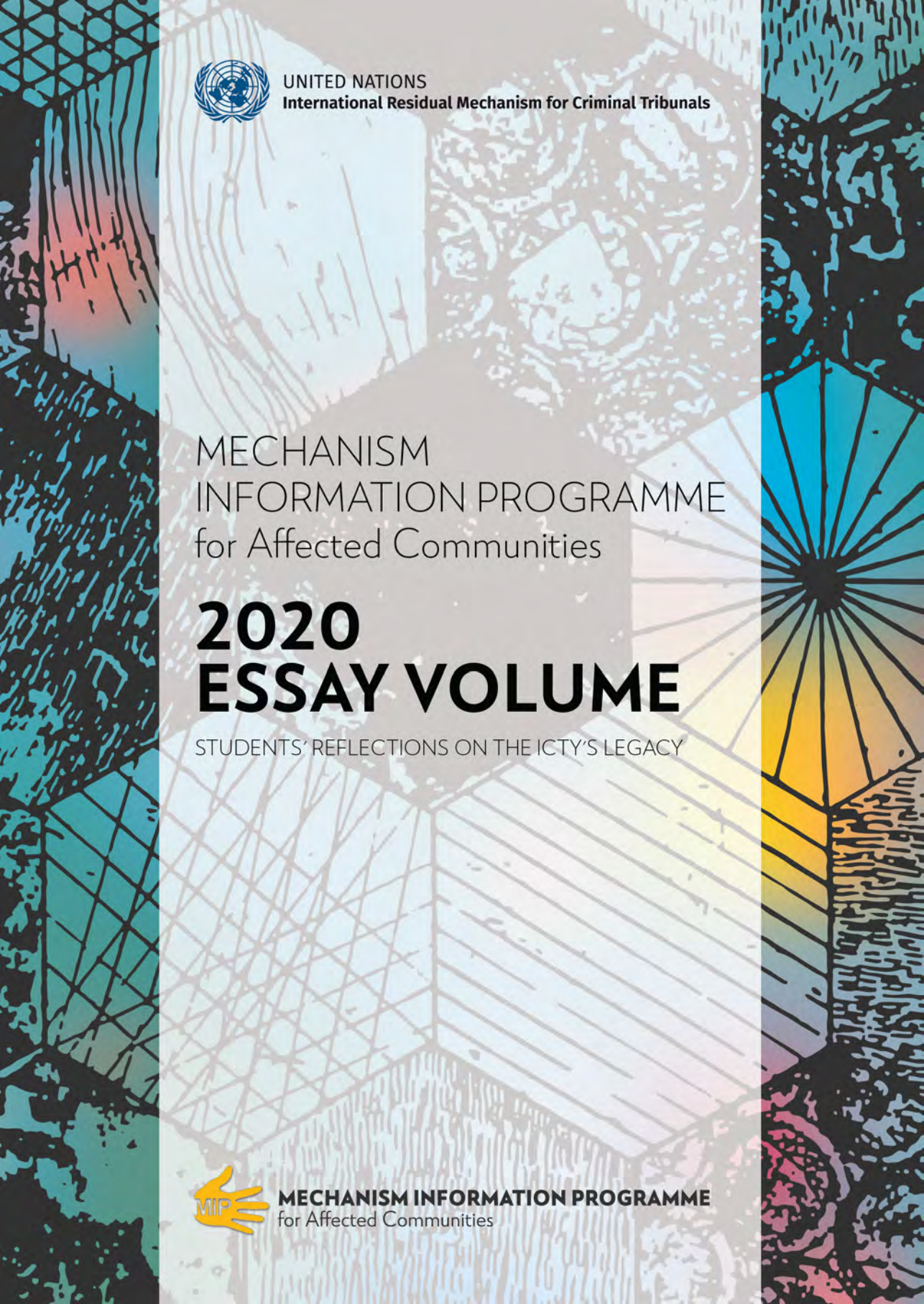

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International Residual Mechanism for Criminal Tribunals

MECHANISM
INFORMATION PROGRAMME
for Affected Communities

2020
ESSAY VOLUME

STUDENTS' REFLECTIONS ON THE ICTY'S LEGACY

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A publication of the Mechanism's Information Programme for Affected Communities (MIP), Registry, International Residual Mechanism for Criminal Tribunals (IRMCT).

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Foreword

The Mechanism Information Programme for Affected Communities (MIP) of the International Residual Mechanism for Criminal Tribunals (Mechanism or IRMCT) is pleased to present its new publication, the *2020 Essay Volume,* featuring the best essays produced by law students who participated in the 2019-2020 Inter-University Video Lectures Programme.

The MIP 2020 Essay Competition invited students who took part in the first cycle of the Inter-University Video Lectures Programme to explore a wide range of relevant, challenging, and contemporary issues. The essay topics were chosen by the participants themselves to reflect on the work and legacies of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the IRMCT. The top essays were selected for publication in this volume.

Developed and implemented by the MIP, the Inter-University Video Lectures Programme brings together postgraduate students from eight law faculties across the former Yugoslavia. The aim of the Programme is to initiate and facilitate discussion on the region's recent history, the role of the ICTY and IRMCT, and the principles of international criminal law and international humanitarian law.

More than 150 post-graduate law students participated in the first cycle of the Inter-University Video Lectures Programme. They represented the University of Niš, the University of Podgorica, the University of Donja Gorica, the University of Priština, the University of Sarajevo, the University of Vitez, the Ss. Cyril, the Methodius University of Skoplje and the University of Zagreb.

The MIP is generously supported by the European Union and the Swiss Federal Department of Foreign Affairs.

The MIP team would like to express deep gratitude to all participating law faculties, their focal points for this Programme, and - most importantly - the students, for their wonderful contribution. We are indebted to them for their efforts and enthusiasm in participating in this initiative, and look forward to our continued collaborations for the benefit of future generations.

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Besnik Beqaj, **student of International Law Master's Program, Faculty of Law, University of Prishtina.**

Education as a Tool towards Creating a Culture of Peace

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"**Education shall be directed toward the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace" Article 26,**
The Universal Declaration of Human Rights (UNESCO 2008:2)

"A culture of peace will be achieved when citizens of the world understand global problems; have the skills to resolve conflict constructively; know and live by international standards of human rights, gender and racial equality; appreciate cultural diversity; and respect the integrity of the Earth. Such learning cannot be achieved without intentional, sustained and systematic education for peace"
Hague Appeal for Peace Global Campaign for Peace Education

Introduction

As many conflicts occurred, civilians were always the most affected, starting with the loss of people, the necessity to be displaced and this way creating in them the feeling of insecurity and instability.[1] "The resulting insecurity and instability that follows from these circumstances – lack of basic needs, harsh surroundings, and oppressive governments – forces many to turn to violence in defence of their right to survive".[2] As a result of the repetition of such examples, society is committed to finding effective ways for such events not to be part of us and for peace and coexistence to prevail. For centuries, nations have been searching for ways how to

[1] Q. Khan, "Role of Education in Promoting Peace, Sustainable Development and Global Citizenship", Education for Peace and Sustainable Development – Concepts, Clarity and Cohesion, UNESCO, Mahatma Gandhi Institute of Education for Peace and Sustainable Development, MGIEP/2014/01, p. 10, https://www.gcedclearinghouse.org/resources/education-peace-and-sustainable-development-concepts-clarity-and-cohesion
[2] *Id.*

achieve a stable peace and to stop using violence as a tool of resolving disagreements. After the horror scenes of World War One and World War Two, the world turned the eyes to the education as a tool for achieving and maintaining a stable peace.

Mr. Agnihotri emphasizes that "Education through its comprehensive range of coverage all across the different segment of human population irrespective of cast, class, race, gender, religion, region etc. keeps tremendous potential to accelerate the peace prospects followed by minimizing the conflict and violence in the significant manner".[3]

Considering the importance of education in the formation of each of us as individuals who will contribute in different ways to our society in the future. If peace education would be included in the path of our formation, no doubt that a part of our contribution would be devoted to the promotion of the importance of peace as a key factor for world stability.

What is peace-education?

The word 'education' comes from the Latin word *educare*, to draw or lead out. So, peace-education guides society to live in the principles of peace and coexistence and to contribute that these principles are part of every human being.[4]

UNICEF defines peace education as "the process of promoting the knowledge, skills, attitudes and values needed to bring about behaviour changes that will enable children, youth and adults to prevent conflict and violence, both overt and structural; to resolve conflicts peacefully; and to create the conditions conducive to peace, whether at an intrapersonal, interpersonal, intergroup, national or international level."[5]

Harris tries to define peace education as a tool that tries to inoculate students against the evil effects of violence by teaching skills to manage conflicts non-violently and by creating a desire to seek peaceful resolutions of conflicts.[6]

[3] S. Agnihotri, "Critical Reflection on the Role of Education as a Catalyst of Peace-building and Peaceful Coexistence", Universal Journal of Educational Research 5(6): 911-917, 2017, https://www.researchgate.net/publication/317309835_Critical_Reflection_on_the_Role_of_Education_as_a_Catalyst_of_Peace-building_and_Peaceful_Coexistence

[4] I. Harris, "Peace Education: Definition, Approaches and Future Directions", Peace, Literature and Art – Vol. I, https://www.eolss.net/Sample-Chapters/C04/E1-39A-06.pdf

[5] Fountain, "Peace Education in UNICEF," 1.

[6] I. Harris, "Peace Education: Definition, Approaches and Future Directions", Peace, Literature and – Vol. I https://www.eolss.net/Sample-Chapters/C04/E1-39A-06.pdf

For a long time, education has been used as a tool of states to establish and push forward their ideas of dominating over other states, and in this way they have contributed to creating generations that used violence as a way to achieve their goals, thinking that their acts are appropriate. Young generations have been taught that they are a nation that should dominate others, or that some nations do not deserve to exist, or that the world is ruled by the powerful and with this way of using education as a propagandist tool, the world has faced many horror acts during its history.

To counteract this trend, UNESCO promoted the idea of "education for world citizenship." UNESCO asserted that "wars begin in the minds of men" and therefore "it was in the minds of men that the defences of peace must be constructed" (UNESCO, 1945).[7] In this way, UNESCO is contributing to raise the importance of education as a factor that will influence the creation of a more stable and peaceful world and will shape in society the sense of the importance of peace. It is helping this process by developing international documents and proposals that will contribute to the advancement of school curricula and the advancement of teachers as well.

Thus, by educating the young generations in the spirit of peace and coexistence, we will contribute to the creation of a more peaceful world where future generations will have the opportunity to coexist and interact with each other regardless of their differences.

Then, a generation that has been educated in the principles of peace and intercultural understanding will be able to resolve conflicts based on dialogue and avoid conflicts. Such a thing has already been proven with the civilized western states where education for peace and intercultural coexistence are given special importance. With the end of World War II and the founding of the United Nations Organization, these countries have followed Emmanuel Kant's peace policy, the so-called "Democratic Peace". Democratic peace implies the importance of promoting peace by states that want to be included in the group of democratic states and that aim to resolve disagreements through dialogue. Kant argues that developed western democracies can seldom get involved in conflicts between themselves and also with less democratic states. While conflicts are most often occurring as a result of disagreements between states which are less democratic. This is a result of the lack of a culture of peace in these countries and the lack of use of democratic instruments in resolving disagreements between them.

[7] V. Tinker, "Peace Education as a Post-conflict Peacebuilding Tool", All Azimuth V5, N1, Jan. 2016, 27-42, p. 28.

"What some practitioners call education for democracy, civic education, tolerance education, or human rights education, are all ultimately education for the creation of a culture of peace".[8] All of these are the necessary elements to understand the causes of violence and how to promote democracy, human rights and peace.[9]

Peace education is not only important for countries that have emerged from conflict but must also be implemented and included in the educational curricula of countries that have a long history of peace. It is important that peace education be included in educational curricula for long periods or even forever because, in this way peace, human rights, intercultural coexistence will be part of the culture of each nation and also in this way it is ensured that extreme nationalist ideas will disappear and nationality will be considered merely as a personal identity of each of us.

How can such a culture of peace be part of post-conflict countries?

Countries that have gone through a dark period of conflict, and that want to leave this period as a memory of the past and engage in peace-building and peace-promotion are engaged in educating new generations in the spirit of coexistence and creating a culture of peace in them. They are achieving this goal either according to national or international educational programs. National programs aim to develop education curricula in the spirit of peace by promoting human rights and freedoms, intercultural coexistence, gender equality, economic equality, and raising awareness among young people about the importance of peace and ensuring democratic values.

There are several of successful examples of the use of education as a response to acts that certain societies have gone through, starting with Japan that introduced "A-bomb education" in the 1950s as a response to the atomic bombings in Hiroshima and Nagasaki; then we have the case of South America in the 1960s which began initiating "development education" as a response to the increase of violence caused by power and development; and also in the 1980s, Ireland initiated a peace education program called "education for mutual understanding" in order to reintegrate divided Catholic and Protestants communities.[10]

[8] L. Ardizzone, "Towards Global Understanding: The Transformative Role of Peace Education", Current Issues in Comparative Education, Vol. 4(2), p. 16.
[9] *Id.*
[10] V. Tinker, "Peace Education as a Post-conflict Peacebuilding Tool", All Azimuth V5, N1, Jan. 2016, 27-42, p. 28; see also Harris, "The Conceptual Underpinnings of Peace Education," 16.

Two examples of international programs for peace education are “The Global Campaign for Peace Education” and “Manifesto 2000”.

The Global Campaign for Peace Education (GCPE) was launched at the Hague Appeal for Peace Conference in May 1999 and the Hague Appeal for Peace is also responsible for the coordination of this campaign. The Global Campaign for Peace Education (GCPE)[11] is an informal, international organized network that promotes peace education among schools, families and communities to transform the culture of violence into a culture of peace. The Global Campaign for Peace Education seeks to foster a culture of peace in communities around the world. It has two goals:

First, to build public awareness and political support for the introduction of peace education into all spheres of education, including informal education, in all schools throughout the world.

Second, to promote the education of all teachers to teach for peace.[12]

Manifesto 2000 was written by Nobel Peace Prize laureates who emphasized the importance of peace education on the road to creating a culture of peace in society. Manifesto 2000[13] is a document of seven sentences calling for the respect of the life and dignity of every human being without discrimination and prejudice, to avoid the violence in all of its forms, to engage all as individuals to stop violence and inequality, to protect cultural freedom and diversity, to promote consumer behaviours while maintaining the balance of nature on the planet and to contribute to the development of the community towards solidarity. In these seven sentences, this document summarizes all that we can call a culture of peace where all citizens of the world would feel equal, free and important.

In addition to forms of formal education, many countries are committed to promoting peace and its importance also through informal activities, whether through state initiatives or even initiatives by non-governmental organizations. A concrete example are the peace museums in Japan which offer a response to war museums. While both museums depict war, the peace museums add images of resistance and positive images of peace. Japan's peace museums are also

[11] The Global Campaign for Peace Education. https://www.campaignforeducation.org/?gclid=CjwKCAjw8MD7BRArEiwAGZsrBSY54rN2Iv9m6xkxptyobnkE3C9_lJVFBj1wBah-EJjQn0i-iL0YMxoCZesQAvD_BwE.

[12] For more information about the “Global Campaign for Peace Education” look at https://www.peace-ed-campaign.org/about/.

[13] Manifesto 2000 document, http://www.peremarques.net/manifes.htm.

noteworthy for their use of progressive, learner-centered pedagogy (Yamane, 1996 & 2000)".[14]

Non-governmental organizations also play an important role in their informal activities in terms of peace education. Forms of NGO activities ranging from scientific research on human rights, intercultural workshops with young people, inter-territorial youth exchanges, protests against political decisions which often affect the destabilization of peace, etc. aim through these informal activities to promote peace and human rights. A group of NGOs also play an important role in protecting and representing marginalized groups that do not have the support of the state such as women, the LGBTI+ community, etc. and in this form become the voice of these groups to ensure the achievement of their rights.

The Situation in the Balkans

For a long time the Balkans has been that hotspot part of Europe, often characterized by tension. The disintegration of the former Yugoslavia was a major turning point for the region and was characterized by the most serious crimes since World War Two, such as war crimes, crimes against humanity, and the Srebrenica genocide.

Before the outbreak of armed conflict, education in the region was also used as a propaganda tool to incite inter-ethnic hatred and also to foster an extreme nationalist spirit. This propaganda took place in various forms, starting with lessons with nationalist content in the curricula of education systems, use of inter-ethnic hate speech, promoting inequality and promoting the superiority of certain nations and going to the point where students were also prepared with military lessons.

Let us mention the example of Kosovo. "In 1999 at the end of the conflict in Kosovo, a Serbian school was discovered where textbooks included diagrams that served as military training aids. Children were given instructions on how to use and set mines and booby traps, and how to determine and attack a tank's weak points".[15] Considering that these instructions were in the Albanian and Serbo-Croatian languages, we can conclude that both Serbian and Albanian children

[14] L. Ardizzone, "Towards Global Understanding: The Transformative Role of Peace Education", Current Issues in Comparative Education, Vol. 4(2), p. 21.
[15] H. Nakano, "Education for Peace in post-conflict situations - Case studies in the Balkans", Dissertation Submitted for the Masters in Development Studies (M.Dev.), Graduate Institute of International and Development Studies, p. 25; Davies 2001:110.

learned how to make bombs as part of their education. And by education, I mean primary and secondary education and not military education.

While education has been used as a tool to incite violence and promote violence and throughout history in many cases has managed to bring society into truly violent situations with indelible consequences for humanity, after the collapse of the communist bloc, many countries positioned themselves in the use of education as a tool to build and promote peace. Such a practice is also being used in the Balkan states which emerged from the break-up of the former Yugoslavia.

Considering that the wars in the Balkans took place at different times during the 1990s, the post-war states began at different times to re-functionalize the education system and engage in the restructuring of educational curricula to suit a generation that had just come out of conflict.

The Case of Slovenia: Considering that the war in Slovenia lasted only 10 days, and the damages were small, it managed, immediately after the declaration of independence and the restructuring of state institutions, to face the adaptation of the curricula. The education system of Slovenia managed to obtain a new legal framework in 1996. "The theoretical and conceptual part of this legislation was prepared and publicly discussed from 1992 to 1994, resulting in the White Paper on Education in the Republic of Slovenia, which was published in January 1995 (*Bela knjiga* … 1995).[16] This process of legislative and curricular reform was based on the principles of international human rights law, rule of law, democracy and the principles of good coexistence.[17]

In this way, Slovenia managed to join the group of Western European countries in terms of educational curricula and their importance in peace education.

The case of Croatia: The situation regarding the war in Croatia was different. In Croatia, the war lasted for four years and was characterized by numerous casualties and extensive material damage. Unlike Slovenia, which immediately started changing educational curricula, the Croatian state, considering the damage from the war, had to initially engage with the creation of the infrastructure of the education system. To develop curricula and the educational system as a whole, Croatia established The Croatian National Human Rights Education Program which was a program under the UN Decade for Human Rights

[16] J. Krek, M. Kovač Šebart, "Citizenship Education in Slovenia after the Formation of the Independent State", Journal of Social Science Education Volume 9, Number 1, pp. 68-80, p. 69.
[17] *Id.*

Education Resolution (1995-2004).[18] "With a view to implementing the UN resolution, the Government of Croatia in 1996 established the National Human Rights Education Committee with the mandate to develop a national human rights education program from pre-school to university level, including adult and media education, to promote and assist the introduction of these programs in school and outside of school education and training, and to monitor and evaluate the outcomes of the implementation to initiate further changes".[19]

Despite the successful steps in the development of educational curricula to promote intercultural peace and coexistence, Croatia is still characterized by the use of hate speech in school curricula in the subject of history. Such a criticism is also emphasized in the latest report of the Non-Governmental Organization "Human Rights House Zagreb", which explicitly states that: "The curriculum for the history course for elementary schools and high schools, which has been running since 2019, is a step backwards as it does not foster a critical understanding of historical developments and multiperspectivity but rather promotes nationalist discourse. Instead of encouraging a critical examination of historical events, the curriculum supports identity-building on the narrative of Croatian heroism and sacrifice".[20]

The case of North Macedonia: In North Macedonia, the conflict began in 2000, after the end of the Yugoslav wars and the conclusion of peace agreements. Considering that Northern Macedonia is a country consisting of two main national minorities, the "Macedonian" and the Albanian, developments have gone slower due to the lack of consensus between the two nations that make up the population of this state.

An issue that in Macedonia for a long time brought disagreements and divisions was the use of Albanian as an official language in Macedonia, which was resolved in January 2019, which was also foreseen in the Ohrid Framework Agreement.[21] This solution also facilitated access to education for the Albanian community in all areas of Northern Macedonia.

In addition to the case of language use, the Ohrid Agreement, which was signed on 13 August 2001, also addressed the issue of structuring curricula in the education system in northern Macedonia. "As Fontana (2017) argues, the

[18] W.Wintersteiner, V. Spajic-Vrkas, R. Teutsch, "Peace Education in Europe, Visions and experiences", p. 268.
[19] *Id.*
[20] 1. Human Rights House Zagreb, "Human Rights in Croatia", Overview of 2019, p. 37 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_ENG_web.pdf.
[21] Ohrid Framework Agreement - https://peacemaker.un.org/fyrom-ohridagreement2001.

education and language reforms have come to epitomize the new power relationship between ethnic Macedonians and the ethnic Albanian minority, who had been mobilizing for greater collective and political rights since the country gained independence from Belgrade in 1991 and embarked in a predominantly mono-ethnic project of state nation-building, essentially through the pre-eminence of the Macedonian language (Bacevic, 2014)."[22] Analysts use to mention that the problem of access to higher education in the mother tongue was the main reason of the conflict that mobilized ethnic Albanians during the 1990s.[23]

The case of Bosnia and Herzegovina: As far as Bosnia and Herzegovina is concerned, this country was one of the countries most affected in terms of losses, both casualties and material damage, during the break-up of Yugoslavia.

The importance of education in the spirit of peace was of great importance for bringing this country back to stability. In addition to the state commitment to advancing the educational curricula, an important role in Bosnia and Herzegovina was played by international programs that have been implemented in this state.

In Bosnia and Herzegovina, a good role was played also by international organizations and agencies, which since 1995 carried an estimated 47 out of 57 projects related to peace education.[24] Each of these programs aimed at and contributed to educating young generations about the importance of peace and intercultural coexistence.

"One of the most important programs is Education for Peace (EFP). Which started as a pilot project in six schools in 2000, and in 12 years managed to become part of the education system of Bosnia and Herzegovina."[25] Considering that some 1.5 million primary and secondary school students and about 110,000 teachers participated in this program, it managed to be also included in higher education in Bosnia and Herzegovina.[26]

The success of such a program is also expressed through the statement of BH representatives addressed to all countries through its Mission to UN in New York: "Children all over the world are in need of peace and security. On the occasion of the Summit devoted to the children, we recommend this program [EFP] to all the

[22] F. Bigagli, "Higher Education in Emergencies: The Case of Consociational North Macedonia", Journal of Curriculum Studies Research, https E-ISSN: 2690-2788, pp. 4.5.
[23] *Id*.
[24] Vanessa Tinker, "Peace Education as a Post-conflict Peacebuilding Tool", All Azimuth V5, N1, Jan. 2016, 27-42, p. 28; see also Harris, "The Conceptual Underpinnings of Peace Education," p. 38.
[25] *Id*. 39.
[26] *Id.*

nations for consideration, as a model of society oriented towards peace, cooperation, and development."[27]

Bosnia and Herzegovina is one of the best examples in the world in terms of its commitment to the development of peace education and its success in this field.

The case of Kosovo: Kosovo on the other hand is also one of the states which faced serious consequences during the break-up of former Yugoslavia with both casualties and material damage.

After the achievement of peace in 1999 and with the creation of state institutions and economic recovery, Kosovo also began the revitalization of the education system both in terms of infrastructure and content in terms of curriculum development. In Kosovo, it was a completely different situation in terms of the above examples, because while all the states that seceded from the former Yugoslavia had an independent curriculum system even during the time they were part of Yugoslavia while Kosovo, for as long as it was a province of the Republic of Serbia until the 1990s, functioned with the curricula of the education system of Serbia. Thus, with secession from Serbia in 1999, Kosovo started to establish a complete educational system with new educational curricula.

Knowing that during the 1990s, a parallel education system functioned in Kosovo and the curricula of this education system were patriotic and nationalistic in content, and this influenced a percentage of this content to appear in the curricula that were developed in the early 2000s. But during these years, since the end of the conflict, and since the declaration of independence in 2008, Kosovo has made significant progress in terms of developing the education system in the spirit of peace and intercultural coexistence.

A defect that still characterizes the curricula of the education system in Kosovo is the use of national hate language in the content of history books in primary and secondary schools.

