, by testifying, endangers his/her

2052 Articles 14-22 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.
2053 Article 20 BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.
2054 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 16.
2055 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 6.
2056 Cf. Humanitarian Law Center, September 2014, p. 66; for instance the Criminal Procedure Code (CPC) governing until 2006, only contained the rule that "the presiding judge, the president of the court or the public prosecutor" take care of the basic protection of witnesses, including the injured party (Article 109 CPC Serbia).
2057 Already the 2006 CPC outlined specific measures to protect witnesses in criminal proceedings (Articles 117-122 CPC Serbia). This code significantly improved the legislative basis of witness protection; cf. Ivanišević, 2007, p. 22.
2058 Cf. Ivanišević & Trahan, October 2004, p. 22.
2059 Cf. Orentlicher, 2018, p. 402.
2060 Cf. Michaeli, 2011b, p. 82; confirmed in: interview with OWCP prosecutor, Belgrade, 6 November 2018, I-39.

life, health, freedom or property, or that of their loved ones, is allocated the status of protected witness,[2061] with the main purpose being to protect the witness' identity from becoming known to the public.[2062] All protected witnesses are given a pseudonym,[2063] although the defence is entitled to know their identity at the latest 15 days prior to the start of the trial.[2064] The court must order the erasure of all personal data – including data that can indirectly reveal the identity of the witness – from all court records.[2065] Other measures include excluding the public from the courtroom,[2066] examining witnesses from a separate room,[2067] face and/or voice distortion,[2068] or any combination hereof.[2069] Article 109 provides for special cautions and interviewing modalities for protected witnesses. During the investigation, the prosecutor is responsible for their implementation, and during the trial, it is the court.[2070]

In Serbia, the implementation of in-court witness protection is generally positively evaluated, especially in recent years. While virtually no measures of witness protection were applied in the trials that took place prior to the adoption of the 2006 CPC,[2071] protective measures are now routinely used,[2072] and judges are reported to resort to all possible measures of witness protection at their disposal.[2073] For a long time, this could not be said for the courts in BiH, with the exception of the SCBiH.[2074] The entity/district courts were not systematically instituting the available protective measures when they might have been

2061 Article 105 CPC Serbia.

2062 Cf. Humanitarian Law Center, September 2014, p. 68.

2063 Articles 108 (2) and 109 (6) CPC Serbia; the breach of using the pseudonym is a criminal offence under Article 337 CPC Serbia. But reportedly, this rule is not properly enforced; cf. Humanitarian Law Center, September 2014, p. 68.

2064 Article 106 (2) and (3) CPC Serbia.

2065 Cf. OSCE Mission to Serbia, 2015, p. 82; under Article 110 (1) CPC Serbia, that means "[d]ata on the identity of the protected witness and persons close to him and other circumstances which may lead to the exposure of their identity".

2066 Article 106 (1) CPC Serbia.

2067 Article 108 (2) CPC Serbia.

2068 Article 108 (2) CPC Serbia.

2069 Cf. OSCE Mission to Serbia, 2015, p. 81; the CPC governing until 2011 also foresaw physical protection of the witness during the proceedings (Article 109a); cf. OSCE Mission to Serbia, 2015, p. 82.

2070 Articles 102-111 CPC Serbia; when the trial ends, out-of-court witness protection measures (if there are any) will be implemented by the police (see the following section).

2071 Cf. Ivanišević, 2007, p. 22; except for witnesses testifying via a videoconference link; cf. Ivanišević, 2007, p. 22f.

2072 Cf. Ivanišević, 2007, p. 23.

2073 Cf. OSCE Mission to Serbia, 2015, p. 82.

2074 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 11; although, as Organisation for Security and Co-operation in Europe (OSCE) trial monitors have observed, at the SCBiH, in the beginning, there was the problem of overuse of witness protection – hampering the rights of the defendant; cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 16.

appropriate, nor was their application effective.[2075] For instance, as a rule, entity/district courts did not conceal in their indictments the names of the witnesses whose testimonies would be sought, with a few exceptions.[2076] Since 2011, however, the use of witness protection measures by prosecutors and courts has become increasingly effective.[2077] This is largely due to international donor-funded projects,[2078] which improved the physical conditions for witness protection measures, especially in entity/district courts.[2079] In addition, prosecutors and judges have become more and more sensitive to the needs and interests of witnesses, particularly of traumatised witnesses,[2080] as can be seen from the creative use of procedural possibilities to relieve witnesses from testifying.[2081]

Some problems also remain in Serbia, mostly concerning careless behaviour of judges who ask identifying information from witnesses who testify under a pseudonym or refer to identifying information in the judgments.[2082] Witness harassment by the defendant, or even by judges, also occurred in several instances,[2083] and was rarely sanctioned.[2084]

What is striking is the low number of witnesses who were granted protected status in Serbia: by the end of 2013, 54 witnesses made use of in-court witness protection.[2085] In Bosnia and Herzegovina, there were more than 1,000.[2086] The exact reasons for this stark difference are unknown. Of course, it can partly be explained by the number of trials, which is much lower in Serbia than in BiH. In addition, witnesses testifying at trials in

2075 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 79; OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 7f. and 11; similar: ICTY OTP (19 November 2012), *Completion Strategy Report November 2012*, provided to the United Nations Security Council, S/2012/847, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16november2012_en.pdf (last accessed 14/08/2019), p. 30.

2076 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 15.

2077 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 74; especially in cases of conflict-related sexual violence; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 74f.; Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 6.

2078 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 41 and fn. 144.

2079 Cf. European Commission (9 October 2014), *Bosnia and Herzegovina Progress Report 2014*, COM(2014)700 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf (last accessed 22/08/2019), p. 13; one such project, for instance, had at least one court room renovated in each court that conducts war crimes trials, provided technical equipment for transferring image and sound, sound and voice distortion, and had witness antechambers constructed in the respective court buildings. The only court that does not have these facilities is the Bihać Cantonal Court; cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 41 and fn. 145.

2080 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 74; in many entity courts there is now a policy of automatically offering vulnerable witnesses to testify from a separate room via a video-audio link; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 75.

2081 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 77f.

2082 Cf. Ivanišević, 2007, p. 23; OSCE Mission to Serbia, 2015, p. 11 and 82.

2083 Cf. Ivanišević, 2007, p. 24; Humanitarian Law Center, September 2014, p. 66.

2084 Cf. Humanitarian Law Center, September 2014, p. 66.

2085 Cf. OSCE Mission to Serbia, 2015, fn. 240.

2086 Cf. State Investigation and Protection Agency, Witness Protection Department, http://www.sipa.gov.ba/en/about-us/structure/organisational-structure/witness-protection-department (last accessed 22/08/2019).

Belgrade often come from far away (mostly from BiH, Croatia or Kosovo, as this is where most of the crimes were committed during the wars), out of the reach of the accused, which possibly reduces their need for witness protection. It might, however, also be due to difficiencies in the witness protection system.

1.2.2 Out-of-Court Protection

Out-of-court protection is only systematically available at state level in Bosnia and Herzegovina. The main actor in this respect is the Witness Protection Department within the State Investigation and Protection Agency (SIPA),[2087] a police unit specialised in preventing terrorism, organised crime, serious financial crime and corruption, detecting and investigating war crimes, and witness protection.[2088] Members of this unit are trained on sensitive issues that need to be considered when protecting witnesses in war crimes cases. Until 2018, the unit provided protection to more than 1,000 witnesses who testified before the SCBiH and entity courts,[2089] during and after the criminal proceedings.[2090] Measures included guarded transport, physical protection of the witness and his/her family, or even relocation within BiH or abroad, or change of identity.[2091] According to a war crimes prosecutor, when a SCBiH-protected witness needs to travel to Serbia or Croatia in order to testify at trials there, an investigator from the Prosecutor's Office BiH accompanies him/her.[2092]

In Serbia, there is also a specialised Witness Protection Unit (WPU) within the Ministry of Interior,[2093] which is tasked with ensuring the physical safety of particularly sensitive witnesses – before, during and after the criminal proceedings –[2094] in cases of war crimes, organised crime, and other serious crimes.[2095] Key legal provisions regulating the work of the WPU are modelled upon the example of the ICTY's practices.[2096] Possible measures of witness protection include the physical protection of persons (of the witness and his/her

2087 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 42.

2088 For more information on SIPA's witness protection programme, see State Investigation and Protection Agency, Witness Protection Department, http://www.sipa.gov.ba/en/ about-us/structure/organisational-structure/witness-protection-department (last accessed 22/08/2019). SIPA is part of the Ministry of Security and was established in 2004.

2089 Cf. State Investigation and Protection Agency, Witness Protection Department, http://www.sipa.gov.ba/en/about-us/structure/organisational-structure/witness-protection-department (last accessed 22/08/2019).

2090 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12.

2091 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 11.

2092 Cf. interview with POBiH prosecutor, Sarajevo, 23 November 2018, I-32.

2093 Law on the Protection Programme for Participants in Criminal Proceedings, Official Gazette of Serbia No. 85/2005; the director of the Serbian police is the direct supervisor of the head of the Unit; cf. Humanitarian Law Center, September 2014, p. 72f.

2094 Article 4 of the Law on the Protection Programme for Participants in Criminal Proceedings.

2095 Article 5 of the Law on the Protection Programme for Participants in Criminal Proceedings; cf. OSCE Mission to Serbia, 2015, p. 83.

2096 Cf. Orentlicher, 2018, p. 402.

family, if needed on a 24/7 basis) and property, relocation inside or outside Serbia,[2097] concealing identity and information about ownership, or change of identity.[2098] The special protection programme applies to witnesses and cooperating witnesses, suspects, defendants, victims, expert witnesses, and experts,[2099] but the focus of the unit is on the protection of insider witnesses, who often represent the key evidence against higher-ranking perpetrators.[2100] The Serbian WPU was founded following the adoption of the Law on the Programme of Protection of the Participants in Criminal Proceedings in September 2005, which addresses this out-of-court protection for serious criminal cases in detail.[2101] This was a significant step forward, as under the old Serbian codes of criminal procedure, out-of-court protection was also barely regulated.[2102] Much of what then developed in terms of rules and good practices, was inspired by the way in which witness protection was dealt with at the ICTY, as by that time, the Serbian authorities had great experience in cooperating with the Tribunal regarding the protection of witnesses who had testified at the ICTY.[2103] As witness interference was a serious problem for the trials in The Hague, the ICTY's Victims and Witnesses Section was working closely together with local authorities in order to improve the quality of their work.[2104]

Although BiH's National War Crimes Strategy has already highlighted this problem, out-of-court witness protection remains poor at the entity and district level. There, the ordinary local police conducts investigations into war crimes and is responsible for witness protection. The entity police agencies do not have specialised witness protection units to

2097 The Witness Protection Unit claims that this is often unavoidable to give witnesses the prospect of a new life and to free police resources which are otherwise devoted to the physical protection of the witness; cf. OSCE Mission to Serbia, 2015, p. 83. Serbia entered into several bilateral agreements that provide the legal basis for relocating witnesses to other countries. For sensitivity reasons, the list of countries is not public; cf. Ivanišević, 2007, p. 22. So far, there has been no relocation abroad; cf. Humanitarian Law Center, September 2014, p. 72.

2098 This measure has never been applied, as its application requires the adoption of several bylaws, which different ministries have not adopted; cf. OSCE Mission to Serbia, 2015, p. 83; Humanitarian Law Center, September 2014, p. 72.

2099 Cf. Humanitarian Law Center, September 2014, p. 71.

2100 Cf. OSCE Mission to Serbia, 2015, p. 83; depending on the types of measures, protected persons also have the right to economic, social, legal, or psychological support (Articles 12, 15, 30 (1) lit 5 Law on the Protection Programme for Participants in Criminal Proceedings).

2101 Cf. Ivanišević, 2007, p. 22.

2102 Under the CPC of 2001, for instance, nothing more than Article 109 (3) regulated witness protection outside the courtroom: "The president of the chamber, the president of the court or the state prosecutor may request that the organs of internal affairs take necessary measures to protect the witness of the injured party." In December 2002, a new chapter was added to the CPC, dealing exclusively with the prosecution of individuals involved in organised crime (including war crimes). Here, the authority of the prosecutor to "order that special protection be secured for the witness, witness collaborator, or members of their families" was reasserted in Article 504p; cf. Ivanišević, 2007, p. 21.

2103 Cf. Vekarić, 2013, p. 40.

2104 Cf. ICTY OTP, 24 November 2008, p. 20.

carry out risk assessments and implement other operational protective measures.[2105] They generally lack the capacity to ensure effective witness protection measures in war crimes cases.[2106] In exceptional cases, entity/district prosecution authorities avail themselves of SIPA services on an *ad hoc* basis.[2107] An additional problem is that the local police is not trusted by the population, because it is considered corrupt, but also because some police officers are themselves suspected to have committed war crimes.[2108] There had been attempts to include witness protection at the entity and district level in the 2014 Law on the Witness Protection Programme, but they failed due to the lack of competence of the state regarding this matter.[2109] The consequence is that drastic out-of-court protection measures, such as relocation or change of identity, are only available at the state level under the BiH Law on the Witness Protection Programme.[2110]

While in Bosnia and Herzegovina, the main problem in the area of out-of-court protection is the lack of resources made available to the specialised police unit SIPA (which is why it sometimes has to rely on the ordinary police),[2111] problems in Serbia are numerous. The Serbian legal framework is solid, but its implementation by the WPU is insufficient.[2112] Most importantly, for many years, some members of the WPU were suspected of having committed war crimes themselves.[2113] While the former head of the unit had been removed (who was known to at least have had knowledge about – if not *participated* in – war crimes), there was no systematic vetting in that unit.[2114] Of course, this is not conducive to building trust with those who the WPU is tasked to protect. In addition, there are numerous reports about improper behaviour by WPU members towards protected witnesses, including threatening and blackmailing witnesses in order to prevent them from testifying against police officers (i.e. colleagues of the WPU members).[2115] This is a particular problem for

2105 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 42.

2106 Cf. Rüedi, 2015, p. 90; ICTY OTP, 23 May 2012, p. 33.

2107 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12.

2108 Cf. Human Rights Watch (July 2008), *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts*, New York, https://www.hrw.org/sites/default/files/reports/bosnia0708_1.pdf (last accessed 26/09/2019), p. 27.

2109 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, fn. 150; OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12.

2110 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12.

2111 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12.

2112 Cf. Humanitarian Law Center, September 2014, p. 71.

2113 Cf. Humanitarian Law Center, September 2014, p. 73 and 74; M. Ristic (29 November 2013), Serbia's War Crimes Witness Protection Unit 'Failing', Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2013/11/29/serbia-s-war-crimes-witness-protection-unit-failing/ (last accessed 22/08/2019); interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.

2114 Cf. Orentlicher, 2018, p. 403.

2115 Cf. OSCE Mission to Serbia, 2015, p. 83; Humanitarian Law Center, September 2014, p. 74f.; for a recent example, see: F. Rudic (12 June 2018), Witness Quits Serbian Srebrenica Trial, Citing 'Threats', Balkan

insider witnesses.[2116] As a consequence, several witnesses either altered their testimony at trial,[2117] or opted out of the protection programme.[2118] For this reason, it was suggested that the WPU be moved to the Ministry of Justice to avoid conflicts of interests between the members of this unit and the witnesses they are tasked to protect.[2119] Until now, no follow-up action has been taken on this proposal.[2120] In addition to that, the Witness Protection Unit suffers – similar to the Bosnian SIPA – from a lack of resources, staff, and adequate premises to perform all its tasks.[2121] Generally speaking, there are serious doubts concerning the WPU's reliability, professionalism, and even impartiality,[2122] and there is no proper legal framework for monitoring the work of the WPU.[2123] It has been criticised by major international and domestic actors, such as the European Commission, the European Parliament, the Council of Europe, the OSCE Mission to Serbia, Amnesty international, and the War Crimes Prosecution Office, for endangering the lives of protected persons (rather than protecting them) and, in many cases, preventing the administration of justice in the trial of war criminals.[2124] The political establishment has ignored complaints to this date.[2125] The problems, however, only seem to exist in war crimes cases, not in organised crimes cases (which also fall under the competency of the WPU).[2126] It must be noted that the working relationship between the War Crimes Prosecutor's Office and the WPU is poor –[2127] partly because the former makes promises that the latter cannot keep, straining the relationship between witnesses and the WPU.[2128] The consequence of these problems concerning the main actor in out-of-court witness protection is that witnesses

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Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/06/12/protected-witness-drops-from-serbian-srebrenica-trial-06-12-2018/ (last accessed 22/08/2019).

2116 Cf. OSCE Mission to Serbia, 2015, p. 12; Humanitarian Law Center, September 2014, p. 74f.

2117 Cf. Ivanišević & Trahan, October 2004, p. 20.

2118 Cf. OSCE Mission to Serbia, 2015, p. 84; Orentlicher, 2018, p. 403.

2119 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 6; T. Hammarberg, Commissioner for Human Rights of the Council of Europe (22 September 2011), *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Serbia 12-15 June 2011*, CommDH(2011)29, Strasbourg, https://rm.coe.int/16806db6e0 (last accessed 29/08/2019), p. 2.

2120 Cf. Humanitarian Law Center, September 2014, p. 77.

2121 Cf. European Commission, 9 November 2016b, p. 18; European Commission (8 October 2014), *Serbia Progress Report 2014*, COM(2014)700 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf (last accessed 29/08/2019), p. 13; European Commission, 10 October 2012, p. 54; European Commission, 12 October 2011b, p. 109; Ivanišević, 2007, p. 24; Ivanišević & Trahan, October 2004, p. 20.

2122 Cf. OSCE Mission to Serbia, 2015, p. 83.

2123 Cf. Humanitarian Law Center, September 2014, p. 72 and 75f.

2124 Cf. Humanitarian Law Center, September 2014, p. 73 and 76f.

2125 Cf. Humanitarian Law Center, September 2014, p. 77.

2126 Cf. OSCE Mission to Serbia, 2015, p. 84.

2127 Cf. European Commission, 9 November 2016b, p. 18; OSCE Mission to Serbia, 2015, p. 84.

2128 Cf. OSCE Mission to Serbia, 2015, p. 84.

get the impression that they are not safe in Serbia, and are therefore afraid to testify.[2129] Higher Court Belgrade judges have also told me that out-of-court witness protection is still rather ineffective in Serbia. According to them, Serbia is too small of a country, and too many people have access to the personal details of protected witnesses, thereby increasing the risk that information is leaked.[2130]

The Serbian example shows that "borrowing legal practices from the ICTY is hardly a panacea for entrenched flaws in the administration of justice."[2131]

1.2.3 Prosecution of Threats against Witnesses

The national authorities in both Bosnia and Herzegovina and Serbia are obliged to prosecute threats to – or attacks on – witnesses.[2132] Neither of the countries, however, have a consistent record doing so.[2133]

1.3 Witness Support

In the context of witness support during the criminal trial, judges at the SCBiH have tried to minimise the adverse effects of criminal trials on vulnerable witnesses. Under Article 8 of the BiH Law on Protection of Witnesses, the judge shall "exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is being examined, particularly to protect the witness from harassment and confusion." In conjunction with this, Article 8 (2) further articulates that in exceptional circumstances, and if the court deems it in the witness' best interest, the court can hear a vulnerable witness by posing questions directly on behalf of the parties and defence attorney.[2134] Outside the realm of these rules, judges have made creative use of their procedural possibilities to avoid multiple testimonies by the same witness,[2135] as this might lead to re-traumatisation every time. For instance, judges have joined hearings, used written statements instead of testimonies, organised status conferences where the parties agree on undisputed facts, they

2129 Cf. OSCE Mission to Serbia, 2015, p. 84; ICTY OTP, 24 May 2004, p. 46; for this reason, the ICTY Office of the Prosecutor helped in making sure that witnesses from Croatia would testify in the Ovčara trial (Serbia's first war crimes trial before the specialised organs) via a videoconference link; cf. ICTY OTP, 24 May 2004, p. 46.

2130 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

2131 Orentlicher, 2018, p. 403.

2132 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 12; Article 102 (5) CPC Serbia.

2133 Cf. Humanitarian Law Center, September 2014, p. 70f.; Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 28; OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 7 and 11.

2134 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 17.

2135 On this, the Office of the High Representative consultants had suggested that BiH adopts similar rules as at the ICTY; cf. Bohlander, 2004, p. 10.

have accepted plea agreements, or they have accepted adjudicated facts from the ICTY. As to the last point, there is an ongoing discussion about whether this rule should be extended to domestic courts, so that, for instance, facts adjudicated by the SCBiH can also be used at entity/district courts.[2136] Since 2016, victims have the right to receive free legal assistance at the state level.[2137]

Also in Serbia, judges have the possibility to prevent re-traumatisation of particularly vulnerable witnesses under the Serbian CPC,[2138] mostly through specific rules on examining them, for instance in the presence of a social worker, psychologist or other professional, or by using technical means of video and sound transmission. The witness also does not need to be confronted with the defendant, unless the defendant so requests, and a competent body (depending on the procedural stage) allows it – taking into account the degree of sensitivity of the witness and the rights of the defendant.[2139] In addition, under the previous CPC, victims could exercise their rights through representatives. The representatives were allowed to question witnesses and introduce evidence. In the early stages of specialised war crimes proceedings, this representation was often exercised through staff members of the Humanitarian Law Center,[2140] sometimes non-lawyers, which led to harsh criticism from the defence counsel of the defendants.[2141]

In addition to these procedural possibilities, the guarantee of psychosocial support to vulnerable victims and witnesses is provided for in BiH's law,[2142] but for a long time, there had been only one structure that provided such services in a sustainable manner: the Witness Support Section at the SCBiH, which was established in 2005.[2143] It provides psychological, organisational and administrative support to prosecution and defence witnesses in war crimes trials,[2144] is staffed with professional psychologists and social

2136 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 21f.

2137 Cf. interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8.

2138 Articles 103 and 104 CPC Serbia; Humanitarian Law Center, September 2014, p. 67.

2139 Cf. Humanitarian Law Center, September 2014, p. 67; observers regret that the criteria for awarding someone the status of a vulnerable witness are too broad, resulting in the possibility for "literally anyone" to present themselves as a vulnerable witness; cf. J. Tintor (2014). The Defence as a Party to the Proceedings in Prosecutorial Investigation. In I. Jovanović & A. Petrović-Jovanović (Eds.), *Prosecutorial Investigation - regional criminal procedure legislation and experiences in application* (p. 271-293). Belgrade OSCE Mission to Serbia, p. 290.

2140 Cf. Ivanišević, 2007, p. 25f.

2141 Cf. interview with Serbian defence counsel, Belgrade, 25 January 2017, I-16.

2142 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 41.

2143 Cf. Hammarberg, Commissioner for Human Rights of the Council of Europe, 29 March 2011, p. 28; a judge of the war crimes department of the Belgrade Higher Court explained that the idea to establish a Witness Support Unit was born on that conference; cf. Orentlicher, 2018, p. 402.

2144 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18; the procedures are as follows: witnesses are given a 24-hour telephone number that they may call to pose additional questions and concerns, when they receive the summons. The Witness Support Section (WSS) assists in transport and logistical arrangements for witnesses and, immediately prior to testimony, invites witnesses to waiting rooms in a high-security corridor of the courthouse. Staff provide witnesses with a description of the testimonial process

workers with expertise in working with traumatised victims of crime.[2145] Its financial assistance to witnesses covers expenses to secure the witness' testimony.[2146] As mentioned, its first director was a former staff member of the ICTY's Victims and Witness Section, who managed to bring to bear a broad range of practical experience and to implement lessons learned from The Hague in Sarajevo,[2147] which rendered witness support in BiH effective. A witness protection and support section also exists within the administration of the Prosecutor's Office BiH. It provides technical, psychological and other types of witness support, in order to ensure effective cooperation with witnesses during the investigation and criminal proceedings. It also cooperates with other law enforcement agencies in BiH.[2148]

In Serbia, a Victims and Witnesses Support and Operations Unit[2149] was established at the High Court in Belgrade –[2150] relatively late –[2151] in June 2006,[2152] following a regional conference in Sarajevo organised by the ICTY's Victims and Witnesses Section, where it called for enhanced witness support throughout the region.[2153] The set-up of the unit and its working procedures is modelled on similar services within international and regional

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and discuss with them the psychological risks and benefits of testifying, but they refrain from getting involved in deciding whether victim-witnesses should do so. During a witness' testimony, specialised and trained personnel of the WSS can be present in the courtroom for the purpose of communicating to the judges the stress level of the witness and the possibility that certain actions and questions will have negative effects on the witness. Alternatively, staff may monitor testimony by live-streaming of video feed into their office. Staff also take the opportunity to provide advice to the judges in relation to the treatment of witnesses when it is deemed appropriate to do so. Importantly, the WSS provides support on a strictly neutral basis, serving both prosecution and defence witnesses, often in the same case; cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18f.

2145 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18.

2146 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18; while the financial assistance provided to witnesses by the WSS is modest in nature, it includes expenses necessary to secure the testimony of the witness in court, such as a travel allowance and the hiring of care for the dependants of the witness while the witness is away testifying; cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18f.

2147 Cf. Orentlicher, 2010, p. 126; in terms of lessons learned, the Bosnian WSS also consciously departed from some of the practices at the ICTY. For instance, at the ICTY, the Victims and Witnesses Section was not allowed to communicate directly with the judges on the witness' practical needs in the courtroom – a rule that was not implemented at the SCBiH. Another example is that at the SCBiH WSS they made sure they would contact the witness much earlier than was practiced at the ICTY, where the witness would first get into touch with the Victims and Witness Section at the moment s/he was summoned to testify. Both examples show that lessons learned at the ICTY made witness support much easier and effective in BiH.

2148 Cf. Tužilaštvo Bosne i Hercegovine, Odjeli u Tužilaštvu BiH – Uprava Tužilaštva, http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=46&jezik=b (last accessed 14/08/2019).

2149 For further information, see Viši Sud u Beogradu, Služba za Pomoć i Podršku Svedocima i Oštećenima, https://www.bg.vi.sud.rs/tekst/334/sluzba-za-pomoc-i-podrsku-svedocima-i-ostecenima.php (last accessed 29/08/2019).

2150 The Unit is directly subordinate to the president of the High Court Belgrade; cf. Humanitarian Law Center, September 2014, p. 57.

2151 Cf. Humanitarian Law Center, September 2014, p. 57.

2152 Cf. Ivanišević, 2007, p. 21.

2153 Cf. Ivanišević, 2007, p. 29.

tribunals,[2154] but most importantly, on those within ICTY.[2155] The employees of the Serbian Victims and Witness Support and Operations Unit were subsequently trained by the ICTY's counterpart on good practices of witness support,[2156] and ICTY personnel trained judges on judicial techniques in dealing with vulnerable victims in a criminal trial.[2157] The Unit's tasks include: interacting with witnesses prior to their arrival in Belgrade;[2158] providing information about the trial,[2159] the witness' rights, and about available support and protection measures;[2160] arranging their travel and accommodation;[2161] offering encouragement; providing basic explanations regarding the trial before they enter the

2154 Cf. Humanitarian Law Center, September 2014, p. 57.

2155 Cf. Orentlicher, 2018, p. 402.

2156 Cf. Ivanišević, 2007, p. 21 and 29; more regular training is provided by the OSCE; cf. Humanitarian Law Center, September 2014, p. 58.

2157 Cf. Orentlicher, 2018, p. 402.

2158 Cf. Ivanišević, 2007, p. 21; along with the summons to testify, a brochure is handed over to witnesses on the support provided by the Unit; cf. Humanitarian Law Center, September 2014, p. 60. At this point in time, witnesses can express preferences regarding possible protective measures; cf. Ivanišević, 2007, p. 21.

2159 Cf. Humanitarian Law Center, September 2014, p. 60.

2160 Following both, United Nations General Assembly Resolution 40/34, A/RES/40/34, 29 November 1985, Article 6 (a) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Annex to the Resolution) and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Articles 4 and 6; at the witness' arrival at court, a representative of the Victims and Witnesses Support and Operations Unit (VWSU) explains the proceedings and procedure, the rights and duties of the victim/witness, warns him/her of cross-examinations, etc. However, after the witness' testimony, s/he receives no further information about the further course of the proceedings, their completion, the possible release of the accused from custody or prison sentence; cf. Humanitarian Law Center, September 2014, p. 60f.

2161 Cf. Ivanišević, 2007, p. 21; there is good and comprehensive logistical support for witnesses from Serbia, and through good informal cooperation with their counterparts responsible for witness support in Croatia, also for witnesses from Croatia. There is no cooperation with the BiH witness support authorities, which is why there is no contact with witnesses from Bosnia and Herzegovina before the trial and the witness is not informed about possibilities of support by the Unit until arrival at court. The same applies to witnesses from Kosovo, although EULEX accompanies witnesses to the court in Belgrade where the Unit takes over. Until 2010, the already mentioned human rights nongovernmental organisation Humanitarian Law Center (HLC) played an important role in organising the arrival of victims from Croatia, BiH, and Kosovo, including checking on the needs of the witness, logistical preparation, and organisation of their arrival; cf. Humanitarian Law Center, September 2014, p. 61f. Witnesses are reimbursed their travel costs, although the amount depends on the discretion of the presiding judges, who decide in an inconsistent manner; cf. Humanitarian Law Center, September 2014, p. 62.

courtroom and during the trial,[2162] and regarding other practical matters.[2163] In accordance with the ICTY's model, the unit has the same obligations towards prosecution and defence witnesses.[2164] Prior to the enactment of the 2011 CPC, the unit was responsible for providing support to victims and witnesses also during the investigation stage, which was then still under the auspices of the investigating judges. Ever since the prosecution took over full responsibility for the investigation, this became the task of the prosecutors' office.[2165] Only in exceptional cases – upon request of the war crimes prosecutor and with the approval of the president of the Higher Court – can the VWSU get involved at the investigation stage. Reportedly, the support has thereby become less comprehensive during these early stages,[2166] although some war crimes prosecutors have recognised the importance of witness support and therefore request the unit's services.[2167] The unit itself assesses that the resources at its disposal are proportionate to the number of cases they are involved in.[2168] It has three employees. None of them are psychologists,[2169] although providing moral support is one of their main tasks. None of them have special expertise in handling sexual violence victims.[2170] The unit has two reception rooms for witnesses and one office within the Higher Court building, and from their office, the Unit's representatives can view trials on a screen.[2171]

In addition to the support provided to victims and witnesses at the courts, the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses foresees that social

2162 Cf. Ivanišević, 2007, p. 21; Humanitarian Law Center, September 2014, p. 60; the time spent before trial is very short (30-60min) and it is mostly spent on informing the witness and encouraging him/her and neutralising any negative emotions that may impair their ability to testify. At request of the witness and with approval of the presiding judge, representatives remain in the courtroom during the testimony. This has proven very valuable to witnesses. However, there is no possibility for the unit to intervene (as is possible at the SCBiH), in order, for instance, to draw attention to any deterioration in the psychological state of the witness during the testimony. After the testimony, the Unit makes sure that the witness is stable and then sends him/her away. This is where the Unit's work usually ends. In cases of great distress of the witness, the Unit contacts him/her again within 15 days and, if needed, refers him/her to competent bodies that provide psychological help; cf. Humanitarian Law Center, September 2014, p. 63.

2163 Cf. Ivanišević, 2007, p. 21.

2164 Cf. Humanitarian Law Center, September 2014, p. 57.

2165 As mentioned, the VWSU only has one staff member at the moment, who is, at the same time, the assistant of the Chief War Crimes Prosecutor; cf. interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56. At the time of writing, the office was waiting for the arrival of a psychologist; cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

2166 Cf. Humanitarian Law Center, September 2014, p. 59f.

2167 Cf. Peković, 27 November 2013, p. 64.

2168 Cf. Humanitarian Law Center, September 2014, p. 57f.

2169 In exceptional circumstances, they can hire a juvenile delinquency psychologist employed at the Higher Court Belgrade; cf. Humanitarian Law Center, September 2014, p. 58.

2170 Cf. Ivanišević, 2007, p. 21.

2171 Cf. Humanitarian Law Center, September 2014, p. 58.

welfare centres provide psychological support to witnesses.[2172] In reality however, they lack the capacity to do so, which is why prosecutors' offices often rely on regional or thematic NGOs for these matters.[2173] NGOs provide services such as psychological counselling, legal aid, logistical aid (such as transport for witnesses to and from court hearings), as well as moral support during testimonies.[2174] In 2015, the NGO sector was the driving force behind the establishment of 15 regional networks of witness protection and support throughout Bosnia and Herzegovina.[2175] These networks, which include victims' associations, social welfare centres, law enforcement authorities, public health institutions, and the civil society within one region, are coordinated by national NGOs. They strengthen regional cooperation among all actors involved in witness support (governmental, judicial and nongovernmental), in order to create clear channels for referrals from one institution to another, as a vulnerable witness proceeds through the criminal justice process, from pre-investigation stage support through post-testimony counselling and social services.[2176] They have been instrumental in establishing victims' trust in public institutions.[2177] Also in Serbia, victims and witnesses in need of psychological support after the trial are referred to specialised NGOs for that purpose.[2178] At the time of writing, Serbia is setting up a nationwide support service to victims and witnesses of crime, with the aim that

> "Serbian citizens […] receive assistance and information from their very first contact with the responsible authority after having suffered or witnessed a crime, as well as support and guidance throughout the criminal proceedings and even after their conclusion."[2179]

2172 Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Articles 5 and 6; cf. Humanitarian Law Center, September 2014, p. 64.

2173 Cf. OSCE Mission to Bosnia and Herzegovina, June 2015, p. 41.

2174 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 81.

2175 The networks were established in the context of the project "Ensuring Access to Justice for Witnesses/Victims through Strengthening Existing and Establishing new Witness Support Networks Across BiH", which was initiated in 2015 and ended in December 2017.

2176 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 82.

2177 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 6.

2178 Cf. Humanitarian Law Center, September 2014, p. 61.

2179 Cf. OSCE, OSCE Mission to Serbia and European Union support authorities in establishing nationwide support service to victims and witnesses of crime, Press release 1 June 2018, https://www.osce.org/mission-to-serbia/383262 (last accessed 29/08/2019).

Both Bosnia and Herzegovina and Serbia have been criticised for not having stable and comprehensive structures for witness support (especially before and after trial),[2180] and they are called upon to align their standards with the ICTY's practices.[2181]

In BiH, the main problem lies at the entity/district level, where, for a long time, insufficient structures were available to financially, logistically, psychologically or emotionally support witnesses – even exceptionally vulnerable ones – throughout the criminal process.[2182] While these structures existed at the SCBiH early on,[2183] witness support at the entity/district level was unregulated and *ad hoc*.[2184] The consequences included that witnesses were increasingly unwilling to collaborate for reasons of fear of reprisal or of reliving traumatic events, that they no longer believed that trials could deliver justice, as well as having hesitations about attending trials.[2185] Since 2014, the capacity of courts and prosecutors' offices across the country to render adequate psychological support to vulnerable witnesses has dramatically increased.[2186] Most institutions now employ a full-time, dedicated witness support officer to provide assistance during the investigation

2180 Cf. European Commission, 9 November 2016b, p. 64; European Commission, 9 October 2014, p. 14; European Commission (16 October 2013a), *Commission Staff Working Document: Bosnia and Herzegovina 2013 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/ba_rapport_2013_en.pdf (last accessed 29/08/2019), p. 13.

2181 Cf. European Commission, 9 November 2016b, p. 57f.

2182 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 8.

2183 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 17; criticism towards the SCBiH's system is mostly focussed on the fact that it does not provide long-term counselling to witnesses, and that the WSS gets involved only at the post-indictment phase, unless it is invited earlier by the prosecutor; cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 19.

2184 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 18; there were no government funded structures carrying out psychosocial witness support, social welfare centres were not actively engaged, contrary to the law, they didn't have the qualified staff and working structures anyway, and while prosecutors sometimes relied on nongovernmental organisations (NGOs), their services vary a lot; cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 19.

2185 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 8.

2186 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 75.

and at trial.[2187] This progress, however, heavily depended on international financing,[2188] and was still insufficient to cover the large number of people involved, particularly in entity/district courts. The long-term sustainability of these support units is at risk due to insufficient domestic financing. On the positive side, as prosecutors and judges are becoming increasingly aware of the importance of proper witness support, they resort to in-court support and protection mechanisms increasingly often.[2189]

Both countries are also encouraged to professionalise the psychological support provided to victims and witnesses, especially to victims of sexual violence.[2190]

2187 As of 2017: SCBiH, Prosecutor's Office BiH, Banja Luka District Court, Bihać Cantonal Court, Bihać Cantonal Prosecutor's Office, Brčko District Basic Court, Istočno Sarajevo District Prosecutor's Office, Istočno Sarajevo District Court, Mostar Cantonal Prosecutor's Office, Sarajevo Cantonal Court, Sarajevo Cantonal Prosecutor's Office, Travnik Cantonal Prosecutor's Office, Novi Travnik Cantonal Court, Trebinje District Prosecutor's Office, Tuzla Cantonal Prosecutor's Office, Zenica Cantonal Court, and Zenica Cantonal Prosecutor's Office; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 75 and fn. 251. Their role is to assess the mental state of the witness during investigation, provide an opinion to the prosecutor and the court on the individual's ability to testify and the potential need for protective and support measures, provide psychological support to the witness during investigation and trial. Prosecutors' offices and courts increasingly rely on these services and expert opinions to ensure that vulnerable witnesses are prepared to testify and are not unnecessarily subjected to re-traumatisation, or in ruling on protective measures and other procedural motions relating to vulnerable witnesses; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 76. Institutions that do not have dedicated witness support officers: Banja Luka District Prosecutor's Office; Bijeljina District Court; Bijeljina District Prosecutor's Office; Brčko District Prosecutor's Office (uses services of Brčko District Police); Doboj District Court; Doboj District Prosecutor's Office (previously had a witness support officer who was laid off due to funding challenges); Livno Cantonal Prosecutor's Office; Livno Cantonal Court; Mostar Cantonal Court (uses services of Mostar Cantonal Prosecutor's Office witness support officer); Trebinje District Court; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 80 and fn. 272. In those jurisdictions, where there is such a support unit either at the court or at the prosecutor's office, both institutions profit from it. Only in Bijeljina, neither of both have a support unit – and in Bijeljina there are serious problems of witness protection and support; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 80f. See also: OSCE Mission to Bosnia and Herzegovina, 2017, p. 74.

2188 Cf. European Commission, 9 October 2014, p. 14.

2189 Cf. European Commission (9 November 2016a), *Commission Staff Working Document: Bosnia and Herzegovina 2016 Report*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2016 Communication on EU Enlargement Policy, SWD(2016) 365 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_bosnia_and_herzegovina.pdf (last accessed 29/08/2019), p. 28; European Commission (10 November 2015), *Commission Staff Working Document: Bosnia and Herzegovina 2015 Report*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Enlargement Strategy, SWD(2015) 213 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf (last accessed 29/08/2019), p. 27.

2190 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 7; Humanitarian Law Center, September 2014, p. 57f.

2 Compensation for Victims

2.1 Explaining Impact: The ICTY as a Negative Example in Compensating Victims

All victims of gross violations of international human rights law and serious violations of international humanitarian law have the right to adequate, effective and prompt reparation for the harm suffered, in line with the 2005 United Nations (UN) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These principles and guidelines highlight various forms of remedies that need to be introduced at the national level in order to provide redress to victims.[2191] It is therefore up to local actors to decide what type of compensation they opt for – as long as it is proportional to the gravity of the violations and the harm suffered by victims. Most states either choose a legal route (through court proceedings), or an administrative route (through reparation programmes).[2192]

In Bosnia and Herzegovina and Serbia, there are several ways for victims to get reparations, although none of them are effective and adequate; none of them ensure reparations to all victims of war-related crimes and to their families.[2193] The most common routes for reparations are under administrative law or by initiating civil proceedings. The third route is to be awarded compensation for the suffered damage directly during the criminal proceedings.

The ICTY did not have a mechanism in place that allowed victims to directly apply for compensation during the criminal proceedings in The Hague. There is no real explanation for this, it was simply not foreseen – but budget constraints certainly played a role. The International Criminal Court has learned from the Tribunal's experience and has established the Trust Fund for Victims, where victims can apply for financial reparations.

2191 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 7.

2192 Cf. J. Schurr (27 November 2013). *Reparations for War Crimes Victims in the former Yugoslavia: In Search of the Way Forward.* Paper presented at the 20 Years of the ICTY, p. 91; more generally, reparations can have several meanings: compensation (addressing economic consequences from crimes), restitution of damaged property, rehabilitation (addressing the medical and psychological consequences of the crimes), satisfaction (knowing what happened and who is responsible / recognition of the wrong (e.g. through court proceedings)), guarantees of non-reoccurrence in the future (through changes to the legislation, law reform, training of army and police authorities, etc.); cf. Schurr, 27 November 2013, p. 92.

2193 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 8 July 2015, p. 7; the European Commission has criticised that in Serbia, few victims of war crime have access to effective compensation (either through criminal or civil proceedings) under the current legal framework; cf. European Commission, 9 November 2016b, p. 57 and 64; European Commission, 10 October 2015, p. 19; European Commission, 8 October 2014, p. 42 and 43.

Also in Bosnia and Herzegovina and Serbia, compensation claims had never been adjudicated during criminal trials – although the possibility exists in both countries.[2194]

Until 2015, the common practice in Bosnia and Herzegovina had been

> "that when a witness gives a statement in a trial (so, a witness victim) s/he is asked at the end of the testimony 'do you want to file a claim for compensation?' and the person says 'yes', with no instruction. Normally, the person is left confused thinking that that is all s/he had to do. But then it needs to go to civil proceedings. So, when the judgment is pronounced there is a standard sentence saying 'due to the fact that adjudication of the claim would have prolonged the trial, we refer the claim to civil proceedings.' And this despite the fact that the CPC makes it a duty of the prosecution to collect evidence supporting the claim of the injured party and to give her full instruction."[2195]

In addition to the fact that judges were often of the opinion that dealing with compensation claims would prolong the proceedings (risking violations of fair trial rights), two other main problems have prevented the success of compensation claims in criminal proceedings: first, most requests are made without a lawyer representing the victim, as the right to free legal aid is poorly implemented in BiH. Victims therefore struggle to satisfy technical compensation criteria.[2196] Second, prosecutors are consistently avoiding their duties under the Code of Criminal Procedure, which entail the facilitation of the victim's claim (e.g. by gathering evidence in support) –[2197] either because they are convinced that compensation claims should be filed in civil courts, or because of concerns that the claims will stretch

2194 Articles 252ff. CPC Serbia; victims can seek compensation from the defendant regardless of whether they testified at the trial; cf. Ivanišević, 2007, p. 26. Although the possibility exists to decide upon claims during the criminal trial, Article 258 (4) CPC Serbia foresees that "the claim for restitution [is awarded] in full or in part" and that the injured party will be referred "to civil litigation for the remaining part. If the facts of the criminal proceedings do not provide a reliable basis either for full award of partial award, the court will refer the authorised person to pursue the claim for restitution in full in civil litigation."
Conditions for the claim to be made during criminal proceedings are that the claim be related to damages resulting from a criminal offence; that an authorised person submits a request that the compensation claim be discussed; request should not significantly delay criminal proceedings; requests should relate to compensation, restitution of property, or the annulment of a legal transaction (Article 252 CPC Serbia and case law); cf. Humanitarian Law Center, September 2014, p. 82. See also: Ivanišević, 2007, p. 26; Article 193ff. CPC BiH.

2195 Cf. interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

2196 Article 195 CPC BiH.

2197 Both judges and prosecutors are obligated to facilitate the compensation request: prosecutors must "gather evidence regarding the property claim" (Article 197 (1) CPC BiH), they must ask the survivor about his/her wishes in respect to compensation during direct examination (Article 86 (10) CPC BiH), and the court must notify the survivor about the possibility of a claim if s/he has not filed a request by the time the indictment is confirmed (Article 195 (4) CPC BiH).

their already overburdened offices, or simply due to a lack of experience with compensation claims. As a result, judges have historically referred victims to civil litigation, due to a lack of evidence in the victim's support.[2198]

The ICTY's practice to not deal with compensation claims of victims had already caused great frustration among victims, victims' communities, and the general public in BiH, which was further exacerbated by the fact that the domestic practice in war crimes proceedings was no different.

Bosnian local actors therefore viewed the ICTY's regime as a negative example and consciously chose to do it differently.[2199] As one of my interviewees put it: "The ICTY served as an example where the disadvantages of referring victims to civil proceedings were visible."[2200] Especially victims' associations feared that national courts would follow the ICTY in not paying much attention to victims.[2201] The NGO TRIAL International played a crucial role in lobbying judges to adjudicate compensation claims. They first focused on strategic litigation, and now pursue a more systemic approach.[2202]

In their endeavour, TRIAL International were actively encouraged and supported by the ICTY's Office of the Prosecutor, which believed that this would relieve the victims of the stress of having to go through separate civil compensation proceedings.[2203] In that context, the ICTY OTP suggested adopting operational guidelines that would assist prosecutors in improving the consistency of approaches across prosecution offices towards compensation claims in criminal proceedings. This would lead to better outcomes for victims and increase their confidence in the rule of law.[2204] The ICTY's presidents had also been very supportive from early on.[2205] In fact, they had tried to move the Tribunal away

2198 Cf. TRIAL International in Bosnia and Herzegovina (2016), *Compensating Survivors in Criminal Proceedings: Perspectives from the Field*, Sarajevo, https://trialinternational.org/wp-content/uploads/2016/11/TRIAL-International_compensation-publication_EN_web.pdf (last accessed 12/09/2019), p. 9f.

2199 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

2200 Interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2201 Cf. Ramulić, 6 November 2012, p. 27.

2202 By reaching out to prosecutors and judges, providing free legal aid to victims, they also produced a practical manual for judges and prosecutor on how to deal with compensation claims, they lobby before the High Judicial and Prosecutorial Council and the training centres for judges and prosecutors to include compensation claims in trainings, and they organise regular round tables; cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2203 Cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2204 Cf. ICTY OTP, 17 May 2016, p. 25.

