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Where the ICTY is Still Alive
Explaining the ICTY's Impact on Domestic Criminal Justice Systems in the Former Yugoslavia

Summary
After having conducted proceedings concerning all 161 indictees, the ICTY finally ceased to exist in December 2017. Through its vast case law and court practice, the ICTY has developed international criminal law and procedure like no other court before.
The Tribunal's footprints will leave a long-term impact on the domestic criminal justice systems of Bosnia and Herzegovina, Croatia, and Serbia. The ICTY significantly influenced transitional justice in all three countries by having triggered national war crimes proceedings. It helped establish domestic specialised war crimes institutions and catalysed their initial work through various support programmes.
At the same time, the Tribunal also influenced criminal law reforms, both concerning substantive and procedural criminal law. Amongst other sources, its case law forms the basis for the codification of international crimes in the domestic criminal codes, and domestic criminal procedures were aligned to the ICTY's procedure and court practice. Domestic courts frequently follow the Tribunal's jurisprudence, both on substantive and on procedural legal issues. Its practices are also taken up in the realm of victims and witness protection and support. Importantly, the ICTY's impact has over the years transcended the realm of war crimes and spilled over into the overall criminal justice systems.

Kei Hannah Brodersen

Where the ICTY is Still Alive

Explaining the ICTY's Impact on Domestic Criminal Justice Systems in the Former Yugoslavia

1. "Beyond our Direct or Intended Efforts" [1]

The International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) closed its doors for good in December 2017 after 24 years of existence and operation. Its record in conducting criminal trials is unprecedented at similar international or hybrid criminal tribunals: It had indicted 161 persons, of which the majority was tried in The Hague, and a few had their cases referred to national jurisdictions. [2] As the first modern international criminal tribunal, the ICTY's work was under close scrutiny by both, academics and practitioners, since its early days. Much has been written about its performance and accomplishments, especially in terms of interpreting international humanitarian law and developing international criminal law and procedure. What went by largely unnoticed is the impact the ICTY had on the criminal justice systems in the countries of former Yugoslavia. Although influencing domestic systems wasn't foreseen in the Tribunal's mandate, [3] the traces it left in Bosnia and Herzegovina's (BiH), [4] Croatia's, and Serbia's criminal justice systems are arguably one of the most important elements of the Tribunal's legacy. That way, although the Tribunal itself has finished its work and closed, it somewhat lives on in the countries of the former Yugoslavia.

By way of example, this contribution will present two areas within domestic criminal justice systems where change was brought about by the ICTY – areas in which the Tribunal's footprint is the most visible, and where its impact was confirmed by local practitioners. [5] It will also be attempted to demonstrate how the ICTY triggered

1 *John Hocking*, Opening Remarks, Legacy Conference, 22 June 2017, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Registrar/20170622-john-hocking-opening-remarks-sarajevo_en.pdf (accessed 29/12/2017), p. 4.

2 *ICTY*, Key Figures of the Cases, http://www.icty.org/en/cases/key-figures-cases (accessed 26/03/2018).

3 Its mandate was to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (article 1 ICTY Statute).

4 *BiH* is the common abbreviation for Bosnia and Herzegovina due to its Bosnian name *Bosna i Hercegovina*.

5 The results largely draw on field research conducted between November 2016 and February 2017 in The Hague, Belgrade, and Sarajevo.

change. The contribution's focus is on Bosnia and Herzegovina and Serbia, with occasional comments on Croatia for comparative reasons. BiH and Serbia were chosen because traditionally – and over-simplifying –, the two countries have taken an opposite stance towards the ICTY, with Serbia being largely hostile towards it and Bosnia and Herzegovina cooperative. In addition, for a number of reasons, the ICTY was very active in supporting BiH's transition to a democratic state under the rule of law, whereas the Tribunal's relationship with Serbia was rather marked by a noticeable distance. One would thus expect considerable differences in impact on the two local justice systems. Indeed, the ICTY's footprint is most obvious in BiH, however, also Serbia (and, to a lesser extent, even Croatia) has taken up many of the rules and practices developed at the ICTY, which can only be explained by the great authority and respect the ICTY has gained amongst the local legal community. As one Bosnian war crimes [6] prosecutor put it: "Everything we are doing – we learned from the Hague." [7]

Section 2 will describe the most obvious effect of the ICTY – having spurred national prosecutions and trials for international crimes; and section 3 will demonstrate the Tribunal's influence on domestic criminal law and procedure, jurisprudence, and court practice, including victims and witness protection and support. What becomes obvious from the various areas the ICTY left traces in is that its impact went beyond the field of war crimes adjudication. The positive effects it triggered spilled over into the broader criminal justice systems in Bosnia and Herzegovina, Croatia, and Serbia, where still not everything is perfect, but many things are better now. The ICTY thereby lastingly contributed to a more effective administration of justice at the local level.

2. Domestic Adjudication of International Crimes

2.1. Establishment of War Crimes Institutions

In the report drafted pursuant a mandate given by paragraph 2 of UN Security Council resolution 808 of 22 February 1993, the United Nations Secretary General proposed for the envisaged international tribunal a jurisdictional regime that would be concurrent to national courts. This implied that the proposed tribunal wouldn't be meant to prosecute *all* persons responsible for serious violations committed in the territory of former Yugoslavia. 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. [8]

6 For reasons of simplicity, the generic term "war crimes" is used throughout this contribution to refer to all international crimes, including genocide, crimes against humanity, war crimes, and aggression. This is the usual practice in the region of the former Yugoslavia, where in local language, international crimes are generally referred to as *ratni zločini* – "war crimes".

7 Interview with a war crimes prosecutor, Sarajevo, 09/02/2017.

8 Cf. *United Nations Secretary General*, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (accessed 03/04/2018), p. 16.

For about a decade, this did not have any implications. Instead of advocating for national prosecutions, a number of cases for international crimes were taken away from national courts and deferred to the Tribunal in The Hague. This considerably changed as of 2002/2003, when the Tribunal proposed its "completion strategy", [9] the plan to gradually terminate its work, while making sure that it would be properly continued in the region, which was increasingly seen as a "key aspect" of the Tribunal's legacy. [10] Combining both goals, the ICTY judges suggested referring certain low level cases to the countries of the former Yugoslavia, which would kick off domestic war crimes prosecutions. For this, it was however necessary that national courts "operate[d] fairly and with respect for the principles of international humanitarian law and the protection of human rights." [11] The judges therefore recommended certain reforms including strengthening the independence of the judiciary or ensuring fair trials rights and effective witness protection. [12] Most importantly, however, the ICTY judges advised to establish a specialised court in Bosnia and Herzegovina that would conduct war crimes cases. The court would incorporate international judges, in order to ensure that prosecutions and trials conform to international standards. [13]

Together with the overall completion strategy, these recommendations were endorsed by the UN Security Council in August 2003, and eventually, almost all of them were implemented in the region: In 2002, the State Court of Bosnia and Herzegovina (SCBiH or State Court) was set up upon an agreement between and as a "joint initiative" [14] of the Office of the High Representative (OHR) and the ICTY. A war crimes department was incorporated in that court, [15] which became operational in January 2005. ICTY officials performed an important role with regard to the future

9 Cf. ***ICTY***, Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf (accessed 03/04/2018) (hereinafter: Judicial Status Report).