While in terms of the University level, a great advancement has been made in terms of promoting peace and introducing in the university educational curricula topics that address the importance of peace. The University of Prishtina, as the largest public university with about 50,000 students, is part of numerous international programs aimed at educating students in peace education. As successful programs that are being implemented now are: the TEMPUS project,

[27] Government of Bosnia and Herzegovina message to all countries through its Mission to the UN in New York.

the HEART project, and also the Faculty of Law of the University of Prishtina has become a partner of the project: "Building Bridges without Walls: The Role of Universities in Peace Education" as a regional project of the Norwegian Helsinki Committee for Human Rights.[28]

Special importance in terms of peace education at the University of Prishtina lies with the Academic Centres that operate within this university. In their daily work these academic centres provide extracurricular activities that are of particular importance to promoting peace. And they implement a range of projects on this topic. The centres that are engaged in this field are "The Human Rights Centre", "The Transitional Justice Resource Centre" and "The Centre for Gender Equality".

From the above examples we can say that in the Balkans, great advancement is being made in the field of using education as a tool for promoting peace. With all the defects that characterize this process, starting from the continued use of national hate language in textbooks, absence of interstate cooperation, absence of academic cooperation, etc., education has played and is playing an important role in creating a more peaceful region.

Recommendations

Balkan countries should remove the use of hate language from their school curricula;
To increase the institutional cooperation between them in order to exchange their experiences and to start the coordination on the issue of curriculum content;
To start close cooperation on the issue of writing joint history books (example of the cooperation of Germany and Poland in writing history books);
To increase academic cooperation.

Conclusions

Achieving and maintaining peace requires the commitment of each of us. And to ensure the commitment of each of us, peace needs to be an integral part of us, that means to be part of our culture. Such a culture can only be achieved by educating ourselves and others in this spirit. Such a development is presented in the above examples, where states which have gone through terrible conflicts, have managed to restore stability through peace education. They have managed to turn education from a propaganda tool to incite conflicts into a "propaganda"

[28] R. Istrefi, D. Buqaj, "*Roli i edukimit për mos-përsëritje: ngritja e vetëdijes së të rinjëve lidhur me të kaluarën dhe proceset e drejtësisë tranzicionale*", (Prishtina, 2018).

tool for promoting peace, and the results of this process have been proven in many cases.

To ensure the inclusion of a culture of peace in our society, just the commitment of the respective states is not enough, but also the commitment of international mechanisms, national and international non-governmental organizations, and every individual who wants to see the world as a safer place for every human being. Also of special importance in this process are the interstate collaborations in order to exchange their experiences.

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ICTY and Conflict-Related Sexual Crimes: Barriers of successful outcomes - Kosovo case

"It is now more dangerous to be a woman than to be a soldier in modern conflict"[29]

Introduction

Sexual violence crimes are not new as phenomena, such crimes have always been present in conflicts. According to UN Action Against Sexual Violence in Conflict, the vast majority of casualties in today's wars are among civilians, and women in particular can face devastating forms of sexual violence, which are sometimes deployed systematically to achieve military or political objectives.[30]

As conflict-related sexual violence varies widely in form, groups or individuals commit CRSV as a deliberate tactic of war, an act of opportunism, a form of troop payment, an effort to build group cohesion, or a tool of ethnic destruction.[31] Unfortunately, it is usual, after the end of an armed conflict, for post-conflict countries to deal with the consequences in terms of sexual and gender-based violence. Impunity for acts of sexual violence committed during the conflict, post-conflict poverty, lack of livelihood opportunities and the weakened rule of law, may combine to foster increased inter-personal and sexual violence, and to make women and girls particularly vulnerable to sexual exploitation and trafficking.[32]

With the breakup of the former Yugoslavia, countries such as Bosnia and Herzegovina (BH), Croatia, Slovenia and Kosovo (as an autonomous province), experienced armed conflict. In order to terrorize and displace populations, as part of a campaign called "ethnic cleansing", massive sexual violence took place, especially in BH and Kosovo.

[29]Maj. Gen. Patrick Cammaert, 2008, former UN Peacekeeping Operation commander in DR Congo.
[30] Outreach Programme on the Rwanda Genocide and the United Nations, Sexual Violence: a Tool of War (2014).
[31] Countering Sexual Violence in Conflict, Jamille Bigio and Rachel Vogelstein (2017), p. 4.
[32]Megan Bastick, Karin Grimm & Rahel Kunz, Sexual Violence in Armed Conflict, Global Overview and Implications for the Security Sector (2017), p.10.

The awareness of sexual violence during conflicts in the Balkans was increased during the 1990s. The case of BH was a turning point that led to the international recognition of protection of women in conflict, and rape in war became a matter of concern in the international community. In the case of Kosovo, there was a massive CRSV after the North Atlantic Treaty Organization (NATO) bombing in March 1999. During that period a big pressure was made by the press and non-governmental organizations (NGOs), as some of them were present during those times, reporting directly and witnessing what was happening. As the international press was highly focused on the documentation of the sexual atrocities that occurred in BH and Kosovo (against Albanian women and men) during the conflict, the NGOs: Human Rights Watch, Amnesty International and other global organizations like the United Nations Commission on Human Rights (UNCHR), reported different violations in detail.

The prosecution of these crimes and the punishment of the responsible persons at the international level is a merit of the extensive work of the ICTY and ICTR. Both broke new grounds in securing the first convictions for rape and other forms of sexual violence as war crimes, crimes against humanity and acts of genocide.[33] The ICTY has contributed to the prosecution of sexual violence in armed conflict, in terms of the doctrinal development and the number of prosecutions in this area.[34] The Tribunal was among the first courts of its kind to bring explicit charges of wartime sexual violence, and to define gender crimes such as rape and sexual enslavement under customary law.[35]

ICTY and Crimes of Sexual Violence

Reports of horrible crimes happening during the conflict in the Balkans, which showed how civilians were being killed, displaced from their houses, tortured and sexually abused, captured international attention and pushed the UN Security Council to act. In response to those crimes, happening firstly in Croatia and BH, in May 1993, the United Nations established the ICTY. The ICTY had the purpose to prosecute the responsible persons for serious violations of international humanitarian law for the period from 1991 to 2001, in the countries and provinces of the former Yugoslavia. The aim was to bring the perpetrators to trial, in order to stop possible future crimes and to bring justice to the victims and their

[33] Sexual Violence in Armed Conflict, Global Overview and Implications for the Security Sector, Megan Bastick Karin Grimm & Rahel Kunz (2007), p. 10.
[34]Kirsten Campbell, The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia, The International Journal of Transitional Justice, Vol. 1 (2007), 411–432.
[35]Crimes of Sexual Violence, International Criminal Tribunal for the former Yugoslavia United Nations, available at: https://www.icty.org/en/features/crimes-sexual-violence

families. The Tribunal had the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949,[36] violating the laws or customs of war,[37] committing genocide,[38] committing crimes against humanity.[39] The Rome Statute of the International Criminal Courts marks the first time an international treaty codifies grave forms of gender-based violence as crimes against humanity, war crimes and genocide.[40]

Since the creation of the Tribunal and its Office of the Prosecutor (OTP), they were determined to prosecute sexual violence crimes as well as other crimes committed during the conflicts. The ICTY was also the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as a crime against humanity, as well as the first international tribunal based in Europe to pass convictions for rape as a crime against humanity, following a previous case adjudicated by the ICTR.[41]

In the work of the Tribunal, more than a third of those convicted by the ICTY have been found guilty of crimes involving sexual violence.[42] Besides punishing the violations, such convictions have put in practice the treaties and conventions which have existed for a long time only on paper. The ICTY has played a crucial role in the prosecution of CRSV in the former Yugoslavia, it has proved that effective prosecution of the sexual violence is possible, and it has broken the silence of some survivors to talk about their suffering.

[36]Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2. (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

[37]*Ibid,* Article 3, (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

[38]*Ibid*, Article 4, (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

[39]*Ibid*, Article 5, (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

[40]Edited by William A. Schabas, Shannonbrooke Murphy, Research Handbook on International Courts and Tribunals (2017), p. 163.

[41]ICTY, Crimes of Sexual Violence, available at: https://www.icty.org/en/features/crimes-sexual-violence

[42] *Ibid*.

Sexual violence contains acts that are prohibited under international humanitarian law, and so it can be prosecuted as a constituent element or can form part of the war crime, genocide or as a crime against humanity as elaborated below:

Sexual Violence as a war crime: Grave breaches of the Geneva Conventions, which include acts like torture,[43] or inhuman treatment, wilfully causing great suffering or serious injury to body or health; and serious violations of humanitarian law which include the violations of Common Article 3 of the Geneva Conventions, such as violence to life and person which encompasses murder,[44] mutilation,[45]cruel treatment, and torture,[46] and outrages upon personal dignity which requires that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or other serious attack on human dignity.[47]

Sexual violence as an act of genocide[48] includes killing or causing serious bodily or mental harm to members of the group,[49] deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group,[50] and forcibly transferring the children of one group to another group.

Sexual violence as a crime against humanity - systematic or widespread attacks upon civilian populations: including, murder,[51] extermination,[52] enslavement,[53]

[43]*Kunarac, Kovač and Vuković*, (Appeals Chamber), June 12, 2002, para. 142: The definition of torture has the following elements: "(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person".
[44]*Prosecutor v. Krstić* case, 2001.
[45]*Kvočka et al.* (Trial Chamber), 2 November 2001, para. 144: "Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture."
[46]"*Kunarac, Kovač and Vuković* (Appeals Chamber), 12 June 2002.
[47]*Kunarac, Kovač and Vuković* (Appeals Chamber), 12 June 2002, para. 161.
[48]*Krstić* (Trial Chamber), 2 August 2001, para. 550: "Genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. Those are two elements of the special intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group."
[49]*Krstić* (Trial Chamber), 2 August 2001, para. 513: "[S]erious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering.
[50]*Akayesu* case, it was concluded that rape constitutes genocide.
[51]*Krstić* (Trial Chamber), 2 August 2001, para. 485.
[52]*Krstić* (Trial Chamber), 2 August 2001, para. 503.
[53]*Kunarac, Kovač and Vuković* (Appeals Chamber), 12 June 2002, para. 116.

deportation, imprisonment, torture,[54] rape,[55] persecutions on political, racial and religious grounds[56] and other inhumane acts.

The Definition of Sexual Violence: Another credit of the ICTY and ICTR is that of the definition of sexual violence, including rape, as before it was not defined. Three cases known as *Akayesu* (ICTR), *Furundžija* and *Kunarac* (ICTY), have set the standard for the definition of the crime of rape, sexual violence.

In the *Akayesu* case, before the ICTR, sexual violence, which includes rape, was defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[57] The definition was endorsed in the *Kvočka* case, and it was added that "sexual violence is broader than rape and includes such crimes as sexual slavery or molestation."[58]

The *Furundžija* Trial Chamber finds that the following comprises what may be accepted as the requisite elements of the offence of rape under international criminal law: "The sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person."[59]

The *Kunarac* Trial Chamber identified three categories of circumstances that under domestic law are required for a sexual act to constitute rape: (i) the sexual activity is accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) the sexual activity occurs without the consent of the victim.[60]

[54] *Kunarac, Kovač and Vuković* (Appeals Chamber), 12 June 2002.
[55] *Kvočka et al.* (Trial Chamber), 2 November 2001, *Kunarac, Kovač and Vuković* (Appeals Chamber), 12 June 2002.
[56] *Kvočka et al.* (Trial Chamber), 2 November 2001.
[57] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T.
[58] *Prosecutor v. Kvočka et al.*, Case No. ICTY-98-30/1-T.
[59] Judgement Summary (Exclusively for the use of the media. Not an official document.), The Hague, 10 December 1998, Statement of the Trial Chamber at the Judgement Hearing, *The Prosecutor v. Anto Furundžija*, December 1998.
[60] *Kunarac et al.*, Trial Judgement, para. 442.

In a number of landmark judgements, the Tribunal advanced the development of international justice in the realm of gender crimes.[61] The first case at the ICTY that had sexual violence in focus was the one against Anto Furundžija.[62] The second ICTY trial to deal entirely with charges of sexual violence was the *Kunarac et al.* case.[63] And the *Duško Tadić* case[64] was the first trial for sexual violence against men.

Since the beginning, the ICTY had a focus on the investigation and prosecution of wartime sexual violence. From the 161 persons accused of committing crimes in the former Yugoslavia, the Tribunal has filed charges of sexual violence against 78 of them.[65] As of September 2016, 32 individuals were convicted for their responsibility for crimes of sexual violence, as defined under Article7(1)[66] of the ICTY Statute, and four of them were additionally convicted for failing to prevent or punish the actual perpetrators of the crimes, under Article 7(3)[67] of the Statute.[68]

The Kosovo Case

After the end of Ottoman rule in 1913, Kosovo became part of Yugoslavia. In the 1974 Constitution of the SFRY, Kosovo was guaranteed the status of an autonomous province until 1989, when the Serbian-controlled government suspended autonomy and initiated massive and systematic human rights violations against Kosovo Albanians. During this period, numerous reports by Human Rights Watch and other international and domestic human rights organizations, such as the Council for the Defence of Human Rights and Freedoms, the Humanitarian Law Centre, the Centre for the Protection of Women

[61]United Nations, International Criminal Tribunal for the Former Yugoslavia, Landmark Cases, available at: https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases
[62]*Furundžija* case (Case No. IT-95-17/1).
[63]*Kunarac, Kovač and Vuković*, Appeals Chamber in June 2002.
[64]Incidents of sexual violence against men were examined in other cases before the Tribunal, including among others *Češić, Mucić* et al.*, Todorović* and *Simić*.
[65]United Nations, International Criminal Tribunal for the Former Yugoslavia, In numbers, Available at: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers
[66]Article 7(1) of the Statute addresses the issue of individual criminal responsibility. The first paragraph defines "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".
[67]Article 7(3): "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".
[68]United Nations, International Criminal Tribunal for the Former Yugoslavia, In numbers, available at: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers.

and Children, and the Kosovo Helsinki Committee, reported incidents of torture, political "disappearances," imprisonment of critics of the regime, and rape.[69]

Conflict-related rapes were recorded from at least the early 1990s, but became more frequent in 1998-1999,[70] as there was an ongoing armed conflict between the Kosovo Liberation Army (KLA) and the Serbian and Yugoslav forces. By the end of 1999, the Organization for Security and Co-operation in Europe (OSCE) Kosovo Verification Mission (OSCE-KVM), and international and regional NGOs had documented widespread rape and other sexual violence as a means of ethnic cleansing.[71] Human Rights Watch documented reports of extremely brutal sexual violence involving injuries to women's breasts, genitals and faces, biting, the rape of pregnant women, and the use of drugs to either blank out a woman's memory or to kill her.[72]

In 1999, the Office of the Prosecutor (OTP) of the ICTY found that the Tribunal had jurisdiction as the conflict in Kosovo was qualified as an internal armed conflict (and that is a precondition for establishing the jurisdiction of the ICTY). Following the signing of the Peace Agreement, investigators from the ICTY have launched investigations into war crimes committed in Kosovo, the UNMIK Civilian Police was engaged and the Kosovo Police Service (KPS - formed in 1999) had no primary role in war crimes investigations until the transfer of competencies by EULEX to local institutions. On 10 March 1999, the ICTY Prosecutor Louise Arbour gave the statement that the Prosecutor's office has started gathering information and evidence in relation to the Kosovo incidents.[73] Also, the UN Security Council urged the Office of the Prosecutor to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and notes that the authorities of the Federal Republic of Yugoslavia (FRY) have an obligation to cooperate with the Tribunal[74] but it did not actually happen.

The ICTY on its mandate has dealt with five separate cases: three of them have addressed the violations carried out by Serbian officials and two by Albanian Kosovo Liberation Army leaders. In total, eight people were found guilty of crimes

[69]Report of Human Rights Watch, Kosovo**,** Gender-Based Violence against Kosovar Albanian Women.
[70]As cited in Valeza Ukaj Elshani, Legal Framework of Conflict-Related Sexual Violence; the Kosovo Case, (2020).
[71]Edited by Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY (2016), page 23.
[72]As cited in Megan Bastick, Karin Grimm & Rahel Kunz, Sexual Violence in Armed Conflict, Global Overview and Implications for the Security Sector, p. 126P
[73]The Prosecutor's statement regarding the Tribunal's jurisdiction over Kosovo. Available at: http://kosovo.sense-agency.com/assets/investigation/02-01-EN.pdf
[74]Resolution 1160 (1998) Adopted by the Security Council at its 3868th meeting, on 31 March 1998.

committed in the conflict in Kosovo.[75] The first indictment was against Milošević and his five aides for deciding on crimes committed in Kosovo and was filed in May 1999.[76]

Despite the scale and intensity of rape and other forms of sexual violence during the armed conflict in Kosovo[77], only seven CRSV cases that have been brought to national and international courts have been completed.[78] The CRSV cases in Kosovo have been processed at three different mechanisms: the ICTY, the Special War Crimes Court in Serbia,[79] and Kosovo's courts. Defendants have been convicted in only three cases – four defendants at the ICTY and one in Serbia and only three cases were completed in Kosovo's courts; in each case the defendants were acquitted.[80]

Regarding the war crimes committed in Kosovo, the Tribunal in 2009 in the case *Šainović et al.* (formerly *Milutinović et al.*),[81] found five persons, who at the time of the conflict were political figures, police and military commanders in the FRY, guilty of war crimes and crimes against humanity in Kosovo. The Trial Chamber found that in 1999 there was "a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO airstrikes, conducted by forces under the control of the FRY and Serbian authorities, during which there were incidents of killing, sexual assault…"[82] The indictment[83] included sexual assaults that happened in some municipalities of Kosovo, and found responsible three senior officials. The former Yugoslav Army General Nebojša Pavković was found guilty and sentenced to 22 years' imprisonment for or all convictions including those for sexual violence. Moreover, the Chamber considers that, in the circumstances, the commission of murder, sexual assault, and the deliberate destruction of or damage to mosques, by the VJ /Yugoslav Army/ and MUP /Interior Ministry/ forces executing his orders, were reasonably foreseeable to Pavković.[84] The former Yugoslavia's Deputy Prime Minister Nikola Šainović and

[75]Humanitarian Law Centre, *Manual për Drejtësinë Tranzicionale Konceptet, Mekanizmat dhe Sfidat* (2015), p. 31.
[76]*Milošević* Case No. IT-99-37.
[77]Amnesty International, "Wounds that burn our souls", compensation for Kosovo's wartime rape survivors, but still no justice (2017).
[78]Valeza Ukaj Elshani, Legal Framework of Conflict Related Sexual Violence; the Kosovo Case (2020).
[79]At the Special War Crimes Chamber in Belgrade, only two cases involving indictments for rape have been completed. Both cases involve KLA members. There was only one indictment against Serbian defendants.
[80]Amnesty International, "Wounds that burn our souls", compensation for Kosovo's wartime rape survivors, but still no justice (2017).
[81]For more see : https://www.icty.org/en/case/milutinovic.
[82]*Ibid.*
[83]Amended joinder indictment, 5 August 2005.
[84] Judgement summary, 26 February 2009,
http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf

Police General Sreten Lukić were found guilty of crimes of sexual violence through participation in the Joint Criminal Enterprise, but no conviction was entered for these charges.[85]

In 2014, former Assistant Minister of Interior Vlastimir Đorđević was also convicted. The Indictment charged Đorđević with persecutions through sexual assaults as crimes against humanity in a number of locations in Kosovo in 1999.[86] The ICTY also indicted Ramush Haradinaj, former commander of the KLA's Jablanica compound and former unit commander, Idriz Balaj, for the alleged rape of a Romani woman at Jablanica in August 1998, in a broader indictment for crimes against humanity and war crimes, but both were acquitted in April 2008.[87]

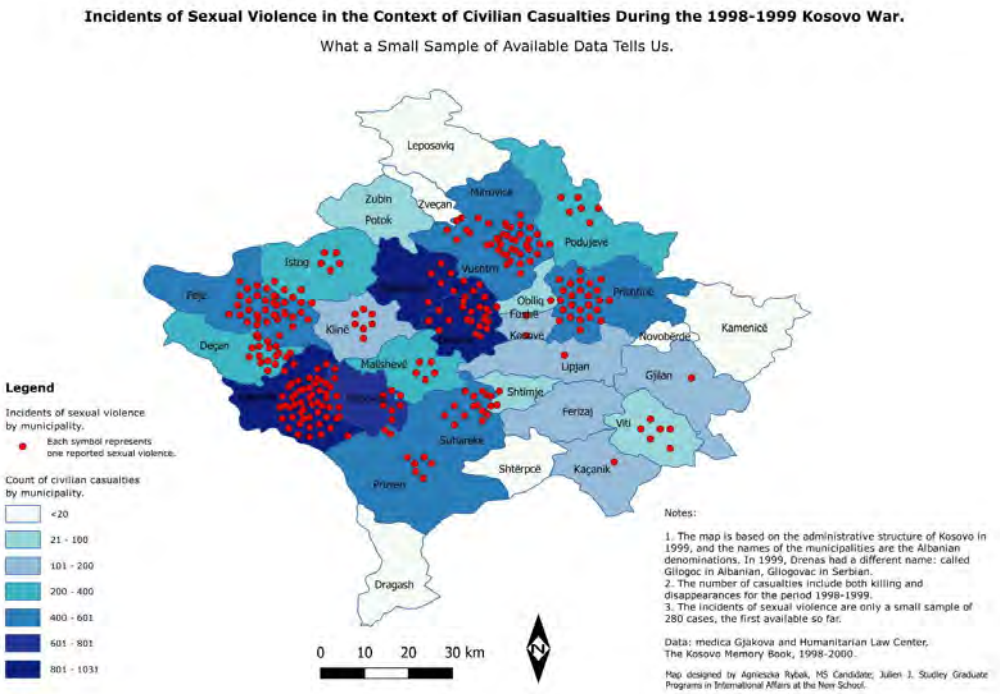
After finishing its mandate, the Tribunal started transferring the remaining cases to national courts as part of an effort to strengthen local capacities. Moreover, national courts remain the principal venue for holding individuals accountable for crimes of sexual violence.[88] In the case of Kosovo, war crimes cases were handed over to international prosecutors and tried by international or mixed trial panels set up by the administration of the United Nations Mission in Kosovo (UNMIK), and later followed by the EU Rule of Law Mission (EULEX).[89]

Now, two decades after the end of the war, 1,200 survivors of sexual violence have been identified, and the number of survivors is estimated to be around 20,000. In 2018, the Government of Kosovo, together with civil society and survivors, started to implement comprehensive reparations programmes, legal recognition and reparations, including financial assistance for thousands of survivors of CRSV.

Below is a map[90] that shows more detailed data on the incidents of sexual violence that occurred in the cities of Kosovo during 1998 and 1999. It confirms

[85]United Nations, International Criminal Tribunal for the Former Yugoslavia, In numbers, available at: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers
[86]*Đorđević*, Case No.: IT-05-87/1, Appeals Chamber Judgement, 27 January 2014.
[87]AmnestyInternational, "Wounds that burn our souls", compensation for Kosovo's wartime rape survivors, but still no justice (2017).
[88]Edited by Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY (2016), p. 335.
[89]Humanitarian Law Centre, *Manual për Drejtësinë Tranzicionale Konceptet, Mekanizmat dhe Sfidat* (2015), p.37.
[90]The map was done by Anna Di Lellio, Mirlinda Sada and Garentina Kraja, based on their research called "Wartime sexual violence: new evidence as hundreds of survivors come forward" (2018).

what OSCE and Human Rights Watch investigators concluded as early as 1999: sexual violence was "a weapon of ethnic cleansing" in Kosovo, like in Bosnia.[91]



Barriers for successful outcomes

In theory, prosecuting conflict-related sexual violence crimes should not be more difficult than prosecuting any other category of crimes under international criminal law,[92] but the experience of those prosecuting the CRSV shows that when it comes to practice, there are many factors that drive to non-satisfactory outcomes in these cases. Focusing on survivors in particular, they struggle with many obstacles to speak openly about what happened or to testify before international and national courts.

[91] Prishtina Insight, Wartime sexual violence: new evidence as hundreds of survivors come forward (2018), available at: https://prishtinainsight.com/wartime-sexual-violence-was-a-tool-of-ethnic-cleansing-in-kosovo-mag/.

[92] Edited by Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY, (2016), page 33.

As mentioned above, the number of survivors is high in Kosovo, but there were not many CRSV cases before the ICTY or in national courts. Why? What were the barriers? Did the relevant institutions do enough about it?