2205 For instance, in the context of the ICTY's Legacy Programme, in an endeavour to explore to what extent, and how, the ICTY could contribute to ensuring that the victims would obtain redress for the crimes they suffered from, ICTY President Meron commissioned a report with the International Organization for Migration; cf. P. Van der Auweraert (June 2013), *Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward*, International Organization for Migration (IOM), Geneva, https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Reparations-for-Wartime-Victimes-in-the-Former-Yugoslavia-In-Search-of-the-Way-Forward.pdf (last accessed 26/09/2019), p. 9. The report had the core objective to facilitate discussions and political decision making about reparations for victims of international crimes

from a purely punitive justice approach and towards a more restorative justice approach, by creating funds for victims with the UN Security Council.[2206] Yet, they received very negative reactions,[2207] which is why the ICTY limited itself to supporting domestic actors in moving into this direction. To this day, ICTY representatives actively support local actors in advocating for financial compensation in criminal proceedings. The Tribunal's Prosecutor in particular keeps mentioning the importance to domestic judges and prosecutors.[2208]

In the end, a few war crimes judges decided to leave behind the Tribunal's and Bosnian tradition during a trial in 2015. They pressed the prosecutors to collect evidence in support of the victims' compensation claims and decided to deal with the claim in the context of the criminal proceeding.[2209] This very first judgment of its kind sent the message that "not only it has to be done, but it can be done: it doesn't prolong criminal proceedings."[2210]

2.2 *Compensation Claims Within Criminal Proceedings in Bosnia and Herzegovina and Serbia*

Thus, in June 2015, the SCBiH rendered a landmark judgment, setting a ground-breaking precedent of awarding damages to war victims in several criminal cases.[2211] This judgment was remarkable as all previous requests had been denied by the courts.[2212] As of November 2018, eight similar judgments were issued at first instance,[2213] with final judgments in four cases.[2214] Almost all of these cases were adjudicated in front of the SCBiH (there was one at the entity level),[2215] all of them were related to sexual violence,[2216] and in all cases, the

(genocide, crimes against humanity and war crimes) committed during the Yugoslav wars; cf. P. Van der Auweraert, June 2013, p. 9.

2206 Cf. T. Meron (27 November 2013a). *Assessing 20 Years of the Tribunal.* Paper presented at the 20 Years of the ICTY, Sarajevo, p. 54.

2207 Cf. A. Zervos (27 November 2013). *Reparations for War Crimes Victims in the former Yugoslavia: In Search of the Way Forward.* Paper presented at the 20 Years of the ICTY, p. 83.

2208 Cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2209 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

2210 Interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

2211 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 6; the victim was awarded 26 000 Bosnian Konvertible Mark.

2212 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 20.

2213 This means that the bulk of cases is still referred to civil proceedings; cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 10; TRIAL International, Another Victory Against Impunity for Wartime Sexual Violence, Press release 12 October 2018, https://trialinternational.org/latest-post/another-victory-against-impunity-for-wartime-sexual-violence/ (last accessed 29/08/2019).

2214 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 7.

2215 Cf. interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48.

2216 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 6.

BiH branch of the international NGO TRIAL International provided legal aid to the victims and thereby assisted them in their compensation claim.[2217] In determining the amount of non-material damages, the court has referred to the orientation criteria established by the FBiH Supreme Court.[2218] Although none of these judgments have been enforced as of September 2017 (due to the fact that the defendants lacked the required financial means),[2219] they nevertheless open up a possibility for victims to obtain the requested compensation in criminal proceedings. Having secured a criminal verdict, the statutes of limitations that normally govern civil proceedings no longer apply.[2220] Hence, awarding compensation during criminal proceedings is a constructive mode of reparations for war crimes victims who have the status of injured party at criminal trial.[2221]

In addition to the financial benefit,[2222] other functions of reparations within criminal proceedings include: imposing an additional punishment on the perpetrator (one that is more victim-centred, more personal);[2223] recognising the harm that the victim has suffered; expressing societal condemnation of war crimes;[2224] helping to deter future offences; empowering victims; building trust in the legal system; and facilitating personal rehabilitation.[2225] According to TRIAL international, "symbolic benefits take precedence over material gain, making court-ordered damages worthwhile despite extant problems with the enforcement of verdicts."[2226] In addition, identity protection of the victim/witness is ensured during criminal proceedings,[2227] the presence of support units during criminal trials (unlike in civil proceedings) may help to prevent re-traumatisation of the victim,[2228]

2217 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 14.
2218 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 84.
2219 Cf. Muižnieks, Commissioner for Human Rights of the Council of Europe, 7 November 2017, p. 7.
2220 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 14.
2221 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 6.
2222 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 24.
2223 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 17f.
2224 See for instance the verdict of the SCBiH in the *Vojić and Mešić* case: after finding the co-defendants guilty of wartime rape, the SCBiH ordered them to pay her 28 000 Konvertible Mark (approximately 14 300 EUR) for non-material damages. In doing so, the court identified the principle behind its decision: "[T]he Panel finds that awarding compensation to the victim of a crime, as was done in the case in hand, complies with the principle of social justice. Sociologically, the principle of compensating the victim should be equally important as the principle of punishment as a form of social reaction to a criminal activity. Namely, the purpose of trial must not be only the repression against the perpetrator of the crime, but rather to strive to fully restore the condition violated by the crime"; SCBiH, *Prosecutor's Office of Bosnia and Herzegovina v. Adil Vojić and Bekir Mešić*, Verdict, S1 1 K 012506 16 Krž, First Instance, 16 March 2016, para. 354–355, 362.
2225 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 6f.
2226 TRIAL International in Bosnia and Herzegovina, 2016, p. 6f.
2227 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 27.
2228 Cf. TRIAL International in Bosnia and Herzegovina, 2016, p. 28ff.

and lastly, by avoiding a separate procedure before a different court, judicial economy is promoted.[2229]

Of course, so far these first cases are only a drop in the ocean. However, the civil society sector and the judges at the SCBiH hope to have set a precedent that will also be followed by the entity/district courts.[2230] One of the judges involved in one of the first cases regarded the compensation of victims in the criminal trial as one of the court's greatest achievements of the past years.[2231]

In Serbia, no such development has taken place to date, although there have been first attempts to lobby for dealing with compensation claims in criminal proceedings as well.[2232] The practice in all criminal matters, including in war crimes cases, is that the victim is directed to civil proceedings.[2233] There has not been a single case where compensation claims have been adjudicated in criminal proceedings.[2234] Reportedly, one of the main problems is that victims are not represented in court. Since the enactment of the 2011 Code of Criminal Procedure, only professional lawyers can be hired as victims' representatives in the criminal trial.[2235] In order to make their request for compensation during the criminal trial, victims therefore have to carry a great (financial) burden themselves, as they are required to pay the expensive legal fees (in particular, for a lawyer). In addition, many victims have little trust in the legal institutions in Serbia, including lawyers. Many victims therefore even refrain from being represented at court,[2236] which diminishes their possibility to make a credible and legally sound claim for compensation. The few compensation claims that were filed under Articles 252-260 CPC, were rejected

2229 Cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 83f.

2230 Cf. interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8; interview with SCBiH judge, Sarajevo, 2 February 2017, I-45; that the direct compensation becomes the governing practice in the near future is unlikely, however, as many prosecutors and courts are still reluctant to this novel procedure, and not all prosecutors collect the relevant evidence that can substantiate a compensation claim during the investigation as required by law, and as the enforcement of such judgments is more than unlikely in many cases, due to the lack of resources of the defendants; cf. OSCE Mission to Bosnia and Herzegovina, 2017, p. 84ff.

2231 Cf. interview with SCBiH judge, Sarajevo, 2 February 2017, I-45.

2232 Cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2233 Cf. Ivanišević, 2007, p. 26.

2234 Cf. Humanitarian Law Center, September 2014, p. 82.

2235 Article 50 (1) lit 3, Article 56 CPC Serbia; according to the old CPC, a victims' representative could be any person whom the victim designated to represent him/her. In many proceedings, victims chose to be represented by human rights defenders, most of them from the Humanitarian Law Centre, most notably by Nataša Kandić, then executive director. The HLC asserts that the fact that human rights NGOs were actively involved in war crimes proceedings made a "valuable contribution to finding the truth and uncovering crimes"; cf. Humanitarian Law Center, September 2014, p. 81. Legal professionals, especially prosecutors and lawyers have a different opinion on the participation of non-legal professionals in the criminal proceedings. They criticise that they lacked the relevant legal knowledge and ultimately disturbed the legal process; cf. interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52; interview with ICTY defence counsel, The Hague, 25 November 2016, I-26.

2236 Cf. Humanitarian Law Center, September 2014, p. 81.

by the Higher Court Belgrade, using the argument that it would delay the proceedings.[2237] Instead, the court instructed the injured parties to claim compensation through civil litigation.[2238]

3 Conclusion: Effectiveness and Justice

In the early stages of the work of domestic war crimes institutions, victims and witness protection and support were very difficult in both Bosnia and Herzegovina and Serbia, mostly due to the lack of adequate legislative frameworks. In BiH, the situation was aggravated by the fact that most cases adjudicated before the courts concerned 'grass-root crimes' against the direct perpetrators, where witnesses testified against their former neighbours or friends and acquaintances from the same village. Suspects were easily identifiable for the victims, but also the victims were known to the suspects. Witness protection and the protection of the extended family was extremely difficult under these circumstances.[2239] In Serbia, the biggest obstacle to effective victims and witness protection and support was – and remains – the political climate that is generally hostile towards war crimes prosecutions,[2240] especially when it concerns former and current members of the police or the military. Lacking witness protection led to difficulties in securing testimonies from insider witnesses. As a consequence, in both countries, witnesses were often (too) afraid to testify.[2241] These cases therefore underline the paramount importance of adequate victims and witness protection and support.

While over the years, both countries have struggled – and continue to struggle –[2242] to implement proper protection and support programmes, one can nevertheless observe an increased professionalisation and specialisation of police, prosecutors, judges, and victims

2237 Cf. Humanitarian Law Center (May 2017), *Report on War Crimes Trials in Serbia During 2016*, Belgrade, www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf (last accessed 29/08/2019), p. 47.

2238 Cf. Humanitarian Law Center, May 2017, p. 46f.

2239 Cf. Manuell & Kontić, 2002, p. 340.

2240 Cf. Ivanišević, 2007, p. 19.

2241 Cf. Ivanišević, 2007, p. 20; ICTY OTP, 24 May 2004, p. 46

2242 Cf. European Commission, 9 November 2016b, p. 57 and 64; European Commission, 10 October 2015, p. 19 and 57; European Commission, 8 October 2014, p. 42f.; European Commission, 16 October 2013a, p. 13; European Commission (6 November 2007a), *Commission Staff Working Document: Bosnia and Herzegovina 2007 Progress Report*, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/bosnia_herzegovina_progress_reports_en.pdf (last accessed 29/08/2019), p. 20; European Commission (8 November 2006a), *Commission Staff Working Document: Bosnia and Herzegovina 2006 Progress Report*, COM (2006)649 final, Brussels, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/nov/bih_sec_1384_en.pdf (last accessed 04/10/2019), p. 19.

and witnesses support staff.[2243] With war crimes cases highlighting the need for victims and witness protection and support, the judicial systems in both countries started to develop institutions and good practices in the realm of war crimes prosecutions and trials.

An appropriate legislative framework for witness protection has been adopted for both in-court and out-of-court protection. The necessary technical equipment for protection measures, such as voice or face distortion or remote testimonies, are in place in most courts in BiH and Serbia. In addition, the police is trained and equipped to protect witnesses outside the courtroom. Furthermore, several courts and war crimes prosecutors' offices across the region have witness support programmes and facilities in order to alleviate the stress of testifying at court. War crimes trials have thereby become increasingly effective in Serbia and Bosnia and Herzegovina. These developments were much needed, as war crimes trials rely heavily on witnesses' testimonies, and many witnesses would not come forward without proper protection and support.

The Tribunal was instrumental in bringing witness protection and support to the region. Both countries were first introduced to witness protection and support in the context of ICTY proceedings, as witnesses who had testified in The Hague required further protection and support upon their return home. When the ICTY became aware of the problems that arose and persisted in the region, they lobbied for the development of proper protection and support frameworks, gave advice on proposals, and carried out and supported capacity building initiatives.[2244] In addition, the Tribunal and its practices simply acted as an example for domestic actors who were involved in putting in place protection and support programmes for witnesses at the national level.

For victims' compensation claims, in contrast, the Tribunal served as an 'anti-role model', a negative example. While Serbia continues to not adjudicate claims for compensation during criminal trials, but to refer victims to civil proceedings instead, the State Court of Bosnia and Herzegovina developed a new practice of dealing with their claims directly. This happened mainly thanks to the persistent advocacy of one nongovernmental organisation, which, however, had always been encouraged by ICTY actors. This was instrumental as – although the Tribunal itself was a negative example in this respect – its representatives nevertheless had a favourable stance towards compensation claims in criminal proceedings, and their voice is still very powerful in Bosnia and Herzegovina, as was outlined in previous Chapters.

2243 Cf. European Commission, 10 November 2015, p. 27.

2244 Of course, the Tribunal could not do the impossible and overcome all problems that the domestic actors had in protecting and supporting witnesses effectively, as the problems were mainly caused by the limited capacity of these institutions; see for instance: Michaeli, 2011b, p. 90, describing the limited capacity of the witness protection unit in the Serbian Ministry of the Interior.

The first judgment that granted victims of war crimes reparations for their harm suffered (rendered in 2015), as well as similar subsequent decisions, have significantly contributed to justice for victims as well as to the *feeling* of justice.

Both developments described in this Chapter – effective reparations for victims and witness protection and support – developed in Serbia and Bosnia and Herzegovina in the context of war crimes prosecutions and trials. War crimes trials have been particularly conducive to demonstrating the importance of witness protection and support and of justice for victims.

However, since the facilities have now been created, the skills acquired, and the precedents developed, they also serve a purpose for other organised and ordinary criminal trials. In both BiH and Serbia, other courts and prosecutors' offices that do not deal with war crimes, have already started putting in place the necessary facilities and resources.[2245] This certainly applies to using video-conference links for remote testimonies, which has become common practice at courts across the region, and to the possibilities of voice and image distortion for protected witnesses, as well as out-of-court witness protection. Likewise, granting victims of ordinary crimes compensation for the harm they suffered might become reality in the future in BiH or Serbia.

The ICTY's impact thus ultimately went beyond war crimes trials and also rendered – or might render in the future – ordinary criminal trials more effective, and victims might experience improved justice.

2245 Cf. interview with SCBiH Registry representative, Sarajevo, 19 November 2018, I-49; interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23; interview with OSCE Mission to BiH representatives, Sarajevo, 2 February 2017, I-48; interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17; interview with ICTY OTP legal officer, The Hague, 8 February 2018, I-22.

8 Modernising the Courtroom

How the ICTY Contributed to Efficiency, Effectiveness, and Transparency of Court Proceedings by Demonstrating the Benefits of Technology

As the first modern international criminal court, the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) was not only a pioneer in developing jurisprudence on international humanitarian and international criminal law. It also found a number of solutions to overcome challenges that are particular to war crimes trials. Most of these challenges relate to the (in)efficiency of proceedings caused by the complexity of cases and the sheer volumes of investigative materials, as well as to the (in)accessibility of the court.[2246] The Tribunal therefore devoted attention and resources to making its proceedings more efficient, effective and transparent – in many instances, by using technology.[2247]

At the national level, financial resources, legal restrictions, or conservative approaches to the criminal process often limit the potential of technology in and outside the courtroom.[2248] Nevertheless, my interview partners frequently mentioned the use of technology in and outside the courtroom as an important impact of the ICTY on the national judiciary. Hence, even though national courts cannot attain the level of the Tribunal in this respect, at least the *idea*, as well as a few individual solutions, were introduced to Serbia and Bosnia and Herzegovina by the ICTY. In some instances, this impact went beyond war crimes proceedings: for instance, the use of video-conference links for witness testimony or equipment for in-court witness protection is also used by courts of ordinary jurisdiction.

The following section will explain the dynamics that led to the Tribunal's impact on the development of modern courtrooms in Serbia and Bosnia and Herzegovina. Section 2 will describe this modern courtroom and section 3 will reflect on the broader achievements that ensued from this.

2246 Cf. D. Pimentel (2003). Technology in a war crimes tribunal: Recent experience at the ICTY. *William & Mary Bill of Rights Journal, 12*, 715-729, p. 716ff.

2247 Cf. Pimentel, 2003, p. 721.

2248 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.

1 Explaining Impact: Leading by Example

In what concerns the use of technology for the purpose of increasing the efficiency and transparency of courts, the ICTY was clearly a role model for national courts, which tried to replicate the Tribunal's practice. In that sense, the impact dynamics are similar to those for witness protection and support. The advantages of the novelty introduced by the ICTY (in this case, using technology in the courtroom) were so obvious that this practice was copied for utilitarian reasons.

There is no evidence that the Tribunal was directly involved in setting up technological solutions at the courts of Bosnia and Herzegovina or Serbia, except for a donor conference (convened and hosted by the ICTY in 2003) at which the international community secured financing for the first two years of the war crimes department of the State Court of Bosnia and Herzegovina (including modern equipment necessary to conduct war crimes trials).[2249]

However, merely leading by example apparently sufficed for national actors to follow the Tribunal. For instance, the former president of the Higher Court Belgrade explained that when the domestic war crimes institutions were established in Serbia, they "sought to emulate" the skills, knowledge, and "technical gadgets" of ICTY judges and facilities.[2250]

By way of example: at the ICTY/United Nations International Residual Mechanism for Criminal Tribunals (MICT), there are digital knowledge management systems available to the prosecution, the defence, and the chambers, which make it possible to process and share one's thoughts, and assist in managing the otherwise unbearable amount of evidence related to most war crimes cases.[2251] The prosecution also has the possibility to give the defence access to its investigative material through an e-disclosure system,[2252] in order to comply with its duty to share potentially exculpatory evidence.[2253] Inside the courtroom, a digital evidence presentation system is used that scans and saves the evidence, and displays it on video monitors in the courtroom.[2254] All hearings are audio and video recorded.[2255] Transcripts are produced in real time and can be viewed by all participants on their monitors.[2256] If need be, evidence in the form of witness testimony can be obtained by way of video-conference link,[2257] for example if the witness is unable to come to The Hague

2249 Cf. ICTY, Donors Raise 15.6 Million Euros for War Crimes Chamber of BIH Court, Press release 30 October 2003, http://www.icty.org/en/press/donors-raise-156-million-euros-war-crimes-chamber-bih-court (last accessed 29/08/2019).
2250 Cited in: Orentlicher, 2018, p. 402.
2251 Cf. Pimentel, 2003, p. 725.
2252 Cf. Pimentel, 2003, p. 728.
2253 Rule 68 ICTY RPE.
2254 Cf. Pimentel, 2003, p. 726.
2255 Rule 81 (A) ICTY RPE.
2256 Cf. Pimentel, 2003, p. 727.
2257 Rule 81*bis* ICTY RPE.

and testify in person. In addition to that, the Tribunal uses technological means for the purposes of in-court witness protection, such as voice or image distortion.[2258] These measures render the ICTY's proceedings more efficient and ensure effective compliance with its duties.

An example of technological measures that increase the accessibility of the Tribunal to the public is the uploading of hearing transcripts to the Tribunal's website. The same applies to court records (including evidence, submissions by the parties, transcripts, videos of the hearings, judgments, etc.) that are made available on the ICTY's online judicial database.[2259] Court sessions are open to the public[2260] and broadcasted on the Tribunal's website with a 30-minute delay. Videos of the most important hearings (such as the opening and closing statements of the prosecution and the defence) are uploaded to the website of the ICTY/MICT. The jurisprudence of the ICTY's, International Criminal Tribunal for Rwanda's and MICT's appeals chambers is nowadays searchable via the Case Law Database through notions, cases names, titles of filings, date, statutes, rules, and other instruments.[2261]

In both Serbia and Bosnia and Herzegovina, trials for war crimes and organised crimes take place in modern courthouses.[2262] In BiH, they are conducted in the building of the State Court of Bosnia and Herzegovina, which was reconstructed pursuant to the joint OHR and ICTY conclusions, and after the adoption of the Law on the Court of Bosnia and Herzegovina in 2002.[2263] According to a representative of the SCBiH Registry, it is the court with the best technological equipment in the whole Bosnian judiciary and in the region.[2264] In Serbia, a separate building of the Higher Court Belgrade was constructed in 2003 and is equally equipped with modern technology.[2265] Practices copied from the ICTY include testifying via video-conference links, protecting vulnerable witnesses inside the courtroom, audio-recording court hearings and producing verbatim transcripts, video-recording court hearings for efficiency or public information purposes, as well as

2258 Rule 75 (B) (c) ICTY RPE.

2259 See ICTY, ICTY Court Records, http://icr.icty.org/ (last accessed 29/08/2019).

2260 Rule 78 ICTY RPE; restrictions only apply in sessions involving protected witnesses (Rule 75 (B) ICTY RPE).

2261 See ICTY, Case Law Database, http://cld.irmct.org/?q=en/cases/ictr-icty-case-law-database (last accessed 29/08/2019).

2262 As mentioned previously (Chapter 5, section 2.1), the State Court of Bosnia and Herzegovina also has jurisdiction over administrative and other criminal matters within the competencies of the state.

2263 See Sud Bosne i Hercegovine, *Brošura*, 4th edition, www.sudbih.gov.ba/files/docs/brosura/brosura%202012_B.pdf (last accessed 29/08/2019), p. 15ff.; OHR and ICTY Joint Conclusions as recited in: Bohlander, 2004, p. 18.

2264 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.

2265 Cf. Ivanišević, 2007, p. 15; although a representative of the Humanitarian Law Center (HLC) called the technological equipment "pre-historic", describing, for instance, the use of video-conference links for remote testimonies: "But you have to see how that looks like! […] [T]here is always someone who didn't hear well, or I don't know, something happens that is not good in that technique."; interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.

using the institutions' websites in order to keep the public informed about the courts' activities. These practices will be further outlined in the following section.

2 Technical Innovations in National Courts

2.1 Electronic Evidence and Case Management

The ICTY has granted the national prosecution services in the former Yugoslav countries access to its e-disclosure system, providing them with the entirety of its non-confidential evidence.[2266] In Serbia, the Prosecutorial Strategy for Investigation and Prosecution of the War Crimes in Republic of Serbia 2018-2023 foresees copying the Tribunal's case management system, allowing the prosecutors to process information within the office more efficiently.[2267]

2.2 Video-Conference Link

The possibility to testify via video-conference link was first introduced into the Serbian criminal procedure through the Law on Organization and Competence of Government Authorities in War Crimes Proceedings,[2268] and is now generally available in the Serbian CPC,[2269] as well as in the courts of other jurisdictions. The Bosnian CPC provides for the possibility of testifying via video-conference link in Article 86 (6) CPC BiH.

At the Higher Court Belgrade and at the State Court of Bosnia and Herzegovina, the possibility of testifying via video-conference link is provided for in all four (Belgrade) and all eight (Sarajevo) courtrooms.[2270] Entity and district courts have also copied this practice and use it frequently.[2271] Although Serbian prosecutors and judges were initially reluctant to propose that witnesses testify via video-cnference link from another country, because

2266 Cf. interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; see also: Republic of Serbia Prosecutor's Office for War Crimes (March 2018), *The Presecutorial Strategy for Investigation and Prosecution of the War Crimes in Republic of Serbia 2018-2023*, Belgrade, www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2018-05/strategija_trz_eng.pdf (last accessed 29/08/2019), p. 19.

2267 Cf. Republic of Serbia Prosecutor's Office for War Crimes, March 2018, p. 22.

2268 Cf. Freeman, October 2004, p. 6; previous Article 14 of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings.

2269 Article 404 (1) CPC Serbia.

2270 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14; see also: Nettelfield, 2010, p. 253.

2271 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14; interview with cantonal prosecutor, Sarajevo, 6 February 2017, I-4.

they deemed that such testimony would have limited effect,[2272] it is now frequently used when witnesses are unable to come to Belgrade.[2273]

2.3 Witness Protection

The necessary technological equipment for in-court witness protection, such as voice or image distortion, is also available at the courts in BiH and Serbia.[2274] In Bosnia and Herzegovina, entity and district courts have the possibility of borrowing this equipment from the SCBiH when needed.[2275]

2.4 Audio-Recording and Transcripts

At the Higher Court Belgrade, all trials are audio-recorded and verbatim transcripts are produced following the hearing.[2276] At the Appeals Court Belgrade, courtrooms are not equipped for audio-recording court sessions and producing transcripts.[2277] When the Court of Appeal Belgrade holds a hearing in a trial for war crimes or organised crimes (which is not necessary in every case)[2278], then they use the premises of the Higher Court.[2279] In Serbia, the practice of writing transcripts based on the audio-recording of the court hearing is new and only applies in trials for war crimes and organised crimes. In courts of general jurisdiction, the (presiding) judge dictates what a court clerk must write in the minutes for the court session.[2280]

When requested, transcripts and audio-recordings of testimonies are mostly provided by the Higher Court Belgrade to third parties. It has happened, however, that such requests

2272 Cf. Ivanišević, 2007, p. 20.

2273 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.

2274 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14; interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2275 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010b, p. 16.

2276 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; see also: Ivanišević, 2007, p. 15.

2277 In fact, according to a Court of Appeal Belgrade judge, the equipment is there, but it does not work. He described it as a "decoration of the courtroom"; cf. interview with Appeals Court Belgrade judge, Belgrade, 20 January 2017, I-12.

2278 In practice, the Court of Appeal Belgrade only holds hearings in cases in which it had quashed the verdict of the first instance once and sent the case back to the first instance for retrial and quashed the verdict of that retrial again. The second retrial needs to be conducted by the Court of Appeal Belgrade itself – a case cannot be sent back to the first instance twice. For these retrials, court sessions will be hold and they will then take place in the premises of the Higher Court Belgrade; cf. interview with Appeals Court Belgrade judge, Belgrade, 20 January 2017, I-12.

2279 Cf. interview with Appeals Court Belgrade judge, Belgrade, 20 January 2017, I-12.

2280 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; see also: Ivanišević, 2007, p. 15.

were rejected in cases that were not yet concluded. The explanation given was that this would jeopardise the proceedings (without providing further details).[2281] The Serbian NGO Humanitarian Law Center publishes transcripts of war crimes trials on their website,[2282] the courts do not.

At the State Court of Bosnia and Herzegovina, all hearings are audio-recorded, but verbatim transcripts are only produced in the most complicated cases (involving several defendants) and/or long-lasting trials.[2283] In all other cases, a court clerk writes a summary of the hearing.[2284] While in the first years, transcripts were systematically produced and shared with the parties to the proceedings, nowadays only the audio file is handed over to those parties – and the video file and the transcript only upon request.[2285] The transcripts and audio-recordings can only be published with the written approval of the parties to the proceedings.[2286] In practice, they are not published or shared with third parties.[2287]

Verbatim transcripts are produced at entity and district courts in Bosnia and Herzegovina.[2288]

2.5 Video-Recording and Public Sessions

Since 2009, the Law on Organization and Competence of Government Authorities in War Crimes Proceedings, which is *lex specialis* to the CPC, allows the recording and public broadcasting of court proceedings upon a decision of the court's president, after obtaining the opinion of the parties to the proceedings.[2289] The possibility to video-record court sessions has been provided in all courtrooms at the Higher Court Belgrade since 2006.[2290]

2281 Cf. M. Kostić (2016), Public's Right to Know of War Crimes Trials in Serbia, In *Analysis of current issues in war crimes proceedings: Collection of papers*, OSCE Mission to Serbia, Belgrade, p. 7-43, http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2016/11/Analiza-ratnih-zlocina-Book-ENG.pdf (last accessed 13/09/2019), p. 22.

2282 Email communication with a Humanitarian Law Center representative, 6 November 2018; see: Fond za humanitarno parvo, Spisak predmeda, http://www.hlc-rdc.org/?cat=234 (last accessed 29/08/2019) (during the early years, HLC also published English summaries of court sessions; nowadays they merely publish the Serbian transcripts, together with all other obtainable documents relevant to the case, such as the indictment or the judgment).

2283 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14; interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2284 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.

2285 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2286 Article 155 (9) CPC BiH.

2287 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.

2288 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2289 Article 16a of the Law on Organization and Competences of Government Authorities in War Crimes Proceedings; cf. Ostojić, 2014, p. 187.

2290 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; see also: Kostić, 2016, p. 22.

Nevertheless, the President of the Higher Court Belgrade has never allowed the video-recording of court hearings,[2291] not by the court itself nor by media representatives.[2292] This is the case despite the fact that the Law on Organization and Competence of Government Authorities in War Crimes Proceedings was amended in 2009 precisely in order to familiarise the public with the facts and evidence of committed war crimes,[2293] and despite frequent requests from media stations, NGOs,[2294] but also defence counsel.[2295] Hence, contrary to the ICTY's practice, Serbian war crimes trials are not broadcasted on the court's website or in the media, because – in the words of Higher Court judges – "that's not something we do here"[2296]. According to one defence counsel, "judges don't like having TV cameras in the courtroom"[2297].

The situation in BiH is somewhat different: all eight courtrooms of the SCBiH provide the necessary equipment for the video-recording of court hearings.[2298] While the hearings are also not broadcasted on the court's website, and audio-visual media are permitted into the public gallery only in exceptional cases, journalists do have the right to receive videos with 10-minute extracts. In cases that are of particular interest to the public, and if the public release of records does not bear the risk of endangering court proceedings, the entire hearing is made available to journalists.[2299] The current practice is that nearly all requests for short extracts are granted and the videos are usually provided within one day. According to the Rules of Procedure of the State Court of BiH, the decision to release audio/video-recordings lies with the President of the court.[2300] According to a representative of the SCBiH Registry, this – compared to that of the ICTY – rather restrictive policy is due to the limitations imposed by the CPC's requirement to publicise court hearings, and out of fear that witness statements could be manipulated.[2301]

The sessions are, however, of course, open to the public at all courts. Trial monitors from the OSCE, observers from different human rights organisations,[2302] and media

2291 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59; see also: Kostić, 2016, p. 22.
2292 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.
2293 Cf. Kostić, 2016, p. 34f.
2294 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.
2295 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.
2296 Interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50.
2297 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.
2298 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.
2299 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14; see also: Kostić, 2016, p. 36.
2300 Cf. Kostić, 2016, p. 36.
2301 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.
2302 For Serbia, in particular, the Humanitarian Law Center (http://www.hlc-rdc.org/?lang=de).

representatives,[2303] are present on a daily basis –[2304] often they are the only visitors, unless important verdicts or verdicts in big cases are expected.[2305]

2.6 Use of the Internet to Inform the Public

The ICTY uses its website to grant the public access to its case law, trial transcripts, court session videos and livestreams, as well as to other documents relevant to its cases. It also publishes other types of information, such as trial schedules, and details about the Tribunal's history, structures, and outreach activities.[2306]

While courts in BiH try to replicate these practices, the same cannot be said for courts in Serbia.

In Serbia, there is a general reluctance to publish case law on the internet.[2307] Only the Constitutional Court publishes all its judgments, and the Supreme Court of Cassation publishes selected judgments of general interest or that have the potential to influence the jurisprudence of lower courts.[2308] Almost all decisions of the Court of Appeal Belgrade can be found on its website, including those of war crimes cases,[2309] whereas the Higher Court Belgrade does not publish its jurisprudence at all. The State Court of Bosnia and Herzegovina publishes all its verdicts on its website, most of them not only in the local language, but also in English. A number of entity and district courts also publish their judgments on the internet.[2310]

While the Serbian Office of the War Crimes Prosecutor (OWCP) used to publish indictments,[2311] they stopped doing so.[2312] The OWCP also no longer shares the indictments

2303 In both countries, in particular, from the Balkan Investigative Reporting Network (http://birn.eu.com/).

2304 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2305 For BiH: Nettelfield, 2010, p. 257; for Serbia: my own observation.

2306 See http://www.icty.org/en.

2307 Cf. Ivanović & Lukić, 2015, p. 262.

2308 Cf. Ivanović & Lukić, 2015, p. 259f.

2309 Cf. Kostić, 2016, p. 12; for the war crimes judgments, see: Republika Srbija Apelacioni sud u Beogradu, Sudska praksa, Ratni zločini, http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/ (last accessed 29/08/2019).

2310 Cf. Kostić, 2016, p. 29.

2311 Cf. Kostić, 2016, p. 16.

2312 While representatives of the Office of the War Crimes Prosecutor (OWCP) cite capacity reasons (cf. interview with OWCP expert assistant, Belgrade, 6 November 2018, I-56), a representative of the OSCE Mission to Serbia could not understand this argument as it would, according to him, not cost a lot of time or effort to upload indictments. He voiced concerns that transparency is no longer important to the office and, in addition, suspected that they in fact *preferred* not to be transparent – in order not to give opportunities to criticise the OWCP; cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.

of non-completed cases with international organisations or NGOs.[2313] In BiH, indictments used to be made available on the basis of the Freedom of Access to information Act, the Rulebook for Exercise of the Right to Access to Information under Control of the Court of BiH, and on Collaboration of the Court with the Community.[2314] However, there are differences in practice: while the Prosecutor's Office BiH does not publish indictments, some entity and district prosecutors' offices do.[2315]

The State Court of Bosnia and Herzegovina strives for transparency and informing the public about the court and its trials. It even tries to replicate the ICTY's outreach programme, but with considerably fewer financial resources: the Registry ensures that statistical information about cases is published on the website, as well as information about the court and its history, and the court schedule. In addition to that, the SCBiH cooperates with law schools in order to inform law students about the court, they also receive visits from all over Bosnia and Herzegovina, the region, and the world, and they organise community events.[2316] In Serbia, neither the Higher Court Belgrade nor the Court of Appeal Belgrade even publish trial schedules,[2317] which is similar to the practice of other courts in Serbia.[2318] Their websites only provide basic information about the courts' competencies and organisation. The Serbian Office of the War Crimes Prosecutor sometimes publishes information on its website, including short films and information records about cases.[2319]

3 Conclusion: Efficiency, Effectiveness, and Transparency

While technological means have certainly contributed to increased efficiency and effectiveness of criminal proceedings, they have not yet significantly increased the transparency of war crimes courts in the region.

The implementation of electronic evidence and case management systems based on the ICTY model allow for a more efficient prosecution of war crimes. The possibility to testify via video-conference link, and technological means for in-court witness protection, allow the parties to the proceedings to put forward their evidence, even if a particular witness cannot be present in the respective courthouse or would otherwise not come forward. For witnesses, there are several reasons for preferring to testify remotely, such as

2313 Cf. interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35; OSCE Serbia.
2314 Cf. Kostić, 2016, p. 28f.
2315 Cf. Kostić, 2016, p. 29.
2316 Cf. interview with SCBiH Registry representative, Sarajevo, 23 November 2018, I-14.
2317 Cf. Kostić, 2016, p. 13; within the building of the Court of Appeal Belgrade, which is open to everyone, there are at least screens that display the court hearings of the day. Such screens do not exist at the Higher Court Belgrade.
2318 Cf. Kostić, 2016, p. 13.
2319 Cf. Kostić, 2016, p. 13.

not being able or willing to travel for health or age reasons, the risk of being arrested, fearing the country of the perpetrator, or fearing retaliation.[2320] Both innovations hence contribute to a smoother and fairer adjudication of the proceedings in both Serbia and Bosnia and Herzegovina.

Witness protection increases the effectiveness of criminal proceedings as it contributes to securing witness testimony that might otherwise not have taken place, because the respective witness might otherwise have refused to come forward. In addition, witness protection also increases the transparency of the proceedings, as using technology for voice or face distortion avoids using more restrictive protection measures (such as proceedings in closed session). Voice and face distortion provide the prerequisites for a preference for open session for transparency reasons.[2321]

Keeping audio-recordings and writing verbatim transcripts can increase the efficiency of proceedings, as it relieves judges from the duty of having to think about and dictate the minutes while presiding over a hearing. This is especially important in complex trials, which war crimes and organised crimes proceedings often are, especially when they involve a high number of perpetrators and therefore a large number of participants in the courtroom.[2322] Keeping audio-recordings and transcripts also speeds up the proceedings.[2323] The verbatim transcript is also a more accurate basis for the later judgment or decision, thereby potentially leading to fairer outcomes[2324] and improved effectiveness of the proceedings.[2325]

Furthermore, publicised verbatim transcripts increase the potential to accurately inform the public about war crimes proceedings, without the bias of individual interpretation of what happened in the courtroom. While Serbian courts share their verbatim transcripts with at least one NGO, Bosnian courts do not even produce them. The Higher Court Belgrade's decision to not share nor permit others to produce video-recordings is critised by observers. No testimony of victims, perpetrators, and witnesses, nor a pronunciation of judgement, has ever been broadcasted in Serbia.[2326] As a Humanitarian Law Center representative put it:

> "I think that is a really big problem for the history and someone who in some following years will research about Serbian war crimes cases. It is true, we have

2320 See also: Orentlicher, 2018, p. 402.
2321 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 19.
2322 Cf. interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.
2323 Cf. Ivanišević, 2007, p. 15.
2324 Cf. interview with Higher Court Belgrade judges, Belgrade, 1 November 2018, I-50; interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.
2325 Cf. Ivanišević, 2007, p. 15.
2326 Cf. Kostić, 2016, p. 11.

> transcripts from all hearings. But that is not the same as podcast or some short videos or videos with final words or with verdicts, etc."[2327]

This critique is in fact part of a general criticism of the lack of implementation of the public's right to know about war crimes trials in Serbia. The Humanitarian Law Center postulates that this right consists of, at the very least, the right to access to the courtroom where trials are held, the right to access to documentation regarding war crimes cases (including indictments, transcripts, audio and video records of the main hearing, as well as judgments), the right to record the trial for the purpose of public presentation, as well as the right to keep court records from war crimes cases. However, only the right to access the courtroom is currently fully being adhered to.[2328]

Access to documentation related to war crimes cases is limited by the fact that such documentation is, for the most part, not proactively published by the courts and the prosecutor's office, nor do these institutions provide these documents upon request in all instances. In fact, the material is usually withheld until a case has become final.[2329] Access in its practical, not only formal, sense is also restricted by the fact that indictments and judgments are usually "excessively" anonymised (blacking out all names, including those of the perpetrator, their defence attorney, the victims, the witnesses, experts, of places, and sometimes even of the judges; occasionally entire paragraphs or pages of judgments are blacked out to the point of making them incomprehensible).[2330] This practice is somewhat ironic, as all the information that will later be anonymised is publicly available at the court hearing.[2331] In addition, the practice regarding the destruction of criminal records that is currently being applied in war crimes trials, is also being employed in all other ordinary criminal cases.[2332] By not keeping court records from war crimes cases permanently, the Serbian authorities fail to recognise their historical and social significance.[2333]

There seems to be a stark contrast between what is legally possible – and even official policy – in Serbia, and the practice. The National Strategy for the Prosecution of War Crimes for the Period 2016-2020 for instance recognises the need for – and citizens' right

2327 Interview with Humanitarian Law Center representative, Belgrade, 2 November 2018, I-59.
2328 Cf. Kostić, 2016, p. 11 and 15.
2329 Cf. Kostić, 2016, p. 11.
2330 Cf. Kostić, 2016, p. 11f. and 16 and 23; this same problem is also present at some of the entity and district courts in BiH, while the SCBiH publishes its judgments in non-anonymised form; cf. Kostić, 2016, p. 29.
2331 Cf. Kostić, 2016, p. 24.
2332 Cf. Kostić, 2016, p. 11; in fact, the legislator has recognised the particular significance of keeping records of the most serious criminal cases in the new Rules of Procedure of the Higher Court Belgrade which stipulate that cases entailing a penalty of at least 30 years must be kept forever. This new rule, however, in practice, does not apply to war crimes cases being adjudicated in Serbia at the moment, as the old Criminal Code of the Socialist Federal Republic of Yugoslavia is applied in these trials, entailing a maximum penalty of 20 years. Those records are kept for merely 30 years; cf. Kostić, 2016, p. 40.
2333 Cf. Kostić, 2016, p. 11.

to – a "timely, impartial and objective informing of citizens about war crimes trials"[2334]. The Prosecutorial Strategy for Investigation and Prosecution of the War Crimes in the Republic of Serbia 2018-2023 reiterates the need for a "regular, objective and impartial reporting in the field of war crimes trials"[2335] and recognises the right of citizens, as guaranteed by the Serbian Constitution, to "truthfully, fully, and in a timely manner inform the public about the proceedings in specific cases"[2336]. The National Strategy for the Prosecution of War Crimes for the Period 2016-2020 calls for the "education system, the media and bodies engaged in the prosecution of war crimes" to "constantly engage several segments of society", and underlines the duty of "the state authorities […] to provide citizens, […] directly or through the media, complete information on war crimes proceedings."[2337] It further notes that

> "[b]y providing the media representatives with an opportunity to familiarize themselves with the issues of war crimes, the Serbian authorities would ensure that information that citizens receive about the conflicts in the former Yugoslavia is not incomplete and inconsistent, and reporting on war crimes trials is not subjective, biased and sensationalist. Transparency of state bodies and their readiness to cooperate with the media are a prerequisite that the lack of relevant and objective information is not compensated by publishing unverified data, originating from sources of questionable credibility."[2338]

Overall, it aims to increase awareness regarding the events during the wars of the former Yugoslavia, and to positively influence the public's attitude regarding the need for war crimes trials.[2339]

These ambitions have not been fully implemented in practice, even though the law does not preclude this. As mentioned, the Law on Organization and Competence of Government Authorities in War Crimes Proceedings was amended in 2009 precisely in order to allow the broadcasting of war crimes proceedings with the purpose of better informing the public. The limited transparency of Serbian courts rather seems to be a consequence of the governing judicial mentality, as it is largely up to the prosecutors and judges to decide how transparent they want their work to be.

2334 Republic of Serbia (January 2016), *National Strategy for the Prosecution of War Crimes for the Period 2016-2020*, www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF (last accessed 29/08/2019), p. 19.

2335 Republic of Serbia Prosecutor's Office for War Crimes, March 2018, p. 46.

2336 Republic of Serbia Prosecutor's Office for War Crimes, March 2018, p. 46.

2337 Republic of Serbia, January 2016, p. 19.

2338 Republic of Serbia, January 2016, p. 19.

2339 Cf. Kostić, 2016, p. 15.

In any case, the result is that the public remains largely uninformed about the work of the Serbian war crimes institutions,[2340] and the limited use of technological possibilities has had a significant impact on the low visibility of war crimes trials in Serbia.[2341]

In Bosnia and Herzegovina, there is a similar trend: media representatives complain that the judiciary is increasingly closed to them, which makes it impossible to prepare high-quality reports on judicial processes involving war crimes, corruption, and organised crime.[2342] For instance, the fact that the Prosecutor's Office of BiH does not publish indictments makes it hard for journalists to understand the trials and cover them.[2343] In the early years of the POBiH, from 2003-2012, while foreign prosecutors were still involved, the office was so transparent that it published not only the indictments, but also annexed a list of evidence and a document entitled 'The Results of the Investigation', which contained an explanation of prosecutorial decisions. However, transparency levels have decreased since the departure of the foreign prosecutors and judges; indictments are no longer published and recordings of court sessions are limited to 10-minute extracts.[2344] As an observer notes, when foreigners were present at the relevant institutions, transparency was more "adequate" and "proactive". Media and NGO requests were answered more easily and quickly. Now, information given to journalists by the Prosecutor's Office of BiH is often very general.[2345]

The efforts of the Registry of the State Court of Bosnia and Herzegovina and of its public relations and outreach department, are somewhat contradictory to that. It is hard to understand the reasons for the tendency towards decreased transparency. One observer notes that the reasons for this development could be related to the cautiousness of war crimes institutions.[2346] A journalist suspected that this new tendency is a result of political influence on the judiciary.

> "It is actually in the interest of politicians to close the door for the media to courts and prosecutions, and to the judiciary as a whole, in order to prevent

2340 Cf. Ostojić, 2014, p. 188.

2341 Cf. Kostić, 2016, p. 13

2342 Cf. E. Dizdarevic (8 November 2018), Bosnian Judiciary Restricts Information on War Crimes Cases, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/11/08/bosnian-judiciary-restricts-information-on-war-crime-cases-11-07-2018/ (last accessed 29/08/2019).

2343 Cf. Dizdarevic, Balkan Investigative Reporting Network, 8 November 2018; as one journalist put it: "[i]f the accused pleads guilty on count 3 of the indictment, but I don't have access to the indictment, this guilty plea does not tell me anything."; Detektor Epizoda 100 (8 November 2018): Netransparentno pravosuđe ograničava pristup medijima i građanima, http://detektor.ba/netransparentno-pravosudje-ogranicava-pristup-medijima-i-gradjanima/ (last accessed 29/08/2019).

2344 Cf. Dizdarevic, Balkan Investigative Reporting Network, 8 November 2018.

2345 Cf. Detektor Epizoda 100, 8 November 2018.

2346 Cf. Detektor Epizoda 100, 8 November 2018.

> some important incidents or large-scale organised crimes in this country from being uncovered"[2347].

The comparison with Serbia shows that transparency of courts and prosecutors' offices might simply not be in line with the mentality of representatives of the judiciary of former Yugoslav countries. The international influence – either through the presence of international prosecutors and judges, or through the ICTY, which served as a model for the SCBiH's Registry and its outreach section – might have slightly changed the mentality in BiH for a period of time. However, as the international community increasingly pulled out of Bosnia and Herzegovina, a shift back to old patterns could have been the consequence. Local actors are in fact calling for the re-establishment of transparency (based on the ICTY model), which would involve publishing not only the recordings of court hearings, but also the transcripts, as well as evidence and documents related to the cases.[2348]

In conclusion, while the use of technology has increased the efficiency and effectiveness of war crimes proceedings in Bosnia and Herzegovina and Serbia, its potential to also increase the transparency and visibility of war crimes trials has not yet been fully explored (in Serbia) –[2349] or has even been reversed (in BiH). In the case of Serbia, this was reflected in opinion polls conducted around 2016, which revealed that most citizens in Serbia were not able to list any war crimes cases that were being processed before national courts, or to mention any of the institutions that were participating in the processing of war crimes.[2350]

However, transparency is particularly important in countries like Serbia and Bosnia and Herzegovina, where some parties openly question the impartiality of domestic war crimes courts for political gain.[2351] Their decisions must therefore be *visibly* fair, in order for the courts to preserve their legitimacy, and for them to contribute to dispelling myths about the Yugoslav conflicts.[2352] Indeed, in Bosnia and Herzegovina, the decreased transparency has had a negative impact on trust in the country's judicial institutions. For instance, as was previously noted, the fact that media only has access to 10-minute extracts from the video-recording of court proceedings, has resulted in more one-sided reporting. This reporting is often more focused on the views of the defence, as the defence is not restricted regarding the dissemination of their interpretation of events. The side of the

2347 Television editor Suzana Stambol, cited in: Dizdarevic, Balkan Investigative Reporting Network, 8 November 2018.

2348 Cf. Dizdarevic, Balkan Investigative Reporting Network, 8 November 2018.

2349 Cf. Kostić, 2016, p. 13.

2350 Cf. Kostić, 2016, p. 13; to my knowledge, there are no similar opinion polls in Bosnia and Herzegovina. The likelihood though that Bosnian citizens know at least the State Court of Bosnia and Herzegovina is at a high level as it frequently features in the media, due to the generally still lasting omnipresence of war crimes trials; cf. interview with Bosnian defence counsel, Sarajevo, 16 November 2018, I-54.

2351 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 18f.