10 Cf. ***Claire Garbett***, Transitional Justice and 'National Ownership': An Assessment of the Institutional Development of the War Crimes Chamber of Bosnia and Herzegovina, Human Rights Review, Vol. 13 (2012), Issue 1, p. 65.

11 ***ICTY***, Judicial Status Report, p. 5.

12 Cf. ***Serge Brammertz***, ICTY OTP Completion Strategy Report of November 2017, p. 76; ***ICTY***, Judicial Status Report, p. 18.

13 Cf. ***ICTY***, Judicial Status Report, p. 24.

14 ***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, http://www.un.org/press/en/2003/sc7888.doc.htm (accessed 03/04/2018).

15 Cf. ***Lejla Rüedi***, "War Crimes Trials in Bosnia and Herzegovina: Selected Aspects of Transitional Justice Mechanisms" (hereinafter: Selected Aspects), Zürich/St. Gallen: 2015, p. 87 and 88. The SCBiH consists of three divisions, a criminal, an administrative, 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. Appeals against judgments of the Criminal Division are heard by the Appellate Division.

work of the new court, [16] most importantly in preparing the SCBiH for receiving cases from The Hague. [17] The ICTY's experience was for instance used in the process of drawing specific rules of procedure for the specialised war crimes chambers of the SCBiH. [18] The State Court also has a registry that resembles the ICTY Registry. Prosecutions and trials in less complex cases continue in the entity or district courts, where there are, however, no specialised war crimes institutions.

A specialised BiH State Prosecutor's Office (SPO) was established in January 2003 at the state level. The war crimes department of the SPO immediately established relations with the ICTY, making it possible, for instance to use evidence obtained by the ICTY in domestic war crimes trials. In order to facilitate their work, the ICTY granted the office access to the ICTY Evidence and Disclosure Suite, which contains all non-confidential evidence of the ICTY. [19] In the first years of operation, [20] international judges and prosecutors were employed at the SCBiH and the SPO, some of which had previous work experience at the ICTY (either as judges or prosecutors). [21] Also some former ICTY staff members subsequently went to work at the SCBiH as legal advisors. [22] The involvement of international staff was considered a guarantee for impartiality and improving public credibility. [23] According to the State Court itself, through the internationals' experience and expertise, they contributed to building a modern and efficient court which respects the highest international standards in its work of adjudicating international crimes. [24]

In Serbia, only a limited number of war crimes trials had taken place between 1991 and 2003, under ordinary criminal law jurisdiction in all district courts in the country. The serious concerns as to the proper conduct and fairness of these trials [25]

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16 Cf. *William W. Burke-White*, The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina (hereinafter: The Domestic Influence), Columbia Journal of Transnational Law, Vol. 46 (2007), Issue 2, p. 336.

17 Cf. *Theodor Meron*, ICTY Completion Strategy Report of November 2004, p. 4.

18 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 (accessed 03/04/2018).

19 Cf. *Lejla Rüedi*, Selected Aspects, p. 97 f.

20 The downsizing of the number of international judges began in January 2008. All new cases were then allocated to chambers made of two Bosnian judges and one international; cf. *Bogdan Ivanišević*, The War Crimes Chamber in BiH: From Hybrid to Domestic Court (hereinafter: The War Crimes Chamber in BiH), International Center for Transitional Justice, 2008, p. 41 f. International judges and prosecutors left the Bosnian institutions in 2012.

21 Cf. *Diane F. Orentlicher*, That Someone Guilty Be Punished: The impact of the ICTY in Bosnia (hereinafter: That Someone Guilty Be Punished), International Center for Transitional Justice, 2010, p. 124.

22 Interview with a representative of the OSCE Mission to Bosnia, Sarajevo, 02/02/2017.

23 Cf. *Lejla Rüedi*, Selected Aspects, p. 102.

24 Cf. *SCBiH*, Istorijat Suda BiH, http://www.sudbih.gov.ba/stranica/86/pregled (accessed 03/04/2018).

25 Cf. *OSCE Mission to Serbia*, War Crimes Proceedings in Serbia – An analysis of the OSCE Mission to Serbia's monitoring results (hereinafter: War Crimes Proceedings in Serbia), Belgrade 2015, p. 21.

considerably diminished with the establishment of specialised organs within the judicial system in 2003: [26] The Office of the War Crimes Prosecutor, the War Crimes Investigation Service within the Ministry of Interior, a war crimes section within the Belgrade District Court [27] having first instance jurisdiction, a Special Department within the Belgrade District Court responsible for administrative/technical tasks, tasks related to witness and victim protection and administrative support, and a Special Detention Unit in the District Prison in Belgrade. In addition, a special department for war crimes was founded within the Supreme Court of Serbia that would have second instance jurisdiction over war crimes, which, after the court restructuring reform in 2010, moved to the newly founded Appeal's Court Belgrade.

Contrary to the situation in Bosnia and Herzegovina, in Serbia the establishment of specialised institutions was not instigated or brought about directly by the ICTY, but rather by regime change and external coercion. [28] However, considering their similarities, it is likely that the ICTY served as a role model for the local Serbian institutions. [29] As Judge Siniša Važić put it, when Serbia adopted legislation establishing its war crimes institutions, "we took a lot of provisions" from the ICTY, and sought to emulate the "skills, knowledge and technical gadgets" of ICTY facilities and techniques. [30] In addition, prominent ICTY staff members participated in the expert group that assisted the Serbian government in the drafting of its Law on War Crimes. [31] A similar scenario evolved in Croatia where no direct impact from the ICTY can be observed in the establishment of four new chambers within the county courts in Zagreb, Osijek, Rijeka, and Split that would deal specifically with war crimes cases. [32]

What is certain though, is that both Serbia and Croatia had an enhanced interest to commence proper war crimes proceedings within their own country, as a matter of "professional pride." [33] Judge Važić, then-president of the war crimes department at the High Court Belgrade, explained: "Everyone learned from [the ICTY both] as an idea and as know how." [34] At the same time, this would spare the domestic

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26 Cf. ***Keren Michaeli***, The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions in Serbia (hereinafter: The Impact of the ICTY (Serbia)), DOMAC/13, Reykjavik 2011, p. 59.