In the post-conflict environment in Kosovo, it was almost impossible to talk about this category of crimes. Unjustifiable barriers prevented the survivors from talking freely and telling what had happened - starting from the strong social stigma, which caused the reluctance of the persons who experienced sexual violence during the conflict. Survivors of CRSV still ask for comprehensive support to fight the stigma and the culture of shame and silence that continues to surround the issue.[93] The fear of prejudice and discriminations and other personal reasons impacted the will of the survivors to testify. It is sad to think that there are survivors of whom nobody knows because they have never talked about it to anyone, and all for personal reasons like trauma, fear of divorce or the dishonor it would bring to their families. Some survivors of CRSV, having told their families and husbands what happened, have experienced divorce,[94] women were mistreated and treated with prejudice by their families, even by their own children.[95]

The patriarchal system and the high degree of gender discrimination right after the war contributed to the silence of the survivors. CRSV was a taboo for years, it was like a 'public secret', everyone knew but nobody talked about it, it was not spoken of in families, at schools or anywhere else publicly. At the time, institutions failed to immediately implement measures that would contribute to support of the survivors. Amnesty International has created a checklist for states at the global summit to end sexual violence in conflict, it suggests that "states should do school and public educational programmes to eradicate stigma and discrimination against sexual violence survivors, and to break cycles of victimization and disempowerment of women and girls".[96] In the case of Kosovo, this would have been very helpful for the survivors, and also young generations should know about it and contribute to the reduction of gender-based violence, which directly influences CRSV. Looking at our educational curricula, there was no subject or course taught at schools or universities related to the issue. A big step

[93]UN Women, "Reparations soon for conflict-related sexual violence survivors in Kosovo"*, 17 March 2016, available at: http://www.unwomen.org/en/news/stories/2016/3/reparations-soon-for-conflict-related-sexual-violence-survivors-in-kosovo.

[94]Memory book with stories of women survivors of torture during the last war, I want to be heard, Story of Viki, p. 110, Prishtina 2017.

[95]Memory book with stories of women survivors of torture during the last war, I want to be heard, Story of E.T, p. 32, Prishtina 2017.

[96]Amnesty International's Checklist for States at the Global Summit to end Sexual Violence in Conflict, London, June 2014. Available at: https://www.amnesty.org.uk/files/ior530072014en.pdf

toward this was made in 2018, with the establishment of Transitional Justice Resource Centre (TJRC)[97] at the Faculty of Law, University of Prishtina. It offers a professional course about Transitional Justice and one of the main topics is related to CRSV.

In Kosovo, where rural areas were seriously affected by the war, the number of survivors is high but the stigma is strong, and there is a probability that some of them were not aware of their entitlement and were not familiar with the court process, and in the case of the ICTY, the fact that it is located in a foreign country inhibited the victims from coming forward.[98]

Long-lasting cases before the ICTY and national courts caused discouragement to the survivors. As survivors want justice and their perpetrators to be punished, prosecution of more and more cases, and faster procedures of conviction, would have given more trust to them. "Some cases will never be prosecuted because the survivor is not willing to testify any more. It takes time and effort, and cases can last forever because of the [lack of effective] scheduling".[99]

In some cases before the ICTY, investigators or prosecutors were the first person the victim told about experiencing sexual violence crimes during the conflicts. And some, even after telling what they had gone through, were reluctant to testify in court because they were afraid of re-living those moments. Some survivors were asked to testify in multiple cases, exposing them to the trauma of recounting their story multiple times and compounding any associated witness fatigue.[100]

At the national level, UNMIK was responsible for investigating and prosecuting war crimes, and sexual violence crimes were clearly not amongst UNMIK's priorities. Although survivors provided their statements to UNMIK police, or made statements to other international organizations - including the ICTY - which were passed on to UNMIK, it did not raise one indictment for rape or other CRSV.[101] UNMIK police also failed to open investigations even in cases when survivors

[97]Check the website for more information on Centre's work: https://tjrc-up.net/
[98]Edited by Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY (2016), p. 42.
[99]Amnesty International interview with EULEX officials, September 2017, as cited in Amnesty International, "Wounds that burn our souls" (2017).
[100]For example, sexual violence victims who gave evidence in *Slobodan Milošević* became increasingly reluctant to be involved in the later *Milutinović et al*. and then *Đorđević* trials, which covered the same incidents of sexual violence, Prosecuting Conflict-Related Sexual Violence at the ICTY, Edited by Serge Brammertz and Michelle Jarvis, page 2.
[101]Amnesty International, "Wounds that burn our souls" (2017).

approached them and gave sensitive testimonies,[102] as they knew the perpetrators and their names. The resulting failure to conduct prompt, effective and impartial investigations into allegations of CRSV, in this period so close to the war, has created a legacy of impunity which later prosecutors have been unable to remedy.[103]

After the end of UNMIK's mandate, it passed the cases to EULEX. The mission inherited 1,200 war crimes cases from UNMIK; it has closed or dismissed (due to lack of evidence) 500 of these and has initiated 51 new war crimes cases, including the first-ever investigations into cases where acts of sexual violence or rape have been assessed as war crimes.[104] But EULEX also failed to fully address UNMIK's legacy of uninvestigated case files.[105]

Later on, EULEX transferred responsibility for the prosecution of war crimes to local counterparts in the Special Prosecution Office of the Republic of Kosovo (SPRK). We can say that until recently, there was no political will to deal with CRSV – priority was given to other issues. Survivors did not have institutional support and little was done for them in an institutional way. Just two years ago, institutions have approved a new regulation that gives the legal recognition and reparations, including a monthly financial support. Enormous effort was done for the survivors of CRSV by the civil society, and the women's or human rights NGOs[106] which were strongly engaged right after the war by taking over key tasks. They were also engaged with ICTY prosecutors on the investigation of crimes in Kosovo, as the OTP provided questionnaires to willing NGOs designed to facilitate the identification of witnesses and the provision of contact details to them.[107]

[102] Amnesty International interview, T.K., September 2017. "I accompanied 12 women to UNMIK between 2003 and 2006. The worst thing was that they never gave them copies of their statements or allowed them to have a lawyer. They made their statements to a police officer from Finland. We went five or six times, but no one contacted us again. Some of them knew the perpetrators, their name and surname. Some were para-militaries: women heard their nicknames when they were calling to each other. One survivor gave UNMIK the ID card that fell out [of his pocket] when he was raping her".

[103] Amnesty International, "Wounds that burn our souls" (2017).

[104] Bernd Borchardt, EULEX Head of Mission, available at: https://www.eulex-kosovo.eu/en/news/000427.php.

[105] *Ibid.*

[106] Right after the armed conflict, the Kosova Rehabilitation Centre for Torture Victims (KRCT) and *Medica Gjakov*a were founded. Those organisations contributed to the evidence of sexual violence during the conflict.

[107] Edited by Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY (2016), p. 44.

Conclusion

Since the establishment of the ICTY and the ICTR, both have contributed to important developments in international criminal law, specifically, to the prosecution of sexual violence in armed conflict. Despite all the challenges that the ICTY faced, misconceptions concerning the nature of CRSV and other barriers, it brought before the Tribunal around 70 people with charges on sexual violence and found 32 people responsible for crimes of sexual violence.

Even though the processes last so long, some survivors have received justice and there are thousands waiting for it. In the case of Kosovo, despite the number of the survivors of CRSV, the number of punished people remains low, and this slow and inadequate justice has discouraged survivors from seeking it. It is still not late to prosecute CRSV, even though, in Kosovo's case, there are still social stigmas that need to be broken and other challenges, such as lack of mutual legal assistance agreement between Kosovo and Serbia, which makes it impossible to bring the perpetrators to justice.

Now it is up to the national institutions to develop an effective strategy for prosecuting CRSV and implement comprehensive programmes of reparations and an efficient mechanism for supporting the survivors and empowering them to rebuild their lives and have a better future.

Since the beginning, civil society and NGOs were strongly engaged on achieving legal recognition of survivors, and they were supported by the National Council for Survivors of Sexual Violence during the War, which was established in 2014, upon the initiative of the former president, Mrs. Atifete Jahjaga.

It is very important to break the silence and to motivate the survivors to share their stories, as in the case of Vasfije Krasniqi-Goodman. She is one of the first survivors of wartime sexual violence in Kosovo that publicly shared her story, encouraging others to do the same and demand justice.

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Autonomous Weapon Systems and Individual Criminal Responsibility

The world in the 21st century is moving at an unprecedented speed in the sphere of technological development, and new technologies based on artificial intelligence are deeply rooted in human reality. Modern information society has imposed a new way of living, and the creation and development of weapon systems that operate on the basis of artificial intelligence has become an inevitable goal of the modern state for the fulfillment of the essential interests in the area of public safety. At the same time, the discourse and character of warfare have changed fundamentally – the new reality faces distance warfare, the reduction of military human resources and the implementation of autonomous computer decisions with minimal requirement for human intervention. The likelihood of using autonomous weapon systems that will be completely autonomous and independent of the human factor is on the verge of its realization nowadays, and the fact that there is still no international legal framework that will precisely regulate the rules of use of force by deploying the new methods and ways of warfare confronts the international community with an obligation to interpret and apply the already existing rules and principles of international humanitarian and criminal law in terms of the new systems of autonomous weapons. Examination of the legality of the systems of autonomous weapons and their (in)ability to act in accordance with the fundamental principles of international humanitarian law has undoubtedly caused extensive discussion in the international community about whether these systems will be able to understand those rules and operate in accordance with them.

The International Committee of the Red Cross defines systems of autonomous weapons as weapons that can independently, without control by a human being, select, attack and kill human targets.[108] Thus artificial intelligence built into these systems enables exclusion of the human factor in the decision-making process related to the so-called "critical" decisions – obtaining and receiving information, tracking targets, selecting and attacking.[109] All this allows the system, once

[108] Report of an expert meeting: *Autonomous Weapon Systems: Technical, military, legal and humanitarian aspects*, ICRC, Geneva, 2014, p. 11, ["ICRC, *AWS: Technical, military, legal and humanitarian aspects*"].
[109] Report of an expert meeting: *Autonomy, artificial intelligence and robotics: technical aspects of human control*, ICRC, Geneva, 2019, p. 5, [ICRC, *Autonomy, artificial intelligence and robotics: technical aspects of human control*].

activated, to autonomously participate in the process of target recognition, identification of persons, objects, as well as autonomous definition of patterns and ways of behavior of human targets and finally in making an autonomous decision to attack.[110] Such huge autonomy of these systems and independence from the human factor makes it extremely difficult to predict the decision the system will make, especially if the systems are given the opportunity to learn from each situation in which they find themselves and if they are given freedom of deciding about and conducting an attack.[111] In this context, in its program for the development of the systems of autonomous weapons, the United States of America concludes that "while weapon systems may become more capable with increased autonomy, they may become less predictable due to an increased ability to define their own actions."[112] The United Kingdom has taken a similar standpoint, concluding that "the overall activity of such a system would be predictable but individual actions may not be."[113] This key shortcoming regarding the predictability of autonomous weapon systems is extremely relevant in terms of the potential (im)possibility of establishing individual criminal responsibility. Even if it was possible to provide algorithms through which systems can act in accordance with the basic principles and rules of international humanitarian law, there would always be a possibility for the system to make a wrong decision. In fact, if the system was set up only with "the rules of the game" and was given the opportunity to independently learn and decide in each particular situation, it would be impossible to guarantee that the system will always function as it is expected of it, and taking into consideration its great unpredictability and great destructive power, there is no doubt that this system will be involved in a serious violation of the international humanitarian law.[114]

It is well known that the legal regime that establishes international humanitarian law is specifically designed to address humanitarian problems that arise directly from armed conflict, whether international or non-international, and is aimed at "an ideal: the protection of man from the consequences of brute force."[115] However, over the years, the world has witnessed armed conflicts in which some of the most brutal forms of systemic violations of human rights and human dignity

[110] *Ibid*.
[111] Neil Davidson, "A legal perspective: Autonomous weapon systems under international humanitarian law", *UNODA Occasional Papers*, No. 30, 2016, pp. 15, ["Davidson"].
[112] ICRC, *AWS: Technical, military, legal and humanitarian aspects*, p. 19.
[113] *Ibid*, p. 18.
[114] Rebecca Crootof, "War Torts: Accountability for Autonomous Weapon Systems", *University of Pennsylvania Law Review,* Vol. 164, 2016, p. 1373.
[115] Ljubomir D. Frčkovski, Sašo Georgievski, Tatjana Petruševska, *Public International Law*, Skopje, Magor, 2012, citing: Hans – Peter Gasser, *International Humanitarian Law – An Introduction, Humanity for All*, The International Red Cross and Red Crescent Movement, Paul Haupt Publishers, 1993, p. 16.

have occurred, and the impossibility of punishing these violations "is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation."[116] It was therefore crucial to formulate a concept of individual criminal responsibility, according to which perpetrators of international crimes could be punished. The Nuremberg Tribunal emphasizes the importance of this concept and asserts: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[117] Although it finds its sources in national criminal systems, this regime "takes on a primary role in guaranteeing that such legal system, though 'international', remains a tool for 'justice'."[118] After World War II, the international community established a legal regime through which the perpetrators of the most serious international crimes – genocide, crimes against humanity and war crimes – can be punished, and this was best demonstrated through the *ad hoc* tribunals for the crimes in the former Yugoslavia and Rwanda, as well as through the establishment of a permanent International Criminal Court.[119] Hence the rule that perpetrators of international crimes must be held accountable for their actions,[120] and the whole system of "individual criminal responsibility is the unchallenged cornerstone of the entire edifice of international criminal law."[121] For that reason, when establishing the correspondence of these systems with the international humanitarian law it will be necessary to satisfy the principle of existence of individual criminal responsibility for committed international crimes. Given the fact that autonomous weapon systems will operate independently, without human control, the question arises as to whether these systems can be held accountable for the crimes committed and if they cannot, whether it is their very autonomous decision-making mode that will prevent a guarantee for individual criminal liability?

[116] M. Cherif Bassiouni, "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights", in M. Cherif Bassiouni, *Post Conflict Justice,* Brill – Nijhoff, 2002, p. 422.
[117] Judgement of the Nuremberg International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, vol. 41, 1947, p. 223, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf
[118] Vincenzo Militello, "The Personal Nature of Individual Criminal Responsibility and the ICC Statute", *Journal of International Criminal Justice 5*, Oxford University Press, 2007, p. 944.
[119] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, 2015, p. 18, ["Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots"]; Similarly, in one of its "Basic Principles and Guidelines", the UN General Assembly recognizes the importance of individual responsibility for international crimes committed, see: UN General Assembly, "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", 2005, Resolution 60/47, 21 March 2006, A/Res/60/147.
[120] Rule 102, ICRC, Study of Customary International Humanitarian Law; Article 33, Fourth Geneva Convention; Article 85 and Article 86, Additional Protocol I of 1977.
[121] Christian Tomuschat, "The Legacy of Nuremberg", *Journal of International Criminal Justice*, Vol. 4, Issue 4, 2006, pp. 830 – 840.

a) *Actus reus* and *mens rea* and their applicability to autonomous weapon systems

The first element of any crime is the existence of an action that is criminogenic, forbidden, the so-called *actus reus*, which is accompanied by a certain state of mind, the so-called *mens rea*, which should be proven as a second element, depending on the conditions required by the crime. In order for a system of autonomous weapons to be responsible for a committed international crime – genocide, crimes against humanity or war crimes, it is necessary that both elements are satisfied, each depending on the conditions set by the corresponding definition.[122] For example, a fully autonomous weapon would have the potential to direct attacks against civilians or civilian objects, kill or wound a surrendering combatant, or launch a disproportionate attack, all of which are elements of war crimes.[123] In order for them to be individually responsible, it will be necessary to have an appropriate "mental state" – knowledge of the act committed (also known as the *guilty mind*). The International Committee of the Red Cross (ICRC), in its Comments on the Additional Protocols to the Geneva Conventions, states that a "wilful act" involves acting "consciously and with intent", which indicates that the perpetrator is aware of a breach of the rule, or taking "negligent action", which can be defined as the "attitude of the perpetrator," who, although unsure of the end result, accepts the possibility of a violation of international humanitarian law through the action he takes.[124] Similarly, in the case *Prosecutor v. Delalić*, the Tribunal for the former Yugoslavia concludes that there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[125] In addition, Article 30 of the Rome Statute elevates the element of *mens rea* to a standard that must necessarily be met in all serious violations of international humanitarian law, so the perpetrator will be criminally liable for an act committed only if it is done with "intent and knowledge".[126] Since these systems do not possess the required *mens rea*, i.e., they lack the required independent intentionality that must accompany the commission of a particular criminal act, a criminal liability cannot be established.[127] Acts of genocide and crimes against humanity also require the existence of a certain level of intent to destroy, in whole or in part, a

[122] See: Rome Statute of the International Criminal Court (ICC), Elements of Crimes, published by the ICC.
[123] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 18.
[124] International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949, 1987, para. 3474, ["ICRC, Commentary on the Additional Protocols of 1977"].
[125] *Prosecutor v. Delalić*, Case No. *IT-96-21-T*, ICTY, Judgement, para. 326.
[126] Article 30 of the Rome Statute of the International Criminal Court.
[127] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 18.

national, ethnic, racial or religious group, or to carry out a widespread or systematic attack on the civilian population[128], a level that autonomous weapon systems could not satisfy due to the lack of *mens rea*. Even if the non-existence of *mens rea* in these systems was ignored and their responsibility was made possible for practical reasons, it would not be possible to punish them because, as machines, they could not understand the essence of the punishment, nor could they learn from it, which undermines the whole essence of individual and general deterrence of punishment.[129] Given the fact that these systems could not meet the elements necessary to identify individual criminal responsibility, it cannot be said that they are legally responsible for the acts committed, hence the responsibility will have to be sought in the human factor. [130]

b) Inability to locate individual responsibility in the human factor

Given that autonomous weapon systems cannot be held criminally liable for international crimes committed, it will be necessary to determine whether responsibility can be found in the human factor – the individuals involved in the development and deployment of the systems of autonomous weapons, such as computer programmers, engineers, mechanics, commanders, planners, and other actors. In this context, it is necessary to point out two situations.

In the first situation, the human operator involved in the development process of the autonomous weapon system "intentionally" and "consciously" programs and deploys the system that is unable to function in accordance with international humanitarian law. For example, the programmer intentionally programs the system algorithm to violate international humanitarian law, or the military operator negligently deploys, in an urban setting, a system that cannot distinguish between civilians and combatants or civilian objects and military targets, or a commander who ordered the system to be used in such a way as to commit a war crime, or knew that the system would be used in a manner that violates international humanitarian law, and did not take action to prevent the attack or punish the perpetrator.[131] In all these situations, the outcome is quite simple – the autonomous weapons system is deployed in such a way that it is used to commit a war crime or other serious violation of international humanitarian law, hence, the responsibility will be located in that individual or individuals, who programmed or

[128] *Prosecutor v. Popović et al*, Case No. IT-05-88-A, ICTY, Appeal Judgement, para. 529. The same has been confirmed by the International Criminal Tribunal for Rwanda in several verdicts: *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, ICTR, Appeal Judgement, para. 894; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeal Judgement, para. 141.
[129] Robert Sparrow, "Killer Robots", *Journal of Applied Philosophy*, Vol. 24, Issue 1, 2007, p. 72.
[130] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 18.
[131] Crootof, pp. 1376, 1377.

deployed such a system, as well as the commander who ordered or authorized the use of this weapon.

The second situation is as follows: all participants in the process of developing the system of autonomous weapons and putting it into operation have taken all steps to enable the system to function in accordance with international humanitarian law. This would mean that the developer would program the system to comply with all the rules, all previous tests and preparations would be carried out to ensure the compatibility of these systems with international humanitarian law, and the commander, before deploying the system, would also make sure it is not defective. However, in the process of its functioning, the system still violates international humanitarian law. It is important to emphasize that, in the operational phase, autonomous weapon systems analyze information from a given environment independently, and then, based on that data, autonomously decide whether to carry out a particular attack, which method or manner of warfare will be used and whether and how much force will be applied. This way of functioning of the systems causes problems in terms of locating individual criminal responsibility, because without the existence of a special intention of the human factor, there can be no responsibility.[132] For example, programmers would not have the necessary knowledge of the specific situation in which, at a later stage, the system would violate international humanitarian law, or, commanders, at the time of activating the weapon, would not know the exact time and place where the attack would take place.[133] In this particular situation, it would be impossible for any of the actors involved in the system development process – engineers, computer programmers, technicians, operators, commanders and planners – to reasonably foresee how these systems would react in any given circumstance.[134] Hence, an intention which can be raised to the level of individual criminal responsibility could not be located in any of the individuals involved, because the decision for an attack would always be in the hands of the weapon itself.[135]

Some authors believe that even if direct responsibility for the human factor was allowed, there would be a real challenge in terms of determining responsibility.[136] In the process of developing these systems there are at least two parties that will

[132] *Ibid*, p. 1377, 1378.
[133] Davidson, p. 17.
[134] Amnesty International, Autonomous Weapon Systems: Five Key Human Rights Issues for Consideration, 2015, p. 26; Markus Wagner, "Autonomous Weapon Systems", *Oxford Public International Law*, 2016, para. 21.
[135] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 20; Crootof, pp. 1377, 1378; UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns, UN Doc. A/HRC/23/47, 2013, paras. 76, 77, 80, ["Heyns, 2013"]; Davidson, p. 17; ICRC, AWS: Technical, Military, Legal and Humanitarian Aspects, pp. 87 – 90.
[136] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 20.

develop the instructions and commands: developers and operators, mechanics, and often a huge number of people are involved in the programming process itself.[137] Each party could try to shift the blame to the other in an attempt to evade responsibility, so it would be too difficult even to determine the person who deliberately programmed the system to violate the international law, and even more difficult to establish responsibility when everyone was "conscientious" regarding the system's compliance with the international law.[138] There are a number of authors who suggest determining responsibility in advance in such a way that devices would be installed that record every action taken on autonomous weapon systems, so that such transparency could help the court in determining the legality of the attack, and at the same time, it is proposed to establish a chain of responsible persons in case of possible violation of international humanitarian law.[139] However, it is important to note that such ways of establishing liability may violate the customary international humanitarian rule that no one can be punished for an act he has not personally committed.[140] The inability to establish legal liability of the various persons involved in the process of creating autonomous weapon systems for violations of international humanitarian law is a real problem and undermines one of the most important "tools for the protection of civilian population", and if "the nature of a weapon renders responsibility for its consequences impossible, its use should be considered unethical and unlawful."[141]

c) Inability to locate command responsibility

The system of international humanitarian and criminal law includes the concept of command responsibility, along with individual criminal responsibility. Thus, commanders and other superiors are criminally liable for war crimes committed by their subordinates if, under the circumstances prevailing at the time, they knew or could have known (had information) that their subordinates were preparing to commit or were committing such crimes, and did not take all reasonable measures to prevent their commission, or, if such crimes had already

[137] *Ibid.*
[138] *Ibid.*
[139] Ronald Arkin, "The Robot didn't do it", *Position Paper for the Workshop on Anticipatory Ethics, Responsibility and Artificial Agents*, University of Virginia, 2013, p. 1; Gary E. Marchant and others, "International Governance of Autonomous Military Robots", *Columbia Science and Technology Law Review*, Vol. 12, 2011, p. 7; Sassoli, p. 338.
[140] Rule 102, ICRC, *Study of Customary International Humanitarian Law*.
[141] Human Rights Watch, Losing Humanity: The Case against Killer Robots, 2012, p. 42; Heyns, 2013, para. 80, citing: Gianmarco Verugio and Keith Abney, "Roboethics: The Applied Ethics for New Science", USA MIT Press, 2012, p. 114 and Robert Sparrow, "Killer Robots", *Journal of Applied Philosophy,* Vol. 24 No. 1, 2007.

been committed, to punish those responsible.[142] In the context of autonomous weapon systems, the systems would be the subordinates, and if the commission of an international crime was determined, responsibility should be located in the competent and superior commander. However, this way of determining responsibility would also be a challenge with respect to autonomous weapon systems, especially due to the conditions imposed by this rule.