2352 Cf. OSCE Mission to Bosnia and Herzegovina, January 2010a, p. 19.

prosecution and of the judges is no longer represented in the media. In BiH, there have been pleas to go back to taking the ICTY as an example for complete transparency (for instance, in terms of livestreams, publishing documents and transcripts, and of its general approach to transparency).[2353]

Nevertheless, The Hague's demonstration of the benefits of technology in war crimes proceedings was decisive in triggering Serbia's and Bosnia and Herzegovina's efforts to modernise their criminal processes. Although the Tribunal hardly took any active steps in supporting the use of technology, the mere fact that it led by example sufficed to make an impact. What should be positively noted is that some of the technological innovations used in war crimes proceedings have since also been used in other courts of ordinary jurisdiction, thereby also rendering their cases more efficient and effective. As mentioned, this applies to technological means for in-court witness protection. Some domestic practitioners hope that the positive experiences with verbatim transcripts might, in the future, encourage courts of ordinary jurisdiction to switch to literal transcripts as well.[2354] Also in terms of using technology, the Tribunal's impact thus went beyond war crimes trials.

2353 Cf. Detektor Epizoda 100, 8 November 2018.
2354 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

Part III
Analysis of the ICTY's Impact on Bosnia and Herzegovina and Serbia

9 Explaining the ICTY's Impact on Changes in the Bosnian and Serbian Justice Systems

There have been great expectations towards the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal), not only in terms of what it could contribute to the evolution of international humanitarian and international criminal law globally, but also with respect to what it could achieve for the countries of the former Yugoslavia and the strengthening of their justice systems. The previous Chapters have described selected developments within the Serbian and Bosnian judiciaries, and how the ICTY influenced these developments.

The aspects outlined in Chapters 5 to 8 are those where there is greatest consensus in the literature – mainly in the reports of civil society and international organisations, and among the experts and observers who I interviewed in the course of my research – on the notion that the Tribunal *did* play a role in how things evolved. There is consensus that through its mere existence and through various initiatives, the ICTY triggered the establishment of domestic war crimes institutions.[2355] It is clear that the Tribunal had an impact on criminal law reforms and its evolution (of both substantive and procedural criminal law), which have been taking place in Bosnia and Herzegovina (BiH) and Serbia since the early 2000s. Witness protection and support for witnesses is referred to by many as something that the ICTY has 'brought' to the region. The Tribunal's practice of not dealing with victims' compensation claims within the criminal process caused so much frustration within victims' communities in BiH, that a point was reached where they were able to convince judges and prosecutors to consciously move away from the Tribunal's practice in the national context. Lastly, the ICTY demonstrated how technological equipment can facilitate criminal proceedings, which has led to the adoption of similar practices throughout the region of the former Yugoslavia.

These are therefore the areas where the ICTY's impact can best be observed, where its footprint is the most visible. It cannot, however, be excluded that there are other areas where the ICTY left footprints or sparked activities. Examples of such footprints include: improved detention conditions in Bosnia and Herzegovina;[2356] improved domestic

2355 See Chapter 5.

2356 The newly built State Court of Bosnia and Herzegovina (SCBiH) has the most modern detention facility in the whole country, if not in the region. The new detention facility was a common idea of the ICTY and the Office of the High Representative for BiH (cf. OHR and ICTY Joint Conclusions as recited in: Bohlander,

sentencing practices in war crimes trials;[2357] lustration of the police in Bosnia and Herzegovina;[2358] the establishment of a state-level defence ministry in BiH;[2359] and finally, a strengthened culture of law.[2360] Impact in those areas is, however, less obvious, or it is methodologically not possible to clearly demonstrate it. They were therefore excluded from the present analysis.

This Chapter will focus on the dynamics and mechanisms that led to the ICTY's impact on the domestic developments presented in Chapters 5 to 8. In section 1, the changes that occurred in Serbia and Bosnia and Herzegovina will be recalled and categorised. After a short summary of the impact theory presented in Chapter 3, section 2 will analyse the most important impact factors that played a role in the Tribunal's influence on the domestic

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2004, p. 18f.), and the ICTY's Registry (responsible for administering the Tribunal's detention facilities) has provided advice in setting up this prison (cf. Aitchison, 2011, p. 188). It has also contributed to capacity building of detention officers and other prison personnel (cf. ICTY, Press release 21 February 2003). In addition, whether appropriate detention conditions can be guaranteed was one of the criteria for referring cases from the ICTY to the domestic judiciaries under Rule 11*bis* (cf. for instance ICTY, *Prosecutor v. Radovan Stanković*, Decision, IT-96-23/2-PT, Referral Bench, 17 May 2005, para. 67), creating some pressure for high standards. It was hoped that the new state level facilities would serve as a "vehicle for continued prison reform in Bosnia and Herzegovina" (Aitchison, 2011, p. 184), in particular by envisaging a rotating system where guards from prisons from all over the country would temporarily come work at the SCBiH prison in order to get acquainted with the new (high) standards and subsequently implement them at home as well. This, however, never worked as planned – some say that one of the problems was that work was completed in a rush in order to be ready to receive ICTY detainees. Planning and implementation were therefore not as well thought through as would have been necessary (cf. Aitchison, 2011, p. 184ff.). Despite the clear involvement of the ICTY in setting up the SCBiH detention facility, I have excluded impact on detention conditions as this development seems to have remained isolated. It did not lead to better conditions in BiH generally, and even less so beyond Bosnia and Herzegovina.

2357 This was brought up, for instance, in: interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8. I could, however, not detect such a connection. The sentencing practice at the Tribunal is anything but consistent (see, in particular: B. Hola (2012). *International sentencing: "A game of Russian roulette or consistent practice?".* (Doctoral thesis), Vrije Universiteit, Amsterdam; or P. Chifflet & G. Boas (2012). Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo. *Criminal Law Forum, 23*(1-3), 135-159), so that it would be difficult to derive guidance from it. In addition, domestic sentences in Serbia and BiH are based on domestic sentencing traditions, which follow the civil law approach of specific ranges of sentences determined per crime in the criminal codes. The ICTY Statute does not even provide for sentencing rules (see Article 24 of the ICTY Statute). Of course, there is the claim that both at the Tribunal and in the region, sentences for war crimes are generally "low" (cf. interview with TRIAL International representative, Sarajevo, 1 February 2017, I-8). This, however, seems to be too little to make the far-fetched assumptions that one derives from the other.

2358 This is claimed because of the fact that the ICTY's trials revealed the police's heavy involvement in war crimes in the region; cf Aitchison, 2011, p. 70ff. and 83f.

2359 That the state level ministry of defence was founded was, for some, triggered by the fact that entity defence ministries did not sufficiently cooperate with the ICTY. The Office of the High Representative therefore wanted to reduce their powers; cf. Nettelfield, 2010, p. 214.

2360 I cannot make any conclusions on the ICTY's contribution to the general 'culture of law' in the countries of the former Yugoslavia – although especially ICTY officials often like to claim that the Tribunal was instrumental in the transition of mentalities in the countries of the former Yugoslavia from war-torn to peaceful societies.

criminal justice systems in BiH and Serbia. It will become clear that the rapport between the ICTY and the respective domestic actors (who were relevant for the respective change) was instrumental; when contact was intense and collaboration close, domestic professionals were more likely to adopt the ICTY's practices. Secondly, attitudes towards the Tribunal were also crucial; those who were sceptical about the Tribunal were less likely to accept its practices – although it should be noted that attitudes were linked to the closeness of relations between the domestic actor and the ICTY – the closer the contact the more positive their attitudes towards the Tribunal. Overall, the observations made in BiH and Serbia confirm the impact theory that postulates that international criminal courts and tribunals can have capacity building and demonstration effects, which can lead to a cascade of their norms into domestic societies. This will be addressed in section 2.5 of this Chapter. Before concluding, section 3 will reflect on whether the ICTY's impact on BiH and Serbia can be described as influence on the rule of law.

1 Analysis of Observed Changes in the Criminal Justice Systems of Bosnia and Herzegovina and Serbia

In section 2.2 of Chapter 4 it was explained that instead of numerically *measuring* impact, the Tribunal's influence on the Bosnian and Serbian criminal justice systems will be assessed by using different categories. The first category looks at whether there was an impact or not, i.e. whether the ICTY triggered a certain domestic development or not;[2361] the second category concerns the *form* of impact, i.e. whether it was legislative, jurisprudential, whether it concerned material resources, or whether it led to a change in domestic practice;[2362] the third category concerns the *type* of impact, i.e. whether it led to retrenchment of the international norm, absorption, or transformation at the national level, or whether there was inertia, meaning that nothing happened.[2363] The last category relates to the question whether the Tribunal's impact on domestic developments in the field of war crimes adjudication triggered spill-over effects to other areas.[2364]

The changes presented in Chapters 5 to 8 will therefore be analysed according to these categories in the following sections.

2361 Section 1.1.
2362 Section 1.2.
2363 Section 1.3.
2364 Section 1.4.

1.1 Clear, Unclear or Partial, or Non-Existent Impact

Table 9 Existent or non-existent impact

	Clear impact	Unclear or partial impact	Non-existent impact
Establishment of domestic war crimes institutions	BiH Serbia		
Criminal code	BiH		Serbia
War crimes jurisprudence	BiH	Serbia	
Procedural law		BiH	Serbia
Witness protection and support	BiH Serbia		
Victims' compensation		BiH	Serbia
Technological innovations	BiH Serbia		

The first way to categorise the observed impact is to divide it according to the question whether there was impact or not. For some areas, it is not entirely clear whether it was (only) the ICTY's influence that lead to the respective changes, a third column for unclear or partial impact therefore seems necessary.

There is consensus in the academic literature, in the reports of civil society organisations, and among my interviewees that the ICTY led to the establishment of domestic war crimes institutions. As described in Chapter 5, the Tribunal was actively involved in setting these up in Bosnia and Herzegovina. Also in Serbia, there is consensus that – had it not been for the ICTY – domestic war crimes institutions would not exist.

The ICTY's footprint is also clearly visible in the 2003 BiH Criminal Code, which not only took over articles from the ICTY Statute (verbatim or in essence), but which also takes into account developments of the ICTY's jurisprudence, such as on sexual violence crimes. The same cannot be said for Serbia. The 2006 Criminal Code draws inspiration from various sources (for instance, the Rome Statute and past Yugoslav criminal codes), but not from the ICTY Statute. In fact, the 2006 Criminal Code differs from the ICTY Statute in many respects, and from the jurisprudence that the Tribunal had rendered in the meantime; the most obvious example being command and superior responsibility, which has been codified as a separate crime instead of a form of responsibility of superiors for the actions of their subordinates.

Bosnian war crimes jurisprudence makes extensive use of ICTY jurisprudence, not by blindly following it, but by seriously considering it. The use of the Tribunal's case law is very rare in Serbian war crimes courts, and explicit references are even less frequent. In fact, Serbian jurisprudence differs in many ways from the ICTY's jurisprudence.

Reportedly, during the process of drawing up the new BiH Criminal Procedure Code (CPC), the ICTY's Rules of Procedure and Evidence were consulted as a model that marries the adversarial criminal procedure with inquisitorial elements. In Serbia, although the undertaking was similar (shifting from a purely inquisitorial procedure to a hybrid model), this had only been done superficially or not at all. Also, courts in Serbia, contrary to those in BiH, do not seem to examine the ICTY's practice or jurisprudence on procedural matters.

Witness protection and support for witnesses is something that was reportedly completely lacking in the Yugoslav penal system, and the ICTY's practice was the first occasion when domestic courts and government institutions were confronted with the matter. In both countries, the necessity for proper witness protection – both in and outside the courtroom – was quickly recognised. Programmes that featured similar protection measures as those available in The Hague were subsequently set up. The same is valid for witness support. While this implementation was carried out with a lot (in Bosnia and Herzegovina) and much less (in Serbia) involvement of the ICTY, the very idea of witness protection was nevertheless introduced in both countries by the international Tribunal.

The same goes for using technology in the courtroom. Using technology for evidence and court management, witness protection, and to inform the public about proceedings, had not been a practice at domestic courts in BiH and Serbia until the ICTY demonstrated how it can be done.

As for reparations for victims, the ICTY served as a negative example for domestic legal practitioners, and they consciously moved away from the Tribunal's practice. However, the main impetus for this change was probably given by the advocacy of victims' communities and not by the ICTY – even though they were supported by the Tribunal.

1.2 Types of Domestic Changes

Table 10 Types of domestic changes

	Legislative	Jurisprudential	Material	Practical
Establishment of domestic war crimes institutions	BiH Serbia		BiH	
Criminal code	BiH			
War crimes jurisprudence		BiH Serbia		
Procedural law	BiH	BiH		BiH
Witness protection and support	BiH Serbia		BiH Serbia	BiH Serbia

	Legislative	Jurisprudential	Material	Practical
Victims' compensation		BiH		BiH
Technological innovations			BiH Serbia	BiH Serbia

A second way to categorise the impact is to look at the types of measures that were taken at the domestic level, in which change is manifested.

The establishment of specialised war crimes institutions is first and foremost legislative, as the legal bases for these institutions, their jurisdiction, competencies, as well as their institutional design and infrastructure, needed to be created in law. As for Bosnia and Herzegovina, a new court house, which hosts the State Court of Bosnia and Herzegovina (SCBiH) and the BiH Prosecutor's Office, as well as a detention facility were established. This happened with considerable involvement of the ICTY, as the Tribunal had convened a donor conference for financing the new courthouse.

The BiH 2003 Criminal Code is, by definition, a legislative change. As mentioned, the ICTY had very little – or even no – impact on the Serbian 2006 Criminal Code.

Again, by definition, the general alignment with (in BiH) and general divergence from (in Serbia) ICTY case law is impact on jurisprudence.

Concerning criminal procedure, the new Code of Criminal Procedure of Bosnia and Herzegovina does not only draw inspiration from the ICTY's Rules of Procedure and Evidence (which thus represents a legislative change), but domestic courts also increasingly use the ICTY's practice in interpreting their own domestic procedure (which is manifested in jurisprudence on procedural matters as well as in court practice).

The impact in the area of witness protection and support has been *legislative* (because the relevant laws were adapted), *material* (because the necessary material resources were provided, such as voice-distortion equipment), and *practical* (because witness protection and support is also closely related to the practice and working methods of the police, prosecutors, judges, and other judicial personnel).

In BiH, compensation for victims was introduced as a result of prosecutors and judges changing their practice: prosecutors started gathering evidence supporting the victims' claims, and judges allocated time for the claim. The relevant jurisprudence followed at the end of the respective trial.

By getting the necessary equipment and changing the practices of courts and prosecutors' offices, technological innovations have been introduced in Serbia and BiH.

1.3 Degree of Change

Table 11 Degree of change

	Retrenchment / rejection	Inertia	Absorption	Transformation
Establishment of domestic war crimes institutions	Serbia			BiH
Criminal code		Serbia		BiH
War crimes jurisprudence	Serbia (factual findings)		Serbia (legal findings)[2365]	BiH
Procedural law		Serbia		BiH[2366]
Witness protection and support				BiH Serbia
Victims' compensation	BiH	Serbia		
Technological innovations				BiH Serbia

Another way to categorise the Tribunal's impact in Serbia and Bosnia and Herzegovina is to examine the degree of change, or, in other words, whether the ICTY's practice is followed, or moved away from on purpose.

In Bosnia and Herzegovina, the domestic war crimes institutions were clearly established with the intention to *continue* the work of the ICTY, meaning not only to finish what still needed to be done, but also to follow its established practices, pursue the same goals, and spread the same values. This was – at least partially – not the case in Serbia, where war crimes institutions were founded – at least partially – out of an *anti*-Hague sentiment. Political elites in Serbia wanted to move war crimes prosecutions and trials away from the international level and bring them to Serbia, with the intention to conduct them *differently*. Therefore, while the Tribunal clearly triggered the establishment of war crimes institutions in both countries, it led to transformation in BiH, but to retrenchment of the Tribunal's norms in Serbia.

2365 As shown in Chapter 6, section 2.2.2 on Serbia, it is clear that the Serbian courts follow the ICTY's legal findings in some respects and in some cases. The Serbian jurisprudence on contextual elements of war crimes is one such example where, albeit Serbian courts seldomly explicitly refer to Tribunal case law, they do use it. However, in many other respects, take for instance the existence of joint criminal enterprise or command responsibility, Serbian courts differ completely from the ICTY's findings. For these cases, one would have to establish 'inertia' instead of 'absorption'.

2366 Section 3 of Chapter 6 has explained that while the new Bosnian Code of Criminal Procedure effectively shifted from an inquisitorial to and adversarial approach to criminal procedure, which means that the degree of change can be labelled as 'transformation'. A caveat is nevertheless indispensable as there is no consensus among practitioners, whether the trigger for this transformation really was the ICTY.

As a result of the ICTY's influence, the Bosnian 2003 Criminal Code also considerably changed its approach to international crimes, which was reinforced by the courts that follow the ICTY's jurisprudence in their adjudication. This cannot be said for Serbia, where the 2006 Criminal Code largely maintained the structure and definitions of international crimes from previous criminal codes. While there is some consideration of the Tribunal's jurisprudence, the degree of change is mixed: Serbian courts reject the ICTY's factual findings, while in some legal matters they follow the Tribunal, and in others, they ignore its jurisprudence.

The Serbian Criminal Procedure Code was also not affected by the ICTY. However, reportedly, the Tribunal's Rules of Procedure and Evidence and its practical experience were taken into account in drafting the BiH CPC. The exact effects are, however, unclear. Nevertheless, domestic practitioners recount that in searching for practical solutions to new problems, they look at the ICTY's practice.

The area of witness protection and support changed completely in both countries due to the ICTY's impact. Not only was it non-existent before, but the Tribunal was also a role model for procedures and practices for the relevant witness protection and support institutions.

In Serbia, to this day, victims cannot claim compensation for the harm they suffered during criminal trials. The ICTY did not have any impact in this matter, as there is no change as compared to previous traditions. In BiH, the practice changed, in part, *because* of the negative experience at the Tribunal. Bosnian practitioners have therefore rejected the ICTY's system and consciously chosen to do things differently.

The novelties in terms of technology introduced into the courtroom in The Hague also completely changed how trials are conducted in Serbia and Bosnia and Herzegovina. In both countries, the criminal process was transformed due to the ICTY's influence.

1.4 Impact that Transgresses the Field of War Crimes and Impact that Does Not

Table 12 Broader or confined impact

	Impact beyond the immediate field	**Impact restricted to the field**
Establishment of domestic war crimes institutions	BiH Serbia	
Criminal code		BiH Serbia
War crimes jurisprudence	BiH	Serbia
Procedural law	BiH	

	Impact beyond the immediate field	Impact restricted to the field
Witness protection and support	BiH Serbia	
Victims' compensation	BiH	
Technological innovations	BiH Serbia	

The last way to assess the ICTY's impact is by looking at its broader effects. This is the ultimate test whether the effects that the Tribunal triggered will be lasting or not.

In both countries, war crimes institutions are closely linked to specialised institutions for organised crime. Many of the practices that are relevant in war crimes proceedings are equally important or useful in organised crimes trials, such as witness protection and the use of technology, but also case management in complex cases – often involving multiple accused. When the time comes when no more war crimes trials are conducted, either because all proceedings are completed, or because defendants and witnesses will have died, the institutional infrastructure, staff, and skills of these specialised institutions will not be lost. Much of it is likely to continue to exist in organised crime proceedings.

The innovations of both the Serbian and BiH criminal codes are, however, restricted to the field of war crimes. In both cases, the new articles that were either positively or negatively triggered by the ICTY, can be found in the specific chapters on international crimes. This is logical, because the ICTY has little else to offer in terms of substantive law than the definition of international crimes.

War crimes jurisprudence has wider effects when it is replicated by others. Its only functions are: to act as a source for drawing up a narrative about what happened during the wars,[2367] and to inform the public accordingly. In Serbia, this is more difficult than in BiH, where all war crimes verdicts are systematically published on the website of the State Court of BiH, in contrast with Serbian courts that do not publish (Higher Court Belgrade), or selectively publish (the higher instances) their case law.

In addition, and interestingly, there is at least one Serbian interviewee who reported that the ICTY's jurisprudence on joint criminal enterprise was used in an organised crimes case.[2368] It thus also develops a life outside the war crimes realm.

In Bosnia and Herzegovina, ICTY jurisprudence is not only used in war crimes trials (to find the answer to a particular procedural question), but also in ordinary crimes trials.

2367 On what historians can do with verdicts of criminal tribunals, see: C. Axboe Nielsen (2013). Can We Salvage a History of the Former Yugoslav Conflicts from the Milošević Trial? In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 326-348). Oxford: Oxford University Press; and F. Bieber (2013a). Do Historians Need a Verdict? In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 349-376). Oxford: Oxford University Press.

2368 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

Most notably, defence counsel bring ICTY jurisprudence into ordinary crimes trials as an authority, for instance on questions of disclosure obligations of the prosecutor, or the like. As one Bosnian defence counsel put it: "I cannot un-know what I have learned studying the ICTY's procedure. Of course, I use it also in other trials, when it suits my case."[2369]

Witness protection and support is equally useful beyond war crimes trials. Once in-court witness protection was codified in the codes of criminal procedure, they became applicable in all trials where witness protection was necessary. Witness protection units and programmes within the relevant government institutions can also be activated more generally. Witness support offices have been established throughout Bosnia and Herzegovina, irrespective of whether the court or prosecutor's office deals with war crimes or not.

The precedents set by the SCBiH on granting compensation claims during the criminal process, instead of referring the victim to civil proceedings, can potentially also be followed in ordinary crimes contexts. In fact, as a representative of TRIAL International in BiH told me, they pursued strategic litigation in war crimes trials, among others, because the victims of war crimes (and especially, of sexual violence war crimes) are among the most vulnerable, and therefore particularly suitable for demonstrating the need for granting compensation at the criminal court.[2370]

Although technological means are not yet widespread in either Serbia or BiH, the aim is to make use of them more extensively (not just in specialised courts). The fact that this has not yet happened is mostly due to the limited resources of courts of ordinary jurisdiction, but also due to the reduced necessity for such technological means. Ordinary crimes cases are generally much less complex, rendering sophisticated evidence or case management software superfluous. Additionally, the public interest in ordinary crimes cases is not as high as in war crimes or organised crimes cases (in fact, considerations of privacy might often outweigh the public interest). Making verbatim recordings and electronic transcripts, or even audio-visual recordings of the trials, and publishing these, is therefore much less important – or should even be impeded. Nevertheless, a few features are certainly useful, such as videolink conference material, and the aim is to ensure that they become more widely available in Serbia and Bosnia and Herzegovina.[2371]

2369 Interview with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21.

2370 Cf. interview with TRIAL International representative, Sarajevo, 22 November 2018, I-23.

2371 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28; interview with EU Delegation to BiH representative, Sarajevo, 3 February 2017, I-10.

1.5 *Appraisal of the Observed Change*

In summary, a stark contrast can be observed between the impact of the ICTY on Serbia and on Bosnia and Herzegovina. In some areas, the Tribunal had no influence on Serbia at all, whereas even in those areas where impact is detectable, the degree of change is usually not as significant as in BiH.[2372]

How the changes described in Chapter 5 to 8, and analysed in sections 1.1 to 1.4, came about will be explained in the following section 2. Along the way, it will become obvious why there is such a stark contrast between Bosnia and Herzegovina and Serbia.

2 Explaining the ICTY's Impact on Bosnia and Herzegovina and Serbia

This section begins by recapitulating the impact theory developed in Chapter 3 (section 2.1 of this Chapter), before delving into an analysis of those impact factors that were relevant in the context of the ICTY, Serbia, and BiH. Section 2.2 will reiterate what was asserted in section 1.4 of Chapter 3 on the topic of 'Impact Receivers'. Section 2.3 will, instead of conducting a comprehensive examination of *all* impact factors that the theory entails, expand upon those factors that explain the Tribunal's effects at the domestic level. Section 2.4 is dedicated to outlining which networks that were developed around the ICTY internationally and domestically 'carried' the ICTY's demonstration and capacity building effects towards a tipping point – the highest point of the norm cascade. The ICTY's rule of law norm cascade in Bosnia and Herzegovina and Serbia will be described in section 2.5. It will become clear that instrumental to the Tribunal having an impact – no matter on what area – was how familiar the relevant actors were with the ICTY and what their stance towards it was.

2.1 *Theory Recap: From Capacity Building and Demonstration Effects to the Norm Cascade*

In Chapter 3, a theoretical model of how war crimes courts influence domestic justice systems has been developed based on existing research.

This model proposes that two types of 'impact factors' play a crucial role: direct and indirect impact factors. War crimes courts have 'capacity building abilities'[2373] and

2372 See, in particular, section 1.3.
2373 See Chapter 3, section 1.2.

'demonstration abilities'[2374], with the former being direct and the latter being indirect impact factors. As a prerequisite to having demonstration effects, the war crimes court will first have to establish (or demonstrate) its own authority, which is only possible if the court 1) is legally established,[2375] 2) is effective in its fight against impunity,[2376] and 3) achieves compliance with its orders and principles.[2377] In short, and simply put, it needs to be a 'good' criminal court. If it is respected as a good court, and if it then *demonstrates* what it means to adhere to the rule of law, the war crimes court will be perceived as legitimate, which increases the likelihood that domestic actors will follow the principles it aims to advance (by demonstrating them).[2378] In addition to merely being an example, the war crimes court has the possibility to directly influence its target society through capacity building initiatives. A war crimes court's capacity building abilities include its possibilities 1) to provide material resources,[2379] 2) to provide advice on legal reform, by making use of its own experiences on relevant matters,[2380] 3) to transfer the knowledge it has gained over the years,[2381] and 4) to empower the civil society.[2382] By implementing one or more of these four measures, a war crimes court can lay the groundwork for ensuring that local actors 'receive' the message that is demonstrated. For instance, during trainings or knowledge transfer, these same values would be propagated.

The impact model is furthermore based on the assumption that the 'receivers' of impact, i.e. the key constituents of war crimes courts, are first and foremost their counterparts at the domestic level – the court representatives. At the same time, depending on the area and the impact factor, war crimes courts can also affect a broader audience, namely members of the legislature, executive, or the civil society.[2383]

As a last step, the impact model proposed in Chapter 3 borrows Risse and Sikkink's 'norm cascade model' and the 'spiral model' in order to explain how a war crimes court's capacity building and demonstration abilities really lead to impact.[2384] The assumption is that advocacy networks,[2385] through a mix of constructivist and realist factors, assist in reaching a tipping point at which the norm that the war crimes court seeks to spread cascades into the domestic society. The result is norm internalisation.[2386]

2374 See Chapter 3, section 1.3.
2375 See Chapter 3, section 1.3.1.
2376 See Chapter 3, section 1.3.2.
2377 See Chapter 3, section 1.3.3.
2378 See Chapter 3, section 1.3.4.
2379 See Chapter 3, section 1.2.1.
2380 See Chapter 3, section 1.2.2.
2381 See Chapter 3, section 1.2.3.
2382 See Chapter 3, section 1.2.4.
2383 See Chapter 3, section 1.4.
2384 See Chapter 3, section 2.
2385 See Chapter 3, section 2.2.1.
2386 See Chapter 3, section 2.2.2.

The following sections will explain the ICTY's impact on Bosnia and Herzegovina and on Serbia, first, by analysing who the impact receivers were in the two countries (section 2.2), then by examining the relevant impact factors (section 2.3), prior to naming the Tribunal's advocacy networks (section 2.4), and zooming into the ICTY's rule of law norm cascade in Serbia and BiH (section 2.5).

2.2 Actors Relevant for Change

In Bosnia and Herzegovina, many of the mentioned legislative changes were initiated by the Office of the High Representative (OHR), who imposed the Law on the State Court of Bosnia and Herzegovina, as well as both the Criminal Code and the Code of Criminal Procedure. However, these – and all relevant accompanying laws – later also passed parliament. But in general, the OHR was behind the reforms that were initiated in the early 2000s, which included establishing the SCBiH and introducing new criminal laws. At the same time, specific working groups were established that worked out the details of the respective reform. These working groups also included local jurists, both academics and practitioners.[2387] The same applies to reforms providing for witness protection measures in and outside the courtroom.

Jurisprudential changes are, of course, implemented by judges – but often suggested by the prosecutor or the defence in their motions and submissions. In this respect, legal assistants also play an important role, as it is often them who draft the judgments (this holds true at least for the SCBiH).[2388]

Material changes, such as establishing the SCBiH court house and detention facility, providing for witness protection equipment or software for transcribing court proceedings, or, simply, for the court website where jurisprudence is published, is often a matter for the relevant government authorities and for the administrative staff within the courts.

Court practice, such as holding status conferences or organising a day of proceedings, is again a matter for judicial practitioners – mostly for judges, but also for the parties to the proceedings. Witness protection practices are implemented by the same practitioners, as well as by the police (as far as out-of-court protection is concerned). Likewise, whether or not technological equipment is used is mostly the judges' decision.

This demonstrates that it is mostly the political elites (in the relevant government institutions), law makers and legal practitioners who are responsible for the changes that occurred in the domestic legal systems in Serbia and Bosnia and Herzegovina.

2387 Cf. interview with OHR representative, Sarajevo, 20 November 2018, I-47; interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

2388 Cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9.

2.3 Factors That Mattered in BiH and Serbia

My analysis shows that most of the changes that were presented in the Chapters 5 to 8, and summarised in section 1 of this Chapter, can be explained by: 1) how intense the contact was between the ICTY and these domestic actors (political elites and legal practitioners); and 2) their view of the Tribunal – i.e. whether they saw it favourably or not. This is particularly visible in the comparison between Bosnia and Herzegovina and Serbia.

The intensity of contact between the ICTY and domestic actors reflects, in essence, a war crimes court's capacity building abilities – as it is through these capacity building initiatives that the relations between counterparts becomes closer. It will be shown in section 2.3.1 that by closely working together with domestic legal practitioners on the Tribunal's own cases or on national cases, but also through targeted training measures, the ICTY 'along the way' contributed to capacity building in Serbia and Bosnia and Herzegovina. The Tribunal also fulfilled an important role as a solicited advisor on legal reforms, thereby reinforcing its impact, as this permitted the ICTY to directly implement its experiences in legislative proposals. The second main impact factor that I observed, attitudes towards the Tribunal, mirrors its demonstration abilities: the ICTY will only make itself heard insofar as it is perceived as authoritative and legitimate.

From the impact model developed in Chapter 3, the only factor that did not stand out as relevant was the provision of material resources.[2389] Although the ICTY's efforts to secure funds for modern courthouses were certainly helpful, they did not significantly contribute to the developments described here. An additional factor, not mentioned in the impact model, but postulated by academics, is the jurisdictional regime between international war crimes court and national war crimes courts. As will be explained below,[2390] I did not find evidence that supports the assumption that the jurisdictional relationship is *that* relevant. All other factors (advice on legal reform, transfer of knowledge, and empowering the civil society as capacity building effects, and legality, effectiveness, compliance, and perceived legitimacy as demonstration effects)[2391] mentioned in the impact model could be confirmed in the contexts of BiH and Serbia.

2389 See Chapter 3, section 1.2.1.
2390 See section 2.3.1 below ("Change of the Jurisdictional Relationship Between the ICTY and Domestic Courts").
2391 See sections 1.2 and 1.3 of Chapter 3.

2.3.1 Capacity Building Abilities: Intensity of Contact

Impact Factor Advice on Legal Reform: The ICTY as a Solicited Advisor

As explained in section 1.2.2 of Chapter 3, advice on legal reform can lead to the alignment of domestic rules and practices with international standards, due to the fact that representatives of the war crimes court – with their background and experience – directly influence national law and practices.

As explained in section 2.1 of Chapter 1, even though the 'international community' saw the ICTY more as an 'alibi institution' relieving them from their bad conscience for not intervening during the Yugoslav wars, the Tribunal enjoyed great international support once it was up and running. Leaders from all over the world praised its potential role in the international fight against impunity and lauded its contribution to international humanitarian and international criminal law. This was manifested in the establishment of the International Criminal Court (ICC) at the Rome Conference in 1998.[2392]

The 'international community' present in Bosnia and Herzegovina in the aftermath of the wars regarded the ICTY highly. Of course, this reputation is partly derived from the ICTY's nature as a United Nations (UN) institution, as most other institutions that were active in BiH at the time were also UN institutions. At the same time, back then, it was common practice to consult with a variety of institutions on reform projects. The ICTY was considered *the* expert institution when it came to criminal law.[2393] Therefore, through the 'international community', and most importantly, the Office of the High Representative, the ICTY was a frequently solicited advisor. It thereby had a direct impact on the institutional set-up of domestic war crimes institutions[2394] and on Bosnian criminal legislation.[2395]

Arguably, the first step of bringing the ICTY to BiH and closer to the Bosnians was therefore made by the 'international community', and not by the Bosnians themselves. However, once the ICTY was present in BiH, the domestics had ample opportunities to interact and establish close ties with ICTY counterparts.

Impact Factor Transfer of Knowledge

In addition to providing material resources and advice on legal reform, the impact model presented in Chapter 3 mentions the transfer of knowledge as an important capacity building ability of war crimes courts. Several different measures can lead to knowledge transfer, as explained in section 1.2.3 of Chapter 3: collaboration and therefore 'learning

2392 See generally: Y. Aksar (2004). *Implementing International Humanitarian Law: From The Ad Hoc Tribunals to a Permanent International Criminal Court*. London: Routledge; or Cryer *et al.*, 2014.
2393 Cf. interview with OHR representative, Sarajevo, 8 February 2017, I-46.
2394 See Chapter 5.
2395 See Chapter 6.

from the experts', internship or fellowship programmes, formal trainings, or supervsion and therefore introduction to international standards.

Formal Trainings

As mentioned in section 1.2 of Chapter 5, at least with its completion strategy, the ICTY committed to actively strengthening the domestic justice systems. Therefore, judge Fausto Pocar refers to it as the "continuation strategy"[2396].

The ICTY provided and participated in numerous trainings for domestic legal practitioners with the aim of transferring the knowledge and skills that the Tribunal's staff had acquired over the years. Transfer of knowledge initiatives first concentrated on judges and prosecutors, but increasingly also targeted defence counsel.[2397] The issues that were addressed included substantive aspects of international criminal law and international humanitarian law, fair trial rights, or issues related to specific reforms or case referrals. Also practical matters, such as case investigation techniques, computerisation of the courtroom, or dealing with witnesses and victims,[2398] were addressed in the ICTY's training programmes or those in which the Tribunal participated.[2399]

On-the-Job Training

While these formal transfer of knowledge initiatives were generally welcomed, legal practitioners in Bosnia and Herzegovina and Serbia believed that more practical on-the-job training was more useful. In that regard, the Tribunal's internship programme and the domestic liaison prosecutors whose workplace was in The Hague – while working on domestic cases, but still interacting with ICTY staff – proved particularly useful. Both programmes provoked great interest and had high participation rates with participants from both countries.

In addition, in BiH, domestic practitioners had the opportunity to work side by side with foreign judges, prosecutors, and other staff members, some of whom had personal ICTY experience. They also made a significant contribution to introducing the ICTY's legacy, for instance in the form of jurisprudence into the domestic criminal justice system.[2400] Their involvement led to higher penetration of norms of international law into the domestic legal order.[2401] Beyond that, Chehtman and Mackenzie argue that working

2396 Pocar, 2008.
2397 Cf. Chehtman & Mackenzie, 2009, p. 16.
2398 Cf. Orentlicher, May 2008, p. 71f.
2399 Cf. Chehtman & Mackenzie, 2009, p. 15.
2400 Cf. Chehtman & Mackenzie, 2009, p. 19.
2401 Cf. Uhlířová, 2012, p. 219.

side-by-side had an important impact on the national legal culture – a crucial aspect of strengthening the domestic rule of law.[2402]

Cooperation: The Daily Business

As learning by doing – and by collaborating with – the Tribunal's counterparts ('learning from the experts') proved much more effective than formal trainings, the ICTY (and particularly the ICTY Office of the Prosecutor (OTP)) increasingly concentrated on establishing close ties with their counterparts in Serbia and BiH. The opportunity to collaborate presented itself since the very beginning of the existence of the Tribunal when it demanded the surrender of its defendants to The Hague.

Transfer of Defendants

As explained in section 4.2 of Chapter 5, Serbia has not always cooperated with the Tribunal to the satisfaction of the ICTY's and other actors. Orentlicher observes that there were two phases, essentially a Milošević and a post-Milošević phase. During the early years of its existence, Serbia completely refused to cooperate with the ICTY, and would therefore neither arrest nor surrender those accused, nor grant the Tribunal access to documents.[2403] Orentlicher explains that this

> "period has had an enduring impact on Serbia's relationship with the ICTY and on Serbian citizens' attitudes concerning accountability for atrocities committed by or with the criminal participation of Serbian leaders and citizens."[2404]

Indeed, the fact that Milošević called the Tribunal's campaign for cooperation "genocide against Serbs"[2405] deeply influenced the public's view of the ICTY. The second phase of cooperation began when Milošević had to step down after mass protests following alleged election fraud. This phase was marked by the opposition over the question of cooperation between Milošević's successor, President Vojislav Koštunica, and Serbia's Prime Minister Zoran Đinđić, with Đinđić becoming an advocate for good relations with the Tribunal.[2406] The Serbian public's reaction to transferring Milošević to The Hague was a 'turning point' in the cooperation between the Tribunal and Serbia, which improved from that moment

2402 Cf. Chehtman & Mackenzie, 2009, p. 20.
2403 Cf. Orentlicher, May 2008, p. 33f.
2404 Orentlicher, May 2008, p. 34.
2405 Orentlicher, May 2008, p. 35.
2406 Cf. Orentlicher, May 2008, p. 35-39.

onwards,[2407] with a temporary high after Đinđić's assassination in March 2003.[2408] The new willingness to cooperate was, however, never justified by altruistic principles, but rather by opportunistic considerations. For instance, Koštunica's policy of voluntary surrenders, with which he convinced a handful of accused to voluntarily surrender to The Hague by guaranteeing financial compensations to their families, was based on the claim that the accused would patriotically serve Serbia, as it would relieve the country from outside pressure. Thus, even when the Serbian government cooperated with the Tribunal by encouraging indictees to surrender, it strengthened the public's notion of an unjust tribunal.[2409]

Thus, although Serbia's outright refusal to cooperate with the Tribunal under Milošević turned into cautious willingness to cooperate, this willingness was just a response to intense outside pressure.[2410] Cooperation was therefore never based on moral grounds, but rather justified as being a precondition for ending the estrangement between Serbia and the West. Orentlicher concludes that "there is no clear message about the principles underlying ICTY cooperation even among those who support cooperation."[2411]

As a consequence, from early on, the Serbian public had a very negative perception of the Tribunal. In fact, it merely regarded it as a source of economic and political pressure, rather than a just institution that would ensure accountability for war crimes victims, and that would free the country from its worst criminals. At the same time, the Tribunal also did not contribute to an understanding of its work in a moral rather than opportunistic context. It has been argued that relentlessly insisting on cooperation meant "focusing on surrenders in its dealings with the Serbian government at the expense of emphasizing the values underlying the ICTY's work."[2412] Of course, the Tribunal needed surrenders in order to fulfil its mandate and conduct trials. However, it failed to connect this mandate to its broader goal of ensuring accountability and ending impunity for terrible crimes.

Indeed, the Tribunal's insistence on Serbia's cooperation was a necessity, because otherwise Serbia would probably not have surrendered the accused who resided in its territory. In the case of Bosnia and Herzegovina this was not necessary, as surrenders of the few accused who had not fled to other countries occurred without major resistance. This gave the Tribunal the opportunity to concentrate on other aspects of cooperation with Bosnia and Herzegovina, including preparing the domestic judiciary for taking over some of the ICTY's caseload. The good cooperation with Bosnia and Herzegovina also gave domestic practitioners yet another opportunity to interact with their ICTY counterparts

2407 Cf. Orentlicher, May 2008, p. 39.
2408 Cf. Orentlicher, May 2008, p. 43.
2409 Cf. Orentlicher, May 2008, p. 45.
2410 Cf. Orentlicher, May 2008, p. 50.
2411 Orentlicher, May 2008, p. 50.
2412 Orentlicher, May 2008, p. 102.

and intensify their relationships. Thereby, they could learn from the Tribunal's experts from the beginning. As Serbia was not even fulfilling basic requests regarding the handover of accused, there was no point in thinking about – and cooperating on – intense capacity building or the like. On the other hand, it was a missed opportunity to build other channels of communication from the outset with Serbia.

The ICTY's first president Antonio Cassese once noted that the ICTY was

> "like an armless and legless giant which needs artificial limbs to act and move. These limbs are the State authorities…the national prosecutors, judges and police officers. If state authorities fail to carry out their responsibilities, the giant is paralyzed, no matter how determined its efforts."[2413]

This perfectly explains how the Tribunal was dependent on national state authorities in order to fulfil its mandate. It depended on state authorities to carry out arrests and to surrender the ICTY's defendants, but also to hand over evidence, or grant Tribunal personnel access to the crime scenes and witnesses in the countries. Thus, especially in the beginning, the Tribunal needed to build authority among – what Levi and Hagan call – "compliance partners" in order to collect and develop the evidence required for prosecution. What helped, was the authority it enjoyed among third states, other international organisations, and among civil society groups, as they supported its quest for compliance and pressured the relevant states to cooperate.[2414]

It was therefore in the ICTY's own interest to build strong ties with domestic political elites and legal professionals, as it needed their cooperation in order to exercise its mandate. Its interest focused, in particular, on Bosnia and Herzegovina because most of the ICTY's cases related to crimes committed on the territory of what is now BiH.[2415] In terms of crimes, Serbia proper essentially 'only' experienced the bombings of Belgrade in 1999 by the North Atlantic Treaty Organization (NATO), which were not subject to trial proceedings at the ICTY.[2416] Therefore, many of the tasks ICTY personnel needed to perform in order

2413 Cited in: R. Levi & J. Hagan (2006). International Police. In M. D. Dubber & M. Valverde (Eds.), *The New Police Science: The Police Power in Domestic and International Governance* (p. 207-247). Stanford: Stanford University Press, p. 235.

2414 Cf. R. Levi, J. Hagan & S. Dezalay (2016). International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law. *Law and Contemporary Problems, 79*(1), 289-314, p. 303.

2415 Cf. Trapani, 2011, p. 11; see also: ICTY, Interactive Map, http://www.icty.org/en/cases/interactive-map (last accessed 31/08/2019).

2416 In fact, only one single case relates to crimes committed on the territory of Serbia proper. This is the case against Vojislav Šešelj who was convicted for delivering a hate speech in Hrtkovci, a village in the northern Serbian province Vojvodina, calling for the expulsion of Croats from the area and reading a list of individual Croat residents who should leave for Croatia. As a result, many non-Serbs were allegedly harassed, threatened with death and intimidated; consequently, many felt forced to leave the area. Homes of Croats were looted

to advance the Tribunal's own cases, were related to – or even took place in – BiH. Much less of its early contacts were with Serbia, from whom mostly only arrests and surrenders were expected.

Visits of the Crime Scene

In order to advance its own cases, the Tribunal's personnel had to – for instance – visit the crime scenes, interrogate witnesses at (or close to) their homes, or engage in excavations of mass graves. In order to perform these duties, ICTY staff regularly travelled to BiH. But the Tribunal also established two offices in Bosnia and Herzegovina (among others) for this purpose: one in Sarajevo, established in 1995;[2417] and one in Banja Luka, established in 1998.[2418] These field offices were supposed to provide support to investigative teams for their fieldwork in the former Yugoslavia; to act as a liaison between the ICTY Office of the Prosecutor and local and national governments, war crimes commissions, nongovernmental organisations (NGOs), and various United Nations agencies; to provide expert legal advice to the ICTY OTP on republic and federal law in the former Yugoslavia; to coordinate and report on the work of those monitoring war crimes trials in the former Yugoslavia; and to inform the OTP regarding important developments relevant to its work, including monitoring the situation with respect to the United Nations peace forces in the former Yugoslavia and local media reports.[2419] Increasingly, the field offices were also tasked with communicating with the affected communities, legal professionals, public officials, and civil society leaders.[2420] The field offices were closed as soon as cases relating to their respective territory were finalised.[2421] In short, the field offices established links between ICTY personnel and local government authorities and legal professionals with whom the ICTY needed to liaise in order to perform its tasks. In summary, the ICTY was very present in the country, not only for its own trial work, but also to train local personnel.

This was different in Serbia. In the early years of the Tribunal, the Former Republic of Yugoslavia refused to allow staff of the Tribunal's Office of the Prosecutor to enter Serbia

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and occupied by Serb families who had been displaced from other parts of the former Yugoslavia; cf. ICTY, Interactive Map, http://www.icty.org/en/cases/interactive-map (last accessed 31/08/2019), Hrtkovci; see also: MICT, *Prosecutor v. Vojislav Šešelj*, Judgment, MICT-16-99-A, Appeals Chamber, 11 April 2018, para. 175.

2417 Cf. ICTY (23 August 1995), *Annual Report 1995*, provided to the United Nations General Assembly and Security Council, A/50/365-S/1995/728, http://www.icty.org/x/file/ About/Reports%20and%20Publications/AnnualReports/annual_report_1995_en.pdf (last accessed 31/08/2019), p. 14.

2418 Cf. ICTY, 10 August 1998, p. 32; the Banja Luka office was open only for a few years; cf. interview with ICTY outreach officer, The Hague, 25 November 2016, I-7.

2419 Cf. ICTY, 23 August 1995, p. 14.

2420 Cf. ICTY, 16 November 2011, p. 14; ICTY, 18 May 2011, p. 20; ICTY, 19 November 2010, p. 18; ICTY, 13 November 2009, p. 15; ICTY, 18 May 2009, p. 14.

2421 At the time of writing, only field offices in Belgrade and Sarajevo are still operating.

and Kosovo.[2422] Even though relations between Serbia and the ICTY normalised over time, visits were less frequent than to Bosnia and Herzegovina. As none of the Tribunal's cases related to crimes that were committed in Serbia proper, crime scene visits were not necessary. Furthermore, a large number of witnesses interrogated for ICTY cases (direct or eye-witnesses) were typically not found in Serbia. Serbian witnesses would usually only be questioned on matters relating to the participation of a particular accused, but not on the crimes themselves. Visits, which were coordinated by a field office in Belgrade established in 1995/1996,[2423] became less and less frequent over time. While ICTY staff would still regularly come to BiH for cooperation purposes while I was conducting this research, this was not the case for Serbia.

Protected Witnesses

At the same time, contact with domestic political elites and – most importantly – domestic legal practitioners, was also necessary in order to ensure that witnesses who enjoyed protection in The Hague would continue enjoying the same protection when returning to their home countries.[2424] As most witnesses who had testified at the ICTY under one of the Tribunal's protection regimes were eye-witnesses, most of them came from places where crimes had been committed in Bosnia and Herzegovina.

Through informal working channels, the ICTY made sure that these witnesses would be protected, in addition to more structural initiatives in which the Tribunal advised national authorities on setting up similar in-court and out-of-court protection regimes under their national law. Again, the focus was on BiH, as most of the protected witnesses came from there.