27 After the court restructuring reform in 2010, this court was called Belgrade High Court.

28 Cf. ***Keren Michaeli***, The Impact of the ICTY (Serbia), p. 59. Coercion was exerted most notably through the European Union with its conditionality policy. I have elaborated on the EU's conditionality policy elsewhere: ***Kei Hannah Brodersen***, The ICTY's Conditionality Dilemma, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 22 (2014), Issue 3.

29 Jelena Vladisavljev, clerk at the Serbian War Crimes Prosecutor's Office and former Serbian liaison officer at the ICTY, ADC-ICTY Annual Conference, 3 December 2016.

30 As cited in ***Diane F. Orentlicher***, Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia (hereinafter: Some Kind of Justice), Oxford: 2018, p. 402.

31 Cf. ***Lejla Rüedi***, Selected Aspects, p. 86.

32 Cf. ***ICTY***, Development of the Local Judiciaries, http://www.icty.org/en/outreach/capacity-building/development-local-judiciaries (accessed 03/04/2018).

33 ***Diane F. Orentlicher***, Shrinking the Space for Denial: The Impact of the ICTY in Serbia (hereinafter: Shrinking the Space for Denial), Open Society Justice Initiative, 2008, p. 48.

34 Id.

institutions enhanced cooperation with the Hague Tribunal. [35] Somewhat paradoxically, anti-Hague sentiment may have helped foster a more receptive attitude towards domestic war crimes prosecutions than would have been possible without the ICTY. [36] By all means, Croatia and Serbia wanted to show that they could do the job at home and that the ICTY was not necessary.

The ICTY not only – directly (BiH) or indirectly (Serbia and Croatia) – spurred the establishment of national war crimes institutions. Following the United National Security Council's request to "strengthen [...] the capacity of [the national] jurisdictions" [37] in former Yugoslavia, the Tribunal implemented a series of dedicated programmes in order to facilitate domestic war crimes proceedings. Thereby, it had a considerable influence on the domestic institutions' operation and performance. Most obviously, the overlapping jurisdiction and division of labour between the international level (dealing with the most complex and high level cases) and the national level (dealing with less complex cases concerning mid- and low-level accused) provided an opportunity (and need) to cooperate amongst the courts and assist each other in their common endeavour to prosecute and try crimes committed throughout former Yugoslavia. The cooperation has been set out in various agreements and policy programmes, which all had both goals of sharing the work load and enabling the local judiciaries to prosecute and try war crimes in compliance with international standards. This of course influenced both the efficiency of the domestic war crimes institutions and thus the quantity of cases they could deal with, but also the quality.

Next to this mutual practical cooperation, the ICTY also offered its expertise for assisting national war crimes prosecution initiatives. One important project in that regard was the Rules of the Road Programme, under which the ICTY oversaw the first domestic war crimes investigations in Bosnia and Herzegovina. The procedure required the relevant BiH authorities to submit every war crimes case (including the evidence that formed the basis of the proposed indictment) that was intended to be prosecuted to the Rules of the Road Unit within the ICTY Office of the Prosecutor (OTP). The unit then examined whether the evidence was *prima facie* sufficient and whether the allegations were credible before a suspect could be arrested. The supervisory function of the ICTY OTP arguably had several positive effects, most importantly, preventing arbitrary arrests, and secondly, educating local prosecutors which cases to pursue further, on what evidentiary basis, and how. 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

35 Cf. *Sharon Weill / Ivan Jovanović*, War Crimes Prosecutions in a Post-Conflict Era and a Pluralism of Jurisdictions: The Experience of the Belgrade War Crimes Chamber (hereinafter: The Experience of the Belgrade War Crimes Chamber), in: *Edda Kristjánsdóttir / André Nollkaemper / Cedric Ryngaert*, "International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States" (Cambridge: 2012), p. 244.

36 Cf. *Diane F. Orentlicher*, Shrinking the Space for Denial, p. 47.

37 United Nations Security Council Resolution 1503, preamble, p. 2.

were attended by several hundreds of judges, prosecutors, lawyers, and investigators, on how war crimes indictments should be prepared. [38]

The next step, and arguably the next test, for the local judiciaries came with the ICTY's completion strategy and the referrals of cases under Rule 11*bis* ICTY Rules of Procedure and Evidence (RPE) as one of its principal components. [39] As pointed out above, in order to reduce its case load, the ICTY decided to focus solely on the 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, [40] and one case concerning one accused was also transferred to Serbia, but he was never tried because he was unfit to stand trial for medical reasons. [41] 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 (at least according to BiH's national legislation) not be amended. At the ICTY, the process of Rule 11*bis* case referrals was viewed as very positive and effective, [42] mostly concerning its "capacity-building impact". [43]

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. [44] With respect to Serbia and Croatia, [45] the ICTY itself engaged in a number of initiatives designed to help make both countries' criminal justice systems suitable for eventual referral of cases, including through knowledge and experience transfer, and establishing stable channels between the international and the domestic courts. [46] Second, new concepts such as command responsibility and joint criminal enterprise were taken up by the domestic institutions and successfully adjudicated. As such, Rule 11*bis* cases were a very useful learning terrain, both for developing legal expertise and skills in practical matters such as witness protection. [47] Third, actors in The Hague are convinced that the threat of taking back the case if it was not dealt with properly made national actors particularly cautious in handling

38 Cf. *Janet Manuell / Aleksandar Kontić*, Transitional Justice: The Prosecution of War Crimes in Bosnia and Herzegovina under the 'Rules of the Road', Yearbook of International Humanitarian Law, Vol 5 (2002), p. 335 ff.

39 Cf. United Nations Security Council Resolution 1534, para. 4.

40 Cf. *ICTY*, Status of Transferred Cases, http://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases (accessed 03/04/2018).

41 Cf. *OSCE Mission to Serbia*, War Crimes Proceedings in Serbia, p. 30.

42 Interview with a representative of the ICTY OTP, The Hague, 25/11/2016; interview with an ICTY judge, The Hague, 02/12/ 2016.

43 *Serge Brammertz*, ICTY OTP Completion Strategy Report of November 2017, p. 77.

44 Id.

45 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. *Bogdan Ivanišević / Jennifer Trahan*, Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, Human Rights Watch, 2004, p. 8.

46 Cf. *Theodor Meron*, ICTY Completion Strategy Report of November 2004, p. 4 f.

47 Cf. *Serge Brammertz*, ICTY OTP Completion Strategy Report of November 2017, p. 77.

these cases. [48] Overall, in dealing with Rule 11*bis* cases, knowledge and expertise was gained that could later be used also in other cases.

