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# MECHANISM INFORMATION PROGRAMME for Affected Communities

# 2021 ESSAY VOLUME

STUDENTS' REFLECTIONS ON THE ICTY'S LEGACY



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**MECHANISM INFORMATION PROGRAMME**  
for Affected Communities



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**ESSAY VOLUME**

STUDENTS' REFLECTIONS ON THE ICTY'S LEGACY

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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 2021 Essay Volume, featuring the best essays produced by law students who participated in the 2020-2021 Inter-University Video Lectures Programme. The MIP 2021 Essay Competition invited students who took part in the second 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 or Tribunal) 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 nine 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 second cycle of the Inter-University Video Lectures Programme. They represented the University of Donja Gorica, the University of Niš, the University of Podgorica, the University of Pristina, the University of Sarajevo, the Ss. Cyril and Methodius University of Skopje, the University of Vitez, the Union University in Belgrade and the University of Zagreb.

The MIP is funded 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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# Overview of the ICTY's Complex History of Prosecuting Crimes of Sexual Violence Committed during the War in the Balkans

## Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) was established by the UN Security Council in Resolution 827 on 25 May 1993 as a tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991. Overall, the Tribunal's fundamental mission was to bring suspects and responsible individuals to justice for their heinous violations of international humanitarian law, thereby ensuring justice for victims and greatly contributing to the establishment of peace in the war-ridden area, as well as encouraging necessary reconciliation in the former Yugoslavia. At the same time, this institution served to examine the possibility of establishing a functioning permanent criminal court in this particular area. The dominant objective of this essay is to precisely acknowledge the historic role of the ICTY in prosecuting crimes of sexual violence committed during the war in the former Yugoslavia, and to further emphasize on the importance of creating the relevant case-law for processing such crimes within other tribunals in the future.

Rape and other forms of sexual violence, although always present in every type of war conflict and punished at a national level, were in fact never identified as war crimes in the practice of international tribunals up until the establishment of the ICTY. This meant that many perpetrators of such crimes fled free from suffering the adequately severe consequences of their actions on an international level.

The first, loosely called, modern rape ban during war originated in the United States of America back in 1863 within the so-called *Lieber Code*, which was followed, chronologically speaking, by a rape ban established in The Hague Convention (1907) and The Geneva Convention (1929). Both of these documents prohibited any type of rape, although in a very implicit and loose way. However, a few years later, in the crucial Geneva Conventions (1949), this prohibition finally became more explicit and

the term rape was openly used to provide adequate protection for women against such actions<sup>1</sup>.

Despite such provisions, sexual violence committed by members of armed forces during World War II was very common and cruel, which is best demonstrated by terrifying transcripts from the trials in Nürnberg and Tokyo, containing many testimonies of mass rape and other severe examples of crimes of sexual violence. However, since the statutes applied by said international military courts did not officially classify rape as a war crime, sexual violence committed by defendants in these processes remained unacknowledged.

Fortunately, such approach changed since 1991, with the establishment of the ICTY and its purpose of processing crimes committed during the war in the Balkans. It was believed that this can be, to a large extent, contributed to the activity of worldwide media and numerous articles within which, in addition to general allegations of war conflicts in this area, various forms of sexual violence carried out against innocent civilians were reported, which was followed by an adequately turbulent public reaction<sup>2</sup>.

In response to the public's newly formed awareness of the importance of punishing rape and other forms of sexual violence in Yugoslavia, the ICTY incorporated the incrimination of rape as one of crimes against humanity in its Statute.

## ICTY and Prosecuting Rape

In service of better comprehension, it is extremely necessary to elaborate on the question of what makes rape and other crimes of sexual violence committed during war so distinct that they need to be prosecuted through an internationally established institution, instead of a national one. In order to answer this question and define the very nature of this crime, a more detailed analysis on the features of crimes of sexual violence committed during war is required.

These features can be boiled down to three main groups:

- the use of sexual violence as a weapon of war,
- the sheer mass of sexual violence committed in the framework of international crimes,

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<sup>1</sup> Živković, I., *Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju*. Pravnik: časopis za pravna i društvena pitanja, 2020, Vol. 54, no. 106, p. 107.

<sup>2</sup> Wu, Y., *Genocidal Rape in Bosnia: Redress in United States Courts under the Alien Tort Claims Act*. 1993, UCLA Women's Law Journal 4, p. 105.



- the specificity of situations where such violence occurs, which refers mostly to the increased brutality and ferocity of said acts<sup>3</sup>.

The most comprehensive progress in prosecuting crimes of sexual violence in armed conflict occurred precisely within Article 5 of the ICTY Statute. In addition to this provision, the Tribunal also prosecuted alleged perpetrators of wartime sexual violence under statutes that did not contain explicit provisions on sexual violence. For example, the ICTY has found in some of its judgments that sexual violence can constitute torture, persecution, enslavement and inhuman acts as a crime against humanity, and cruel treatment, inhuman treatment and violations of personal dignity as a war crime<sup>4</sup>.

It should also be noted that, other than the above-mentioned Article 5 of the Statute, there are no other mentions of rape and other wartime sexual crimes in the Statute itself. This can be explained by the lack of more precise provisions relating to rape in the 1949 Geneva Conventions, as well as the 1948 Convention on the Prevention and Punishment of Genocide Crimes. Both above-mentioned documents could have been an excellent precedent for the ICTY Statute in relation to prosecuting sexual crimes, had they contained more provisions on the topic. Considering this was not the case, it was ultimately up to the ICTY Prosecutor's Office to discover acceptable solutions when prosecuting such crimes.

## Defining the Term Rape

Classifying rape as a crime against humanity was undeniably a huge step forward just by itself, considering it finally ensured the possibility of prosecuting individuals guilty of such acts during the war in the Balkans. In practice, however, certain challenges quickly arose, especially in terms of providing definitions for such actions as the Statute itself did not offer any definitions. This meant that defining it was ultimately left to the case-law.

The first time an international criminal tribunal defined rape was the ICTR, during the *Akayesu* case. Similarly, the first case of rape that the ICTY deliberated on was the *Čelebići* case, in which it fully embraced the definition provided by the *Akayesu* case, where rape was described as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive<sup>5</sup>.

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<sup>3</sup> Živković, I., *Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju*. Pravnik: časopis za pravna i društvena pitanja, 2020, Vol. 54, no. 10, p. 110.

<sup>4</sup> OSCE Misija u BiH, *Borba protiv nekažnjivosti za seksualno nasilje u oružanom sukobu u BiH: postignuti napredak i izazovi*, 2014.

<sup>5</sup> The *Čelebići* Case, <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>

Looking back on the ICTY practice, the judgement given in the *Furundžija* case clearly outlined different elements of rape in situations of armed conflict.<sup>6</sup>

The exact definition, taken from the above-mentioned case, described rape as a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression". This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by another object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis<sup>7</sup>.

Other than that, the Trial Chamber noted that no elements other than those previously emphasized may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail<sup>8</sup>.

This definition will later become fundamental in referencing the act of rape for all other convictions that concern the crime of rape. On the other hand, what many authors found interesting about the given definition was the fact that it included oral penetration as an act punished under rape as a crime against humanity<sup>9</sup>. Such an inclusion can be easily explained by the fact that forcible oral penetration is an extremely humiliating attack on human dignity as any other form of forcible penetration, despite the reduced level of physical pain.

It is further necessary to mention the indisputable significance of the judgment in the *Kunarac* case, given that it represented a turning point in terms of understanding rape in the ICTY practice.

Although the Tribunal concluded that the definition given in the *Furundžija* case was appropriate for the factual situation of that case, it considered that in one part of the mentioned definition was too scarce for what international law and standards

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<sup>6</sup> Živković, I., *Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju*. Pravnik: časopis za pravna i društvena pitanja, 2020, Vol. 54, no. 106, p. 125.

<sup>7</sup> The *Furundžija* Case, <https://www.icty.org/x/cases/furundzija/tjug/en/>

<sup>8</sup> Ibid.

<sup>9</sup> Živković, I., *Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju*. Pravnik: časopis za pravna i društvena pitanja, 2020, Vol. 54, no. 106, p. 129.

required. That resulted in incorporating smaller changes that would fit accordingly to the facts of the *Kunarac* case<sup>10</sup>.

The term rape was then defined for a third time, and it included sexual activity accompanied by force or threat of force to the victim or a third party; the sexual activity accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated their ability to make an informed refusal; or the sexual activity that occurs without the consent of the victim<sup>11</sup>.

Nevertheless, the definition in this case received much criticism, and a number of theorists prefer to adhere to the definition in the *Furundžija* case.

The main arguments stated that the lack of consent is not an appropriate part of the definition of rape. It is much more appropriate to link rape to coercive circumstances, and to use the existence of consent as a defence, which in a particular case indicates the absence of such circumstances<sup>12</sup>.

## Determining Mitigating and Aggravating Circumstances

The ICTY Statute leaves room for defining different aspects of rape and crimes of sexual violence. Precisely due to this, any outline regarding what could potentially be considered an aggravating or mitigating circumstance should be determined through case-law.

A thorough analysis of many rape-related cases in front of the Tribunal determined that certain factors can be singled out as aggravating circumstances and were recognized as such by the Tribunal:

- utmost vulnerability of the victim (the *Furundžija* case),
- youth of the victim (the *Kunarac* case),
- extreme violence, humiliation and cruelty (the *Kunarac* case),
- abuse of power and authority (the *Kordić* case).<sup>13</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> *Kunarac et al*, <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>

<sup>12</sup> Živković, I., *Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju*. Pravnik: časopis za pravna i društvena pitanja, 2020, Vol. 54, no. 106, p. 131.

<sup>13</sup> Brammertz, S., Jarvis, M., *Procesuiranje zločina seksualnog nasilja u nadležnosti Međunarodnog krivičnog suda za bivšu Jugoslaviju / Prosecuting Conflict-Related Sexual Violence at the ICTY/* (translated by Šoljan, L.), 2017, CPU: Sarajevo, pp. 297, 298.

<sup>14</sup> Ibid, pp. 302, 303.

In the same manner, certain factors can be recognised as mitigating circumstances that were established in a number of judgments delivered by the Tribunal:

- admission of guilt (the *Zelenović* case),
- explicitly expressed remorse (the *Zelenović* case),
- personal circumstances regarding youth or old age (the *Plavšić* case)<sup>14</sup>.

In addition, co-operation with the Prosecution is obviously an important mitigating circumstance. Namely, according to Rule 101 (B) of the ICTY Rules of Procedure and Evidence, the significant cooperation of the accused with the prosecutor before or after he was found guilty is the only example of the mitigating circumstances that Trial Chambers must consider, while all other circumstances taken into account are the result of their discretion<sup>14</sup>.

## Acknowledgment of Male Victims

The gendered nature of international criminal courts/tribunals and international criminal and humanitarian law has been discussed throughout feminist literature in great detail. However, the idea that international criminal law and the practice of international criminal courts and tribunals could be gendered in a way that does not recognize the harms inflicted upon men has rarely been explored<sup>15</sup>. That is followed by the fact that there are certain stereotypes surrounding male victims of sexual assault and their validity, which often results in male victims feeling discouraged to testify to their experience.

The ICTY-given definition of rape is formulated in a gender-neutral manner. For an act to constitute rape, it has to involve the sexual penetration of the vagina, the anus or the mouth of the victim by the penis or another object used by the perpetrator, which is enough of an acknowledgment that victims of rape can be men as well as women. This conclusion was further solidified by the fact that there were ten cases featuring sexual violence against men that were prosecuted before the ICTY (*Tadić*, *Mucić et al.*, *Todorović*, *Sikirica et al.* and *Mejakić et al.*, *Stakić*, *Simić et al.*, *Česić*, *Brđanin*, *Krajišnik*, and *Martić*).

However, it should be noted that the Tribunal, in some cases, opted to choose broader categories of crime, such as torture or inhumane treatment, in cases that

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<sup>14</sup> ICTY Rules of Procedure and Evidence (footnote 1), Rule 101 (B) (ii). V. the same and the ICTY Statute (footnote 25), Art. 24.

<sup>15</sup> Ruiz. L, *Gender Jurisprudence for Gender Crimes*, 2016. ICD Brief 20, p. 13.

could also have fallen under the category of rape, due to the extreme reflected sexual nature of the crimes<sup>16</sup>.

On the other hand, the ICTY is, significantly to date, the only international criminal tribunal to have completed prosecutions for acts constituting male rape<sup>17</sup>.

## Issues that Arose in Practice

The ICTY has undoubtedly taken pioneering steps to respond to the imperative of prosecuting acts of sexual violence committed during the war. Along with the ICTY, the ICTR was among the first of its kind to explicitly bring forward the charges of sexual violence, as well as the first to define gender crimes such as rape and sexual enslavement in the relevant case-law.

That certainly was an issue of its own kind, especially taking into consideration the lack of a standard that precisely determines the meaning of the concepts that require its application to be precedent in any case corresponding to such a description<sup>18</sup>. That is precisely why a lack of definition leads to a lack of necessary unification. This issue, though, was partially resolved when the definition of rape given in the case of *Furundžija*, and later *Kunarac* as well, was taken as a generally accepted standard when defining the term rape.

This was, on the other hand, simply one of the few existing problems that have occurred for the ICTY in this regard. Such fold of events was, after all expected, considering the fact that the ICTY was essentially the first tribunal of its kind that embodied the role of prosecuting wartime rape and other sexual crimes.

Then in 1993, when the ICTY Office of the Prosecutor was established, the international community's awareness of crimes of sexual violence through conflict and war was only at the beginning of its initial development. Most of the Prosecution then, were for the first time having to work on cases prosecuting sexual violence, as well as the topic of sexual violence during war in general. Also, the available guidelines to promote a clear and effective approach to this challenge from the point of view of the investigation and trial were extremely scarce<sup>19</sup>. There have been

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<sup>16</sup> K.D. Askin, 'Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward', in A-M de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Antwerp, 2013), pp. 19-55, p. 52.

<sup>17</sup> Ruiz, L, *Gender Jurisprudence for Gender Crimes*, 2016. ICD Brief 20, p. 14.

<sup>18</sup> Ellis, M. (2007). *Breaking the Silence: Rape as an International Crime*, 38 Case W. Res. J. Int'l L. 22, p. 230.

<sup>19</sup> Brammertz, S., Jarvis, M. (2017). *Procesuiranje zločina seksualnog nasilja u nadležnosti Međunarodnog krivičnog suda za bivšu Jugoslaviju*. (Translated by Šoljan, L.), CPU: Sarajevo, p 354.

practically no cases of prosecution of sex crimes under international law, which also led to uncertainty about the elements of crimes under which sexual violence could be brought into charge as well as the type of evidence that could be used to prove these crimes, which increased difficulties for the ICTY in this area.

Other specific issues involved difficulties that appeared while collecting evidence related to rape or other forms of sexual violence, which unfortunately was an issue for national courts as well, due to the nature of the crime itself. It was absolutely expected that the same difficulties, to an increased extent, would appear on the international level.

In fact, what makes gathering the evidence in such cases a challenge relates to a multitude of factors involved in documenting international crimes, as opposed to crimes committed in simply one country. Within one state, only the police and the judiciary have jurisdiction over the investigation and prosecution of crimes, and thus almost exclusive access to evidence. Internationally however, local and international NGOs, journalists, UN bodies, and potentially the International Criminal Court or other international courts and tribunals, can also seek evidence to fulfil their mandates. This often results in the duplication of work, as sometimes, for example, the same individuals can be questioned numerous times by different groups of people (depending on who is investigating and for what reason ).<sup>20</sup>

Similarly, different international crime documenting bodies have different methods and approaches to investigation, and also limited capacity to coordinate with each other, which may also be an issue when analysing evidence important for such cases<sup>21</sup>.

This segment of the essay particularly focuses on the processing problems that arose in the work of the ICTY organs, which, on the other hand is not an indication that these are the only problems that can arise in terms of prosecuting rape crimes. Furthermore, it does not exclude the difficulties that can often appear with victims, who, understandably, find it very difficult to talk about such events. This includes struggling to remember crucial details of the specific act, as well as a lack of willingness to share parts of their experience with others, due to the trauma such events have caused.

Time can also pose a significant factor in the process. Depending on the length of the time that has passed, and the specific way the crime was committed, especially in

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<sup>20</sup> Brammertz, S., Jarvis, M., *Procesuiranje zločina seksualnog nasilja u nadležnosti Međunarodnog krivičnog suda za bivšu Jugoslaviju*. (Translated by Šoljan, L.), 2017, CPU: Sarajevo, p. 401.

<sup>21</sup> Ellis, M. *Breaking the Silence: Rape as an International Crime*, 2007, 38 Case W. Res. J. Int'l L. 225, p. 237.

terms of the degree of violence that was present, it is unfortunately often difficult to discover any type of physical evidence that the prosecutors can use to bring the perpetrator of the crime to justice.

## The Activity of the ICTY in this Regard

By observing the actions taken by the ICTY, it can certainly be noted that it was clear from the early stages of the Prosecution's work that, in order to overcome difficulties in accessing sexual violence cases, it would need the commitment of particularly specialized individuals to deal with this category of crimes.

In this regard, Prosecutor Goldstone appointed a legal adviser as a member of his team in 1994, precisely on the topic of gender or gender affairs<sup>22</sup>. Patricia Viseur Sellers was given this mandate, which she performed until 2007.

This position was undeniably very significant and it entailed holding three key areas of responsibility:

- consultation on gender-motivated crimes and women's policy issues, including internal gender issues such as employment and progression in business;
- cooperation with the Prosecution Department in the formulation of the legal strategy and development of the case-law of international criminal law in the field of sexual violence;
- assistance to the Investigative Department in developing an investigative strategy to procure evidence of sexual abuse<sup>23</sup>.

However, appointing the special adviser for gender could not immediately solve all pre-existing issues. Although the gender affairs adviser could propose strategies, what she could not do is implement them among either senior management staff or teams of investigators or prosecutors. This meant that her success depended mostly on the extent to which other management staff carried out her advice and how much each employed person was willing to accept them<sup>24</sup>.

Interestingly enough, in early 1995, a special team was designated to investigate evidence of sexual violence committed in eastern Bosnia and Herzegovina. The team, otherwise called the Sexual Violence Investigation Team, or Team 5 for short,

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<sup>22</sup> Goldstone, R. (1997). *The United Nations' War Crimes Tribunals: An Assessment*. Connecticut JIL 12.

<sup>23</sup> Sellers, P. (2009). *Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts*. AUJ Gender Soc Pol & L 17(2), p. 306.

<sup>24</sup> Sellers, P. (2009). *Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts*. AUJ Gender Soc Pol & L 17(2), p. 308.

focused mostly on gathering evidence to identify patterns of sexual violence and devise a strategy in order to incriminate the Bosnian Serb leadership of these particular crimes. The sexual abuse investigation team consisted of investigators, legal counsel and several translators. Over time, the team's functions expanded to help with sexual violence investigations for teams in other geographical areas and not just eastern Bosnia<sup>25</sup>. Although the said team did not exist for a long period of time – in fact it ceased to exist only two years later – it nevertheless achieved admirable results in its area of work, which ultimately led to indictments against the Bosnian Serb leadership. This is a very successful example of how creating specialised teams or working groups within the ICTY, with additional knowledge in relevant topics contributed to the prosecution of sex-related crimes.

In the meantime, the Tribunal did not stagnate with its attempts to solve the issues relating to the prosecution of sexual crimes. It was with that in mind that the Tribunal initiated the establishment of the Working Party on the Prosecution of Crimes of Sexual Violence in 2009. Its establishment was encouraged by two primary factors:

- the need to improve guidelines and resources related to crimes of sexual violence in the last phase of the Prosecution's work,
- the awareness that before the cessation of work, there was only a small possibility of documenting the prosecution's new legal heritage and fundamental knowledge of the research and prosecution of sexual violence<sup>26</sup>.

The task force was made up of volunteers gathered from throughout the Prosecution – it consisted of anyone who showed a willingness to work on the cases at the initiative of the Group in addition to their basic work on regular cases. The group's success was contributed to by the UN Women's Organization (UN Women), which provided crucial financial support.