In addition, when domestic war crimes proceedings gained momentum in BiH and Serbia, contact between the Tribunal and domestic courts increased when domestic practitioners needed access to ICTY-protected witnesses, because they were supposed to be interrogated by prosecutors or even at court. According to Rule 75 (H) of the Tribunal's Rules of Procedure and Evidence, domestic judicial authorities could submit an application to the ICTY president to rescind, vary, or augment the protective measures.[2425]

Indeed, this impact factor exemplifies how capacity building effects work: as the Tribunal closely cooperated with domestic authorities on witness protection – thereby advancing

2422 Cf. Michaeli, 2011b, p. 43.

2423 Cf. ICTY, 18 September 1997, p. 21; ICTY, 23 August 1995, p. 14.

2424 Cf. King & Meernik, October 2016, p. 61.

2425 The same rule can be found in Rule 86 (H) of the Rules of Procedure and Evidence of the United Nations International Residual Mechanism for Criminal Tribunals (MICT). The relevant rule has also been laid down in national law, see for instance: Law on Organization and Competences of Government Authorities in War Crimes Proceedings, Article 14a (6).

its own cases – domestic practitioners acquired the necessary skills to improve witness protection (and thereby *their* own cases) at the national level.

Exchange of Evidence

As explained in section 4.2 of Chapter 5, the ICTY shared the evidence it had collected with domestic authorities, either by transferring it to them together with Rule 11*bis* or Category II case files, or as 'leftovers', by responding to requests for evidence from parties to domestic proceedings,[2426] or by making its databases available to domestic liaison prosecutors. This evidence was – and still is – crucial to prosecutions of war crimes in both BiH and Serbia,[2427] and this form of mutual international assistance had a "positive impact"[2428] on domestic war crimes prosecutions.

However, that was not the only benefit. In fact, an efficient and respectful working relationship was formed between the ICTY Office of the Prosecutor and national prosecutors,[2429] which removed mutual fears of contact, as both sides increasingly got to know and appreciate each other.[2430] It has fostered a "partnership" between the Tribunal and its domestic counterparts, which both sides view as a "great cooperation".[2431] More than that, mutual respect was developed, and the Tribunal had the unique opportunity to instil its practices into the domestic systems.

Domestic legal practitioners in BiH explained that this collaboration contributed to their view that the Tribunal was a professional court (in the sense of being effective and efficient), and that much of the authority it developed among domestic institutions and practitioners, was due to the fact that it could offer solutions for various practical and legal problems that also they faced.

The contact with Serbian domestic institutions was much less frequent and the working relationship less intensive. As there are fewer cases taking place before Serbian domestic institutions, and because domestic cases have less in common with the cases in The Hague, there was no need for more intensive cooperation. Of course, mutual assistance also existed

2426 Such requests have been and still are very frequent. In 2011, Michaeli reported that they occur on a weekly basis; cf. Michaeli, 2011b, p. 55f. In the meantime, the competence to deal with these requests has almost completely been handed over to the domestic liaison prosecutors who are based in The Hague. Domestic institutions still make frequent use of ICTY evidence; cf. interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15; interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55; interview with OKO representatives, Sarajevo, 8 February 2017, I-36.

2427 Cf. Orentlicher, May 2008, p. 69; confirmed in: interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3; interview with OWCP expert assistant, Belgrade, 26 January 2017, I-55.

2428 Kirs, 2011, p. 404.

2429 Cf. Michaeli, 2011b, p. 55.

2430 Cf. interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

2431 Cf. Orentlicher, May 2008, p. 70; confirmed in: interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52; interview with POBiH prosecutor, Sarajevo, 9 February 2017, I-3, interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

with Serbian institutions. But, as explained, in the beginning, the relationship was marked by mutual distrust.[2432] Although relations improved, and mutual respect developed, the point was never reached where domestic practitioners were so convinced of the value of ICTY solutions, that they would draw inspiration from them (at least much less than BiH practitioners).

These cooperation initiatives therefore demonstrate how, on the one hand, collaboration can lead to an experience of 'learning by doing' among domestic practitioners, but at the same time, they also provide an opportunity to get to know each other and develop mutual respect. This effect will become relevant when explaining the second main impact factor (attitudes towards the Tribunal) in section 2.3.2 below. Attitudes ultimately also depended on the extent to which the ICTY was perceived as foreign or 'strange' by domestic actors.

Change of the Jurisdictional Relationship Between the ICTY and Domestic Courts

Some have argued that the jurisdictional regime within which an international war crimes court operates, and particularly its jurisdictional relationship with national courts, is decisive for the impact it can have on domestic justice systems.[2433] Through the jurisdictional design and policy choices of the court, as Burke-White argues, it can monitor, sanction, and provide benefits directly to national governments.[2434]

With respect to the ICTY, Burke-White argues that "the variance in the Tribunal's influence [is] in large part [attributed] to changes in its jurisdictional relationship with national courts brought about by the ICTY's Completion Strategy." He analyses the situation of the ICTY in Bosnia and Herzegovina, comparing the time before 2002 and after 2002, with the year 2002 being marked by the Tribunal's completion strategy and by the preparation to transfer cases. According to Burke-White, at that time, the jurisdictional relationship shifted from "absolute international primacy"[2435] to a regime that was "close to complementarity"[2436]. He notes that the jurisdictional regime of absolute international

2432 Cf. Michaeli, 2011b, p. 50.

2433 Cf. Burke-White, 2007, p. 280 and 345.

2434 Cf. Burke-White, 2007, p. 284; in his primarily rational choice model, Burke-White, however, also includes two other factors that influence an international war crimes court's possibility to have a domestic impact: first, preferences of domestic actors, and second, norm leadership by the respective tribunal; cf. Burke-White, 2007, p. 303-306. He defines "norm leadership" as setting the "standards of appropriate behaviour for actors with a given identity;" cf. Burke-White, 2007, p. 306. Institutions would be looking at one another for ideas, innovations, and best practices. Domestic institutions may borrow from or adopt the policies and practices of their international counterparts, and vice versa; cf. Burke-White, 2007, p. 307.

2435 With this concept, Burke-White refers to the power of the ICTY to defer cases from the national level to The Hague, but also its possibility to impede cases that are ongoing at the national level, through the controlling mechanisms of the Rules of the Road programme; cf. Burke-White, 2007, p. 310.

2436 Complementarity is the jurisdictional regime of the International Criminal Court (ICC, see Article 17 of the Rome Statute) which puts the ICC in a position of being the last resort, meaning that it would only become active when national courts do not. The ICC can thus not take away cases from national courts as the ICTY under its primacy regime. When Burke-White speaks of "close to complementarity", he means

primacy over domestic courts was not an incentive for domestic prosecutions, or even fair domestic prosecutions. In addition, national and international actors did not have an interest in such domestic prosecutions, nor did the Tribunal intend to send a message through norm leadership. This changed after 2002 with the introduction of a close-to-complementarity regime.[2437] According to Burke-White, the Rule 11*bis* referral requirements provided domestic courts with clear guidelines and targets around which to structure reform efforts.[2438] The new rule gave the ICTY the means to provide benefits directly to those national institutions within BiH that met the criteria for an effective judiciary, and thereby to push national institutions to meet the benchmarks it had set for the effectiveness of a domestic judiciary.[2439] At that time, it was in the interest of both the ICTY and domestic actors to conduct prosecutions, with the ICTY implementing its completion strategy, and domestic actors being under increasing pressure from the civil society, and from a group of legal practitioners who aimed to enhance the competences of the federal judiciary.[2440] At the same time, the ICTY had been playing an important part in generating new norms adopted by BiH – a process that was spearheaded by a number of organisations, including the ICTY itself, but also the OHR and the internationalised Registry of the SCBiH.[2441] Simultaneously, domestic officials looked to their international counterparts for leadership and guidance, eagerly embracing the norms proffered by the international level of governance, in response to the incentives provided by the jurisdictional relationship of Rule 11*bis*.[2442]

This view on the importance of Rule 11*bis* cases in terms of impact on the domestic justice system is shared by ICTY OTP and ICTY judges,[2443] and is also reflected in the literature.[2444] Burke-White proves his finding by explaining that:

> "[i]n all aspects of its creation, the [S]CBiH has sought to borrow the norms, procedures, and best practices of international institutions specifically so as to

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that with the completion strategy, the *de facto* jurisdictional regime changed in the sense that it had become highly unlikely that the ICTY would defer cases from national courts to The Hague. Rather, it would only become active if absolutely necessary. One can fairly say that the ICTY's jurisdictional regime, as introduced by the completion strategy (with its Rule 11*bis* referrals coupled with capacity building and close cooperation) better achieved the goals of complementarity than the ICC currently does.

2437 Cf. Burke-White, 2007, p. 310-344.

2438 Cf. Burke-White, 2007, p. 323.

2439 Cf. Burke-White, 2007, p. 324.

2440 Cf. Burke-White, 2007, p. 331f.

2441 Cf. Burke-White, 2007, p. 335.

2442 Cf. Burke-White, 2007, p. 335f.

2443 Cf. interviews with ICTY judges, The Hague, 2 December 2016, I-33; and Berlin, 20 December 2016, I-42; interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

2444 See for instance: Canter, 2008-2009, in the context of the International Criminal Tribunal for Rwanda's Rule 11*bis* regime.

> meet the standards for referral of cases back from the ICTY discussed above. Each element of the Court – from the applicable law to the structure of the prosecutor's office, and from the criminal defense section to the information technology unit – closely parallels the requirements set forth in the ICTY Completion Strategy and the early decisions of the ICTY Referral Bench. […] The new [S]CBiH is thus a product of the norms led by the international community, the incentives flowing from a jurisdictional relationship similar to complementarity under Rule 11*bis*, and the self-interested motivation of actors within the ICTY and the government of BiH."[2445]

While it is true that the prospect of receiving cases from The Hague triggered the establishment of the war crimes department at the State Court of Bosnia and Herzegovina, domestic actors do not acknowledge the importance attributed to Rule 11*bis* in terms of reform and change of judicial practices.[2446] It was not so much the transferred cases themselves that led to changes, and even less so the formal jurisdictional relationship between the Tribunal and domestic courts, but rather the cooperation with external actors (such as with ICTY representatives and especially with foreign judges and prosecutors) regarding these cases that stimulated change. Domestic actors recount that what made them more open to new concepts was, on the one hand, the authority that the ICTY had developed throughout several years of good cooperation (during which it offered innovative legal solutions), and on the other hand, the collaboration with foreign judges and prosecutors who had experience in applying these new concepts. It is true that the ICTY itself viewed the Rule 11*bis* case referrals as an opportunity to assess domestic needs and follow up on them with tailor-made capacity building activities.[2447] It is clear that the formal rule itself, even if Burke-White sees it as a "guideline", was not enough to trigger change.[2448] What made the difference was rather, first, the close ties that evolved around the Rule

2445 Burke-White, 2007, p. 344.

2446 Cf. Barria and Roper speak of a "momentum" created for reforming Bosnia and Herzegovina's (BiH) judiciary system at the state level; cf. Barria & Roper, 2008, p. 323. Also Orentlicher calls the completion strategy an "impetus for change"; Orentlicher, 2010, p. 114.

2447 Cf. interview with ICTY OTP legal advisor, The Hague, 25 November 2016, I-15.

2448 It is true, however, that one (good informal contact) cannot go without the other (a conducive legal relationship): scholars have found that the Rules of the Road programme was a "significant source of disempowerment for local judiciaries"; Chehtman & Mackenzie, 2009, p. 24; similar: Orentlicher, 2010, p. 110-113. The programme not only shaped the formal relationship between domestic courts and the ICTY, but also the relationship between legal professionals on both sides: a survey, conducted in 2000 in BiH, indicated that local legal professionals perceived "disrespect" in their sporadic contact with the ICTY, suggested that the ICTY officials failed to keep them informed of the status of the investigations even in response to direct enquiries and in fact, that the international community saw them as intellectual inferiors who did not understand the relevant law. The study concluded that these professionals viewed the ICTY as unresponsive and detrimental to the ability of the Bosnian courts to conduct national war crimes trials; cf. Chehtman & Mackenzie, 2009, p. 24.

11*bis* transfers between ICTY and Bosnian actors, and second, the opportunity that the monitoring of Rule 11*bis* cases provided to identify local needs in terms of knowledge and skills. As stipulated above, it is therefore rather the oversight aspect of the new jurisdictional regime that led to capacity building effects.

That the mere change in jurisdictional regime was not decisive is moreover confirmed by the fact that in 2002, the ICTY's jurisdictional relationship also changed towards the other countries of the region, including Serbia. However, the same developments cannot be observed there as of 2002. As was explained in section 1.6 of Chapter 5, the prospect of an altered jurisdictional regime vis-à-vis the ICTY did not trigger the establishment of specialised war crimes institutions, but anti-Hague sentiments and political will did. In addition, although Rule 11*bis* could have acted as a 'guideline' for the Serbian judiciary as well, legislators and legal practitioners did not respond to it by altering Serbian legislation or jurisprudence.

The differences between Bosnia and Herzegovina and Serbia can therefore not be explained by the *de facto* change in the jurisdictional regime of the ICTY that was introduced by Rule 11*bis*. Instead, the informal cooperative and collaborative aspects are more relevant.[2449] And since the informal contacts between Serbian and ICTY officials were initially not that good and not that intensive, the difference with BiH becomes even more understandable.

It is of course true that only one case involving one accused was referred to Serbia, compared to six cases involving 10 accused that were referred to BiH. Reportedly, the limited number of cases that the Serbian war crimes court received was "not a source of pride" for Serbia, also considering that the ICTY's Referral Bench had refused the referral of the so-called Vukovar Three case (the *Mrkšić et al. case* (IT-95-13/1)), for which Serbia had applied.[2450] This possibly explains why the Rule 11*bis* innovations were not seen as an encouragement for reform by Serbian officials to the same extent as by Bosnian officials. But again, this was not confirmed in interviews with legal practitioners in Serbia and BiH. In fact, Serbian legal professionals do not accord any importance to these referrals.[2451] Indeed, as Serbia received only one case (which was, to this day, not adjudicated due to the court's finding that the defendant was unable to stand trial), the ICTY did not organise

2449 My impression is that people in the Balkans accord much more importance to informal contacts than to formal relationships or rules. This might, at times, be overlooked by people who know little about the functioning of societies in the countries of the former Yugoslavia. The issue of how the influence of Rule 11*bis* versus that of informal cooperation and collaboration between peers is evaluated is, in my opinion, a good example of this phenomenon.

2450 Cf. Michaeli, 2011b, p. 54f.

2451 Cf. interview with transitional justice and rule of law expert, Belgrade, 27 January 2017, I-17; interview with OWCP prosecutor, Belgrade, 19 January 2017, I-52.

the same needs assessment and tailored programmes to transfer skills and knowledge to domestic professionals.

Appraisal of the ICTY's Capacity Building Abilities

It becomes clear that since the very beginning, the Tribunal had more intense contact with domestic officials from Bosnia and Herzegovina than with those from Serbia. This was due to the fact that most of the ICTY's own cases related to BiH and therefore required cooperation from the Bosnian authorities and institutions. In fact, for many years, cooperation from Serbia regarding the transfer of evidence and accused proved to be cumbersome due to mutual mistrust. As a consequence, there was less interaction with Serbia, which likely inhibited any attempts from the Tribunal to cooperate on other matters, the way it did with Bosnia and Herzegovina. Indeed, the mindset of ICTY judges, prosecutors, and administrators, was not geared towards assisting Serbia (contrary to BiH), especially when it was not properly cooperating with the Tribunal. Moreover, Serbian domestic officials had no particular interest in further interaction with the ICTY.[2452]

The intensive contact with Bosnia and Herzegovina continued throughout the implementation of the ICTY's completion strategy, during which it not only transferred ready and 'unready' cases (mostly) to BiH, but also increasingly concentrated on preparing domestic institutions to continue the prosecution of war crimes. Nevertheless, the DOMAC research project, which assessed the impact of a variety of international and internationalised criminal courts on their target audiences, concluded that once the ICTY became aware of the necessity to also identify the local needs of the Serbian judicial system, and to cultivate a positive working relationship with Serbian institutions entrusted with war crimes prosecutions, it managed to transfer expertise as well as evidence. That way, to a somewhat limited exntent, the Tribunal still complemented the limited capacity of the Serbian judicial system to process war crimes.[2453]

My research demonstrates that more intense contact with Bosnia and Herzegovina ultimately also led to greater impact of the ICTY on the domestic criminal justice system.[2454] In the beginning, it was in the Tribunal's very own interest to establish intensive relationships with the domestic justice systems of the countries of the former Yugoslavia, because it depended on them to fulfil its mandate. But there was more to this: the intense contact gave the Tribunal the opportunity to establish itself as a reliable partner, a competent institution that works according to high standards, and that offers solutions for a myriad of problems – both for practical problems, for instance by providing evidence and advice, and for legal problems, for instance by offering interpretations of new legal provisions.

2452 Cf. Michaeli, 2011b, p. 87.
2453 Cf. Michaeli, 2011b, p. 5.
2454 Trapani comes to the same conclusion: Trapani, 2011, p. 68.

That way, the ICTY gained great respect among domestic legal practitioners in Bosnia and Herzegovina, making it, in turn, more likely that they would adopt solutions offered by the Tribunal – be that in terms of institutional, legislative, jurisprudential, or practical solutions. Ultimately, the good relationships between the ICTY and domestic personnel helped the Tribunal in establishing a domestic legacy.

In addition, the authority that it had gained as an effective and fair criminal court in the meantime (both internationally and domestically), led, in BiH, to frequent consultations with the Tribunal on domestic criminal reforms. This yet again increased the ICTY's impact on the Bosnian criminal justice system, for instance in terms of substantive and procedural criminal law.

In terms of having an impact on BiH's justice system, it was certainly helpful that the ICTY enjoyed such strong support internationally. This yet again reinforced its reputation at the domestic level.

For Serbs, however, who had less frequent contact with the ICTY, the court remained something foreign, something alien, something strange. The same respect for the Tribunal could therefore not ensue, and domestic officials remained mostly reluctant to adopt legislation, jurisprudence, court or prosecutorial practices. There are exceptions, however. When it comes to witness protection and support, as well as using technology in the courtroom, Serbian institutions gladly drew inspiration from the Tribunal. The reason for this seems to be that these two areas are purely practical, and not built on an 'ideology' or a particular (legal) cultural conviction. When comparing witness protection and using technological means to, for instance, criminal legislation or jurisprudence, with the former often having been developed over decades or centuries, and the latter expressing the current beliefs and interpretations of judges regarding long-standing legislation. Adopting practices from the ICTY is therefore not dependent on whether a particular practice is 'good' or 'bad', but rather whether it is useful or not. The Tribunal's impact in these two areas can thus be explained by purely opportunistic considerations on the side of domestic officials, and not by their level of respect for the ICTY.

This impact factor of intensity of contact is therefore intertwined with the next impact factor of domestic officials' attitudes towards the Tribunal: my research shows that the more contact domestic practitioners had with the ICTY, the better their view of it, and the greater the likelihood that they would use elements of the Tribunal's legacy. A former ICTY judge put it this way:

> "I think those who are very much opposed against the Tribunal are usually not found in the judiciary, although I am not sure about that. At least those who are in favour of the ICTY will be encouraged and will benefit from sharing

> experience as we are benefitting from their experience. And those who are sceptical about it may be less sceptical about it."[2455]

The Tribunal could therefore influence how it was perceived by domestic officials by establishing close ties.

In conclusion, the impact model suggests that advising on legal reforms and transferring knowledge increases the capacity of domestic actors, but it also does more than that: the intensive contact that can evolve through capacity building initiatives may also lead to mutual respect and understanding. This, in turn, influences domestic actors' attitudes towards the Tribunal and whether it is seen as legitimate. This second main impact factor explaining the ICTY's impact in Serbia and Bosnia and Herzegovina will be further developed in the following section.

2.3.2 Attitudes Towards the ICTY

Although the topic of this research is the legal impact of the ICTY on the judiciaries under its jurisdiction, and not its political effects or the societal reactions that it provoked in the countries of the former Yugoslavia,[2456] these latter aspects do play a role in examining the former. This can be explained by the fact that the judiciaries do not operate in a vacuum, but are influenced by political and societal processes. Attitudes towards the Tribunal are therefore an important determining factor in whether it manages to establish itself as an authoritative criminal court and whether it will be perceived as legitimate.

One of my main findings is therefore that those who played a key role in incorporating elements of the ICTY's legacy into the domestic judicial system – mainly legislators, legal professionals, and the police – had an influence on their broader environment. In fact, it clearly transpires from my research that within Bosnia and Herzegovina, where the general atmosphere was more favourable towards the Tribunal, even those decision makers who were personally not supportive of the ICTY or of a particular element of its legacy, were – and are – nevertheless more inclined to use it (to their advantage) than their colleagues in Serbia. As shown in Chapters 5 to 8, a wealth of ICTY-related elements can be found in the Bosnian criminal justice system, and making use of the Tribunal's experience and expertise has practically become institutionalised, and therefore no longer depends on the will of individual legislators, judges, prosecutors, lawyers, or police officers. In Serbia, where the ICTY faced strong opposition among political elites and the general public, the opposite is true: even those legislators and legal practitioners who have a rather favourable stance towards the Tribunal, are more reluctant to use elements of its legacy. A brief analysis

2455 Interview with ICTY judge, The Hague, 2 December 2016, I-33.

2456 Much has been written about these topics. See, for instance: Ostojić, 2014, for Serbia, and Nettelfield, 2010, for BiH, naming only two prominent publications.

of the general public's, politicians', and the media's attitudes towards the ICTY, of its effects on knowledge about the war, and of the level of acknowledgement of war crimes is therefore indispensable. For my analysis, however, these general attitudes are only relevant insofar as they explain the views of 'impact receivers' on the Tribunal.

Prior to further analysing the ICTY's demonstration abilities below, this section will therefore provide a general overview of perceptions of the Tribunal in BiH and Serbia. It will start by introducing the ICTY's outreach activities that aimed to bring the Tribunal closer to the people, thereby influencing their views. It continues by outlining the general public discourse in Serbia and Bosnia and Herzegovina. The last section will be dedicated to what this means for the ICTY's demonstration abilities.

The ICTY's Outreach Activities

In the early years, the Tribunal paid little attention to communicating with the region (the most iconic exemplification of this fact is that it took the ICTY six years to issue its first press release in a language of the countries of the former Yugoslavia, rather than only in English or French).[2457] The reasons for this included the ongoing conflict (that lasted until 1999), funding constraints, as well as the professional culture – mostly among judges, who were, on the one hand, convinced that rendering verdicts was sufficient, and on the other hand, feared allegations of bias if they were to engage in anything more than trial proceedings.[2458]

The consequence was that reflections on verdicts in the region went through the filter of local politicians. In 1998, former ICTY President Gabrielle Kirk McDonald and former Prosecutor Louise Arbour became aware of the fact that the Tribunal was misunderstood and wilfully misrepresented, but that it had no capacity to counter those accounts. That is how the idea of an outreach programme was born, although even organised outreach had limited possibilities to dispel the appeal of elite nationalist discourse. The outreach programme was established in September 1999.[2459] Its goal was to improve the understanding of the work of the ICTY and its relevance in the territory of the former Yugoslavia, by making the ICTY's activities more transparent and accessible to local communities.[2460] In 2005, the outreach programme was merged with the Press and Information Services Section.[2461]

2457 Cf. Orentlicher, 2018, p. 308; I elaborate on this here: Brodersen, 2018.
2458 Cf. Orentlicher, 2018, p. 309.
2459 Cf. Orentlicher, 2018, p. 309.
2460 Cf. ICTY, 7 August 2000, p. 33.
2461 Cf. ICTY, 17 August 2005, p. 39.

The programme set out with translating key judgments and decisions, basic documents, including all information sheets and press releases, as well as the Tribunal's website,[2462] first into Bosnian/Croatian/Serbian (BCS),[2463] and later also into Albanian and Macedonian.[2464] Public court sessions were broadcasted live on the Tribunal's website in English, French, and as of 2000, also in BCS and Albanian.[2465] In 2010, the ICTY also started using social media. While the interest in the broadcasting of high-profile cases was always high,[2466] the Tribunal's website and social media presence generated less and less interest over the years.[2467]

The ICTY communicated and worked intensively with the media in order to improve reporting about war crimes trials.[2468] Over the years, these efforts slightly improved the quality of ICTY coverage, while in the past, media coverage related to the ICTY had almost exclusively been biased, which contributed to keeping opinions divided about the work of the ICTY and the facts it established.[2469] Towards the end of the existence of the ICTY, the outreach programme produced thematic and regional documentaries, which were published on the Tribunal's website and YouTube channels.[2470] In a similar effort to provide

2462 Cf. ICTY, 17 August 2005, p. 40; ICTY, 16 August 2004, p. 78; ICTY, 20 August 2003, p. 60; ICTY, 4 September 2002, p. 44; ICTY, 7 August 2000, p. 33.

2463 Cf. ICTY, 7 August 2000, p. 33.

2464 Cf. ICTY, 20 August 2003, p. 60.

2465 Cf. ICTY, 20 August 2003, p. 60; ICTY, 7 August 2000, p. 33.

2466 For instance, in September 2005, there were 10 000 clicks on the English website, 98 000 on the BCS website, and 1 5000 on the Albanian website; cf. ICTY, 14 December 2005, p. 9. High numbers of clicks were also achieved in the following years; see for instance: ICTY, 31 May 2006, p. 14; ICTY, 16 May 2007, p. 9; ICTY, 14 May 2008, p. 8; ICTY, 13 November 2009, p. 15; ICTY, 16 November 2011, p. 14; ICTY, 23 May 2012, p. 12; ICTY, 23 May 2013, p. 12; ICTY (16 November 2015), *Completion Strategy Report November 2015*, provided to the United Nations Security Council, S/2015/874, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/151116_icty_progress_report_en.pdf (last accessed 15/08/2019), p. 10.

2467 Cf. ICTY, 18 May 2011, p. 20; ICTY, 16 November 2011, p. 14; ICTY, 18 November 2013, p. 9; ICTY (17 November 2016), *Completion Strategy Report November 2016*, provided to the United Nations Security Council, S/2016/976, www.icty.org/sites/icty.org/files/documents/161117_icty_progress_report_en.pdf (last accessed 15/08/2019), p. 24; ICTY (17 May 2017), *Completion Strategy Report May 2017*, provided to the United Nations Security Council, S/2017/436, www.icty.org/sites/icty.org/files/documents/170517_icty_progress_report_en.pdf (last accessed 31/08/2019), p. 11.

2468 Cf. ICTY (15 May 2015), *Completion Strategy Report May 2015*, provided to the United Nations Security Council, S/2015/342, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_15may2015_en.pdf (last accessed 15/08/2019), p. 11; ICTY, 16 May 2014, p. 7; ICTY, 23 May 2013, p. 12; ICTY, 16 November 2011, p. 14; ICTY, 13 November 2009, p. 15; ICTY, 14 May 2008, p. 8; ICTY, 16 May 2007, p. 10; ICTY, 16 August 2004, p. 78; ICTY, 20 August 2003, p. 60; ICTY, 4 September 2002, p. 44; similar: Nettelfield, 2010, p. 159. At the very beginning of the outreach programme, there were even efforts to establish an independent weekly BCS TV programme on the ICTY broadcasted throughout the region; cf. ICTY, 7 August 2000, p. 33f.

2469 Cf. Nettelfield, 2010, p. 159.

2470 Even though the first documentary about the ICTY was produced as early as 2000; cf. ICTY, 7 August 2000, p. 34; ICTY, 16 November 2011, p. 14; ICTY, 18 November 2013, p. 9; ICTY (19 November 2014), Com*pletion Strategy Report November 2014*, provided to the United Nations Security Council, S/2014/827,

information about which specific crimes had been committed in specific regions, the ICTY's website featured information on crimes committed per region on an interactive map.[2471]

In addition to that, the outreach programme was designed to reach out to local communities and NGOs,[2472] victims' associations, and educational institutions committed to promoting the rule of law, truth telling, and reconciliation.[2473] With the aim of providing explanations to the local population regarding the functioning and work of the Tribunal, as well as its verdicts, the outreach programme also organised conferences and symposia attended by ICTY officials, as well as round-tables, presentations, and lectures.[2474] Partly in order to better position itself to communicate with local communities,[2475] the Tribunal

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www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_19nov2014_en.pdf (last accessed 15/08/2019), p. 8; ICTY, 15 May 2015, p. 11; ICTY (17 May 2016), *Completion Strategy Report May 2016*, provided to the United Nations Security Council, S/2016/454, www.icty.org/sites/icty.org/files/documents/160517_icty_progress_report_en.pdf (last accessed 14/08/2019), p. 11.

2471 Cf. ICTY, 31 May 2006, p. 14; see here: ICTY, Interactive Map, http://www.icty.org/en/cases/interactive-map (last accessed 12/09/2019).

2472 Cf. ICTY, 18 May 2011, p. 20.

2473 Cf. ICTY, 14 May 2008, p. 8; ICTY, 12 November 2007, p. 10; ICTY, 17 August 2005, p. 40; ICTY, 16 August 2004, p. 77; ICTY, 20 August 2003, p. 60; ICTY, 4 September 2002, p. 44; ICTY, 7 August 2000, p. 34; the Tribunal has worked with over 50 such associations; cf. ICTY (29 November 2017), *Completion Strategy Report November 2017*, provided to the United Nations Security Council, S/2017/1001, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/171129-completion-strategy-report-icty.pdf (last accessed 14/08/2019), p. 46; ICTY, 16 May 2014, p. 7; ICTY, 23 May 2013, p. 12; ICTY (19 November 2012), *Completion Strategy Report November 2012*, provided to the United Nations Security Council, S/2012/847, www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16november2012_en.pdf (last accessed 14/08/2019), p. 10; ICTY, 13 November 2009, p. 15; ICTY, 12 November 2007, p. 10; ICTY, 16 November 2006, p. 6; ICTY, 7 August 2000, p. 34.

2474 Cf. ICTY, 23 May 2012, p. 12; ICTY, 1 June 2010, p. 20; ICTY, 24 November 2008, p. 10; ICTY, 16 November 2006, p. 6; ICTY, 16 August 2004, p. 78; ICTY, 20 August 2003, p. 60; ICTY, 4 September 2002, p. 44; ICTY, 7 August 2000, p. 34; worth mentioning is a series of conferences held in 2004-2005 ("Bridging the Gap Between the ICTY and Communities in Bosnia and Herzegovina"). Once a case reached a final conclusion, ICTY officials and staff travelled to the town where adjudicated crimes had occurred and met with local judicial officials, students, members of the civil society, representatives of international organisations, and the diplomatic corps to explain how they investigated, prosecuted, and adjudicated the crimes, describe the outcome of cases, and respond to questions. This was the most robust outreach initiative of the ICTY. According to participants' and observers' accounts, the majority of attendees of these conferences subsequently understood that people from their communities were not convicted because of their ethnicity, but because of the crimes they had committed, although there had also been incidents of denial and laughter or shouts. It seems that in the short run the conferences advanced acknowledgement of crimes, but their impact in the long run was limited: due to funding problems, the conferences were discontinued after five events, and nongovernmental organisations' (NGO) events who had picked up the idea were not attended by multi-ethnic audiences; cf. Orentlicher, 2018, p. 311ff.; see also: ICTY, 16 May 2007, p. 9; ICTY, 31 May 2006, p. 14; ICTY, 14 December 2005, p. 9. For the ICTY's Legacy Conferences towards the end of its mandate, see: ICTY, 17 May 2017, p. 12; ICTY, 17 November 2016, p. 24; ICTY, 18 November 2013, p. 14; ICTY, 19 November 2012, p. 10.

2475 Cf. ICTY, 16 November 2011, p. 14; ICTY, 18 May 2011, p. 20; ICTY, 19 November 2010, p. 18; ICTY, 13 November 2009, p. 15; ICTY, 18 May 2009, p. 14.

set up field offices in Belgrade, Sarajevo, and Zagreb[2476] in 1995/1996,[2477] in Banja Luka in 1998, and in Pristina in 2001.[2478]

In addition, it was of particular importance to the Tribunal to work with the youth in the region. ICTY representatives saw great potential for changing the trajectory of denialism, as young people are usually more susceptible to changing their views than their parents.[2479] The outreach programme therefore designed numerous events specifically targeted at young people.[2480]

The task of the outreach programme was clear: to explain the functioning and work of the ICTY to those communities most affected by the crimes at the heart of the Tribunal's work, to clarify how the ICTY held perpetrators accountable, and to communicate facts about war crimes established by the ICTY beyond reasonable doubt.[2481] The goal was to counter myths, misperceptions, and inaccurate information that circulated in the countries of the former Yugoslavia, and to ensure greater understanding of the work of the ICTY.[2482] The hope was that the Tribunal's achievements would be recognised – or even that local communities would take ownership of the ICTY's achievements –[2483] and that support for the ICTY's work in the former Yugoslavia would increase.[2484]

However, the outreach programme faced many difficulties; it was not included in the Tribunal's budget and was financed only through voluntary contributions from donors,[2485] which, to make matters worse, declined towards the end of the Tribunal's existence. A structured and lasting programme could not be built under those conditions.[2486]

On top of that, critics note that the outreach programme had been largely confined to providing information to journalists and members of the legal profession, rather than communicating with the public in a more direct manner.[2487]

The consequence of a late and unambitious outreach programme was – and remains – a lack of visible impact on the level of knowledge about the ICTY, and on the degree of

2476 Cf. ICTY, 18 November 2013, p. 9; ICTY, 23 May 2012, p. 12; ICTY, 1 June 2010, p. 20; ICTY, 12 November 2007, p. 10.
2477 Cf. ICTY, 18 September 1997, p. 21; ICTY, 23 August 1995, p. 14.
2478 Cf. ICTY, 17 September 2001, p. 39; ICTY, 10 August 1998, p. 32.
2479 Cf. Orentlicher, 2018, p. 314.
2480 Cf. ICTY, 17 November 2016, p. 11 and 47; ICTY, 16 November 2015, p. 11; ICTY, 19 November 2014, p. 8; ICTY, 18 November 2013, p. 9; ICTY, 19 November 2012, p. 11; ICTY, 16 November 2011, p. 14; ICTY, 19 November 2010, p. 18; ICTY, 13 November 2009, p. 15; ICTY, 24 November 2008, p. 10; ICTY, 16 May 2007, p. 9; ICTY, 16 November 2006, p. 6.
2481 Cf. ICTY, 31 May 2006, p. 14; ICTY, 14 December 2005, p. 9f.
2482 Cf. ICTY, 24 November 2008, p. 10; ICTY, 12 November 2007, p. 10; ICTY, 14 December 2005, p. 9f.; ICTY, 7 August 2000, p. 33.
2483 Cf. ICTY, 16 November 2011, p. 14.
2484 Cf. ICTY, 12 November 2007, p. 10; ICTY, 14 December 2005, p. 9f.
2485 Cf. interview with ICTY outreach officer, The Hague, 25 November 2016, I-7.
2486 Cf. Orentlicher, 2018, p. 315.
2487 Cf. Gordy, 2013, p. 62.

trust in it. Indeed, accurate knowledge about the Tribunal's work and trust in it have been consistently low across the region,[2488] and misconceptions continue to circulate today.

Partly, the Tribunal's communication failures were a result of its institutional design and culture, and were somewhat unrelated to the outreach programme. Its geographical distance to the countries of the former Yugoslavia, for instance, made it physically inaccessible to the vast majority of their citizens. Hardly anyone attended hearings or met with ICTY personnel in order to get unfiltered impressions of its work.

In addition, some have asserted that the Tribunal, and, particularly the evidence it collected, were also inaccessible to the people. For instance, much of its documentation was kept confidential and presented at trial only in closed sessions, making it unavailable to the public. Furthermore, while other evidence and documentation is open for public access on the ICTY's website, its judicial records and archives database is not user-friendly, and even experts sometimes struggle to use it efficiently, let alone inexperienced members of the public. At the same time, while state-funded institutions in the countries of the former Yugoslavia are failing to properly research the events of the 1990s conflicts by using court-established facts and documentation, war crime convicts and defendants are publishing books and publications that downplay and deny the crimes that were committed.[2489]

Another problem was the ICTY's and the OTP's failure to effectively communicate with the media in order to maintain or even increase support from pro-ICTY media – both from regional and international media outlets. According to Bachmann, a few improvements could have led to good results, such as making regular efforts to present the Prosecution's preferred framing of the Tribunal's trials to the media, and to implement a coherent public relations strategy. He explains, for instance, how Prosecutor Carla del Ponte was very outspoken towards several institutions and groups all over the world, but not towards the press corps in The Hague that was actually reporting on the trials – and when she did, she hardly ever disclosed anything that would explain her trial strategy.[2490] The weekly press conferences, held by the ICTY Registry and Office of the Prosecutor for a few years, did not contribute to journalists' understanding of the ICTY's trials either: usually, they were

> "rather technical, serving as an opportunity to distribute legal documents, deal with accreditation processes and the trial schedule, or announce visits of judges and prosecutors abroad or of prominent foreign guests to the ICTY. Substantive

2488 Cf. Gordy, 2013, p. 62.

2489 Cf. Balkan Investigative Reporting Network, 2019, p. 19f.

2490 Cf. K. Bachmann (2013). Framing the Trial of the Century: Influences of, and on, International Media. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 260-279). Oxford: Oxford University Press, p. 272.

> questions about opinions, interpretations or intentions of members of the Prosecution team were left unanswered, or were dealt with in a cursory, superficial manner. Neither the Prosecution's nor the Tribunal's press teams actively sought to shape or influence the media debate about the ICTY."[2491]

This was a missed opportunity. The cost of this reluctance for the Tribunal are clear to Bachmann: most journalists in The Hague could have been, or were, natural allies of the prosecution and the ICTY. But because they were kept at maximum distance, cut off from even informal contact with prosecutors and investigators, these journalists began to live and work in a separate world, in which a lack of understanding of the prosecution shaped their attitudes. As a consequence, journalists had to resort to other sources: defence lawyers, external experts, politicians, and diplomats – some of whom were quite critical of the Tribunal, the prosecution, and their trial strategy.[2492] Thus, the ICTY and the Office of the Prosecutor did not only loose key opportunities to frame the news coverage of the Tribunal and its proceedings, their behaviour also reinforced the image of the ICTY being a secretive and hermetic institution, hostile towards the media.[2493]

Despite the efforts of the ICTY, interest in war crimes trials is generally declining in the region, especially in Serbia.[2494] This also holds true for domestic war crimes trials: unless important verdicts are expected, the public galleries of the domestic war crimes courts are usually empty.[2495] In BiH, the media still report regularly, both about ICTY and domestic trials,[2496] but in Serbia, war crimes trials are almost completely absent from the public discussion.[2497]

Public Discourse and Media Coverage

The problem with outreach is that no public relations strategy or programme can ever be powerful enough to change the dominating public discourse of local elites or politicians and the media. By definition, national politicians and media representatives are closer to the people than an international tribunal. Hence, even though serious efforts were undertaken by the ICTY, and by some of the local war crimes institutions, to communicate with the people within their respective jurisdictions, they were undermined by nationalist discourse in the countries. These will be briefly outlined in the following section, by focusing

2491 Bachmann, 2013, p. 272f.
2492 Cf. Bachmann, 2013, p. 273.
2493 Cf. Bachmann, 2013, p. 274.
2494 Cf. Ostojić, 2014, p. 188.
2495 Cf. Nettelfield, 2010, p. 257.
2496 Literally all my Bosnian interview partners have confirmed that war crimes trials are still very present in the media.
2497 Also this impression was confirmed by literally all my Serbian interview partners.

on discourses in the media and on those advanced by political elites, as both had – and have – tremendous influence on the public's opinion about the Tribunal. At the same time, it will become apparent that there is no serious and neutral academic or scientific discussion on the Tribunal in Serbia that could contribute facts to the debate. In contrast, the voices of ICTY defendants are an increasingly dominant factor in the public discussion in Serbia. The result is that the Serbian general public has a very biased perception of the ICTY, while opinions in Bosnia and Herzegovina are much more diverse.

Media and Political Elites

Generally speaking, judicial institutions, and courts in particular, communicate with the people only through their judgments, and only rarely through public statements. The same applied to the ICTY. Due to the fact that, except in the case of the Milošević trial,[2498] Serbs did not follow the trials in The Hague, and given that there is no evidence that they read its judgments,[2499] the court depended on the reporting of the media to inform the people about its existence and work. Media reporting is, however, never truly neutral, as the reporter necessarily interprets the message s/he conveys by recounting or summarising, or even by expressing an explicit opinion about it.[2500]

In Serbia, war crimes trials take place, as Ristić notes, in an "atmosphere of 'conspiracy of silence' about crimes and of dominant nationalism"[2501]. Media reporting is usually very tendentious,[2502] and there is a clear pattern in the media of sustaining ethnical divisions by referring to "our" and "their" criminals. The coverage of trials is primarily determined by the ethnic origin of the accused.[2503]

2498 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

2499 Cf. Orentlicher, 2018, p. 220; the longest ICTY judgment is 2615 pages long (*Karadžić* trial judgment).

2500 Cf. Orentlicher, 2018, p. 220; as Bachmann explains: "Through the very act of writing about an issue, media draw upon and refer to cognitive schemes, called 'frames,' which provide categories, order, and chronology; these in turn allow the reader (and author) to organize fragmented information and attribute meaning to it. By emphasizing certain aspects of an event and embedding its description in a conventional format – headlines; pictures; the structure of a page, a film, or a radio program – media instruct us both what to think, and how to think about it. Such frames act as patterns of interpretation that affect problem definition, moral evaluation, and causal interpretation, and may even imply particular solutions for the identified problem. Viewed through this lens, journalism appears as a far more discretionary and constructed exercise than the popular or professional image of journalism as mere reporting facts"; Bachmann, 2013, p. 264; see also Bachmann, Kemp, *et al.*, 2019, p. 5.

2501 K. Ristić (2014), *Medijski diskursi o suđenjima za ratne zločine u Srbiji, 2003-2013*, Humanitarian Law Center, Belgrade, www.hlc-rdc.org/wp-content/uploads/2014/11/medijski-diskursi_SR.pdf (last accessed 26/09/2019), p. 1.

2502 Cf. Balkan Investigative Reporting Network, 2019, p. 24; for a detailed analysis of reporting on war crimes trials (whether domestic or international) in the Serbia media from 2003 to 2013, see: Ristić, 2014. For a noticeable exception to the tendentious media reporting: Z. Martinov (4 December 2017), Antisrpski, antihrvatski i antibošnjački Tribunal, Danas, https://www.danas.rs/dijalog/licni-stavovi/antisrpski-antihrvatski-i-antibosnjacki-tribunal/ (last accessed 01/09/2019).

2503 Cf. Ristić, 2014, p. 1.

While in the beginning of the ICTY's operation, media attention was significant,[2504] in the years that followed, media representatives showed scarce interest in trials that involved Serb defendants, especially when they had been members of the armed forces. Ristić observes that these trials cause "social silence"[2505]; there is barely any coverage on them. As a result, news about these war crime trials rarely reach the wider public.[2506] Those media reports that do exist, mostly lack context and substantive information, often merely announcing tomorrow's hearing or briefly summarising yesterday's. Even though a limited number of media outlets do publish longer reports,[2507] these never make it to the front page.[2508] Symptomatic for the lack of interest of media stations in war crimes proceedings is the limited level of coverage of the Serbian Office of the War Crimes Prosecutor's arguably greatest coup so far: the arrest of eight war crimes suspects, charged with war crimes committed in Srebrenica in July 2015. While the indictment does not charge the defendants with genocide, it is the first – and so far, only – case pertaining to the events in Srebrenica in Serbia. The "pro-government"[2509] Radio Televizija Srbija (Serbia's most important state TV channel) evening news programme only mentioned the arrest ten minutes into the programme and among other events. The reports about the arrest lasted no longer than one day and did not trigger any further interest from the media or within society, and certainly did not lead to a discussion about the Srebrenica genocide and those responsible.[2510] The media is especially reluctant to introduce witness testimony of victims, and they often relativise and marginalise crimes committed by Serbs, by replicating the official narrative of a civil war in which all sides committed crimes equally.[2511] This holds true not only for ICTY proceedings, but also for domestic war crimes proceedings, which are almost peripheral in the country's political and social discourse.[2512]

Thus, in the absence of explanations about the wider context of addressing the past in which they occur, and without critical and substantiated responses from political or

2504 And thus, the local awareness of ICTY proceedings was probably higher than anywhere else in the region – although already back then, media coverage was "very unfavourable and often inaccurate"; cf. Freeman, October 2004, p. 3.

2505 Ristić, 2014, p. 1.

2506 Cf. Balkan Investigative Reporting Network, 2019, p. 24; there are also other reasons than disinterest or active ignoring of war crimes trials, among others: the limited resources of media houses, or the restrictive policy of courts in Serbia to admit media representatives and their equipment into the courtroom (for further details, see Chapter 8).

2507 For instance, in the newspapers *Danas* ("Today") or *Politika* ("Politics").

2508 Cf. Ristić, 2014, p. 1.

2509 P. Münch (6 January 2019), "Vučić, du Dieb", Süddeutsche Zeitung, https://www.sueddeutsche.de/politik/tausende-serben-demonstrieren-gegen-den-praesidenten-1.4276741 (last accessed 01/09/2019).

2510 Cf. Todorović, 2016, p. 96.

2511 Cf. Ristić, 2014, p. 1; some exceptions to the media neglecting victims are explained by: Bachmann, Kemp, *et al.*, 2019, p. 13.

2512 Cf. Michaeli, 2011b, p. 93; it should be noted that the defendants of Serbian domestic war crimes proceedings are almost exclusively Serbian citizens.

intellectual elites, media reports about war crimes trials involving Serb defendants rarely become real "media events"[2513].[2514] Ristić's conclusion is harsh: "Relativisation of guilt and responsibility, decontextualisation and fragmentation of narratives about the past, minimalisation of crimes and dehumanisation of victims" are, according to her, the main characteristics of the media coverage on domestic war crimes trials.[2515]

This picture dramatically changes when it comes to trials that involve non-Serb defendants. Such trials are perceived as "justice for the victims"[2516] and reporting often alleges that they are proof for the involvement of members of the highest political level in the crimes at stake. The defendants' acts are presented as lacking any justification and as "monstrous, uncivilised atrocities"[2517]. Victims' statements are given far more frequently than in trials involving Serb defendants, the trials are commented upon, they easily reach the front page of the main Serbian newspapers, and attract greater public interest. In the media, these trials are mostly used to confirm the official narrative about the wars, and to sustain nationalism and feelings of Serb victimisation.[2518]

In any case, it can be argued that ICTY judgments had no real impact on how the media reported about the Tribunal and its defendants.[2519] Instead, the Tribunal reinforced existing preconceptions about it: convictions of accused war heroes were interpreted as an attack on the entire nation, and convictions of out-group members were seen as a confirmation of the out-group's moral inferiority.[2520] Indeed, most media outlets from Serbia evinced anti-ICTY bias.[2521]

In both Serbia and Bosnia and Herzegovina, domestic politicians also had a great influence on how media reported on the ICTY, and how it was perceived by the general public. Their positions, voice and attitude towards the Tribunal, and towards events in the

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2513 Ristić, 2014, p. 1.