Apart from these cooperation initiatives geared towards enabling local judiciaries in handling concrete cases, the ICTY made more general capacity building efforts in former Yugoslavia, although this had never been part of its mandate. While these efforts were *ad hoc* and uncoordinated in the beginning, with the implementation of the completion strategy they became more and more comprehensive and structured, and targeted towards the specific needs identified. [49] Increasingly, the main goal of capacity building shifted from facilitating the adjudication of concrete cases towards introducing legal professionals from the region to the work of the ICTY, in order to encourage local actors to adopt its standards and best practices. [50]

2.2. General Progress of National War Crimes Cases

Despite the intensive efforts of the ICTY to facilitate domestic prosecutions and trials and to build domestic actors' capacities to handle them, national judiciaries still face a myriad of problems and are criticised for many different lacunae and policies. The main challenges relate to notoriously lacking resources and expertise in international humanitarian law, international criminal law, in investigating, prosecuting, and adjudicating war crimes, including, for instance, witness protection and support. As a consequence, many indictments are returned to the prosecutors and many first instance judgments quashed by the higher instances, further paralysing the systems. Problems also exist regarding the correct and consistent application of legal provisions, or regarding criminal procedure, for instance with ensuring equality of arms between the defendant and the prosecution. Although this has steadily improved over the years, difficulties in regional cooperation have also hampered the successful prosecution and adjudication of war crimes.

Unfortunately, to this date, bi- and multilateral cooperation agreements that were concluded in order to provide each other access to evidence and witnesses, or to transfer proceedings, have not brought about any tangible results. One of the major problems is that none of the countries of the former Yugoslavia extradite their own nationals, except for Croatia. This leads to impunity gaps: As many of the suspects hold dual nationality – a consequence from the split-up of Yugoslavia –, they often reside in another country (for instance Serbia) than where proceedings against them are initiated (for instance Bosnia and Herzegovina), and are therefore exempted from extradition. Domestic institutions were also criticised for poor prosecutorial strategies, which lead to few prosecutions of mid-high ranking officials, and a lack of prioritisation of the most serious cases. What doesn't help is the general climate throughout the region, where there is limited public support for war crimes prosecutions

48 Interview with a representative of the ICTY OTP, The Hague, 25/11/2016; interview with an ICTY judge, The Hague, 02/12/ 2016.

49 Cf. *Serge Brammertz*, ICTY OTP Completion Strategy Report of November 2017, p. 75.

50 See the ICTY's and ICTY OTP's numerous accounts of its capacity building efforts in its annual and completion strategy reports.

against members of the ethnic majority. Under these conditions, effective and fair prosecutions are possible only if governments are seriously willing to commit themselves to creating the conditions necessary for war crimes accountability – which has been the case only for few governments in power since war crimes prosecutions and trials began about 15 years ago.

Of course war crimes are very difficult criminal cases: They are committed during armed conflict which makes gathering evidence – which usually happens many years later – particularly difficult. The crime scene is possibly on the territory of another state, the perpetrator and witnesses might be foreign citizens, and thus access to both, crime scene and people, might be limited. Testimonies by witnesses are usually the key evidence, if not the only evidence. Stress and time affects witnesses' memory. [51] Most of the time, the war crimes institutions throughout former Yugoslavia are undertaking their responsibilities in a professional and independent manner in handling these difficult cases. [52] Considerable support for this endeavour, through different mechanisms, came from the ICTY. The biggest challenge for domestic institutions, however, cannot be alleviated by the Tribunal: The huge backlog which effectively becomes a race against the clock, as witnesses, suspects, and victims are getting older and dying. [53]

Since the beginning of war crimes proceedings in Bosnia and Herzegovina, the quantity of trials has increased almost steadily. According to the State Court of BiH, a total of 182 first-instance judgments has been issued between 2005 and 2016, whereas the appellate division of the war crimes sections has issued 167 judgments. In total, 185 persons were sentenced by a final judgment to 2449 years of imprisonment (which makes 13.2 years on average), whereas 64 persons have been acquitted by final judgment. There have been eight third instance judgments between 2005 and 2016. [54] – As of March 2018, there are currently 53 defendants standing trial in 19 cases both at High Court Belgrade and the Appeals Court Belgrade. Until now, 42 cases have been completed, with 72 persons convicted and 43 acquitted. Contrary to the trials at the State Court of Bosnia and Herzegovina, in Serbia most cases are against one or a handful of low-ranking defendants and deal with crimes with a small number of victims. [55] Of course, the numbers are not necessarily comparable as the

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51 Cf. ***OSCE Mission to Serbia and Montenegro***, War Crimes before Domestic Courts: OSCE Monitoring and empowering of the domestic courts to deal with War Crimes, Belgrade 2003, p. 49.

52 Cf. ***Serge Brammertz***, ICTY OTP Completion Strategy Report of November 2015, p. 19.

53 Cf. ***Serge Brammertz***, ICTY OTP Completion Strategy Report of May 2016, p. 18.

54 Cf. ***SCBiH***, Section I, www.sudbih.gov.ba/files/docs/statistika/Statistike%202016/Statistika%20web%20-%20Odjel%20I%20-%20eng.pdf (accessed 03/04/2018).

55 Cf. ***Tužilaštvo za ratne zločine***, Statistika, http://www.tuzilastvorz.org.rs/sr/predmeti/statistika (accessed 03/04/2018); SCBiH, Pretraga predmeta u toku, http://www.sudbih.gov.ba/ (accessed 03/04/2018); modest hope that this policy changes is fed by three major ongoing trials that involve large numbers of victims and multiple accused; cf. ***Filip Rudic***, Serbia's New War Prosecutions Strategy 'Flawed', NGOs Claim, 16 March 2018, http://www.balkaninsight.com/en/article/serbia-s-war-crimes-strategy-seriously-flawed-ngos-say-03-16 2018?utm_source=Balkan+Transitional+Justice+Daily+Newsletter+-+NEW&utm_campaign=340c6036db-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_a1d9e93e97-340c6036db-319752665 (accessed 03/04/2018).

capacities are greater in BiH than in Serbia, but the contrast is so stark that it almost can't be explained by the different circumstances in which trials are taking place. [56]

3. Reform of the Criminal Justice System

3.1. Substantive Criminal Law

The ICTY's impact on the development of criminal law, both substantive and procedural, is clearly visible in the newly adopted criminal codes and codes of criminal procedure, as well as in court practice and jurisprudence. Although the Tribunal was partly actively involved in the drafting of the new criminal legislation in several countries of former Yugoslavia, its influence must rather be attributed to the authority it had developed over the years, not only globally, but also amongst domestic legal practitioners in the region, who have great respect for the ICTY. [57]

The reform process of the criminal codes began once again in Bosnia and Herzegovina in 2002, when a report was submitted to the OHR by international consultants (two of whom were an ICTY judge and an ICTY prosecutor) on issues relating to war crimes prosecutions that might take place in BiH. The report recommended that existing domestic legislation should serve as far as possible 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 in the ICTY. The Tribunal's jurisprudence should be "persuasive authority" in domestic courts. [58] The consultants thus not only recommended adapting the criminal legislation, but also that domestic courts align their jurisprudence and court practice.