Although the ICTY has indeed adopted many guidelines and strategies aimed at improving access to knowledge and experience regarding crimes of sexual violence, these substantive efforts have, in parts, been obstructed by insufficient implementation of the established policy. This situation was further exacerbated by the ICTY's *ad hoc* status, which made any long-term planning very difficult. This leads to the conclusion that, while the inclusion of rape and other forms of sexual violence did indeed constitute a major step forward for the practice of international courts in

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<sup>25</sup> Brammertz, S., Jarvis, M. (2017). *Procesuiranje zločina seksualnog nasilja u nadležnosti Međunarodnog krivičnog suda za bivšu Jugoslaviju*. (Translated by Šoljan, L.), CPU: Sarajevo, p. 410.

<sup>26</sup> Haddad, H. (2010). *Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*. Springer Nature.



the future, it was nevertheless not deprived of certain deficiencies that demanded detailed planning and carefully implemented strategies.

## Conclusion

Keeping all of the above in mind, the recognition of rape and other forms of sexual violence as a crime against humanity charged before the ICTY is a major improvement in this area of law and a very good basis for raising awareness not only of the brutality, but also of the prevalence, of this kind of behaviour during war and other occasions including conflict. Despite the time it has taken to finally introduce the prosecution of such crimes on an international level, it does not diminish the pioneering actions of the ICTY in this regard.

Namely, the ICTY has indeed taken a much-needed initiative to ensure that victims of wartime sexual violence can testify or come forward without the fear of retaliation. All the more so, this Tribunal has tried to protect victims of sexual violence as much as possible from verbal abuse and further creation of trauma and inconvenience during interrogations and testimonies, and has furthermore relieved their search for justice by carefully and strategically developing its rules of procedure.

This essay does highlight certain issues and problems that occurred for the ICTY during practical application of existing regulations, or issues that occurred due to the lack of existing regulations. Despite that, all of the challenges mentioned did not diminish the quality of work that can be attributed to the ICTY and its employees, especially in the area that is as delicate as the one regarding rape and other acts of sexual violence. Having that in mind, the existing practice and case-law of the ICTY certainly represents a valuable example of successful prosecution of such crimes for other internationally constituted tribunals that are or will eventually be established, as well as a priceless source of law in general.

This example only solidifies the belief that we genuinely can rely on the future practice of this and similar tribunals, which, by adopting a number of new regulations and forming specialised bodies and units with notable knowledge in this regard, indicate the possibility of further improvement.

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*Čelebići Case*

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# THE UNSUNG HEROES of the *ad hoc* Tribunal: The Impact and Challenges of Testifying in ICTY Practice

*‘The dead cannot cry out for justice. It is a duty of the living to do so for them’.*<sup>27</sup>

## Abstract

The International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal) has taken ground-breaking steps at the international level in prosecuting and sentencing the perpetrators of crimes in the territory of the former Yugoslavia. The jurisprudence created by the Tribunal was life-changing for most individuals, especially in the Balkans. In addition, in administering justice, the ICTY has received extraordinary assistance from those who have experienced the most serious crimes known to international justice.

Witnesses and victims have left their mark in the ICTY courtrooms through their testimonies.

Despite the fact that their testimonies would be a painful reminder of what they had seen, heard or experienced, their ambition and courage pushed thousands of individuals from the territory of the former Yugoslavia to come together and testify in the ICTY courtrooms. Although there were plenty of challenges throughout their journey, the desire to contribute to justice and speak on behalf of those who are no longer with us was accomplished.

However, it is always easier to witness peace, rather than war. This essay will address the journey of witnesses at the ICTY, the challenges and the impact they have had on sentencing the perpetrators. In addition, the ICTY’s Statute and role in

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<sup>27</sup> Lois McMaster Bujold, *Diplomatic Immunity*, a 2002 science fiction novel, part of the Vorkosigan Saga. It was nominated for the Nebula Award for Best Novel in 2003.

relation to the witnesses and victims of these crimes will be addressed. Without the cooperation from both parties, international justice today would be inadequate and the perpetrators would not be punished for their criminal actions.

Therefore, their indefatigable contribution and journey as witnesses in *ad hoc* tribunals such as the ICTY will be given special attention.

## Introduction

The outbreak of conflicts in the former Yugoslav federation<sup>28</sup> presented the need for the international community to intervene in order to prevent and punish the perpetrators. The establishment of the ICTY marked an important turning point in international humanitarian justice. In the territories now known as Kosovo, Croatia, North Macedonia, Bosnia and Herzegovina, serious humanitarian violations, sexual violence and acts of genocide took place, not only between military forces but also involving civilians, including children, men and women.

The Tribunal had challenges during its work but also extraordinary achievements. The purpose of this paper is to investigate the role and impact of witness testimonies in the Hague Tribunal. How did the witnesses help bring justice to their own countries? What steps did the ICTY take in order to assist and support the witnesses throughout the trials? How cooperative were the witnesses during the testimony period? Was their role crucial to success?

These are just some of the questions that this essay will try to answer and focus on. The purpose of this essay is to analyse profoundly the challenges faced by the witnesses testifying in criminal proceedings at international tribunals such as the ICTY.

Without the cooperation of the individuals who have experienced and seen the most serious crimes recognized by international law, the success of the ICTY would have been almost impossible.

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<sup>28</sup> The former Yugoslavia is the territory that was known as the Socialist Federative Republic of Yugoslavia (SFRY) until 25 June 1991. Specifically, the six republics that made up the federation – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the regions of Kosovo and Vojvodina) and Slovenia.

## The International Criminal Tribunal for the Former Yugoslavia: Bringing Justice to War

The International Criminal Tribunal for the former Yugoslavia, also known as the Hague Tribunal for its location in The Hague, arose as a result of the violent conflicts taking place in the territory of the former Yugoslavia in the late 1990s. In the wake of increasingly frequent reports of mass crimes, the United Nations Security Council adopted Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia in The Hague, the Netherlands.<sup>29</sup>

UN Resolution 827 contains the Statute of the ICTY, which establishes the Tribunal's jurisdiction and organizational structure. The mandate of the *ad-hoc* Tribunal is fourfold:

- a) to bring to justice those responsible for violations of international humanitarian law,
- b) to render justice to the victims,
- c) to put an end to the crimes being committed in the former Yugoslavia, and
- d) to contribute to the restoration of peace.

The Tribunal is an independent and impartial body that consists of three separate organs. These three organs are: the Chambers, the Office of the Prosecutor and the Registry.

The jurisdiction of the International Tribunal was defined in Article 1 of the Statute, which states that “[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute”.<sup>30</sup>

For international criminal justice, this was the first temporary tribunal to be established after World War II, since the International Military Tribunals of Nuremberg<sup>31</sup> and the Tokyo War Crimes Tribunal<sup>32</sup>.

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<sup>29</sup> *Security Council Resolution 827 established the International Criminal Tribunal for the Former Yugoslavia, in order to prosecute individuals responsible for human rights violations* (ICTY) U.N. Doc. S / RES / 827 (May 25, 1993), available at <http://www.icty.org/en/about/tribunal/establishment>

<sup>30</sup> *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 25 May 1993 by Resolution 827, accessible at [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>31</sup> After the war, the top surviving German leaders were tried for Nazi Germany's crimes, including the crimes of the Holocaust. Their trial was held before an International Military Tribunal (IMT) in Nuremberg, Germany. Judges from the Allied powers—Great Britain, France, the Soviet Union, and the United States—presided over the hearing of 22 major Nazi criminals. Subsequently, the United States held 12 additional trials in Nuremberg of high-level officials of

Since its inception, the ICTY has charged 161 individuals with serious violations of international humanitarian law committed in the territory of the former Yugoslavia. Among the accused, 91 have been convicted, 21 others have been transferred to serve their sentences in other countries, 59 have served their sentences, 9 have died after or while serving their sentences, 18 have been acquitted, 13 have been referred to national jurisprudence, and for 37 of the accused, charges have been dropped or the accused passed away.

The Statute of the ICTY, in its Articles 2, 3, 4 and 5, has defined the competences of the ICTY in the crimes which the ICTY, according to the Statute, has the authority to judge. These crimes include Serious Violations of the 1949 Geneva Conventions<sup>33</sup>, Violations of the Laws or Customs of War<sup>34</sup>, Genocide<sup>35</sup> and Crimes Against Humanity<sup>36</sup>.

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the German government, military, and SS as well as medical professionals and leading industrialists. The crimes charged before the Nuremberg courts were crimes against peace, war crimes, crimes against humanity, and conspiracy to commit any of the foregoing crimes.

<sup>32</sup> The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Trial was a military trial convened on 29 April 1946 to try the leaders of the Empire of Japan for the conspiracy to start and wage war – The University of Georgia School of Law, retrieved on 22 April 2017.

<sup>33</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Article 2, Grave breaches of the Geneva Conventions of 1949: “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (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.”

<sup>34</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, adopted on 25 May 1993 by resolution 827, Article 3, Violations of the laws or customs of war: “The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (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.”

<sup>35</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Article 4, Genocide: “1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: 5 (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. 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.”

<sup>36</sup> Statute of the International Criminal Tribunal for the former Yugoslavia adopted 25 May 1993 by resolution 827, Article 5, Crimes against humanity: “The International Tribunal shall have the power to prosecute persons



About 10,800 days of court hearings, 2.5 million pages of transcripts and documentation, and about 4,650 witnesses have been part of this journey in order to bring justice to the international level<sup>37</sup>.

Life would be unbearable for witnesses and victims if their murderers and rapists were to live freely without being punished by the ICTY. As Mahatma Gandhi used to say: "I appeal for cessation of hostilities, not because you are too exhausted to fight, but because war is bad in essence."<sup>38</sup>

## Witnesses before the ICTY: The Challenges and Impact of Giving Testimony

The establishment of international criminal tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)<sup>39</sup> and the International Criminal Court (ICC)<sup>40</sup> – marked a turning point for the international community to ensure justice, advance human rights, end impunity and prevent future atrocities. The success of these courts in achieving their goals depends on many factors, including overcoming challenges to the institution and its actors – in particular, those who testify to the war.<sup>41</sup>

Witnesses always play an extraordinary role in court proceedings in general, and in criminal proceedings in particular. Generally, testifying in war crime tribunals is not a pleasant experience. In criminal proceedings in different countries, witnesses are of particular importance, due to the fact that the weight of evidence can have a positive impact on detecting responsibility for criminal offenses. There is nothing

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responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (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."

<sup>37</sup> *Infographic: ICTY Facts & Figures*, accessible at <https://www.icty.org/node/9590>

<sup>38</sup> Gandhi: *An Autobiography by Mahatma Gandhi*, 1925, p. 33.

<sup>39</sup> The International Criminal Tribunal for Rwanda (ICTR) is the first international court of law established to prosecute high-ranking individuals for massive human rights violations in Africa. The purpose of this court is to prosecute those allegedly responsible for the 1994 Rwandan Genocide.

<sup>40</sup> The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. Governed by the Rome Statute, the ICC is the world's first permanent international criminal court.

<sup>41</sup> *The Burden of Bearing Witness: The Impact of Testifying at War Crimes Tribunals*, Kimi King, and James Meernik. Department of Political Science, University of North Texas, Denton, TX, USA, *Journal of Conflict Resolution* 1-25 The Author(s) 2017.

more valuable to criminal proceedings, much less to a temporary tribunal that primarily judges crimes against humanity, than a living testimony of a horrific event.

For some witnesses, the ICTY was a chance to tell their stories and see their abusers punished.

The retired schoolteacher Mehmet Mazrekaj, now 74 years old, remembers how the Serbian forces separated the men from the women and children, how he was tied up and heard the screams of women and girls being raped in a cattle barn throughout the night between 28 and 29 March. He remembers his escape to Albania the next morning, and those he left behind.<sup>42</sup>

“They raped women and girls all night. Most of them were my students,” he told BIRN. “We left behind around 70 men from the village. Most of them have never been found.” They included three members of Mazrekaj’s own family.<sup>43</sup>

On the other hand, the ICTY prosecuted suspected war criminals for unspeakable atrocities from 1993. It did so not simply because genocide and crimes against humanity had to be punished – international law would mean nothing otherwise – but also because establishing the truth about crimes through judicial process is held by many international observers to be crucial for communities of the victims and for the eventual reconciliation of the people of Balkan.<sup>44</sup>

In addition to the macabre crimes that the witnesses testified, in most cases they also had to testify about crimes which they themselves had experienced. Thus, for example, the victims of sexual violence had to testify about the crimes in which they were the subject. In some cases before the ICTY, investigators or prosecutors were the first person a victim told about experiencing sexual violence crimes during the conflicts.

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<sup>42</sup> *Kosovo War Witnesses Find Little Solace in Testifying*, Author: Serbeze Haxhijaj, Pristina, BIRN.

December 28, accessible at <https://balkaninsight.com/2018/12/28/they-told-of-kosovo-war-crimes-but-found-little-solace-12-26-2018/>

<sup>43</sup> Balkan Investigative Reporting Network: BIRN, *Interview with Mr. Mazrekaj, a witness at the ICTY*.

<sup>44</sup> In its 1994 annual report, the ICTY states that its work is essential to peace and security in the former Yugoslavia: “[I]t would be wrong to assume that the Tribunal is based on the old maxim *Wat justitia et pereat mundus* (Let justice be done, even if the world were to perish). The Tribunal is rather based on the maxim propounded by Hegel in 1821: *Wat justitia ne pereat mundus* (let justice be done lest the world should perish).” Quoted in Bass, *Stay the Hand of Vengeance*, 284. Also see Ignatieff, “Articles of Faith,” 110–22.2. See Herman, *Trauma and Recovery*, 51–73.3. Ibid, 47.4. Ibid, 48.5. D. G. Kilpatrick, C. L. Best, L. J. Veronen, et al., “*Mental Health Correlates of Criminal Victimization: A Random Community Survey*,” *Journal of Consulting and Clinical Psychology* 53 (1985): 866–73.

And some were reluctant to testify in court even after telling what they had gone through, because they were afraid of reliving those moments<sup>45</sup>. It happened that 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.<sup>46</sup>

Sexual violence crimes mostly affect personal integrity and, in many ways, can be difficult to describe.

Such statements by the victims of sexual violence in particular could be extremely challenging. This is due to the prejudices of the community where the victims of this type of violence lived. Most of the victims had not had the courage to share what they had experienced, and so they continued for years to bear in silence the pain they had experienced.

During the *Kunarac et al.* trial, Witness 48 confessed: “Nobody wanted to hear my story because they knew. They knew what had happened. They knew what was going on”. [...]

“My first husband did not want to hear me tell what had happened to me, because he knew from day one what had happened to me as soon as the Serbian army had took us off...”<sup>47</sup> The same witness also declared in the *Kunarac et al.* case: “I simply cannot think about these things because I was exposed to so much torture. But I’m proud to be here. Let the world know what they did.”<sup>48</sup>.

Despite the pain and trauma of testifying, a witness like Witness 48 had the courage to testify because they wanted justice to be done. But sometimes family members do not fully comprehend the extent of the crime’s impact on the victim. According to psychiatrist Judith Herman, when family members do not respond to the victimization the way the victim thinks they should, the victim feels isolated from the people to whom he or she is closest. Also, the victim may relive the crime while sleeping and have frightening, unsettling dreams. A victim may experience unpredictable mood swings and even doubt his or her sanity. In some cases, the

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<sup>45</sup> Behxheti, Egzona, *ICTY and Conflict Related Sexual Crimes: Barriers of successful outcomes, Kosovo case*, p. 17.

<sup>46</sup> For example, sexual violence victims who gave evidence in the *Slobodan Milošević* case 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, p. 2.

<sup>47</sup> *Kunarac et al.* (IT-96-23 & 23/1).

<sup>48</sup> *Kunarac et al.* (IT-96-23 & 23/1).

sense of loss may be so profound and the grief so encompassing that the victim's life may never be the same.<sup>49</sup>

It is unimaginable how hard it was for women who were raped to leave their children and families back home and travel to the ICTY courtrooms to share their heart-breaking experiences.

Sometimes, the witnesses confronted the perpetrators in the ICTY courtrooms where, despite witness protection measures, some witnesses expressed their consent to testifying in open sessions. All this can be interpreted as a sign of revolt and resistance towards crimes and their perpetrators.

Most of the witnesses at the ICTY testified because they saw this as a moral duty. Dragutin Berghofer, who survived the Ovčara massacre, said that when he had heard about the establishment of the Hague Tribunal, he made it a personal quest to testify there one day: "I'd wake up and go to sleep with the Ovčara grave. I didn't need to testify for myself. Why should I? I survived. But I felt sorry for the younger guys who were wounded and helpless and lost their lives—half of them could have been my son. My conscience was telling me I had to go [to The Hague.]" If some went because they wanted the memory of their dead loved ones, especially children, to be acknowledged before an international court, others wanted to confront the men who had caused them to suffer.<sup>50</sup>

Of all the crimes listed in the ICTY Statute, it is indisputable that the most heinous one is genocide. In the practice of the ICTY, many witnesses took the stand to testify about the genocide that took place in Srebrenica in Bosnia in July 1995. Mass killings in Srebrenica were committed by units of the Bosnian Serb Army of Republika Srpska (VRS)<sup>51</sup> under the command of Ratko Mladić, in which the paramilitary unit the Scorpions, from Serbia, also participated.<sup>52</sup>

The Scorpions<sup>53</sup>, a paramilitary unit from Serbia, also participated in the wars that took place in Kosovo and Croatia.

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<sup>49</sup> A. W. Burgess and L. L. Holmstrom, "Adaptive Strategies and Recovery from Rape," *American Journal of Psychiatry* 136 (1979): 1278–82.

<sup>50</sup> Stover, Eric. *The witnesses: war crimes and the promise of justice in The Hague* / by Eric Stover., 2007 Edition, Chapter 5- Bearing Witness, p. 77, para. 1.

<sup>51</sup> Military structure of the Army of the Republika Srpska (VRS) explained by the ICTY in the *Borovčanin* case, case no. IT-02-64, accessible at <https://www.icty.org/x/cases/borovcanin/ind/en/borannexA020906.htm>

<sup>52</sup> Case no. IT-95-14/2-T, Prosecutor v. Dario Kordić and Mario Čerkez, accessible at [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf)

<sup>53</sup> Gordy, Eric (2013). *Guilt, Responsibility, and Denial: The Past at Stake in Post-Milošević Serbia*. Philadelphia: University of Pennsylvania Press. ISBN 978-0-8122-4535-6

"We saw our sons and our husbands off to those woods and never found out anything about them."<sup>54</sup>

"This youngest boy I had, those little hands of his, how could they be dead? Every morning I wake up I cover my eyes not to look at other children going to school."<sup>55, 56</sup> An early decision of the Yugoslavia Tribunal explained the following: "The Nuremberg and Tokyo trials have been characterised as 'victor's justice' because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. Therefore, the International Tribunal is distinct from its closest precedents."<sup>57</sup>

Such testimonies were given thousands of times in the ICTY halls, for days, by different people and genders. According to ICTY data, the vast majority of witnesses were men,<sup>58</sup> from all the states of the former Yugoslavia. Based on the data, most of those who refused to testify refused due to health or stress issues. Witnesses sometimes had to stay in The Hague for days to testify and answer questions before the Tribunal. This was unquestionably challenging for some of them.

Despite the challenges – travelling to an unknown place, reminiscing about difficult events, reliving the suffering and experiencing stress and fatigue – many witnesses decided to make their way to The Hague and testify. Most witnesses had fears and concerns about testifying, perhaps that someone might retaliate, that the community would not treat them the same as always; or they feared that their statement would affect their families. On the other hand, some others thought that the hell would end after giving testimony, and when they return home they would feel relieved. Some witnesses, who happened also to be the family members of the victims in the ICTY practice, saw this as an opportunity to remember the victims, or to carry their legacy to the end, and some others simply hoped that they would sleep peacefully at night.

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<sup>54</sup> Mirsada Malagić, a Bosnian Muslim woman, speaking about the women whose husbands were killed in the Srebrenica massacres in 1995. She testified on 3 and 4 April 2000 in the case against Radislav Krstić and on 16 February 2011 in the case against Zdravko Tolimir, *Tolimir* (case no. IT-05-88/2), *Krstić* (case no. IT-98-33).

<sup>55</sup> *Krstić* (case no. IT-98-33), Indictment, One count of genocide (Count 1) One count of complicity to commit genocide (Count 2) Five counts of crimes against humanity, Extermination (Count 3) Murder (Count 4) Persecutions (Count 6), Deportation (Count 7), Inhumane acts (forcible transfer) (Count 8), Four counts of violations of the laws or customs of war, Murder (Count 5). Sentenced by the ICTY to 35 years' imprisonment.