Primarily, command responsibility can be established only if the subordinate, in this case the autonomous weapon system, commits an international crime. As noted above, although capable of committing acts that can be classified as international crimes, autonomous weapon systems do not have the necessary *mens rea* to be held accountable for the act committed. Furthermore, even if the fact that individual criminal responsibility cannot be located was not taken into account, the question arises whether the commander needs to be familiar with the way these systems work and make decisions, whether the supervision and control exercised by the commander over the system will enable taking measures that would prevent the commission of an international crime and is it possible to determine a punishment for the system? Regarding the last question, the answer is always negative, because the punishment could not be executed on the system as a machine, nor would the purposes of the punishment be met. As for the required level of knowledge of the commander before activating the system itself, it is considered that "the operator need not understand the complex programming of the robot, but must understand the result, that is, what the robot is able and unable to do."[143] If the commander, knowing that the system cannot act in accordance with international humanitarian law, still puts it into operation, it is possible to establish the responsibility of the commander. By the same token, the commander will be responsible for the subordinate human operator's decision to deploy an autonomous weapon system.[144]

However, it is also possible that, in the deployment phase, the commander takes all reasonable steps to ensure that the system operates in accordance with the international law, but in a future situation the system decides on an attack that will mean committing a crime. The requirement of command responsibility implies the existence of a *mens rea* in the commander who "knew or had information that would enable him to conclude, under the circumstances

[142] Rule 153, ICRC, Study of Customary International Humanitarian Law; Article 86, Additional Protocol of 1977; Article 28 (a) of the Rome Statute of the International Criminal Court; Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.
[143] Marco Sassoli, "Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and legal Issues to be clarified", *U.S. Naval War College, 90 INT'L. STUD. 308*, Volume 90, 2014, p. 324, [„Sassoli"].
[144] ICRC, *AWS: Technical, Military, Legal and Humanitarian Aspects*, p. 88.

prevailing at the time," that the system would violate the international humanitarian law. The International Tribunal for Rwanda concludes that "the material ability to control the actions of subordinates is the touchstone of command responsibility"[145], and the Tribunal for the former Yugoslavia adds that it refers to "a material ability to prevent or punish criminal conduct."[146] This would mean that the commander should have some level of control over the system in order to be able to take measures to prevent an attack. It is reasonable to assume that these systems will have a high degree of artificial intelligence that will enable data analysis and decision making to attack in a very short period of time, even a fraction of a second, thus making control of the system impossible. At the same time, the question arises: what knowledge or information should the commander have, how could he use it to prevent the crime from being committed by the system, given the fact that punishment would not be an option? For instance, should previous crimes committed by other systems of the same model or program as the one in use be taken into account, or should a previous system error (for example, a civilian mistaken for a soldier) mean information through which the commander will have to assume that such an error could lead to a violation of another principle (for example, proportionality in the attack), or the responsibility will depend on the commander's individual knowledge of the complexity of the programs?[147] The answer to these questions will depend on the level of responsibility of the commander, and in any case, it will be necessary to have "*knowledge or information*" that would *cause* the need to take "*necessary and reasonable measures*" through which command responsibility could be located, otherwise it would be unfair to punish the commander who could not prevent the commission of a crime or could not achieve punishment for the crime committed.[148]

d) Responsibility of the State

International law creates obligations towards states, thus every committed international illegal act of a state creates responsibility of that state. The Draft Rules on Responsibility of States for Internationally Wrongful Acts deem the state to have committed an internationally wrongful act if a conduct (act or omission) can be attributed to a state under the international law, and such conduct constitutes a breach of an international obligation by which the state is bound.[149]

[145] *Prosecutor v. Kayishema*, Case No. ICTR–95–1–T, International Criminal Tribunal for Rwanda (ICTR), Judgement, 1999, para. 229.
[146] *Prosecutor v. Delalić*, Case No. IT–96–21–A, ICTY, Judgement, 2001, para. 256.
[147] Human Rights Watch, Mind the Gap: The Lack of Accountability for Killer Robots, p. 23.
[148] *Ibid*.
[149] Articles 1, 2, Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, adopted by the General Assembly by Resolution A/RES/56/83 of 12 December 2001. These

Given that international humanitarian law primarily creates obligations for states, each party involved in the conflict "shall be responsible for all acts committed by persons forming part of its armed forces."[150] Thus, a number of authors believe that responsibility will still exist in relation to the crimes committed by the systems of autonomous weapons, and the state that put them into use will be directly responsible for them.[151] Accordingly, the state may be held liable for acts committed by the armed forces resulting from the use of autonomous weapon systems, and may also be responsible if it were to use an autonomous weapon system that has not been adequately tested or reviewed prior to deployment.[152] It must be noted, however, that state responsibility and individual criminal responsibility are not mutually exclusive. On the contrary, the Geneva Conventions stipulate that the responsibility of the state exists in parallel with individual criminal responsibility, and the Rome Statute establishes that the responsibility of the State for violation of international obligations is not contingent on individual criminal responsibility.[153] Additionally, the Committee on International Law emphasizes that "the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out."[154] Vice versa, it cannot be concluded that the State's responsibility for the use of autonomous weapon systems will be sufficient to satisfy the concept of individual criminal responsibility, especially if one also takes into account the use of these systems by non-State actors in non-international armed conflict, where State responsibility could not be located in the side involving non-State actors.

A possible solution to the potential problems regarding the compatibility of these systems with the principle of individual criminal responsibility emerges in the concept of "substantial human control". In this regard, at the Expert Meeting held by the States-Members of the Convention on Certain Conventional Weapons and its Protocols of 1980, all States agreed to maintain a certain level of control over

rules are widely accepted by the States and by international courts and tribunals, and the International Court of Justice has in many cases invoked these rules as part of the corpus of customary international law. See: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004, стр. 195, ["The Wall Case"]; C*ase concerning the application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ, 2007, p. 116.

[150] Article 91 of Additional Protocol I of 1977; Article 3 of the Fourth Hague Convention.

[151] Heyns, 2013, para. 81.

[152] Davidson, p. 16.

[153] Article 51 of the First Geneva Convention; Article 52 of the Second Geneva Convention; Article 131 of the Third Geneva Convention; Article 148 of the Fourth Geneva Convention; Article 25 (4) of the Rome Statute.

[154] ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.

autonomous weapon systems.[155] However, the question of what level of control is needed and how to establish it over the unique features of autonomous weapon systems remains open and is the subject of discussion and interpretation in the international community.[156] Considering the fact that the basic problem that the international community would face in using these systems is a potential legal vacuum in locating individual criminal responsibility in the human factor, it is crucial to direct the dialogue between States and other international actors towards a more detailed definition and specification of this concept. At the same time, urgent international action is essential, directed to addressing the potential areas for possible regulation of the new systems, as well as the revival and reaffirmation of the basic international principles viewed from the perspective of the new technologies. This is needed because autonomous weapon systems are the new reality and herald of the future way of carrying out different types of activities that cover key aspects of human life, not only a distant fictional creation of the human mind, but a feasible reality that awaits us in the near future.

[155] Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, "Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems", CCW/GGE.1/2019/3, 2019, para. 17 (d), para. 22 (b), para. 23 (a) ["CCW Expert Meeting 2019"].
[156] CCW Expert Meeting 2019, Annex III, Possible questions for the GGE to explore in 2019, para. 3.

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Proving specific intent in the *Radislav Krstić* case

Introduction

World War II, being the greatest catastrophe to strike the world, and the mass casualties of the Holocaust, which were a result of that catastrophe, led to the need for human civilization to create a system whose task would be to protect humanity from further suffering in times of armed conflict. The development of human civilization and the lessons learned from the great war based on infliction of death by the Nazi military machinery contributed to the creation of an organization by the international community to prevent further military conflicts, primarily for the purpose of protecting human beings from suffering.

In accordance with the above, several international legal documents have been adopted and codified, such as: the UN Charter, the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide.

Namely, in the period after World War II, the world was already familiar with the terminology, i.e. the term *genocide* is a compound combining the two terms *genos* and *cidare*, with *genos* meaning 'group, race, nation or tribe', while *cide* or *cidare* means 'to kill'.

Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide provides a definition of this international crime. In this document, ***genocide* is defined as acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such**. What must be noted is that since the moment the Convention was adopted, in order for genocide to exist, it has been deemed necessary for a specific intent, i.e. *dolus specialis*, to exist. This can be seen from the text of the Convention, which states "with intent to destroy"… Namely, in order for genocide to exist as a crime, first of all, that act must be systematically planned and carried out accordingly.

The case of *Radislav Krstić* is the first case before the International Criminal Tribunal for the former Yugoslavia in which the genocidal intent was established,

and this resulted in confirmation of the specific intent and therefore the Srebrenica massacre was declared genocide.

Radislav Krstić is a former general of the Army of Republika Srpska, *de facto* at the moment of the operations in Srebrenica, and since July 12 *de jure,* commander of the Drina Corps, which operated on the territory of Srebrenica and had a key role in the operation to cut off Srebrenica and Žepa and capture Srebrenica. He was sentenced to 35 years in prison by the Appeals Chamber, setting a precedent that would be used to convict the rest of Republika Srpska's leadership, including Karadžić and Mladić.

Intention to destroy a group in whole or in part

What makes this case particularly interesting is the fact that here the Tribunal for the former Yugoslavia aims to thoroughly investigate the specific intent. Namely, according to the definition of the Commission of International Law, in order to establish *dolus specialis,* or specific intent, a special state of mind or a special intent with special attention to the consequences of the prohibited act is required.[157] By the same token, the International Court of Justice, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, also emphasizes the fact that a specific intent to destroy is necessary and indicates that "the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, as required by Article II of the Convention on the Prevention and Punishment of the Crime of Genocide." This view has been accepted by the Tribunal for Rwanda, where it has been concluded that *dolus specialis* is necessary to establish that genocide exists. This view is expressed in *The Prosecutor v. Jean Kambanda*.

It has also been established that the intention of the operation does not necessarily need to be committing genocide. To be exact, it is enough for the intention to become a goal during the operation. In several cases, this view has been established in the appeal procedure. Namely, the existence of such a plan would be evidence for determining the intention of the creators of such an action; in fact the plan would be the main indicator of such an action.

It is crucial to note that the court could not determine whether the killings in Potocari on 12 and 13 July were part of the plan to kill men fit for military service. What is indisputable is that the mass killings from 13 July onwards were part of that plan.

[157] http://www.ejil.org/pdfs/8/1/1401.pdf

Furthermore, the court states that in addition to the physical or biological destruction of the group, there were attacks on religious and cultural heritage, which may constitute an intention to physically destroy the group, so the court considers the destruction of mosques and houses as evidence of the intention to destroy the group.[158] Further in the work of the International Commission on International Law, as in the case of *Jelisić*, it was established that "in whole or in part" should be a significant portion of the group from either a quantitative or qualitative standpoint.[159] The Prosecution, on the other hand, added that it does not have to be compulsory to look at the group's global population.

In addition, the Prosecution also relies on the *Akajesu* case, in which the defendant was found liable of genocide (for actions committed in a single municipality) and the decision in the *Nikolić* case. The decision made pursuant to Article 61, which characterizes genocide as an act committed in one particular region in BH, concerns the Vlasenica region.[160] Along the same line is the position expressed in the Jelisić case, in which it is established that the international custom admits the characterisation of genocide even when the exterminatory intent extends to a limited geographical zone.[161]

The Defence concludes that the term *in part* refers to the level of crimes committed, while, to the contrary, the intent refers to the group as a whole. This position of the Defence is in line with the position of the persons who drafted the Convention, which states that any destruction must be carried out with the intention of destroying the whole group as such.

The court, on the other hand, concluded that any act committed with intent to destroy part of the group as such constitutes genocide according to its meaning defined in the Convention.

In several cases before the International Criminal Tribunal for Rwanda, a more precise interpretation of the case gained importance. Thus, in the case of *Kayishema and Ruzindana*, it was established that the intention to destroy the

[158] On the issue of cultural genocide, Raphael Lemkin subsumed under it all forms of destruction that separate the group as a social entity. In the Nuremberg trials, in addition to the physical destruction of the group, they also counted destruction of objects which were the social or cultural basis of the group. Such a broad set-up was established in the case of Ulrich Greifelt, in which the defendant was accused of implementing a systematic genocide program aimed at destroying foreign nations and ethnic groups. This also includes undermining national features. See USA v. Ulrich Gerifelt, http://www.worldcourts.com/imt/eng/decisions/1948.03.10_United_States_v_Greifelt2.pdf

[159] *Jelisić* Case.

[160] IT-94-2R61. Para 34.

[161] *Jelisić* Judgement para. 83.

group in part must have implications for a "significant" number of individuals. The same opinion is adopted in the case of *Bagilishema*.[162]

This is the opinion of the Commission on International Law, as well as of Benjamin Whitaker, according to whom destruction of the group in part is a feature of genocide when it affects a large number of people from the whole group or a significant part of the affected group.[163]

In the *Jelisić* case, it was established that the genocide could be aimed at a limited geographical area. The judgments of German national courts are of a similar opinion. Namely, the Federal Constitutional Court of Germany, in the case of *Nikola Jorgić*, supports the verdict of the Supreme Court of Düsseldorf, in which the destruction of the group in part, as well as the intent to destroy the group in a limited geographical area, indicates that genocide may be limited to a geographical zone, which is in agreement with the Jelisić case.[164] In the verdict against Nikola Džajić, the Bavarian court of appeal found that the genocide took place within the administrative district of Foča.

In the *Krstić* case, the Prosecution claimed that the VRS /Army of Republika Srpska/ troops were fully aware of the fact that killing the men fit for military service would shake the social and cultural foundations of the group. The offensive against the safe area was aimed at ethnic cleansing, which was carried out by killing men and transporting women and children.

According to the Prosecution, this was in agreement with the goal set out in Directive 7, which is to create an impossible state of complete insecurity with no hope of further survival for the people of Srebrenica and Žepa.

Thus, as it will be shown below, the International Criminal Tribunal for the former Yugoslavia concludes that the intention to kill Bosnian Muslims is an intention to partially destroy the group, pursuant to Article 4, and therefore it must be qualified as genocide.

Specific intent

The main point of contention between the Defence and the court concerns the intention of the VRS forces to kill men fit for military service. In particular, they

[162] *The Prosecutor v. Ignace Bagilishema*, Case no. ICTR-95-1A-T.
[163] Para. 29.
[164] *Nikola Jorgić* case, 30 April 1999.

have different views due to the fact that they have different standards when examining specific intent. The fact that the Defence attaches particular importance to the intent or motives for the executions indicates that the Defence has accepted a high standard of intent, while the Court primarily addresses the fact that Serbian forces had to know the consequences the murder would cause and understand them - here a substantially lower standard of intent is applied. Using a factual approach, "[t]he Defence contends that … the VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat."[165] Moreover, the Defence states that if the VRS had intended to destroy the Bosnian Muslim community, they would also have killed all the women and children, who were powerless and already under their control, and would not have wasted resources (time and armed forces) again to eliminate the men of the column.[166]

The court seemed to have evaded examining the motives and backed up the facts presented by the Prosecution that "the murder of all the military aged men would constitute a selective genocide, as the VRS knew that their death would inevitably result in the destruction of the Muslim community of Srebrenica as such."[167]

The court concluded that, within the meaning of Article 4, the intent to kill all the Bosnian Muslims (i.e. the men of Srebrenica) constitutes an intent to destroy in part the Bosnian Muslim group and therefore must be qualified as a genocide.[168]

Namely, while the Defence is guided by the fact that the goal of the Bosnian Serbs was to eliminate the military danger by killing the men, the court found that the selective destruction of the men represented a broader intention for the partial destruction of the Bosnian Muslims. To that end, it was established, pursuant to Article 4, that Bosnian Muslims were "part of a protected group"[169], and that, according to the Tribunal, by destroying men fit for military service, the VRS aimed to destroy the Srebrenica Bosnian Muslim community, a community that is part of the Bosnian Muslim community in the former Yugoslavia.

Motive

Before proceeding with the analysis of the decision, it is necessary to examine the role of motive in the specific intent, in order for genocide to exist. As set out in

[165] *Krstić,* supra note 2, para. 593.
[166] *Id.*
[167] *Id.*
[168] *Id*. para. 598.
[169] *Id.* para. 560.

the domestic criminal law, motive and intent are different concepts. It is explicitly stipulated that "several individuals may intend to commit the same crime, but for different motives."[170] The intent "explains what is being attempted without asking why."[171] Namely, there is no consensus on the extent to which the motive can be considered a resolve to commit genocide, but then again the controversial issue is that the academic and judicial community aim to rely on the incorporation of the motive in the definition of genocide.[172] The purpose of this discussion is to show that this tendency is problematic for certain intents to genocide.

William Schabas, a well-known scholar in the field of international humanitarian law, states that "[t]here is no explicit reference to motive in Article II of the Genocide Convention [Article 4 (2) of the Tribunal statute], and … the words 'as such' are meant to express the concept."[173] A similar view is held by Cecil Tournaye, who believes that without the element of motive, the concept "as such" would have no meaning.[174] In some countries, as, for instance, Norway, the view is held that "it was the fact of destruction which was vital, whereas motives were difficult to determine."[175] On the other hand, many delegates conceded that, under common law, motive is generally irrelevant to guilt, but they argued that genocide was a special case.[176] In addition, Raphael Lemkin expressly mentions the motive: "Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations."[177]

Applying the well-established rules for the implementation of the agreements, the court in the *Krstić* case paid limited attention to the motive and applied the already established standard for determining genocide, primarily in part due to the fact that the Genocide Convention does not explicitly include the motive. In addition, further examination of the case reveals that the method of the court excluding the motive has potentially negative consequences up to the point where such results are inconsistent with the purpose of the interpretative

[170] William A. Schabas, Genocide in International Law: the Crime of Crimes 245 (2000).
[171] *Id.* at 246.
[172] *Id.* at 251-252; see also Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 36 (1997) (stating that "most commentators agree that so long as the requisite intent is established, underlying motives are irrelevant").
[173] Schabas, supra note 51.
[174] Cécile Tournaye, Genocidal Intent Before the ICTY, 52 INT'L & COMP. L.Q. 447, 451 (2003).
[175] U.N. GAOR 6th Comm., 3rd Sess., 69th mtg. at 11, U.N. Doc. A/C.6/SR.69 (1948), quoted in SCHABAS, supra note 51, at 248. Other countries that protested reference to motive included the United Kingdom, Venezuela, Panama, and Brazil. See id. at 4-8, 11.
[176] Schabas, supra note 51, at 249.
[177] Raphael Lemkin, Genocide, 15 AM. SCHOLAR 227, 227 (1946).

principles of the Vienna Convention.[178] Furthermore, the views expressed in the *Krstić* case are inadequate, and an alternatively more feasible understanding of the intent in relation to genocide must be adopted and applied.

Problems related to the exclusion of motive

Given the consequences that seem to involve characterization of the facts, neither the court nor the Defence can prove intent solely on the basis of the results. As Schabas puts it as follows: "The crime of genocide does not require a result, and courts need not determine whether the actual method was well chosen."[179]

To be more precise, the fact that certain results exist does not necessarily mean that those results were achieved when certain actions were performed. Additional analysis is needed for the terminology that characterizes the consequences of the acts to meet the requirements.

The Court's approach, which is attached to and dependent on the results in order to show the intent and states that the VRS should have known about the impact that the killings had on Srebrenica community as a whole, is doubtful and uncertain. Relying on the testimony of a social science expert,[180] the court accepts that "the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society."[181] Namely, the court more specifically interprets the mass executions as a "long-term consequence on the whole group" that "effectively" destroyed the Bosnian Muslims from Srebrenica.

Given the fact that patriarchal structures are common to many societies, the knowledge of what impact the elimination of men would have had is all too obvious. Killing any man that other people depend on, for whatever reason, will have consequences for those who depend on him. The Defence states that "these consequences would remain the same, regardless of the intent underlying the killings and that does not contribute to deciding and determining what the true intent of the killing was."[182] This does not mean that the nature of social structures is irrelevant in determining genocidal intent; far from it. It only states that in certain cases, especially in those where the victims are men and are

[178] See supra note 65, art. 32(b), 1155 U.N.T.S. at 340
[179] William A. Schabas, Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia, 25 FORDHAM INT'L L.J. 23, 47 (2001).
[180] Wald, supra note 10.
[181] *Krstić,* supra note 2, para. 595.
[182] *Krstić*, supra note 2, para. 593.

potential participants in an armed conflict, such an investigation should not be dispositive, as it was in the *Krstić* case.

Intention to eliminate a military threat

One cannot assume that the elimination of men fit for military service means an intention to target the rest of the Srebrenica community, even if the perpetrators were aware of such an outcome. In the context of the military conflict in that territory, it is logical that there is a goal to eliminate the military opponent. At the Nuremberg trials, US General Telford Taylor used a similar argument: "Berlin, London and Tokyo were not bombed because their inhabitants were Germans, British or Japanese, but because they were fortifications of the enemy."[183] Although contrary to the law of war, killing potential soldiers can be seen as an effective tactic to achieve the primary goal, which is to defeat the "fortification of the enemy" such as Srebrenica.

William Schabas cited this analysis in his presentation:

Specifically, the argument of the Prosecution that the killing of men and boys of military age was intentionally aimed at eliminating an entire community ... is too strong a deduction to make on the basis that men and boys were massacred. Can there not be other plausible explanations for the destruction of 7,000 men and boys in Srebrenica? Could they not have been targeted precisely because they were of military age, and thus actual or potential combatants?[184]

It is necessary to note that such characterization of the intent of the VRS, both by the Defence and by Schabas, is in fact an indication of the intent of the VRS. They suggest that without an investigation into the specific intent in the motives, the deductive reasoning of the Court on which they rely is that the perpetrators had to be aware or were aware of the consequences of those actions.

It must be noted that the Defence builds its case in response to genocide allegations on the basis of alternative motives for the executions. Namely, the Defence in its statements presents the evidence and facts which prove that "the VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat"[185], because, for example, "the wounded men were spared".

[183] Leo Kuper, Theoretical Issues Relating to Genocide: Uses and Abuses, in Genocide: Conceptual and Historical Dimensions 31, 33 (George J. Andreopoulos ed., 1994) (internal citations omitted).
[184] Schabas, supra note 71, at 46.
[185] *Krstić*, supra note 2, para. 593.

More significantly, 3,000 members of the column were let through after a general truce was concluded between the warring parties.[186] The Defence also points to the fact that the VRS targeted only the men of military age, while the women, children and the elderly were transported to Kladanj, as opposed to all other genocides in modern history, which have indiscriminately targeted men, women and children.[187]

In his book, Schabas is on a similar line with the Defence. Namely, he asks the question: *Would someone truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenceless men and boys, go to the trouble of organizing transport so that women, children, and the elderly could be evacuated?*[188] He states that if the VRS had left the women, children and the elderly, and had not organized the transport, then the intention for physical destruction of the group would have been justified, but of course such conclusion would depend on many facts that would need to be discovered.

Additional facts on which the court bases its perception that VRS forces perceived Bosnian Muslims as a military threat are: in the years before the fall of Srebrenica, BH Army troops were significantly more numerous than VRS troops and they undertook sabotage activities against the VRS. Moreover, the court states that "on the evening of 11 July 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the BH Army and attempt a breakthrough towards Bosnian Muslim-held territory in the north".[189] While it may be true that "the boys were afraid they would be killed if they were caught by the VRS in Potočari", these facts also have a military connotation that the court ignores. The term *able-bodied* itself is often used to describe men who are capable of military action. Although the column was probably constructed in a way for ARBiH members to protect civilians, the term breakthrough sounds like a manoeuvre.

It should be noted that the court states that VRS forces failed to distinguish between members of the BH Army forces and civilians (men). It is also important to note that the Court found that members of the 28th Division were disorganized. Additionally, many members of the division did not have functional weapons, and "few had real uniforms". In the light of these facts, if the Bosnian Serb forces did

[186] *Id.* para. 593.
[187] *Id.*
[188] Schabas, supra note 71, at 46.
[189] *Krstić*, supra note 2, para. 60.

not have an indication as to which men were soldiers and which were civilians the VRS suspected that all men fit for military service were soldiers.

The court uses the term "military aged" to describe the men, which is part of the opinion of several people in the court, implying that the men were probably part of the resistance and that they were in fact potential soldiers. Of course, international law takes the standpoint of prohibiting the designation of a target group of civilians in the conflict, such as "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms."[190] It is suggested that the VRS forces had a motive to achieve a certain military goal, while the analysis aims to fully investigate the genocidal intent to exterminate Bosnian Muslims by eliminating men of military age.[191]

It is important to note that nowhere in the judgement has the fact that "the alleged intent of the perpetrators … was to 'ethnically cleanse' the region of Muslims"[192] been challenged. The court and the Defence part on the point of whether accomplishing the mission, by killing men fit for military service, the VRS achieved the goal to destroy the Bosnian Muslim community in part, and thus commit genocide; or the intention of the VRS was to seize territory and transport Bosnian Muslims from Srebrenica to another territory. This question of when ethnic cleansing can be categorized as a war crime or a crime against humanity and when it can be categorized as genocide has been raised by both the court and the Defence.[193]

Although the Defence points out the difficulties the court encounters in establishing genocidal intent, i.e. the knowledge of the consequences caused by killing the men on the part of VRS forces, the court categorically finds the genocidal intent in the executions. Namely, the answer of the court is:

***The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group*.[194]**

It is necessary to say that the jurisprudence of the tribunals (the Tribunal for Rwanda and the Tribunal for the former Yugoslavia) has so far not set a clear

[190] Geneva Convention (IV) Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 137 [hereinafter GPW].
[191] Schabas, supra note 51, at 254 (stating "where the defense can raise a doubt about the existence of a motive, it will have cast a large shadow of uncertainty as to the existence of genocidal intent").
[192] Schabas, supra note 79, at 45-46 (quoting *Krstić*, supra note 2, para. 592).
[193] Tournaye, supra note 55, at 447.
[194] *Krstić*, supra note 2, para. 595.

strategy how to proceed when different conclusions are drawn about the same events. In these circumstances, judges have complete discretion. In such cases, when certain evidence is contradictory to particular conclusions the court must apply the standard beyond reasonable doubt and withdraw such incrimination.