The new criminal codes entered into force in 1998 (with amendments in 2004, Croatia), 2003 (BiH), and 2006 (Serbia). They introduced new substantive criminal law provisions, most importantly, crimes against humanity and the crime of aggression, as well as the mode of liability of command and superior responsibility. While all three codes are mostly based on the Rome Statute of the International Criminal Court, which all three countries ratified (Croatia and Serbia in 2001, BiH in 2002), [59] they do take into account developments in international criminal law, which were until then mostly shaped by the ICTY's case law. [60]

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56 The State Prosecutor's Office in BiH employs 30 prosecutors, whereas in Serbia, there are only eight; cf. *Bogdan Ivanišević*, Against the Current – War Crimes Prosecutions in Serbia (hereinafter: Against the Current), International Center for Transitional Justice, 2007, p. 5.

57 This was underlined by virtually all legal practitioners interviewed in both, Serbia and Bosnia and Herzegovina during field research in January and February 2017.

58 Cf. *Michael Bohlander*, Last Exit Bosnia: Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts, Criminal Law Forum, Vol. 14 (2003), Issue 1, p. 78; the report is described in detail in Bohlander's article.

59 Cf. *William W. Burke-White*, The Domestic Influence, p. 338.

60 Cf. *OSCE Mission to Bosnia and Herzegovina*, Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina (hereinafter: Moving towards), Sarajevo 2008, p. 6.

As such, some ICTY elements can still be identified, in particular in the criminal code of Bosnia and Herzegovina. For instance, article 180 of the BiH criminal code, which defines the modes of individual responsibility, is an almost verbatim copy of the ICTY Statute's article 7. At the same time, the BiH criminal code picks up where the ICTY Statute and Rome Statute of the ICC leave off, by drawing on ICTY case law to provide a far more specific definition of the constituent elements of international offences. [61] The same cannot be said for the Serbian equivalent provisions, which, for instance in terms of modes of liabilities, only partially codify command responsibility as formulated by the ICTY. [62] In general, the ICTY has not had a profound impact on the Serbian 2006 criminal code. Rather, the latter maintained previous legal structures, while including therein some of the provisions of the ICC Statute. Part of the reason for this might lie in the difference between the systematics and definitions of the crimes in the ICTY and ICC statutes and those of the domestic law. [63] Also the 1998 Croatian criminal code incorporated neither the mode of liability of command responsibility nor the crime of crimes against humanity, which were only introduced by amendments in 2004, after the ratification of the Rome Statute. The ICTY's impact on Croatian criminal legislation is thus also limited. [64]

While The Hague Tribunal's impact on criminal legislation is minimal, this is different in the domestic courts' jurisprudence. The former president of the SCBiH described ICTY case law as one of the "most important sources" for the court, [65] and domestic courts have indeed extensively drawn on ICTY-established international norms and precedents, in order to find guidance for interpreting domestic and international law. "Following the practices of the ICTY," the war crimes department of the SCBiH has also even started implementing the concept of joint criminal enterprise, [66] although, just as in the ICTY Statute, this mode of liability is not explicitly foreseen. While courts in all three countries use ICTY jurisprudence, which thereby effectively becomes part of the national law, living on as the Tribunal's legacy in the domestic legal order, Serbian and Croatian courts are more reluctant to do so than Bosnian courts. In Croatia, this is so although courts are required to refer in their judgments to the relevant provisions of international law which criminalise the respective war crimes.

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61 Cf. ***William W. Burke-White***, The Domestic Influence, p. 338; for example, art 172 of the Criminal Code provides detailed definitions of key elements including attack directed against any civilian population, extermination, deportation, and torture.

62 Cf. ***European Commission,*** Serbia and Montenegro 2005 Progress Report, 9 November 2005, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/2005/package/sec_1428_final_progress_report_cs_en.pdf (accessed 03/04/2018), p. 23.

63 Cf. ***Keren Michaeli***, The Impact of the ICTY (Serbia), p. 71 f.

64 Cf. ***Keren Michaeli***, The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions In Croatia (hereinafter: The Impact of the ICTY (Croatia)), DOMAC/10, Reykjavik 2011, p. 58 f.

65 Cf. ***Meddžida Kreso***, Panel: Assessing 20 Years of the Tribunal, Conference: 20 Years of the ICTY (hereinafter: Assessing 20 Years of the Tribunal), 2013, conference proceedings p. 35.

66 Cf. ***Yaël Ronen***, Bosnia and Herzegovina: The Interaction Between the ICTY and Domestic Courts in Adjudicating International Crimes (hereinafter: The Interaction), DOMAC/8, Reykjavik 2011, p. 47.

An exception is command responsibility which was introduced into Croatian law through the Ademi/Norac case, referred to Croatia by the ICTY under Rule 11*bis*. [67]

In Serbia, it was left up to the judges whether they would follow ICTY jurisprudence in war crimes adjudication. Their judgments in fact frequently even differ from ICTY jurisprudence, for instance when it comes to qualifying the conflicts in Croatia, BiH, or Kosovo as international (ICTY) or national (Serbian courts). [68] References to international jurisprudence and customary international law are mostly lacking in Serbian case law, although treaty law (e.g. the Geneva Conventions) is often referred to, albeit sometimes inaccurately. [69] It has been noted that instances of references to ICTY jurisprudence are increasing as Serbian war crimes judges are more and more exposed to contacts with the ICTY and international judges. However, citations of ICTY case law are usually only made to the extent ICTY cases support existing interpretations of laws rather than to introduce new ones. [70]

The differences in impact on the domestic legislation and jurisprudence concerning substantive criminal law can be explained through the different intensity of engagement of the ICTY in the three countries. As noted above, the ICTY was most active in Bosnia and Herzegovina. As in the context of its own completion strategy, the Tribunal was most preoccupied with proper preparation of BiH to continue the work of conducting war crimes trials. Already in the context of the establishment of the State Court of Bosnia and Herzegovina and its war crimes department, the ICTY advised the domestic authorities on how to adapt their substantive criminal law – also in order to enhance their chances to receive Rule 11*bis* cases. [71] But the example of Croatia, where the concept of command responsibility was introduced into Croatian law with a case referred under Rule 11*bis*, shows that also other former Yugoslav countries accepted certain changes to their domestic law in the course of this direct form of interaction with the Hague Tribunal.