2514 One exception was the broadcasting on the "Scorpions tape".

2515 Ristić, 2014, p. 2; the observation of relativisation is shared by others. Concerning the genocide in Srebrenica, for instance, Todorović notes that, when mentioning Srebrenica, politicians and media often put the events in the wider context of crimes, which were committed by all sides, thus losing the "real culprits out of sight". She mentions the example of Milorad Dodik who said on 17 June 2015 in the newspaper *Kurir*: "The condition is that the Bosnians admit the genocide against the Serbs. No one to remember 3500 Serbian victims, but their 8000 victims are used to make a spectacle. The persecution is endless, and clearly subjected to the goal of bringing down the Republic of Srpska."; cf. Todorović, 2016, p. 87.
Here, Dodik only uses the Srebrenica topic as an opening to in fact talk about crimes against Serbs, presenting them as the actual victims – until this day.

2516 Ristić, 2014, p. 2.

2517 Ristić, 2014, p. 2.

2518 Cf. Ristić, 2014, p. 2.

2519 Cf. Bachmann, Kemp, *et al.*, 2019, p. 9.

2520 Cf. Bachmann, Kemp, *et al.*, 2019, p. 11)

2521 Cf. Bachmann, 2013, p. 271; for a description of the work of serious media, reporting continuously from The Hague, see: J. Armatta (2013). The Court and Public Opinion: Negotiating Tensions between Trial Process and Public Interest in Milošević. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 280-292). Oxford: Oxford University Press, p. 286f.

past, could always be read through the media coverage.[2522] It is safe to say that reporting by most media outlets in Bosnia and Herzegovina and Serbia has never been truly independent, especially not when it comes to war crimes issues.[2523]

In addition to that, state officials from all former Yugoslav states also often fail to recognise and accept verdicts passed by the ICTY,[2524] contributing to the overall lack of information about the 1990s conflicts and prolonging a feeling of injustice among victims. On top of that, national parliaments in Croatia and Serbia adopted declarations that either deny or undermine ICTY-established facts.[2525] Factual findings are largely neglected by state-funded institutions that are responsible for researching the 1990s conflicts, which represent wartime events only partially.[2526]

In Serbia, the consequence of "slurs by officials and media close to the government"[2527] directed at the ICTY and at transitional justice activists, as well as the effect of independent media reporting in different ways, is a "toxic environment"[2528] for all those advocating for a different approach to dealing with the past.[2529]

In contrast to Serbia, in Bosnia and Herzegovina, both international and domestic media coverage of war crimes trials and related topics, is still vast.[2530] Indeed, from the totality of interviews that I conducted, and from my observations of the public discourse (especially through print and TV media), I got the impression that war crimes trials (and

2522 Cf. Todorović, 2016, p. 84.

2523 Quoting Mirko Klarin: Orentlicher, May 2008, p. 34; similar: interview with OKO representative, Sarajevo, 20 November 2018, I-44.

2524 Cf. BIRN (22 November 2017), Mladic Verdict Highlights Bosnia's Ethnic Divisions, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2017/11/22/mladic-verdict-highlights-bosnia-s-ethnic-divisions-11-22-2017/ (last accessed 01/09/2019).

2525 In 2010, the Serbian Assembly passed the Declaration on Condemnation of Crimes from Srebrenica, referring to the massacres committed by Bosnian Serbs against Bosniaks from Srebrenica in 1995. Although the International Court of Justice affirmed that this was an act of genocide, it did not establish that Serbia committed the genocide, but that it breached the Convention on the Prevention of Genocide by failing to prevent the genocide from occurring. However, in the Serbian Assembly Declaration, the genocide was referred to as simply 'a crime'.

2526 See for instance: Dnevnik.ba (30 November 2018), Ante Nazor za Dnevnik.ba: Haški sud presudio sam sebi, https://www.dnevnik.ba/teme/ante-nazor-za-dnevnikba-haski-sud-presudio-sam-sebi (last accessed 01/09/2019); Balkan Investigative Reporting Network, 2019, p. 19.

2527 Amnesty International, 2018, p. 322.

2528 Amnesty International, 2018, p. 322.

2529 Cf. Amnesty International, 2018, p. 322; at least, the Court of Appeal Belgrade convicted the editor of the *Informer*, a Serbian tabloid paper that is close to president Aleksandar Vučić's Progressive Party, of hate speech in January 2019. After civil society organisations' protests against the book presentation of war convict Veselin Šljivančanin, the newspaper had called the Youth Initiative for Human Rights (the organiser) a "Soros-Shiptar-Fascist organisation", thereby linking it to the billionaire philanthropist George Soros – a hated figure among nationalists in Eastern Europe – as well as using a highly insulting term for Albanians; cf. F. Rudic (21 January 2019), Serbia Court Fines 'Informer' Editor for Using Hate Speech, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2019/01/21/serbian-court-fines-informer-for-hate-speech-against-activist-01-21-2019/ (last accessed 01/09/2019).

2530 Cf. Nettelfield, 2010, p. 159.

more generally, the war) are still somewhat omnipresent. Almost all political disputes and discussions seem to be rooted in war-related topics. The obvious reason for this is that the Bosnian constitution, and hence, the organisation of the whole state, is itself merely an annex of the Dayton Peace Agreement, the treaty ending the war in Bosnia and Herzegovina in 1995, which was negotiated between the United States, Slobodan Milošević, Franjo Tuđman (for Croatia), and Alija Izetbegović (for Bosnia and Herzegovina). The whole functioning of the state and its political system is therefore a consequence of the war. Indeed, the postwar dispensation has done little to ameliorate the sense of victimisation that every single ethnic community in BiH seems to feel, or to promote inter-ethnic reconciliation. Since Dayton, Bosnian politics have been characterised by ethno-territorial division, nationalist rhetoric, and contested narratives over past crimes and the future of the state.[2531] Discussions over almost every political question are still today brought back to the war and the ethnic divides resulting from it. As one of my interviewees put it: "[p]olitical debates in Bosnia are mainly based on national hatred, even today, 21 years after the war. That's the reality of BiH. There are no normal topics."[2532] Consequently, also the ICTY and even domestic war crimes proceedings still remain an important topic in the public debate.[2533]

However, media reporting on war crimes topics and war crimes trials in BiH is often as questionable as it is in Serbia.[2534] It has always been biased,[2535] with coverage differing in both emphasis and tone, which contributes to divided opinions about the work of the ICTY and the facts it has established.[2536] Generally, it can be said that the media in the Republika Srpska report rather negatively about the Tribunal, and media in the Federation of BiH rather positively. Of course, this tendency coincides with the sides that has more convicts (Republika Srpska) than the other (Federation of BiH). Also in Bosnia and Herzegovina, media coverage tends to focus on negative or dramatic events, and less on legal or technical information.[2537] Politicians in BiH use and – at times abuse – the ICTY for their own purposes, which is to maintain ethnic divisions in order to retain power.[2538]

As Bachmann notes, and as described above, the tendencies in reporting about the ICTY in both countries were partly its own fault, as the Tribunal and the OTP did not have a media strategy, and therefore failed to shape journalists' opinions and reporting in their favour. In addition, ICTY trials were long and complicated, and therefore not

2531 Cf. Swimelar, 2013, p. 186.
2532 Interview with ICTY defence counsel, The Hague, 25 November 2016, I-26.
2533 Cf. interview with Constitutional Court of BiH judge, Sarajevo, 7 February 2017, I-5.
2534 Cf. interview with ICTY outreach officer, The Hague, 25 November 2016, I-7; interview with Bosnian defence counsel, Sarajevo, 16 November 2018, I-54.
2535 Cf. Nettelfield, 2010, p. 159; similar: interview with OKO representative, Sarajevo, 20 November 2018, I-44.
2536 Cf. Nettelfield, 2010, p. 159.
2537 Cf. Swimelar, 2013, p. 187.
2538 Cf. Orentlicher, 2010, p. 98.

conducive to today's sensationalist media reporting style.[2539] The technical details, necessary for the work of the lawyer, are hard to squeeze into normative frames which are necessary for interesting media reporting.[2540]

A few practical factors also partly accounted for the loss of interest in trials over time. For instance, the Dutch authorities imposed visa and residency restrictions on journalists from the former Yugoslavia, who were not allowed to professionally report on the ICTY on a tourist visa. In addition, living in The Hague on a permanent basis can become very expensive for someone on a Bosnian or Serbian salary, and/or for their employer. As a consequence, many Yugoslav journalists covered ICTY proceedings from their home offices, meaning that those constituents who had highest interest in the trials had relatively limited possibilities to cover them in a comprehensive and sustained manner (compared to international journalists).[2541] Consequently, in line with Bachmann's hypothesis, Yugoslav journalists were not exposed to the peer pressure from international journalists, most of whom were relatively pro-ICTY. According to him, this contributed to the negative framing of the ICTY by journalists from the region.[2542]

In summary, the general perception in anti-ICTY Balkan media was that "the ICTY did not bring justice to their victims, but injustice to their war heroes on trial."[2543] One of my interviewees' evaluation of the reporting in local media outlets is clear: "99% of the press reporting on the ICTY has been complete bullshit."[2544] This, of course, has implications for the legal community as well. When direct contact with, and therefore direct knowledge about the ICTY, is lacking – for instance among Serbian political and legal decision-makers – then their understanding of the Tribunal's work and of its relevance "is equal to the understanding of an average lawyer who reads newspapers."[2545] From Serbian and most Bosnian media reports, however, the relevance of the work of the Tribunal for the region did not – and will not – become apparent.

Academic Discussion

There is also little meaningful or serious academic discussion on the ICTY and its work in Serbia and Bosnia and Herzegovina which could contribute to a balanced and fact-based discussion.

2539 Cf. Bachmann, 2013.
2540 Cf. Bachmann, 2013, p. 265f.
2541 Cf. Bachmann, 2013, p. 270.
2542 Cf. Bachmann, 2013, p. 271.
2543 Cf. Bachmann, 2013, p. 272; similar: Bachmann, Kemp, *et al.*, 2019, p. 4, fn. 9.
2544 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18; see for instance further down, section "General Public", and the accompanying footnotes.
2545 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

This is especially the case in Serbia, where few academics seem to have developed an interest in international criminal law or in the ICTY's work or jurisprudence.[2546] Whereas reportedly,[2547] and based on my research of the university curricula, the main law faculties in Serbia (located at the University of Belgrade and the University of Novi Sad) hardly teach international criminal law, and few staff members seem to be researching international criminal law related topics.

That being said, the interest in the International Criminal Court is much greater than in the ICTY, which is viewed more favourably due to its potentially universal jurisdiction.[2548] Škulić and Rinceanu, for instance, postulate that interest in the ICTY is low among academics due to its "selective justice"[2549] and the "discriminatory access to the court"[2550]. Publications on international criminal law mostly focus on the functioning of the ICC. Few address the ICTY, and even fewer domestic war crimes institutions, or the domestic implementation of international criminal law.[2551]

2546 Cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

2547 E.g. interviews with Humanitarian Law Center representatives, Belgrade, 2 November 2018, I-59; and Belgrade, 24 January 2017, I-25.

2548 Cf. Škulić & Rinceanu, 2004, p. 281.

2549 Škulić & Rinceanu, 2004, p. 280.

2550 Škulić & Rinceanu, 2004, p. 280f.

2551 With exceptions, of course. See, for instance on the ICTY: V. Dimitrijević, V. Hadži-Vidanović, I. Jovanović, Ž. Marković & M. Milanović (2013). *Haške Nedoumice: Poznato i nepoznato o Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju*. Belgrade: Beogradski centar za ljudska prava; T. Fila (2015). Haški tribunal – Sumrak Pravosuđa. In V. Popović (Ed.), *Krivična Djela protiv čovječnosti: Normativno i stvarno* (p. 295-326). Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci; A. Gajić (2009). Međunarodni krivični sud za bivšu Jugoslaviju - iz perspektive ljudskih prava. *Anali Pravnog fakulteta u Beogradu, LVII*(4), 138-155; B. Fatić (2004). Nastavak rada Haškog tribunala. *Branič, CXVI*(2), 63-66; on international criminal law in BiH: N. Stanković (2018). *Međunarodno krivično pravo*. Tuzla: Evropski Univerzitet "Kallos" Tuzla; G. Šimić (2013b). *Suđenja za ratne zločine u Bosni i Hercegovini*. Sarajevo: www.goransimic.ba; M. N. Simović & V. M. Simović (2015). Ratni zločini u odlukama Ustavnog suda Bosne i Hercegovine, sa posebnim osvrtom na zločine protiv čovječnosti. In V. Popović (Ed.), *Krivična Djela protiv čovječnosti: Normativno i stvarno* (p. 45-89). Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci; M. Blagojević (2015). Poremećana precedentizacija prava u praksi Suda Bosne i Hercegovine. In V. Popović (Ed.), *Krivična Djela protiv čovječnosti: Normativno i stvarno* (p. 251-293). Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci; I. Marković (2015). Zločin protiv čovječnosti. In V. Popović (Ed.), *Krivična Djela protiv čovječnosti: Normativno i stvarno* (p. 141-167). Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci; G. Šimić (2013a). Materijalno-pravne odredbe Statuta Haškog tribunala i njihova usporedba s odgovarajućim odredbama u nacionalnom zakonodavstvu Bosne i Hercegovine. *Pravna Misao, 9-10*, 34-56; H. Pleh (2013). *Zajednički zločinački poduhvat kao oblik krivične odgovornosti u krivičnom zakonodavstvu Bosne i Hercegovine*. (Magister's thesis), Univerzitet u Sarajevu, Sarajevo; M. N. Simović & V. M. Simović (2002). Genocid u Međunarodnom Krivičnom Pravu i Krivičnom Pravu Bosne i Hercegovine. *ANALI Pravnog fakulteta Univerziteta u Zenici, 10*, 51-72; on international criminal law in Serbia: Z. Stojanović (2018). *Komentar Krivičnog zakonika*. Belgrade: Službeni glasnik; Z. Stojanović (2017). *Međunarodno krivično pravo*. Belgrade: Pravna knjiga; D. Jovašević (2013). Zločin protiv čovečnosti u međunarodnom i krivičnom pravu Republike Srbije. In S. M. Marković (Ed.), *Vojno Delo* (p. 115-132): Ministarstvo odbrane Republike Srbije; on international humanitarian law and international criminal law as interpreted by different international criminal courts and tribunals, in comparison with Serbian international criminal law: B. Vekarić (2017). *Krivično-pravne specifičnosti ratnih zločina*. Belgrade: ATC Beograd; M. Škulić, G. Ilić, V. Đorđević, V. Vukčević,

In contrast, in Bosnia and Herzegovina, the interdisciplinary *Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava* (Institute for Research of Crimes Against Humanity and International Law) was founded already in 1992, and is composed of researchers from the University of Sarajevo, who investigate crimes against peace, genocide, and other grave breaches of international humanitarian law from – among others – historical, legal, sociological, criminological, economic, demographic, psychological, political, cultural, medical, and ecological perspectives.[2552] The institute conducts multiple research projects on questions related to the Yugoslav wars, including a missing persons project. It also cooperates closely with the ICTY with regard to some of these projects.[2553] The ICTY is a topic that is covered rather regularly in Bosnian academic literature.

At the same time, war crime convicts and defendants are publishing books and publications downplaying and denying the crimes that were committed.[2554] Petrović, who has examined the works written by ICTY defendants (inmates), recounts that 22 out of the 141 defendants who have spent time at the ICTY's Scheveningen prison, have written 119 publications while incarcerated there.[2555] Eight works are fiction, 22 nonfiction, and 89 publications compile documentary material.[2556] Especially the latter category provides defendants with the unique opportunity to only present selected material in order to build a story that suits the author.[2557] One of the defendants has been particularly expressive – Vojislav Šešelj, former Deputy Prime Minister of Serbia and convicted for crimes against humanity against Croats in Serbia, writing 63 volumes during his stay in The Hague,[2558]

M. Petrović, B. Vekarić, B. Đorđević & S. Nenezić (2011). *Ratni zločini i drugo osnovni instituti međunarodnog krivičnog prava*. Belgrade: ATC Beograd; I. Rangelov & J. Nicić (2004). Komandna odgovornost: Savremeno pravo. *Branič, CXVI*(2), 14-20; on international humanitarian law and international criminal law as interpreted by different international criminal courts and tribunals, in comparison with Bosnian international criminal law: N. Halilagić (2015). *Zločin protiv čovječnosti u savremenom krivičnom pravu*. Sarajevo: Univerzitet u Sarajevu, Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava; B. Petrović, M. Bisić & V. Perić (2011). *Međunarodno kazneno sudovanje: pregled sudske prakse i relevantnih dokumenata*. Sarajevo: Provredna štampa; G. Šimić (2008b). *Utjecaj Haškog Tribunala na Kazneno Zakonodavstvo Bone i Hercegovine*. Sarajevo: Federalno ministarstvo pravde; on international humanitarian law and international criminal law as interpreted by different international criminal courts and tribunals, in comparison with Bosnian and Serbian international criminal law: D. Marković (2013). *Zajednički zločinački poduhvat*. Beograd: Zadužbina Andrejević; or on domestic international criminal law of the SFRY: J. Đ. Lopičić (1999). *Ratni zločin prtiv civilnog štanovništva iz člana 142 KZ SRJ*. Belgrade: Excelsior.

2552 Cf. Univerzitet u Sarajevu, Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava, https://www.unsa.ba/org-jedinica/institut-za-istrazivanje-zlocina-protiv-covjecnosti-i-medunarodnog-prava (last accessed 01/09/2019).

2553 Cf. interview with ICTY office BiH representative, Sarajevo, 30 January 2017, I-38.

2554 Cf. Balkan Investigative Reporting Network, 2019, p. 19f.

2555 Cf. V. Petrović (2018). The ICTY Library: War Criminals as Authors, Their Works as Sources. *International Criminal Justice Review, 28*(4), 333-348, p. 334f.

2556 Cf. V. Petrović, 2018, p. 335.

2557 Cf. V. Petrović, 2018, p. 336.

2558 Cf. V. Petrović, 2018, p. 335; V. Šešelj (2005). *Vašingtonski seksualni manijak Bil Klinton*. Belgrade: Srpska radikalna stranka ("Bill Clinton, the sexual maniac from Washington", my translation); V. Šešelj (2006).

including "trial transcripts, selected documents, and random personal reflections almost invariably published under offensive or grotesque titles such as *A Suit against Prosecution and False Witnesses of The Hague Tribunal*, *The Chetnik Vojvoda in Front of The Hague Tribunal*, *The European Union is Satan's Creation*, *A Banana for Kofi Annan*, and *The Sex Maniac of Washington Bill Clinton*"[2559]. As Petrović explains,

> "[s]uch approach is in line with Šešelj's scandalous defense strategy, aimed to delegitimize the proceedings and mobilize the Serbian public around his case. To that end, he also maintains Internet visibility through video clips, which enjoy unusual popularity in Serbia. More surprisingly, they are widely viewed in the entire region, perhaps due to their vulgar content [...]."[2560]

The *Narodna Biblioteka Srbije* (National Library of Serbia) contains 326 publications where Vojislav Šešelj figures as the author, including the two editions of *U Čeljustima Kurve Del Ponte* (*In the jaws of the whore Del Ponte*)[2561], one from 2004 and one from 2018, or *Holandski Kurvin Sin Alfons Ori* (*The Dutch Son of a Whore Alphons Orie*)[2562]. When searching for key words such as "international criminal law" or "ICTY", almost all of Šešelj's publications come up, as if they were serious contributions to either topic. Other contributions from ICTY defendants, such as Veselin Šljivančanin's *Branio sam istinu: 2450 dana u Hagu* (*I defended the truth: 2450 days in The Hague*) from 2012, can also be found in that library.[2563] At the same time, there is little other literature on the topic in Serbia's biggest and most important library. Bosnia and Herzegovina's main library (*Nacionalna i univerzitetska biblioteka Bosne i Herzegovine*, National and university library of Bosnia and Herzegovina) does not provide as much space for the publications of ICTY defendants, although it also does not offer an impressive amount of serious academic literature on international criminal law or international criminal courts and tribunals.

This demonstrates that in Serbia, there is an imbalance between the contributions of (former) ICTY defendants and those of neutral experts to the debate about the Tribunal and its mission. State institutions, such as the national library, indirectly contribute to this

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Evropska Unija satanistićka tvorevina. Belgrade: Srpska radikalna stranka ("The European Union, a satanic creation", my translation); V. Šešelj (2009). *Jedna banana za Kofi Anana*. Belgrade: Srpska radikalna stranka ("A banana for Kofi Annan", my translation); V. Šešelj (2011). *A suit against prosecution and false witnesses of the Hague Tribunal*. Belgrade: Srpska radikalna stranka.

2559 V. Petrović, 2018, p. 336; italics added.

2560 V. Petrović, 2018, p. 336.

2561 Carla del Ponte was the ICTY's Chief Prosecutor from 1999 until 2007.

2562 Alphons Orie was the Dutch judge at the ICTY from 2001 until its closure in 2017, and is still serving as a judge at the MICT; cf. ICTY, Judge Alphons M. M. Orie, https://www.irmct.org/en/about/judges/judge-alphons-mm-orie (last accessed 01/09/2019).

2563 At the library of Belgrade University's law faculty, the situation is not much different.

imbalance by providing space to obviously one-sided, at times even obscene, publications, while not also adding serious contributions to their stock.

ICTY Defendants

In fact, ICTY defendants have generally received a lot of attention in the public debate in Serbia, and have rarely been treated as guilty of atrocious crimes, even after such a verdict.

Arguably, preferential treatment of ICTY defendants already started in the ICTY's early years, when Serbia covered the attorney costs of Serb defendants in The Hague. The Law on the Rights of Persons Indicted by the International Criminal tribunal for the former Yugoslavia, introduced by the Serbian Radical Party, and supported by former Prime Minister Vojislav Koštunica, enabled the use of tax payers' money to cover ICTY indictees' legal fees and expenses, and even compensated lost earnings during the legal proceedings.[2564]

Since convicts have been returning home to Serbia – or to Republika Srpska –[2565] after serving their sentences elsewhere, there have been several incidents where they have not only been welcomed by crowds of supporters, but even by incumbent Serbian high profile politicians, sending the message that the government sees them as people deserving respect, and not condemnation for what they have done. For example, when Biljana Plavšić, former President of Rpublika Srpska, arrived in Serbia after serving her sentence in Sweden, she was given a hero's welcome by supporters and local politicians,[2566] including Republika Srpska Prime Minister Milorad Dodik.[2567] The same happened when Nikola Šainović, who had been Prime Minister of Serbia and Deputy Prime Minister of the Federal Republic of Yugoslavia during Milošević's government, arrived in Belgrade in August 2015.[2568] When former Yugoslav Army General Vladimir Lazarević arrived in Belgrade in December 2015, he was even welcomed by two incumbent ministers: the Ministers for Defence and for Labour.[2569] In the media, the returned war convicts are treated nicely, referred to as

2564 Cf. Freeman, October 2004, p. 4.

2565 It should be noted that many Bosnian Serbs 'returned' not to BiH, but to Serbia, after having served their sentence. The same goes for Bosnian Croats, who did not go back to Bosnia and Herzegovina, but went to Croatia instead; cf. J. Mihajlović Trbovc (2018). Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment. *International Criminal Justice Review, 28*(4), 406-422.

2566 Cf. Nettelfield, 2010, p. 270.

2567 Cf. S. Karstedt (2018). "I Would Prefer to Be Famous": Comparative Perspectives on the Reentry of War Criminals Sentenced at Nuremberg and The Hague. *International Criminal Justice Review, 28*(4), 372-390, p. 376.

2568 Cf. A. Bečić (26 August 2015), SLOBODAN ČOVEK: Ovako danas izgleda Nikola Šainović, koji je odslužio hašku kaznu!, Kurir, https://www.kurir.rs/vesti/politika/1908275/slobodan-covek-nikola-sainovic-veceras-u-srbiji (last accessed 01/09/2019).

2569 Cf. M. Dragić (4 December 2015), Polemika oko dočeka Lazarevića iz Haga, N1, http://rs.n1info.com/Vesti/a115279/Docek-Vladimira-Lazarevica.html (last accessed 01/09/2019).

"heroes"[2570],[2571] and media outlets are generally more interested in the every-day life of war convicts, than in the crimes for which they have been convicted.[2572]

Although there have been homecoming celebrations for convicts from all ethnic backgrounds upon their return to their social or ethnic groups after serving their sentences,[2573] Serbia has been most active in organising homecoming celebrations,[2574] and in covering the events in the media. Mihajlović Trbovc shows that the vast majority of ICTY defendants from other ethnicities returning home have received no *public* welcome.[2575] She opines that

> "[t]hese findings [...] point out that celebratory welcomes of the convicted individuals should be viewed as a litmus test for the success/failure of the ICTY in changing values and conflicting historical interpretations, and in arriving at a commonly accepted 'truth' about what happened during Yugoslav wars and who is responsible for the crimes."[2576]

2570 See for instance here: Srbija danas (7 January 2019), ŠLJIVANČANIN OTKRIO ZBOG ČIJEG JE SVEDOČENJA OSUĐEN: "NISI ČOVEK AKO SE SMRTI PLAŠIŠ" Praljak, koji je izvršio samoubistvo, rekao mi je: "Gospodine, znam da niste ratni zločinac i da je..", a!, https://www.alo.rs/vesti/drustvo/praljak-koji-je-izvrsio-samoubistvo-rekao-mi-je-gospodine-znam-da-niste-ratni-zlocinac-i-da-je/205495/vest (last accessed 01/09/2019).

2571 Cf. Mihajlović Trbovc, 2018, p. 408.

2572 See for instance this article which describes Serbian inmates' every-day life in the Scheveningen prison and who played in whose football team, but makes no mention of the crimes or the victims of the crimes at stake in their trials; cf. Srbija danas, a!, 7 January 2019.

2573 Cf. Karstedt, 2018, p. 376; Mihajlović Trbovc, 2018, p. 407.

2574 Out of the 15 Serb defendants from Serbia, three died before their trial ended (Slobodan Milošević, Željko "Arkan" Ražnatović, Vlajko Stojiljković), three are still serving their sentences (Vlastimir Đorđević, Sreten Lukic, Nebojša Pavković), one is still on trial (Jovica Stanišić) as of August 2019. The others (Vladmir Lazarević (cf. Dragić, N1, 4 December 2015), Milan Milutinović (cf. E. Radosavljević (28 February 2009), Advokati traže duži rok za žalbu, Večernje novosti, http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:233303-Advokati-traze-duzi-rok-za-zalbu (last accessed 01/09/2019)), Dragoljub Ojdanić (cf. RTS (29 August 2013), Dragoljub Ojdanić se vratio iz Haga, RTS, http://www.rts.rs/page/stories/sr/story/135/hronika/1386268/dragoljub-ojdanic-se-vratio-iz-haga.html (last accessed 01/09/2019)), Miroslav Radić (cf. M. Malešević (28 September 2007), Sloboda posle četiri godine, Online Media Press, http://www.pressonline.rs/info/politika/20996/sloboda-posle-cetiri-godine.html (last accessed 01/09/2019)), Nikola Šainović (cf. Bečić, Kurir, 26 August 2015), and Vojislav Šešelj (airport scenes: Ovako je izgledao doček Šešelja na aerodromu, Blic YouTube channel, published on 12 November 2014, https://www.youtube.com/watch?v=M9cDGlpOgMc (last accessed 01/09/2019))) have received large homecoming parties. Momčilo Perišić's party was more modest than the others' (cf. M. Ristic (4 March 2013), Muted Welcome in Belgrade for Perisic's Release, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2013/03/04/belgrade-lost-its-trill-over-perisic-s-acquittal/ (last accessed 01/09/2019)), as he had broken with the Serbian leadership while in The Hague, whom Perišić accused of letting him down. Only Milan Milutinović and Momčilo Perišić were acquitted, all the others had been found guilty by the ICTY. (I was unable to find out whether there was a public homecoming celebration for Miodrag Jokić.)

2575 Cf. Mihajlović Trbovc, 2018, p. 412.

2576 Mihajlović Trbovc, 2018, p. 408.

Indeed, in Serbia, there have in fact been additional ways of welcoming ICTY convicts back to public life, instead of outlawing them. Lazarević, who was convicted for war crimes in Kosovo, has recently been nominated teacher of the Serbian Military Academy.[2577] Both Lazarević and Šainović, as well as Veselin Šljivančanin, a former officer of the Yugoslav Army, have been regular guests at political events since their return, often upon invitation by members of the political elite or of political parties.[2578] Nikola Šainović, sentenced to 18 years imprisonment for crimes against humanity and war crimes in Kosovo, was appointed a board member of his party only a week after his return.[2579] In 2018, the Serbian Ministry of Defence published books on the NATO bombing of Belgrade in 1999 written by Yugoslav Army general Nebojša Pavković and Vladimir Lazarević, and publicly promoted them at the Belgrade Book Fair.[2580] At the same time, members of the civil society have been arrested and convicted for disturbing a book event of Šljivančanin.[2581] The Balkan Investigative Reporting Network sees this as a "trend" where "those who champion human rights to be portrayed as traitors, and for those who have abused human rights to be portrayed as patriots."[2582] After the convictions, the initiators of the protests, the Youth Initiative of Human Rights, asked "why can't a man convicted of war crimes be publicly called a war criminal?",[2583] implying that the convictions of the protesters were a form of denial of Serbian war crimes.

Vosjislav Šešelj has returned to politics since his 2014 provisional release awaiting judgment. In 2016, he was elected into Serbia's Parliament again, despite a law stipulating that his conviction legally disqualifies him from serving in parliament.[2584] Until now, no efforts have been made to remove him from office. Šešelj remains popular among

2577 Cf. F. Rudic (24 October 2018), Serbian Defence Ministry Publishes War Criminal's Book, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/10/24/serbia-defense-ministry-published-war-criminal-s-book-10-24-2018/ (last accessed 01/09/2019).

2578 Cf. J. Prusina (31 October 2018), Serbia Embraces War Criminals and Convicts Their Critics, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/10/31/serbia-embraces-war-criminals-and-convicts-their-critics-10-31-2018/ (last accessed 01/09/2019); Rudic, Balkan Investigative Reporting Network, 24 October 2018.

2579 Cf. Karstedt, 2018, p. 383.

2580 Cf. F. Rudic (2 November 2018), Serbian Activists Protest Against Glorification of War Criminals, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/11/02/serbian-activists-protest-against-glorification-of-war-criminals-11-02-2018/ (last accessed 01/09/2019); Prusina, Balkan Investigative Reporting Network, 31 October 2018; Rudic, Balkan Investigative Reporting Network, 24 October 2018.

2581 Cf. Prusina, Balkan Investigative Reporting Network, 31 October 2018.

2582 Balkan Investigative Reporting Network, 2019, p. 22.

2583 Cf. Prusina, Balkan Investigative Reporting Network, 31 October 2018.

2584 Cf. F. Rudic (27 December 2018), Serbia: Unrepentant War Criminals Enjoy Public Spotlight, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2018/12/27/serbia-unrepentant-war-criminals-enjoy-public-spotlight-12-21-2018/ (last accessed 01/09/2019); apart from serving in parliament, there are no restrictions in Serbia to take up public office; cf. Karstedt, 2018, p. 383.

supporters. At the 2018 Belgrade Book Fair, he was seen giving autographs and making selfies with elementary and high school students.[2585]

All of this suggests that neither the population nor political elites have broken with the protagonists of the war, even though some of them are convicted war criminals. Instead, domestic politicians organise large celebratory homecomings for politically significant returnees for political gain.[2586] In terms of those who were welcomed, there seems to be no difference between those who were acquitted and those who were convicted, showing that ICTY verdicts seem to be largely irrelevant for whether home comers are celebrated or not.[2587]

These same people are both at the forefront of the political stage and behind the scenes again, and occupy important positions in politics and in the military.[2588] The law that is supposed to prevent this from happening is – although in force – not enforced in Serbia.

General Public

The description of the general atmosphere within the media, the political sphere, and even academic circles, helps to understand the generally negative perception of the ICTY in Serbia,[2589] which has been described as "open animosity"[2590].

2585 Cf. Rudic, Balkan Investigative Reporting Network, 24 October 2018.

2586 Cf. Mihajlović Trbovc, 2018; which is why mostly only those defendants received a hero's welcoming by domestic politicians, who "possess symbolic capital as wartime political or military leaders"; cf. Mihajlović Trbovc, 2018, p. 413.

2587 Cf. Mihajlović Trbovc, 2018, p. 412.

2588 Cf. Amnesty International, 2018, p. 322.

2589 For comprehensive studies of public perceptions of the ICTY, see: Beogradski centar za ljudska prava (October 2011), *Attitudes towards war crimes, the ICTY and the national judiciary 2011*, www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/10/Attitudes-towards-war-crimes-the-ICTY-and-the-national-judiciary-2011-detailed-tables.zip (last accessed 01/09/2019); Beogradski centar za ljudska prava (April 2009a), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu ICTY 2009*, www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2009-detaljne-tabele.pdf (last accessed 01/09/2019); Beogradski centar za ljudska prava, December 2006; Beogradski centar za ljudska prava (April 2005), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu ICTY 2005*, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2005-detaljne-tabele.pdf (last accessed 01/09/2019); Beogradski centar za ljudska prava (September 2004), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu ICTY 2004*, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2004-detaljne-tabele.pdf (last accessed 01/09/2019); Beogradski centar za ljudska prava (July 2003), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu (ICTY) 2003*, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2003.pdf (last accessed 01/09/2019).

2590 Orentlicher, 2018, p. 223f.

Even in the early years of the ICTY, when media coverage was still frequent,[2591] the Serbian public was largely uninformed, or, more accurately, *mis*informed[2592] about what actually happened in The Hague –[2593] and at domestic war crimes institutions.[2594] While this has improved slightly over the years, observers have noted a trend going backwards again in recent years.[2595] Both politicians and the media have a strong influence on the public opinion in Serbia,[2596] and Milošević and the wartime government already played a crucial role in shaping many Serbians' views about the ICTY.[2597] If anything, perceptions of the Tribunal have worsened since then.

2591 Cf. Freeman, October 2004, p. 3.

2592 As a matter of example, take the message with which Serbian media summarised the work of the ICTY towards the end of its lifespan: the coverage concentrated almost exclusively on the number of Serb, Croat, Bosniak, or Albanian convicts and on the number of years to which each group was convicted collectively (see for instance here: B. Bojić & K. Blagović (20 November 2017), HAG GASE NA SVETOG NIKOLU: 72 Srba osuđeno na 1.138 godina zatvora! HAŠKI TRIBUNAL BIO NAJVEĆI LOGOR ZA SRBE!, Kurir, https://www.kurir.rs/vesti/politika/2944021/hag-gase-na-svetog-nikolu-72-srba-osudjeno-na-1138-godina-zatvora (last accessed 01/09/2019), or here: Telegraf (20 November 2017), HAŠKA SRAMOTA: Tribunal presudio više od 1.000 godina robije za Srbe, Telegraf, https://www.telegraf.rs/vesti/politika/2913197-kako-je-sudio-haski-tribunal-vise-od-1000-godina-robije-za-srbe (last accessed 01/09/2019), or here: L. Begenišić (4 June 2017), Hag: Srbima 1.000 godina robije, pa ključ u bravu, Večernje novosti, http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:668650-Hag-Srbima-1000-godina-robije-pa-kljuc-u-bravu (last accessed 01/09/2019)). While no one disputes the fact that most of the indictees and most of the convicts of the ICTY were ethnic Serbs, the number of years of imprisonment for the group of ethnic Serbs that Serbian media has been propagating seems questionable at best. The tabloid paper *Kurir*, for instance, calculates that 63 Serbs were convicted and sentenced by the ICTY, of which 5 to life imprisonment and 58 to a specific number of years. While the newspaper calculates 975.5 years for the latter group, it claims a total of 1138 years for all ethnic Serbs – which would mean that a life sentence is assumed to be 32.5 years (for which there is no legal basis in the Tribunal's jurisprudence, rather, life imprisonment seems to amount to at least 45 years; cf. O. Windridge (15 July 2015), Guest Post: Two-thirds of 45–Does Life Mean Life at the ICTY?, OpinioJuris, http://opiniojuris.org/2015/07/15/guest-post-two-thirds-of-45-does-life-mean-life-at-the-icty/ (last accessed 01/09/2019)). In addition, the 1138 years are equalled by the newspaper to "almost 1200 years"; cf. B. Bojić & K. Blagović, Kurir, 20 November 2017. In short, while there is no serious discussion of the ICTY's achievements and shortcomings, the newspaper focusses on numbers which are – at best – misrepresented. In the discussions I had during those weeks leading up to the closure of the Tribunal with Serbian friends, I noticed how the actual number (somewhere around 1000 years of imprisonment) had been raised in people's minds to 2000 or even 3000 years of imprisonment for ethnic Serbs, lacking any basis whatsoever. This is one example of a fact about the Tribunal which had first been misrepresented, was not contested, and then had developed its own dynamic until it had nothing to do anymore with reality.

2593 Cf. Freeman, October 2004, p. 3.

2594 Cf. Stromseth, 2006, p. 274; D. Tolbert (2002). The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings. *The Fletcher Forum of World Affairs, 26*(2), 7–19, p. 13.

2595 Cf. M. Kostić (22 January 2018), Public Opinion Survey in Serbia Sheds Light on ICTY Legacy, EJIL:Talk!, https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/ (last accessed 01/09/2019).

2596 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

2597 Cf. Orentlicher, 2018, p. 220.

Strikingly, while opinions on the ICTY are strong, knowledge about it has always been poor. In an opinion poll commissioned in 2003, only 6% of the respondents considered themselves *quite* or *well informed* about the ICTY.[2598] Only 7% knew the correct name of the Tribunal,[2599] and 45% knew that it was founded by the UN, while 6% thought it was a European Union (EU) court, and 9% thought it had been established by NATO.[2600] In 2004, the majority of citizens, by their own admission, were not familiar with the ICTY (64%), and they did not follow trials for war crimes in The Hague (69%).[2601] In 2004, a majority of Serbs thought that the ICTY had not tried anyone for crimes against Serbs, even though at the time, 16 people had been indicted for crimes against Serbs.[2602] In 2009, the number of Serb respondents who consider themselves *quite* or *well informed* about the ICTY had increased to 18%.[2603] A total of 49% of respondents stated that they watched TV recordings of ICTY trials at least once per month.[2604]

Even in 2017, an opinion survey conducted by the Humanitarian Law Center, found that the ignorance pertaining to certain ICTY-adjudicated crimes is still striking (e.g. 64% do not know what happened on the topic of Ovčara,[2605] 71% do not know what happened regarding the siege of Sarajevo between May 1992 and December 1995, and 83% do not know what happened on the topic of the mass graves in Serbia).[2606]

In Bosnia and Herzegovina, there are no systematic studies of the public's attitudes towards the Tribunal similar to those in Serbia. Anecdotal evidence, however, suggests that "Bosniaks are more or less satisfied, Croats somewhat, and Serbs not at all."[2607]

2598 Cf. Beogradski centar za ljudska prava, July 2003, p. 13.

2599 Cf. Beogradski centar za ljudska prava, July 2003, p. 15.

2600 Cf. Beogradski centar za ljudska prava, July 2003, p. 15.

2601 Cf. Beogradski centar za ljudska prava (August 2004), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu (ICTY) 2004*, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2004.ppt (last accessed 01/09/2019), p. 14.

2602 Cf. Freeman, October 2004, p. 3.

2603 Cf. Beogradski centar za ljudska prava (April 2009b), *Javno mnenje u Srbiji i stavovi prema Međunarodnom krivičnom tribunalu za bivšu Jugoslaviju u Hagu (ICTY) 2009*, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2009.ppt (last accessed 01/09/2019), p. 5.

2604 Cf. Beogradski centar za ljudska prava, April 2009b, p. 11.

2605 Five ICTY cases related to the killings of more than 200 non-Serb individuals who had fled to a hospital in Vukovar (Croatia), but were removed by Serb military forces and executed near the Ovčara farm: the *Slobodan Milošević case*, the *Slavko Dokmanović case*, the *Mrkšić et al. case*, the *case against Goran Hadžić*, and the one against *Vojislav Šešelj*.

2606 Cf. Kostić, EJIL:Talk!, 22 January 2018.

2607 Bosnian lawyer cited in: Orentlicher, 2010, p. 48.

Of all the communities in BiH, Bosniaks had the highest expectations[2608] as to what the Tribunal could achieve. They have given the strongest support to the institution, and were the most likely to believe that the Tribunal could achieve numerous transitional justice goals.[2609] In 2004, an opinion survey found that 51% of BiH's population, which is predominantly Bosniak with an ethnic Croat minority, trusts the ICTY, while in the predominantly ethnic Serb Republika Srpska, only 4% trusts the Tribunal.[2610] Thus, also in BiH, positive attitudes towards the ICTY tend to correlate with the degree to which the ICTY has prosecuted perpetrators who committed atrocities against members of the survey respondents' own ethnic communities, and to correlate negatively with the degree to which suspects prosecuted by the ICTY come from respondents' own ethnic group.[2611] At the same time, a majority of the population in BiH's Republika Srpska – perhaps differently to Serbia – supports the idea that the ICTY had to be established in principle, but wants the crimes committed against its own group to be prosecuted, too.[2612]

In addition, attitudes towards the Tribunal changed for the better, due to the fact that the ICTY took steps to realise its completion strategy and therefore, its legacy, and started investing in the infrastructure to conduct war crimes proceedings at the domestic level.[2613]

Demonstration Abilities: The Reasons for Attitudes

What does this mean for the ICTY's demonstration abilities, for its abilities to establish its authority towards its constituents and to be perceived as legitimate, which should ultimately lead to an internalisation of the Tribunal's values – first and foremost, the rule of law?

As mentioned earlier, legal practitioners and political decision makers who – actively or unconsciously – decided on whether the Tribunal's legacy would be accepted and adopted at the national level, are of course also influenced by the debate about the Tribunal, besides being important actors in this very debate themselves.[2614] In the interviews that I conducted in Serbia and Bosnia and Herzegovina, it became clear that generally speaking,

2608 Similar: interview with Bosnian defence counsel, Sarajevo, 6 February 2017, I-6; at the same time, these high expectations have led to deep disappointments as well, leading to harsh criticism; cf. Swimelar, 2013, p. 186.

2609 Cf. Swimelar, 2013, p. 186.

2610 Cf. Freeman, October 2004, p. 3; citing a public opinion survey, conducted by International IDEA; see also: Swimelar, 2013, p. 186.

2611 Cf. Orentlicher, 2010, p. 49.

2612 Cf. Orentlicher, 2010, p. 50.

2613 Cf. Nettelfield, 2010, p. 171; it should be noted, however, that at the same time, the conditions within BiH also improved in the sense that they became more favourable towards the ICTY: nationalists were less strong, anti-Tribunal rhetoric would not be tolerated by political elites (the High Representative would remove them from their office), and there was better media coverage of the Tribunal thanks to trained journalists; cf. Nettelfield, 2010, p. 171f.

2614 See Chapter 6, sections 1.2.5 and 1.3.

there is alignment between the attitudes of the legal and political professionals, and those of their respective national or ethnic group.[2615]

Therefore, as it has been demonstrated that the Tribunal was perceived more negatively in Serbia than in BiH, it is understandable that Bosnians generally interpreted the key characteristics of the ICTY that determined its demonstration abilities differently than Serbians.

These key characteristics and their effects on Bosnian and Serbian opinions will be outlined in the following sections. As explained in section 1.3 of Chapter 3, the impact model supposes that an international war crimes court must first manifest its authority, the decisive criteria for that being: 1) whether it was legally established,[2616] 2) whether it is effective,[2617] 3) and whether it can ensure compliance.[2618] These three key characteristics will be addressed below, before analysing views on the ICTY's legitimacy that prevail in Serbia and Bosnia and Herzegovina. It will become clear that through the lens of the general atmosphere in their respective countries,[2619] 'impact receivers' in BiH and Serbia developed different views on the Tribunal and interpreted the same performances and characteristics of the ICTY very differently.

Ultimately, these views determine whether 'impact receivers' perceive the Tribunal as a "role model" for domestic institutions or not.

Impact Factor Legality: Legal Establishment

The first element of a court's ability to demonstrate a suitable solution is the question of its legal establishment. Courts that are established under dubious – and possibly, illegal – circumstances will not enjoy the same reputation as courts that are established through legitimate legal procedures.

The ICTY was established by the United Nations Security Council under its Chapter VII powers.[2620] Critics highlight two contentious points: first, the UN Security Council did not have the competency to establish a criminal tribunal, and second, the relevant states did not consent to its establishment, violating their sovereignty. Both points therefore challenge the legality of the ICTY.

2615 This concerns not only my interview partners themselves – while I did conduct more than 60 interviews, I did not speak to a representative number of people from each national and ethnic community. Rather, I also asked my interviewees for their assessments of their colleagues' attitudes. While this is mere anecdotal and not empirical evidence, it is in line with the literature and press or NGO reports on the topic.

2616 See Chapter 3, section 1.3.1.

2617 See Chapter 3, section 1.3.2.

2618 See Chapter 3, section 1.3.3.

2619 See the explanation of the public discourse and media coverage in Serbia and BiH above.

2620 For a general description of the circumstances under which the ICTY was established, see: Gordy, 2013, p. 113.

The first issue was most prominently brought forward by the Tribunal's first defendant, Duško Tadić, in his interlocutory appeal. There, he argued that the ICTY was not duly established by law. As the Trial Chamber summarised:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong."[2621]

According to the Appeals Chamber, these issues raise three distinct constitutional questions:

> "1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal? 2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in

2621 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion on Jurisdiction, IT-64-1, Trial Chamber, 10 August 1995, para. 2.

> Articles 41 and 42 (and possibly Article 40 as well)? 3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?"[2622]

With regard to the first question, whether there was a threat to peace, justifying the invocation of Chapter VII of the UN Charter, the ICTY Appeals Chamber held that

> "an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal."[2623]

Referring to the UN Security Council's practice, both international and internal armed conflicts can constitute a "threat to peace".[2624] Regarding the second question, despite the wording of Article 39 of the UN Charter, which stipulates that the UN Security Council should "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security", the Appeals Chamber held that the powers of the Security Council are not limited to the measures listed in Articles 41 and 42 (which do not include the establishment of an international criminal tribunal).[2625] Lastly, the Appeals Chamber saw no legal argument precluding the UN Security Council from establishing a judicial organ.[2626] In concluding whether the ICTY was "established by law", which the Appeals Chamber considered a "general principle of law"[2627], it held that the Security Council is a "body which, though not a Parliament, has a limited power to take binding decisions"[2628]. Furthermore, the United Nations General Assembly held that the "'representative' organ of the United Nations,"[2629]

2622 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 27.