This opinion suggests that the Defence does not have to prove the perpetrator's intent; it is enough to raise a reasonable suspicion that the Bosnian Serbs intent to kill the men was genocidal. This is also in line with the view of a scholar who believes that "there is a well-established principle that allows the people of the Defence to apply the benefit of reasonable doubt where the applicable law is not clear."[195] Instead, the vagueness regarding the genocidal intent and the general sense that the motives are not relevant to the genocidal intent allows the court to establish its initial approach.

Ambiguity pertinent to the definition

The second element in relation to which the court's approach raises concern is the freedom that the court itself takes in connection with the other vague elements of the definition of genocide. The effect of this approach is such that it has expanded the contexts in which the genocidal intent can be located.

In part

A key element of the definition of genocide is the group's connection to the term *in part*. Namely, the court in this case rejects the Prosecution's categorization of the target group as "the population of Bosnian Muslims from Srebrenica."[196] Namely, the court finds that although the Constitution of the former Yugoslavia recognised Bosnian Muslims as a different "nation", the highest political and military authorities of the Bosnian Serbs distinguished Bosniaks as a specific national group.[197] Also, they are part of a protected group with only one distinction, and that is the geographical location, which is not a criterion according to the Genocide Convention.[198]

Posing the fact in such a way that Bosnian Muslims from Srebrenica are considered part of a protected group sets the definition of genocide in a problematic manner. Namely, the court finds that the killing of Bosnian Muslims

[195] David L. Nersessian, The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 TEX. INT'L L.J. 231, 276 (2002).
[196] *Krstić*, supra note 2, para. 558.
[197] *Krstić,* supra note 2, para. 559
[198] *Krstić,* supra note 2, para. 559

of military age, who are part of the population of the Bosnian Muslims from Srebrenica, means that the forces of VRS wanted to destroy the Srebrenica Bosnian Muslims, who are part of the Bosnian Muslims as a group. The court here effectively finds that the destruction of part of the group constitutes genocide. It can be noticed that this set-up is based on application of a standard from some other cases brought before the court. Thus in the *Jelisić* case, the court finds that the genocidal intent may be manifest in "the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such."[199] A similar view is held by the Commission of Experts, set up by the Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia.[200]

A part of the commission's report states: "Similarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against attacks of the enemy, particularly if the leadership is being eliminated as well."[201] Although the report states the importance of leadership for the group, that report also states the importance of combatants for the group, i.e. that they represent a significant segment of the group's population, so that killing these individuals could qualify as genocide, assuming the rest of the group was also subjected to such an act. It can be concluded that the report of the Commission and the position of the court are on a similar line.

Certainly, this view expressed in the Commission report is limited because, above all, it is not entirely consistent with the practice of the Tribunal for the former Yugoslavia; primarily due to the fact that the events in Srebrenica are inconsistent with the report statement due to the fact that the able-bodied men killed were "a multitude of Bosnian Muslims of military or political importance to the enclave who successfully escaped capture, as is often the case in war - the significance of the person guaranties the greatest certainty for survival."[202] Leaders captured on both sides were swapped during the conflict.[203] In the case *the Prosecutor v. Sikirica*, where the killings in the concentration camps were put under scrutiny, the court found that „the victims had no special significance for their community, except to the extent that some of them were of military age, and therefore could

[199] *Jelisić*, supra note 98, para. 82.
[200] See, Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, para. 94, U.N. Doc. S/1994/674 (1994).
[201] *Id.* para. 94.
[202] JAN WILLEM HONIG & NORBERT BOTH, SREBRENICA: RECORD OF A WAR CRIME 58 (1996). 106. *Id.*
[203] *Id.*

be called up for military service."[204] Namely, as regards the activities in this concentration camp, the court found that it was not genocide, primarily because the killings were limited in number and that it was necessary to induce "significant consequences for the survival of the Bosniak population."[205] This case will raise several questions, above all whether the militarily capable individuals represent a significant part so as to fall under the categorization of genocide.

Such confusion is not surprising, primarily due to the way men fit for military service were categorized and the fact that the segment of significance was adopted as an approach to determine genocidal intent. First, as stated in the Expert Report, the killing of able-bodied men would have consequences for the survival of the community, given that these men could be called up for military service. But excluding men fit for military service from a set of segments which could help define genocide would be inconsistent with the fact that the destruction of defences, including military personnel, is part of the war itself. Although killing soldiers under certain conditions is a war crime, identifying it as genocide is unrealistic given the nature of the war.

Schabas specifically cites the second reason: why the court in the Sikiraca case dismissed the argument of the men of military age being a "significant part". The "significant part" is an argument in itself, due to the fact that it can lead to an arbitrary assessment by judges "of how important one or another group may be to the survival of the community."[206] It is more logical to aim for women and children than community leaders or men fit for military service if the goal is to limit the group's continued physical survival. Targeting of community leaders and men fit for military service in brutal situations can be limited to defeating the enemy and submitting to a particular policy. Such goals do not fall under the categorization of genocide. Moreover, the protection of the lives of women and children suggests that the enemy is acting on the assumption that the target group will continue.

The third shortcoming of the "substantial segment" as an approach is primarily the acceptance that the destruction of the group in part or part of the group constitutes genocide; here, especially, logic can go to infinity. For example, if the VRS forces killed only the military leaders, but the court found that such an act destroyed the capacity to defend the rest of the men, and thus the care for their community, which would lead to the population being forcibly transported

[204] *The Prosecutor v. Sikirica*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, para. 80 (Sept. 3, 2001) [hereinafter *Sikirica*].
[205] *Id.*
[206] Schabas, supra note 71, at 45.

without a possibility to ever return to that territory and continue life there. Does such a hypothetical destruction of part of a group constitute genocide? Such a set-up is difficult to accept. It distorts the meaning of genocide.

Destruction

In addition to "stretching" the meaning of "group in part", the court in the *Krstić* case problematically "stretches" the meaning of the term *destruction* in correlation with the definition of genocide. Tournaye believes that "[t]he ICTY judgments have consistently found that the destruction referred to under the Genocide Convention only covers a physical or biological destruction."[207] The decision in the *Krstić* case supports such a view,[208] citing the analysis of the Commission on International Law: "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group."[209] This is in line with the Eichmann case, in which the Jerusalem District Court made a distinction between the Nazi forcible elimination of the Jews and the "sense of total extermination", adopted in the 1941 'Final Solution'.[210]

Whereas most men were physically destroyed, women, children and the elderly survived, as did several wounded men. In concluding that genocide was committed, the court perceives the view of the extermination of Bosnian Muslims from Srebrenica in a figurative sense, contradicting the interpretation of the literal meaning of the term "destruction". The Prosecution stated that "what remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. It's a community in despair; … it's a community that's a shadow of

[207] Tournaye, supra note 55, at 454 (citing *Krstić*, supra note 2, para. 580; *Jelisić*, supra note 98, paras. 78-83; *Sikirica*, supra note 107, paras. 63-86.

[208] *Krstić*, para. 580 ("[c]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group.") The Trial Chamber took care to indicate that it had reached this conclusion "with due regard for the principle of *nullum crimen sine lege*." *Id.* According to the Court, there have been several recent attempts to interpret "destruction" in a more general sense. *Id.* 7 577-580. The 1993 United Nations General Assembly Resolution labelled ethnic cleansing as a form of genocide. Id. 8 578 (refers to UN GAOR, 47th Session, UN Doc. AG/Res./47/121).

A / Res / 47/121 (1993)). The notion of destruction as implied by Raphael Lemkin, the founder of the word "genocide", also seems to be more open to interpretation. He writes: "Genocide does not necessarily mean the immediate destruction of a nation. . . . It is intended rather to signify a co-ordinated plan of different nations aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." Raphael Lemkin, AKIS.

[209] *Krstić*, supra note 2, para. 576 (citing International Law Commission Draft Code, at 9 0- 91).

[210] A-G *Israel v. Eichmann* (1961), in 36 International Law Reports 18, 104 (E. Lauterpacht ed., 1968).

what it once was."[211] The conclusion given by the Court in relation to the community itself is that "the elimination of virtually all the men has made it almost impossible for the Bosnain Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives. ... They have been forced to live in collective and makeshift accommodations for many years ... The majority of refugees were unable to find work."[212]

The court also said that any possibility of establishing a Bosnian Muslim community in Srebrenica on that territory had been eliminated by Bosnian Serbs.[213]

When using terminology such as the *physical destruction of the population* or *effective destruction of the community itself*, the community recognizes the fact that there is a figurative approach to the term *destruction*. To be more precise, by using subtle language, the court interprets the consequences of the Srebrenica massacre so as to be commensurate with the meaning of "destruction" under Article 4 (2).

* * *

Given the above, the court's reasoning in establishing genocide runs into two problems. First of all, the exclusion of the motive is problematic – the interpretation of the facts of the Court in relation to the genocidal intent is too selective, given that the Defence provides an alternative to the intent of the Bosnian Serbs. Instead of aiming to destroy some Bosnian Muslims, the VRS aimed to destroy a military threat that existed in the region, while the transfer of other civilians from Srebrenica could be seen as a plan to remove an ethnic population and occupy the region without committing genocide.

The second problem is the reasoning of the court, primarily in the way the term *specific* from Article 4(2) has been interpreted. As stated, the group "in part" does not allow drawing a conclusion that the destruction of "part of the group in part" constitutes genocide. In relation to this, the court also states that the group must be "effectively destroyed". Such a broad range of interpretations poses a problem in interpreting the term *genocide*.

[211] *Krstić,* supra note 2, para. 592.
[212] *Id*. para. 91.
[213] *Id.* para. 93 (citing testimony of Jasna Zečević, Director of Vive Zene, a non-governmental organization that provides psychosocial support for Srebrenica survivors).

The problem with the court's approach suggests that in some cases, especially those relating to the destruction of the group and genocidal intent, the latter cannot be completely separated from the investigation of the motive, where a whole host of actions can reasonably lead to an explanation that acts were committed with genocidal intent. Such actions must, in particular, be subject to rigorous consideration and the assessment of other evidence and a precise explanation of the parties' approach to terminology must be sought. Evaluation would be less relevant in situations when the evidence evokes to a lesser degree the intent to physically destroy the protected group as a whole or in part and the motives are being examined or discriminatory grounds established. Such an approach to genocidal intent is in line with the dual purpose of the Genocide Convention, above all to condemn ethnic and religious discrimination and to preserve ethnic and religious differences.[214]

Conclusion

The consequences that World War II had on the world and the Holocaust resulting from the distorted Nazi ideology led to creation of the first legal mechanisms to prevent and punish crimes against humanity, as well as the categorization of mass atrocities such as genocide. Namely, in the first years after World War II, the Convention for the Prevention and Punishment of the Crime of Genocide was adopted - the first international legal document that lays the foundations for thought and action of lawyers around the world.

A special feature of the Convention is the specific intent. It is a key postulate in the investigation of genocide as a crime above all crimes. Namely, in accordance with its definition in the Convention, in order for a crime to be categorized as genocide, it is necessary that the perpetrator has a specific intent to commit the crime.

What happened to Srebrenica in the summer of 1995 caused a radical disruption in the basic postulates of the international order, and thus put the international criminal law to the test. One such specific example is the case of Radislav Krstić, the person directly involved in the July events in Srebrenica.

[214] Aleksandar K. A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 COLUM. L. REV. 2259, 2265 (arguing for the genocidal intent to be based on knowledge that the victim group "is in danger of extermination even though the intention of the group committing such an act is not clear"). Without fully supporting Greenawalt's approach, his analysis supports the idea that motive inquiries would be of smaller importance in cases involving (threat of) physical destruction of a large or significant protected group.

In this particular case, the arguments of the Defence and the Prosecution regarding the specific intent and its examination came into a clash. The Court relied on the interpretation expressed by the Tribunal for Rwanda, as well as on the opinion of the Commission on International Law.

The Court finds the specific intent in the fact that the VRS forces had to know that killing of the men from the Bosnian Muslim community in Srebrenica would lead to its erosion and that if such a goal were accomplished the community would not be able to rebuild itself. This view has been commented on by several lawyers. Especially categorical in this respect is William Schabas, who believes that it was not their intention, primarily due to the organized transport of women, girls and the elderly.

Even though different views ensued from this, the case of *Radislav Krstić* is crucial due to the fact that the court does not dwell on examination of the motive, but derives the intent based on the result achieved by the VRS forces, which is the fact that even up to the present day the community of the Bosnian Muslims in Srebrenica cannot rebuild itself entirely and this is certainly in agreement with the position of "... creating an ethnically clean living space for the Serbian people on both sides of the Drina River."

This case is of crucial significance due to the fact that the court assumes a key role in the broad interpretation of the Convention, and thus sets a precedent that will be followed by the court in future cases.

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Statutes of International Courts as the source of law

Introduction

Two questions arise when we talk about sources of the law. What are the material and what are the formal sources of the law? The material sources of the law are social factors, i.e., social reasons that lead to the creation of laws, from which laws springs forth.[215] Formal sources of the law on the other hand are the forms in which the laws are expressed. Thus, these are acts of legislation that contain the norms of the law, by which the subject of a branch of the law is regulated.

Of the numerous classifications of the sources of law, the classification into internal (national) and international sources of law are important for the subject of this paper. Internal sources are found in national judicial legislative acts. International sources are legal acts brought under the auspices of universal or regional international organizations (conventions, declarations, resolutions, models of laws, etc.), or adopted by an agreement that is the will of two or more states (bilateral, regional and multilateral international agreements). A significant place among international sources of law today is held by the statutes of the international criminal courts.

Statutes of the Nuremberg and Tokyo tribunals

After the end of World War Two, 8 August 1945 the Allied forces[216] concluded the London Agreement[217] and thereby established an International Military Tribunal for the trial of war crimes committed by the Nazis. This document consists of seven parts and 30 Articles and contains material and procedural provisions. Article 6 of the Statute envisages the jurisdiction of the Tribunal for trying crimes committed against peace, war crimes and crimes against humanity, prescribing the substance of these crimes. It can be said that the aforementioned article represents an actual criminal codex “in miniature.” Furthermore, the Statute establishes several very significant principles for international criminal law (the

[215] Momčilo Dimitrijević, Miroljub Simić, *Uvod u pravo* /An Introduction to the Law/, Niš 2001, p. 217.
[216] USA, Great Britain, France and the USSR.
[217] This agreement is known as the London Charter or Nuremberg Charter.

right to a fair trial, responsibility for joint criminal enterprise, command responsibility and others).

The Tribunal's Statute envisages the following forms of criminal sanctions: imprisonment (which may be of a certain duration or life) and the death penalty (Article 27). The criminal procedure envisaged by the Statute of the International Military Tribunal is closer to continental law rather than Anglo-American. This is in particular visible for the rules of evidentiary proceedings. Functional jurisdiction is entrusted to the trial chamber (without the participation of judge-jurors). The function of indictment lay in the hands of four prosecutors, one from each of the Allied powers. An appeal organ was also envisaged, in the form of the Allied Control Council. It is a curiosity that the Statute, in addition to individual criminal responsibility, also envisaged responsibility for criminal organisation. A total of 24 people and seven organisations were indicted in the Nuremberg process.[218]

Article 6 of the Nuremberg Tribunal is one of the most important articles of this Statute, because it explicitly determined the three categories of crimes: crimes against peace, crime against humanity and war crime.[219]

(1) Crimes against peace – When referring to crimes against peace, it is important to mention that what is important for the commission of crimes against peace are certain undertakings in connection with aggressive warfare, for instance: planning, preparing, initiation or waging a war of aggression. Such actions automatically result in violations of international treaties, agreements and assurances. Furthermore, a crime against peace may also represent any action for the purpose of participation in a conspiracy or common plan for the accomplishment of any of the foregoing.

(2) Crimes against humanity – Crimes against humanity are criminal acts that it is possible to commit even in times of peace. They encompass actions such as: extermination, capture of civilians, murder, deportation, or other acts against the civilian population committed both before and during the war. In addition to the aforementioned, the crime against humanity also encompasses action taken for the purpose of persecutions on political, religious or racial grounds, under the condition that the persecution was conducted during the commission or in connection with the commission of any of the crimes within the jurisdiction of the Nuremberg Tribunal. It would be good to emphasise here that the Nuremberg

[218] The Nazi Party, the *Schutzstaffel* (SS), the *Sichereitsdienst* (SD), the Gestapo, the *Sturmatteilung* (SA), and the Supreme Command of the German Party (OKW).
[219] Igor Šabić, *Krivični Sud za bivšu Jugoslaviju* /Criminal Tribunal for the former Yugoslavia/, Banja Luka 2013, p. 4.

Tribunal Statute does not refer to genocide outright but includes it descriptively within the framework of the crime against humanity. This is why it is possible to conclude that in some manner the crime against humanity represents the foundation for the development and later explicit defining the concept of genocide. One other important characteristic of the crime against humanity is linked to its temporal dimension. Specifically, although not explicitly stated in the text that these crimes can be committed both in time of peace and war, we can however reach such a conclusion because of the formulation "before or during the war." Furthermore, what additionally characterises the crime against humanity is the fact that the principle of "the supremacy of international law over national law" is valid in its provisions.[220]

(3) War Crimes – War Crimes are a specific category of criminal offences that encompass violations of the laws or customs of war. War crimes, just as crimes against humanity, include murder and the deportation of the civilian population from occupied territory for conducting forced labour or the achievement of other purposes. In addition to the acts that are identical for war crimes and crimes against humanity, the following also constitute war crimes: ill-treatment, murder or ill-treatment of prisoners of war or persons at sea, plunder of public or private property, killing of hostages, wanton destruction of cities, towns or villages not justified by military necessity.

Of particular importance for the Nuremberg Tribunal Statute is Article 7. This Article prescribes that in so far as the accused certain official functions, regardless of whether they are an official in the Government or a representative of that state, this official function, shall not be reason for freeing them from responsibility or mitigating punishment. On the other hand, should the Court establish that a certain person committed a specific crime pursuant to an order from their superior, this may not free them from punishment, but should the Court deem that reasons of fairness call for it, such facts may be considered in mitigation of punishment. As for sanctions, the possibility was left up to the Tribunal to impose upon conviction the penalty of death or such other punishment, that considering all the circumstances of the case may be considered to be just.[221]

The International Military Tribunal for the Far East, with its seat in Tokyo, was modelled on the Criminal Tribunal in Nuremberg and established in 1946. The

[220] Branislav Nikolić, *Međunarodno krivično pravo*, /International Criminal Law/ Maj 04, 2011, p. 6.
[221] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 5.

Tribunal in Tokyo had jurisdiction to try Japanese politicians, officers and diplomats for three groups of crimes. The first group consisted of crimes against peace, the second group consisted of crimes against humanity and the third group, war crimes that were a violation of the laws and customs of war.[222]

The specific significance of the Tokyo Statute and in particular the Nuremberg Tribunal Statute and the Nuremberg judgement is reflected in the fact that these documents contain a multitude of the general principles that were designated as the universally valid principles of international law in Resolution 95 of the General Assembly of the United Nations in 1946.[223] Specifically, the principles are as follows: 1) Any person who commits a crime under international law is responsible therefor and liable to punishment; 2) The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relive the person who committed the act from responsibility under international law; 3) The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law; 4) The fact that a person acted pursuant to order of his Government or of a superior does not relive him from responsibility under international law, provided a moral choice was in fact possible to him; 5) Any person charged with a crime under international law has the right to a fair trial; 6) The following crimes are punishable as crimes under international law: crimes against peace, war crimes and crimes against humanity; 7) Complicity in the commission of a crimes enumerated in the preceding item shall also be deemed a crime under international law.[224]

The statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda

With Resolution 827 of 15 May 1993, the UN Security Council adopted the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[225] (ICTY). The legal foundation for

[222] The decision to punish the Japanese aggression was taken on 1 December 1943 following the Cairo Conference in which American President Roosevelt, Chinese President Chiang Kai-shek and British Prime Minister Churchill took part, with the particulars specified in the Japanese Instrument of Surrender of 2 September 1945; Dragan Jovašević, *Međunarodno krivično pravosuđe - između prava, pravde, pomirenja i prava žrtava* /International Criminal Justice – between the law, justice, reconciliation and victims' rights/, Niš 2011, p. 541.
[223] Borislav Petrović and Dragan Jovašević, 2010, Sarajevo: Sarajevo University Law School, p. 75.
[224] [224] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 5.
[225] International Criminal Tribunal for the former Yugoslavia, ICTY.

the establishment of this *ad hoc* tribunal is found in Chapter VII of the UN Charter. The Tribunal has jurisdiction to try the following types of crimes: serious violations of the Geneva Conventions of 1949 (Article 2), violations of the laws and customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5).[226] Unlike Nuremberg, the ICTY Statute envisages individual, personal criminal liability for physical persons only. Furthermore, the Statute establishes responsibility for crimes committed by subordinates on order of superiors. Legal persons, i.e. states or other organisations, cannot answer before the Tribunal at The Hague. The principles of command responsibility and *non-bis-in-idem* were not forgotten either.[227] The function of conducting trials was entrusted to Trial Chambers and Appeal Chambers, which consist of elected judges. The accusatory function was conducted by the Prosecutor.

Article 7 is one of the most important articles of the Statute of this Tribunal. Specifically, it deals with individual criminal liability and in this context the Article prescribes the following:[228]

(1) The official position of any person accused of a crime under the jurisdiction of the Tribunal, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment when determining punishment.

(2) The fact that any specific was committed by a subordinate does not relieve his superior of criminal responsibility if he – the superior in the specific case, knew or had reason to know that the subordinate had committed or was about to commit an act that comes under the jurisdiction of the Tribunal or had done so and (the superior) failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The distinction of the above provisions is that they proclaim the institution of command responsibility, whereby it is of particular importance that they (the above provisions) also establish the possibility of criminal responsibility for acts committed out of negligence.

[226] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 6.
[227] By this principle, it is forbidden to try the same person for the same crime before a court of national jurisdiction if he was already tried before the ICTY. Contrary to this, if someone was previously tried by a national court for the same crime, under certain conditions he can be tried again by the ICTY (Article 10, paragraph 2).
[228] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 7.

(3) The fact that a subordinate committed a crime that is under the jurisdiction of the Tribunal, pursuant to an order of his immediate superior or the Government of his state shall not relieve him of criminal responsibility but may be considered as a valid reason for mitigation of punishment if the International Tribunal determines that justice so requires.

The procedural portion of the ICTY Statute prescribes that the prosecutor shall initiate proceedings *ex officio*. The pretrial proceedings consist of the investigation phase and indictment review phase. It is followed by the trial, as the central phase of the proceedings, which encompasses the evidentiary proceedings as its most important part. The Statute envisages the rights of the accused during proceedings (Article 21), and provisions for the protection of the victims and witnesses (Article 22). The spectrum of criminal sanctions envisaged by the ICTY Statute comes down to one main penalty – imprisonment, and one additional penalty – the return of proceeds acquired by criminal conduct. The Statute envisages two legal remedies: appeal and application for review of the judgement. Finally, Article 27 of the ICTY Statutes prescribes the rules on enforcement of the sentence. Considering all of the above, it is evident that the ICTY Statute is a collection of material, procedural and enforcement law. In theory and practice the question arose of the legal binding nature of UN resolutions by which the ICTY and its Statute were established. The position was adopted that they enjoy the legal force identical to international treaties.[229]

Very similar provisions are contained in the Statute of the International Criminal Tribunal for Rwanda,[230] which was founded by UN Security Council Resolution 955 in 1994.