<sup>56</sup> Witness DD testified with her name and identity withheld from the public. A woman from Bosnia who lost her husband and sons in the Srebrenica Genocide testified in the case against Radislav Krstić.

<sup>57</sup> *Tadić* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 21.

<sup>58</sup> United Nations – International Criminal Tribunal for the former Yugoslavia, Chapter 2 – *Pilot Study: survey background and methodology* 25 Figure 2.1 – Gender by geographic area.

Witnesses motivation for seeking justice overcame every obstacle. Owing to these witnesses who took the courage and the heavy burden to testify, the ICTY has indicted figures like Slobodan Milošević for the crimes in Kosovo, including forced deportation of approximately 800,000 Kosovo Albanians, the murder of hundreds of Kosovo Albanian civilians – men, women and children, which occurred in a widespread or systematic manner throughout Kosovo, sexual assaults carried out by forces of the FRY<sup>59</sup> and Serbia against Kosovo Albanians, in particular women, a systematic campaign of destruction of property owned by Kosovo Albanian civilians accomplished by the widespread shelling of towns and villages; the burning and destruction of property, including homes, farms, businesses, cultural monuments and religious sites; as a result of these orchestrated actions, villages, towns, and entire regions were rendered uninhabitable for Kosovo Albanians. Slobodan Milošević was also indicted for crimes in Bosnia and Croatia<sup>60</sup>. Due to thousands of testimonies, the ICTY convicted individuals such as Radovan Karadžić<sup>61</sup> to 40 years in prison and Ratko Mladić to life imprisonment<sup>62</sup>.

Justice could not have triumphed without the voices of thousands of witnesses who were heard from all over the world. Their testimonies should leave a mark in the 21<sup>st</sup> century, if they have not so far become part of it.

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<sup>59</sup> FRY, Federal Republic of Yugoslavia.

<sup>60</sup> President of Serbia from 26 December 1990; President of the Federal Republic of Yugoslavia (FRY) from 15 July 1997 until 6 October 2000; as FRY President, he was also the President of the Supreme Defence Council of the FRY and the Supreme Commander of the Yugoslav Army. Case no. IT-02-54. at the ICTY.

Indicted for genocide; complicity in genocide; deportation; murder; persecutions on political, racial or religious grounds; inhumane acts/forcible transfer; extermination; imprisonment; torture; wilful killing; unlawful confinement; wilfully causing great suffering; unlawful deportation or transfer; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; cruel treatment; plunder of public or private property; attacks on civilians; destruction or wilful damage done to historic monuments and institutions dedicated to education or religion; unlawful attacks on civilian objects

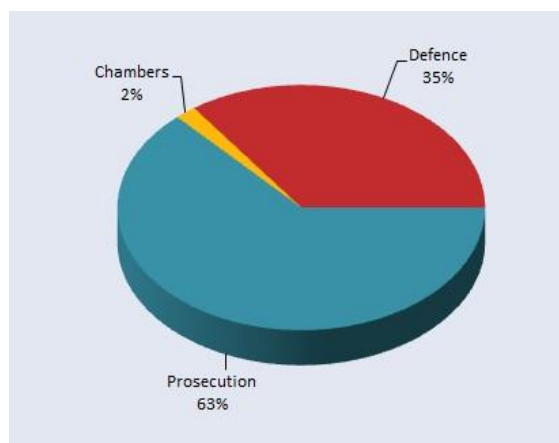
<sup>61</sup> Accessible at <https://www.icty.org/en/case/karadzic>, the Karadžić case, IT-95-5/18.

<sup>62</sup> Mladić, case no. IT-09-92, Colonel General, Commander of the Main Staff of the Army of Republika Srpska, Bosnia and Herzegovina.

## Supporting Witnesses: The Victims and Witnesses Section

Article 22 of the ICTY Statute states that “[t]he Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned”.<sup>63</sup> Furthermore, Article 15 of the Statute, entitled Rules of procedure and evidence, states that “[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”<sup>64</sup>

These Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute of the Tribunal, came into force on 14 March 1994.<sup>65</sup>



Prosecution, Defence and Chambers witnesses, 1996-2015.

Witnesses were brought to testify mostly on behalf of the Prosecution or the Defence, and in few cases were invited by the Chambers.

Rule 69 of the Rules of Procedures and Evidence, Protection of Victims and Witnesses, states that: “(A) In exceptional circumstances, either party may apply to a

<sup>63</sup> *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 25 May 1993 by resolution 827, Article 22, Protection of Victim and Witnesses, accessible at [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>64</sup> *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 25 May 1993 by resolution 827, Article 15, Rules of procedure and evidence, accessible at [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>65</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, IT/32/Rev.50 8 July 2015, *Rules of Procedure and Evidence*, Part One, General Provisions, Rule 1, Entry into Force (Adopted 11 Feb 1994).

Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001, amended 28 Aug 2012) (B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001) (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or Defence. (Amended 28 Aug 2012).<sup>66</sup>

The majority of witnesses testified in open sessions. However, if they felt that it was necessary to protect their security or privacy, the prosecution and defence could ask the court to apply protective measures. In order to protect the victims and witnesses, measures for the protection and privacy of witnesses were also envisaged.<sup>67</sup> Some of the measures that the ICTY had envisaged were consistent with

<sup>66</sup> *Rules of Procedure and Evidence*, Rule 69.

<sup>67</sup> Rule 75, *Measures for the Protection of Victims and Witnesses* (Adopted 11 Feb 1994, amended 12 July 2007, amended 28 Feb 2008) (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999) (B) A Chamber may hold an in camera proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (Amended 12 Nov 1997) (a) expunging names and identifying information from the Tribunal's public records; (Amended 1 Dec 2000, amended 13 Dec 2000) (b) non-disclosure to the public of any records identifying the victim or witness; (Amended 28 Feb 2008) (c) giving of testimony through image – or voice – altering devices or closed circuit television; and (d) assignment of a pseudonym; (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (Amended 30 Jan 1995) (C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002) (D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation. (E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal or another jurisdiction. (Amended 12 July 2007) (F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures: (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002, amended 12 July 2007) (G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply: (i) to any Chamber, however constituted, remaining seised of the first proceedings; or (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings. (Amended 12 July 2002) (H) A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application: (Amended 28 Feb 2008) (i) to any Chamber,



the rights of the accused in the Tribunal proceedings. Measures ranged from personal identity protection, image protection during testimony, one-way closed-circuit television, giving testimony through image- or voice-altering devices or closed-circuit television; and assignment of a pseudonym.<sup>68</sup> To ensure respect for the rights of witnesses, testimony was allowed in closed sessions and remotely via video link also.

Several types of witnesses testified before the ICTY, such as victim or survivor witnesses, insider witnesses, perpetrator witnesses or expert witnesses. Each witness or victim has their own importance.

The Tribunal itself made sure to establish a special section, called the Victims and Witnesses Section (VWS). The Victims and Witnesses Section is an independent and neutral body in the Registry of the Tribunal that facilitates the appearance of all witnesses before the Tribunal, whether called by the Chambers, Prosecution or Defence. The Victims and Witnesses Section works to ensure that all witnesses can testify in safety and security and that the experience of testifying does not result in further harm, suffering or trauma to the witness. The Victims and Witnesses Section fosters an environment in which testifying can be experienced as a positive, strengthening and enriching event. The Victims and Witnesses Section operates with the highest levels of integrity, impartiality and confidentiality, and ensures that all witnesses are informed about their rights and entitlements and have equitable access to the services of the section. There are three units in the Victims and Witnesses Section. The Protection Unit co-ordinates responses to the security requirements, the Support Unit provides social and psychological counselling and

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however constituted, remaining seised of the first proceedings; (ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or, (iii) if no Chamber remains seised, to a newly constituted Chamber. (Amended 12 July 2007) (I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal. (Amended 12 July 2002, amended 12 Dec 2002, amended 12 July 2007) (J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent. (Amended 12 July 2007, amended 28 Feb 2008) (K) An application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to “a Chamber” shall include a reference to “a Judge of that Chamber”. (Amended 12 July 2002)

<sup>68</sup> Rule 75, *Measures for the Protection of Victims and Witnesses* (Adopted 11 Feb 1994, amended 12 July 2007, amended 28 Feb 2008), (B)(i)(a), (b), (c) and (d).

assistance to witnesses, and the Operations Unit is responsible for logistical operations and witness administration.<sup>69</sup>

The VWS made sure to assist before, during and after the trials held at the ICTY. The Witnesses pursuant to Rule 90: *(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".*<sup>70</sup>

Rule 91, False Testimony under Solemn Declaration, provides that *"[a] Chamber, proprio motu or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so".*<sup>71</sup>

Witnesses are required not to discuss their own testimony during breaks in a trial with either party in the proceedings, including the Defence and the Prosecution. Of course, in the Rules of Procedure and Evidence, the Tribunal included the rules in which a Trial Chamber may warn the witnesses of the duty to tell the truth during the trials. There were also consequences envisaged. When a Chamber had strong reasons to believe that a witness knowingly and wilfully did not tell the truth, it could institute proceedings against him or her. If a witness gave a false testimony and was found guilty, a penalty of 100.000 Euros or seven years in prison was envisaged, or in some cases both penalties, depending on the consequences of their false testimony.<sup>72</sup>

## Conclusion

In conclusion, since the inception of the Tribunal, international justice has undergone a major shift, especially in international criminal law. Despite the great work that the Tribunal's mechanisms have done in order to shed light on the perpetrators of criminal acts in the territory of the former Yugoslavia, this success would have been impossible had it not been for the witnesses. The role of witnesses in the Tribunal has been a key point which has helped the Tribunal to see with its own eyes the crimes that took place in the territory of the former Yugoslavia.

It is an indisputable fact that in order to come to testify, the witnesses faced many challenges and procedures of the Tribunal. The biggest concerns in giving evidence

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<sup>69</sup> *Information booklet for ICTY witnesses* (2007). Publication prepared by the Victims and Witnesses Section, Registry, Produced by the Graphics and Reproduction Unit, International Criminal Tribunal for the former Yugoslavia.

<sup>70</sup> Rule 90, Testimony of Witnesses (Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000), A

<sup>71</sup> Rule 91, False Testimony under Solemn Declaration (Adopted 11 Feb 1994), (A).

<sup>72</sup> Rule 91, False Testimony under Solemn Declaration (Adopted 11 Feb 1994), (G).

were related to the trauma of their experiences. Above all, the motive and courage that these witnesses had, became a triumph for international justice in the Tribunal. The Tribunal also, through the Statute and the Rules of Procedure, sought to facilitate witnesses throughout their journey in seeking justice together with the ICTY.

Thus, owing to the testimonies of these witnesses, justice was served. Nothing would be the same today if it had not been for the courage and bravery of ICTY witnesses. Because of this evidence and the hard work of the ICTY, today there are still people who are serving sentences for the crimes committed. In one way or another, this represents peace for the family members who have lost their loved ones during the conflict, and inspires individuals, despite the challenges, to always confess the truth. The Tribunal in its practice has depended on the willingness of the witnesses to testify in the courtrooms.

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# Srebrenica: Perpetrators, Apologists and Negators

## Introduction

Following the widespread violations of fundamental human rights and international humanitarian law in the former Yugoslavia, the United Nations Security Council adopted Resolutions 808 (1993) and 827 (1993) to establish an *ad hoc* international tribunal to prosecute the perpetrators responsible for severe violations of international law (Pocar, 2008). With the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal), the international community undertook unprecedented efforts to punish the perpetrators of genocide, war crimes, and crimes against humanity. The role of the ICTY was fundamental in changing the landscape of international humanitarian law, providing an opportunity for victims to express what they experienced and witnessed during the Balkan conflicts in the 1990s (ICTY, 2014).

Like other former Yugoslav countries, Bosnia and Herzegovina voted for independence in 1992, with most Bosnian Muslims and Bosnian Croats supporting the referendum. Despite the wish for a peaceful transition from the Yugoslav Federation, the Bosnian Serbs boycotted the referendum. Ethnic tensions contributed to a conflict deliberately created by Slobodan Milošević between the Bosnian Serbs, Bosnian Muslims, and Bosnian Croats. Even though many ethnic and religious groups lived together under Yugoslavia's communist government, ethnic tensions and the fall of communism led to the Bosnian War, marking the most horrific crime after World War II (Biserko, 2012).

Under the leadership of Radovan Karadžić, Bosnian Serbs pursued the creation of a Serb Republic through mass killing and persecutions of Muslims and Croats (Reuters, 2008). During the conflict, 100,000 people were killed, with an estimated 8,000 Bosnian victims massacred by the Bosnian Serbs in Srebrenica (Holocaust Memorial Museum, 2013).

This paper seeks to explain how the perpetrators of international crimes are tried and sentenced, in this case, through the creation of the *ad hoc* international tribunal for the former Yugoslavia. The method used in the essay is to examine the case of Radovan Karadžić, looking more closely at the arrest, trial, and sentencing in the first part, while the second part of the paper will focus on genocide denial and the reactions of state officials, politicians and civilians, both in Bosnia and Herzegovina and Serbia. The conclusion will provide, following the argumentation, a final remark on the case of Radovan Karadžić as a successful case of the ICTY and the importance of the international community in combatting genocide denial in countries where transitional justice measures are still needed.

## The Case of Radovan Karadžić – the Arrest, Trial, and Sentence

On July 21<sup>st</sup>, 2008, Radovan Karadžić was arrested in Belgrade by the Serbian authorities after 12 years as a fugitive. Karadžić, a trained psychiatrist, worked at a private clinic specializing in psychology and alternative medicine, using the alias Dragan Dabić (Šekularac, 2008). As one of the most prominent fugitives from international criminal justice, Karadžić was handed over to the custody of the ICTY. In March 2016, Karadžić was convicted of genocide, war crimes, and crimes against humanity during the Bosnian War and sentenced to 40 years' imprisonment (Prosecutor v. Radovan Karadžić, 2016). In an attempt to overturn his sentence, Karadžić appealed for the third and last time. The Appeal Chamber increased the initial sentence to life imprisonment, stating that the Trial Chamber "*committed a discernible error and abused its discretion in imposing a sentence of only 40 years of imprisonment.*" (Appeal Chamber, 2019) The ICTY Prosecutor indicted Karadžić in 1995, and later the indictment was amended in April 2000. The Prosecutor of the Tribunal charged Karadžić with "*genocide, crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions of 1949*" (The Prosecutor v. Radovan Karadžić, 2000). Since the ICTY was surprised by Karadžić's arrest, very little work had been done to prepare the case against one of the most high-profile defendants. The Office of the Prosecutor, being preoccupied with the remaining cases and deadlines imposed by the UN Security Council, amended the previous indictment from 2000 only after the arrest of Karadžić in 2009, to include the relevant developments that had happened in meantime. (The Prosecutor v. Radovan Karadžić, 2009).

The third amended indictment, together with the second, introduced crucial changes regarding the first indictment. The Prosecutor reduced the crime base by lowering the actual instances of criminal conduct from 41 to 27 municipalities (Milanović, 2009). Another change was restructuring the single genocide count into two: one for



ten municipalities in Bosnia and Herzegovina and another for Srebrenica, with an additional five counts of crimes against humanity and an additional four counts of violations of the laws or customs of war. The third indictment charged Karadžić with four Joint Criminal Enterprises (JCE): through his participation in efforts to permanently remove Bosnian Muslims and Bosnian Croats from the territory of Bosnia and Herzegovina, spreading terror amongst the civilian population of Sarajevo, killing men and boys in Srebrenica, and forcibly displacing women and children, and taking United Nations personnel hostage to stop NATO airstrikes against Bosnian Serb military personnel (The Prosecutor v. Radovan Karadžić, 2009).

The Karadžić trial served as one of the most prominent examples of exposing the policy of ethnic cleansing after the death of Slobodan Milošević. As one of the best substitutes for the trial of Milošević, the Karadžić case had tremendous importance not just in Bosnia and Herzegovina, but throughout the countries of former Yugoslavia and the rest of the world. As in the cases of Milošević and Šešelj, Karadžić demanded to represent himself during his trial (Simons & Bilefsky, 2008). Using the trial as a political platform, Karadžić argued that the set-up of the Tribunal was a global conspiracy tool against him, imposed by Western countries. In one instance, Karadžić called the ICTY "a NATO court", which he believed was hiding under the guise of a court of the international community (Simons, 2008). It is important to note that the arguments made by Karadžić are still widely believed and used by his supporters. This fuels the divide between the Balkans and the Western world to a degree which places Serbia as a 'victim' in the eyes of the international community.

During his first hearing, Karadžić claimed an alleged immunity deal he made with Richard Holbrooke, stating that *"he would not be prosecuted at the ICTY if he resigned from public office and withdrew from public life"* (Robinson, 2012). Despite the claims of Karadžić's pro-bono lawyer, Peter Robinson, that 22 witnesses supported Holbrooke's promise of an immunity deal, the ICTY rejected the immunity appeal (Reuters Staff, 2009). Karadžić, similarly as in the case of Milošević, filed a motion to challenge the legal validity and legitimacy of the ICTY (The Prosecutor v. Radovan Karadžić, 2009). The Prosecutor opposed the motion, claiming that *"the Appeals Chamber has already determined the validity of the Tribunal's creation in previous decisions which constitute established precedent on this issue"* (The Prosecutor v. Radovan Karadžić, 2009).

Looking more closely at the trial judgment and the evidence, Karadžić stood trial for 11 counts through participation in four JCEs. In the Overarching JCE, the Accused participated in permanently removing Bosnian Muslims and Bosnian Croats from the Bosnian Serb-claimed territory through planning, coordinating, and taking control of the municipalities in Bosnia and Herzegovina. In Karadžić's defence, the population

moved voluntarily in a time of war, without any policy of expulsion. The Chamber found that the Serbian Forces' attacks in the villages were a piece of primary evidence for their forceful removal, followed by their arrest, detainment, and transportation from their municipalities. The perpetrators committed crimes with discriminatory intent, based on the victim's identity as Bosnian Muslims and Bosnian Croats (Prosecutor v. Radovan Karadžić, 2016).

The Sarajevo JCE encompassed the perpetrators' crimes committed by shelling and sniping the civilian population and holding the city under siege, which was constant and persistent. The Chamber was convinced that the members of the Bosnian Serb Forces engaged in deliberate shelling of the population in Sarajevo through the use of heavy weapons. Karadžić argued that the Bosnian Serb forces were responding to attacks from the Bosnian Muslim military, claiming they sniped and shelled their own civilians as a provocation. The Chamber rejected the claims made by Karadžić, based on evidence that the Bosnian Serb forces directed fire at civilians randomly and disproportionately, while the Accused was directly involved in the military matters in Sarajevo (Prosecutor v. Radovan Karadžić, 2016).

The Hostage component of the third JCE encompassed the detention of UN personnel by the Bosnian Serb Forces. Karadžić significantly contributed, and intended for threats to be issued against the UN personnel with the objective of stopping further NATO airstrikes. The Chamber found that the Accused treated the UN soldiers as enemies, giving subordinates orders to attack and detain the UN forces. In the final JCE, the Srebrenica component, the Accused participated in eliminating Bosnian Muslims by killing boys and men in Srebrenica and forcibly removing children and women from Srebrenica. Together with Mladić, the Accused made a long-term plan for the forcible removal of the Bosnian Muslim population. Despite Karadžić's claims that he did not know about the mass killings, the Chamber found that the Accused received information and was in constant contact with high-ranking officers of the Bosnian Serb Forces (Prosecutor v. Radovan Karadžić, 2016).

## **Karadžić's Verdict – Victims' Reactions and the Response of the International Community**

The ICTY verdict for Karadžić represented a significant step towards justice and contributed towards the Tribunal's overall legacy. It created a historical narrative for the whole region by attributing acts of genocide to the leaders in the conflict (Sterio, 2017). Although there were mixed reactions to Karadžić's sentencing, Bosnian Muslims were not satisfied with the length of the prison sentence. A relative of the victims of Srebrenica, Kada Hotić, expressed it as follows: *"Is the tribunal not*

*ashamed? Do the Bosnian Muslims and Bosnian Croats not have a right to justice? He got 40 years. That's not enough.*" (Borger & Bowcott, 2016). Although Bosnian war survivors argued for Karadžić to be convicted on every count in the indictment, Serb veterans claimed it was unjust (Džidić, 2016).