2623 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 30.

2624 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 30.

2625 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 31.

2626 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 33-38.

2627 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 42.

2628 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 44.

2629 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 44.

> "has […] repeatedly approved and endorsed [the ICTY]: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions."[2630]

Lastly, the Appeals Chamber also held that the ICTY was established by law in the sense that it operates under the rule of law, because it observes all internationally recognised standards of fair trial.[2631]

The fact that it was the Appeals Chamber of the ICTY which ruled that the Tribunal it belongs to is not illegal did not necessarily convince all critics. Indeed, as international observers also note, the decision of the United Nations Security Council to found a criminal tribunal raised "serious legal, political and institutional questions and obstacles."[2632]

As Zacklin writes:

> "[t]he traditional method of establishing an international body is by treaty – a primary source of international law. Through the conclusion of a treaty, states would be able to negotiate an instrument, setting out in detail the provisions governing the tribunal, its competence, structure, and procedures. The treaty would represent the exercise of each state's sovereign will; the tribunal would be an intergovernmental treaty body, the parties to which would be only those states having signed and ratified the treaty."[2633]

Indeed, contrary to the International Criminal Court, the ICTY does not have a corresponding legislature, such as the ICC's Assembly of State Parties.[2634] Establishing the ICTY without the express or tacit consent of the involved states, meant that its legitimacy and authority could not be established by reference to the consent of the states in question. Instead, it must be derived from the UN itself, which itself was formed as a multilateral treaty ratified by nearly all states worldwide. The authority of the UN is therefore based on a multilateral treaty, which, similarly to other treaties, is itself grounded in the consent of the states who are parties to the Charter.[2635]

2630 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 44.

2631 Cf. ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-64-1, Appeals Chamber, 2 October 1995, para. 45-46.

2632 R. Zacklin (2004). Some major problems in the drafting of the ICTY Statute. *Journal of International Criminal Justice, 2*(2), 361-367, p. 361.

2633 Zacklin, 2004, p. 361f.

2634 Cf. L. May & Fyfe, 2017, p. 11.

2635 Cf. L. May & Fyfe, 2017, p. 19.

This indeed illustrates the opposing opinions that my interview partners held. Most Serbs criticised the fact that the ICTY was established by the United Nations Security Council – an organ that is viewed as dominated by the United States and NATO (and NATO brings to mind the bombing of Belgrade) – and that it did not have the authority to create a criminal tribunal. The ICTY is consequently perceived as a "Western" institution, despite the international character of its staff and its UN framework.[2636] In addition, the fact that the ICTY's jurisdiction is limited to the countries of the former Yugoslavia, rather than having universal jurisdiction, has been described as an "effort to essentially impose a legal system on parts of the world, […] apply[ing] rules that don't apply to everyone."[2637] Consequently, as one of my interviewees put it, "there is a political aspect to the institution, already in the way it is created"[2638] – also, because it

> "hasn't functioned as a criminal court only. Because of other goals that they have given for themselves, such as fostering reconciliation in the Balkans and establishing the historical record of what happened. So, it has not been limited to being a criminal court."[2639]

Thus, while many Serbs perceive the Tribunal's authority as being limited due to the – according to them – dubious circumstances surrounding its establishment by the UN Security Council, many of my Bosnian interviewees, in contrast, state that the fact that it is a UN organ is precisely what gives the ICTY its authority.[2640] For them, this inherently gives the Tribunal a higher status than domestic institutions. In the words of one of my interview partners: "I mean it's UN. It's like a higher standard, higher level."[2641]

Impact Factor Effectiveness: Fighting Impunity

The second aspect that influenced the opinions of legal practitioners and political elites – but also of the general public – regarding the ICTY was the question whether it effectively fulfilled its mandate of fighting impunity.

This first and foremost refers to the Tribunal's capacity to have key suspects arrested and tried in The Hague. As stated in section 1.3.2 of Chapter 3, some consider an important side effect of surrendering perpetrators to another country to be that this removes them from positions in which they can control and abuse others, most notably political posts,

2636 Cf. Dragović-Soso, 2013, p. 407.
2637 Interview with ICTY defence counsel, The Hague, 9 November 2016, I-40.
2638 Interview with ICTY defence counsel, The Hague, 9 November 2016, I-40.
2639 Interview with ICTY defence counsel, The Hague, 9 November 2016, I-40.
2640 Cf. interview with OKO representative, Sarajevo, 20 November 2018, I-44; interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; interview with SCBiH judge, Sarajevo, 15 November 2018, I-57.
2641 Interview with OKO representative, Sarajevo, 20 November 2018, I-44.

or even stigmatising or delegitimising them in the eyes of the public.[2642] A trial can be an effective form of disempowerment of key perpetrators who threaten the stability of – and undermine public confidence in – the rule of law.[2643] Furthermore, in terms of enforcing the law, it is an achievement in itself to remove "some of the worst criminals" from society.[2644]

In addition to that, in the course of this research, it became apparent that whether the ICTY's constituents consider its fight against impunity to be effective largely depends on whether it addressed war crimes against their own people.

These two aspects – whether the Tribunal managed to remove those who undermine public confidence in the rule of law, and whether it addressed war crimes committed against all sides – will be addressed in the following sections. With regard to the first aspect, the example of Milošević will be used, as it illustrates how 'difficult' defendants were able to undermine the entire mission of the Tribunal. The second aspect will be illustrated using the example of three prominent non-Serb defendants (Ante Gotovina, Naser Orić, and Ramush Haradinaj), whose acquittals caused great frustration in Serbia, leading to the general opinion that the ICTY was an ineffective court. The same applies to the Prosecutor's refusal to deal with crimes allegedly committed by NATO in Serbia.

The Problem with Milošević

As to the first point in the assessment of effectiveness, whether the Tribunal has the capacity to arrest and try persons who are suspected of having committed international crimes, the facts are clear: the ICTY indicted 161 defendants and dealt, in one way or another, with all of them. A total of 90 defendants were sentenced, 18 were acquitted, trials against three defendants are ongoing before the United Nations International Residual Mechanism for Criminal Tribunals (the ICTY's and International Criminal Tribunal for Rwanda's successor), 13 defendants were transferred to domestic courts in the countries of the former Yugoslavia, and 37 accused had their indictments withdrawn or died before or during trial.[2645]

In addition, the fact that many of the ICTY's defendants used to be – or still were – high up in the hierarchies of militaries and governments, led to more respect for the Tribunal from many sides. Particularly the indictment of the sitting head of state Slobodan Milošević showed that no one is above the law,[2646] and it certainly contributed to his ultimate

2642 Cf. Stromseth, 2009a, p. 92; similar: Milanović, 2016, p. 31f.; Kritz, 1999, p. 180.
2643 Cf. Stromseth, 2006, p. 257.
2644 Cf. Nettelfield, 2010, p. 288.
2645 Cf. ICTY, Key Figures of the Cases, http://www.icty.org/en/cases/key-figures-cases (last accessed 01/09/2019).
2646 Cf. Stromseth, 2006, p. 268.

fall from power.[2647] Gordy notes that "nobody who saw Milošević driven off to the Belgrade central prison believed in the myth of his invincibility."[2648] And Várady recalls:

> "[d]uring the years of Milošević's rule, one of the dreams of the opposition was the establishment of the rule of law. At that time, there was no better metaphor for this than seeing Milošević stand trial; we thought that if Milošević faced justice, this would mark a triumph of the rule of law."[2649]

Milošević's transfer deeply resonated with Serbians who hoped that their country would break decisively with the "poisonous policies of the past"[2650].

However, the circumstances of Milošević's arrest raise the question as to whether it really was a demonstration of the rule of law:[2651] while Milošević had been incarcerated by the domestic authorities upon an arrest warrant for corruption charges, former Prime Minister Zoran Đinđić transferred him to The Hague against the will of President Vojislav Koštunica.[2652] This happened *before* the law that was supposed to implement Serbia's cooperation obligations into national law – including the surrender of suspects – could be adopted by Parliament. Instead of relying on that law, Đinđić had to resort to a dubious provision of the constitution on protecting Serbia's interests.[2653] In addition to that, not only did Đinđić act alone and without consultation, extraditions in fact fell under the constitutional authority of the federal government, lead by Koštunica. Đinđić's move was

2647 As an indicted sitting head of state, Milošević was internationally isolated, which contributed to people being aware that there was no future with him; cf. Orentlicher, 2018, p. 63.

2648 Gordy, 2013, p. 31.

2649 T. Várady (2013). Ambiguous Choices in the Trials of Milošević's Serbia. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 459-463). Oxford: Oxford University Press, p. 460.

2650 Orentlicher, 2018, p. 67.

2651 Cf. Várady, 2013, p. 460.

2652 On the disagreement between Đinđić and Koštunica, see also: Y. Shany (2013c). Two Sides of the Same Coin? Judging Milošević and Serbia before the ICTY and ICJ. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 441-458). Oxford: Oxford University Press, p. 448-451. For Đinđić, several considerations played a role: first, his stance that Milošević needed to be transferred to The Hague was certainly at least partly based on his conviction that this was "the right thing to do". Second, the decision seems to be supported by the political calculation that the kind of reforms Đinđić sought would be difficult to pursue in the shadow of Milošević. In addition, he might have aimed for political advantage by exposing the criminal policies of the Milošević regime and using it to discredit the more nationalistic and conservative elements in the post-Milošević order (including Koštunica). Lastly, the US (acting at the request of the ICTY Prosecutor) was exerting direct pressure on Belgrade to surrender Milošević by conditioning economic aid for Serbia on cooperation with the ICTY; cf. Shany, 2013c, p. 450.

2653 Cf. Várady, 2013, p. 460f.

therefore later described as "hijacking justice",[2654] and Koštunica called Milošević's transfer a "coup d'état".[2655]

Many Serbs viewed this transfer of Milošević to The Hague as a "national humiliation"[2656] and opposed his transfer – even though they believed him to be guilty of crimes.[2657] One reason was the rushed circumstances of his transfer.[2658] Another reason was that many had hoped that he would be held accountable in Serbia – after all, he was also indicted in Serbia for domestic crimes.[2659] Yet another reason for opposing Milošević's transfer to The Hague was the compromising timing, as it happened just before a deadline of the US Congress for economic aid for Serbia. People therefore felt blackmailed.[2660] Others wanted to send Milošević to The Hague, hoping that it would symbolise a clear shift towards the rule of law. The two positions were difficult to reconcile.[2661] However, it seems clear that the surrender of Milošević to The Hague, did not send out the unequivocal message that would renew respect for the rule of law, which supporters had hoped for.[2662]

Due to the prominence of the accused, and the many Serbs who saw in Milošević a criminal who had tricked them into a war that Serbia was bound to lose, people followed his trial on TV "like a football match"[2663]. The Milošević trial was the ICTY's "flagship trial":[2664] no figure more prominent was ever brought before the Tribunal, no other case addressed the massacres of the Yugoslav wars so comprehensively, or made such consequential claims about the causes and the course of those wars, no other trial received similar levels of attention or resources, and no other trial had the same expectations and

2654 Cf. V. Pešić (2013). Antecedents to a Debate: Conflicts over the Transfer of Milošević. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 409-418). Oxford: Oxford University Press, p. 410.

2655 Cf. Pešić, 2013, p. 417.

2656 Várady, 2013, p. 460.

2657 Cf. Gordy, 2013, p. 47.

2658 Cf. Gordy, 2013, p. 48.

2659 Cf. Várady, 2013, p. 460; Gordy, 2013, p. 48; Bieber, 2013b, p. 422f.

2660 Cf. Gordy, 2013, p. 48

2661 Cf. Várady, 2013, p. 460

2662 Cf. Várady, 2013, p. 461

2663 Interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27; in the beginning, three TV channels, including the state's channel, broadcasted the trial live on television; cf. Dragović-Soso, 2013, p. 390; Bieber, 2013b, p. 421. In the first days of the trial, their viewer numbers doubled; half of the citizens of Serbia watched the third day of the trial, when Milošević began his opening statement, rising to nearly two-thirds watching parts of the fourth day of the trial (which took place on a holiday in Serbia). FRY's foreign minister Goran Svilanović called the trial a "soap opera" for Serb viewers. But viewer ratings declined as the trial dragged on with its often very technical discussion; cf. Bieber, 2013b, p. 421. In March 2002 (one month after the trial had begun), the state TV channel RTS had terminated its live broadcasts (cf. Bieber, 2013b, p. 421), but other channels continued (cf. Dragović-Soso, 2013, p. 394).

2664 "The Milošević trial was hailed as a momentous event for both the [ICTY] and international justice as a whole"; M. Markovic (2004). In the Interests of Justice: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic. *Georgetown Journal of Legal Ethics, 18*(3), 947-958, p. 947. The media coverage about the Tribunal was dominated by media coverage about the Milošević trial; cf. Axboe Nielsen, 2013, p. 335.

hopes attached to it.[2665] Internationally, is was hoped that the trial would be the "capstone of the tribunal's somewhat improbable rise from the margins of the international arena to that of a serious international institution."[2666]

This was therefore the ultimate moment for the ICTY to present itself as a powerful and fair court that demonstrates the truth about crimes committed during the wars of the preceding years.[2667] Instead, however, people witnessed one of the Tribunal's worst trials which dragged on for four years,[2668] and ended with the defendant's sudden death just weeks before a verdict would have been pronounced.[2669] In addition, the Milošević trial introduced the right to self-representation into international law, which the defendant only used to ridicule the Tribunal, to delay proceedings by talking about irrelevant topics, to abuse witnesses, and to deliver televised political speeches.[2670] In an effort not to be

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2665 Cf. Waters, 2013, p. xv.

2666 Tolbert, 2002, p. 8; Waters summarises the expectations towards the Milošević trial: first, the trial's stature was in part a function of the accused's status and notoriety, being the "Butcher of the Balkans" to some and the "Saviour of the Serbs" to others. He was widely seen as the architect of Yugoslavia's violent dissolution and the single most dominant figure. Furthermore, the indictment underlying the trial was the first on a sitting head of state since World War II. The trial was also very ambitious covering all crimes in the Tribunal's jurisdiction and crimes committed in all three major wars of the Yugoslav dissolution. But "what made the trial extraordinary, was the interconnectedness of these many, many crimes, and the story weaving them together: What had been isolated, disparate acts, told and tested in separate trials, was now joined in a single case, under a single theory that implied a claim about the wars as a whole. The case that was brought against Milošević placed him at the very center of a web of criminality – indeed, it was Milošević's place at the center that provided the legal and logical relationship between all the other acts and actors across three wars and the greater part of a decade. […] Slobodan Milošević *was* the network. In short, though Milošević was tried in his individual capacity, his trial was also plausibly, almost necessarily, seen as the culmination of the Tribunal's work, an indictment of the Serbian war project, and a summation of Yugoslavia's dissolution;" Waters, 2013, p. xviif. (emphasis in original).

2667 Cf. interview with ICTY defence counsel, Belgrade, 23 January 2017, I-27.

2668 Slobodan Milošević had been transferred to The Hague in June 2001; cf. ICTY, Slobodan Milosevic transferred into Custody of the International Criminal tribunal for the former Yugoslavia., Press release 29 June 2001, http://www.icty.org/en/sid/7978 (last accessed 01/09/2019). His trial began in February 2002; cf. ICTY, The Trial of Slobodan Milosevic will begin on Tuesday 12 February at 9:30 a.m., Press release 5 February 2002, http://www.icty.org/en/sid/8123 (last accessed 01/09/2019).

2669 Cf. ICTY, Statement by the ICTY Prosecutor, Press release 11 March 2006, http://www.icty.org/en/sid/8793 (last accessed 01/09/2019); Slobodan Milošević was found dead in his cell in the Scheveningen Detention Unit on 11 March 2006; cf. ICTY, Slobodan Milosevic Found Dead in His Cell at the Detention Unit, Press release 11 March 2006, http://www.icty.org/en/sid/8794 (last accessed 01/09/2019). He died from a heart attack; cf. ICTY, Update from the President on the Death of Slobodan Milosevic, Press release 17 March 2006, http://www.icty.org/en/sid/8781 (last accessed 01/09/2019). For an analysis of the myriad problems of the trial and summary of the criticism on it, see for instance: Human Rights Watch (December 2006), *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, https://www.hrw.org/sites/default/files/reports/milosevic1206webwcover.pdf (last accessed 01/09/2019); see also: Orentlicher, May 2008, p. 106-123; or Dragović-Soso, 2013, p. 390f.

2670 Cf. Gordy, 2013, p. 157; as a matter of example, see for instance Slobodan Milošević's initial appearance: Initial Appearance - Milošević, Slobodan - 3 July 2001, ICTY YouTube channel, published on 9 February 2012, https://www.youtube.com/watch?v=7S3CIMpDEjU&feature=youtu.be (last accessed 01/09/2019). There, answering to presiding Judge May's question whether he wishes to have time to consider being

perceived as being unfair on the defendant, the Tribunal felt compelled to indulge the defendant's efforts to discredit it.[2671]

For Milošević, this self-representation strategy had the distinct added advantage that in his defence, he was not only able to address the prosecution and the judges, but also the Serb audience at home – and he did so in Serbian. The prosecution, on the other hand, needed to convince the judges and was understandable only through translation, which left the interpretative presentation of the dissolution of Yugoslavia in the hands of Milošević.[2672]

In the end, the trial did not help to establish the Tribunal's standing as an authoritative body in Serbia – quite to the contrary, it actually undermined trust in it. Over 60% of Serbian citizens tuned into the transmission of the trial during its first days. The impact of Milošević's defence became visible immediately: when asked to rate his defence on a scale of one to five, 41.6% gave him a five, one-fifth gave him a four and another fifth a three, 5% gave him a two, and 11.8% were completely dissatisfied with his performance.[2673] The number of people who believed Milošević should not have been transferred rose from 44% to 62%; the number of those who approved of the transfer fell from 43% to 27%. The respondents gave the poorest marks to the performance of the prosecution and to the chances of Milošević receiving a fair trial, whereas Milošević's own defence received the highest mark.[2674] The trial actually improved Milošević's standing among the Serbian public.[2675]

Milošević's death only made things worse for the Tribunal. The problem associated with the early ending of the trial was – and remains – that it has left all questions about what it was supposed to achieve unanswered. Ultimately, the trial disappointed everyone: it was not able to exercise the kind of decisive influence on the broader jurisprudence of the Tribunal, on international criminal law more generally, nor on post-conflict transition in the former Yugoslavia that was predicted.[2676] And of course, the Serbian media only used it to further discredit the ICTY, by accusing the ICTY of either directly murdering Milošević or indirectly facilitating his death. The newspaper *Večernje novosti* ("Evening

represented by counsel, Milošević answers: "I consider this tribunal false tribunal and indictments false indictments. It is illegal, being not appointed by UN General Assembly. So, I have no need to appoint counsel to illegal organ." (as of min 2:12).

2671 Cf. interview with ICTY judge, Berlin, 20 December 2016, I-42.

2672 Cf. Bieber, 2013b, p. 430f.

2673 Cf. Dragović-Soso, 2013, p. 390.

2674 Cf. Dragović-Soso, 2013, p. 393.

2675 Cf. Dragović-Soso, 2013, p. 390; Bieber, 2013b, p. 431; although his approval rate fell again, once media coverage also declined; cf. Bieber, 2013b, p. 423.

2676 Cf. Waters, 2013, p. xviii.

news") for instance took the opportunity to remind readers that 69.56% of all prisoners in the "Castle of Death" (i.e. the ICTY) were ethnic Serbs.[2677]

Of course, it is an illusion to believe or expect a single trial to have a transformative impact. Many have argued that international criminal courts and tribunals can merely support domestic elites who genuinely embrace the process of confronting the past, and who make societies more receptive to the liberal human rights message of international courts. In Serbia, at the time of the Milošević trial, there were certain resemblances between the Milošević regime and Serbia's post-2000 leadership, both in terms of goals and rhetoric, indicating a continued prominence of illiberal and chauvinistic nationalism in Serbia.[2678] However, the ICTY certainly missed an opportunity to use the highly-mediatised Milošević trial to demonstrate that it is an effective criminal court, and thereby to convince the Serbian public – and legal practitioners and political elites – of its mission.

Despite the setback – related to Milošević's arrest and trial – in establishing the Tribunal's authority, the fact that, as noted, suspects of international crimes could no longer be in positions of political or military power (because they were sitting in a prison in The Hague), managed to contribute to the transitions that took place in the countries of the former Yugoslavia.[2679] Transferring suspects to another country also removed those who would most certainly had reasons to discredit the Tribunal – and hence, undermine its authority.[2680] It certainly provided the countries a viable opportunity to chart a new path going forward.[2681] As one observer noted, if certain "spoilers" had not been removed from BiH's and Serbia's political scene, "we would have had a mafia oligarchy as our leaders"[2682], with Radovan Karadžić still being at least a member of parliament, and Ratko Mladić being the Chief of Staff of the army.[2683] But also, for instance, removing Jovica Stanišić and Franko Simatović, who served as head of the State Security Service of the Ministry of Internal Affairs of the Republic of Serbia (Stanišić), and commander of an elite special forces police unit within the State Security Service (Simatović), was considered crucial for Serbia's transition and for the stability of post-Milošević governments.[2684]

At the same time, removing key politicians and army or security agents also bears political risks. It has been suggested, for instance, that the prosecution of Vojislav Šešelj, who served as Deputy Prime Minister of Serbia from 1998 until 2000, and who is the founder and president of the Serbian Radical Party, only boosted his stature. Šešelj himself

2677 Cf. Bieber, 2013b, p. 433.
2678 Cf. Dragović-Soso, 2013, p. 391.
2679 Cf. Orentlicher, 2018, p. 60 and 117.
2680 Cf. Ostojić, 2014, p. 66.
2681 Cf. Orentlicher, 2018, p. 116.
2682 Quoted in: Orentlicher, 2018, p. 87.
2683 Cf. Orentlicher, 2018, p. 165.
2684 Cf. Orentlicher, 2018, p. 74.

has brought forward this view by suggesting that being prosecuted by "The Hague" means that you are "special".[2685] While the warning is certainly relevant, especially in view of how self-representing accused used the stage of the ICTY's courtroom to their advantage, coupled with increased media interest in these types of sensational trials, the effects for Šešelj are less dramatic. Literally all my Serbian interview partners have confirmed that although Šešelj continues to be a loud voice in Serbian politics, particularly since his return to Serbia in 2014,[2686] his political importance is minimal. Indeed, at the presidential elections of 2018, Vojislav Šešelj earned no more than 4.5% of the votes.[2687] His wife, who was the Serbian Radical Party's candidate in the presidential elections of 2012, while Šešelj was still in custody and defending himself in The Hague, only received 3.8% of the votes.[2688] This suggests that Šešelj's perceived popularity, mostly gained by ridiculing the ICTY, does not translate into political power. Thus, the Tribunal rather "contained their powers"[2689].

Also in BiH, many indictees were local power brokers and remained hostile towards the Dayton peace process. Relocating those who most threatened BiH's fragile stability helped states enforce the peace agreement.[2690] In addition, the constitution bars persons who have been indicted by the ICTY, and those who have failed to comply with an order to appear before the Tribunal from holding public office. The same applies to persons convicted by the ICTY.[2691] This marginalised fugitives like Radovan Karadžić, even though he continued to lead the Serb Democratic Party and the presidency of the Republika Srpska until late July 1996, until he stepped down following negotiations with Richard Holbrooke, former US special envoy to the Balkans.[2692]

When looking at the Tribunal's record of effectively prosecuting key political and military figures, the demonstration is somewhat less impressive with regard to accused from Serbia, than in terms of those from BiH. The two most prominent accused from Serbia were Slobodan Milošević and Vojislav Šešelj; Šešelj certainly was a less important figure than Milošević, both in terms of his political powers during the wars and in terms

2685 Cf. Orentlicher, 2018, p. 118.

2686 He was first provisionally released to Serbia for cancer treatment and then stayed there after his acquittal by the Trial Chamber in March 2016. Although he was subsequently convicted to 10 years imprisonment by the Appeals Chamber of the MICT, he did not have to serve this sentence because he had already spent as much time in ICTY custody during his trial.

2687 Cf. Republika Srbija, Republička izborna komisija, *Rezultati izbora za Predsednika Republike održanih 02. aprila 2017. godine*, http://www.rik.parlament.gov.rs/doc/izbori-2017/dokumenta/1%20Rezultati%20izbora.XLS (last accessed 01/09/2019).

2688 Cf. Republika Srbija, Republička izborna komisija, *Izveštaj o konačnim rezultatima izbora za Predsednika Republike održanih 6. maja 2012. godine*, http://www.rik.parlament.gov.rs/doc/arhiva/predsednik/2012/lat/3.%202012%20izvestaj%20o%20rezultatima%20pr%2006.05.%20LAT.docx (last accessed 01/09/2019).

2689 Orentlicher, 2018, p. 118.

2690 Cf. Bosco, 2014, p. 62.

2691 Article IX, para. 1 Constitution.

2692 Cf. Orentlicher, 2018, p. 38.

of the crimes he was charged with, but he made himself more important than he was by defending himself, by continuously insulting the Tribunal, and by widely publicising his view via several YouTube channels[2693] and written publications.[2694] Both trials were initially welcomed by people in Serbia, but as they dragged on, this contributed to the declining respect for the ICTY, and are now perceived as completely undermining the ICTY's authority.[2695] With regard to the two most important cases for accused from Bosnia and Herzegovina, namely the cases against Radovan Karadžić and Ratko Mladić, the dynamics were reversed: at first, observers feared that they would render the Tribunal a toothles tiger, because it could not secure their arrests for a long time. Many opined that without trying Karadžić, former President of the Republika Srpska, and Ratko Mladić, former Commander of the Main Staff of the Army of Republika Srpska, and who is considered to be chiefly responsible for the Srebrenica genocide, the Tribunal would have failed its mission. However, in 2008 (Karadžić) and 2011 (Mladić), they were finally arrested and brought to The Hague. Compared to other cases, both trials proceeded in a relatively normal fashion, and without any major scandals – despite Radovan Karadžić defending himself, too.[2696] In both cases, the Tribunal demonstrated its ability to conduct effective and fair proceedings within a relatively reasonable timeframe, even when it concerned challenging cases involving complicated charges such as a genocide. The trials were even concluded with – for Bosnians – satisfying sentences, as both convicts received life sentences.

2693 While I do not know whether any of these channels in operated by himself, they for sure are dedicated to him: https://www.youtube.com/user/Stvaranje1/videos and https://www.youtube.com/channel/UCLgAwDP85XKojtGCwMcWSsw.

2694 See section on academic discussions above.

2695 The trial of Vojislav Šešelj has some parallels with the one of Slobodan Milošević: also Šešelj defended himself and used the stage in an even more perfidious manner than Milošević. He not only used his extensive speaking time to spread his political views, but also continuously insulted the ICTY, its judges, and prosecutors. His offensive book series written while in the ICTY's prison has already been mentioned (see section "Academic Discussion" above). Apart from that, Šešelj used every opportunity to provoke the judges and prosecutors. As a matter of example, see this video: Seselj the king!, Xeasar YouTube channel, published on 28 March 2008, https://www.youtube.com/watch?v=FTtWqwD_iEY (last accessed 01/09/2019), where he reads out a previous statement (only after inviting prosecutor Geoffrey Nice to read the statement out himself because "your reading is more beautiful" (my own translation)) which says: "All of you, members of the secretariat of the Hague Tribunal, you can all just suck my dick." (my own translation). Šešelj has also been convicted multiple times for contempt of court, all for disclosing confidential information; ICTY, Contempt Cases, http://www.icty.org/en/action/contemptcases/27 (last accessed 01/09/2019). The fact that he was acquitted at first instance and then – somewhat conveniently – convicted to exactly the amount of years he had already spent in ICTY custody on appeal also raised considerable doubts about the genuine fairness of the proceedings against Šešelj in Serbia. In addition, from the moment of his voluntary surrender to The Hague in 2003 until his final conviction on appeal in 2018, incredible 15 years passed.

2696 Compared to Milošević and Šešelj though, who both were lawyers, Karadžić is reported to actually increasingly like the legal proceedings and mounted a predominantly legal defence, although he was trained as a psychiatrist; cf. interview with ICTY defence counsel, The Hague, 9 November 2016, I-40.

The Problem with the Generals and with NATO

Apart from difficulties in demonstrating to the Serbian public that the ICTY can conduct accountability proceedings effectively, the selection of the Tribunal's accused and convicts also raised major doubts regarding its fairness and effectiveness – and this, ironically, was the case in most countries of the former Yugoslavia.[2697] Noting this irony, Serbian publicist Zlatoje Martinov wrote a piece about the allegedly "[a]nti-Serb, anti-Croat, and anti-Bosniak Tribunal"[2698]. Or, as Serbian lawyer Toma Fila – gravely – put it: "This court didn't achieve establishing its authority neither towards Serbs, nor Croats, nor Bosniaks. It embarrassed itself uncountable times."[2699]

The basis for Serb allegations – whether from Bosnian Serb or Serbian Serb sides – is that the majority of people indicted by the ICTY OTP were of Serb ethnicity, and the biggest group of convicts as well.[2700] Towards the end of the Tribunal's lifespan, criticism regarding the sentences for ethnic Serbs – which were perceived as harsher than for members of other ethnicities – was also voiced.[2701] Indeed, 68% of the indicted persons were of Serb ethnicity (or 109 people)[2702], 21% were of Croat ethnicity, 4% were Bosniaks, 4% Albanians, 1% Macedonians, and 2% unknown.[2703] While more than two-thirds were ethnic Serbs, citizens of Serbia constitute a rather small percentage (7.67% of the Tribunal's indictees, or 21 people),[2704] highlighting that this criticism towards the ICTY goes along ethnic lines and not nationalities, with Serbs drawing no distinction between Serbian and Bosnian Serbs.[2705]

2697 Cf. Greenawalt, 2013, p. 385.

2698 "*[a]ntisrpski, antihrvatski i antibošnjački Tribunal*" (my own translation); Martinov, Danas, 4 December 2017.

2699 "*Taj sud nije uspeo da nametne autoritet ni kod nas, ni kod Hrvata, ni kod Bošnjaka. Izblamirao se bezbroj puta.*" (my own translation); Spasojević, 23 July 2011.

2700 I do not want to try to give exact numbers of ethnic origins of the indictees and convicts here, as the ICTY itself does not gather this information in all cases and even less so provides statistics on the matter. Local media have offered statistics, but they are contested and not knowing the ethnicity of each and every ICTY defendant, I would not be able to verify their accounts. What no one contests, however, is the conclusion: that most of the indictees and the convicts were ethnic Serbs. Orentlicher, for instance, asserts that two thirds of the indictees were Serbs; cf. Orentlicher, 2018, p. 224; similar: Waters, 2013, p. 44.

2701 This was reported by many of my interviewees, for instance: interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28. Also opinion polls among ethnic Serbs reflect the feeling that they felt over-proportionately targeted by the prosecutorial strategy, by the chambers' rulings, and concerning sentencing. Indeed, also Orentlicher confirms that "Serbs suspects were convicted at somewhat higher rates than were suspects of Bosniak or Croat ethnicity"; Orentlicher, 2018, p. 224; see also: Orentlicher, May 2008, p. 123-130. The fact is that ethnic Serbs' sentences were indeed significantly longer on average than those of members of other ethnicities; cf. S. Ford (2013). Fairness and Politics at the ICTY: Evidence from the Indictments. *North Carolina Journal of International Law and Commercial Regulation, 39*(1), 45-113, p. 50.

2702 Cf. Orentlicher, May 2008, p. 30, fn. 77.

2703 Cf. V. Petrović, 2018, p. 235.

2704 Cf. Orentlicher, May 2008, p. 30.

2705 Cf. Orentlicher, May 2008, p. 123.

The fact that this indictment policy corresponded to the proportions of the number of people who committed crimes – and how many crimes they committed – during the wars as well as to their gravity,[2706] did not resonate with Serbs. This is due to the fact that, just as for other ethnicities, allegations of ethnic bias were not only strong when one of "ours" were convicted, but also when one of "theirs" was acquitted,[2707] or indeed, not even indicted. Serbs deplored not only the fact that fewer Croat and Bosniak leaders were put on trial in The Hague, but especially that until 2005, no Kosovo Liberation Army (KLA) leaders had been indicted,[2708] and no one was held accountable for NATO's bombing of Serbia at the ICTY.[2709] After all, the Kosovo conflict and its consequences were the only personal experiences that Serbs from Serbia had with the war.[2710] Both failures (in addition to the few indictments of Croat and Bosniak political and military leaders) provoked the feeling that crimes committed against Serbs were not being addressed by the Tribunal.[2711]

This perception is aggravated by Serbs' belief that they were the greatest victims of the wars, and at the same time had the fewest perpetrators:[2712] half of the respondents of the 2017 Humanitarian Law Center survey considered Serbs to be the greatest victims of the

2706 Cf. O. Simić (2018). "I Would Do the Same Again": In Conversation With Biljana Plavšic. *International Criminal Justice Review, 28*(4), 317-332, p. 327.

2707 Cf. interview with ICTY judge, The Hague, 13 December 2016, I-51; interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28; see also: BIRN (8 January 2019), BIRN Publishes Report on Challenges to Transitional Justice, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2019/01/08/birn-publishes-report-on-challenges-to-transitional-justice-01-08-2019/ (last accessed 01/09/2019). For instance, Serbian publicist Zlatoje Martinov recounts the reactions towards the ICTY's last two verdicts, with the trial judgment in the Mladić trial causing allegations of "anti-Serb" bias. Only one week later, when the appeals chamber rendered its judgment in the *Prlić et al.* case, Serbian commentators were happy with the Tribunal as they interpreted the verdict as confirmation for the allegation that Croats were the real aggressors in Bosnia and Herzegovina, and not the Serbs; cf. Martinov, Danas, 4 December 2017.

2708 Cf. Dragović-Soso, 2013, p. 405.

2709 Cf. Stromseth, 2006, p. 274; May and Fyfe note that although non-Serbs were eventually prosecuted, the Prosecutor had waited so long that by that time, most Serbs were already convinced that the Tribunal was biased; cf. L. May & Fyfe, 2017, p. 89.

2710 Dragović-Soso is describing their experiences: "fear and psychological trauma of being bombed nearly every night for 78 days, the deaths of civilians in the bombing raids, the wide-scale destruction of Serbia's infrastructure and economy, and – following the end of the intervention – the exodus of over a hundred thousand Serbs and other non-Albanians from Kosovo and the forcible loss of a territory that was traditionally viewed as Serbia's sacred heartland"; Dragović-Soso, 2013, p. 401.

2711 Cf. Dragović-Soso, 2013, p. 405; to put things worse, the indictment against Slobodan Milošević was issued in May 1999, at the height of the North Atlantic Treaty Organization (NATO) bombing campaigns, triggering the allegation that the ICTY was an instrument of NATO; cf. Dragović-Soso, 2013, p. 405; Freeman, October 2004, p. 3; similar: Waters, 2013, p. 44.

2712 Cf. V. Krasniqi (2013). Another Report on the Banality of Evil: The Cultural Politics of the Milošević Trial in Kosovo. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 213-221). Oxford: Oxford University Press, p. 219.

wars, and 5% (the lowest number of respondents) considered most perpetrators to be Serbs.[2713]

Indeed, there have been a number of controversial acquittals, in particular of Croat, Bosniak and Kosovo generals, who were perceived as the main culprits of crimes against Serbs: the first one being Naser Orić, former Senior Commander of Bosnian Muslim forces in municipalities in eastern Bosnia and Herzegovina, including Srebrenica.[2714] As many Serbs continue to deny the genocide in Srebrenica,[2715] and to claim that the mass murder was merely a reaction to Bosniak crimes against Serbs in the area, Orić is not only perceived as the main culprit for crimes against Serbs in the area, but he is also regarded as responsible for all the blame that Serbia got for the events that took place Srebrenica. Subsequently, Ante Gotovina,[2716] who had been the overall operational commander of the southern portion of the Krajina region during the military offensive known as 'Operation Storm',[2717] which caused about 200,000 Serbs to flee, was acquitted in 2012, after the Trial Chamber had convicted him to 24 years' imprisonment just a year earlier. Only 13 days after Gotovina's acquittal, Ramush Haradinaj was acquitted on retrial. Haradinaj had been a KLA commander,[2718] again allegedly responsible for multiple crimes against Serbs who commonly accuse him of ethnically cleansing Kosovo.[2719]

2713 Cf. Danas (August 2017), *Obaveštenost građana Srbije o ratovima ´90-ih godina, ratnim zločinima i suđenjima optuženima za ratne zločine*, Belgrade, www.hlc-rdc.org/wp-content/uploads/2017/12/Istrazivanje_javnog_mnjenja_Sudjenja_za_ratne_zlocine_Demostat.pdf (last accessed 01/09/2019), p. 32f.

2714 Cf. ICTY, Case Information Sheet Naser Orić (IT-03-68), http://www.icty.org/x/cases/oric/cis/en/cis_oric_en.pdf (last accessed 01/09/2019).

2715 Cf. S. Biserko (2012). The Srebrenica Genocide: Serbia in Denial. *Pakistan Horizon, 65*(3), 1-6; see also: M. Stojanovic (17 July 2019), Hague Prosecutor Criticises Serbian Politicians for Genocide Denial, Balkan Investigative Reporting Network, Balkan Transitional Justice, https://balkaninsight.com/2019/07/17/hague-prosecutor-criticises-serbian-politicians-for-genocide-denial/ (last accessed 01/09/2019).

2716 *Gotovina et al.* (IT-06-90) "Operation Storm".

2717 Cf. ICTY, Case Information Sheet Gotovina & Markač (IT-06-90) "Operation Storm", www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf (last accessed 01/09/2019).

2718 Cf. ICTY, Case Information Sheet Haradinaj et al. (IT-04-84 and IT-04-84bis), http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf (last accessed 01/09/2019).

2719 Orentlicher, 2018, p. 184; the 2017 Humanitarian Law Center study showed that an overwhelming majority of respondents believe that these non-Serbian war crimes suspects, who were acquitted by the ICTY, are guilty. When asked whether Kosovo's incumbent Prime Minister Ramush Haradinaj is guilty, 64% considered that he is. Not one respondent of Serbian ethnicity found him not guilty. However, when asked what exactly he is guilty of, 40% did not know the answer, while the other 60% gave vague and general responses (e.g. "killings", "war crimes"). The responses were almost identical in relation to the former senior Commander of Bosnian Muslim forces in Srebrenica Naser Orić (acquitted by the ICTY in 2008); cf. Danas, August 2017, p. 23; see also: Kostić, EJIL:Talk!, 22 January 2018. The study suggests that it is in fact the respondents who are ethnically biased: asking them whether a fictional person with an obviously Croatian name (Krešimir Horvat) was guilty, the majority did not respond, while 12% found him guilty, out of which 8% "knew" what he was guilty of; cf. Kostić, EJIL:Talk!, 22 January 2018. The study thereby confirms theories on confirmation biases, a point also made by Milanović in relation to Serbia and the ICTY: Milanović, 2015. One of the key findings relating to the public's ethnic bias is that those who consider themselves well-informed about war crimes trials (about half of the respondents) are those who demonstrated the most ethnic prejudice

A total of 56% of respondents who participated in a study conducted by the Human Rights Center in 2017 find the ICTY to be partial and biased,[2720] while only 6% believe the opposite. As a consequence of this perceived ethnic bias, the Serb public overwhelmingly distrusts the ICTY and its findings. Almost half of the respondents believe that the ICTY did not contribute in any way to establishing the truth about the wars.[2721] Only 12% believe that the ICTY established the truth about what happened in Srebrenica.[2722] State officials from all former Yugoslav states also often fail to recognise and accept verdicts passed by the ICTY,[2723] contributing to the overall lack of information about the 1990s conflicts, and prolonging a feeling of injustice among victim groups. Take, for instance, the Serbian parliament, which adopted a declaration condemning the "massacre" of Srebrenica in 2010, falling short of calling it "genocide" as established by both the ICTY and the International Court of Justice.

As mentioned in section 1.3 of Chapter 6, there is a small – but important – nuance between lack of fairness allegations made by the general public, and those made by legal professionals: while the general public deplores the fact that most defendants and convicted persons at the ICTY were of Serb ethnicity, most of my Serbian interviewees instead criticise the fact that those few people of other ethnicities who *were* indicted, were then found innocent – even though the respective trial chambers often found that crimes had indeed been committed, just not by the accused in question. As one of my interviewees explained:

> "In Serbia, all perception about Tribunal is very bad in public. Almost from the very beginning. Not from the very beginning, but after all these judgments [of acquittal of Croatian General Gotovina, former KLA commander Haradinaj,

– they were the most likely to find non-Serbian "suspects", including the fictional one, guilty (cf. Danas, August 2017, p. 27f., 31). This finding shows that the public's motivation for getting informed is for the purpose of confirming their pre-established beliefs. Not unexpectedly, confirmation bias – i.e. the tendency to search for and interpret information in a way that confirms one's pre-existing beliefs – was not only found when testing the public's ethnic bias, but also when testing their attitudes towards the ICTY. Namely, 76% of those who consider themselves well-informed about war crime trials find the ICTY to be partial and biased (cf. Danas, August 2017, p. 15), and are the least likely to believe that the Tribunal contributed to establishing the truth about the wars (cf. Danas, August 2017, p. 17). Furthermore, out of the 56% of respondents who find the ICTY to be biased, the majority based its response on vague reasons such as repeating that it is "biased" (16%), "political" (2%), or "anti-Serb" (16%) (cf. Danas, August 2017, p. 14 and 16). The majority of those who accounted for their distrust in vague generalities are the highest educated respondents (57% of 45%) (cf. Danas, August 2017, p. 16).

2720 Cf. Freeman, October 2004, p. 3.

2721 Cf. Danas, August 2017, p. 17; a similar number was found in a 2009 survey: Beogradski centar za ljudska prava (2009), *Public perception in Serbia of the ICTY and the national courts dealing with war crimes*, www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/10/Public-perception-of-ICTY-and-the-national-courts-dealing-with-war-crimes-Serbia-2009-ABRIDGED.ppt (last accessed 01/09/2019), p. 19.

2722 Cf. Kostić, EJIL:Talk!, 22 January 2018.

2723 Cf. BIRN, Balkan Investigative Reporting Network, 22 November 2017.

> commander of the Bosnian Army Orić] [...]. In Serbia, people hate Tribunal, have a bad perception of the Tribunal, is not because it found so many Serbs to be guilty. But because the others were acquitted. So, that is something we cannot buy. We – meaning the public opinion."[2724]

He went on to explain that if crimes (against Serbs) were committed, but not by the person standing trial, then someone else should have been indicted.[2725] Many legal professionals put the blame for the flawed outcomes of the Tribunal's trials on the Office of the Prosecutor, rather than on the judges – a distinction that many legal laypersons are unable to make.

What Serbs tend to forget is that around the same time, three high profile Serb accused were also acquitted: Momčilo Perišić, former chief of the General Staff of the Yugoslav Army, was acquitted in February 2013,[2726] and Jovica Stanišić, former Head of the State Security Service of the Ministry of the Internal Affairs of the Republic of Serbia, and his subordinate Franko Simatović, were acquitted in May 2013.[2727] Concerning all these controversial acquittals, Orentlicher writes that they "seemed indefensible even in the eyes of the Tribunal's staunchest supporters"[2728] and that many believed that there were indeed certain political motives behind the acquittals. There were those who believed that the Tribunal had decided that the time had come to "distribute among the former belligerents equal measures of relief from accountability"[2729], and those who thought that the ICTY was increasingly mindful of how its precedents might affect military officials who command Western armies.[2730] Either way, at that time, "it was hard to imagine confidence in the

2724 Interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

2725 Cf. interview with ICTY defence counsel, Belgrade, 5 November 2018, I-28.

2726 Cf. ICTY, Case Information Sheet Momčilo Perišić (IT-04-81), www.icty.org/x/cases/perisic/cis/en/cis_perisic_en.pdf (last accessed 01/09/2019).

2727 Cf. ICTY, Case Information Sheet Stanišić&Simatović (IT-03-69), http://www.icty.org/x/cases/stanisic_simatovic/cis/en/cis_stanisic_simatovic_en.pdf (last accessed 01/09/2019); though they are both currently on retrial at the MICT.

2728 Orentlicher, 2018, p. 178.

2729 Orentlicher, 2018, p. 184.

2730 Cf. Orentlicher, 2018, p. 184; this theory had been provoked by the Danish ICTY judge Frederik Harhoff who had circulated a letter to 56 private contacts which had been leaked. In that letter, he suggested that then-Tribunal President Theodor Meron, who was an American citizen as well as a former Israeli diplomat, had been influenced by US and Israeli military officials to acquit senior military figures in order not to create precedents that could later be used against the US or Israeli forces active in multiple conflict zones. In turn, Meron had allegedly pressured other judges accordingly; cf. Waters, 2013, p. 46. Judge Harhoff was subsequently disqualified from the *Šešelj case* as he was believed to have shown a bias for conviction through his letter. This only added to the catastrophe that the Šešelj trial already was. See: ICTY, Judge Harhoff disqualified from Šešelj case, Press release 29 August 2013, http://www.icty.org/en/press/judge-harhoff-disqualified-%C5%A1e%C5%A1elj-case (last accessed 01/09/2019).

ICTY shrinking any lower"[2731]. This time, however, not only among Serbs, but also Bosniaks.[2732]

Nevertheless, Bosniaks are mostly supportive of the ICTY.[2733] Generally, they have interpreted the numerical imbalance as accurately reflecting the disproportionate share of crimes committed by Serbs.[2734] Therefore, the most significant criticisms that Bosniaks have levelled against the Tribunal have been specific, concerning long and complicated trials, inadequate sentences, and plea bargains, or the long time it took to apprehend two central indictees related to the Srebrenica genocide (Karadžić and Mladić).[2735]

What becomes clear is that the

> "ICTY's success hinges not merely on establishing individual guilt or innocence, but on doing so in a way that supports a broader political and historical narrative conducive to the sort of political transformation the ICTY hopes to achieve. This implies an unavoidably dualistic project of institutional design that attends both to forensic judicial values and to their impact, which is social and political."[2736]

When it comes to convincing people of the legal and factual value of the Tribunal's procedures and judgments, the question of whether all crimes have been effectively addressed becomes highly important.[2737] Bearing in mind their perception of being the victims of the Yugoslav wars, Serbs do not consider that enough perpetrators from the other ethnic groups have been prosecuted. This general attitude of distrust towards the Tribunal obviously also affects legal practitioners and political decision makers who somewhat naturally doubt the solutions proposed by the ICTY. Among their Bosnian colleagues, the situation is reversed: due to the generally positive attitude towards the ICTY among the majority of their peers, legal practitioners and polical elites in BiH are initially

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2731 Orentlicher, 2018, p. 186.