Thus, while the legal obligation to enact implementing legislation entailed in the ICC Statute, is of course stronger than the persuasive authority of the ICTY, which explains the clearer reflection of the Rome Statute in domestic substantive criminal legislation, the ICTY's imprint – even if only through domestic jurisprudence – is clearly visible. An important catalysing effect in this regard is access to the Tribunal's case law. It has taken many years until its jurisprudence was fully available in local languages on the ICTY's website. The effect is as simple as obvious: While most local Bosnian, Croatian, and Serbian judges are not able to work with English and French legal texts, [72] the international judges and prosecutors, employed at the State Court

67 Cf. *Keren Michaeli*, The Impact of the ICTY (Croatia), p. 61 ff.

68 Cf. *Sharon Weill / Ivan Jovanović*, The Experience of the Belgrade War Crimes Chamber, p. 257 and 261; *Bogdan Ivanišević,* Against the Current, p. 17 f

69 Cf. *Sharon Weill / Ivan Jovanović*, The Experience of the Belgrade War Crimes Chamber, p. 264.

70 Cf. Id., p. 265; *Keren Michaeli*, The Impact of the ICTY (Serbia), p. 71 f.

71 Cf. *Lejla Rüedi*, Selected Aspects, p. 157 f.

72 Cf. *Yaël Ronen*, The Interaction, p. 49.

of Bosnia and Herzegovina until 2012, had no problem in that respect. In addition, as has been noted, some of them had previous first-hand ICTY experience. Much of the impetus to use international case law came from them. Then, once domestic jurisprudence on the matter existed, it could be used further by the domestic prosecutors and judges as well.

In addition, it is worth noting that the library of the SCBiH contains the complete ICTY jurisprudence and judges have been briefed about it.[73] Making the Tribunal's case law more accessible to local legal practitioners through trainings or peer-to-peer meetings has visibly increased the frequency and quality of reference to it by domestic courts, as evidenced in Serbia. [74] At the same time, openness to international sources is certainly also a matter of mentality and legal culture. Legal practitioners in Serbia are reported to be generally unaccustomed to invoking international law in their decision-making. [75] Again, as relevant actors in BiH were in daily contact with international colleagues they were by definition exposed to international "sources", which potentially broadened their horizon.

3.2. Procedural Criminal Law

The ICTY's imprint in procedural criminal law is even more obvious, this time not only in jurisprudence and court practice, but in the legislation. The ICTY, having been operative since the mid-1990ies had developed such as vast bulk of best practices concerning court procedures most conducive to effectively handling war crimes cases that it seemed like the obvious choice to draw inspiration from.

Historically, Yugoslavia was based on different legal legacies, including Austro-Hungarian and Ottoman, traditionally featuring a criminal procedure following the essentials of the European continental form, with a neutral investigative judge in the initial stages, followed by inquisitorial hearings. A series of similar reforms of the criminal procedure systems in several countries of the former Yugoslavia began in 2001 in the Brčko District of Bosnia and Herzegovina, [76] where elements of the Anglo-American common law tradition where 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 reform 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

73 Cf. *Eszter Kirs*, Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina (hereinafter: Limits of the Impact), Goettingen Journal of International Law, Vol. 3 (2011), Issue 1, p. 408 f.

74 Cf. *Keren Michaeli*, The Impact of the ICTY (Serbia), p. 71 f.

75 Cf. *Bogdan Ivanišević*, Against the Current, p. 18; *Sharon Weill / Ivan Jovanović*, The Experience of the Belgrade War Crimes Chamber, p. 264.

76 Cf. *Andy Aitchison*, "Making the Transition: International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina" (Cambridge: 2011), p. 143 f.; The reforms in Brčko District had been led by the American lawyer Michael Karnavas, who has vast experience in defending clients in front of the ICTR and the ICTY.

in the reform processes. [77] While the adversarial system was considered more appropriate for prosecuting complex cases, such as organised crime or war crimes cases, [78] the aim was still to maintain some Yugoslav inquisitorial traditions. [79] For that reason, inspiration was drawn from other mixed procedure codes, most notably the ICTY's Rules of Procedure and Evidence. [80]

Indeed, instead of drafting Codes of Criminal Procedure (CPCs) closely tailored to the old system, the new CPCs in Bosnia and Herzegovina (2003), Croatia (2011), and Serbia (2011 for war crimes and organised crimes cases and 2013 for all criminal cases) mirror the ICTY RPE (Rules of Procedure and Evidence) to a significant extent. [81] Similarities can be found on – amongst others – abolishing investigative judges, introducing plea bargaining, making the presentation of evidence more adversarial, changing rules of admissibility of evidence, [82] introducing cross-examination, [83] banning subsidiary and private prosecutions. [84] This was conforming to international experts' recommendations that new criminal legislation should take into consideration the developments before the ICTY and that ICTY jurisprudence should be the persuasive authority in the interpretation of domestic laws. [85]

But also the ICTY had a distinct interest in inserting its experiences in the new code in Bosnia and Herzegovina, in particular, in order to facilitate the Rule 11*bis* referral process. The Tribunal consequently actively engaged in the drafting process of the new BiH CPC. Some opine that together with the then-High Representative, the ICTY

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77 Cf. Id., p. 144.

78 *Cf. United Nations Mission to Bosnia and Herzegovina*, Thematic Report X, Serving the Public: The Delivery of Justice in Bosnia and Herzegovina (November 2000), http://www.esiweb.org/pdf/bridges/bosnia/JSAP_RepX.pdf (accessed 03/04/2018), p. 2 and 18; *Lejla Rüedi*, Selected Aspects, p. 183; interview with a Serbian war crimes judge, Belgrade, 20/01/2017.

79 Cf. *Christopher P. DeNicola*, Criminal procedure reform in Bosnia and Herzegovina: between organic minimalism and extrinsic maximalism (hereinafter: Criminal procedure reform in BiH), University of Pennsylvania Law School 2010, p. 35.

80 Id., p. 33; As the entities adopted nearly identical CPCs in 2003, overall, the introduction of new criminal procedure legislation led to a better, even though not perfect, harmonisation of legislation throughout BiH, though in practice, considerable differences in the application of certain CPC provisions persist. Cf. *Lejla Rüedi*, Selected Aspects, p. 186; *OSCE Mission to Bosnia and Herzegovina*, Moving towards, p. 9 ff.

81 Cf. *Lejla Rüedi*, Selected Aspects, p. 88, fn. 370.

82 Cf. *Yaël Ronen*, The Interaction, p. 44.

83 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. *Christopher P. DeNicola*, Criminal procedure reform in BiH, p. 53.