On the other side, Bosnian Serbs still see Karadžić as a hero, naming a student hall in his honor (Delauney, 2016). To this day, Bosnian Serbs and Serbian nationalists still struggle to view

Karadžić as a war criminal. The Serbian President, Aleksandar Vučić, commented that he would not allow Karadžić's verdict to be used as an excuse to attack Bosnian Serbs (Borger & Bowcott, 2016). Serbia's denial was seen in former President Nikolić's claims that there was no genocide in Srebrenica, but only grave war crimes (BBC, 2012). After such claims, the European Commission warned Belgrade of these attempts to rewrite history while promptly rejecting the statement (Euractiv, 2012). In Serbia, the process of accepting the truth on Srebrenica continues to be reluctant and stagnant (Biserko, 2012).

In an instance, Karadžić was successful in managing to present the narrative of helping the long-suffering Serbian nation. Presenting himself as a savior, Karadžić created a situation where genocide was an option. His tactic and strategy, boldness and arrogance, created a space for unjust discourse and further ethnic tensions (Donia, 2015). The international community's reactions were consistent, addressing the genocide conviction as a triumph for international criminal justice. Additionally, former UN secretary-general Ban Ki-moon sent a strong message that the persons in positions of responsibility will be held accountable (UN News, 2012).

## **Increasing Genocide Denial Through the Continuation of Nationalist Policies**

Although genocide denial in Bosnia and Herzegovina started during the War in 1992 through media manipulation and false information, now Republika Srpska representatives passed two new laws that 'counterattack' the genocide denial legislation. The newly imposed legislation by the Office of the High Representative head, Valentin Inzko, banning genocide denial in Bosnia and Herzegovina, came as a jolt for the Bosnian Serbs. The legislation introduced jail terms for anyone who "publicly condones, denies, grossly trivializes or tries to justify a crime of genocide, crimes against humanity or a war crime" (Office of the High Representative, 2021).

On the other side, the law on non-implementation of the high representative's decision, as well as the law that envisions penalties of up to 15 years of imprisonment, relates to anyone that violates the reputation of the Republika Srpska (National Assembly of the Republika Srpska, 2021).

As previously mentioned, entities that denied genocide from the beginning continued to replace and reduce the genocidal acts through the constant use of the term 'ethnic cleansing'. It is evident that the newly adopted laws by the Republika Srpska parliament trace the same path in forestalling the term 'genocide', and to some degree, they were successful in doing so. According to Benjamin Lieberman (2010), the difference between ethnic cleansing and genocide is the moment when forced removal of the population leads to their destruction. Additionally, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948) is clear in defining genocide as *"acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."*

In recent rulings by the International Court of Justice (ICJ), the ICTY, and also domestic courts, many scholars argue that the scope of genocide has been narrowed. The ICJ, in a 2007 judgment, ruled that genocide had only occurred in Srebrenica, which limits the scope in terms of territory and time. (The New York Times, 2017). The 'restriction' applied by the court can be seen as a precedent that has not been seen before in any judgment.

Nonetheless, the conclusions of the ICJ in the case brought by Bosnia and Herzegovina against Serbia found Serbia guilty of its failure to prevent genocide administered by the Bosnian

Serb forces in Srebrenica (2007). Even though the court ruled that the killing of nearly 8,000 men and boys in Srebrenica was genocide, it found Serbia innocent and exonerated it from direct responsibility for the killings (The New York Times, 2017).

According to some scholars, the court's verdict to limit the scope of genocide to only one locality and at a particular time (July 1995, Srebrenica) is justifiable due to the available evidence, but unsatisfying (Hoare, 2010). The problem that arises from the court's decision is the concept of 'local genocide', while the massacres by the same perpetrators in the same period throughout the country are not characterized as genocide. However, it is essential to note that the court needs proof of motive since the crime of genocide cannot be proved only on the basis of the perpetrator's actions and results.

Today, genocide denial still continues. Following the example of their politicians and state officials in Republika Srpska and Serbia, civilians continue to reject the interpretation of genocide, claiming that genocide never happened in Bosnia and Hercegovina. This was again fuelled with the creation of two commissions by Bosnia's Serb-dominated entity, with the sole purpose of determining the truth of what happened in Sarajevo and Srebrenica. The commissions accused the ICTY of being politically biased of the Bosnian Serb leaders, continuing that the Srebrenica genocide is wrongly classified. What comes as shocking is the claim of the commissions that the Bosniaks refused to surrender to the Bosnian Serb forces, experiencing the "horrific consequence" of the war (Memišević, 2021).

On the positive side, the Serbian parliament made efforts to combat genocide denial, with the adoption of the declaration on Srebrenica in March 2010. The declaration was seen as a formal apology for the genocide committed by the Bosnian Serbs and the paramilitary units of Serbia's Ministry of Internal Affairs (Soso, 2012).

Former President Boris Tadić, the main initiator of the declaration, explained that the Serbian declaration was a crucial step towards a prosperous and inclusive future, while apologizing for the atrocities that happened in the Yugoslav civil wars (Tadić, 2010). The International Center for Transitional Justice (2010) evaluated the declaration as *"an imperfect but important step [...] in which democratic states accept responsibility for past abuse and offer apologies to victims"* since the Serbian public still denies the genocide. Even though the apology was offered for the heinous atrocities, the declaration was seen as a political landmark that would have helped Serbia in the path towards EU accession.

## Conclusion

The establishment of the ICTY changed the persistent discourse that the international community did not respond to breaches of peremptory norms. Even though the international community did not prevent the crimes from happening, it left a strong and unprecedented mark on international law, leaving limited space for perpetrators.

The case of Karadžić was one of the many examples where justice has been served, providing victims a chance to voice the horrors they experienced. The Tribunal laid the foundations for conflict resolution, bringing justice to leaders suspected of mass crimes. The ICTY indicted 161 individuals, with 90 persons sentenced, many former leaders and heads of state. This shows that the response of the international

community to try individuals responsible for murder, rape, torture, and other crimes can be conducted effectively.

Using the case of Karadžić, the international response to the Bosnian War was seen through the creation of the ICTY. The verdict of Radovan Karadžić presents as significant, considering the fact that it assigns individual criminal responsibility to the leader of the Bosnian Serbs. The arrest and trial of Karadžić showed the performance of justice of the Tribunal and a moment of hope for the victims of the Bosnian War.

Today, it is evident that the consequences of the conflict are still present through genocide denial. The mistakes from the past should lead the way forward; but in such a direction that we all learn from them. Identifying and tracing the patterns of bad governance should be a primary responsibility for every human being, in order to stop and prevent future conflicts from ever taking place.

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# Bosnia and Herzegovina: A Complicated State, Glorification and Denial of War Crimes

## Introduction

Throughout history, wars have provided a stage for destruction, disappearance and death. As a phenomenon and a term, war is a metaphor, and this further determines the interpretation of war. It is a feature of war that, in view of the idea of “holiness” and “sacredness”, everything is permitted that is otherwise prohibited: zeal, violence, sacrifice, all this is allowed for the purpose of some new renaissance. In Bosnia and Herzegovina, a whole range of crimes against humanity were committed during the war – genocide, torture, mass murders, massacres, ethnic cleansing<sup>73</sup>. In courtrooms, international as well as domestic, facts were established beyond reasonable doubt and dozens of perpetrators were put on trial, and all this remains documented. The war in Bosnia and Herzegovina is probably one of the best-documented historical events. However, in the political and social reality of this country, final judgments are ignored and denied, and the obvious messages of international justice are not acknowledged. Not only is the true meaning of court judgements ignored, but for decades now state institutions, official representatives and politicians at all levels of power have publicly glorified the said crimes and participated in minimizing and ignoring justice and manipulating the narrative about secessionism, and in so doing they have maintained interethnic tensions. The purpose of this paper is to note to what extent the Bosnian and Herzegovinian society and state are prepared to legally regulate the prohibition of negation (denial), minimization, justification and approval of genocide, holocaust, crimes against humanity or war crimes, despite the political reality of the ruling political parties and their leaders, who through their negation and glorification of the said crimes have been thwarting positive processes and progress in Bosnia and Herzegovina every day for almost three decades now.

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<sup>73</sup> <https://www.britannica.com/summary/Bosnian-War>

## The International Tribunal in The Hague as a Mechanism Contributing to Reconciliation

The break-up of Yugoslavia and the fall of socialism as a social and state model, with the former Yugoslav republics becoming independent states, was supposed to initiate a process of changes at the economic, legal, political, cultural and every other level, with the republics remaining within the borders they had before they became independent territorial and state entities.<sup>74</sup>

The theoretical term for this process was transition, and it basically denotes the replacement of one social system with another. It also denoted the replacement of social and other values, based on the principles of democracy and human rights. At the referendum conducted in 1992<sup>75</sup> the citizens of the Republic of Bosnia and Herzegovina opted for independence and sovereignty in relation to the former Yugoslav community. After this referendum, a considerable number of countries recognized Bosnia and Herzegovina as a sovereign and independent state established in the wake of Yugoslavia's break-up. Despite this fact and the international subjectivity of BiH, Bosnian Serb forces were not prepared to recognize that decision. With all kinds of military and other assistance and cooperation from what was then rump Yugoslavia, Serbian paramilitary formations in Croatia and BiH launched various military operations: first in the territory of Croatia and, subsequently, in the territory of BiH.<sup>76</sup> Numerous facts were established and proved in the judgements of the Hague Tribunal. However, it is not our intention to deal with the beginning of the war and the culprits, but to point out the fact that lack of clarity in defining the nature and character of the conflict unfortunately did no service to reconciliation or the judgements of the International Tribunal for war crimes in the territory of the former Yugoslavia. Instead of implementing forceful, programmatic and well-thought through changes after the end of war, Bosnia and Herzegovina was brought to a standstill, and a situation arose in which negative tendencies that ensued from the war, suffering and destruction were affirmed.

From the very beginning of the war in the territory of Bosnia and Herzegovina, its nature and character were not clearly defined in political, legal and military terms, and therefore the peace that was established by the Dayton peace agreement was in a way the expression of a compromise and without a victor.

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<sup>74</sup> Pursuant to Opinion No. 4 of the Badinter Arbitration Committee, with regard to the request of BH for independence, on 25 January 1992 the Assembly of the Socialist Republic of BH adopted a decision to conduct a referendum to determine the status of BH.

<sup>75</sup> <https://www.britannica.com/place/Bosnia-and-Herzegovina>

<sup>76</sup> <https://www.britannica.com/event/Bosnian-War>

Under the Dayton agreement, the armed conflict and hostilities ended, a road to peace and trust was opened, and Bosnia and Herzegovina as a state in the territorial sense was regenerated and its functions integrated through democratic mechanisms and a high level of decentralisation in the decision-making process.<sup>77</sup> The Dayton agreement created preconditions for transition and the establishment of the society and state on different, democratic foundations.

One of the major obstacles in the process of reintegration of the space, authority and territory is the fact that the political forces that are now active in society are precisely those that figured most prominently in generating the war and under whose auspices the military formations organized on party and ethnic bases acted. Naturally, it was to be expected that this political milieu would put up resistance to changes, the truth, reconciliation and alterations to the internal organization of the state. The political forces that were the most dominant players in the conflict were not ready to accept the truth and leave the past behind for the sake of a better future. The ethnic concept of power supported territorial control, a slow and laborious return of the population, and resistance to the prosecution of individuals for criminal and other illegal acts committed during the war and suffering. Of course, we do not want to generalize and state that all parties to the conflict are equal in terms of the nature and extent of the crimes and the suffering of the population. The International Tribunal in The Hague was envisaged as one of the instruments or mechanisms that were supposed to contribute to reconciliation and the restoration of trust among the peoples and citizens of Bosnia and Herzegovina, and in the wider region as well, including primarily Serbia and Croatia, which had been involved in the war waged on the territory of Bosnia and Herzegovina. The purpose of the Dayton peace agreement was essentially to stop the war and the suffering of the population of Bosnia and Herzegovina and start a process of changes that were necessary in all social spheres. The Hague Tribunal itself became dependent, in a way, on the political processes that were taking place in the territory of Bosnia and Herzegovina. This dependence was made manifest by the fact that the parties to the conflict – in Bosnia and Herzegovina, Croatia, Serbia and Montenegro alike – were not prepared to cooperate with the Hague Tribunal.<sup>78</sup>

At the political level, many conflicts arose, primarily in connection with the gathering of facts related to the crimes and their perpetrators, military formations, their commanders and order-issuing authorities, as well as the organs responsible for arrests and the procedure of surrender to the Hague Tribunal. How unwilling to

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<sup>77</sup> Fočo, Adnan (2017), *Uticaj presuda međunarodnog krivičnog suda za bivšu Jugoslaviju na procese pomirenja u Bosni i Hercegovini*, Sarajevo, p. 174.

<sup>78</sup> Fočo, Adnan, (2017), *Uticaj presuda međunarodnog krivičnog suda za bivšu Jugoslaviju na procese pomirenja u Bosni i Hercegovini*, Sarajevo, p. 174.

cooperate the neighbouring states involved in the Bosnian conflict were – is best illustrated by Julian Borger's voluminous book *The Butcher's Trail*, which provides a detailed description of the role of intelligence structures in the arrests of persons suspected of war crimes, genocide and extermination of peoples in certain areas. Police structures were often involved in preventing the surrender of the accused and in helping suspects to hide, for instance, by providing the accused with other, i. e. false names. Thus, Stojan Župljanin resided in Serbia under the name of Branislav Vukadin, while Radovan Karadžić used the name Dragan David Dabić.<sup>79</sup>

## Glorification and Negation

In order to better understand the issue of the negation of genocide in the context of Bosnia and Herzegovina, it is important to present the system of concepts that may help explain this issue.

Negation is a term that features in the dictionaries and handbooks of foreign words and phrases. In the *Dictionary of Foreign Words – Loanwords, Idioms, Abbreviations and Phrases* the entry *negacija* (negation) reads: “(lat. *negatio*) negative statement; gram. negative modifier; *opposite* affirmation; *phil.* Hegel: ‘...that contradiction does not dissolve into zero, into abstract nothing, but into the negation of its specific content’”.<sup>80</sup> Negation (negating) is the disputing, denial, or even intentional falsification of actual events and facts. This is primarily a conscious action, aimed at achieving specific personal or group interests and goals. In theory and practice, an approach has been developed, among others, that consists of negation of the crimes that were committed. It is believed that the negation of the crimes committed is “typical of every organised criminal group, but also of individual delinquents”,<sup>81</sup> that is, criminals. There are many different reasons and motives for actions aimed at negating the crimes that were committed, the most frequent among them being “to escape from the feeling of guilt and to avoid prosecution.”<sup>82</sup>

The collective and individual negation of the crimes committed, including the most serious among them – the crime of genocide, “the failure to accept – refusal to accept the facts about the genocide committed, is, according to the research by famous scientific authorities on the Holocaust and genocide, the last stage of

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<sup>79</sup> Borger, J. (2016), *Krvnikov trag: Kako je potraga za balkanskim ratnim zločincima postala najuspješniji lov na čovjeka u svijetu* / *The Butcher's Trail: How the Search for Balkan war Criminals Became the World's Most Successful Manhunt*, Buybook Sarajevo, p. 255.

<sup>80</sup> Anić, Šime et al. (2002), *Rječnik stranih riječi – tuđice, posuđenice, izrazi, kratice i fraze*, Sani-Plus, Zagreb, p. 941.

<sup>81</sup> Mulagić, Elvedin (2014), *Negiranje genocida nad Bošnjacima*, Institute for the Investigation of Crimes against Humanity and International Law, University in Sarajevo, Sarajevo, p. 45.

<sup>82</sup> Mulagić, Elvedin (2014), *Negiranje genocida nad Bošnjacima*, Institute for the Investigation of Crimes against Humanity and International Law, Sarajevo, p. 45.



genocide, which always follows that gravest crime against humanity and international law and may last for a (very) long time after the commission of genocide.”<sup>83</sup>

It is extremely important to note that the essential difference between negation and glorification lies in the fact that these are two separate processes that may run parallel to each other but have nothing in common in terms of meaning, definition and purpose. For instance, as the project of a Greater Serbia failed to materialise, the post-war period in Bosnia and Herzegovina saw “continuous efforts to re-evaluate and minimise heinous crimes, with the media and populists promoting major criminals, including the convicted ones, as ‘national heroes’”<sup>84</sup>.

Negation can have a “common vocabulary in which the brutality of a crime committed can be euphemised by minimisation and reinterpretation”.<sup>85</sup> “In order to be effective, the negation of previous crimes, in this case genocide against Bosniaks, had to be placed in the heroic military past. This is a specific type of negation that presents evil as good, and this process is taking place within national culture and family tradition, that is, always at the level of community.”<sup>86</sup> The Srebrenica Genocide Denial Report 2020 states, among other things, that “[t]he glorification of war criminals and the celebration of genocide through institutions and pop culture has transformed the legacy of genocide into an inherited cultural asset in the perpetrators’ communities.”<sup>87</sup>

In this connection, insufficient efforts and steps have been taken, which leaves even more manoeuvring room for those who aim at glorification. Thus the “reactions of democratic societies to this behaviour are very different, ranging from polemic and critical opposition, to public condemnation and scientific disproval, to the legal sanctioning of all forms of racism, xenophobia and denial of [the H]olocaust, genocide and other most serious war crimes.”<sup>88</sup> And so, “[n]ot only is it possible to bluntly deny that war crimes, established during court proceedings, happened, or happened in that severity, that sentenced war criminals are glorified without any sanctions – state institutions, politicians, official representatives are often actively

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<sup>83</sup> Čekić, Smail (2011), *Negiranje genocida u Bosni*, Korak, 23, p. 34-40.

<sup>84</sup> Muratović, Rasim (2014), *Zlo i ljudsko dostojanstvo u djelu Arnea Johana Vetsena*, Institute for the Investigation of Crimes against Humanity and International Law, University of Sarajevo, Sarajevo, p. 14.

<sup>85</sup> Mulagić, Elvedin (2014), *Negiranje genocida nad Bošnjacima*, Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava Univerziteta u Sarajevu, Sarajevo, p. 58

<sup>86</sup> Bećirević, Edina (2009), *Na Drini genocid*, Buybook, Sarajevo, pp. 244-247.

<sup>87</sup> Green Hanson, Monica (2019), *Izveštaj o negiranju genocida u Srebrenici 2020 /Srebrenica Genocide Denial Report 2020/*, Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide, Srebrenica. str. 34.

<sup>88</sup> Zgodić, Esad (2005), *Politike fantazija – o ratu protiv Bosne i Hercegovine*, Institute for the Investigation of Crimes against Humanity and International Law, Sarajevo, p. 230.

participating in denial, trivialising, manipulation of narrative, publicly legitimizing denial, perpetuating the conflict.”<sup>89</sup> This encourages the deniers not only to deny but to go a step further and glorify and celebrate the crimes and criminals.

However, “[t]he culture of denial is not something unique for Bosnia and Herzegovina, as similar situations can be traced to revisionists when speaking about [the] Rwandan genocide and the Holocaust. The legal status of these conflicts, however, did result in criminalisation of denial and glorification acts, which is still not the case in Bosnia and Herzegovina for the 1992 to 1995 war.”<sup>90</sup> For example, on 2 February 2021, the High Representative for Bosnia and Herzegovina, Valentin Inzko, sent a letter to the speaker of the National Assembly of the Republic, requesting that the charters that had been awarded by the National Assembly to the persons convicted of war crimes (Momčilo Krajišnik, Radovan Karadžić, Biljana Plavšić) be revoked within three months. The decorations were awarded on 24 October 2016. The National Assembly of Republika Srpska at its session on Tuesday, 11 May, rejected the request of the High Representative for Bosnia and Herzegovina, Valentin Inzko, to revoke the charters awarded to the war crimes convicts by the Republika Srpska National Assembly’s committee for marking the 25<sup>th</sup> anniversary of the Assembly’s existence and work, 1991-2016.<sup>91</sup>

## Examples of the Glorification of Criminals in Višegrad

In practice, there is a host of examples from the recent as well as the distant past in which criminals have been glorified and mythologised. Among numerous actions that glorify the crimes committed in Višegrad, one that attracted a lot of attention was the decision to give the *Ivo Andrić* Grand Prize to Peter Handke, the Austrian writer and winner of the 2019 Nobel Prize for Literature. This is a man who through his writings and actions directly sided with Slobodan Milošević’s regime, and who later in his works did not accept the judgements of international courts according to which genocide had been committed against the Bosniaks in Srebrenica. The choice of Višegrad as a place where the deniers of the crimes and genocide against Bosniaks were celebrated is very indicative. It has been emphasized that “as an echo and a mirror for the denial of reality, which can be read in Handke’s work, *We Are Never Going to See Vukovar* enables [us] to hear collective denial, on which Serbian nationalist propaganda is based and around which the European, or rather the

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<sup>89</sup> Gačanica, Lejla, Finkeldey, Caroline (2019), *Nazivanje ratnih zločina pravim imenom /Calling War Atrocities by Their Right Name/*, Forum ZDF – TRIAL International, Sarajevo, p. 6.