2732 Cf. Orentlicher, 2018, p. 186f.

2733 Cf. interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53; interview with ICTY office BiH representative, Sarajevo, 30 January 2017, I-38; Bosnian Croats usually either aligned with Serbs or with the Bosniaks on their stance towards the Tribunal – mostly for opportunistic reasons; cf. C. K. Lamont (2013). The Hague Front in the Homeland War: Narratives of the *Milošević* Trial in Croatia. In T. Waters (Ed.), *The Milošević Trial. An Autopsy* (p. 203-212). Oxford: Oxford University Press, p. 206.

2734 Cf. Waters, 2013, p. 44; Swimelar, 2013, p. 188.

2735 Cf. Swimelar, 2013, p. 188; see also: Orentlicher, 2010, p. 14-18.

2736 Greenawalt, 2013, p. 385.

2737 Levi, Hagan, and Dezalay find that international criminal courts and tribunals mostly build authority through practices that lie "upstream in the process", namely in the office of the prosecutor. The two key elements, they consider, are indictments and evidence – indictments, through which a certain prosecutorial strategy can be manifested, and evidence that will ultimately prove the prosecutor's cases or not. The Serbian/Bosnian situation shows that indeed, for public recognition the selection of accused is crucial, and whether their trials are effective; cf. Levi *et al.*, 2016, p. 292.

open to ICTY solutions, until they are proven ineffective or wrong to them. In BiH, the Tribunal is perceived as an effective criminal court, whereas in Serbia, it is not.

Impact Factor Compliance: Cooperation and Deterrence

The third determinant for authority is whether the war crimes court can secure compliance. This refers to both cooperation of states and institutions, and therefore compliance with its requests (for instance, for surrender, or for access to documents or witnesses), but also to compliance with the court's general mission – ultimately, that no more crimes are committed. In other words: deterrence.

While the Tribunal's ability to enforce states' compliance obligations was not often mentioned by my interview partners as one of the important factors that gave it authority, this factor would probably have received much more attention if the ICTY had *not* managed to obtain the surrender of all accused and access to documents.

Indeed, ultimately, all accused were surrendered to The Hague, with the last one being Goran Hadžić, who was arrested in July 2011 in Serbia. This was largely due to the conditionality policies of the United States regarding economic aid, and of the European Union regarding membership, which served as "carrots" for the countries of the former Yugoslavia,[2738] persuading them to comply with their cooperation obligations.[2739] These conditionality policies gave the EU, and to lesser extent, the US, considerable leverage over the countries of the former Yugoslavia.[2740] Especially the EU's insistence springs from a conviction that the Tribunal is a key factor in reestablishing the rule of law following armed conflict in the Western Balkans, ending impunity for international crimes, and facilitating reconciliation across the region.[2741]

As mentioned, when key suspects such as Karadžić and Mladić had not been apprehended yet, strong fears existed that the ICTY would ultimately be perceived as a failure. But eventually, they were arrested, tried, and convicted, clearing the ICTY's fugitive list. The fact that the Tribunal has dealt with all of its indictees, is now considered a great success and demonstration of its authority. At least in BiH, this certainly plays an important role; its reputation would have been very different there today, had Karadžić and Mladić not been tried.

2738 Cf. C. del Ponte (2008). *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*. New York: Other Press.

2739 Cf. Freeman, October 2004, p. 3f.

2740 Cf. Waters, 2013, p. 46.

2741 Cf. Rangelov, 2006, p. 371; it has been criticised that, in particular, the European Union (EU) – which would have had possibilities beyond that – focused solely on cooperation with the ICTY when it comes to dealing with war crimes; cf. Rangelov, 2006, p. 365; Michaeli, 2011b, p. 61; Orentlicher, 2018, p. 425; Gordy, 2013, p. 171. For a more extensive analysis of EU conditionality as a surrogate enforcer for the ICTY, see: Brodersen, 2014.

As for deterrence, it is often said that the worst crime (the genocide in Srebrenica in July 1995) was yet to be committed when the Tribunal was established in 1993. Observers also refer to Serbia's retaliatory activities in Kosovo when Serbs were arrested. The argument here is that the ICTY did not have a deterrent effect. However, its long-term effects cannot be known. In any case, the fact that crimes were still being committed when the Tribunal was already in operation is neither mentioned in the literature, nor in reports, nor by my interviewees, as a decisive factor in assessing its effectiveness.

Impact Factor Perceived Legitimacy: Demonstration of the Rule of Law

From the above, it becomes clear that in Serbia, the ICTY was largely not perceived as an authoritative court, whereas it was in BiH. With this in mind, being perceived as legitimate would naturally have been much more difficult to achieve towards its Serbian constituents than towards its Bosnian audience.

As established in section 1.3.4 of Chapter 3, in order to be perceived as legitimate, the Tribunal would have needed to demonstrate the rule of law, meaning first and foremost, fairness, independence, transparency, predictability, competence, efficiency, commitment to its own rules, and impartiality.

As demonstrated in section 1.3 of Chapter 6, domestic legal practitioners' major points of criticism relate to: 1) certain substantive law concepts as developed in the Tribunal's jurisprudence, most importantly, joint criminal enterprise; and 2) the ICTY's procedures.

The concept of joint criminal enterprise (JCE) was perceived as a breach of the principle of predictability, as domestic professionals did not consider it to be customary international law at the time the Yugoslav conflicts took place. Furthermore, it is also considered unfair, as it potentially holds people accountable who are – according to the critics' understanding of the law – not guilty. This explains why JCE was dubbed "just convict everyone"[2742]. At the same time, for some, the fact that joint criminal enterprise was adjudicated in its three forms (JCE I, II, and III) by the ICTY, even though many consider merely JCE II (the 'concentration camp scenario') to be established practice and appropriate, demonstrates the Tribunal's lack of competence.

The ICTY's procedure was perceived as inherently unfair, especially in terms of equality of arms. First of all, it was said that Yugoslav-trained lawyers could *de facto* not practice and defend before the Tribunal, as the ICTY Rules of Procedure and Evidence were largely accusatorial and not inquisitorial, the latter being the tradition in the countries of the former Yugoslavia. In addition to that, its increasing mixture with inquisitorial elements rendered the procedure unfair, as it married the worst of both systems, at least in the eyes of the defence. Particularly the prosecutor's (lack of) disclosure obligations while being the investigative and the accusing authority at the same time, led to criticism. Lastly, and

2742 Badar, 2006.

related to that, the Tribunal's search for the legal truth frustrated practitioners from both Serbia and BiH, as they were used to a system that looks for the material truth.

The perception of domestic legal practitioners of the ICTY is therefore mainly based on perceptions of fairness. Other principles, such as transparency or commitment, did not receive major attention in assessing the Tribunal's legitimacy.

Although the – mainly Serb – critique (regarding the application of joint criminal enterprise and the ICTY's procedure) is largely shared by Bosnian and international observers, the Tribunal is nevertheless widely seen as impartial and fair.[2743] Many recognise that "ICTY judges have been at pains to ensure that Hague trials are models of fair process"[2744]. The procedures meet extremely high standards that provide rights to both the defendants and the victims.[2745]

While the overwhelming majority of Bosnian political elites and legal practitioners seem convinced of this fact,[2746] and whom therefore gladly draw inspiration from the ICTY, for their Serbian colleagues, the Tribunal's failures weighs much heavier, often deterring them from adopting ICTY solutions in the national system. It is not that the ICTY's flaws are lost on the Bosnians; many of my interview partners had a very nuanced opinion about distinct critical issues in the ICTY's system. But their overall conclusion is nevertheless different from their Serbian colleagues. This can only be explained in light of the factors mentioned above, most importantly the general attitude towards the Tribunal in the country. However, the overall presence of the ICTY within the country, and the intensity of its contact with domestic decision makers and practitioners, also plays a crucial role; the closer the relationship and collaboration, the more solutions are adopted – even if subconsciously – and the less foreign the Tribunal seems to them.

2.3.3 Conclusion: The ICTY's Capacity Building and Demonstration Abilities

As shown in the previous section,[2747] attitudes in Serbia are very negative towards the Tribunal. The ICTY has itself failed to prevent this scepticism due to its late commitment to reaching out to its constituencies; yet, the Tribunal has also been discredited without any basis, as Serbs harboured misconceptions that had little to do with the reality in The Hague. However, reasons for the negative (in Serbia) and positive (in BiH) attitudes towards the Tribunal may, in part, also be due to its practices. Apart from reservations regarding

2743 Cf. Orentlicher, 2018, p. 175; L. May & Fyfe, 2017, p. 20; K. Ambos (2003). International criminal procedure: "adversarial", "inquisitorial" or mixed? *International Criminal Law Review, 3*(1), 1-37, p. 35; see also the ECtHR, *Case of Naletilic v. Croatia*, Decision as to the Admissibility of Application no. 51891/99 by Mladen Naletilić against Croatia, Chamber, 4 May 2000, para. 1b.

2744 Orentlicher, 2018, p. 160.

2745 Cf. Orentlicher, 2018, p. 160.

2746 Cf. Orentlicher, 2018, p. 160 and 175; confirmed by literally all my interview partners.

2747 Section 2.3.2.

the Tribunal's legality, stemming from the circumstances under which it was founded, many Serbs also have problems with its record of indictments and convictions. Ethnic Serbs feel disproportionately targeted, while Bosniaks feel that the imbalance reflects the realities of the wars and is therefore just. Of course, this general atmosphere also affects the propensity of policy makers and legal practioners in implementing legal and factual findings and solutions offered by the ICTY. Interestingly, I could find no difference in the attitudes towards the ICTY between Bosnian Serb legal practitioners and Bosniaks or Bosnian Croats,[2748] although attitudes towards the Tribunal generally follow ethnic lines.

This suggests that not only attitudes account for political decision makers' and legal practitioners' stance towards implementing the ICTY's legacy at the domestic level. Instead, being familiar with the Tribunal – through intensive contact related to common daily business, through transfer of knowledge and skills measures, or through a general presence within the country – is a precondition. In BiH, this contact between domestic practitioners and ICTY representatives was normal: finally, the international community saw the Tribunal as a natural partner, solliciting its advice on legal reform initiatives. Furthermore, some international judges and prosecutors had personal experience with the ICTY, naturally bringing it along to Bosnia and Herzegovina. In addition, the Tribunal and domestic courts had to collaborate on common cases. The question of attitudes did not play a role during these daily contacts – the collaboration was simply a necessity. This necessity was not applicable to Serbia. There, whether to invite the ICTY to Serbia or, instead, search for ICTY solutions themselves, would have been a matter of willingness and openness of the domestic policy makers and legal practitioners. Yet, they often did not do this, as they did, and do not, believe that the Tribunal would have any added value for their domestic legal system.

In conclusion, it can be held that the ICTY's capacity building effects, relating mainly to advice on legal reform and transfer of knowledge initiatives, was supported by the respect that Bosnians developed towards the Tribunal (partly because of its convincing performances, and partly *in the course of* capacity building, i.e. its demonstration effects), which led to considerable change in Bosnia and Herzegovina. As Serbians did not develop the same respect for the Tribunal (partly because of its unconvincing performances, and partly because there were less opportunities to change people's minds, as there were less capacity building initiatives in Serbia), and because less capacity building efforts were made among Serbian professionals, the same change as in BiH did not ensue in Serbia. The issue of attitudes also explains why some ICTY norms were internalised in Serbia,

2748 While the quantity of people I talked to is not representative, I did talk to members of all ethnicities (I never asked for their ethnicity, but most of them spontaneously mentioned it at some point during the interview). In addition, I asked everyone in BiH about their perception on differences in handling the ICTY's legacy at the domestic level between legal professionals of the different ethnicities. Virtually all of them confirmed, that there are no differences.

namely those related to witness protection and support, and to technological innovations. Both developments are free from ideology, and the impact here depended solely on leading by example, and supporting the adoption of these norms at the domestic level through capacity building.

2.4 The ICTY's Impact Networks

As explained in section 2.1.4 of Chapter 3, norm internalisation heavily depends on 'advocacy networks' that take over 'norm leadership', i.e. who promote the norm. Advocacy networks believe in the ideals and values embodied in the norms. Which networks promoted the ICTY's rule of law message in Serbia and Bosnia and Herzegovina?

As mentioned, in Bosnia and Herzegovina, the international community was an important ally to the Tribunal, especially in its early years. The high number of international institutions operating in BiH, who partnered up with the ICTY regarding reforms of the criminal justice system (including the ground-breaking establishment of the war crimes department of the State Court of BiH), normalised the Tribunal's presence in the country. The OHR has been especially instrumental in such gestures, by promoting acknowledgement and reconciliation.[2749] In addition, thanks to these institutions (many of them also UN bodies), there was always someone countering the verbal or political attacks against the ICTY, which usually originated from the Republika Srpska.

The foreign judges and prosecutors (and other staff members) also played a crucial role in introducing ICTY elements into the BiH criminal justice system. Some of them had personal ICTY experience, others could more easily familiarise themselves with ICTY proceedings and jurisprudence due to lower language barriers than those experienced by their Bosnian colleagues. As described in sections 1.2.4 and 2.2.2 of Chapter 6, they started drafting judgments in the same way as the ICTY did, or they used its evidence, or referred to its legal and factual findings.

Furthermore, very strong civil society organisations exist in BiH, such as the Mothers of Srebrenica or the Helsinki Committee, which advocate for different issues relating to the war, such as acknowledgement or compensation. These organisations also always saw the ICTY as their natural partner and demanded that the Tribunal's factual findings – demonstrating, for example, that genocide had been committed – would also be recognised under the domestic justice system.

Ultimately, these distinct groups played an important role in persuading domestic political elites and legal practitioners to implement ICTY-offered solutions into the domestic criminal justice system. In addition, thanks to this variety of actors raising their voice when

2749 Cf. Waters, 2013, p. 28.

it comes to the war and war crimes topics, the discourse on the Tribunal is much more diverse in BiH than in Serbia. As one Bosnian interviewee put it, "in Bosnia and Herzegovina, no criticism of the Tribunal or domestic war crimes institutions, especially no illegitimate criticism, is left unanswered by at least a few representatives of these groups."[2750] It seems that in BiH, it is not possible to discredit the Tribunal or the domestic war crimes institutions without a strong and immediate counterreaction. This is not the case in Serbia, where hostilities towards these institutions are common and remain mostly unanswered. Allegations can therefore develop their own dynamic; they are repeated over and over again without being contested, until they become widely believed.

Indeed, almost no comparable advocates can be found in Serbia. The 'international community' has never been very present in Serbia and there were no foreign judges or prosecutors at the domestic war crimes institutions.

Although there are a few civil society organisations that actively deal with war crimes related topics, and who work more broadly on transitional justice and addressing the past, these organisations are largely unknown, operating within a small interested community inside Serbia (and probably a larger community outside Serbia), or they are disliked. The *Fond za Humanitarno Pravo* (Humanitarian Law Center), *Beogradski centar za ljudska prava* (Belgrade Centre for Human Rights), *Inicijativa Mladih za Ljudska Prava* (Youth Initiative for Human Rights), and the *Helsinški Odbor za Ljudska Prava* (Helsinki Committee for Human Rights) should be mentioned here as the most active ones. These civil society organisations are often met with strong hostility.

Representatives of these civil society organisations, in particular Nataša Kandić of the Humanitarian Law Centre, Sonja Biserko from the Helsinki Committe, and Biljana Kovačević-Vuco of the Lawyers' Committee for Human Rights, have appeared in the media, including on rather shouty talk shows on television, to defend the ICTY and the evidence that it had gathered – or that they believed it had gathered. This strategy had a tendency to backfire as it created a forum for further attacks, the escalation of negative rhetoric, and it diverted the discourse about human rights abuses away from the topic. As an example, one event that seemed to set the entire discourse off track was created by Nataša Kandić, who accused former President Tomislav Nikolić of being involved in crimes against civilians in Antin, although there was no evidence for this. In fact, there was evidence to suggest that he personally had nothing to do with the crimes, which was later discovered and completely discredited Kandić's work.[2751] Similarly, Sonja Biserko's suggestion that Serbia was, as a nation, on trial at the ICTY, and that it should take responsibility for crimes

2750 Interview with Bosnian defence counsel, Sarajevo, 9 February 2017, I-53.
2751 Cf. Gordy, 2013, p. 143f.

committed, also backfired, as it created "public disgust" with the NGO of which Biserko was the director.[2752]

These civil society organisations therefore convinced only a very small, likeminded group within Serbian society.[2753] Indeed, as stated in the Human Rights Watch report from 2017, human rights activists who challenge the glorification of war criminals and try to document human rights abuses, operate in a hostile environment and are most likely to be smeared as "traitors" and "foreign mercenaries" by pro-government media.[2754] The same report also said that "online threats against human rights activists are commonplace and rarely investigated by authorities"[2755].

As explained extensively in section 1.3 of Chapter 6, the one group that had personal ICTY experience and an understanding of its functioning, was the Serbian defence counsel returning from The Hague. Yet, although they were initially committed to the idea, they were disappointed with the Tribunal. They therefore did not advocate for its legacy in Serbia.

It is clear that the ICTY practically had no support network in Serbia. There was no one there who would "enlarge the space" in which domestic actors could operate, to allow the Tribunal's solutions to transform into a habit, which in turn would mold public expectations and deepen the society's commitments.[2756] Under these circumstances, the ICTY could not leave the same footprint in Serbia as it did in Bosnia and Herzegovina.

2.5 Explaining the Tribunal's Impact: The ICTY's Norm Cascade

In the previous sections, the relevant factors that led to domestic actors (mainly political decision makers and legal practitioners) implementing the ICTY's norms and practices at the national level,[2757] and the Tribunal's advocacy networks that lobbied for adopting its legacy were explained.[2758] What remains to be done is to describe the dynamics that enabled the ICTY's norms and practices to cascade through BiH's and Serbia's justice systems.

Bosnia and Herzegovina is a prime example of Sikkink's norm cascade, as presented in Chapter 3.

The norms and practices described in Chapters 5 to 8 emerged from the ICTY (norm cascade, stage 1). The Tribunal kick-started accountability proceedings for war crimes: its

2752 Cf. Dragović-Soso, 2013, p. 394f.
2753 Cf. Gordy, 2013, p. xiv.
2754 Cf. Human Rights Watch (2017), *World Report 2018 (Events of 2017)*, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf (last accessed 12/09/2019), p. 472.
2755 Human Rights Watch, 2017, p. 472.
2756 Cf. Orentlicher, 2018, p. 425.
2757 See section 2.3.
2758 See section 2.4.

Statute, Rules of Procedure and Evidence, and its jurisprudence, set new standards for international humanitarian law, international criminal law, and criminal procedure; it developed practices for witness protection and witness support; and introduced the use of technology in the criminal process. Once the Tribunal became operational, networks in and around it started advocating for, firstly, Bosnia and Herzegovina to cooperate with the ICTY; secondly, for the Tribunal's work to be continued and complemented through war crimes trials at the domestic level; and thirdly, that the values, standards, and practices developed in The Hague are also implemented at the national level.

Following from this, the dynamics predicted by the spiral model became apparent: those who were opposed to the ICTY in post-war BiH, yet were forced to comply with the norms of the ICTY, began to utilise its language, which at least gave the appearance of being in line with new universal norms surrounding accountability. Unwilling elites first adopted these norms for strategic purposes, to avert punishment by the international community; this can be demonstrated by the actions of the High Representative and his Bonn powers (tactical concessions implementing some of the promoted standards: phase 3 of the spiral model).[2759] These concessions further mobilised the ICTY's networks: they now had the additional argument that by making concessions in implementing some aspects of the Tribunal's legacy, domestic actors have implicitly recognised them as a norm to adhere to. In the long term, this led to the internalisation of a pro-ICTY rhetoric, which was eventually adopted by the general public.[2760] At some point, the ICTY was "accepted as part of Bosnia and Herzegovina's political landscape"[2761].

The ICTY's values, standards, and practices, then slowly gained prescriptive status (phase 4 of the spiral model). This is the equivalent to a "tipping point", stipulated in the norm cascade theory: as of now, the norms penetrate and cascade through Bosnia and Herzegovina (norm cascade theory, stage 2): BiH's 2003 Criminal Code, and partly, its Code of Criminal Procedure, is aligned with ICTY standards and jurisprudence. At the same time, the Tribunal introduced its completion strategy and became itself more and more present within BiH, especially for legal practitioners. By then, the ICTY had become normal to them and they saw the utility of adopting the legal and factual solutions presented by the Tribunal.

In the next phase, the ICTY's examples become institutionalised (norm cascade theory, stage 3) not only within law practice, but also – most importantly – in the culture of relevant domestic actors. This is when ICTY norm-consistent behaviour (phase 5 of the spiral model) becomes normal and no longer depends on individuals. Conformity with these

2759 Cf. Nettelfield, 2010, p. 31.
2760 Cf. Nettelfield, 2010, p. 32.
2761 Nettelfield, 2010, p. 146.

values, rules, and practices is depersonalised. At this point, the ICTY's legacy is deeply entrenched in the criminal justice system of Bosnia and Herzegovina.

In a way, Serbia is also a good exemplification of the norm cascade model. In the beginning, the ICTY's core values were affirmed, at least in part, by Serbian cooperation in ensuring the prosecution of war criminals.[2762] Although cooperation happened merely for utilitarian considerations, it nevertheless introduced the Tribunal's mission to Serbia. However, here, the norm cascade only worked to the point of establishing war crimes institutions. This happened as a result of external coercion, which insisted that Serbia cooperate with the ICTY, which one part of society rejected, favouring rather the establishment of domestic institutions; while another part welcomed it, by advocating for the contribution to the ICTY's mission through domestic war crimes institutions. Therefore, the – at times – hostile discourse about the Tribunal still normalised it, to the extent that the creation of these domestic war crimes institutions was made possible.

However, the norm cascade did not go much further than this. As has been argued by those who criticise the EU for not demanding more from Serbia, aside from surrendering accused to The Hague, the external coercion stopped too early. Most Serbs considered the issue of the ICTY closed, with the surrender of the last accused in 2011. By that time, the ICTY no longer had international or domestic allies in Serbia, and most people were waiting for its closure in order to be able to move on. The few domestic war crimes judges and prosecutors who had participated in the Tribunal's capacity building initiatives, and who therefore had some direct knowledge of the ICTY and its functioning, had been replaced; and, as the BiH example shows, the Tribunal's impact is the strongest among those who are well informed about the ICTY and who had direct contact with it.[2763] The only visible impact in the Serbian criminal justice system, aside from the establishment of domestic war crimes institutions, was adopted for purely utilitarian reasons, and concerned completely ideology-free issues, such as using technology in the courtroom, or introducing witness protection and support. Its values, standards, and practices therefore did not become internalised – at least not within the culture of the relevant domestic actors, which is crucial for completing the norm cascade.

Overall, the impact model developed in Chapter 3 explains the ICTY's impact on Serbia and Bosnia and Herzegovina, with the difference between the two countries being that relevant factors were missing in Serbia, accounting for less or less strong impact. Indeed, the Tribunal made fewer capacity building efforts in Serbia, and provoked, through its own performance, negative attitudes towards its work. In addition, and partly as a consequence of this, advocacy networks did not form in Serbia, and the few supporters

2762 Cf. Orentlicher, 2018, p. 60.
2763 Cf. Nettelfield, 2010, p. 33.

the Tribunal did have there did not drum up any additional support. Domestic actors therefore had no reason to align their rhetoric and standards with those of the ICTY.

3 Is This the Rule of Law?

The ultimate question is: by triggering or somehow influencing the developments in the Serbian and Bosnian criminal justice systems, as described in Chapters 5 to 8, did the ICTY contribute to, strengthen, or promote the rule of law in both countries? Or did the rule of law perhaps even deteriorate as a consequence of the Tribunal?

In section 2 of Chapter 4, the assumption was put forward that international criminal courts and tribunals can only realistically affect the rule of law in very limited areas, namely the justice system. My research has therefore concentrated on developments that happened in the realm of the judiciary.

It was held that a justice system, under the rule of law, needs to feature certain minimum standards with regard to the legislation that it adjudicates (normative component), the principles that institutions adhere to (institutional component), and the legal culture that these institutions live in (cultural component). In the normative dimension, emphasis was put on the necessity for a legislative framework that foresees the adjudication of international crimes, and that guarantees certain fundamental human rights, especially fair trial rights. This represents the law that should rule. The institutional components of a justice system (the institutional component), which ensure that it *actually* operates under the rule of law, comprise of independent and impartial judicial organs that work efficiently and in a fair, non-discriminatory, and transparent manner. Lastly, a culture of law is paramount and hence, ordinary citizens, as well as public officials, and representatives of the judicial sector, must adopt an ideology of legality.[2764]

The changes in the Bosnian and Serbian criminal justice systems may, at first glance, not directly relate to the minimum standards outlined in section 2 of Chapter 4. Instead, they may appear to be isolated developments that are confined to the field of international criminal adjudication. This is, however, not the case. What all developments analysed in Chapters 5 to 8 have in common, is that they have broader effects: changes that originate from the area of war crimes prosecutions have, or will have, spill-over effects into other areas of the justice system.

First, with regard to war crimes institutions, their very establishment was, for many, "replacing rule by power with rule by law"[2765]. In addition, the trial process, and the very fact that trials are taking place, may encourage people to see the rule of law as an alternative

2764 See, in particular, Chapter 4, section 2.1.
2765 Armatta, 2013, p. 288.

to conflict and lawlessness.[2766] Indeed, the ICTY created "institutional expectations" at the domestic level. In both BiH and Serbia, when the Tribunal was at the height of its operations in the beginning of the 2000s, it slowly became unacceptable not to prosecute locally.[2767] Thus, despite the negative views of the ICTY within both countries at the time, it had created a space to start judicially reckoning with the past, and thereby demonstrating that crimes do not go unpunished. The importance of this message cannot be underestimated, in particular because the war affected the whole society, and implicated members of both the political and military elites. Showing everyone that unlawful behaviour is unacceptable represents the very first element in re-establishing the rule of law.

In addition to this, domestic war crimes proceedings were also an opportunity for the judiciary to professionalise itself. War crimes investigations and trials are complicated, as the crimes often would have taken place many years ago, they depend on eye-witness evidence, and entail complex ways of linking the perpetrator to the crime. As a result of their specialisation, criminal trials at domestic war crimes institutions in both Bosnia and Herzegovina and Serbia have improved on "all aspects"[2768] over the years. Generally, in both countries, they are recognised as being professional and effective;[2769] although the SCBiH and lower courts in BiH are considered more efficient than Serbian courts, as they have simultaneously conducted significantly more – and more complex – trials. Reportedly, the judges of the SCBiH and of the Court of Appeal Belgrade have an excellent reputation,[2770] and are seen as role models for other members of the judiciary.

What is remarkable in both countries, is that courts conduct proceedings mostly against their own ethnic group, while treating them fairly.[2771] This is partly due to their inability to get hold of citizens of other countries; however, it shows that there is no preferential treatment for people with the same ethnic background as the judges' and prosecutors'. In BiH, this also applies to defence counsel, who, reportedly, defend accused of all ethnicities.[2772] For war crimes prosecutions and trials, which are often under close public scrutiny, the implementation of the equality of law principle is a significant signal that no one is above the law. The same applies in the event where people of high political or military ranks are prosecuted. That said, courts in both countries struggle to indict high-ranking

2766 Cf. C. L. Sriram (2007). Justice for whom? Assessing hybrid approaches to accountability in Sierra Leone. In *Security, Reconstruction, and Reconciliation* (p. 175-194). London: UCL Press, p. 177.
2767 Cf. Nettelfield, 2010, p. 35.
2768 Michaeli, 2011b, p. 59.
2769 Cf. Michaeli, 2011b, p. 59.
2770 Cf. interview with foreign SCBiH judge, Nuremberg, 28 July 2018, I-9; interview with OSCE Mission to Serbia representative, Belgrade, 9 November 2018, I-35.
2771 Cf. Michaeli, 2011b, p. 59.
2772 Cf. interviews with Bosnian defence counsel, Sarajevo, 31 January 2017, I-21; and Sarajevo, 6 February 2017, I-6.

suspects, and Serbian courts have an especially long record in failing to meet expectations in this regard.

With regard to the criminal law reforms that took place in the early 2000s, the Serbian Criminal Code did not change much under the ICTY's influence, as Serbian lawmakers considered their criminal code to be in line with international standards regarding the codification of international crimes and appropriate modes of liability. Reportedly, the changes made to the Code of Criminal Procedure were not inspired by the ICTY's example either. This was very different in BiH, where both the Criminal Code and the Code of Criminal Procedure adopt innovations and lessons learned from the Tribunal, its Statute, its Rules of Procedure and Evidence, and even its jurisprudence. In BiH, frequent reference to the ICTY's jurisprudence further instilled these legal foundations into the domestic legal system. Serbian courts have also considered ICTY jurisprudence when researching the appropriate judgment for their domestic defendants, but over the years they have distanced themselves from it, both in terms of law and facts.

As explained in Chapter 6, the effects of these reforms, and the subsequent reference to ICTY jurisprudence, has produced the side effect of bringing international law into the domestic arena for the first time. It opened up legal practitioners' minds to sources that lie outside their own domestic laws. Knowledge of these sources potentially equips them with more options to argue their case – whether in the position of judge, prosecutor or defence counsel. Practitioners and observers in both countries describe how this effect was particularly evident when BiH and Serbia joined the European Convention on Human Rights (ECHR) in 2002 and 2004 respectively. The familiarity with international sources and case law research, both of which had been unknown until the Tribunal came into play in BiH and Serbia, helped in making full use of the ECHR domestically – especially with regard to fair trial rights. This effect was not confined to the adjudication of war crimes, as it soon spilled over to other judicial proceedings, even leaving the domain of criminal law.

A first test of this, and at the same time a good training ground, came in the form of the *Maktouf* and *Damjanović* cases, before the Bosnian Constitutional Court. The defendants challenged the application of the 2003 Criminal Code before domestic courts, which adopted many legal foundations from the ICTY Statute, as breaching the *nullum crimen, nulla poena sine lege* principle (prohibition of retroactive application of criminal law).[2773] These two cases, and similar cases, kept many domestic practitioners busy for several years, with defence counsel fiercely fighting for their clients' rights, and prosecutors and judges struggling to find the right take on this element of the legality principle. In the end, however, the debate contributed to greater awareness and a thorough understanding

2773 This and other elements of the legality principle had long before the ICTY was established been part of the domestic legislation.

of the legality principle, which was ultimately beneficial for its entrenchment in the domestic system – beyond war crimes proceedings. Under the ICTY's influence, Bosnian law and practice thus became aligned with international law and standards.

There is some contention over the question of whether the reforms of the Serbian and Bosnian codes of criminal procedure, inserting adversarial elements into them, render the proceedings fairer.[2774] Those who believe that this is the case also partly credit the ICTY for this improvement, at least for Bosnia and Herzegovina, whose code was clearly influenced by the Tribunal. However, given that fair trial rights had been codified in both countries' CPCs for a long time, the improvements may, instead, be linked to the ICTY's practice in demonstrating how to effectively apply these rights. This was certainly more significant than its impact on the relevant legislation.

What is undisputed, however, is that the CPC reform has rendered criminal proceedings (not only war crimes proceedings) more efficient. By making use of the Tribunal's jurisprudence and practice, domestic practitioners can potentially save a lot of time and effort during the trials. As this also applies to the ICTY's practice on procedural questions, again, this increase in efficiency is not limited to war crimes proceedings.

Working with the Tribunal's jurisprudence also introduced a new style of judgment drafting in Bosnia and Herzegovina, which many have described as clearer, and easier to read and understand. This development has increased courts' transparency, as both legal professionals and the general public are now able to better understand what is happening in their domestic courts. In addition, the improved judgment drafting is also a demonstration of increased competence, as mistakes and sloppiness can no longer be hidden.

The courts' selection of defendants, and the uniform application of the law towards them, shows their firm commitment to the equality before the law principle. In addition, the SCBiH's jurisprudence, which applies command and superior responsibility, demonstrates the State Court's independence towards political interference. In this regard, the State Court is a role model for other courts in the region; however, as mentioned, other courts in the region continue to struggle with this.

In Bosnia and Herzegovina – and to a lesser extent in Serbia – the new criminal code and the code of criminal procedure, as well as their application in practice, marked a new culture of law among practitioners. It literally was a new start for the Bosnian judiciary, which, supported by a comprehensive vetting procedure, adopted a new way of working under circumstances that had little to do with the former Yugoslav legal traditions. This latest generation of professionals worked in the new war crimes institutions, and helped entrench new legal principles (particularly those that derive from international or foreign law) in Bosnia and Herzegovina. The new openness towards international law and

2774 My interviewees were split on that question, which confirms the disagreement in the literature.

non-Bosnian legal sources, and the important standing of human rights, especially in the criminal process, was subsequently also adopted by other members of the judiciary, and are now an important part of the Bosnian legal culture.

Witness protection and support for witnesses, both inside and outside the courtroom, were also new in the Bosnian and Serbian criminal justice systems, as well as in their legal culture. The new practices in this regard have led to more professional and effective criminal proceedings beyond war crimes trials, as witnesses are more likely to come forward when they are free of the fear of the consequences of their testimony. Both the prosecution and the defence are thus better enabled to successfully make their case. This renders the whole process fairer, as it no longer only depends on the resources of either side to produce document evidence. The equality before the law principle is thereby, again, strengthened. In addition, intimidating witnesses has become much more difficult, which arguably leads to outcomes of the trial that are closer to the truth than under circumstances where witness intimidation and bribery are easily possible. The fact that witness protection and support for witnesses is not only necessary in order to conduct effective criminal trials, but also a moral imperative towards those witnesses, now seems to be firmly ingrained in the Bosnian and Serbian criminal justice systems. Institutions and practices that support the needs of witnesses have spread throughout both countries, demonstrating that this development is no longer only confined to war crimes institutions.

Given that domestic advocators and practitioners were unhappy with the ICTY's practice of referring victims of war crimes to domestic civil law courts, they decided to establish a different practice across national institutions in BiH. Thus far, only victims of sexual violence have made use of this new practice, which consists of prosecutors collecting evidence on behalf of the victim for her/his compensation claim, and judges adjudicating the claim as part of the criminal trial; but there is no reason why other victims' claims should not be successful, too. As the new practice slowly but surely becomes the norm, there is hope that, in the long run, this will become the custom for victims of ordinary crimes. It is not thanks to the ICTY that domestic practitioners developed the necessary skills to adjudicate victims' claims. Nevertheless, by leading by bad example, the Tribunal still triggered a change in practice at the domestic level. Overall, the new practice leads to increased effectiveness of the criminal trial, as victims are no longer deprived of their right to claim compensation for the harm that they suffered – leading to more justice for victims.

As demonstrated in Chapter 8, the use of technology in the courtroom, also for matters such as witness protection, has contributed significantly to the success and efficiency of war crimes proceedings. Software for storing and displaying evidence contributes to providing a better overview of the evidence for all parties, the possibility to testify via a videoconference link increases the likelihood that witnesses come forward, and verbatim transcripts render the writing of a judgment easier, and provide a reliable basis for contestation in possible appeal proceedings. In addition, the websites of war crimes

institutions are used to inform the population about their work, including – in the case of the State Court of Bosnia and Herzegovina – through publishing their judgments. The level of transparency of these judicial institutions is unheard of in the region of the former Yugoslavia, yet there is still potential to increase the transparency of these war crimes institutions. Many of my interview partners have voiced the hope and optimism that – depending on their financial resources – also other courts and prosecutors' offices will adopt some of the technological means and measures that have proven useful at the war crimes institutions. In what concerns in-court witness protection measures (such as for voice or face distortion), this has already happened, as the necessary equipment has been installed also at other courts.

Table 13 represents whether the changes of the domestic justice systems (triggered by the ICTY) contributed to wider compliance with rule of law standards, which were presented in section 2.1 of Chapter 4 as the analytical framework for this research. Green-coloured boxes show the situation where the changes triggered by the ICTY *did* contribute to better compliance with the respective rule of law principle (example: the ICTY triggered the reform of the criminal legislation in BiH, which led to the inclusion of international crimes in national criminal law). Red-coloured boxes refer to the situation where the Tribunal did not have any impact on that area in that country to begin with (example: the ICTY did not trigger a reform of the criminal legislation in Serbia).[2775] Yellow-coloured boxes refer to the situation where, while the ICTY did trigger change in the domestic criminal justice system, this change did not lead to the broader effect of better compliance with the respective rule of law principle (example: while the ICTY did trigger changes in the war crimes jurisprudence in Serbia, this did not lead to the availability of modes of liability that are appropriate for international criminal law adjudication). The blank squares show where the respective change triggered by the Tribunal *could logically not* have any impact on the respective rule of law principle.

2775 See also section 1.1 of this Chapter for areas where the ICTY did not have any impact.

Table 13 Evaluation of the changes in the BiH and Serbian justice systems under the ICTY's rule of law principles

Changes in the BiH and Serbian justice systems / ICTY's rule of law principles	Establishment of domestic war crimes institutions	Reform of criminal legislation	War crimes jurisprudence	Witness protection and support	Compensation for war victims	Use of technology in war crimes prosecutions and proceedings
Normative limb						
Availability of international crimes in national criminal law		BiH	BiH			
		Serbia	Serbia			
Availability of appropriate modes of liability in national criminal law		BiH +	BiH +			
		Serbia	Serbia			
Availability of appropriate punishment in national criminal law*		(BiH)	(BiH)			
		(Serbia)	(Serbia)			
Legality principle (*nullum crimen, nulla poena sine lege, lex mitior*)		(BiH)	(BiH)			
		Serbia	Serbia			
Fair trial rights		BiH	BiH			
		Serbia	Serbia			
Absence of death penalty						
Adequate detention conditions**	(BiH)					
	(Serbia)					
Institutional limb						
Independence	BiH		BiH			
	Serbia		Serbia			
Impartiality						
Competence	BiH		BiH	BiH	BiH	BiH
	Serbia		Serbia	Serbia	Serbia	Serbia
Transparency			BiH			BiH
			Serbia			Serbia
Efficiency and effectiveness	BiH	BiH	BiH	BiH	BiH	BiH
	Serbia	Serbia	Serbia	Serbia	Serbia	Serbia
Cultural limb						
Culture of law/ideology of legality	BiH	BiH	BiH	BiH	BiH	
	Serbia	Serbia	Serbia	Serbia	Serbia	
Fairness of judicial institutions	BiH	BiH	BiH		BiH	
	Serbia	Serbia	Serbia		Serbia	
Equality before the law	BiH		BiH		BiH	
	Serbia		Serbia		Serbia	

* As mentioned in the introduction of this Chapter, the sentencing practices were not included in my research, as too few of my interviewees mentioned it as a significant impact of the ICTY. Also, there is some literature that suggests the contrary. See, for instance: B. Ristivojević & S. Radojčić (2019). Punishing International Crimes in Serbia. *International Criminal Law Review, 19*(1), 39-68; or M. M. Vajda (2019). Domestic Trials for International Crimes – A Critical Analysis of Croatian War Crimes Sentencing Jurisprudence. *International Criminal Law Review, 19*(1), 15-38.

** I also did not research this aspect although some see better detention conditions for defendants at the State Court of Bosnia and Herzegovina as an indirect impact of the ICTY. Indeed, partly in order to fulfil the conditions for transfer of Rule 11*bis* cases from the ICTY, a new detention centre was built at the venue of the State Court of Bosnia and Herzegovina. This is the most modern detention centre in Bosnia and Herzegovina. In Serbia, a similar development has not happened. Next to the fact that none of my interviewees considered this to be an important impact of the ICTY, this is the reason why the Tribunal's impact on detention conditions has not been researched for this contribution.

Many of the changes in the Bosnian and Serbian criminal justice system, which were initially triggered or influenced by the International Criminal Tribunal for the former Yugoslavia are therefore no longer confined to the domestic adjudication of war crimes, but have proliferated into other areas of the criminal justice system. In that sense, the ICTY has had an effect that goes beyond what was expected from it: to begin with, at the moment of its establishment, it had not been envisaged and even less been part of its mandate that the Tribunal would influence the domestic justice systems in the former Yugoslavia, which were, at that time, nearly dysfunctional due to the state of war in 1993; even when the Tribunal adopted its completion strategy, in the early 2000s, the judges had hoped to enable or strengthen domestic war crimes proceedings, and parts of the completion strategy were geared towards that end. Yet, the fact that the reforms and innovations initiated within war crimes adjudication would spread beyond this domain is an unexpected – and until now unresearched – side effect of the ICTY. This confirms the assumption[2776] that the Tribunal's local influence will last significantly longer than its formal lifetime.

Among my interviewees, there is consensus that in both Bosnia and Herzegovina and Serbia, many of the changes presented here would not – or only much later, or to a lesser extent – have happened, if it had not been for the ICTY.[2777] Had there been no pressure from the Tribunal in The Hague, and from its domestic and international supporters, local actors would have attempted to obstruct or delay domestic war crimes proceedings. Specialised institutions would not have been established. In both Serbia and BiH, the anti-Hague and pro-Hague sentiments (respectively) created expectations at the national level with regard to war crimes proceedings; once these institutions were operational, both countries "wanted to show that they could" prosecute war criminals out of "professional pride".[2778] Without the ICTY, it is hard to imagine that any court – or any other institution – would have initiated the extensive innovations of international criminal and international humanitarian law that the Tribunal developed over the years. Thus, for national legislators and national courts, there would have had been no international precedent to rely on for domestic criminal law reforms. Witness protection and support for witnesses are part of modern criminal justice systems, but their necessity is much more obvious in the context of complex war crimes or organised crimes trials, where the life of witnesses is often at stake. The same applies to the right of victims to demand compensation for the harm they suffered, which is, arguably, often greater for war victims than for victims of ordinary crimes. As for the use of technology, the ICTY was a pioneer among criminal courts, even when compared to the most modern national criminal justice systems. This is partly due to its extensive resources and partly due to the complexity of its trials, which made

2776 Cf. Orentlicher, 2018, p. 429.
2777 Similar: Orentlicher, May 2008, p. 64; Nettelfield, 2010, p. 288.
2778 Cf. Orentlicher, May 2008, p. 64.

technological support indispensable. Arguably, without this example, making use of of technology in order to increase the efficiency, effectiveness, and transparency of criminal proceedings, would only have been explored by national courts much later.

While the ICTY's effects were clearly greater in Bosnia and Herzegovina, many of the Tribunal's side effects are also visible in Serbia, despite the negative views of the population and the political and legal elites regarding the Tribunal, and despite the ICTY having less leverage on national actors than in BiH (for example, through the powerful High Representative, but also through Rule 11*bis* proceedings). This shows that it is not necessarily the coercive measures that make the difference, but rather the persuasiveness of the ICTY's practices (whether they seem worth copying), and the intensity with which the Tribunal itself promotes its practices at the national level, either through collegial collaboration or through active capacity building. This explains the Tribunal's impact on Serbian witness protection and witness support, and on technological innovations in criminal proceedings in Serbian courts.

For some developments within Serbia's and BiH's criminal justice system, one cannot say whether it is 'better' now than before. For instance, the change in tradition in the Bosnian criminal procedure, now leaning towards the common law approach, cannot be labelled as better or worse than the previous civil law tradition. It is simply different. The same can be said for certain changes in the Bosnian substantive criminal law, which are, to a great extent, based on the ICTY's Statute and its jurisprudence. It is precisely for this reason that many Bosnian legal practitioners believe their substantive law to be 'better' now, because it stems from international law. However, there is no reason why the new Serbian Criminal Code, which was less influenced by the legal innovations introduced at the international level, but rather continued to rely on its domestic precedents, is 'inferior' law. What matters is the criminalisation of certain conducts, under which labels, or in which structure, is insignificant. Nevertheless, for many of the ICTY-triggered innovations in Serbia and Bosnia and Herzegovina, it *can* be said that it is 'better' now, as they contribute to better justice for both the defendants and the victims, and because domestic institutions work more professionally and efficiently, or, at the very least, in a more transparent way.

4 Conclusion

Several conclusions can be drawn from the findings outlined above.

First of all, it was demonstrated that the changes within the Bosnian and Serbian criminal justice systems, which were triggered or otherwise influenced by the ICTY, can be evaluated from different perspectives: 1) whether there was impact from the Tribunal or not; 2) the type of domestic change; 3) the degree of change; and 4) whether the changes

transcend the field of war crimes and thereby contribute to the criminal justice system more generally.[2779]

The Tribunal clearly had an impact on the establishment of war crimes institutions in both Serbia and BiH. The changes triggered were first and foremost legislative, introducing the legal bases for these new institutions. For BiH, the ICTY also contributed to the new war crimes institutions in material terms, namely by securing funds for them. The establishment of new institutions in Serbia can at least partially be regarded as an outcome of the rejection of the Tribunal and its norms and values, while in BiH it was precisely the opposite: the ICTY led to a transformation in Bosnia and Herzegovina. In both countries, the material resources, knowledge, and skills acquired in the context of the establishment of the specialised war crimes institutions have the potential to serve the criminal justice system beyond war crimes trials.

The ICTY left its footprint in BiH's new Criminal Code from 2003, while it does not appear to have had any impact on Serbia's new Criminal Code. In BiH, a transformation can be observed, while in Serbia, there is inertia; the changes triggered in the substantive criminal legislation are confined to the field of war crimes, as they literally concern the codification of international crimes.

Regarding domestic war crimes jurisprudence, the picture is mixed: while Serbian legal practitioners do refer to the ICTY's jurisprudence, they do so much less than their Bosnian counterparts; at times they do so implicitly, and in other instances they diverge from the international jurisprudence, while in BiH, jurisprudence is largely aligned with the Tribunal's. Thus, the ICTY has led to a transformation in Bosnia and Herzegovina and to retrenchment of the ICTY's norms in the context of factual jurisprudential findings, and inertia or absorption regarding legal findings. The example of the Tribunal's case law led to a completely new approach to, and professionalisation of, judgment drafting in BiH, transcending the field of war crimes. The same cannot be said for Serbia, which is why the ICTY's impact in that regard remains limited to war crimes adjudication.

A few elements from the ICTY's practice were also adopted in Bosnian criminal procedure, while the Tribunal did not have any impact in Serbia in that respect. The changes were not only legislative and jurisprudential, they were also practical, as some of the ICTY's operational procedures were also adopted. Thus, while in Serbia, there is inertia, in BiH, there is transformation in this field. The new practices and skills developed over the course of the war crimes proceedings are also used in other trials; the changes that were triggered therefore go beyond the area of war crimes.

Witness protection and support, as well as technological innovations in the criminal process, were introduced to both countries by the ICTY. The impact was mostly practical, but also material, as the necessary equipment was provided, and legislative (related to

2779 See section 1.

witness protection and support), as it led to changes in the codes of criminal procedure and in specific laws. In both countries, the Tribunal led to a complete transformation in the approach towards both witness protection and support, and the use of technology, within the criminal justice system. These improvements are not only used in the context of war crimes prosecutions and trials, but throughout the criminal justice systems.