84 Cf. Id., p. 38 f.

85 Cf. *Michael Bohlander*, The Transfer of Cases from International Criminal Tribunals to National Courts, Colloquium of Prosecutors of International Criminal Tribunals, 2004, p. 9.

was the main force that pushed common law criminal procedures into BiH in 2003. [86] While its engagement in Serbia was much less active and direct, the Tribunal's RPEs nevertheless provided the model for the new Serbian CPC. As legal practitioners report, it was the obvious choice to follow: "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." [87]

Beyond shaping the new codes of criminal procedure, the practical solutions concerning its criminal procedure the Tribunal developed over the years is also being taken up in courts' practice. [88] The ICTY's work has been "of great value" to the domestic judiciaries in demonstrating how procedural innovations can function in practice. [89] Especially judges have made an effort to embrace where possible the work and experience of the ICTY. [90] To name but one example, the practice of holding so-called status conferences, where the further course of a trial is discussed amongst all parties to ensure efficient planning, has proved to be a very effective tool developed by the ICTY, and copied by domestic courts. [91] Similarly, the use of technical equipment in the courtroom, inspired by ICTY practice, [92] for instance for keeping an automatic trial record, or for the questioning of witnesses, is speeding up the proceedings and improving their effectiveness. [93]

Overall, the ICTY's impact can be witnessed at several levels: First, while they initially created frustration among domestic professionals as most were entirely alien to the domestic legal traditions, [94] the new procedures enhanced efficiency and effectiveness

86 Cf. ***Christopher P. DeNicola***, Criminal procedure reform in BiH, p. 39 f.

87 Interview with a Serbian defence counsel, Belgrade, 23/01/2017.

88 Cf. ***Theodor Meron***, Marking the Twentieth Anniversary of the Tribunal: Keynote Speech (hereinafter: Marking the Twentieth Anniversary of the Tribunal), Conference: 20 Years of the ICTY, 2013, conference proceedings, p. 27.

89 Cf. ***Bogdan Ivanišević***, Against the Current, p. 29.

90 Cf. ***Eszter Kirs***, Limits of the Impact, p. 408; ***Meddžida Kreso***, Assessing 20 Years of the Tribunal, p. 35; however, also the techniques and working methods developed by the ICTY prosecution are taken over to a large extent; ***Jelena Vladisavljev***, clerk at the Serbian War Crimes Prosecutor's Office and former Serbian liaison officer at the ICTY, ADC-ICTY Annual Conference, 3 December 2016.

91 Cf. ***Lejla Rüedi***, Selected Aspects, p. 194.

92 Cf. ***Diane F. Orentlicher***, Shrinking the Space for Denial, p. 51.

93 Cf. ***Bogdan Ivanišević***, Against the Current, p. 15.

94 Interview with a Serbian defence counsel, The Hague, 25/11/2016. The frustration stemmed from the fact that domestic practitioners got the impression that their legal tradition was seen with contempt by international actors, and from lack of familiarity with the new procedures and a lack of training, which led to great confusion in the beginning, and at times also to unfair outcomes; cf. ***Yaël Ronen***, The Interaction, p. 47; ***Christopher P. DeNicola***, Criminal procedure reform in BiH, p. 40 and 54. The younger generation of jurists sees the reform much more positively. Not only have they learned within the new procedure from the beginning of their careers. They also underline the advantage of having an international tribunal to learn from, which helps to interpret local rules, fill in gaps in the domestic procedure, and find the best strategies for their respective role in the criminal trial; interview with a Bosnian defence counsel, Sarajevo, 31/01/2017.

of war crimes trials.[95] Second, as the procedural innovations inspired by the ICTY, ranging from witness protection measures to status conferences, are generally applicable in all criminal trials, since they were implemented in the new criminal procedure codes of the countries of the former Yugoslavia, they improve the efficiency of criminal trials more generally. Thus, the Tribunal's influence thus extended beyond war crimes trials and the specialised war crimes institutions. Third, its influence on the judicial process in the countries of former Yugoslavia transcends the value of specific procedures. With respect to Serbia, domestic actors observed that ICTY trials raised public expectations to conduct fair processes also at the national level. At the same time, the Hague trials taught practitioners – judges, prosecutors and defence counsel – independence and how to implement fair trials in practice.[96] Especially defence counsel see a spill-over effect in effectively defending clients in war crimes cases in The Hague, then domestically, and then also in ordinary crimes cases.[97]

3.3. Victims' and Witnesses' Matters

A similar spill-over effect can be observed in the realm of victims' and witnesses' matters. The need for victims and witness protection and support was first apparent in the realm of war crimes, and is now generally available, which benefits other cases as well.

In developing local laws and practices, the ICTY's Victims and Witnesses Section has served as a role model for similar institutions established at different courts and prosecution offices in Bosnia and Herzegovina, Croatia, and Serbia. When domestic war crimes institutions evolved, the ICTY Victims and Witness Section held a series of ground-breaking conferences with health and welfare professionals practicing in the areas where witnesses reside, with the aim of transferring knowledge and skills to professionals.[98] They also conducted trainings for local victims and witnesses support and protection staff, and cooperated with domestic actors on witness protection and support in transferred Rule 11bis cases, which thereby again were a useful training field for implementing rules and practices learned at the international tribunal.[99] The ICTY considers it part of its legacy to have crafted practical processes for, amongst others, the protection and support of victims and witnesses.[100] And indeed, domestic actors explain that the Tribunal has been instrumental in developing domestic solutions.[101]

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95 Cf. ***Yaël Ronen***, The Interaction, p. 47.

96 Cf. ***Diane F. Orentlicher***, Some Kind of Justice, p. 403 f.

97 Cf. ***Diane F. Orentlicher***, Shrinking the Space for Denial, p. 51; interview with a Bosnian defence counsel, Sarajevo, 31/01/2017.

98 Cf. ***ICTY***, Annual Report 2004, p. 83 f.

99 Cf. ***Muris Brkić***, Panel: Tribunal and Local Judiciaries: Lessons Learned in Victim and Witness Support and Protection (hereinafter: Lessons Learned), Conference: 20 Years of the ICTY, conference proceedings, p. 66.

100 Cf. ***Theodor Meron***, Marking the Twentieth Anniversary of the Tribunal, p. 27.

101 Cf. ***Slavica Peković,*** Panel: Tribunal and Local Judiciaries: Lessons Learned in Victim and Witness Support and Protection, Conference: 20 Years of the ICTY, conference proceedings, p. 62; ***Muris Brkić***, Lessons Learned, p. 66; similar: ***Meddžida Kreso***, Assessing 20 Years of the Tribunal, p. 35.

The result of the Tribunal's engagement were comprehensive national rules on in-court-witness protection, [102] such as the use of pseudonyms or testimony from a separate room with image and/or voice distortion, but also solid out-of-court witness protection, implemented by specialised agencies, whose tasks and working methods are modelled upon the example of the ICTY's practices. [103] The clearest traces of the Hague Tribunal can be observed in the realm of victims and witness support, starting with awareness for this vital part of proceedings in complex criminal cases, to the establishment of specialised victims and witness support units that provide psychological, organisational, and administrative support, until inspiration taken from the ICTY for in-court witness support efforts by judges in order to minimise the adverse effects of criminal trials on vulnerable witnesses.