Statute of the International Criminal Court

The permanent International Criminal Court was also created by an international treaty, known as the Rome Statute, which came into effect on 1 July 2002. By 2002, the Statute was ratified by 60 United Nations member states. The ICC Statute envisages the jurisdiction of this court for the crime of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and the crime of aggression.[231] The envisaged jurisdiction for the crime of aggression will be

[229] See Antonio Cassese, *Međunarodno krivično pravo* /International Criminal Law/, Belgrade 2005, p. 30.
[230] International Criminal Tribunal for Rwanda, ICTR.
[231] Borislav Petrović and Dragan Jovašević, 2010, Sarajevo: Sarajevo University Law School, p. 219; Dragan Jovašević, *Pojam, elementi i karakteristike međunarodnog krivičnog prava* /The Concept, Elements and Characteristics of International Criminal Law/, *Strani pravni život* /Foreign Legal Life/, Belgrade, No. 1-2, 2005, pp. 277-298.

implemented only after the definition of this crime is adopted. The institution of limitation of statute is not envisaged for the above crimes, but it will be applicable only in connection with crimes committed after the Statute of the International Criminal Court came into effect. The Statute thoroughly envisages the elements of the substance of these crimes. Under the provisions of the Statute, the Court has jurisdiction over acts committed after the ICC Statute came into effect. The authorised prosecutor initiates proceedings *ex officio*, and it is possible defer investigation or prosecution (Article 16). In Part II of the Statute, the basic principles of criminal law (*nullum crimen sine lege, nulla poena sine lege*, non-retroactivity and others) are envisaged. The following principles are defined in line with the previously adopted statutes of the *ad hoc* tribunals: *non-bis-in-idem*, command responsibility and non-applicability of statute of limitations for the most heinous crimes. The material portion of the Statute contains the grounds for excluding criminal responsibility. The organisational portion of the Statute consists of provisions for trial chambers, Registry and prosecutor. Part V of the Statute is devoted to procedural provisions. The prosecutor is in charge of the investigation along with an appropriate role of the Trial Chamber. Envisaged is the possibility for issuing the Warrant of Arrest as a measure to ensure the appearance for proceedings. The trial is conducted before the Trial Chamber. For the purpose of procedural equality, the accused is provided with adequate rights and the presumption of innocence is acknowledged, while adequate protection is also envisaged for the victims and witnesses. The system of criminal sanctions consists of the penalty of imprisonment up to 30 years, life sentence, fine and confiscation of property. Appeal and review are the legal remedies. The Statute also prescribes the provision of international judicial assistance (Part IX) and enforcement (Part X).

The criminal responsibility of physical persons for acts under the jurisdiction of the Court, pursuant to the Statute of the International Criminal Court will exist in the situation when the specific crime was carried out in one of the following manners:[232]

(1) As an individual;

(2) Jointly with another or through another person, regardless of whether that other person is criminally responsible;

[232] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 10.

(3) Orders, solicits or directly or indirectly induces the commission of a crime (all applicable if in fact the crime occurs or is at least attempted);

(4) In respect of the commission of the crime of genocide, directly and publicly incites others to commit genocide;

(5) If the person's deeds, including aiding and supporting or otherwise, contribute to the commission of a crime or its attempt, abet its commission, or if the person engages actively on providing the means for its commission;

(6) If the person intentionally (but not with negligence) contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose;

(7) If the person actively takes any actions to commit a crime, but the crime does not occur because of circumstances independent of the person's intentions;

Here it would do well to emphasise that the Statute of the International Criminal Court envisages the possibility that a person may be not be liable for punishment for the attempt to commit a crime if that person completely and voluntarily gave up the criminal purpose, or if in any other manner prevented the onset of consequences that would occur if the crime was accomplished. This shall apply only if the person completely and voluntarily gave up the criminal purpose.

This statute too envisages responsibility and penalties for all physical persons regardless of the person's status or the function they performed at the time of commission of a crime under the jurisdiction of the Court – "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility, nor shall it, in and of itself, constitute a ground for reduction of sentence."[233]

The ICC Statute represents the most comprehensive legal act with the power of an international treaty that regulates the entire penal and judicial material of international criminal law. Bearing in mind the provision of Article 194 of the Constitution of Serbia, by which all ratified international treaties form part of the legal order with legal force greater than law or other legal documents of lesser

[233] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 11.

legal power, it stems that the statutes of the ICC and ICTY are sources of law in Serbia with legal power equivalent to other ratified international treaties.

Statute of the Special Court for Sierra Leone

The civil war that wrought destruction upon Sierra Leone at the end of the 20th century and the beginning of the 21st had as its objective the attainment of economic power over natural resources in the fight between the government and rebel forces. The peace agreement was signed in the capital city of Togo, Lome, in 1999. Still, the above agreement did not mean the end of the fighting. A significant decline in the amplitude of war activities in this state came about only in 2002 when the Special Court for Sierra Leone was founded on the basis of an agreement signed in the capital of Sierra Leone, Freetown, between the Government of Sierra Leone and the United Nations.[234]

The Special Court for Sierra Leone was the third *ad hoc* international criminal court, following the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. However, in comparison to the ICTY and ICTY, the Special Court for Sierra Leone had certain specific characteristics. This was the first international criminal court with the participation of both domestic and international (UN) judges involved in its work. Furthermore, unlike the ICTY and ICTR, the Special Court for Sierra Leone, had the possibility to try the accused for both international crimes and crimes prescribed by national legislation. Also, the Special Court for Sierra Leone had joint jurisdiction with the national courts of Sierra Leone, whereby the Special Court and the national courts of Sierra Leone could try persons for the same crimes. Still, the Special Court reserved the right to request transfer of jurisdiction from the domestic courts, by which it factually expressed its supremacy over the national court organs.[235]

As for the jurisdiction of the Special Court, it should be noted that this Court has jurisdiction "to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law committed in

[234] This recommendation is an integral part of the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone from October 2000. Based on this Report, the Security Council adopted Resolution 1370/2001 requesting that the government of this African State expedite the process of establishing a special criminal court together with the UN Secretary-General and High Commissioner for Human Rights. Dragan Jovašević, *Međunarodno krivično pravosuđe - između prava, pravde, pomirenja i prava žrtava*, Niš 2011, p. 561.
[235] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 8.

the territory of Sierra Leone after 30 November 1996."[236] It is precisely this provision that is the reason for the fact that all the crimes under the jurisdiction of the Court pursuant to its Statute can be classified in two large groups:

The first group consists of acts that are crimes under international law;

The second group consists of acts that are crimes under Sierra Leonean law;

Specifically, the first group includes: crimes against humanity, violations of the common Article 3 of the Geneva Conventions, violations of the Additional Protocol II, and other serious violations of international law.

Specifically, the second group includes: crimes related to the abuse of girls and crimes related to the destruction of property.[237]

Considering the fact that many children between 12 and 18 years old took part in the war, the question of their criminal responsibility arose. This problem was resolved by Article 7 of the Special Court's Statute. Specifically, this article exempts from criminal responsibility all persons who at the time of commission of crimes were younger than 15 years. On the other hand, for persons between the ages of 15 and 18 years, the Court was ordered that he or she shall be treated with dignity, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards and basic freedoms.[238] A particular characteristic was expressed by the fact that should the Special Court establish the responsibility of a person between 15 and 18 years of age, it must not hand down a sentence of imprisonment, but one of the following pre-arranged measures: orders for community service, care guidance and supervision, correctional, educational and vocational training programmes, counselling, foster care, programmes of disarmament, demobilization and reintegration or programmes of child protection agencies, and approved schools.

[236] Miodrag Simović, Milan Blagojević, *Međunarodno krivično pravo* /International Criminal Law/, University Law School, Banja Luka, 2007, pp.29-31.
[237] Igor Šabić, Criminal Tribunal for the former Yugoslavia with separate review of the Markač and Gotovina judgements, Banja Luka 2013, p. 9.
[238] Marisabel Škorić, *Tužitelj pred međunarodnim kaznenim sudovima* /Prosecutor before international criminal tribunals/, *op. cit.*, pp. 42/44.

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War-time Destruction of Cultural Heritage in Bosnia and Herzegovina: Impunity for Cultural Cleansing

Introduction

Before 1992, Bosnia and Herzegovina (BH) was a part of the Socialist Federative Republic of Yugoslavia[239] (SFRY) that also consisted of five other republics (Serbia, Croatia, Slovenia, Macedonia and Montenegro) and two autonomous provinces within Serbia (Vojvodina and Kosovo). Of all the republics, BH was the most ethnically diverse.

In early 1990, the SFRY began to break up violently following the first multi-party elections and independence referendums, held first in Slovenia and Croatia in 1991, and in the spring of 1992 in BH.[240]

When the election was held in Bosnia and Herzegovina in December 1991, new parties representing the three ethnic groups (Bosniaks - Bosnian Muslims,[241] Croats and Serbs) won seats in rough proportion to their share of the population.[242] A tripartite coalition government was formed; however, this did not prevent the escalation of ethnic tensions around the issue of independence.

A referendum on the independence of BH (separation from the SFRY) was held on 29 February and 1 March 1992. Of the nearly two-thirds of the electorate who took part, the overwhelming majority voted in favour of independence, which was officially proclaimed on 3 March, 1992.

[239] https://www.britannica.com/event/Bosnian-War.
[240] https://www.nytimes.com/1992/03/02/world/turnout-in-bosnia-signals-independence.html.
[241] The Bosniaks were known as Muslims until the 1992-1995 war. The term Bosniaks (*Bošnjaci*) should not be confused with the term Bosnians (*Bosanci*), which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin. Footnote 1 of the ECHR Judgement in the Case of *Sejdić and Finci v. Bosnia and Herzegovina*, (Applications nos. 27996/06 and 34836/06), 22 December 2009, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-96491%22]}.
[242] http://www.statistika.ba/.

In May 1992, BH became a member of the United Nations.[243] The war that broke out at the same time lasted until December 1995, and between 97,000 and 110,000[244] people were killed and some 2.2 million were displaced.[245] The killings and displacement were later judicially confirmed to constitute acts of ethnic cleansing.[246]

Ethnic cleansing[247] can be generally defined as an attempt to create ethnically homogeneous geographic areas through the deportation or forcible displacement of persons belonging to particular ethnic groups. Ethnic cleansing sometimes involves the removal of all physical vestiges of the targeted group through the destruction of monuments, cemeteries, and houses of worship. Such practice can also "…constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention."[248]

This paper will try to shed more light on the issue of prosecution of heritage destruction as part of ethnic cleansing in particular in relation to the heritage bearing importance for the identity of a group, be it cultural, religious or historical.

During the 1992-1995 war in BH, many religious and cultural objects on its territory were damaged or destroyed. This had detrimental effects on the BH tradition, history and culture and its effects are present to this day.

Judging by the number of prosecuted cases in relation to these crimes, the protection of national heritage in the context of war is rarely given sufficient importance. The issue remains in the shadow of protecting people and rendering justice for heinous crimes against human victims.

[243] UN Security Council Resolution 757, 30 May 1992, available at http://unscr.com/en/resolutions/757.
[244] http://news.bbc.co.uk/2/hi/europe/6228152.stm.
[245] https://www.unhcr.org/4bbb422512.html.
[246] ICTY: Radoslav Brđanin: *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber Judgement, 1 September 2004, paras 548, 551 and 552, confirmed by the Appeals Chamber Judgement, *IT-99-36-A*, 3 April 2007, para 211; Duško Tadić: *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber Opinion and Judgement, 7 May 1997, para 373 and Trial Chamber Judgement, 14 July 1997 paras 38 and 56, confirmed by the Appeals Chamber Judgement, IT-94-1-A and IT-94-1-A *bis*, 26 January 2000; Naletilić and Martinović: *Prosecutor v. Naletić and Martinović*, IT-98-34-T, Trial Chamber Judgement, 31 March 2003, paras 238, 241, and 244, confirmed by the Appeals Chamber Judgement, IT-98-34-A, 3 May 2006, paras 246, 353, 363 and 550; Kordić and Čerkez: *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber Judgement, 26 February 2001, para 852 confirmed by the Appeals Chamber Judgement, IT-95-14/2-A, 17 December 2004, paras 669, 670, 673, 675 and 676, available at https://www.icty.org/en/cases/judgement-list.
[247] https://www.britannica.com/topic/ethnic-cleansing.
[248]https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml.

Cultural Heritage

There is no universal definition of cultural heritage. However, for the purpose of this paper, the most relevant is the definition provided for in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) describing cultural heritage as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as centres containing monuments.[249]

Moreover, the Convention provides for its safeguarding and respect,[250] as well as for prosecution and punishment of persons who breach it.[251]

The definition comprehensively includes all elements that are of great importance to examining and studying the history of humankind in general, and different cultures and traditions. This is relevant to the heritage of Bosnia and Herzegovina, especially considering the country's diverse historical background, which includes artefacts and items from the period of Medieval Bosnia, Ottoman Empire, Austro-Hungarian Monarchy, the Kingdom of Yugoslavia, Socialist Federative Republic of Yugoslavia and, ultimately, BH as an independent state. Each of these periods was

[249] Available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html. By the act of succession BH became a member state of this Convention in 1993, available at https://pax.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha. Since 2009, BH is a member state of both Protocols to the Convention by accession.
[250] *Ibid*, Article 2.
[251] *Ibid*, Article 28.

significant for the extension of BH's legacy and every single one has contributed to its diversity.

Protection of Cultural Heritage in War in International Law

The 1949 Geneva Conventions failed to distinctively address the protection of cultural heritage.[252] A similar omission exists in the International Criminal Court (ICC) Statute, which in Article 8 (War Crimes), provides general protection to property, placing hospitals, religious facilities and historic monuments into the same category, as follows: Article 8, b), (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.[253] A slightly better formulation was introduced in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) whereby it deals only with cultural property and no longer lists historic monuments together with hospitals, as follows: Article 3 (Violations of the Laws or Customs of War), (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.[254]

The key protection instrument of cultural heritage in war came later in the form of the abovementioned Hague Convention from 1954. The SFRY was a member state of this Convention and by the act of succession BH became a member state in 1993.[255]

In addition to providing a definition of cultural property, its protection and the obligation to prosecute and sanction its breaches, cited in Section 2 above, the States Parties to the Hague Convention benefit from their mutual commitment, with a view to sparing cultural heritage from consequences of possible armed conflicts through the implementation of the following measures:

I. Adoption of peacetime safeguarding measures such as the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and

[252] Micaela Frulli, The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict, page 205, available at http://heritage.sensecentar.org/assets/Uploads/sg-7-04-frulli-criminalization.pdf.
[253] https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.
[254] https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.
[255] *Supra* 11.

the designation of competent authorities responsible for the safeguarding of cultural property;

II. Respect for cultural property situated within their own territory as well as within the territory of other States Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property;

III. Consideration of the possibility of registering a limited number of refuges, monumental centres and other immovable cultural property of very great importance in the International Register of Cultural Property under Special Protection in order to obtain special protection for such property;

IV. Consideration of the possibility of marking certain important buildings and monuments with the distinctive emblem of the Convention;

V. Establishment of special units within the military forces to be responsible for the protection of cultural property;

VI. Wide promotion of the Convention within the general public and target groups such as cultural heritage professionals, the military or law-enforcement agencies.

It is evident that international law provides a legal framework for protection of cultural heritage and creates grounds for prosecution of those who commit such crimes. This is important for establishing adequate protection in BH, which is a state party that has to abide by these standards.

Protection of Cultural Heritage in War in Domestic Law

Similarly to the international standards applicable in this area, domestic criminal legislation provides protection of cultural heritage through the provision of the applicable BH Criminal Code, providing imprisonment as the punishment for the war-time destruction of cultural heritage.

The 2003 BH Criminal Code in Article 183 (Destruction of Cultural, Historical and Religious Monuments) provides for imprisonment as the punishment for the destruction of cultural heritage as follows:

(1) Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural, historical or religious monuments, buildings or establishments devoted to science, art, education, humanitarian or religious purpose, shall be punished by imprisonment for a term between one and 10 years.

(2) If a clearly distinguishable object, which has been under special protection of international law as a people's cultural and spiritual heritage, was destroyed by the criminal offence referred to in paragraph 1 of this Code, the perpetrator shall be punished by imprisonment for a term not less than five years.[256]

Moreover, it provides in Article 179 (Violating the Laws and Practices of Warfare), criminalization of commanding the destruction or damaging of what could be qualified as cultural heritage, as follows:

(1) Whoever in time of war or armed conflict orders the violation of laws and practices of warfare, or whoever violates them, shall be punished by imprisonment for a term not less than 10 years or long-term imprisonment.

(2) Violations of laws and practices of warfare referred to in paragraph 1 of this Article shall include:

a) Use of poison gases or other lethal substances or agents with the aim to cause unnecessary suffering;

b) Ruthless demolition of cities, settlements or villages or devastation or ravaging not justified by military needs;

c) Attack or bombardment by any means of undefended cities, villages, residences or buildings;

d) Confiscation, destruction or deliberate damage of establishments devoted to for religious, charitable or educational purposes, science and art; historical monuments and scientific and artistic work;

e) Plundering and looting public and private property.

[256] Criminal Code of BH, *Official Gazette of BH*, nos. 3/03, 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18.

Finally, in the criminal offence of War Crimes against Civilians (Article 173) it provides protection for civilian objects which are under specific protection of international law, as follows:

(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 the civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damage to people's health;

b) Attacks without selecting a target, by which the civilian population is harmed;

c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhumane treatment, biological, medical or other scientific experiments, removal 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 by force or by threat of immediate attack upon life or limb, or the life or limb of a close person, 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 to concentration camps and other illegal arrests and detention, deprivation of the right to a fair and impartial trial, forcible service in the armed forces of enemy 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 a large scale 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 10 years or long-term imprisonment.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whomever in violation of the rules of international law, in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

a) Attack against objects specifically protected by the international law, as well as objects and facilities with a dangerous power, such as dams, embankments and nuclear power stations;

b) Targeting indiscriminately civilian objects which are under the specific protection of international law, of undefended places and of demilitarised zones;

c) Long-lasting and large-scale environmental devastation, which may be detrimental to the health or survival of the population.

(3) Whoever in violation of the rules of international law applicable in the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his civilian population into the occupied territory, shall be punished by imprisonment for a term not less than 10 years or long-term imprisonment.

Likewise, the Criminal Code of the SFRY[257] from 1976, that was applicable during the war in BH,[258] also clearly provides for the criminal offence of destruction of cultural and historical monuments in Article 151, as follows: (1) Whoever, in violation of the rules of international law during war or armed conflict, destroys cultural and historical monuments and buildings or institutions intended for science, art, education or humanitarian purposes, shall be punished by imprisonment for a term not less than one year.

(4) The perpetrator shall be punished by imprisonment for a term not less than five years for destroying a clearly identifiable object representing the cultural and spiritual heritage of the people under special protection of international law by an act referred to in paragraph 1 of this Article.

It can be concluded that, in line with relevant international law, the criminal legislation provisions applicable in BH provide sufficient grounds for successful prosecution of acts of damaging or destroying cultural heritage during war.

[257] Criminal Code of the SFRY, *Official Gazette of the SFRY*, nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 i 45/90.
[258] By Decree became the Criminal Code of the Republic of BH, *Official Gazette of the RBH* /Republic of Bosnia and Herzegovina/, no. 2/92 and applied in different parts of BH until 1998 and 2000.

Destruction of Cultural Heritage in BH during the War

Bosnia and Herzegovina has a rich architectural and archaeological heritage, dating back to the Palaeolithic era. The cultural heritage of BH is specific considering the amount of destruction it suffered in the period between 1992 and 1995.[259] Reportedly, the overall estimate of destroyed religious buildings alone was 3,290.[260]

The vast destruction and its ethnic cleansing boosting effects were the reason that the issue became a part of the General Framework Agreement for Peace in BH (also known as the Dayton Peace Agreement).[261] Namely, Annex 8 of the Agreement provides for establishing the Commission to Preserve the National Monuments of Bosnia and Herzegovina. The Commission was to receive and decide on petitions for the designation of property having cultural, historic, religious or ethnic importance as National Monuments.[262]

The Commission's report titled Architectural and Archaeological Heritage, gives a meticulous description of what is considered to be BH cultural heritage and a detailed report on its war-time damages and destruction, as follows:[263] 2,771 architectural heritage sites were partially damaged or destroyed, 713 properties were completely destroyed and 554 were set on fire and are deemed unusable. The figures in the reports, although incomplete, indicate the significant degree of devastation of Bosnia and Herzegovina's heritage. Monuments from the 15th to 19th centuries, as well as monuments from the Austro-Hungarian period, suffered the most severe destruction.

The urban centres of Sarajevo, Mostar and Jajce were devastated, along with a large number of individual buildings that were considered a heritage of international importance. The urban centres of Stolac, Banja Luka and Foča were also destroyed. The city centres of Trebinje, Tešanj, Maglaj, Bihać, Travnik, Derventa and Livno suffered severe damage. Thus, out of a total of 60 valuable urban centres, 49 were destroyed or severely damaged.

[259] *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber Judgement, 1 September 2004, para 584, available at https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf.
[260] https://detektor.ba/2008/04/10/bosniak-sue-republika-srpska-over-destroyed-heritage/?lang=en.
[261] Agreement concluded between the Republic of BH, Republic of Croatia and Federal Republic of Yugoslavia on 14 December 1995 in Paris to end war in BH, available at https://www.osce.org/files/f/documents/e/0/126173.pdf.
[262] Available at http://hrlibrary.umn.edu/icty/dayton/daytonannex8.html.
[263] According to the data collected by the Institute for the Protection of the Cultural, Historical and Natural Heritage of Bosnia and Herzegovina in November 1995.

Out of 58 most valuable mosques and tekkes in BH, 22 were completely destroyed. 13 objects from the Palaeolithic and Mesolithic periods were also destroyed. Out of 40 most valuable Orthodox and Catholic churches and monasteries dating between 15th and 19th centuries, five were destroyed and four were damaged (destroyed: the Orthodox Monastery of Žitomislići, the Church of the Nativity of the Blessed Virgin in Mostar, the settlement of Bjelušine, the Orthodox Church of the Transfiguration of Christ in the village of Klepci near Čapljina, the Orthodox Church of St. Nicholas in the village of Trijebanj and the Catholic monastery on Plehan near Derventa). The Catholic Church of St. John in Podmilačje, an important place of pilgrimage from the 15th century, was also completely destroyed. Two Ottoman-era synagogues in Sarajevo (the Old Sephardic Synagogue and the New Ashkenazi Synagogue) were partially damaged.

Many cemeteries and monuments were also badly damaged, such as the graveyard (harem) of Sinan-beg's mosque in Čajniče, Sinan-beg's mausoleum (turbe) in Čajniče, the mausoleum of Sinan-beg's family in Čajniče, the Tomb of Ibrahim in Foča, the Tomb of Hasan Sheikh Kaimi-babe in Zvornik, three mausoleums next to the Ferhad-pasha mosque in Banja Luka, the mausoleum of Halil-pasha in Banja Luka. The Sephardic cemetery in Sarajevo, the Old Orthodox cemetery in Bjelušine (Mostar) and the chapel of the Orthodox cemetery in Koševo in Sarajevo were damaged.

The Old Bridge in Mostar, a monument of international importance, was demolished.

Sixteen buildings dating from the Austro-Hungarian period were damaged, and four were destroyed (the City Hall, which houses the National and University Library, the Post Office building in Sarajevo, and the Spa and Hotel Neretva in Mostar).

During 1997 and 1998, the Council of Europe carried out activities aimed at determining the state of the heritage in the entire territory of Bosnia and Herzegovina. However, some areas were not examined because they remained inaccessible for security reasons. According to the final report of the Special Action Plan for Bosnia and Herzegovina from March 1999, three secular buildings, 48 mosques, three Catholic and one Orthodox church were completely destroyed; nine secular buildings, 13 mosques, four Catholic and two Orthodox churches were partially destroyed; 14 secular buildings, 13 mosques, one Catholic and nine

Orthodox churches were severely damaged. The research covered a total of 315 religious and 211 secular monuments.[264]

Prosecution of Destruction of Cultural Heritage in BH

Despite the massive damage and destruction of cultural heritage in BH and the existence of a legal framework that enables prosecution of these acts, this issue has not been tackled by international tribunals or domestic courts to a sufficient extent. There seems to be a huge rate of impunity for such crimes. The available data (or lack thereof) suggest that prosecution can be considered to be at the level of a statistical error.

The difference between prosecution of war related crimes concerning human victims and crimes concerning cultural heritage is overwhelming.

Moreover, it seems that the practice of the qualification of such crimes differs. For example, in two separate cases prosecuted by the Prosecutor's Office of BH and adjudicated before the Court of BH, damage/destruction of religious buildings (damaging a Catholic Church and destruction of two mosques) were qualified as the criminal offence of Violation of the Laws and Practices of Warfare[265] and War Crime against Civilians.[266] The latter provision provides protection for civilian objects under protection of international law under paragraph 2) item b) however, in this particular case the perpetrator was found guilty under paragraph 1) items a) and f).