<sup>90</sup> Softić, Adna (2019), *A diplomatic graveyard: Genocide denial and glorification of war criminals in Bosnia and Herzegovina*. [online] Available at:<<https://crd.org/wpcontent/uploads/2019/11/EUTH-BiH-Genocide-Denial-and-Glorification-of-War-Criminals-Adna-Softic%CC%81-.pdf>> [Accessed on:/ 22 July 2021].

<sup>91</sup> <https://www.dw.com/bs/teme/>

world's, scenario about this war has been articulated – denial which also partly explains, but does not condone, the inappropriate reactions of Europeans, or the reactions of Americans.”<sup>92</sup> This is another example in which Višegrad was chosen as a place where today, in peacetime, when supporting co-existence and harmonious interpersonal relations should be a priority, the deniers of the crimes committed are also glorified. In order to speak of the possibilities and chances for dissociation from the crimes and criminals, it is necessary to answer several crucial questions: are efforts being made towards dissociation from the criminals and crimes, and to what extent are individuals prepared to remain outside that framework imposed by politics, ideology and even religion?

It is very meaningful and very important to create that “mental distance from the crimes and criminals and to not allow them to burden the entire collective. There is no such thing as our crimes and their crimes. There are only crimes and criminals (it goes without saying that all circumstances must be assessed using the truth and facts as the sole criteria, whether we are dealing with the acts of individuals or events and processes in their entirety)”<sup>93</sup>.

With regard to the representatives of Serbs in the Republika Srpska entity and the authorities in the neighbouring Republic of Serbia, one can notice that they are still at the beginning, as if war is being waged in peacetime as well, only by different means. Efforts are constantly being made to negate the truth, to negate the crimes committed, including the genocide against Bosniaks in the “UN safe area” of Srebrenica in July 1995, which has been proven in judgements delivered in The Hague. There is no recognition, either, of the “basic truth about the nature of the war which has been factually proven and is so obvious that any repetition thereof would be almost superfluous, so how can one expect any objective approach to other aspects of that conflict and to the crimes that were evidently and beyond any doubt committed in the name of the Serbian people, Serbia and the Orthodox faith?”<sup>94</sup> There have been individuals who believed and hoped that the passage of time would contribute to dissociation from the crimes and criminals, but it has turned out that their forecasts, at least up to now, could not hold and have not come true, and it has been more than 25 years since the aggression against the Republic of Bosnia and Herzegovina – a period of time neither short nor negligible. The best evidence for this is the microlocation of the town of Višegrad, which has become

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<sup>92</sup> Lambrichs, L. Louise (2007), *Efekt leptira*, ArmisPrint, Sarajevo.

<sup>93</sup> Pinter, Zlatko (2017), *Srpska rehabilitacija najvećih zločinaca XX stoljeća*. [online] Available at: <<https://portal.braniteljski-forum.com/blog/novosti/slavljenje-zlocina-izlocinaca-sastavnim-je-dijelom-srpske-tradicije>> [Accessed on: 22 July 2021].

<sup>94</sup> Pinter, Zlatko (2017), *Srpska rehabilitacija najvećih zločinaca XX stoljeća*. [online] Available at: <<https://portal.braniteljski-forum.com/blog/novosti/slavljenje-zlocina-izlocinaca-sastavnim-je-dijelom-srpske-tradicije>> [Accessed on: 22 July 2021].

fertile ground for “planting” the memorial bust statues of the so-called “Serbian heroes”. Is it to be expected, then, that a memorial bust of the convicted criminal Milan Lukić will also appear in Višegrad in the foreseeable future?

It is important to emphasise that the grounds of what is currently the Vilina Vlas holiday/summer resort and rehabilitation centre<sup>95</sup> in Višegrad were once the site of brutal crimes and evil acts, a fact which is corroborated in the judgements against Milan Lukić:

“681. On 29 May 1992, after Milan Lukić had raped VG094 at the Vilina Vlas hotel and left the room, another man came in and raped her.”<sup>96</sup>

“89. The Trial Chamber found that: i) There was an understanding amounting to an agreement between Milan Lukić, the Appellant and two unidentified men to kill the seven Muslim men, including the two survivors; ii) the Appellant participated in this joint criminal enterprise to murder by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other offenders shortly before the shooting occurred.”<sup>97</sup>

“123. [...] The Trial Chamber found that the Appellant was armed in the Vilina Vlas Hotel, pointing his gun at the seven Muslim men to prevent them from fleeing and that he knew that the seven Muslim men were going to be killed and not exchanged.”<sup>98</sup>

“9. The Trial Chamber found that, on the afternoon of 7 June 1992, Milan Lukić and two other unidentified men forcibly detained seven Muslim men and took them by two motor cars to Vilina Vlas Hotel in Višegradska Banja.”<sup>99</sup>

I am of the opinion that it is impermissible for this facility to be used at all, let alone as a “rehabilitation centre”.

Action taken so far to develop and encourage the culture of dialogue and mutual tolerance, as attempts have been made to impose these as possible instruments and solutions, in the end did not prove to be a powerful and efficient enough response to

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<sup>95</sup> <https://vilinavlas.com/>

<sup>96</sup> Milan Lukić Judgement, 2009, p. 296.

<sup>97</sup> Mitar Vasiljević Judgement, 2004, p. 32.

<sup>98</sup> Mitar Vasiljević Judgement, 2004, p. 42.

<sup>99</sup> Mitar Vasiljević Judgement, 2004, p. 64.

the glorification of crimes and criminals. The Hague Tribunal has not been successful, either. At least not in environments such as Višegrad, or in numerous other places throughout the entity of Republika Srpska and the Republic of Serbia. It is evident that the forces and ideas that are constantly being reanimated through various events, gatherings, speeches and even behaviour, are much more powerful. It is of vital importance that “the denial, the trivialising of all war crimes established as such by courts is sanctioned. That no convicted war criminal can be glorified, no matter by whom. That victims, no matter the background, are recognized, that the wrongdoing, no matter where it was committed, is accepted, understood and treated as wrong, without excuses, without a ‘but...’.”<sup>100</sup>

## Legislation

Although the Criminal Code of the Federation of Bosnia and Herzegovina contains a relevant article, no case has been processed so far for any of the criminal offences described in it.<sup>101</sup>

Article 163, paragraph 5 of the Criminal Code of the Federation of BiH (amended in 2014) provides for the crime of Inciting National, Racial or Religious Hatred, Discord or Hostility: “Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation [...] or perpetrates the criminal offence referred to in paragraph 1 of this Article by publicly denying or justifying genocide, crimes against humanity or committed war crimes established in a final decision of the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia or a domestic court shall be punished by imprisonment for a term between three months and three years.”<sup>102</sup>

## The Decision of the High Representative

Justice is slow but sure. The decision of the High Representative on amendments to the BiH Criminal Code is a step towards the implementation of justice. This decision is a historic milestone and a huge step forward, and its significance lies in the fact

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<sup>100</sup> Gačanica, Lejla, Finkeldey, Caroline (2019), *Nazivanje ratnih zločina pravim imenom*, Forum ZDF – TRIAL International, Sarajevo, p. 6.

<sup>101</sup> In 2017, the Court of Bosnia and Herzegovina ruled in a case in which the accused were acquitted of the charges of causing ethnic, racial and religious hatred, discord and intolerance under Article 145a of the Criminal Code of Bosnia and Herzegovina. For more information about the case, visit: <http://www.sudbih.gov.ba/predmet/3589/show>

<sup>102</sup> *Official Gazette of the Federation of Bosnia and Herzegovina*, nos. 36/2003, 21/2004 – corr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017.

that it prohibits the denial of genocide and glorification of war criminals. [Law on Amendment to the Criminal Code of Bosnia and Herzegovina]

**Article 1.**

**(Amendment to Article 145a)**

- “(2) Whoever publicly incites to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, when that behaviour does not constitute the criminal offence from paragraph (1) of this Article, shall be punished by imprisonment for a term between three months and three years.
- (3) Whoever publicly condones, denies, grossly trivializes or tries to justify a crime of genocide, crimes against humanity or a war crime established by a final adjudication pursuant to the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 or by the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court or a court in Bosnia and Herzegovina, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group, shall be punished by imprisonment for a term between six months and five years.
- (4) Whoever perpetrates the criminal offence referred to in paragraphs (1) to (3) of this Article by public dissemination or distribution of tracts, pictures or other material, shall be punished by imprisonment for a term not less than one year.
- (5) If the criminal offence referred to in paragraphs (1) to (3) of this Article is carried out in a manner likely to disturb public peace and order or which is threatening, abusive or insulting, the perpetrator shall be punished by imprisonment for a term not less than three years.
- (6) Whoever gives a recognition, award, memorial, any kind of memento, or any privilege or similar to a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or names a public object such as a street, square, park, bridge, an institution, building, municipality or a city or similar, or registers a brand, after or under a name of a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or whoever glorifies a person sentenced by a final judgement for genocide, crimes against humanity or a war crime in any way, shall be punished by imprisonment for a term not less than three years.”<sup>103</sup>

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<sup>103</sup> *Official Gazette of the Federation of Bosnia and Herzegovina*, 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 and 35/18.

In view of its past behaviour, it was to be expected that the RS National Assembly would stand by its goals and attitudes, and so it adopted the Law on Non-Implementation of the Decisions of the High Representative in the Context of the Amendment to the BiH Criminal Code Pursuant to the Decision of the High Representative.<sup>104</sup>

## **The Contribution of the Hague Tribunal Judgements to the Reconciliation Process**

A review of the overall process and role of the International Tribunal in The Hague indicates that it helped initiate the process of reconciliation and the rebuilding of trust between the ethnic groups and citizens of Bosnia and Herzegovina. Its decisions and judgements are very significant for the satisfaction of innocent victims, their families and even ethnic groups. It continues to give hope that justice exists and that the perpetrators of the crimes will be held responsible for their behaviour and actions.

The process is slow, burdened with the inherited state of affairs and the projected relations within the state of Bosnia and Herzegovina. Any acceleration of the process of change is made much more complex by the fact that the state system and political representation are based on the ethnic principle, with the marginalisation of citizens and forces that support the process of reconciliation and the building of Bosnia and Herzegovina as a modern civil state. It should be noted that among political subjects, the non-governmental sector and the citizens themselves, there is significant potential and that serious efforts are being made towards reconciliation, condemnation of “our own” crimes, and learning the truth about the nature and character of the war, forces and perpetrators of crimes and other evil deeds, efforts to leave the past behind and move on towards a better life and building the state of Bosnia and Herzegovina as the common homeland to the peoples and citizens living in it. But neither public nor electronic media have supported this process and these efforts, and while they played an important role in instigating war conflicts, they have not done so in the reconciliation process.

The reason for this lies certainly with the powers that control the media and decide on their financing largely based on their own political will. Civil society organisations have contributed greatly to the reconciliation process and through their activities have gathered abundant documentation about war crimes and possible perpetrators, thereby helping the Hague Tribunal.

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<sup>104</sup> <https://www.narodnaskupstinars.net/?q=la/akti/odluke>

For its part, the ICTY was open to information from civil society. The Hague Office of the Prosecutor used these documents for the foundation or reinforcement of its indictments, or as evidence. Through this hard work and devotion, non-governmental organisations have gained the trust of victims and witnesses, and encouraged them to cooperate with prosecutors and testify in individual cases.

A number of civil society organisations in BiH have developed specific and creative multidisciplinary programmes of education and psycho-social support for traumatised individuals and their families. Some of them have signed protocols on cooperation with judicial and other relevant institutions, such as centres for social work or mental health centres of the Ministry of Justice. It is noteworthy that a large number of citizens are still searching for missing persons and their nearest and dearest. This process is organised in BiH within various institutions, but also within non-governmental organisations. It is understandable that the judgements of the International Tribunal in The Hague currently do not have a far-reaching effect because of the abovementioned reasons and the policies, still actively pursued, that marginalise the truth about crimes and the extent of the suffering that was inflicted by the war.

## Conclusion

The narrative and behaviour that shamelessly glorify and praise the crimes committed and their perpetrators (criminals) and portray the criminals as role models and national heroes are pervasive in Bosnia and Herzegovina. A significant number of individuals and groups among the Serbian people in the Republika Srpska entity and in the Republic of Serbia work in a planned and systematic manner to affirm the hero status of the criminals.

To this end, they are using the tried and tested means such as the glorification of criminals and the dehumanisation of victims. The case study presented, that of Višegrad as a microlocation/town where the Serbian aggressor and criminals committed major war crimes against Bosniaks in the period from 1992 until 1995, shows how glorification of crimes and criminals is being used as a means in peacetime. This is done as shown in the examples described above and through the actions of individuals and groups from among the Serbian people, with the participation of political and religious figures and institutions.

This deep-rooted and engrained behaviour at the level of the ethnic group makes it almost impossible to work, or even just attempt working, towards dissociation from the crimes committed and the criminals. The fact is that efforts have been and are



being made to this end, but the results are almost negligible and invisible. And while it was expected that the mindset that glorifies the crimes and criminals will disappear over time, the reality is completely different.

One thing that has not been sufficiently utilised in responding to this situation in society and this mindset is education, more specifically, the education system and the academic community. Through a systematic and serious approach, with international subjects and the state in key roles, the education system and the general academic community orientated towards emancipation in Bosnia and Herzegovina could become the locus and the wellspring for generating the ideas of community, tolerance and of a younger generation finally dissociating itself from crimes and criminals. It is necessary to work proactively towards a state democratic educational policy and the engagement of the academic community as alternatives and as a response to the effects of glorification and denial.

This would entail adoption of education laws at the state level, common educational programmes, implementation of common informal forms of education, identifying and affirming commonalities, as well as support from international institutions, especially in terms of organisation, coordination and financing. This especially because nowadays, as the young are leaving Bosnia and Herzegovina en masse, the lesson they have learned growing up here can be summed up by the Latin phrase *Non est salus nisi in fuga* (There is no safety except in escape).

The power of the judgements will be increasingly evident and persuasive because the past cannot be forgotten, nor can the statute of limitations for the crimes expire. The new forces that will leave the war and the policy of divisions behind them, in the past, will have valid arguments in favour of the new reconciliation processes. Bosnia and Herzegovina will be economically and socially prosperous, democratic in its politics, and the standards of the rule of law will be observed.

Thus, the judgements will provide arguments for the truth and the foundations for reconciliation, democratisation, rule of law and respect for human dignity and values regardless of collective identities.<sup>105</sup>

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<sup>105</sup> Fočo, Adnan (2017), *Uticaj presuda međunarodnog krivičnog suda za bivšu Jugoslaviju na procese pomirenja u Bosni i Hercegovini*, Faculty of Philosophy in Sarajevo, Sarajevo, p. 182.

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The Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the FBH*, nos. 36/2003, 21/2004 – corr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 i 75/2017).



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# Witnesses:

## The Unsung Heroes of the ICTY

### Introduction

Ordinary people, military personnel, but mostly the victims or direct witnesses of gruesome crimes committed during the war in the former Yugoslavia became the key to unlocking the criminal responsibility of the perpetrators during the war. The sacrifices they had to make in order to see justice done and the criminals prevented from going unpunished are most probably immeasurable: the immense pressure, harsh psychological consequences, the potential for ruining relationships and the loss of safety are just some of them. Despite all that, heroic motivation and bravery have been found and used by the witnesses in order to help the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) reach its goal: to bring the perpetrators to trial.

Unlike national courts, the ICTY's main focus in regard to evidence were witness testimonies. Why, you may ask. The answer is simple. Gathering the evidence of war crimes and crimes against humanity is very complex and requires that strict procedural guidelines be followed in order for the evidence to be used before the court of law. Add to this the fact that ex-Yugoslavia was torn apart by war, the physical evidence destroyed by the perpetrators themselves, and you can conclude that one of the most reliable sources of information and evidence were witnesses. That is exactly how they became key to almost every trial, ensuring that the truth gets out there and that the wrongdoers get the deserved punishment. But talking about the perpetrators' criminal responsibility can be very dangerous and stressful. That is the reason why witness protection is a very important concept in the law of criminal procedure. All of the above made me dedicate this essay solely to witnesses.

In this paper, the ICTY's legal norms regarding witness protection will be briefly compared to the national ones, the Victims and Witnesses Section analysed and a conclusion provided with the path and effects of testifying in The Hague to point out an unprecedented and, in my opinion, often overlooked impact of the testimonies.

## From Southeast Europe to The Hague

Witnesses who testified before the ICTY came from all parts of the world but, undoubtedly, the majority was from the countries of today's Southeast Europe.<sup>106</sup> They were about to discover a whole new world, miles apart from the war-torn region. It took a lot of courage and trust on their part to embark on such a journey, consisting not only of travelling, of course, but primarily of what they had decided to do in the Netherlands – all for the sake of finding justice for the victims, or the accused.

The investigators from the Prosecutor's office are probably the first ones from the ICTY to contact witnesses.<sup>107</sup> The initial connection is of great importance for the fact of gaining the trust of a potential witness, especially if he or she is a victim. Experience has shown that the contacted persons were almost immediately worried for their safety, as well as for the pure psychological pressure of the past experiences, or feared the powerful individuals they would have to testify against.<sup>108</sup> However, with reasoning and thorough reassurance, investigators managed to gain their trust. Also, the sheer motivation of bringing the accused to justice, preventing horrible crimes from happening again and showing the world what really happened steered these unsung heroes towards a brave step, that eventually led the ICTY to a very successful mission. That being said, the whole witness preparation process started there, with the first contact between them and the ICTY.<sup>109</sup> Despite that, for their sake, in 2007, booklets have been published by the Victims and Witnesses Section in various languages to give thorough information about the testifying process in The Hague, making the witnesses much more comfortable and informed about what is awaiting them in the Netherlands.<sup>110</sup>

According to the Directive on allowances for witnesses and expert witnesses, the Tribunal shall provide the following: attendance allowance as compensation for wages, earnings and time lost as a result of testifying; transportation necessary for witnesses to travel to and from the location where they testify, including arrangements and costs for any travel documents which may be required; overnight accommodation for witnesses when required at the location where witnesses testify,

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<sup>106</sup> *Witness statistics*. Downloaded on 3 July 2021, from <https://www.icty.org/en/about/registry/witnesses/statistics>, para. 6.

<sup>107</sup> *ICTY Manual on Developed Practices* (2009). Turin: UNICRI, p. 21.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016). Downloaded on 3 July 2021, from [https://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report\\_EN.pdf](https://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf), p. 46.

<sup>110</sup> *Information booklet for ICTY witnesses* (2007). Downloaded on 3 July 2021, from [https://www.icty.org/x/file/About/Registry/Witnesses/witnesses\\_booklet\\_en.pdf](https://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf)

and during travel to and from such location; meals for witnesses who require overnight accommodation; incidental allowance for reasonable personal expenses to witnesses who require overnight accommodation.<sup>111</sup> Other services could be requested by the witnesses themselves. Upon their arrival, the witnesses were accommodated and met with Victims and Witnesses Section personnel.<sup>112</sup> They were informed about the logistics and practical information needed during their stay in The Hague, as well as about the role of the VWS<sup>113</sup>, medical assistance etc. After sufficient rest, witnesses were prepared by either party of a certain case, which is called proofing.<sup>114</sup> It was usually done briefly before testifying, for the sake of informing them about the procedure itself and reviewing the potential evidence.<sup>115</sup> All that is left after the preparation is to testify.