Serbia's stance on victims' compensation claims did not change under the influence of the Tribunal, while it did in BiH: jurisprudence on the matter changed and practical skills were acquired. This happened as a response to the rejection of the ICTY's approach towards victims' compensation claims. While this has not happened yet, this development has the potential to transcend the area of war crimes, as victims of other crimes will have precedents they can rely on in order to make their case for reparations.

As a next step, it was demonstrated that two impact factors predominantly account for these changes:[2780] the ICTY's capacity building effects and whether close ties ensued from them, and attitudes towards the Tribunal (i.e. its demonstration abilities). Here, it should be noted that attitudes among 'impact receivers' significantly improved over the course of intensive capacity building initiatives, as they became more familiar with the Tribunal. The two impact factors are therefore intertwined, and one partly follows from the other. In that sense, neither one of the two factors stands out as more decisive than the other – it is precisely their interrelation that explains impact.

Table 14 below links the impact factors to the developments in the criminal justice systems in Serbia and Bosnia and Herzegovina.

Table 14 Impact factors accounting for changes in the domestic justice systems in BiH and Serbia

	Advice	**Transfer of knowledge**	**Authority and perceived legitimacy**
Domestic war crimes institutions	BiH Serbia	BiH Serbia	BiH
Legislation	BiH		BiH
Jurisprudence		BiH Serbia	BiH (Serbia)[2781]
Witness protection and support	BiH Serbia	BiH Serbia	BiH Serbia

2780 See section 2.

2781 As explained in section 2.3.2, Serbian legal practitioners, including judges at the Higher Court Belgrade see the ICTY very critically. This is different for the judges at the Court of Appeal Belgrade – they have greater respect for the Tribunal than their colleagues at the lower instance. In addition, even for the Higher Court Belgrade, as some judgments follow the ICTY in its legal findings, the Tribunal must have some convincing authority at least. This mixed picture explains the parenthesis.

	Advice	Transfer of knowledge	Authority and perceived legitimacy
Compensation claims			
Technological innovations		BiH Serbia	BiH Serbia

It has become clear in the analysis of the ICTY's impact factors that the Tribunal has concentrated its capacity building initiatives in Bosnia and Herzegovina. The Tribunal had much less contact with its Serbian counterparts. In part, this is because most of the Tribunal's own cases related to BiH, which meant that cooperation had to be tight; furthermore it also hoped to transfer cases to Bosnia and Herzegovina, creating an extra incentive to ensure that proper structures and practices were being developed at the domestic level. In contrast, in Serbia, there were hostile opinions about the ICTY from the very beginning, making it awkward for Tribunal representatives to show increased presence in the country. Indeed, negative discourses among the political elites, the media, and nowadays also among returning ICTY defendants, have heavily influenced the public's opinion of the Tribunal. This negativity can partly be explained by the ICTY's own performance. In BiH, the Tribunal is largely regarded as legal and effective, and it obtains compliance from Bosnian decision-makers, as such it is perceived as legitimate. This is not the case in Serbia. Most Serbs have doubts about the legality of the Tribunal's establishment; they do not think it effectively fights impunity (at least not for crimes committed against Serbs), they have long refused to cooperate with the ICTY, and they do not perceive the Tribunal as a legitimate court. When combined with the lack of capacity building initiatives focused on Serbia, these views of the Tribunal account for less impact in Serbia than in Bosnia and Herzegovina. Indeed, in BiH, the ICTY's capacity building and demonstration effects, supported by strong advocacy networks,[2782] led to a norm cascade, which explain the changes that can be observed in the Bosnian criminal justice system.[2783] In Serbia, the norm cascade stopped early, merely leading to the establishment of domestic war crimes institutions, but not to the internalisation of the ICTY's values, norms, jurisprudence, and practices. There are only two exceptions, namely in relation to witness protection and support, and to technological innovations. These two elements were adopted at the domestic level in Serbia for utilitarian reasons, not because of norm internalisation, which would imply a cultural change.

Overall, the impact model developed in Chapter 3 is therefore suitable to explain not only the ICTY's impact on both countries, but also the variations that can be observed between Bosnia and Herzegovina and Serbia. The combination of capacity building and

2782 See section 2.4.
2783 See section 2.5.

demonstration abilities of war crimes courts, supported by advocacy networks, which consequently leads to a norm cascade, accounts for the differences between both countries: in Serbia there was a lower intensity of capacity building, the Tribunal was negatively perceived, and there were no advocacy networks to support its message.

Only a few adjustments need to be made to the impact model: first, according to my findings, providing material resources is not a relevant capacity building impact factor, at least it is not a decisive factor. Second, cooperation between the international war crimes court and its counterparts at the national level is not only a matter of compliance (and hence a demonstration ability), but also an important opportunity for capacity building. The fourth capacity building ability posited in the impact model from Chapter 3, is empowering the civil society. This, I have found, is a factor that relates rather to securing advocacy networks, which create demand for norm internalisation from within the country. As for a war crimes court's demonstration abilities, deterrence as compliance with the court's mission has not been mentioned as a decisive factor. In the ICTY's situation, crimes continued to be committed after the establishment of the Tribunal, which neither diminished respect for it in Bosnia and Herzegovina (at least not in the long run), nor changed Serbs' perception of the Tribunal. Lastly, at least in the ICTY's context, the impact factor of perceived legitimacy primarily comes down to whether the court is fair.

As a final conclusion, it should be mentioned that although the methodology of this research was designed to assess where the ICTY left a footprint in the Bosnian and Serbian criminal justice systems, conclusions about its impact on the rule of law in Bosnia and Herzegovina and Serbia may still be drawn.[2784] Generally speaking, the Tribunal has contributed to re-establishing accountability; to greater compliance with international law and standards; to more effective, efficient, and transparent criminal processes; and to providing justice for victims. When looking at the ICTY's own conceptualisation of the rule of law, as outlined in section 2.1 of Chapter 4, it becomes clear that the Tribunal did contribute to strengthening many of the rule of law principles featured in the conceptualisation. Within the normative limb, it has contributed to the availability of substantive international criminal law in domestic law, as well as to the codification, and proper application, of fair trial rights. It has contributed to the independence of judicial institutions, to their competence, transparency, efficiency and effectiveness, as well as to their overall fairness. It has contributed to ensuring the principle of equality before the law, and to spreading a culture of law. All of this goes well beyond the scope of trying war crimes.

2784 See section 3.

10 Conclusion: "The Tribunal Is Dead, Long Live the ICTY!"[2785]

The International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) closed its doors in December 2017 at the age of 24. A few days earlier, it convicted Ratko Mladić, the former Commander of the Bosnian Serb Army Main Staff, to life imprisonment for – among others – the genocide in Srebrenica in July 1995. Mladić was one of the Tribunal's most prominent, high-profile accused; the crimes adjudicated during his trial are among the most atrocious committed during the conflicts of the former Yugoslavia; his penalty is one of the few life imprisonment sentences pronounced by the ICTY;[2786] his verdict was among the most impatiently awaited in the countries of the former Yugoslavia and around the world. For many, the judgment rendered in the *Mladić* trial was an appropriate final event that took place at the Tribunal, illustrating the successes it achieved over the years. Indeed, people almost forgot that the very last judgment would in fact be pronounced one week later in the *Prlić et al.* case. This event, however, was less glorious for the ICTY. In fact, some claim that it may even have undermined the entire legacy of the Tribunal, which was built throughout the 24 years of its existence: having heard the confirmation of his guilty verdict, Slobodan Praljak, one of the six defendants (all former political or military leaders of Bosnian Croats), shouted: "Slobodan Praljak is not a war criminal and I reject your judgment with contempt". He then drank a vial of poison in full view of the (visibly shocked) judges and the courtroom cameras.[2787] Praljak died a few hours later in a Dutch hospital. These two last major events illustrate the range of challenges that the ICTY faced throughout its 24 years; the range of its successes and failures, as well as the range of different reactions that it provoked.

Despite these successes and failures, the ICTY's own assessment of its achievements is very positive. On its website, the Tribunal reports that it has: held leaders accountable; brought justice to victims and given them a voice; established "the facts"; developed international law – and that it has "strengthen[ed] the rule of law".[2788]

2785 Holá & Simic, 2018, p. 285f.

2786 In total, the Appeals Chamber has convicted five defendants to life imprisonment. Ratko Mladić was convicted by the Trial Chamber to life imprisonment. His appeal is pending before the MICT at the time of writing. Milomir Stakić's life verdict was converted into a 40-years sentence on appeal; cf. ICTY, Judgement List, http://www.icty.org/en/cases/judgement-list (last accessed 01/09/2019).

2787 Cf. M. Milanović (30 November 2017), An Eventful Day in The Hague: Channeling Socrates and Goering, EJIL:Talk!, https://www.ejiltalk.org/an-eventful-day-in-the-hague-channeling-socrates-and-goering/ (last accessed 01/09/2019).

2788 Cf. ICTY, Achievements, http://www.icty.org/en/about/tribunal/achievements (last accessed 15/08/2019).

In June 2017, the Tribunal convened the big names of the ICTY and of the Western Balkan justice systems in Sarajevo to hold its last official "Legacy Dialogues Conference"[2789]. At that conference, the former ICTY Registrar John Hocking commented on the ICTY's legacy: "I […] see a larger impact, a spill over effect in the strengthening in the rule of law, even beyond our direct or intended efforts."[2790]

In addition to many similar claims, these two statements demonstrate that the ICTY is convinced of its contributions to the rule of law in the countries of the former Yugoslavia. John Hocking's comment also shows that enhancing the rule of law at the national level was not necessarily an objective of the Tribunal, let alone its mandate. The assertion might therefore seem surprising to some.

The aim of this research was to confirm or deny those claims by asking the question: *to what extent and how did the ICTY contribute to the rule of law in the countries of the former Yugoslavia?* In order to answer this research question, the research was based on two case studies: Bosnia and Herzegovina and Serbia. More specifically, the comparison aimed to shed light on the second part of the question: "*how* did the ICTY contribute to the rule of law?". The two countries are in very different positions *vis-à-vis* the Tribunal: Serbia is generally perceived as the aggressor state during the wars in the former Yugoslavia, and most of the accused in The Hague were ethnic Serbs. As most crimes were committed in Bosnia and Herzegovina (BiH), Bosnian Muslims are perceived as the biggest victims of the war. In this context, studying the impact of the ICTY on the two countries aimed to shed light on the conditions that would need to prevail, in order for a tribunal to have an impact on the rule of law in a country under its jurisdiction.

My research has demonstrated that the ICTY *did* contribute to the rule of law in Bosnia and Herzegovina and even in Serbia, albeit to a more limited extent. The reason for this is twofold: first, despite the lack of an explicit mandate regarding the promotion of the rule of law, the Tribunal increasingly undertook measures that aimed to support the domestic judiciaries; the Tribunal focused primarily on BiH, while Serbia eventually dropped from the ICTY's agenda. Second, due to the way war crimes prosecutions and trials were conducted in The Hague, Serbs were never really convinced of the Tribunal, while Bosnians took a favourable stance towards it. As a consequence, the ICTY's message was less welcome in Serbia than in Bosnia and Herzegovina. When combined, these two factors account for the difference in impact that the Tribunal had on the rule of law in Serbia and in BiH. As a result, the main conclusion of this research is that when it comes

2789 For more information on the conference, see: ICTY, ICTY Legacy Dialogues Conference – Sarajevo 2017, http://www.icty.org/en/features/legacy-conferences/icty-legacy-dialogues-conference-2017 (last accessed 01/09/2019).

2790 J. Hocking (22 June 2017), Opening Remarks, Legacy Conference, Sarajevo, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Registrar/20170622-john-hocking-opening-remarks-sarajevo_en.pdf (last accessed 01/09/2019), p. 4.

to the ICTY's potential for impact on the countries under its jurisdiction, much depends on the Tribunal's own performance – and less on the circumstances on the ground. My main findings will be presented in the next section.

Section 2 will show the extent to which these findings can be generalised for other, or future, international war crimes courts (section 2.1), and will give recommendations on how these courts should be set up and how they should operate, in order to positively influence the rule of law in the countries under their jurisdiction (section 2.2). Section 2.3 will briefly summarise the academic and societal contributions made by this research. Before concluding with section 4, section 3 will reflect on this research and the research process more generally.

1 The ICTY's Impact on the Rule of Law in BiH and Serbia: Summary of the Main Findings

This contribution has demonstrated that while some might have hoped for big changes – especially in terms of dealing with the past, comprehensive lustration of the political class and the judiciary, and reconciliation among the ethnicities – the ICTY's influence can, first and foremost, be observed in the criminal justice systems of the former Yugoslav countries. And here, the Tribunal's impact is mostly visible in the details.

The ICTY triggered the establishment of domestic war crimes institutions in both Serbia and Bosnia and Herzegovina. While in BiH the Tribunal was actively involved in setting up domestic institutions, the reasons for establishing institutions in Serbia rather seemed to be motivated by a wish to keep cases in Serbia, instead of handing them over to The Hague.

In Bosnia and Herzegovina, the legislator drew inspiration from the ICTY Statute and its jurisprudence (rendered at the time) when drafting the new 2003 BiH Criminal Code. Although the same did not happen in Serbia, Serbian war crimes courts nevertheless used ICTY jurisprudence when determining the legal meaning of particular criminal law and humanitarian law provisions. However, the number of references made to the Tribunal's case law has been decreasing compared to the number during the initial years of the domestic institutions' operation; this can be explained, on the one hand, by the increase in domestic case law, rendering it superfluous to look at foreign courts, and, on the other hand, by a decrease in knowledge of, and interest in, the Tribunal. When it comes to factual findings, Serbian courts usually adopt differing – or even opposing – stances to those of the ICTY. In contrast, the State Court of Bosnia and Herzegovina (SCBiH) and even lower courts, align their case law – both in legal and in factual terms – with that of the Tribunal. However, judges insist that there is no obligation to do so, and ICTY case law is considered, among other sources, when searching for the correct take.

In fact, Bosnian judges even look for inspiration in the Tribunal's jurisprudence when it comes to difficult or unfamiliar procedural questions. Furthermore, the reformed Bosnian Code of Criminal Procedure (CPC) is, reportedly, at least partly inspired by the ICTY's Rules of Procedure and Evidence (RPE). Although Serbia also adopted a new CPC, which (similar to the Tribunal's RPEs and the Bosnian code) mixes the inquisitorial tradition with accusatorial elements, the drafters did not take the ICTY's procedure as an example.

Witness protection and support had been absent from the criminal justice systems in both Serbia and Bosnia and Herzegovina until the idea was introduced by the ICTY. The requirement of the domestic systems to provide protection to ICTY witnesses returning to their home countries contributed to firmly establishing witness protection in BiH and Serbia.

The fact that the Tribunal did not provide for reparations for injured victims in the context of its trials was negatively perceived in BiH. As a result, domestic practitioners and activists reported that precisely for that reason, the SCBiH started granting compensation requests from victims directly in the criminal trial. The ICTY therefore indirectly triggered also this development.

Lastly, the Tribunal was a pioneer in using technological equipment during the prosecution phase and in the courtroom, not only for witness protection, but also for case management and for showcasing evidence. Although domestic courts have limited resources, they have strived to replicate the ICTY's practices in this respect.

It should, however, be noted that the Tribunal's influence in BiH and Serbia has changed profoundly throughout the decades,[2791] depending on political circumstances at the domestic level and on events in The Hague.[2792] This is reflected in the two factors that predominantly explain the ICTY's impact.

The first factor can be summarised as the 'capacity building' effect of the Tribunal, where capacity building must be understood broadly, including on-the-job training and learning through collaboration. Since the very beginning, the ICTY needed to cooperate closely with Bosnia and Herzegovina as most of its own cases related to crimes committed on Bosnian territory; this required frequent visits to BiH, and access to documents and witnesses. In the course of this cooperation, close ties – and eventually trust and mutual respect – developed between ICTY representatives and their counterparts at the national level. Over the years, it became clear that the Tribunal needed to reduce its own workload in order to finalise all proceedings in a timely manner; it therefore planned to transfer some of its cases to Bosnia and Herzegovina. In addition to this, it emerged that most of the ICTY's 'follow-up' trials, involving crimes of lower gravity and lower-level perpetrators,

2791 Cf. Orentlicher, 2018, p. 429.

2792 Cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

would be conducted in BiH, given that the country had territorial jurisdiction. These factors provided sufficient reasons for the Tribunal to take active measures to strengthen the Bosnian criminal justice system.

In contrast, the cooperation with Serbia had been difficult since the beginning; although at least at the working level, it significantly improved over time. Nevertheless, contact with the ICTY's counterparts in Serbia was simply less frequent because less interaction was needed than with their Bosnian colleagues. Likewise, concerning capacity building, Serbia was not the Tribunal's top priority – even though it did undertake activities to strengthen the domestic war crimes institutions. Given that the ICTY was less present in Serbia, Serbian legal practitioners had fewer occasions to develop trust in – and respect for – the Tribunal than their Bosnian colleagues. Having limited (or no) personal experience with the ICTY, Serbian legal professionals remained influenced by the general atmosphere prevailing in the country, which was rather negative, at times even hostile, towards the Tribunal. It is therefore understandable that, under these circumstances, they had little reason to look towards the ICTY for inspiration.

This is, however, what Bosnian legal practitioners did, almost at any instance or on any matter in a criminal trial: when confronted with thereto-unknown questions of procedural nature; when incorporating modern technical gadgets in the criminal process; when dealing with witness support and protection; when defining international crimes or forms of responsibility; or when drafting judgments. The institutional set-up of specialised Bosnian war crimes institutions even resembles that of the ICTY; and the manner in which the State Court of Bosnia and Herzegovina interprets its mandate is similar to practices of the late Tribunal, for instance, when engaging in outreach activities to explain its work, or when cooperating with counterparts at the cantonal/district level.

In Serbia, the ICTY's tangible impact is only visible in the establishment of the domestic war crimes institutions, in witness protection and support, and in the use of technology in the courtroom. In the latter two areas, the Tribunal's rules and best practices were incorporated in Serbian law and practice. While some argue that Serbian war crimes institutions were founded out of anti-Hague sentiments, witness protection and support, and the use of technology in the courtroom were value-free areas. Adopting these practices did not have to be justified in normative terms, instead utilitarian reasons were brought forward. The risk that decision-makers and legal practitioners faced of being confronted with resistance from the general public was therefore minimal. This is probably why the ICTY's impact on domestic war crimes jurisprudence is much less tangible – the analysis of the Tribunal's case law is often hidden by omitting references to it. In terms of factual findings on crimes committed during the wars – a very contentious issue in Serbia – the domestic war crimes institutions often depart from the ICTY's jurisprudence.

The Tribunal therefore strengthened the rule of law in Bosnia and Herzegovina to a much greater extent than in Serbia. By triggering domestic war crimes prosecutions and

trials in both countries, the ICTY contributed to re-establishing accountability for crimes – arguably the first step in re-establishing the rule of law. Taking the ICTY's example in terms of laws, procedure and court practice, the Bosnian judiciary professionalised – and today, their war crimes institutions enjoy a very good reputation in terms of competence, effectiveness, efficiency, and fairness. In addition, the first steps were taken in making the judiciary more transparent and accessible to the public. In Serbia, witness protection and support, as well as the use of technology in court, have contributed to improved effectiveness and efficiency of criminal trials.

While these developments were triggered in the context of war crimes adjudication, many changes have been implemented in other areas of the criminal justice system as well. For example, witness protection and support are now available in all criminal trials and at many courts throughout the region. Generally speaking, the ICTY has provoked a change in legal practitioners' mindsets – at least in Bosnia and Herzegovina. Many of the novelties introduced by the ICTY have become standard practice, and people have started forgetting that they originated at the Tribunal in The Hague.[2793] Conformity with these values, rules, and practices is depersonalised. They have become completely internalised. It can therefore be expected that the Tribunal's effects will last for a long time.[2794]

2 The Take-Aways from This Study

2.1 General Validity of This Research

What general conclusions can be drawn from this research regarding the ICTY's impact on the rule of law in Serbia and Bosnia and Herzegovina?

Any research related to the ICTY is difficult to generalise. The ICTY was a very special international criminal tribunal. Its uniqueness stems not only from the fact that it was the first of the modern kind – established decades after the Nuremberg and Tokyo tribunals, which are commonly criticised for rendering 'victor's justice' – but also because the ICTY was created following a consensus among the most powerful nations in the United Nations (UN) Security Council – a unique moment of unity, which many hoped would mark a new era of peace and collaboration after the cold war. The Tribunal benefited from the Security Council's backing until the very end. Apart from the International Criminal

2793 This also applies to Serbia, where one of my interviewees recounted how through frequent turnover at the witness protection units, no one remembers anymore that Serbian witness protection started off with a visit of legal practitioners to The Hague; cf. interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

2794 According to my interview partners, this applies at least to witness protection and support and the use of technology in the courtroom, as they are beneficial beyond war crimes proceedings.

Tribunal for Rwanda (ICTR), the ICTY's sister tribunal, no other international criminal court has been established by the UN Security Council since. The International Criminal Court (ICC) was established by a treaty, which only binds its state parties. The ICTY thereby enjoyed political consensus, which the ICC never had, and will most likely never have. The Tribunal could count on that support, even in times when it was less successful and more controversial.[2795]

The ICTY was also established at a very special moment. Some of my interview partners described the general feeling of excitement at the time – with regard to the new court and the new field of law: international criminal law.[2796] Many were optimistic about its global potential for justice and peace within and among states. This enthusiasm lasted until the terrorist attacks on 09/11 in 2001. The reactions to 09/11 overrode the new respect for rules, law, and morality; respect for international humanitarian law was up for discussion again. By virtue of the new world order following the end of the Cold War, and owing to the first successes of the Tribunal, there was strong support for the goal of global peace and justice in 1998, when the Rome Statute of the International Criminal Court was adopted. By the time the ICC became operative in July 2002, the world was no longer occupied with justice, but rather with the global war on terror. Despite the referral of two situations by the UN Security Council to the ICC, the permanent Court has never received the same support from the UN Security Council. In fact, attempts to refer situations where global players – in particular, the US and Russia – see their interests being at stake, such as in the situation in Syria, have repeatedly been blocked by Security Council members.

In addition, as an organ of the UN Security Council, states were obliged to cooperate with the ICTY. Although it lacked the mechanism to enforce these rules, they were respected to a large extent by many countries.[2797] Furthermore, other powerful actors, such as the European Union, later joined in providing support, and made the ICTY's mission *their* mission, thereby helping to enforce its mandate. Indeed, the new generation of international criminal courts and tribunals has a more collaborative, horizontal approach to cooperation, compared to the Tribunal's top-down approach.[2798]

Moreover, the ICTY had primacy over national courts. This, together with states' cooperation obligations, gave the ICTY substantial leeway, especially at the start of its

2795 Cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

2796 Cf. interviews with ICTY defence counsel, Belgrade, 23 January 2017, I-27; and Belgrade, 25 January 2017, I-31.

2797 Think of the deferral of the *Tadić case* from a German court. But also the states of the former Yugoslavia extensively collaborated with the Tribunal. While only their (especially Serbia's and Croatia's) unwillingness to hand over accused made it into the media, there had always been intensive cooperation between national authorities and the ICTY on the working level, such as for handing over documents or otherwise giving access to evidence, on witness protection, etc.

2798 Compare, for instance, Article 29 of the ICTY's Statute with Article 93 Rome Statute.

operations, for instance through deferring ongoing cases to The Hague. In contrast, the International Criminal Court is a court of last resort, which only becomes active when national courts are unable or unwilling to do so.[2799] This not only decreases the number of cases that the ICC will ever potentially adjudicate, but it also removes a pressure mechanism, as the bar for the ICC's Prosecutor to prove inactivity at the national level is high, whereas for the ICTY, there was no bar at all.

The ICTY's extensive financial resources should not be forgotten. Thanks to its generous budget, the Tribunal could employ a total of up to 35 judges in 2009,[2800] in addition to numerous prosecutors and other staff members. At times, the only thing that prevented even more trials from taking place, was the fact that the Tribunal only had three court rooms. A large budget is also important for conducting effective (on-site) investigations. As of 2003,[2801] the UN Security Council exerted pressure on the Tribunal to close its doors, yet it extended its mandate numerous times, allowing the ICTY to finish all its envisaged trials. The ICC is a permanent court and is therefore not subject to this pressure. Nevertheless, the Assembly of State Parties was arguably more hands-on regarding the ICC's budget, questioning its size, and comparing it to its output.[2802]

The ICTY was a mono-situation tribunal, dealing only with the wars in the former Yugoslavia. This permitted the Tribunal to specialise, by developing knowledge about the conflicts, the structures of the involved militaries and political hierarchies. In addition, an investigation regarding one case frequently pointed to other cases, involving other accused or other crimes. The contacts that the Tribunal established over the years with their national counterparts also remained the same. The ICC, instead, deals with many different situations in different countries, and its resources only allow for the adjudication of a few cases per situation. For each case, the ICC therefore has to start all over again: familiarise itself with the factual situation, with the evidence and potential suspects, and establish a relationship of trust with domestic contacts. It is therefore much more difficult for the ICC to build up knowledge about each situation it deals with, and to establish the relevant contacts.

Lastly, the conditions on the ground are hardly generalisable. The ability or willingness of domestic actors in the target country (or countries) to support an international criminal court or tribunal in fulfilling its mandate, or to enable impact on their criminal justice

2799 See Article 17 Rome Statute.

2800 In 1993, the Tribunal had started off with 12 judges, rising to around 30 from 2003 to 2010, and then declining to seven in 2017; cf. ICTY, The Judges, http://www.icty.org/en/about/chambers/judges (last accessed 01/09/2019); and ICTY, Former Judges, http://www.icty.org/en/sid/10572 (last accessed 01/09/2019).

2801 At least with United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003, endorsing the ICTY's completion strategy.

2802 See for instance: J. Anderson (3 December 2018), ICC: What's on the Menu for 2019, Justiceinfo.net, https://www.justiceinfo.net/en/tribunals/icc/39657-icc-what-s-on-the-menu-for-2019.html (last accessed 01/09/2019).

system, depends on many factors, including the political, the societal or even the economic situation in the country.

2.2 Recommendations

Despite the characteristics that make the International Criminal Tribunal for the former Yugoslavia a unique court, a few lessons can be drawn from its example. Particularly the ICTY's experience regarding the potential for an international war crimes court to have an impact on domestic justice systems is instructive. These general conclusions would, in my view, be valid for any existing or future international – or even hybrid – criminal court, regardless of the type of conflict it adjudicates:[2803]

1. Do the work well.

The findings of this study point to the importance of attitudes towards an international criminal court or tribunal, not only of the general public in the target societies, but also of potential key actors that would defend the court or tribunal against attacks, or even advocate for domestic impact. Key actors in this respect mainly comprise the 'international community' and powerful members of the 'international community', who are willing and able to support the court or tribunal in fulfilling its mandate to conduct criminal trials. In addition, all individuals from the target societies that come into contact with the court or tribunal, particularly the defence counsel, legal interns or liaison officers, are also key in spreading the message of the court or tribunal within their country.

In order to convince these key actors, the court or tribunal needs to demonstrate that it is efficient and effective. It needs to conduct convincingly fair trials within a reasonable timeframe. It will thereby establish itself as a court of authority and respect, which is the precondition. Without good trials, the court or tribunal's practices will not be deemed worth copying.

In order to be able to conduct good trials, it is essential to have competent and committed people, and an appropriate legal framework that is fair and allows for effective and efficient proceedings.

In addition, those who are convinced of the court or tribunal, will assist it and become its advocacy network. As mentioned in the impact model in Chapter 3, authority and advocacy networks are vital elements of the norm cascade.

2803 Although, in view of the ICC's nature as a multiple-situation court, it would be very difficult to develop the specialised knowledge, close ties with domestic counterparts, and the authority on the ground that is needed to have tangible impact on the rule of law in each situation country.

The ICTY did manage to build up strong advocacy networks in Bosnia and Herzegovina: the 'international community', civil society organisations and the Tribunal's counterparts in the domestic justice system had ample occasions to make contact with the Tribunal. They have come to share the overwhelming opinion that the ICTY was an effective and fair court. The Tribunal's efforts to build advocacy networks in Serbia were much less extensive.

2. Collaborate closely with domestic practitioners and engage with target communities.

The more personal court or tribunal experience domestic practitioners have, the less strange, foreign, or maybe even frightening, the international institution will usually feel to them – thereby increasing the likelihood that they will be receptive to the court or tribunal's influence. It is therefore recommended to allow domestic practitioners to work as temporary or permanent staff members at the court or tribunal in order to immerse them into the system. This could also have beneficial effects on the "perception of neutrality"[2804] of the international criminal court or tribunal.

In addition to that, the court or tribunal should take all possible measures to collaborate intensively with those domestic counterparts who are unable to work at the court or tribunal. The mandate of the court or tribunal itself poses several possibilities in this respect, such as with regard to witness protection and witness support or exchange of evidence. Through collaboration, the court or tribunal can show its esteem for, and trust in, the domestic system; empowering local actors, while at the same time familiarising them with the court or tribunal's practices.

Of course, the general atmosphere in their country will influence even those who have personal court or tribunal experience, regardless of whether it is pro or anti court or tribunal. Therefore, it is important to engage early and intensively with the general public in the target country (or countries) of the court or tribunal. The court or tribunal needs to explain its work and the reasons for its decisions. An effective communications strategy, funded by the court or tribunal,[2805] is essential for an international court or tribunal whose judges do not naturally engage in the ongoing, multi-layered dialogue with local citizens, which establishes the legitimacy of domestic courts.[2806] Of course, there is a limit to what can be done, and studies have shown that outreach rarely changes pre-existing attitudes, and sometimes even reinforces them. However, timely outreach can make a difference, as it is more difficult to reverse an established opinion than to shape a new one.[2807]

2804 Orentlicher, 2010, p. 132.
2805 Cf. Nettelfield, 2010, p. 282.
2806 Cf. Orentlicher, 2018, p. 315.
2807 Cf. Orentlicher, 2018, p. 310; outreach for international criminal courts and tribunals is so important because first, unlike domestic courts, they need to promote their public image in order to justify their existence; cf.

In any case, the court or tribunal needs to be resilient and show patience towards countries that are less receptive to their messages in the beginning, and they should not shy away from being present in those countries – especially towards local practitioners.

Most probably, the hostile attitudes towards the ICTY in Serbia have at times prevented its representatives from reaching out to the Serbian general public and legal practitioners. In BiH, the Tribunal was in general welcomed by most of the people. There were thus fewer barriers to close collaboration and outreach in Bosnia and Herzegovina. Building a good relationship is easier when there is already a common basis. However, the ICTY's experience shows that close ties and cooperation between the international war crimes court and domestic key actors is vital for impact on the criminal justice system. The Serbian example shows that once relations improve and trust is built, the potential for impact rises immediately. Timely, well-targeted communications could have made a difference.

As explained in Chapters 3 and 9, collaboration leads to capacity building, and at the same time influences attitudes – both vital elements within the norm cascade.

3. Prosecute all sides of the conflict.

The most important factor influencing attitudes – and hence, a court's demonstration abilities – towards an international criminal court or tribunal is whether each side of the conflict believes that crimes against their own community are addressed. Demonstration abilities are one of the vital elements for impact within the norm cascade. It is therefore paramount that all sides of the conflict are investigated, prosecuted, and tried.[2808] This does not, however, mean equal numbers of people, or numbers proportionate to the size of either population, or even numbers that are proportionate to either side's role in the conflict (as the latter will be a contested premise).

The Serbian frustration with the ICTY is due, in particular, to the acquittals of high-level accused from the other sides to the conflict. This suggests that it is not the numbers that matter, but rather the fact that *key* accused need to be prosecuted from all sides.

Some might reject this recommendation as unduly inserting non-legal considerations into case selection. However, the cases pursued at international criminal courts or tribunals are *always* selective, as no international war crimes court would be able to prosecute all

Ostojić, 2014, p. 134. In addition, it seems intuitive that courts' expressivist impact will always be limited if their target audience does not know how they work. Indeed, at times, improved outreach and media coverage have led to more favourable attitudes about the ICTY and have tempered unrealistic expectations in segments of the population targeted; cf. Nettelfield, 2010, p. 282. However, the Tribunal underestimated the importance of communicating with the public in the targeted countries in order to have justice "seen to be done"; cf. Ostojić, 2014, p. 134. As Bachmann notes, in its early years, the Tribunal had no coherent public relations strategy; outreach came too late and it was not ambitious enough; cf. Bachmann, 2013, p. 272.

2808 See also: L. May & Fyfe, 2017, p. 89.

crimes committed during the conflict in question. More often than not, international prosecutors are not transparent about this fact, pretending that they merely "follow the evidence" in deciding whom to prosecute.[2809] Thus, given that selection is always necessary, the selection process should take into consideration the extent to which specific prosecutions might contribute to increasing acceptance of the war crimes court among its constituents, and as a consequence, to increasing the impact on them. The ICTY's experience in Serbia shows that the potential for impact was there (demonstrated through Serbia's willingness to adopt practices on witness protection and support, as well as technological innovations introduced by the ICTY). I am convinced that if more attention had been given to indicting and convicting high-profile criminals from the other sides of the conflict, the Tribunal would have been perceived more positively in Serbia,[2810] and ultimately, its jurisprudence would have led to more significant changes – both in the Serbian society and in domestic proceedings.

Of course, this does not mean that those who are innocent should be prosecuted or convicted. The evidence must still be the primary guide for indictments, and the *only* guide for convictions. However, in my view, sending the message that crimes committed against all sides of the conflict, and ensuring that this message is embedded in the proecutorial strategy of the international criminal court or tribunal, is essential in order to be able to generate broader impact.

4. Conduct many, rather than big, trials.

Another key element in achieving domestic impact is the organisation of numerous trials, as well as the existence of case law and court practice. The higher the number of trials, the more possibilities arise for domestic-international collaboration. The more occasions for domestic actors to observe – or even participate in – court practice, the more experience they will gain and the higher the likelihood that they will grow accustomed to these practices. The more case law there is, the more precedents there will be to analyse, learn from, and to cite; and the more coherent case law is, the more convincing it will be. Therefore, I recommend conducting as many trials as possible.

Apart from conducting a few 'show trials' concerning key actors from all sides of the conflict (also, in order to demonstrate that no one is above the law), so-called 'small fish' trials should be the main preoccupation of the court or tribunal. Domestic institutions are

2809 See also: Akhavan, 2009, p. 631.

2810 Although Orentlicher agrees that the Tribunal had to prosecute people from all sides, because otherwise, it would have been totally incredible, she points out that Bosnian Serbs (and probably also Serbian Serbs) would have never been happy with the ICTY, unless it had prosecuted all sides equally, as they believed that all sides committed crimes to an equal extent; cf. Orentlicher, Open Society Foundation: Book Launch – Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, 31 May 2018.

most likely to conduct the vast majority of low-level perpetrator trials. Evidence collected by the international court or tribunal can help domestic institutions to get their cases started, and legal reasoning for direct perpetration or other modes of participation in a crime will provide a useful example for domestic prosecutors, judges and defence counsel. In terms of jurisprudence, it is not the judgments of high-level perpetrators that will be used at the national level, but rather those of the 'small fish'. In order to boost domestic trials and establish the international practice at the domestic level, it would therefore be beneficial to have many cases related to low-level perpetrators. Often, this is also advantageous to the court or tribunal's own work, as crime theories usually work bottom-up, from the direct perpetrator to the mastermind, and not the other way around.

Overall, the court or tribunal needs to conduct a mix of 'show trials' that convince the local audience of its fairness towards all parties to the conflict, and 'demonstration trials'[2811] that demonstrate how domestic trials could operate. 'Show trials' are important in terms of influencing attitudes towards the Tribunal and 'demonstration trials' can assist in capacity building; these are both vital elements of the norm cascade.

The number of trials that the ICTY conducted is unparalleled. The wealth of jurisprudence and court practice produced by the Tribunal, the range of legal concepts it has defined, and the number of facts it has established is now the basis for many prosecutors, defence counsel, and judges throughout the region of the former Yugoslavia. In addition, each and every trial the Tribunal conducted required cooperation with the domestic judiciary in the countries of the former Yugoslavia, which provided an opportunity to bring the ICTY closer to its domestic counterparts.

5. Plan domestic impact ahead.

The actors establishing the court or tribunal need to foresee its potential for domestic impact and plan accordingly: in terms of set-up, dedicating staff and resources to collaboration with domestic counterparts, and engaging with the court or tribunal's target audience; but also in terms of planning investigations, and conducting trials. Thus, apart from conducting good trials (see recommendation 1) that will influence the court or tribunal's domestic perception (and thus its demonstration abilities), the court or tribunal needs to plan its capacity building abilities.

Not all courts will have the time that the ICTY had to correct its path in the form of a completion strategy; therefore, a strategy on domestic impact needs to be formulated early

2811 Cf. Gordy, 2013, p. 51.

on.[2812] Furthermore, this strategy should be periodically reviewed to assess whether changing conditions call for new strategies.[2813]

Being the first modern international criminal tribunal of its kind, the ICTY did not have a strategy from the outset. The Tribunal did not even have a strategy concerning how, and until when, to conduct its own trials, or whom to indict (see the belated completion strategy); and there was certainly no strategy regarding its broader impact on domestic judiciaries. Its failures in this regard are particularly visible concerning its public relations and lack of outreach.[2814]

2.3 Academic and Societal Contributions

As described in Chapter 1,[2815] the ICTY was an experiment. Its importance for international law and global justice has been studied extensively. My findings on the Tribunal's role in post-war developments in Bosnia and Herzegovina and Serbia contribute to a broader understanding of the ICTY, and in particular, of its nature as a *domestically* relevant institution.

The rule of law conception of Chapter 2 (with the refinements of section 2.1 in Chapter 4), as well as the impact model developed in Chapter 3 (with the adjustments of section 4 in Chapter 9), proved to be an appropriate framework to analyse the ICTY's impact on the rule of law in Serbia and BiH. They are, however, sufficiently general to allow it to be used for the purpose of examining the domestic impact of other courts and tribunals. Future researchers are invited to make further improvements to this analytical framework, in particular: to further narrow down the rule of law conception that forms the dependent variable of this research; and to adapt the impact model (the independent variable) to the situation of international criminal courts and tribunals, as this model stems from the field of international relations, which describes how norms developed within a state can diffuse to other states.

Lastly, in the previous two sections, I have demonstrated to what extent my findings on the ICTY may be generalisable also for other international criminal courts and tribunals, and other domestic situations. The recommendations formulated in section 2.2 should guide future decision-makers in setting up and operating international war crimes courts, if strengthening the rule of law is a desired (side-)effect of that court or tribunal.

2812 See also: Orentlicher, 2010, p. 129.
2813 Cf. Orentlicher, May 2008, p. 29.
2814 See recommendation 2.
2815 Section 1.

3 Reflections on Doing This Research

Taking up what has been said on the methodology of this research in Chapter 4, a few more reflections are warranted.

As pointed out above, the aim of this research was to review the claim made by *others* that the ICTY strengthened the rule of law in the countries of the former Yugoslavia. It is my opinion that these statements are rather bold, especially given that almost none of them explain what is meant by 'the rule of law'. In order to examine whether the Tribunal influenced the rule of law, I therefore created my own definition – which can be found in Chapter 2 – relying on literature from the fields of philosophy, the political sciences and legal psychology. Considering the many different views regarding the rule of law, any conceptualisation is unavoidably incomplete, or may even be considered by some as wrong. Furthermore, the definition that I initially formulated was much broader than the confines of my research topic; it would have been impossible to determine whether or not the ICTY had an impact on *that* kind of rule of law.

Therefore – as described in section 2 of Chapter 4 – I chose to develop a different framework for my analysis, based on the Tribunal's own definition of the rule of law. This, however, does not exist. There is no policy document describing what the ICTY understands by the 'rule of law' – even though, as shown, the Tribunal frequently claims to strengthen the rule of law. It has never actually been revealed *what* exactly is strengthened when the rule of law is strengthened. As described, I therefore conducted a document and discourse analysis, using all relevant or official documents and statements by the ICTY principles, in order to deduce a rule of law definition. The framework presented in section 2 of Chapter 4, is therefore constructed; this definition is my own definition, as such I do not know whether the Tribunal would agree with me (whom would I even ask, who is 'the Tribunal'?). It must, however, be noted that I did not invent anything. The general rule of law conception, described in Chapter 2, provided the parameters that I used to structure the ICTY's definition; furthermore, this conception guided the document and discourse analysis. The challenge related to selecting the conceptualisation for the rule of law of the institution whose contribution to the rule of law I am assessing, is that it is not a neutral benchmark, as it implies measuring one's achievements with one's self-proclaimed goals. This method is not well perceived in the literature on impact, as the outcome is almost inevitably positive. However, as mentioned in Chapter 4, this criticism only partly applies here, given that the Tribunal never pronounced strengthening the rule of law as an objective. Admittedly though, given that it was included in the adoption of the completion strategy, it clearly was one of the aims of the ICTY. Future researchers might want to use different benchmarks for assessing a war crimes court's successes and failures.

Risse and Sikkink's norm cascade theory, as well as the spiral model, turned out to be excellent models to analyse and describe impact; indeed, others had tested their suitability

for the field of war crimes adjudication before me (using different research questions).[2816] My research confirms that both models can also explain the impact of war crimes courts on the rule of law in the domestic societies of their jurisdiction.

Assessing impact was one of the biggest challenges of this research. "And how do you measure impact?" was a frequently reoccurring question in the course of this research. The best method (used by myself and others before me) was to ask the counterfactual question, after having 1) determined what impact is; 2) determined explicit indicators regarding the Tribunal's role in the particular change that I was analysing; and 3) after having determined implicit indicators. The problem is that even the counterfactual question cannot exclude the role that other factors have played in triggering the respective change – maybe even one that was more important than the ICTY's. When looking solely at the Tribunal's role, there is a risk of overemphasising its importance. I am sure that this has happened from time to time in this research as well. In order to prevent the pitfall of overemphasising the ICTY's role, I avoided making a judgment call on whether the rule of law in Serbia and Bosnia and Herzegovina is 'better' now or not, or even putting cyphers on the change. Instead, I have only evaluated whether the ICTY has made a difference on a particular rule of law element – or not. If it *has*, then I do not exclude that other factors may also have had an impact on that particular rule of law element. The focus of my research was thus on the *ICTY's impact on* the rule of law; my focus was not the *rule of law* in Bosnia and Herzegovina and Serbia. Therefore, if one wants to conduct a comprehensive analysis on the rule of law in Serbia and BiH, more research on other factors (i.e. other independent variables) would be warranted. In particular, the Tribunal's *interaction* with other actors or factors would be an interesting future research topic, which has only appeared marginally in my research.

Lastly, my advice to future researchers pursuing similar studies is to conduct as many interviews as possible, and as early as possible in the research trajectory. In my case, it was only through the interviews that I really understood: my research topic; the role of the ICTY in BiH and Serbia; how its impact unfolded; who were the relevant actors; and even the structure that I would adopt in order to present my findings. Learning the local language of the countries that one is researching is, in my view, indispensable.

4 The ICTY, the Birthplace of Everything

In 1993, when the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia, not many believed that it would ever conduct even a single trial. Some say that it was only established to alleviate the bad conscience of powerful

2816 For instance, Stromseth, or Snyder and Vinjamuri.

states who did not want to intervene in the Yugoslav conflicts, but who also did not want to stand by and do nothing. Twenty-four years later, the ICTY is the most successful international criminal tribunal ever – and it will be difficult for any future court to match its achievements.

Its impact on the development of international criminal law and international humanitarian law is undisputed. By being the first modern international criminal tribunal, and by issuing extensive jurisprudence on a broad variety of matters, its case law has not only influenced the jurisprudence of the ICTR, and the next generation of international or internationalised criminal courts and tribunals, but it has also found its way into the national law and military manuals of many countries.

The success of the Tribunal has also led to the establishment of other international criminal courts and tribunals. Observers and activists agree that without the ICTY, the International Criminal Court would not have been founded in Rome in 1998. Thus, in the end, it is also owing to the Yugoslav Tribunal that national courts all over the world are now dealing with international crimes on the basis of customary international law or on the basis of implementing laws of the Rome Statute.

While talking about witness protection, one of my interviewees commented on the ICTY's overall importance:

> "[The] ICTY experience […] is most relevant. OK, this [witness protection] is for war crimes cases specifically, but I cannot really see that there could be anyone who did not have ICTY experience and could be even remotely relevant for this topic. Even people now at the ICC or other hybrid tribunals, they all had at some point in their career experience with the ICTY. The ICTY was a birthplace of many other things that are now being taken over by others who regard the ICTY very critically, but at the same time apply it."[2817]

The comment points to the many novelties developed by the ICTY over the course of 24 years of war crimes proceedings – starting from prosecutorial techniques designed to investigate and indict complex crimes; to court procedures and practices conducive to long, complicated, and, for some people, dangerous criminal trials; up to and including new legal definitions and factual findings.

This contribution has demonstrated that many of these innovations have been implemented in Bosnia and Herzegovina and in Serbia. Ultimately, thereby, the International Criminal Tribunal for the former Yugoslavia has contributed to the rule of law in both countries.

2817 Interview with transitional justice and rule of law expert, Belgrade, 12 November 2018, I-18.

Postface

The picture on the cover page, drawn specifically for this book by Lysandre Papadopoulos, shows an untypical representation of Lady Justice. Usually, Lady Justice carries a sword and a scale, representing authority and swift and final justice (the sword) and the weighing of evidence in view of determining the strength of a case's support and opposition (the scale). She is blindfolded in order to guarantee her impartiality.

Lady Justice in this picture stands for the type of international criminal courts or tribunals which was analysed in this book, namely which pursues the – secondary – goal of strengthening the rule of law in the countries under their jurisdiction. As mentioned, seeking to influence the rule of law is not something I advocate for, but something I found out to be a fact for many international criminal courts and tribunals.

The Lady Justice that aims for strengthening the rule of law through her judgments and decisions as well as extra-judicial activities needs to "plan her domestic impact ahead". She cannot be blind because she needs to be aware of the consequences of her actions and needs to plan and adapt them accordingly. Of course, in her judicial decisions she needs to be unbiased, nevertheless.

Lady Justice needs to "do the work well", meaning that she needs to be efficient and effective in conducting fair trials. This is the precondition for impact on the rule of law. This is why, just as in traditional representations of Lady Justice, she carries a scale. The scale looks slightly unbalanced because it comes with the nature of international criminal courts and tribunals that they will appear unfair to either one or several sides of the conflict in question.

However, somewhat luckily, my research has shown that what matters for an international criminal court or tribunal's potential to influence the rule of law at the domestic level is much more than merely its judicial decisions. That is why the sword of this Lady Justice is lying somewhat in the background of the picture. Instead, it is the tribunal's existence, its overall performance, its techniques and practices, and ultimately also its extra-judicial activities such as outreach that count. Hence, the specific recommendations to "collaborate closely with domestic practitioners and engage with target communities", to "prosecute all sides of the conflict", and to "conduct many rather than big, trials". This will permit Lady Justice to develop best practices that can actually be used at the domestic level and to convey her experience to her domestic counterparts.

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