Establishing the level of prosecution and its effects in relation to destruction or damaging cultural property is made even more difficult by the fact that there is no comprehensive system of recording of such elements of crimes prosecuted before the judiciary in BH. The overall publicly available data consists mostly of the number of cases and defendants.

According to the data published by the OSCE Mission to BH, in the period between 2004 and 2019, a total of 577 proceedings involving 873 defendants were completed before the courts in BH. There are still 244 ongoing proceedings against 481 defendants.[267] According to the publically available data, currently there is one ongoing proceeding containing charges of the destruction of or

[264] Architectural and Archaeological Heritage: Status Report, March 2010, available at http://old.kons.gov.ba/main.php?mod=vijesti&extra=aktuelnost&action=view&id_vijesti=667&lang=1.
[265][265] Zijad Kurtović, X-KRŽ-06/299, 25 March 2009, available at http://www.sudBH.gov.ba/predmet/2457/show.
[266] Paško Ljubičić, X-KR-06/241, 29 April 2008, available at http://www.sudBH.gov.ba/predmet/2444/show.
[267] War Crimes Case Processing, available at https://www.osce.org/files/f/documents/b/0/451408.pdf.

damage to cultural heritage in BH in accordance with *inter alia* Article 183 (Destruction of Cultural, Historical and Religious Monuments) of the Criminal Code of BH.

In October 2018, the media reported that the Prosecutor's Office of BH raised an indictment against the direct perpetrator of the destruction of the *Aladža* Mosque in Foča.[268] The Mosque was built in the 16th century. It was protected by the Yugoslav authorities in 1950 as cultural heritage. It was blown up by planted explosive in 1992. The indictment was confirmed in December 2018 by the Court of BH. However, the accused failed to appear before the court in 2019 although he was properly summoned after which an international arrest warrant was issued for him.[269]

Similarly to the BH judiciary, the ICTY failed to systematically address this issue in its prosecutions. Out of 90 convictions in total, in only a few cases was the issue of the destruction of cultural heritage addressed. The most notable case is one concerning the 1991 shelling of the Old Town of Dubrovnik in Croatia, a city that has been on the World Heritage List since 1979. The accused in two different prosecution cases, Pavle Strugar[270] and Miodrag Jokić[271] were convicted in separate proceedings for, *inter alia*, destruction or wilful damage done to cultural property under Articles 3 (d) and 7 of the Statute. The Trial Chamber held that since "there had been no military objectives in the immediate vicinity, the destruction or damage of property in the Old Town on that day was not justified by military necessity, meaning that it had retained protected status."[272] "The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of mankind."[273] In the case against Dario Kordić and Mario Čerkez[274], the court found them guilty of *inter alia* violating the laws

[268] https://balkaninsight.com/2018/10/15/bosnian-ex-fighter-indicted-for-destroying-mosque-10-15-2018/.
[269] https://detektor.ba/2020/04/03/bosnia-seeks-interpol-help-to-detain-war-fugitives/?lang=en.
[270] *Prosecutor v. Strugar*, IT-01-42-A, Appeals Chamber Judgement, 17 July 2008, paras 277, 278, 279, 280, 281 and 282, available at https://www.icty.org/x/cases/strugar/acjug/en/080717.pdf
[271] *Prosecutor v. Jokić*, IT-01-42/1-S, Trial Chamber Judgement, 18 March 2004, paras 45, 46, 53 and 64, available at https://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf.
[272] Otto Triffterer, Kai Ambos - The Rome Statute of the International Criminal Court: A Commentary-Beck, Hart (2016) (2), p. 420.
[273] Otto Triffterer, Kai Ambos - The Rome Statute of the International Criminal Court: A Commentary-Beck, Hart (2016) (2), p. 421.
[274] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber Judgement, 17 December 2004, paras 85 and 92, available at https://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

and customs of war by destroying or damaging religious and educational institutions located in BH. Mladen Naletilić and Vinko Martinović[275] were also found guilty of the same crime committed in BH. Finally, in the case against Tihomir Blaškić[276], the accused was *inter alia* acquitted of charges for the destruction or wilfully damaging institutions dedicated to religion or education "because the damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts."[277]

The application of the relevant legislation in the jurisprudence of ICTY seems to be more consistent. However, the number of prosecuted cases and relevant jurisprudence seems to be very limited for drawing clear conclusions about the extent of judicial protection awarded to cultural heritage. The same is true for the jurisprudence of the domestic courts in BH. This makes prosecution even more important and a tool for developing jurisprudence in this area that will be clear and free of major ambiguities, such as what type of destruction or damage constitutes the criminal offence of Destruction of Cultural, Historical and Religious Monuments, and when the War Crimes against Civilians provision will apply. However, this will depend on the success of the prosecutors in identifying the perpetrators or commanders of such crimes and their success at bringing them to justice.

Conclusion

The purpose of this paper was to emphasize the importance of the protection of cultural heritage through prosecution of the perpetrators of such heinous crimes. Destroying and damaging the cultural heritage of a group delivers irreparable damage not only to that group but also to humankind in general. A number of international treaties have been developed for this purpose and reflect the importance of the issue. Protection during war is particularly important but also very challenging. For this reason the prosecution of such crimes has even greater importance. It shows to the immediate victims of these crimes that their loss is recognized, but it also sends the message to the perpetrators that their crimes will not go unpunished. It also represents general prevention, sending the message to any future perpetrators attempting to commit this crime.

[275] *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber Judgement, 3 May 2006, paras 381, 382, 383, 384 and 385, available at https://www.icty.org/x/cases/naletilic_martinovic/acjug/en/nal-aj060503e.pdf.
[276] *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, par. 444, available at https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.
[277] Otto Triffterer, Kai Ambos - The Rome Statute of the International Criminal Court: A Commentary-Beck, Hart (2016) (2), p. 421.

Despite the lack of an agreed upon definition of cultural heritage, the existing definitions provided for in international and domestic legislation should be used more efficiently for successfully prosecuting and sanctioning the perpetrators of this crime. It is evident from the jurisprudence of ICTY and the domestic courts in BH that these crimes were prosecuted to a very limited extent.

The prosecution practice in BH, in addition to being limited, also seems inconsistent, creating additional challenges in developing relevant jurisprudence in this area. This, paired with the lack of easily available data on such adjudicated cases, provides fertile ground for further inconsistencies.

Cultural heritage marks an important aspect of the identity of large and small communities, and of all of the humanity in general, but it also significantly affects the identity of each individual. Therefore, it is clear, that the issue of protection and preservation of cultural heritage has surpassed today's frameworks of individual states and it deserves the concerted efforts of international and domestic bodies for its protection.

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The Tendencies and Objectivity of Southeast European Media Reporting regarding ICTY, with a Reference to Public Opinion on the Work of the Tribunal

Introduction

General remarks

Firstly, some clarifications about the subject and the structure of this paper. This paper's matter of interest is an analysis of media reports about the work of the ICTY by the media in various countries that emerged in Southeast Europe after the breakdown of Yugoslavia in the 1990s. As it is not possible to analyse all of the media reports done by all the media, the later displayed material will aspire to be as representative as possible. That will be accomplished by choosing the most relevant media enterprises in Croatia, Serbia and Bosnia and Herzegovina (where the focus shall be on the Bosniak media). The criteria by which this task is to be accomplished is selecting the most read media in a particular country as well as the media with the greatest revenue. All of the aforesaid is going to be exposed by objective metrics. The cases analysed will be those of *Radovan Karadžić* and *Gotovina and Markač*.

The analysis of the before mentioned media reports is not a goal in and of itself. The objective is, rather, to compare that which is found in media coverages with the objective elements of ICTY judgements; to explore various tendencies in reporting done by the media of one country, and to give some comments about public opinion on the ICTY. It has to be stated that this paper does not enter the topic of the media's impact on public opinion. It is only presumed that there is at least some impact on public opinion; for more on the topic of media reporting on

law cases and public opinion see *e.g.* Giorgio Resta's "Trying Cases in the Media: A Comparative Overview."[278]

As to the structure of the paper, the specific topics of the media reporting will include two cases before the ICTY. Specifically, the paper will analyse the media reporting of Serbian, Bosniak and Croatian media regarding the ICTY judgements in the cases of *Radovan Karadžić* and *Gotovina and Markač.* This will be done one country at a time (first the Serbian media, then the Bosniak and lastly the Croatian media). Fake news and false reporting will be pointed out with an occasional comment about the impact of such reporting on public opinion towards the Tribunal. A more detailed approach to public opinion will be taken after various cases have been presented because the tendencies and the state of public opinion can be thoroughly comprehended only after the media reports have had some impact on the public. Again, there is no extensive analysis of the media reports' impact on public opinion; the analysis rather focuses on the media reporting and presumes that the media have had some impact on public opinion. For some remarks on that topic see *infra*. The focus is rather on the question of how the media reported and how *that might have affected* public opinion.

Lastly, a disclaimer concerning the fact that the author of this paper is a Croatian national with an already formed opinion about the International Criminal Tribunal for the Former Yugoslavia which is, at least by some extent, formed by following some of the media reports which he is now going to analyse. Having that in mind, this paper will strive to be as objective as possible and all expressions of subjectivity will be minimised. However, to make the paper more interesting and innovative, some exceptions to the rule ought to be made, but on all such occasions the opinions of the author will not be based on his nationality, but rather on a personal and fresh approach regarding the facts presented. Of course, never will this get in the way of the facts.

The legacy of the ICTY in Southeast Europe – the importance of public opinion

Before we dive into the vast media articles and coverages, a short exposition concerning the importance of public opinion in criminal law in general, and *argumentum ad maiori ad minus,* regarding the ICTY and the peoples of Southeast Europe. The goal of this paragraph is to emphasize the connection between public opinion and the legacy of the Tribunal. Even though the conclusions and

[278] Resta, G., "Trying Cases in the Media: A Comparative Overview." *Law and Contemporary Problems*, Vol. 71, no. 4, 2008, pp. 31–66.

references within this paragraph will be general, rather than specifically concerning the ICTY, it is important to point them out because of their universal logical validity with regards to criminal courts.

To begin with, media reporting has a self-explanatory influence on public opinion at least to some extent and concerning the topic of this paper, there will not be an endeavour to prove this hypothesis. For more on this topic, see *e.g.* Sara Sun Beale's The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness.[279]

One of the several goals of criminal justice in general is *general deterrence*. General deterrence involves making an example of the offender so that others will not be tempted to emulate their conduct.[280] In simpler terms, the goal is to discourage others from committing crimes. If crime offenders are punished, the public will be deterred from committing crimes because if they are not, they too will be punished. Or as *Britannica* puts it, "Less concerned with the future behaviour of the offender himself, general deterrence theories assume that, because most individuals are rational, potential offenders will calculate the risk of being similarly caught, prosecuted, and sentenced for the commission of a crime."[281] The idea of general deterrence is based on the public opinion that the criminal justice system works properly. If the public thinks that the offenders are punished, i.e. if the public's opinions about the criminal justice system is high, then the general deterrence principle will have a greater effect. *Argumentum a contrario,* if the public thinks that one can commit a crime and get away with it, i.e. if the public's opinion about the criminal justice system is low, the general deterrence principle will have a weaker effect. This is a perfect example which demonstrates the practical importance of public opinion about the criminal justice system. This concerns national criminal systems and courts, as well as the international ones.

This corresponds to the conclusions of many scholars; e.g. Green[282] notes that "public opinion should be the ultimate basis of the law." Furthermore, Faulkner[283] says that "[t]he citizen's voice in the running of the country and confidence that it will be heard, are what give governments and the state their legitimacy and

[279] Sun Beale, S., The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness; William and Mary Law Review, Vol. 48, November 2006, pp. 397 – 482.
[280] Lanham, D., Bronwyn, B., Evans, R., Wood, D., Criminal Laws in Australia, The Federation Press, 2006, p. 8.
[281] https://www.britannica.com/topic/punishment/General-deterrence; 25 November 2020.
[282] Green, G., "The concept of uniformity in sentencing", The Australian Law Journal, Vol. 70, 1996, p. 116.
[283] Faulkner, D., Crime, State and Citizen: A Field Full of Folk, Waterside Press, 2006, p. 63.

authority." Lastly, as Flanagan, Carrel and Brown[284] put it, "[i]f people become dissatisfied with the criminal justice system they may refuse to comply with its laws and resort to vigilante justice".

All things considered, public opinion is often influenced by the news media and since public opinion is undoubtedly important for criminal justice systems and courts, it follows that the media have an indirect influence on criminal justice. This applies to the legacy of the ICTY as well. Of course, *this should be taken with a grain of salt* for this paper does not comprehensively explore the impact of media reporting on public opinion[285], but rather concentrates on media reports and presumes that it has *some* impact on the public opinion. In other words, there is no specific analysis on the extent of the impact of media reports on public opinion regarding ICTY judgements because no such research has been done.

The logical basis of the conclusions made in the paper

In order to justify the conclusions made in this paper it is necessary to clarify the type of logical reasoning by which the conclusions are made. The idea is to explain the way of reasoning so that one may follow the logic behind the conclusions more effortlessly.

Generally, there are two main types of reasoning – deductive and inductive.[286] Deductive reasoning is the process of drawing a conclusion based on premises that are generally assumed to be true. Also called deductive logic, this act uses a logical premise to reach a logical conclusion.[287] According to Bradford, deductive reasoning strives to reach a specific logical conclusion.[288] Furthermore it is often used in science.[289] Inductive reasoning, on the other hand, makes broad generalizations from specific observations. There is data, then conclusions are drawn from the data.[290] Therefore, if one seeks to reach a specific conclusion, one would use deductive

[284] Flanagan, T.J., McGarrell, E.F., Brown, E.J., "Public perceptions of the criminal courts: The role of demographic and related attitudinal variables", Journal of Research in Crime and Delinquency, Vol. 22 Issue 1, 1985, as quoted in Wood, J., Gannon, Th., Public Opinion and Criminal Justice, 2013, p. 24.
[285] For that topic, see *e.g.* Haggerty, J. F., In the Court of Public Opinion – Winning Your Case with Public Relations; John Wiley & Sons, Inc., Hoboken, New Jersey, 2003.
[286] Similarly: Winslow R., https://www.mscc.edu/documents/writingcenter/Deductive-and-Inductive-Reasoning.pdf.
[287] https://www.indeed.com/career-advice/career-development/deductive-reasoning, 7 October 2020.
[288] Bradford, A., Deductive Reasoning vs. Inductive Reasoning, 2017, an article at https://www.livescience.com/21569-deduction-vs-induction.html, 6 October 2020.
[289] *Ibid.*
[290] *Ibid.*

reasoning and if one strives to come to a generalized conclusion about an abstract concept, one should use inductive reasoning.[291]

Since the goal here is to reach a general conclusion about an abstract concept (and public opinion surely falls within that category), the type of reasoning which will be predominately used is *inductive reasoning***.** For instance, several most important media from a particular country will be analysed and then the general conclusion will be that the media of the country reported in this or that manner.

Now that the use of inductive reasoning has been legitimated, one additional comment. Seeing that the intention here is to give general conclusions about the Tribunal's legacy, the comparison of the media will not be chronological. *E.g.* when comparing Croatian and Serbian media and their reporting with regards to *two different* cases, *the conclusions will be made with little regard to the chronology of the reporting.* The fact that, as will be seen, the tendencies of media reporting in a particular country generally remained the same through various relevant time periods, justifies this approach even more. The chronology *will be important only when comparing first and second instance judgements.* A different approach would only complicate the whole matter.

Before a more thorough analysis of the media, some *questions need to be asked and some hypotheses established*. A hypothesis which either will or will not be confirmed through further research is that the media of countries relevant to this paper report in such a way that their reports are more affected by the *nationality* of the defendant in question than by the *facts* established by the Tribunal. If this hypothesis is being followed, *e.g.* Croatian media will express words of negative emotion if a Croatian national is convicted. Another question which arises from the previous one is *whether a similar logic can be applied transnationally? Does the media's attitude depend on the ethnicity of the defendant?* Will the Serbian media be biased towards Croats, or, e.g. Bosniak media towards Serbian defendants? The hypothesis is that, to a greater or lesser extent, the media's subjectivity will depend on against *whom the defendant allegedly committed crimes. E.g.* if he allegedly committed crimes against Serbs, the Serbian media will have negative bias towards a defendant even though he may be acquitted by the Tribunal. More simply put, the hypotheses are that the media of the region will have an *ethnical bias*. These hypotheses will be closely examined throughout the paper. Thus it will be concluded which media are biased and to what extent all of this has an influence on the public opinion regarding the Tribunal.

[291] Similarly: *ibid*.

Case summaries

To make the matter clearer, here are short summaries of both analysed cases. This way one may dive into the media reporting analysis with basic knowledge about the subject. This short summary points out the basic and most important aspects of the *Karadžić* and the *Gotovina and Markač* cases. The goal here is not to give an all-inclusive legal analysis, but to paint the picture of Karadžić's crimes and to present the most relevant facts concerning Gotovina and Markač. This is important because it gives us a factual foundation while various media coverages are analysed. A more detailed approach will be taken when the theme of an article which will have been analysed requires it. At the end, the media reports will be exposed country by country in order to alleviate the latter task of country by country public opinion assessment before giving an overall one.

A short summary of the *Karadžić* case[292]

On 12 May 1992, Radovan Karadžić was elected President of the Presidency of the Serbian Republic of Bosnia and Herzegovina.[293] He was later the President of Republika Srpska and Supreme Commander of its armed forces. He stood trial for "...allegedly having planned, instigated, ordered, committed otherwise aided and abetted the commission of crimes against Bosnian Muslims, Bosnian Croats, and other non-Serbs including the removal of non-Serbs from Bosnian Serb claimed territory through the use of force, terror, persecutions and forced transfer; the genocide of Bosnian Muslims in Srebrenica through the forced deportation and transfer of Bosniak women and children..."[294] In 2016, the ICTY Trial Chamber convicted him to 40 years' imprisonment on the basis of individual criminal responsibility for genocide in Srebrenica, crimes against humanity etc. Furthermore, following Karadžić's appeal, when his case was transferred to the International Residual Mechanism for Criminal Tribunals, his conviction was largely confirmed and his sentence was increased to life imprisonment.[295]

[292] First instance - Karadžić, (Case No. IT–95- 5/18), 24 March 2016; appeal – Karadžić (Case No. MICT–13–55), 20 March 2019.
[293] https://www.irmct.org/en/cases/mict-13-55, 25 September 2020.
[294] https://ijrcenter.org/international-criminal-law/icty/case-summaries/karadzic/, 25 September 2020.
[295] Similarly: *ibid.*

A short summary of the *Gotovina and Markač* case[296]

In August 1995, the Croatian military forces conducted an attack against the Krajina region of Croatia.[297] Krajina was a region in Croatia which was controlled by Serb forces prior to operations Flash and Storm. Both Gotovina and Markač were in high military positions that controlled the operation in Krajina.[298] They stood before the Tribunal for allegedly having committed crimes in these military operations. The most interesting thing about this case is the difference between the first and second instance judgements. Firstly, the Tribunal found them both guilty of a joint criminal enterprise and sentenced Gotovina to 24 years, and Markač to 19 years' imprisonment. The Appeals Chamber, however, "considered that Trial Chamber I had erred in its analysis of the lawfulness of artillery attacks on four towns in Croatia".[299] Consequently, and due to the fact that the Chamber did not find the defendants guilty on any alternate mode of responsibility, they were both acquitted and immediately released.[300] Exactly this kind of turn is a great test for media objectivity. Is it possible that one judgement will be praised and the other severely criticized?

The Serbian media

Almost all of the media which are mentioned in this paragraph are, according to *Z1info.rs*, in the top 10 most read media sites in Serbia in 2019.[301] This testifies to the *relevance* of the media sites which are mentioned. Regarding the printed newspaper, they were picked with regards to the best selling newspaper list from 2016, presented by *informer.rs.*[302]. These lists serve as a bedrock for choosing Serbian media in this paper. Occasionally, there may be some exceptions.

The *Karadžić* case

A day after the IRMCT[303] passed a judgement in the appeal stage, the cover pages of the Serbian newspaper read as follows: *Informer* and *Kurir* stated that it was a

[296] First instance: *Čermak and Markač* (Case No. IT-03-73), 14 December 2005, *Gotovina* (Case No. IT-01-45), 19 February 2004; appeal: *Gotovina et al.* (Case No. IT-06-90), 15 April 2011.
[297] Similarly: http://www.internationalcrimesdatabase.org/Case/1235/Gotovina-and-Markač/, 27 September 2020.
[298] *Ibid.*
[299] *Ibid.*
[300] Similarly: *ibid.*
[301] https://z1info.rs/najcitaniji-mediji-na-internetu-u-srbiji-rang-lista/, 26 September 2020.
[302] https://informer.rs/vesti/drustvo/279950/srbiji-nemamo-konkurenciju-informer-ubedljivo-prvi-najprodavaniji-najcitaniji, 26 September 2020, The list ranking: 1) Informer, 2) Kurir, 3) Novosti, 4) Alo, 5) Blic, 6) Politika, 7) Srpski Telegraf, 8) Žurnal, 9) Danas, 10) Sport.
[303] International Residual Mechanism for Criminal Tribunals.

"grave injustice"; *Alo!* said that "Radovan is sentenced to die behind bars"; *Srpski Telegraf, "*A disgrace by the Hague Tribunal"; *Blic* and *Danas, "*A life sentence to Karadžić for the Srebrenica Genocide"; *Večernje Novosti,* "This has nothing to do with justice". Since the most relevant Internet news sites are subsidiaries to the aforementioned newspaper companies, the headlines were approximately the same in the matching newspapers. A simple analysis of the front pages leads to the conclusion that five out of seven Serbian media used negative and emotional terms such as "*grave injustice*" or "*death behind bars*" to report about the judgement. This is more than *71%*! Is it professional and in harmony with media ethics principles to comment on a judgement in such a manner? According to Ethical Journalism Network*,* truth, accuracy, fairness and impartiality are among the seven[304] principles of journalism.*[305]*

In the endeavour to answer these questions concerning the *Karadžić* case, one has to examine the media coverages further. The already mentioned *Kurir* states that the judgement to Karadžić was a judgement to the whole nation.[306] Here, an interesting moment of identifying the whole nation with the convict occurred. Is Radovan Karadžić, according to *Kurir, a national personification*? According to Gwen Sharp, a national personification is a human figure used to represent particular countries, their citizens, or ideas of the national character.[307] She mentions, for instance, Britannia as the UK's and Columbia as the US's national personifications.[308] Both are goddess-like figures who inspire virtue. *Could it be that the statement that "it was a judgement passed on the whole nation"[309] tries to make Karadžić a personification of the Serbian nation?* What impact could a statement like this have on public opinion? Of course, this is simply a comment on the statements found in *Kurir*, and it is in *no way suggested* that this statement is an objective depiction of Serbia's reality at the relevant moment.

After[310] the *Karadžić* judgement some of the Serbian media[311] calculated that the ICTY convicted Serb convicts to a total of more than a thousand years

[304] Or, as it is stated on the site, if truth and accuracy; and fairness and impartiality are grouped together, among the five principles.
[305] https://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism, 26 September 2020.
[306] https://www.kurir.rs/vesti/politika/3224035/uzasna-nepravda-dozivotna-robija-za-radovana-karadzica-ovo-je-presuda-celoj-naciji, 26 September 2020.
[307] https://thesocietypages.org/socimages/2010/07/04/national-personifications/, 26 September 2020
[308] Ibid.
[309] https://www.kurir.rs/vesti/politika/3224035/uzasna-nepravda-dozivotna-robija-za-radovana-karadzica-ovo-je-presuda-celoj-naciji, 26 September 2020.
[310] There were this kind of calculations even *before* the Karadžić's judgement.
[311] E.g. 1) https://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:345555-Hag-Srbima-1000-godina-robije;
2) http://srpskacafe.com/2019/03/hag-srbima-preko-900-godina-bosnjacima-i-hrvatima-trostruko-manje/;

imprisonment. In these articles it is often said that Croatian or Albanian ones got only a significantly smaller number of years. *Telegraf* states that this is "a disgrace"[312] and *Espresso* rhetorically poses the question "Is there justice in the Hague?".[313] From that perspective it is as if in order for the Tribunal to be just, it would have to calculate the years of imprisonment and divide it equally to the various ethnicities. Furthermore, in the aforementioned article, *Telegraf* states that Toma Fila, Radovan Karadžić's attorney, thinks that "the whole world will one day be ashamed of the Hague Tribunal".[314]

Most of the Serbian media have used *emotional* terms while *not even trying to give a reasonable explanation* or basis for their opinion. For that reason, the conclusion is that *the Serbian media have reported biasedly* in the case of Radovan Karadžić. The hypothesis of *ethnical bias* is here *confirmed* by the use of inductive reasoning - a broad generalization is derived from specific observations. In conclusion, it is demonstrated that the Serbian media mostly have not objectively reported about Karadžić's judgement. Even though it is always possible to argue that there are flaws in a verdict, it should be done by arguments, logic and legal opinions. To avoid being unfairly strict while evaluating the Serbian media reporting it has to be said that the conclusions made here and later concerning the *Gotovina and Markač* case deal only with those cases and cannot be generally accepted regarding other cases which are not analysed here.