The amount of stress and pressure probably varies between different types of witnesses and reasons for testifying, but no major health-related incidents while testifying were recorded. After finishing testifying, witnesses were free to request any help necessary from the Victims and Witnesses Section.

## **The ICTY's Norms about Witness Protection: A Brief Comparison with the Ones in Bosnia and Herzegovina and Croatia**

Witness protection is nowadays a common concept of criminal procedure law found in almost every national legal system, including those of Bosnia and Herzegovina and Croatia. The same can be said for the ICTY.

Article 22 of the ICTY Statute stipulates that the Tribunal shall provide protection for victims and witnesses, and that such protection shall include, but shall not be limited to, in camera proceedings and the protection of the victim's identity.<sup>116</sup> Furthermore, Rule 34 of the ICTY's Rules of Procedure and Evidence states that the Victims and Witnesses Section shall recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute.<sup>117</sup> A Judge or a Chamber may, on their own initiative or at the request of the prosecution, defence, victim or witness, order

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<sup>111</sup> *Directive on allowances for witnesses and expert witnesses* (2011). Downloaded on 3 July 2021, from [https://www.icty.org/x/file/Legal%20Library/Miscellaneous/it200\\_rev1\\_corr2\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Miscellaneous/it200_rev1_corr2_en.pdf)

<sup>112</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 47.

<sup>113</sup> Victims and Witnesses Section.

<sup>114</sup> *ICTY Manual on Developed Practices* (2009). Turin: UNICRI, p. 83.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Updated Statute of the International Criminal Tribunal for the former Yugoslavia* (2009). Downloaded on 1 July 2021, from [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>117</sup> *Rules of procedure and evidence* (2015). Downloaded on 1 July 2021, from [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf)

measures for the privacy and protection of victims and witnesses.<sup>118</sup> The measures are as follows: taking the witness's name and/or identifying information off the Tribunal's public record, modifying the image of the witness's face and/or voice in televised proceedings, assigning the witness a pseudonym, allowing the witness to testify in closed session, or allowing the witness to testify remotely via video.<sup>119</sup> The Victims and Witnesses Section also allows a policy called Witness Relocation Programme, after it determines that circumstances prevent the witness from remaining at his or her place of residence.<sup>120</sup>

In Bosnia and Herzegovina, rules of criminal procedure do not regulate witness protection, as they can only be found in special laws dedicated to this subject.<sup>121</sup> Furthermore, there is a clear differentiation between "witnesses under threat" and "vulnerable witnesses", regarding certain measures that can be applied. Not to delve into the depths of the national legal systems, I will only point out certain things of interest for this exact comparison. The court shall decide whether the witness will receive protection and, if so, which measures will be applied.<sup>122</sup>

A similar pattern can be found in Croatia.<sup>123</sup> Furthermore, in the Croatian criminal procedure law, the initiative for granting the status of a protected witness can, with the initial initiative of the witness, come from the prosecutor or from the investigating judge.<sup>124</sup> In Bosnia and Herzegovina, the initiative can be taken by the judge acting in the case, the head of the penitentiary institution, the authorized defence counsel, the prosecutor, the police department in charge of the investigation and the witness or a close person.<sup>125</sup> Both also offer protection outside the court, including similar programmes as the Witness Relocation one of the ICTY.

It is clear that the concept of witness protection is very well developed in Bosnia and Herzegovina and Croatia, as it was in the ICTY. The amount and intensity of the measures provided clearly put emphasis on how important the witnesses can be in the proceedings, especially in the ones that lack physical evidence. Certain sections

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<sup>118</sup> Rule 75 of *Rules of procedure and evidence* (2015). Downloaded on 1 July 2021, from [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf)

<sup>119</sup> *Witnesses*. Downloaded on 1 July 2021, from <https://www.icty.org/en/about/witnesses>, para. 14-15.

<sup>120</sup> *ICTY Manual on Developed Practices* (2009). Turin: UNICRI, p. 202.

<sup>121</sup> Sijerčić-Čolić, H. (2019). *Krivično procesno pravo. Knj. 1, Krivičnoprocesni subjekti i krivičnoprocesne radnje*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu, p. 431.

<sup>122</sup> Zakon o zaštiti svjedoka pod prijetnjom i ugroženih svjedoka. *Official Gazette of Bosnia and Herzegovina*, nos. 3/2003, 21/2003, 61/2004 and 55/2005.

<sup>123</sup> Pajčić, M. (2005). Ugroženi svjedoci u kaznenom postupku. *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 12 No. 1., p. 48.

<sup>124</sup> *Ibid.*

<sup>125</sup> Article 8 of the Law on the Witness Protection Programme in Bosnia and Herzegovina. *Official Gazette of Bosnia and Herzegovina*, no. 36/14.



amongst courts along with their special programmes have been founded just for the sake of victim witness and witness protection and safety. It is safe to say that national courts have taken effective measures to ensure righteous, fair and safe trials for, amongst others, war crimes that are yet to come, as the ICTY formally ended its mandate and closed on 31 December 2017.<sup>126</sup>

## The Victims and Witnesses Section

The Victims and Witnesses Section was founded and introduced in February 1994, but became operational in April 1995, with the following mandate: to recommend protective measures for victims and witnesses and provide counselling and support for them, in particular in cases of rape and sexual assault.<sup>127</sup> It was a neutral body within the Registry of the ICTY and its mandate was to facilitate the appearance of all witnesses testifying before the ICTY.<sup>128</sup> The difficulty of testifying and adapting to the newly surroundings of a criminal tribunal in The Hague was recognised by the United Nations Security Council, and so it set up this special section, which was unprecedented and a first in international law.<sup>129</sup>

The Section itself was divided into three units: the Operations Unit, responsible for logistical operations and witness administration; the Support Unit, which provides social and psychological counselling and assistance to witnesses; and the Protection Unit, which co-ordinates responses to the security requirements.<sup>130</sup>

The Operations Unit's work mostly consisted of tasks regarding visas for travelling to the Netherlands, assistance to the witnesses in the field, accommodation in The Hague and allowances.<sup>131</sup> The Support Unit, on the other hand, worked towards ensuring that the witnesses get professional psychosocial assistance and assessments of their needs, making sure that they adjust to the new environment, and following-up with witnesses after testimony.<sup>132</sup> Finally, the Protection Unit ensured the protection of witnesses in and out of the court.<sup>133</sup>

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<sup>126</sup> *ICTY marks official closure with moving ceremony in The Hague* (2017). Downloaded on 1 July 2021, from <https://www.icty.org/en/press/icty-marks-official-closure-with-movingceremony-in-the-hague>

<sup>127</sup> Rule 34 of the *Rules of procedure and evidence* (2015). Downloaded on 1 July 2021, from [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf)

<sup>128</sup> *ICTY Manual on Developed Practices* (2009). Turin: UNICRI, p. 195.

<sup>129</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 13.

<sup>130</sup> *Ibid.*

<sup>131</sup> *ICTY Manual on Developed Practices* (2009). Turin: UNICRI, p. 195-197

<sup>132</sup> *Ibid.*, p. 198-200.

<sup>133</sup> *Ibid.*, p. 201-204.

The importance of this Section is mostly overlooked, as every type of work they do is managed and executed behind closed doors, far away from the eyes of the public. Most people who followed the ICTY trials do not even know about the existence of the VWS, let alone their mandate and the services which they provide.

As most victims can be traumatised and psychologically impacted by the events that happened during the war, it is of great importance for the staff of the VWS to be encouraging and supportive and to give the witnesses the opportunity to express themselves. All of that should be done in their mother tongue in order to give them a sense of security, which will lead to crucial decision-making power, as this type of exposure can easily re-awaken their trauma and affect their behaviour.<sup>134</sup>

That is exactly why the Support Unit offered individual counselling to victims and witnesses by Support Officers and professional advice to and consultation with other units in and outside of the VWS.<sup>135</sup> Every witness who needed it, received support with specific characteristics and intent, customised just for him or her, avoiding broad, generalised treatment.<sup>136</sup> This approach definitely ensured that the interests and well-being of witnesses were treated as the top priority. The support itself was implemented during three phases: the pre-testimony, testimony and post-testimony period.<sup>137</sup>

Therefore, not only before and during the trials did the witnesses receive the necessary support, but even afterwards. The reason for this was firstly to thank them for enhancing and making the path to justice even viable, but also to ensure their psychological and physical well-being, give them suggestions or lead them to certain ways and NGOs for the help that may be needed.<sup>138</sup>

In case of heightened security issues a witness may face, the Protection Unit developed a policy named Witness Relocation Programme, which consists of moving the witness and, if in danger, his family as well to an undisclosed location in a different country.<sup>139</sup> The risk assessment was being done by the Protection Unit. In order to be included (with or without his family) in this programme, the witness had to testify in relation to a crime involving a breach of Articles 2, 3, 4 or 5 of the ICTY Statute, be an essential witness and provide evidence that could not be secured by any other means; the threat had to be assessed as real and life threatening; and the

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<sup>134</sup> Ibid, p. 198.

<sup>135</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 16.

<sup>136</sup> Ibid, p. 16.

<sup>137</sup> Ibid, p. 17.

<sup>138</sup> Ibid, p. 18-19.

<sup>139</sup> *ICTY Manual on Developed Practices* (2009), p. 203.

subject had to be willing and suitable for inclusion on a witness protection programme.<sup>140</sup>

Nonetheless, experience has shown that short-term relocation was the best, because long-time separation of the witness from their home country had an even more harmful psychological impact on them, as if the previous trauma was not enough.<sup>141</sup> Adapting to completely new surroundings in a country whose language you do not understand, while you are unsure about your safety and future, is definitely not easy to overcome. The entire Victims and Witnesses Section tried to ensure that the whole experience of coming from Southeast Europe to testify in The Hague is safe and stress-free, and despite their extraordinary measures and actions, the health consequences are still to be found in the victims' anamneses.

## Testifying: Motivation, Security and Health Impacts

In order to fully understand the witnesses' story before the ICTY, it is essential to find out what motivated them to set off on this painful but also very important journey. The statistics of a recent research have brought to light the expected reasons for testifying, such as wanting to help judges reach an accurate decision, feeling a moral duty to all victims of war, wanting to "tell my story" or prevent wars like this from happening again, or feeling an obligation to speak for the dead.<sup>142</sup>

The satisfaction of justice, of course, was amongst the top motivational reasons, and can be found in the everyday layman discourse. But the reasons regarding a moral duty to all victims of war, preventing wars in the future and an obligation to speak for the dead stick out as very noble, as a way of making sacrifices for the sake of others. Such reasons were the driving force to give evidence before the ICTY for both: 'the victim witnesses' and 'the perpetrator witnesses'.

The abovementioned study has found that testifying also had some impact on the witnesses' community relationships, but not to such a large extent as many would think.<sup>143</sup> This type of data would give conclusive evidence of a positive attribute, because most of the victims live in regions of Bosnia and Herzegovina or other countries where they are certainly a minority, in terms of their ethnic or religious associations. One interesting piece of evidence is that many interviewees concluded that after testifying before the ICTY they suffered an adverse economic impact.<sup>144</sup>

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<sup>140</sup> Ibid, p. 202.

<sup>141</sup> Ibid.

<sup>142</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 49.

<sup>143</sup> Ibid, p. 57.

<sup>144</sup> Ibid, p. 58.

The issues in this area can vary in many ways, because the economic situation in the Southeast Europe after the war was not very stable and promising, to say the least. Therefore, the question as to why many of the witnesses stated that they had had a significant decrease in income, property, etc. after testifying has not been resolved. That could lead us to two answers to this question. The first one would refer to discrimination, especially if you consider, as I have already mentioned before, that the victim witnesses live in regions where they are a minority. Also, the ones who decided to speak for the sake of the victims and “against their own ethnic leaders” could have also experienced a certain type of backlash. But there is also another side to this. It is essential to take into consideration that many citizens of the Western Balkan countries did not enjoy a stable economic situation after the war and that there is a chance that the process of testifying did not have an important impact on this topic. However, to be completely clear, I find that both answers have a certain impact on the financial well-being of the witnesses.

On the other hand, security was also one of the most important pieces of the puzzle of testifying before the ICTY. This court as an unknown authority, the loss of confidence in the local authorities during and after the war, and being surrounded by people who were politically affiliated with the perpetrators are just some of the reasons for the diminished security of witnesses. Threats, be it in person or indirectly, have not been a rarity, as shown in the research.<sup>145</sup> They consisted of verbal threats, physical ones after testifying, and threats as in asking not to even testify.<sup>146</sup> When being asked about who actually made the threats, the respondents mostly pointed to persons who were not of their own ethnicity, defendants, political leaders, etc.<sup>147</sup> If true, this goes to show that stakeholders could have blackmailed witnesses in various ways, including in the ways that involved the economic consequences mentioned before, just to dissuade them from testifying before the Tribunal.

The sheer amount of pressure and stress the witnesses had to go through is not something everyone could realise, especially inhabitants of the western part of Europe, as ethnic and religious backgrounds have not been of any great importance for them in the past few decades, unlike in Southeast Europe. Having to go back to your community and live amongst the ones who threatened you and your family, or even potentially committed or supported some of the war crimes, is something that calls for enormous amounts of courage and heroism. Some of the interviewees did state that they were satisfied with the way the Victims and Witnesses Section in their

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<sup>145</sup> Ibid, p. 61.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid, p. 62.

field offices and in The Hague dealt or helped them deal with the threats.<sup>148</sup> Also, one encouraging piece of data is that most of the interviewees, 64%, feel secure today, and only 6% do not.<sup>149</sup> Reaching a complete sense of security is most probably impossible, especially after you take into consideration the health impacts of all the described processes, but realising that the situation is improving over the years is very reassuring. It is also important not to forget that some parts of the Western Balkans, especially Serbia and Bosnia and Herzegovina, are to this day facing denial of the Srebrenica genocide and most war crimes in general, not only by parts of the population, but by political leaders with great power.<sup>150</sup> Living in the areas under their jurisdiction requires a lot of bravery, but recent political movements making way for individual human rights instead of dark ideologies can give us and the witnesses some hope.

The health impact of testifying for such a significant cause is hard to even question, whether it influences the witness positively or negatively after fulfilling their duties. Apart from the consequences after the trials, it is also important to notice the impact of stress just before and during the testimonies. Many of the witnesses have experienced and/or witnessed serious traumatic events such as artillery fire, combat situations, being close to death, murder of family or acquaintances, ethnic cleansing, psychological torture, torture, rape and many other events.<sup>151</sup> Just by naming these experiences it is clear how much trauma the witnesses have suffered during the war, only to be re-exposed to it by testifying. This re-traumatisation has caused some to constantly think about the ones they saw lose their lives or be murdered and to be unable to put those experiences behind them and focus on everyday activities.<sup>152</sup>

In general, in the late 1900s there was a movement which focused on researching and developing ways of helping victims of criminal deeds, called victimology.<sup>153</sup> The psychological damage done by the perpetrators had a huge impact on some of the victim witnesses, but can still depend on the nature of the events and the ability of dealing with difficult situations they have been put through. It has been found many times that the victims of rape, despite their innocence, still feel guilt and shame about the atrocities they have suffered (Petrović & Meško, 2008). It can also lead to various kinds of damage to social interactions, or cause social anxiety and

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<sup>148</sup> Ibid, p. 64.

<sup>149</sup> Ibid, p. 68.

<sup>150</sup> *Izveštaj o negiranju genocida u Srebrenici 2021.* (2021). Downloaded on 9 July 2021, from <https://srebrenicamemorial.org/assets/files/1625819630-izvjestaj-o-negiranju-genocida-za-2021godinu-bosanski-jezik.pdf>, p. 4.

<sup>151</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 72.

<sup>152</sup> Ibid, p. 75.

<sup>153</sup> Petrović, B., & Meško, G. (2008). *Kriminologija*. Sarajevo: Pravni fakultet, p. 175.

depression.<sup>154</sup> On the other hand, the results of the pilot study conducted by the University of North Texas and Castleberry Peace Institute along with the Victims and Witnesses Section of the ICTY showed that most of the interviewees (witnesses) had a range of emotional problems before testifying, but these were significantly reduced after their testimonies.<sup>155</sup> They have also claimed that negative effects were mostly felt before, but not after testifying.<sup>156</sup> This type of data goes to show that testifying served as a way of relieving some of the emotional distress that the witnesses felt throughout the years, that it actually helped them improve their mental state and face all the trauma along with helping other victims and speak for the sake of others, as they have mentioned before with regard to their motivation. It is quite interesting to see that, despite the anxieties, stress and threats some of them have faced, speaking about their experiences and difficulties most certainly had a positive effect on their psychological well-being and health in general. Some credit must also be given to the Victims and Witnesses Section, which provided the counselling if necessary and encouraged the victims and other witnesses to fulfil their moral duty. To confirm this, most of the witnesses interviewed confirmed that they disagree with the statement of their health worsening after testifying, and that their health will worsen because of the ICTY.<sup>157</sup>

Another part of a path towards achieving witness satisfaction is actually coping with all the past trauma and finding a way of continuing life. It is not unusual for the witnesses to seek help from their family members, doctors and friends for this kind of support, but a specific type of data has been discovered in the research. Many of them have answered that they actually use humour as a coping mechanism, as well as avoid situations that remind them of the past.<sup>158</sup> Although it is widely known for victims of all types of crime to find help by consuming alcohol and similar products, a different pattern, at least partially, can be found here. The answer could probably lie in the fact that most of the interviewees and victims in general were from the Muslim religious background, where it is believed that taking any type of substance that can alter your state of mind in a bad way is actually forbidden.<sup>159</sup>

All in all, looking at the coping mechanisms from a general point of view is fruitless, especially when you take into consideration the different types of trauma some victim witnesses have been through, their current surroundings, family, economic status, etc. Coping mechanisms are of a strictly individual nature.

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<sup>154</sup> Ibid.

<sup>155</sup> *Echoes of testimonies: A Pilot Study into the long-term impact of bearing witnesses before the ICTY* (2016), p. 79.

<sup>156</sup> Ibid, p. 83.

<sup>157</sup> Ibid, p. 88.

<sup>158</sup> Ibid, p. 90.

<sup>159</sup> Ibid, p. 37.

## Conclusion

Based on everything mentioned above, it is possible to draw a couple of conclusions regarding witnesses who testified before the ICTY.

First and foremost, a long journey awaited all of them. Not only in terms of kilometres, but also in terms of the sudden cultural changes they were about to face. Travelling costs, accommodation, daily expenses, etc. were all covered by the ICTY; the Victims and Witnesses Section staff would await and assist them from the moment they arrived in The Hague, and, if needed, ensure their safety and well-being with appropriate measures. The only thing needed from them at that time were motivation and determination.

Analysing the norms regarding witness protection before the ICTY and the courts in Bosnia and Herzegovina and Croatia, I came to the conclusion that all three offered, and two of them still offer, similar measures sufficient to ensure the safety and well-being of witnesses who are under serious threats. It was finally concluded that the national courts of the two abovementioned countries provided a strong basis for future war crimes trials in terms of witness protection measures, at least in a formal, procedural way.

The central part of the work offered a detailed description of the Victims and Witnesses Section of the ICTY. Since its founding, it was extremely busy offering witnesses everything they needed in order for them to testify and meet the requirements of a fair and righteous trial. All three sections were key to unlocking the most valuable evidence that was used before the Tribunal – witness testimonies. It was their functioning that conditioned the smooth operating of the court and secured its successful mandate. Furthermore, I briefly pointed out how the underestimated Support Unit, which provided social and psychological counselling and assistance to witnesses, contributed to the health and final well-being of witnesses.

What made the witnesses embark on this journey, the sole question of the sources of their motivation, was also analysed. Helping judges reach an accurate decision, having a moral duty and speaking for the dead were the most conspicuous ones. The impact made on their lives by testifying before the Tribunal was anything but negligible. Issues related to security, safety, and community relationships, as well as economic difficulties, were just some of the consequences they had to face afterwards. The way they coped with all the troublesome phases of their lives connected to their testimonies were quite unusual, using humour as the primary

coping mechanism. One of the most positive types of data were the ones stating that most of the witnesses felt better after, rather than before testifying. Taking that burden off their backs certainly purified their minds and, at least to some extent, allowed them to face and deal with the past in the most objective and safe way possible.