Another area where the ICTY's practice influenced domestic practice was reparations for victims. Interestingly, it was precisely the absence of jurisdiction over compensation claims at the ICTY – for which the Tribunal was heavily criticised [104] – that motivated domestic actors in Bosnia and Herzegovina to give victims the chance to apply for compensation directly in the criminal trial. [105] Because it was considered that detaching the criminal trial from compensation claims in civil proceedings would have adverse effects on the victims, NGOs – and ultimately, judges at the SCBiH – backed a new approach. In June 2015, the SCBiH rendered a landmark judgment, setting a ground-breaking precedent for awarding damages to wartime victims in several criminal cases. [106] Until now, all cases in which reparations were awarded were adjudicated in front of the SCBiH, and all of them related to sexual violence. [107]

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 decided to depart from the ICTY's practice. [108] In their endeavour, the SCBiH judges were actively encouraged and supported by the ICTY's Office of the Prosecutor though, which considered that this practice would relieve the victims of the stress of

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102 See in particular the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, the Serbian Law on Organisation and Competence of State Authorities in War Crimes Proceedings, and the Serbian CPC (articles 102-111).

103 Cf. *Diane F. Orentlicher*, Some Kind of Justice, p. 402.

104 Cf. *Christine Evans*, Reparations for Victims in International Criminal Law, http://rwi.lu.se/app/uploads/2012/04/Reparations-for-Victims-Evans.pdf (accessed 03/04/2018), p. 2; *Vesna Teršelič*, The Need for Large-Scale Victim Reparations, in: *Richard H. Steinberg*, "Assessing the Legacy of the ICTY" (Leiden: 2011), p. 98; *Liesbeth Zegveld*, Victims' Reparations Claims and International Criminal Courts: Incompatible Values?, Journal of International Criminal Justice, Vol 8. (2010), Issue 1, p. 88.

105 Interview with a Bosnian war crimes judge, Sarajevo, 02/02/2017.

106 Cf. *TRIAL International*, Compensating Survivors in Criminal Proceedings: Perspectives from the Field (hereinafter: Compensating Survivors in Criminal Proceedings), Sarajevo 2016, p. 6. At the time of writing, eight more such judgments were issued at first instance, with final judgments in four cases; cf. *Nils Muižnieks*, 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, (Council of Europe, Strasbourg, 7 November 2017) [CommDH(2017)28], p. 7.

107 Cf. *TRIAL International*, Compensating Survivors in Criminal Proceedings, p. 6.

108 Interview with a Bosnian war crimes judge, Sarajevo, 02/02/2017.

separate civil compensation proceedings. [109] Also the ICTY's presidents had been very supportive as of early on. In fact, they had tried to sort out possibilities of moving the Tribunal away from a purely punitive justice approach, more towards a restorative justice approach, by creating funds for victims with the UN Security Council. [110] Yet, they had received very negative reactions, [111] which is why the ICTY limited itself in supporting domestic actors in moving into this direction.

4. Conclusion: The Spill-Over Effect

Next to being the to-date most productive international criminal tribunal, over the years, the International Criminal Tribunal for the former Yugoslavia has had a number of somewhat unintended – or at least unforeseen – side-effects. It has triggered domestic war crimes proceedings in former Yugoslavia, considerably boosted these proceedings through a number of support programmes, and heavily influenced the national substantive and procedural law as well as court practices.

While the ICTY's impact often came about directly, in other instances, it evolved rather indirectly. As such, the Tribunal's involvement in setting up specialised war crimes institutions in BiH is very clear and tangible. On the other hand, in Serbia and Croatia, the ICTY did not as vehemently advocate for similar initiatives. Nevertheless, domestic observers share the view that the domestic institutions "wouldn't exist but for the ICTY." In this view, the ICTY's operation provided the context in which it became possible for Serbia to assume a serious role in prosecuting 1990s-era atrocities. At the time, the government saw the ICTY as "very useful" in helping to create a political space for Serbia to deal with "the burden of war crimes in all its dimensions." [112] The same might be concluded for Croatia.

Facilitated by judicial reforms which approximated domestic substantive and procedural law to the ICTY law, the national war crimes institutions could profit from the vast case law and best practices developed by the Tribunal over the years. Of course, it is impossible to say whether the described legal reforms, especially of the codes of criminal procedure, made the domestic legal systems "better" or "worse". However, the fact that domestic courts could profit from legal solutions developed by an international court significantly facilitated domestic trials and enhanced the courts' efficiency and effectiveness. As one judge put it: "Why should we re-invent the wheel when we can simply copy how the ICTY has dealt with this problem?!" [113]

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109 Cf. ***Serge Brammertz***, ICTY OTP Completion Strategy Report of May 2016, p. 25.

110 Cf. ***Theodor Meron***, Panel: Assessing 20 Years of the Tribunal, Conference: 20 Years of the ICTY, 2013, conference proceedings, p. 54.

111 Cf. ***Alexandros Zervos***, Panel: Reparations for War Crimes Victims in the former Yugoslavia: In Search of the Way Forward, Conference: 20 Years of the ICTY, 2013, conference proceedings, p. 83.

112 ***Diane F. Orentlicher***, Shrinking the Space for Denial, p. 46.

113 Interview with a Bosnian war crimes judge, Sarajevo, 01/02/2017.

In addition, reportedly, the exposure to the international tribunal, its court practice and jurisprudence opened up the minds of domestic legal practitioners, who learned how to navigate through and use international legal sources. [114] Now, there is a general "trend" [115] towards using international law, including customary international law, but also treaties such as the European Convention of Human Rights. [116] While, again, international law is not necessarily "better" or "worse" than domestic law, the broader variety of available sources bears the possibility to back up one's legal reasoning and practical choices, thereby rendering them more legitimate, which enhances legal certainty, fairness, and – possibly – trust in judicial institutions. In this respect, the ICTY's impact has gone beyond the realm of war crimes adjudication and influenced the criminal justice systems in Bosnia and Herzegovina, Croatia, and Serbia more generally.

While its impact in Bosnia and Herzegovina is the most obvious, simply because the interaction between the Tribunal and this country was so much more intensive than with the others, which provided for many more impact opportunities, clear traces of the ICTY can also be observed in Croatia and Serbia. The ICTY is dead (in The Hague), long live the ICTY (in the former Yugoslavia).

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114 Interview with a Bosnian defence counsel, Sarajevo, 31/01/2017; interview with a former representative of the OSCE Mission to Serbia, Belgrade, 27/01/2017.

115 ***Katerina Uhlířová***, War Crimes Chamber of the Court of Bosnia and Herzegovina: Seeding "International Standards of Justice"?, in: ***Edda Kristjánsdóttir / André Nollkaemper / Cedric Ryngaert***, "International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States" (Cambridge: 2012), p. 217.

116 Id., p. 217 f.