The *Gotovina and Markač* case

On 15 April 2011 *Blic* reported *objectively and without any emotional arguments* as was the case with the Serbian media while they reported on the *Karadžić* case. *Rtv.rs* had a similar approach.[315] *Novosti.rs* as well.[316] I could not find any overly passionate or unobjective articles about the first instance judgement in the *Gotovina and Markač* case. *Jutarnji*, a Croatian newspaper assessed that generally, the world media reported informatively and objectively, while the

3) https://www.espreso.rs/vesti/politika/365175/hag-je-srbe-poslao-na-1138-godina-robije-a-albanci-i-hrvati-na-slobodi-ovako-je-presudjivano-ima-li-tu-pravde, 26 September 2020.

[312] https://www.telegraf.rs/vesti/politika/2913197-kako-je-sudio-haski-tribunal-vise-od-1000-godina-robije-za-srbe, 26 September 2020.

[313] https://www.espreso.rs/vesti/politika/365175/hag-je-srbe-poslao-na-1138-godina-robije-a-albanci-i-hrvati-na-slobodi-ovako-je-presudjivano-ima-li-tu-pravde, 26 September 2020.

[314] https://www.telegraf.rs/vesti/politika/2913197-kako-je-sudio-haski-tribunal-vise-od-1000-godina-robije-za-srbe, 26 September 2020.

[315] https://www.rtv.rs/sr_lat/region/gotovini-24-markacu-18-godina-zatvora-cermak-oslobodjen_249025.html, 27 September 2020.

[316] https://www.rtv.rs/sr_lat/region/gotovini-24-markacu-18-godina-zatvora-cermak-oslobodjen_249025.html, 27 September 2020.

Serbian media were "a little less neutral."[317] However, knowing what the Serbian media were like regarding the *Karadžić* case, one should emphasise the words *a little* less, meaning that they were generally neutral.

This is an *exact opposite* approach to the one Serbian media had regarding Karadžić. Is it possible, in accordance with the second hypothesis[318], that since the media were content with the content of the judgement, there was *no need for emotional outbursts* and the judgement would speak for itself? Anyhow, the same media which succumbed to great subjectivity in the *Karadžić* case here have higher professional criteria. This comparison is, of course, a *qualitative one, rather than temporal* – it is clear that the *Karadžić* judgement was made later than this one.

Do the criteria sink only if a judgement is unfavourable by their standards? Perhaps nothing reveals the *ethnical bias* of the Serbian media quite as much as the divergence between reporting about the first and second instance judgements.

What was the reporting like concerning the appeal judgement? *Blic*, whose article about the first instance was almost completely neutral, now had this on the front page: „A scandalous decision – Gotovina and Markač are free, as if Operation Storm never happened".[319] Furthermore, after the generals were welcomed by the Croatian public, *Blic* stated that „Criminals were welcomed like heroes". [320] *Kurir's* article is mostly reporting facts, but the headline is *„Crime without punishment".*[321] *Mondo,* on the other hand, simply stated the facts and the statements from relevant people.[322] *Politika* states that the Serbian media in general were somewhere in between informative and objective reporting one one hand, and qualifying the judgement as „scandalous" on the other.[323]

[317] https://www.jutarnji.hr/vijesti/hrvatska/dnevni-avaz-hrvatska-bi-mogla-prestati-slaviti-dan-pobjede-5.8.-2042166, 28 September 2020.
[318] See supra, 2., last paragraph.
[319] This is according to https://www.blic.rs/Vesti/Hronika/353323/Skandalozna-odluka-Gotovina-i-Markac-slobodni-Oluje-kao-da-nije-bilo, 27 September 2020, the original article *was removed* from *Blic*'s site.
[320] https://www.blic.rs/vesti/tema-dana/zlocince-docekali-kao-heroje-gotovini-i-markacu-u-zagrebu-vatrogasci-napravili-vodeni/48rdl5c, 27 September 2020.
[321] https://www.kurir.rs/crna-hronika/512318/skandal-u-hagu-gotovina-i-markac-slobodni-ljudi, 27 September 2020.
[322] https://mondo.rs/Info/EX-YU/a267976/Josipovic-Generali-nosili-teret-tudjeg-zlocina.html, 27 September 2020.
[323] http://www.politikaplus.com/novost/67773/beogradski-mediji-o-presudi-u-haagu-izmedu-suzdrzanosti-i-ocjena-skandalozno, 28 September 2020.

Overall, it could be said that there is a *difference* in reporting regarding first and second instance judgements. While reporting about the first instance, the Serbian media did almost completely objective and informative reporting. As far as the second instance judgement is concerned, the reporting has been more dispassionate than in the *Karadžić* case and could be rated as *slightly passionate*. Since there are no objective scales for assessing these kind of situations, one has to be satisfied with various descriptive terms. The mentioned disclaimer applies here as well: the conclusions which are made here are valid only with regards to the cases analysed here; not generally.

The Bosniak media

What is the Bosniak media?

Initially, while considering the media of Bosnia and Herzegovina it is worth noting that there are *three constitutive ethnic groups* in Bosnia and Herzegovina: Bosniaks, Croats and Serbs.[324] Because of the fact that BA[325] is *not a civic nation (state),* but rather a state with three constitutive ethic groups, the media in the country are, as it will be demonstrated, closely connected to the matching ethnic group. Accordingly, the media in Republika Srpska[326] report similarly to the media in Serbia. The other entity in BA is the Federation of Bosnia and Herzegovina where Bosniaks and Croats are mostly inhabited. The following opinion by Yiftachel & Ghanem demonstrates the *importance of ethnicity in BA.* "The dominance of the ethnic principle is an inherent phenomenon of everyday life in Bosnia, and the systems operated by the elite can arguably be considered *ethnocratic"*.[327] Furthermore, and this cannot be emphasised enough, as Reményi, Végh and Pap[328] put it "...this means that in the case of access to public goods and, in fact, most important decisions, and the operation of institutional structures, the *ethnic principle becomes dominant and decisive*, at both the personal and community level, as opposed to the citizenship/legal principle". We could indefinitely go on, but a point is made. All things considered, it seems that almost everything in BA is governed by the ethnicity principle, and, *argumentum a coherentia,* so are the media. Owing to the hitherto exposed facts, the analysis of the media in BA will concentrate almost only on *Bosniak* media.

[324] The Preamble to the Constitution of Bosnia and Herzegovina.
[325] Bosnia and Herzegovina.
[326] An entity in BA; article 3. of the Constitution of BA; the entity is mostly inhabited by people of Serbian ethnicity.
[327] Yiftachel O., Ghanem A., "Understanding 'ethnocratic' regimes: the politics of seizing contested territories", Political Geography, Volume 23, 2004, pp. 647-676.
[328] Reményi P., Végh A.,Pap N., "The influence of ethnic policies on regional development and transport issues in Bosnia and Herzegovina", Belgeo, Volume 1, 2016, p. 4.

Objektivno.hr states that the interpretation of the verdict's explanation and reach are completely different by various media, depending on which readership they are oriented towards.[329] *E.g.,* while reporting on the *Karadžić* first instance judgement, *Dnevni avaz* (a Bosniak media enterprise) calls him a "bloodthirsty person"[330] while *Glas Srpske* (a Serbian one) emphasizes the fact that Karadžić was acquitted of the genocide charges in seven BA's counties. *Croatian radio television (HRT)* [331]comes to the same conclusion while reporting on the *Karadžić* appeal judgement.

In regard to the criteria by which the Bosniak media are selected, an analysis by *Bisnode d.o.o.* about the greatest revenue and number of employees will be the metrics.[332]. It should be noted that some of the media on the list are not Bosniak media while the list gathers the info for the country as a whole. Therefore, there are Croatian and Serbian media on the list as well but in this paragraph only the Bosniak media is considered. Furthermore, there are some media reports from the media which are not on the list. Lastly, to corroborate the observations which are made here, some analyses made by the Croatian media come to the similar conclusions as those which are made here.

The *Karadžić* case

What was the Bosniak media like when reporting about the first instance *Karadžić* case judgement? *Faktor.ba* published a story containing interviews with Karadžić's former neighbours in Sarajevo. At the end of the text it says that "everyone *Faktor* has been talking to says that they were hoping Karadžić would get a life sentence because that would be the only appropriate punishment."[333] Again, the reporting was *fair* but this report gives us a significant insight into public opinion. The public obviously *follows* the work of the Tribunal and, while allegedly not completely satisfied, it seems that there is a *certain level of trust* in the work of the Tribunal, *unlike in Serbia,* as was explained before.

[329] https://objektivno.hr/radovan-karadzic-osuden-mediji-u-bih-razlicito-reagirali-40-godina-malo-ili-previse-78123, 7 November 2020.
[330] In the original language "*krvolok*".
[331] https://vijesti.hrt.hr/497583/reakcije-na-dozivotnu-presudu-radovanu-karadzicu, 7 October 2020.
[332] Bisnode d.o.o., 2017, as reported by https://mediadaily.biz/2018/06/19/ekskluzivno-top-lista-najvecih-medija-u-bosni-i-hercegovini-2/, 26 September 2020, The list ranking: 1) Bosansko-hercegovačka radiotelevizija; 2) Al Jazeera Balkans; 3) Radiotelevizija Republike Srpske; 4) RTV Federacije BiH; 5) Avaz roto press; 6) Oslobođenje; 7) Hayat; 8) OBN; 9) Pink bh company; 10) RTV BN.
[333] https://faktor.ba/vijest/faktor-u-ulici-gdje-je-zivio-radovan-karadzic-sarajevo-mu-sve-dalo-bio-je-pravo-seljacko-dijete-foto-186802, 26 September 2020.

The Bosniak media seem to be more dispassionate when commenting on the *Karadžić* appeal judgement. *E.g., Klix. ba* simply reported the facts of the case *without using any affective vocabulary***.** The site even offers a link to a timeline description of the passing of the judgement.[334] Additionally, it was merely mentioned that Karadžić wasn't found guilty of genocide in seven BA counties.[335] There was no further comment on that fact. *Dnevni avaz* had a media crew which followed a live broadcast of the passing of the judgement in one of Sarajevo's squares.[336] There was *nothing spectacular or unobjective* in the reporting. An interesting occurrence which took place was that *the citizens of Sarajevo gathered in a square to watch a broadcast of the Tribunal's session.* This seems to indicate that the Bosniak public has an *interest and acceptance* of the Tribunal.

Generally, the reporting was *informative and objective.* As to the matters of interest regarding public opinion, *Dnevni avaz*[337], for example, reported about citizens *gathering on a square* to watch a broadcast of the judgement passing, which, as was the case while following the first instance, is a paramount indicator of *public's interest* in the work of the Tribunal. The reporting of *Al Jazeera*[338] corroborates the *high level of professionalism* in Bosniak media reporting about the *Karadžić* appeal judgement. Some Croatian media seem to share the stated remarks. *E.g. Net.hr*[339] and *Dnevnik.hr* both find the reactions of the Serbian media „harsh"[340] and even „wild"[341] while not making any comments which would indicate that the Bosniak media were not objective. At the end, however, a short disclaimer is needed – the conclusions in this paragraph deal only with the Bosniak media in the here analysed case. No conclusions can be made regarding the Bosniak media reporting in some other cases where, for instance, Bosniak defendants have been found guilty by the Tribunal.

In conclusion, the Bosniak public follows the work of the Tribunal very closely and since the media reporting was *generally objective* (which is induced from the

[334] https://www.klix.ba/vijesti/bih/radovan-karadzic-pravosnazno-osudjen-na-dozivotnu-kaznu-zatvora/190320026, 26 September 2020.
[335] Ibid.
[336] https://avaz.ba/vijesti/bih/468109/pogledajte-reakciju-sarajlija-nakon-sto-je-karadzic-osuden-na-dozivotnu-robiju, 26 September 2020.
[337] https://avaz.ba/vijesti/bih/468109/pogledajte-reakciju-sarajlija-nakon-sto-je-karadzic-osuden-na-dozivotnu-robiju, 28 September 2020.
[338] http://balkans.aljazeera.net/tema/presuda-radovanu-karadzicu, 28 September 2020.
[339] https://net.hr/danas/svijet/evo-kako-su-srpski-i-bosanski-mediji-ispratili-presudu-karadzicu-informer-bruka-presuda-docekana-aplauzom/, 28 September 2020.
[340] https://net.hr/danas/svijet/evo-kako-su-srpski-i-bosanski-mediji-ispratili-presudu-karadzicu-informer-bruka-presuda-docekana-aplauzom/, 28 September 2020.
[341] https://net.hr/danas/svijet/evo-kako-su-srpski-i-bosanski-mediji-ispratili-presudu-karadzicu-informer-bruka-presuda-docekana-aplauzom/, 20 September 2020.

mentioned media report analysis and the remarks of some Croatian media as well), it is possible to conclude that the Bosniak public's opinion about the Tribunal is *positive.* This speaks for itself with regard to the legacy of the ICTY in the region.

The case of *Gotovina and Markač*

Since in the case of *Gotovina and Markač* the Bosniak ethnic group is not directly involved (the alleged crimes all happened in an area which was then known as "Krajina" which is at present a part of Croatia; with a very small percentage of Bosniak population – according to Turk, Šimunić and Jovanić[342] – generally less than 0.5% in the relevant counties) only a short and general remark will suffice - there was nothing uncommon in the reporting of Bosniak media.[343]

The Croatian media

While one may find something of interest in researching the Croatian media with regard to the *Karadžić* case, here there is no room for such an analysis. Instead, the *spotlight shall be on the* case of *Gotovina and Markač* because, as it will be shown, here one can find more thought provoking material from the perspective of interest to this paper. The media which is analysed is picked with reference to an article by *Specialist.com.*[344] The article presents various researches into the most read media in Croatia.

The *Gotovina and Markač* case – first instance judgement

Before discussing the first instance judgement, one interesting remark which proves the significance of the case should be made. Namely, even in 2017 and 2019, more than *10 years* since Gotovina's arrest, some media (for instance *vecernji.hr*[345] and *antenazadar.hr*[346]) still report that 7 December is the *anniversary of Gotovina's arrest.* This gives only a sense of how the Croatian public has followed the case in question. So what was the reporting like?

[342] Turk I., Šimunić N., Jovanić M.; Promjene u sastavu stanovništva prema narodnosti u Karlovačkoj i Ličko-senjskoj županiji od 1991. do 2011., 2015, p. 292 – 293.
[343] E.g. http://balkans.aljazeera.net/foto-galerije/oslobodeni-hrvatski-generali-gotovina-i-markac, 28 September 2020.
[344] https://www.specijalist.com/polemiziranje-o-gemiusu/, 28 September 2020, The list ranking: 1) Net.hr; 2) 24sata.hr; 3) indeks.hr; 4) tportal.hr; 5) jutarnji.hr; 6) njuskalo.hr; 7) forum.hr; 8) dnevnik.hr; 9) vecernji.hr; 10) coolinarka.hr.
[345] https://www.vecernji.hr/vijesti/general-ante-gotovina-haaski-sud-uhicenje-1212599. 28 September 2020.
[346] https://www.antenazadar.hr/clanak/2019/12/uhicen-na-danasnji-dan-prije-14-godina-ustao-je-i-rekao-da-ja-sam-gotovina/, 28 September 2020.

In the first instance judgement, the media reported *quite oppositely* than the Serbian media when Radovan Karadžić was condemned. The reporting was *informative and objective - e.g. jutarnji.hr*[347] (the article title said that Gotovina looked calm, but that he felt concerned)[348], *vecernji.hr*[349] ("Gotovina is sentenced to 24 years, Markač to 18 years and Čermak was acquitted") and *rtl.hr*[350] ("Gotovina and Markač are sentenced for a criminal enterprise"). The public, on the other hand, *gathered* on the main square in Zagreb. At least a *few thousand* (it is hard to estimate) people gathered to watch the broadcasting of the Tribunal session. They were clearly emotional and very disappointed.[351] As *supra* (4. a), in the analysis of the Serbian media and the *Karadžić* judgement, there was an argument that in the eyes of some media (namely – *kurir.rs*) Karadžić was *the Serbian national personification;* could the same argument be made with regards to Gotovina and the Croatian public? It is hard to give definitive opinions, but one should *have in mind* the *supra* (4. a), second paragraph) mentioned definition *while contemplating situations which will be discussed infra.*

The *Gotovina and Markač* case – second instance judgement

To begin with, the media reporting was *objective* and *full of interesting data. Vecernji.hr* offers various statistical data about Gotovina and Markač and some interesting details about the trial as well.[352] *Jutarnji.hr* gives a lengthy timeline report – it commences with the reading of the verdict and later offers statements from various politicians and other relevant individuals. Additionally, it follows the release of the generals until their welcome by the public in Zagreb's main square.[353] According to some unofficial data, *tens of thousands of people* welcomed Gotovina and Markač in Zagreb's Josip Jelačić square. The boldest estimates go up to a hundred thousand (however, this should be considered with a grain of salt).[354] This is a *unique* occurrence in the history of the Tribunal. Never has the public reacted so promptly and remarkably because of a judgement by the

[347] https://www.jutarnji.hr/vijesti/hrvatska/haska-presuda-gotovina-je-izgledao-mirno-a-u-njemu-je-kljucalo.-celjust-mu-se-tresla-2042244, 28 September 2020.
[348] This is not a literal translation.
[349] https://www.vecernji.hr/vijesti/gotovina-osudjen-na-24-godine-markac-na-18-cermak-oslobodjen-276772, 28 September 2020.
[350] https://www.rtl.hr/vijesti-hr/novosti/27433/gotovina-i-markac-osudjeni-za-zlocinacki-pothvat/, 28 September 2020.
[351] https://www.youtube.com/watch?v=hgbQfjUnEhM , 28 September 2020.
[352] https://www.vecernji.hr/vijesti/od-optuznice-preko-osudjujuce-do-oslobadjajuce-presude-476001, 29 September 2020.
[353] https://www.jutarnji.hr/vijesti/hrvatska/video-foto-gotovina-ovo-je-tocka-na-i-rat-pripada-povijesti-okrenimo-se-svi-buducnosti-josipovic-bili-ste-zrtve-u-miru-nosili-ste-tudi-teret-hvala-vam-zaduzili-ste-hrvatsku-1363581, 29 September 2020.
[354] https://www.24sata.hr/news/dan-kad-su-se-generali-vratili-hrvatska-je-plakala-od-srece-659766, 29 September 2020.

ICTY. Furthermore, the passing of the judgement was *broadcasted live on city squares throughout Croatia.* According to *Radio Slobodna Evropa* there were broadcasts and celebrations in Osijek, Rijeka, Zafar, Dubrovnik etc.[355] Besides, the article says that there were national flags everywhere; in schools in Split, *school classes were ceased* and a photo of Ante Gotovina was put in Zadar's City Hall.[356] Without debating whether such acts and atmosphere can be regarded as positive or negative, for giving arbitrary opinions is not the goal of the paper, all of the abovementioned proves almost without doubt that the judgements of the ICTY have *a far-reaching influence* on the Croatian public and that the legacy of the Tribunal is significant. But are there any statistical analyses of public opinion to further clarify the topic? Lastly, it needs to be stated that the remarks and conclusions which are made here deal only with the case that is mentioned and even though the Croatian media have been objective in the first instance judgement which was unfavourable towards the Croatian defendants Gotovina and Markač, this conclusion must not be generalised. I.e. no conclusions are made regarding the Croatian media reporting in some other cases, for example, the case of *Prlić et al*.[357] The question of the Croatian media's objectivity, therefore, remains open when considering other ICTY cases.

[355] https://www.slobodnaevropa.org/a/oslobodjeni-generali-se-vratili-kuci-slavlje-sirom-hrvatske/24772701.html, 29 September 2020.
[356] https://www.slobodnaevropa.org/a/oslobodjeni-generali-se-vratili-kuci-slavlje-sirom-hrvatske/24772701.html, 29 September 2020.
[357] Prlić et al. (IT-04-74), 29 May 2013.

Final remarks

Finally, after analysing Serbian, Bosniak and Croatian media the conclusion is that the Serbian media have been *less objective* in reporting about the cases which are analysed in this article than the Bosniak and Croatian media where *objectivity prevailed* and passionate or emotional reporting was an exception. It has to be emphasised once more that this remark concerns only the cases which are analysed here and cannot be applied generally. The question of media reporting about other ICTY judgements remains open and is not the subject of this paper; this paper only made an evaluation of the media reporting regarding the cases of *Radovan Karadžić* and *Gotovina and Markač*. If the selected cases were different, the conclusions might have been different as well. Furthermore, there are signs of *ethnical bias* in the media as well which is visible, for example, in the Serbian media reporting about the *Karadžić* case judgement as well as the difference in reporting between the first and second instance judgements in the cases of *Gotovina and Markač*. The Croatian media, on the other hand, as it was explained, were not *ethnically biased* about the first instance judgement in the cases of *Gotovina and Markač* even though the judgement was unfavourable towards the Croatian generals. The Bosniak media did not report biasedly about the *Karadžić* judgement but that may be because the judgement sentenced a criminal who committed crimes against Bosniaks. It would be interesting to see how the Bosniak media would report had someone who is a Bosniak been sentenced. Exactly because of that, general conclusions must not be drawn from the cases analysed here. In order to open the possibility of making broader conclusions about *ethnical bias* within the media of the countries relevant to this paper, further analyses need to be made which include other cases before the Tribunal. Even though the analysis here is a bit lacking in volume (meaning it would have been better if more cases were analysed) some conclusions have been made and some tendencies described. They can be valuable for the further exploration of the subject.

Keeping in mind the reservations regarding the media's influence on public opinion and since public opinion towards the ICTY was analysed on the margins of this paper, some final comments on that topic might be interesting. As it has been shown, the public is highly interested in the proceedings of the Tribunal, which is especially confirmed by *public gatherings* where masses of people watch live broadcasts of judgements. As to the public opinion polls about the ICTY, it is worth noting that the polls are somewhat old (the latest being from 2011 and 2012). According to the polls, *14%* of the Serbian population had a *positive,* and

71% a *negative* attitude towards the ICTY in general[358]. This coincides with the analysed media reporting the conclusions made in this paper. In Croatia, however, only *23%* have a *positive* attitude towards the ICTY in general, whereas *65%* have a *negative* attitude. Although this somewhat *differs* from the remarks in this paper, it is necessary to emphasise that Gotovina and Markač were acquitted in 2012, a year *later* than the poll was made. As it has been presented, the Croatian public reacted *emotionally and enthusiastically* to the appeal judgement which acquitted Gotovina and Markač. A question emerges, did the Croatian public *rightly have a negative attitude* towards the Tribunal when the appeal judgement itself says that the Tribunal has "erred"[359] in the previous (first instance) judgement? After all, the Tribunal too said that it had "erred ", and the poll was made only several months after the first instance judgement. *Did not the public react understandably when they had a negative attitude towards an erroneous judgement?* My assumption is that public opinion has changed since the poll was made. It is a shame that there are no more recent ones. As to BA, in the Federation (inhabited mostly by Croats and Bosniaks) *59%* of the public has a *positive* attitude towards the Tribunal, whereas *39%* has a *negative* attitude. One could assume (having in mind all that was said) that if only Bosniak were polled, the percentage of positive attitude would be even higher. In Republika Srpska, *15%* has a *positive* and *84% a negative* opinion. This corroborates the remarks from *supra – 6, The Bosniak media, What is the Bosniak media?* where it is explained that in BA the *ethnical principle is of great importance.* All things considered, the ICTY has had *a great impact* on the populace of the region. The Tribunal's legacy *is significant* and the public opinion polls at the end have *confirmed* the conclusions made in the paper. One could hope that the Tribunal's legacy will be further examined through various forms of *education* with the goal of revealing the truth about various war crimes which took place in the region in the 1990s. This way, not only will the Tribunal's legacy be improved, but the truth will be revealed as well and as Seneca teaches us *"veritas nunquam perit".*

[358] 2011 BCHR Serbia Survey, at 130.
[359] http://www.internationalcrimesdatabase.org/Case/1235/Gotovina-and-Markač/, 7 October 2020.

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