Those are the reasons why I have decided to dedicate this essay to the witnesses. The role they played throughout the ICTY's existence is most certainly overlooked, and they most definitely need a lot more praise than they now receive. The Tribunal and all of its sections have shown how important and powerful they are, not only for the region of Southeast Europe, but potentially for the whole world. But nothing would have been possible without the key piece of the ICTY's puzzle – the witnesses. That is why they are the unsung heroes of the International Criminal Tribunal for the former Yugoslavia.



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# Can We Agree on Negotiated Justice?

The legacy of the ICTY's plea agreements on the case law at the International Criminal Court

## Introduction

Everyone accused of a criminal offence has the right to plead guilty in a court of law.<sup>160</sup> From the perspective of the accused, the ability to present a full answer and a defence to the charges is an essential feature of a fair trial. A fair trial is a value fundamental to any system of international criminal justice, therefore, it has long been recognized as essential in the founding treaties of all “international(ized) tribunals”<sup>161</sup>.

Although a guilty plea is often welcomed by the prosecution, the institute of negotiated justice tends to be highly controversial in the international criminal law domain and was not part of all founding treaties of international tribunals.<sup>162</sup> Such was the case in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal),<sup>163</sup> which did not recognise the opportunity for the parties to enter a plea agreement. This was later amended leading to many defendants pleading their guilt in the form of an agreement with the Prosecutor.<sup>164</sup>

Since its creation, the International Criminal Court (ICC) offers the opportunity to the parties to present an agreement regarding the admission of guilt, and consequently for the Court to proceed in the examination of it.<sup>165</sup> However, to this date only one defendant pleaded his guilt and made a deal with the Prosecutor.<sup>166</sup> This raises questions not only because numerous defendants pleaded not guilty,<sup>167</sup> but the sole defendant who has pleaded guilty, Al Mahdi, is almost done with serving his

<sup>160</sup> The International Covenant on Civil and Political Rights, 1966, Article 14.

<sup>161</sup> Bonačić, M., *Model internacionaliziranih kaznenih sudova: karakteristike i usporedba s ad hoc međunarodnim kaznenim sudovima*, Hrvatski ljetopis za kazneno pravo i praksu, Volume 19, Issue 1, 2012, pp. 31 – 35. Different types of *internationalized criminal courts* and international *ad hoc* Tribunals.

<sup>162</sup> Turner, J. I., Weigend, T., “Negotiated Justice”, in Sluiter, G., Friman, H., Linton, S., Vasiliev, S., Zappalà, S., *International Criminal Procedure: Principles and Rules*, Oxford, 2013., p. 1376.

<sup>163</sup> The Statute of the International Criminal Tribunal for Former Yugoslavia, (updated version September 2009).

<sup>164</sup> Clark, J. N., *Plea bargaining at the ICTY: guilty pleas and reconciliation*, European Journal of International Law, Volume 20, Issue 2, 2009., pp. 416 – 418.

<sup>165</sup> The Rome Statute of the International Criminal Court, 17 July 1998, Article 64(8)(a).

<sup>166</sup> The Prosecutor v. Al Mahdi, Transcript Trial Hearing, 22 August 2016, p.1, paras. 11 and 12.

<sup>167</sup> To the date of submitting this article, a final judgement for defendants that pleaded not guilty was rendered in five cases: Lubanga, Katanga, Bemba, Gbagbo and Ble Goude, Ntaganda.

sentence.<sup>168</sup> On the other hand, Al Hassan, charged in the same situation as Al Mahdi,<sup>169</sup> has pleaded not guilty and is currently on trial at the same Court.<sup>170</sup> Why did the Prosecutor and Counsel for the defence depart from the ICTY's practice on plea agreements? Is the current approach at the ICC in the interests of justice, or is each party entirely certain in its success?

This article explores the foundations upon which the plea agreements rest, different approaches to plea negotiations in international criminal law and how the ICTY's case law contributed to the current view of the Office of the Prosecutor regarding policy on plea agreements at the ICC.

## International Adoptions of Negotiated Justice

When deciding on negotiated justice in contrast to "imposed justice"<sup>171</sup>, we should first understand the different types of plea agreements. Furthermore, it is important to acknowledge the origins of negotiated justice in international criminal law. This is because negotiated justice has emerged from both Common and Civil law jurisdictions.

### The definition of a Plea Bargain

A plea bargain is defined as "an agreement set up between the plaintiff and the defendant to come to a resolution about a case, without ever taking it to trial."<sup>172</sup> This is an agreement in which the Prosecutor and the defendant determine the proposed judgement. The agreement is usually in the form of the defendant pleading guilty or no contest to all or some of the alleged crimes in exchange for concessions by the Prosecutor. These compromises may take the form of a reduction of the charges, the dismissal of the charges or limiting the punishment imposed upon the defendant. The Prosecutor will then disclose the facts of the case that involve the defendant in a more favourable light.<sup>173</sup> Different types of plea bargaining are fact bargaining, charge bargaining and sentence bargaining.

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<sup>168</sup> The Prosecutor v. Al Mahdi, Decision appointing three judges of the Appeals Chamber for the review concerning the reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, 28 June 2021.

<sup>169</sup> Situation in the Republic of Mali, <https://www.icc-cpi.int/Pages/crm-refined.aspx?situation=ICC-01/12>; both defendants were alleged members of the Ansar Eddine movement associated with Al Qaeda.

<sup>170</sup> The Prosecutor v. Al Hassan, Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019.

<sup>171</sup> Damaška, M., *Negotiated Justice in International Criminal Courts*, Journal of International Criminal Justice, Volume 2, Issue 4, December 2004, p. 1032.

<sup>172</sup> <https://thelawdictionary.org/plea-bargaining/>, accessed on 29 June 2021.

<sup>173</sup> Rauxloh, R., *Plea Bargaining in National and International Law*, Routledge, 2012., p. 25.

## Fact Bargaining

Fact bargaining refers to when a defendant changes his or her plea from not guilty to guilty on the reliance that the Prosecution will present the facts of the case in a less incriminating light.<sup>174</sup> The defendant agrees to admit to certain pieces of evidence in return for the Prosecutor's promise not to present all facts of the case or only to present the facts that are favourable for the defendant (e.g., without stating an aggravating circumstance).<sup>175</sup>

## Charge Bargaining

There are two kinds of situations where charge bargaining may be used. The first is where the defendant is charged with two or more crimes. Here, the Prosecution can drop one or more of the charges in return for a guilty plea for those remaining. The other situation is when the defendant has been charged with a serious crime. Here, the Prosecution might drop this charge in exchange for a guilty plea to a less serious crime.<sup>176</sup> This type of agreement was criticized as jeopardizing the mission of the ICTY. Judge Schomburg compared it to "*de facto* granting partial amnesty/impunity by the Prosecutor",<sup>177</sup> which would open the door of avoiding impunity.

## Sentence Bargaining

In instances of sentence bargaining defendants would change their plea from not guilty to guilty to receive a lenient sentence,<sup>178</sup> "based on the Prosecutor's promise to either recommend a sentence or sentencing range to the judge(s) or not to oppose a request by the accused of a particular sentence."<sup>179</sup>

## The Common Law System and the Civil Law System

For many years plea bargaining has been steadily embedded in the Common law criminal justice systems of the United States of America and, more recently, the United Kingdom. These countries apply the adversarial system. The courts under this system do not seek the truth in the sense of actively undertaking a general

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<sup>174</sup> Ibid.

<sup>175</sup> Pajčić, M., Bonačić, M., *Sporazumi o priznanju krivnje u postupcima pred međunarodnim kaznenim sudovima*, Zbornik Pravnog Fakulteta u Zagrebu, Volume 71, Issue 2, 2021, p. 257.

<sup>176</sup> Ibid note 14.

<sup>177</sup> The Prosecutor v. Deronjić, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, 30 March 2004, para. 11.

<sup>178</sup> Petrig, A., *Negotiated Justice and the Goals of International Criminal Tribunals*, Chicago-Kent Journal of International and Comparative Law, Volume 8, Issue 1, 2008, p. 26.

<sup>179</sup> Ibid, p.5.

investigation. Their only obligation is to decide if the evidence that the defence and Prosecutor produce is sufficient to prove beyond a reasonable doubt that the defendant is guilty.<sup>180</sup>

In contrast, Civil law countries, such as Spain, France and Italy, use the inquisitorial system. In this system, the court plays an active role in establishing the truth. The confession of guilt is viewed with deep suspicion, and regardless of the accused's guilty plea the courts are expected to rule on guilt and innocence based on the evidence.<sup>181</sup> It is the Judge's responsibility to actively collect the evidence that goes towards establishing the guilt or innocence of the accused.<sup>182</sup>

### **Procedure at the International Criminal Tribunals**

The International criminal tribunals encompass elements that can be attributed to both Common and Civil law. The result of this is that the international(ized) tribunals have a structure that is something of a hybrid of the two systems.<sup>183</sup> This is evident from Rule 62ter of the ICTY Rules of Procedure and Evidence, "which allows both sentence and charge bargaining, reflects the unique amalgam between adversarial and inquisitorial procedural elements."<sup>184</sup>

When the Rome Statute was being drafted, it was expressed by some delegations that the effect of a guilty plea would need to be spelt out in view of the differences between Civil law and Common law systems. The critique was made concerning the impropriety of negotiating crimes of such gravity as those within the jurisdiction of the court.<sup>185</sup>

These disagreements were resolved by the Argentinian and Canadian Delegations,<sup>186</sup> and the institute of negotiated justice was included in the Rome Statute before it

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<sup>180</sup> Combs, N., *Copping a Plea to Genocide: The Plea Bargaining of International Crimes Source*, University of Pennsylvania Law Review, Volume 151, Issue 1, November 2002, pg. 48., Turner, J.I., "Plea Bargaining" in Pocar, F., Carter, L., *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, 2013, p. 36.

<sup>181</sup> Schabas, W., *An Introduction to the International Criminal Court*, Cambridge, 2020, p. 312.

<sup>182</sup> Ibid Combs, N., note 21., p. 41., Ibid Turner, J.I., note 21., pp. 38 and 39.

<sup>183</sup> Klamburg, M., *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pg. 476. "The negotiations of Article 65 reflected divisions between representatives of common-law countries, who viewed plea bargaining as an efficient mechanism of adjudicating complex crimes, and those of civil-law countries, who found repugnant the notion of —bargaining with justice|| for serious international crimes."

<sup>184</sup> Ibid note 12.

<sup>185</sup> General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Official Records Fiftieth Session Supplement No. 22, A/50/22, New York, 1995, para. 170.

<sup>186</sup> Proposal for Articles 38, 38bis, 41 and 43 submitted by Argentina and Canada, UNDoc.A/AC-249/WP-16, 21 August 1996, pp. 1 and 2., Working Paper Presented by the Delegation of Argentina on Rules of Procedure, A/AC.249/L.6, 13 August 1996, p. 8., Rule 74 (note).

was even discussed at the ICTY.<sup>187</sup> Article 65 of the Rome Statute defined the requirements for the agreement as “proceedings on an admission of guilt”.

Both the ICTY and the ICC have similar procedural requirements for the Trial Chamber to accept a guilty plea agreement.<sup>188</sup> The agreement must be in writing, and it is not binding for the Court.<sup>189</sup> However, when reviewing the agreement, the ICC requirements are generally the same as the ICTY requirements but with two important exceptions. The ICTY accepts the guilty plea agreement only if it is voluntary,<sup>190</sup> informed,<sup>191</sup> unequivocal<sup>192</sup> and based on sufficient facts.<sup>193</sup> The Rome Statute requires the Court to verify the factual basis for the guilty plea, independently of the factual basis of the parties’ agreement on the facts and required consultation with the Counsel before entering a guilty plea and does not require the guilty plea to be unequivocal.<sup>194</sup>

However, neither these conditions nor other formal requirements<sup>195</sup> will be discussed in this article. The substantial concentration will be afforded to the elements needed for the Prosecutor to enter a plea agreement and how the lessons from the ICTY’s practice shaped them.

## Elements for Examination to Enter into a Plea Agreement

The Office of the Prosecutor (OTP) issued the Guidelines for Agreements Regarding Admission of Guilt (Guidelines) on 12 November 2020.<sup>196</sup> The Guidelines are a basic

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<sup>187</sup> Petrig, A., *Negotiated Justice and the Goals of International Criminal Tribunals*, Chicago-Kent Journal of International and Comparative Law, Volume 8, Issue 1, 2008, p.9. “The Rome Statute, which was signed before the ICTY introduced Art. 62ter ICTY-RPE, contains a trial avoidance mechanism resembling American pleabargaining.”

<sup>188</sup> Klamberg, M., *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 476. “Because the provisions on guilty pleas at those Tribunals (ICTY and ICTR) are similar to those on admissions of guilt at the ICC, however, one may expect the ICC to consult Tribunal jurisprudence when interpreting Article 65.”

<sup>189</sup> The Rome Statute of the International Criminal Court, 17 July 1998, Article 65(5), Rules of Procedure and Evidence of the ICTY, 8 July 2015, Rule 62ter.

<sup>190</sup> The Rome Statute, Article 65(1)(b); Rules of Procedure and Evidence of the ICTY, Rule 62bis(i)

<sup>191</sup> The Rome Statute, Article 65(1)(a); Rules of Procedure and Evidence of the ICTY, Rule 62bis(ii); The Prosecutor v. Dražen Erdemović, Judgment, Appeals Chamber, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 8.

<sup>192</sup> Rules of Procedure and Evidence of the ICTY, Rule 62bis(iii); Joint Opinion of Judges McDonald and Vohrah in the Erdemović case, para.8.

<sup>193</sup> ICC Rome Statute, Article 65(1)(c); Rules of Procedure and Evidence of the ICTY, Rule 62bis(iv).

<sup>194</sup> Turner, J., “Plea Bargaining” in Pocar, F., Carter, L., *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, 2013.

<sup>195</sup> Office of the Prosecutor, Guidelines for Agreements Regarding Admission of Guilt, 12 November 2020, para. 16. “All terms of an agreement regarding admission of guilt shall be in writing. All agreements shall be signed by the Prosecutor, the accused, and the accused’s counsel before becoming final.”

<sup>196</sup> Office of the Prosecutor, Guidelines for Agreements Regarding Admission of Guilt, 12 November 2020.



policy paper for internal use and do not represent binding law. Although limited and scant, the Guidelines provide instructions to consider in deciding whether and how the OTP will enter plea negotiations with the accused.

These factors are not exhaustively enumerated but they are the minimum that the Prosecutor should weigh when assembling the particular terms for the plea agreement, but also to consider when closing one.<sup>197</sup> “Every case must be approached individually and assessed in light of all relevant circumstances.”<sup>198</sup> Neither element is decisive, nor would its lack mean that the Prosecutor should terminate the agreement. *A contrario*, this would not imply that the fulfilment of all the elements would oblige the Prosecutor to enter an agreement.

### Consistency with the Founding Treaty<sup>199</sup>

The first element to be considered is the most general one, requiring that the agreement must be in accordance with the purpose of the Rome Statute and the objectives of the OTP. At the time when the idea of negotiation on plea agreements was presented for the first time at the ICTY, its first President, Antonio Cassese, positively declared that plea bargaining was inconsistent with the unique purpose and functions of the Criminal Tribunal. Judge Cassese said that the crimes within the ICTY’s jurisdiction were simply too reprehensible to be bargained over.<sup>200</sup> However, with ample caseload and pressure of the United Nations “plea bargaining has come to The Hague”<sup>201</sup> and with time the practice of plea bargaining has become a “predominant” way of solving cases.<sup>202</sup>

The extensive number of unsolved cases could not justify the sudden shift in adopting plea bargaining in international criminal law. This reason directed the legislator to find justifications for the plea agreements, and they did so in accordance with the mandate of the international(zed) tribunals. Thus, it is necessary to understand that a plea agreement, when met with other elements, as explained

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid para.17.

<sup>199</sup> The Guidelines, para. 18. “Consistency with the Rome Statute. Fundamentally, the Prosecutor shall agree to the admission of guilt only if he or she determines after due deliberation, and consideration of all relevant factors and circumstances, that the agreement is consistent with the purpose and requirements of the Rome Statute and the goals of the Office of the Prosecutor.”

<sup>200</sup> Morris, V., Scharf, M., *An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Volume II, New York: Irvington on Hudson, p. 652. cited by Maviş, V., *Why Should the International Criminal Court Adopt Plea Bargaining*, İnönü Üniversitesi Hukuk Fakültesi Dergisi Cilt, Volume 5, Issue 2, 2014., p. 463. “After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.”

<sup>201</sup> Cook, J. A., *Plea Bargaining at The Hague*, The Yale Journal of International Law, Volume 30, 2005, p. 475.

<sup>202</sup> Ibid.

*infra*, is compatible with the founding treaty, mainly bearing in mind that the purpose of the ICC is to put an end to impunity for the perpetrators of the gravest crimes and consequently to contribute to the prevention of such crimes.<sup>203</sup> Thus, the Prosecutor, by proceeding on the agreement of admission of guilt, will demonstrate the purpose of non-impunity towards the convicted who pleaded guilty but more importantly send a message for other alleged perpetrators.

### **Acceptance of Responsibility<sup>204</sup>**

The person charged must be cognizant that all the facts relevant to the statement of guilt are given “full[y] and truthful[y]”.<sup>205</sup> This is important not only because the admitted facts should not be at contest in the future, but even more because this gives a certain degree of closure to the victims. Delivering its Sentencing Judgement, Trial Chamber I in the case of the Prosecutor v. Dragan Obrenović observed that, “[a]lthough the victims of these crimes and family members of those killed were fully aware of the crimes committed before Dragan Obrenović pleaded guilty, it cannot be doubted that the recognition of the crimes committed against them by a former officer of the Republika Srpska may provide some form of closure.”<sup>206</sup> A defendant’s sincere acknowledgement of and remorse for crimes are a strong contribution to reconciliation in the countries that have suffered mass atrocities. As a matter of fact, one of the witnesses in the plea agreement proceedings at the ICTY said that his burden was eased, but later he stated: “that the years that have passed since Obrenović’s confession have erased any conviction he had about guilty pleas breaking down the barriers of denial and silence over war crimes.”<sup>207</sup> After hearing that those given apologies were not sincere, it can be derived that the victims have suffered severe psychological suffering and repeated trauma.

The victim further explains that “denial of crime has taken on a life of its own because Serbian politics ignores the facts. Besides, outside the courtroom, no one

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<sup>203</sup> The Rome Statute, Preamble.

<sup>204</sup> The Guidelines, para 19. “Acceptance of responsibility. An accused person’s acceptance of responsibility can provide some measure of closure and recognition for the victims. An admission of guilt also offers finality and certainty to the proceedings, which can benefit victims, the public, the parties, and the Court. Moreover, when an accused person accepts responsibility, and especially when he or she admits in detail the facts upon which his or her guilt is based, it is more difficult for others, including future generations, to contest those facts. Consequently, the Prosecutor shall not enter into any agreement in which the accused disputes the essential facts establishing his or her guilt, namely, the facts underlying the elements of the charged crimes and the applicable modes of liability. The Prosecutor should insist, as a condition of every agreement regarding admission of guilt, that the accused person provide the Prosecutor with a full and truthful account of his or her conduct relevant to the charged crimes.”

<sup>205</sup> *Ibid.*

<sup>206</sup> The Prosecutor v. Dragan Obrenović, Trial Chamber I, Sentencing Judgement, para. 111.

<sup>207</sup> <http://barbaramatejcic.com/2020/01/10/culture-of-denial-why-so-few-war-criminals-feel-guilty/> (accessed on 26 June 2021).

has taken responsibility [for committing crimes] or said they were guilty”.<sup>208</sup> It is beyond the Court’s mandate to regulate how defendants will accept the truth after they have served their sentence. The denial of truth has serious consequences not only for the victims, but for reconciliation in the whole region. It is in the authority of the national jurisdictions to establish laws that incriminate such actions.

However, the authority of the Court’s judgement establishing the truth is undeniable and should provide victims with satisfaction on a more official and definitive note than the defendant’s allegations outside of the Courtroom. It is important to note that, at the ICC, the victims can contest the Court’s order on reparation,<sup>209</sup> and the defendant must comply with such final decisions.<sup>210</sup>

Thus, the Prosecutor should not proceed with the agreement if he/she is not satisfied that the accused’s statement is given as unconditional truth about the events that constitute the acts charged.

### Charges<sup>211</sup>

The defence is obliged to avoid excessively distortive bargains with the Prosecution, although they will often agree to drop certain charges against the defendant, which is theorized as charge bargaining. The case of Dragan Zelenović resulted in a plea bargain, where the Trial Chamber found the accused guilty on the seven counts of crimes against humanity, as set in the plea agreement and granted the Prosecutor’s Motion to withdraw the remaining seven counts of torture and rape.<sup>212</sup>

The Prosecutor at the ICC is, however, limited in withdrawal of charges referring to “under prosecuted” crimes. This approach represents a departure from the practice

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<sup>208</sup> Ibid.

<sup>209</sup> The Rome Statute, Article 82(4).

<sup>210</sup> Rules of Procedure and Evidence, Rule 150(1) and 158.

<sup>211</sup> The Guidelines, para 20. “Charges. Although agreements regarding the admission of guilt may be reached at any time, under articles 64(8)(a) and 65, an admission of guilt itself can be made no earlier than the beginning of the trial. At that point, the Pre-Trial Chamber will have confirmed the charges, having already found, under article 61, substantial grounds to believe that the accused person committed the charged crimes. Consequently, the Prosecutor should ordinarily insist as part of any agreement that the accused admit guilt concerning all confirmed charges. However, there may be instances in which amendment or withdrawal of charges following article 61(9) is appropriate, such for example where discussions between the Prosecution and Defence elicit facts that cause the Prosecution to revise its view of the accused’s criminal responsibility or its ability to prove particular charges at trial. The Prosecutor should exercise particular caution before agreeing to seek the withdrawal or amendment of charges which have been traditionally under-prosecuted, such as crimes against or affecting children, sexual and gender-based crimes, attacks against cultural, religious, historical and other protected objects, as well as attacks against humanitarian and peacekeeping personnel.”

<sup>212</sup> The Prosecutor v. Dragan Zelenović, Trial Chamber I, Sentencing Judgment, 4 April 2007, para. 10.

at the ICTY.<sup>213</sup> This can also represent a departure from the procedure of the first guilty plea agreement at the ICC. Although at the confirmation of charges hearing the Prosecutor presented only war crimes amounting to cultural destruction, in the earlier stages it was undoubtedly presented that there was evidence amounting to crimes against humanity and war crimes, namely (at that time under prosecuted) sexual related crimes.<sup>214</sup> In the Al Mahdi case, neither the Arrest Warrant nor any later stage of the proceedings mentioned crimes that are regarded as being under prosecuted.<sup>215</sup> It is questionable why did the Prosecutor decide not to charge Mr Al Mahdi with sexual crimes.<sup>216</sup> However, this practice should be rectified with the new policy instructions presented in the Guidelines.

### Cooperation<sup>217</sup>

In cases at the international(ized) tribunals, the complexity of cases demands time and extensive resources. If the Defendant agrees to cooperate it saves time and brings substantial clarity to the case. After the closure of the case of Dražen Erdemović, the Prosecutor at the ICTY recognised that the development of other cases before the ICTY were furthered because of the information provided by Mr Erdemović.<sup>218</sup> His testimony was significant in narrowing the investigations and beneficial for judicial economy.<sup>219</sup> It is interesting to notice that at the ICC, as mentioned *supra*, Al Hassan is currently on trial, but Al Mahdi, the Defendant who pleaded guilty, does not have any known cooperation with the Prosecution. Cooperation by the accused with the Prosecution that is “substantial”,<sup>220</sup> “full and

<sup>213</sup> The Prosecutor v. Dragan Zelenović, Trial Chamber I, Sentencing Judgment, 4 April 2007.

<sup>214</sup> The Office of the Prosecutor, Situation in Mali Article 53(1) Report, 16 January 2013, paras. 117-119., 166170.; Open Society Justice Initiative, The Trial of Ahmad Al Faqi Al Mahdi at the International Criminal Court, August 2016, p.4.

<sup>215</sup> The Prosecutor v. Al Mahdi, Pre-Trial Chamber I, Mandat d'arrêt à l'encontre d'Ahmad AL FAQI AL MAHDI, 28 September 2015.

<sup>216</sup> Schabas, W., *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, Case Western Reserve Journal of International Law, Volume 49, Issue 1, 2017., p.111.

<sup>217</sup> The Guidelines, para 21. *“Cooperation. An admission of guilt can be an opportunity for an accused person to provide critical information relevant to other investigations or prosecutions. For example, several accused who pled guilty at the ad hoc tribunals agreed, as part of their plea agreements, to testify on behalf of the Prosecution in other trials. Wherever appropriate, the Prosecutor should require, as a condition of any agreement, that the accused agree to assist in other investigations and prosecutions by providing all relevant and requested information to investigators and also by agreeing to testify truthfully, fully and accurately at any relevant trial. However, there may be instances where it is appropriate and in the interests of justice to proceed with an agreement regarding admission of guilt that does not include the accused’s cooperation in other cases. It should be understood, in any event, that only those accused who cooperate with the Prosecution to the full extent they are able will receive the maximum benefit (in terms of recommendations by the Prosecutor and, most likely, in terms of consideration from the Trial Chamber) at the time of sentencing.”*

<sup>218</sup> The Prosecutor v. Dražen Erdemović, Trial Chamber I, Sentencing Judgement, 5 March 1998, para. 99.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

comprehensive”<sup>221</sup> and “voluntary and unconditional”<sup>222</sup> often results in a significant sentence reduction.<sup>223</sup> The Prosecutor should strive to ensure that, in the light of the relevant case situation, the accused’s guilty plea contributes to unravelling the truth.

## Sentence<sup>224</sup>

The Prosecutor at the ICTY in the case of Stevan Todorović introduced a new practice, sentence bargaining.<sup>225</sup> As explained *supra*, in order to get lesser sentence recommendations by the Prosecution, the Defendant pleads guilty to some charges.<sup>226</sup> In the trial of Momir Nikolić, the Prosecution recommended a sentence of between 15 and 20 years, under Rule 62ter(A)(ii), and the defence submitted that Mr Nikolić should not be sentenced to more than 10 years of imprisonment.<sup>227</sup> However, the Trial Chamber found that “it cannot accept the sentences recommended by either the Defence or the Prosecution; neither sentence adequately reflects the totality of the criminal conduct for which Mr. Nikolić has been convicted.”<sup>228</sup> Consequently, the Trial Chamber sentenced the accused to 27 years of imprisonment,<sup>229</sup> which was later reduced by the Appeal Chamber to 20 years.<sup>230</sup> The Trial Chambers followed the Prosecutor’s suggestions in the cases of Miroslav Bralo,<sup>231</sup> Miroslav Deronjić,<sup>232</sup> Miodrag Jokić,<sup>233</sup> and Dragan Zelenović.<sup>234</sup> However, the Trial Chamber deviated from the “general sentence practice of the courts of the former Yugoslavia”<sup>235</sup> and imposed longer sentences than previously suggested, in

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> Similarly, in other case; The Prosecutor v. Stevan Todorović, Trial Chamber, Sentencing Judgement, 31 July 2001, para. 87.

<sup>224</sup> The Guidelines, para. 22., “Sentence. The Prosecutor may agree to recommend, or not to oppose, a specific sentence or a sentence within a particular range. The Prosecutor shall bear in mind the factors identified in article 78 of the Statute and rule 145 of the Rules of Procedure and Evidence, including aggravating and mitigating circumstances. In particular, the Prosecutor shall ensure that any sentencing recommendation by the Prosecution properly reflects the gravity of the crime and the accused’s role therein. At the same time, rule 145(2)(a)(ii) expressly recognizes an accused’s cooperation with the Court as a mitigating factor, and acceptance of responsibility is generally viewed as a factor warranting some reduction in sentence. The Prosecutor shall balance all relevant circumstances to recommend a sentence—or a sentencing range—that reflects the overall culpability of the accused.”

<sup>225</sup> The Prosecutor v. Stevan Todorović, Indictment, 29 June 1995, para.10.

<sup>226</sup> *Supra*, para. 2.1.3.

<sup>227</sup> The Prosecutor v. Momir Nikolić, Trial Chamber I (Section A), Sentencing Judgement, 2 December 2003, para. 172.

<sup>228</sup> *Ibid* para. 180.

<sup>229</sup> *Ibid* para. 183.

<sup>230</sup> The Prosecutor v. Momir Nikolić, Appeals Chamber, Judgement on Sentencing Appeal, 8 March 2006, para. 135.

<sup>231</sup> The Prosecutor v. Miroslav Bralo, Trial Chamber, Sentencing Judgement, 7 December 2005, para. 95.

<sup>232</sup> The Prosecutor v. Miroslav Deronjić, Trial Chamber II, Sentencing Judgement, 30 March 2004, para. 280.

<sup>233</sup> The Prosecutor v. Miodrag Jokić, Trial Chamber I, Sentencing Judgement, 18 March 2004, para. 112.

<sup>234</sup> The Prosecutor v. Dragan Zelenović, Trial Chamber I, Sentencing Judgement, 4 April 2007, para. 70.

<sup>235</sup> The Prosecutor v. Ivica Rajić, Trial Chamber I, Sentencing Judgement, 8 May 2006, para. 182.

regard to Momir Nikolić, as mentioned above, and in the cases of Dragan Nikolić<sup>236</sup> and Milan Babić<sup>237</sup>.

The sentence proposed for Mr Al Mahdi was nine to eleven years of imprisonment,<sup>238</sup> which the Trial Chamber followed by deciding on a sentence of nine years.<sup>239</sup> Although it cannot be certain if the Trial Chamber will accept the proposed sentence, in the light of ICTY's practice, it is necessary to examine all the relevant circumstances of the case and propose a sentence accordingly. It is not sufficient to propose a sentence just to benefit the accused, the Prosecutor must consult all the elements just as the Chamber would when deciding on the sentence.

### **Factual Basis<sup>240</sup>**

To be accepted, a guilty plea must be built on facts.<sup>241</sup> The Chamber must weigh if there is enough evidence for the charges, in both law and facts. Consequently, without the substantive facts, the admission of guilt is not sufficient for the conviction of an accused. This was further approved in the case of Jelisić, where the Chamber explained that "the admission may not be proof of guilt. Far from being proof, it must itself be proven."<sup>242</sup> It is thus necessary that the Prosecutor presents all the relevant evidence to support an agreement.

If the Chamber considers that the supporting evidence does not amount to support a convicting judgement, in a pursue of "the interests of justice, in particular, the interests of the victims"<sup>243</sup>, the Rome Statute suggest to request the Prosecutor to submit new supporting evidence or even to open a trial stage of the proceedings.<sup>244</sup> Divergent from the Rome Statute approach, the Rules at the ICTY imply that "lack of any material disagreement between the parties about the facts of

<sup>236</sup> The Prosecutor v. Dragan Nikolić, Trial Chamber II, Sentencing Judgement, 18 December 2003, paras. 279-282.

<sup>237</sup> The Prosecutor v. Milan Babić, Trial Chamber I, Sentencing Judgement, 29 June 2004, para. 101.

<sup>238</sup> The Prosecutor v. Al Mahdi, Public redacted version of "Prosecution's submissions on sentencing", 22 July 2016, ICC-01/12-01/15-139-Conf, 21 August 2016, paras. 64-70.

<sup>239</sup> The Prosecutor v. Al Mahdi, Judgment and Sentence, 27 September 2016, para. 109.

<sup>240</sup> The Guidelines, para. 23. and 24., "Factual basis. Admissions of guilt will ordinarily shorten trial proceedings. While this has many advantages, it may also result in less fully developed records in some cases. For this reason, the provisions in article 65 requiring a sufficient factual and evidentiary basis to establish the truth of the charges against the accused are critical. The Prosecutor should seek to ensure that all agreements contain a detailed and thorough statement of the facts underlying the admission of guilt. Such facts should address all the essential facts required for a conviction. In no circumstances should the Prosecutor agree to withhold from the Trial Chamber any fact material to the determination of the accused's criminal responsibility or an appropriate sentence."

<sup>241</sup> The Rome Statute, Article 65(1)(c); Rules of Procedure and Evidence of the ICTY, Rule 62bis(iv).

<sup>242</sup> The Prosecutor v. Goran Jelisić, Trial Chamber, Judgment, 14 December 1999, para.25.

<sup>243</sup> The Rome Statute, Article 65(4).

<sup>244</sup> Ibid Article 65(4) (a), (b).

the case” suffice to build a factual basis for a valid guilty plea.<sup>245</sup> Although, the ICTY Chamber had demonstrated more inquisitorial approach in proving the facts.<sup>246</sup>

The Prosecutor at the ICC has a challenging task to present all the relevant evidence to support the agreement but also to support the interests of justice in the light of the victim’s rights.

### **Impact on Victims and Witnesses<sup>247</sup>**

The impact that lengthy trials have on the victims was clearly demonstrated by the practice at the ICTY.<sup>248</sup> Moreover, it was demonstrated how traumatic it is for the witnesses to participate in the trial process. Considering that, the Prosecutor at the ICC should, in the quest to end impunity, try to enhance the chances of agreeing on plea agreements. The closure that the guilty plea, with a sincere apology, brings to the victims has been confirmed at the ICTY.

Unlike the procedure at the ICTY, the ICC recognises the procedural stage of Reparation/Compensation. In that regard, the plea agreement could be restrictive to victims’ ability to be awarded the status of beneficiaries and consequently cause them to lose individual compensation.<sup>249</sup> However, it was demonstrated in the case of Al Mahdi that the Trust Fund for Victims has been implementing compensation in numerous instances to the victims and proved successful in restoring peace in the field.<sup>250</sup> Having in mind the particular victims’ status at the ICC, the Prosecutor has to afford sufficient attention to their rights and how the agreement could have a consequential effect on reparation proceedings.

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<sup>245</sup> Rules of Procedure and Evidence of the ICTY, 8 July 2015, Rule 62bis(iv).

<sup>246</sup> Guariglia, F., Hochmayr, G., “Article 65”, in Triffterer, O., Ambos, K., *The Rome Statute of the International Criminal Court: A Commentary*, Munchen, Oxford, Baden Baden, 2016, pg. 1229.

<sup>247</sup> The Guidelines, para. 25. “*Impact on victims and witnesses. An admission of guilt will ordinarily eliminate or reduce the need for victims and witnesses to testify at trial, which can be a traumatic experience. Witnesses who might require intrusive security measures or even relocation as a result of their testimony can also be spared this significant disruption to their lives. In most cases, therefore, the Prosecutor should consider developing the record of the case through mechanisms such as an agreed statement of facts and one or more of the article 65(1)(c)(ii) and (iii) mechanisms discussed above without the need for viva voce testimony from vulnerable witnesses.*”

<sup>248</sup> Borda, Z. A., *History in International Criminal Trials*, Journal of International Criminal Justice, Volume 18, 2020, p.558.

<sup>249</sup> Combs, N., *Rehabilitating Charge Bargaining*, Indiana Law Journal, Volume 96, 2021, pg. 64. “*As a general matter, once a defendant has been indicted, victims favour more comprehensive charging, so the more robust the voice of victims, the broader prosecutorial charging practices are apt to be.*”

<sup>250</sup> Trust Fund for Victims, Lesser Public redacted version of “Updated Implementation Plan” submitted on 2 November 2018 ICC-01/12-01/15-291-Conf-Exp, ICC-01/12-01/15-291-Red3, 14 October 2019.

## Efficiency<sup>251</sup>

Efficiency regarding time is what brought guilty pleas to the ICTY in the first place. As explained above, extensively accumulated caseload at the ICTY, required an abrupt change. The changes implemented by accepting guilty pleas have accelerated decision making and “improved” the ICTY’s image. While the ICC is currently facing some serious criticism regarding its low number of convictions, it is evident that the Guidelines have been issued at the right time to make clear the Prosecutor’s willingness to enter into plea agreements and eventually accelerate the decision-making process. The Prosecutor should strive to avoid a lengthy trial that would take up the Court’s resources, but also limit the Prosecutor’s efficiency in preparing well for other cases. Although it must not be at the cost of victims’ rights and the interests of justice, efficiency should be achieved through plea agreements and enhance greater accountability.

## Agreeing on Negotiated Justice

We could call the ICTY the cradle of plea agreements in international criminal law, with Mr. Erdemović as a firstborn.<sup>252</sup> Ample case law in the practice and experiences outside the courtroom highlighted two important disagreements. On the one hand, there is the disagreement between the victims’ perspective on the plea agreements, the defendants’ right to a fair trial and the punishment that is sometimes disproportionate. On the other hand, there is a disagreement between charge bargaining and establishing the truth and the historical record.

We can acknowledge that “plea bargaining is a mixed blessing for both the victims and the accused.”<sup>253</sup> It is evident that there are some obstacles for the institute of negotiated justice to be in line with the principles of international criminal law. However, to conclude on a positive note, if there is even the slightest chance for

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<sup>251</sup> The Guidelines, para. 27. “Efficiency. Admissions of guilt can allow significant resources (such as time, money, personnel or court space) that would have been used for trial and appeal to be devoted to other important investigations and prosecutions and thus advance the course of international justice. The freeing of resources for other cases can lead to greater accountability, both through a greater number of prosecutions and also prosecutions against those most responsible for crimes. A greater number of investigations and prosecutions can also further develop the historical record. The Prosecutor may therefore consider the efficient use of resources as one factor, although never the dominant factor, in favour of agreeing to the admission of guilt, particularly where the agreement will eliminate the need for a lengthy trial. The timeliness of an agreement may also be considered in formulating a sentencing recommendation, with earlier agreements ordinarily warranting greater consideration.”

<sup>252</sup> Mr. Erdemović pleaded guilty on his own accord, not as a result of the negotiations with the Prosecutor. The first defendant to plead guilty as a result of the agreement with the Prosecutor was Stefan Todorović. See. Pajić, M., Bonačić, M., *Sporazumi o priznanju krivnje u postupcima pred međunarodnim kaznenim sudovima*, Zbornik Pravnog fakulteta u Zagrebu, Volume 71, Issue 2, 2021, p. 263.

<sup>253</sup> Petrig, A., *Negotiated Justice and the Goals of International Criminal Tribunals*, Chicago-Kent Journal of International and Comparative Law, Volume 8, Issue 1, 2008, p.5.



justice to prevail, even with some negative connotations, it is worth entering into an agreement. As professor Combs concluded, “at this point, international criminal justice in general and the ICC, in particular, cannot afford to categorically eschew procedural devices—even those some consider suboptimal—if those procedural devices could pave the way for far better results than the ICC has been able to achieve without them.”<sup>254</sup>

Therefore, we should agree that the institute of negotiated justice should be a resort to the parties, rather than just a possibility. The development of negotiated justice is going in the direction of acceptance of its application because of the benefits it brings.<sup>255</sup> The positive aspects it has for the parties, for the victims and finally for the Court should prevail over the negative ones, because on a case by case basis the quest to end impunity is achievable.

## Conclusion

The institute of negotiated justice was introduced into international criminal law under the influence of the Common Law system. It was later examined in a number of cases at the ICTY and highly criticized. Although the practice of negotiated justice at the ICC is scarce, the Guidelines are a great incentive for the Office of the Prosecutor to consider preparing the plea agreements once the Defence Counsel and the accused demonstrate an interest in negotiating an agreement on the admission of guilt. The Guidelines are a safe start for the ICC to amend what the ICTY missed and aggregate the development of plea agreements. It falls to the Prosecutor to present an agreement that would be satisfying to both the victims and the accused. The Trial Chamber will have the last word on the agreement, but if the Prosecutor follows the elements presented it is safe to conclude that the agreements will be confirmed without any further trial.

However, it remains to be seen whether the institute of negotiated justice will find its place in the practice of the ICC and reinforce its position in international criminal law after it was abundantly and, it is safe to say, profitably tried at the *ad hoc* tribunals.

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<sup>254</sup> Combs, N., *Rehabilitating Charge Bargaining*, Indiana Law Journal, Volume 96, 2021, p. 61.

<sup>255</sup> Pajčić, M., Bonačić, M., *Sporazumi o priznanju krivnje u postupcima pred međunarodnim kaznenim sudovima*, Zbornik Pravnog fakulteta u Zagrebu, Volume 71, Issue 2, 2021, p. 279.

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