IMT Institute for Advanced Studies, Lucca

Lucca, Italy

What's the story? Legal and media narratives of war crime trials and shaping of national identity in Croatia and Serbia

PhD Program in Political Systems and Institutional Change

XXIV Cycle

By

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2013

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2013

List of "thank you oh so very much"

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Tomica

ITALY

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Giovannicipollamarin
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WORLDWIDE

Professors (Ana D., Dejan Dj., Dejan J., Luca M., Maria Elena, Vjeran)
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Polticka misao: Croatian Political Science Review ISSN: 0032-3241
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1. February 2010 Ministry of Foreign Affairs, The Hague, The Netherlands - 'Political Myths in Former Yugoslavia and Successor States'
2. March 2011 Centre for the Study of the Balkans, Goldsmiths College, University of London, UK - 'Is Peace not Just Enough? Transitional Justice and Dealing with the Past in Croatia and Serbia
3. December 2012 Faculty of Political Sciences, University of Zagreb, Croatia – History in crisis: Transitional Justice and Creation of Historical Narratives in Croatia and Serbia

CONFERENCES

ECPR Joins Sessions, Muenster, Germany, 2010
ECPR Graduate Conference Dublin, Ireland, 2010
LSE Association for the Study of Ethnicity and Nationalism, London, UK, 2010
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Abstract

This thesis analyses the impact of legal and media representations of war crime trials on master narratives of the war and identity in Croatia and Serbia. Our research is situated on the interception of scientific fields of transitional justice, media studies and studies on nationalism. We explore the relationship between official narratives of the war, legal narratives of war crime trials and the way that the media conveys both the narratives and reports on these trials. The research addresses issues concerning war crime trials, collective memories and (re)construction of national identity, national narratives and the war in the former Yugoslavia.

Taking Brooks and Gewritz's methodological approach, we used Critical Discourse Analysis to analyse law not as set of rules and policies, but as a source of narratives. Furthermore, law is given a dimension of "cultural discourse through which social narratives are structured and suppressed". Assuming that the media in contemporary societies have huge influence on shaping knowledge about history and shared historical narratives, this research analyses local media reports on domestic war crimes trials. This research explores how media represent and report about historical narratives established by local courts in Serbia and Croatia. Subsequently, those representations are compared to background, non-legal elements, i.e. historical facts found in judgments rendered at the ICTY. We approached the problematique by analysing trial transcripts and media reports about domestic war crimes trials held in Serbia and Croatia (Ovčara-Vukovar hospital in Serbia and Medak pocket case in Croatia).

We argue that transitional justice, instead of triggering truth seeking and truth telling processes that would lead to reconciliation, multiplied mutually exclusive historical narratives that determined national collective identities.

List of abbreviations

BIH	Bosnia and Herzegovina
CDA	Critical Discourse Analysis
EU	European Union
HLC	Humanitarian Law Centre
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for former Yugoslavia
IDP	Internally Displaced Person
JCE	Joint Criminal Enterprise
JNA	Yugoslav People's Army
NDH	Independent State of Croatia
NGO	Non Governmental Organisation
RECOM	Initiative for a Regional Truth Commission
SFRY	Social Federal Republic of Yugoslavia
SRY	Federal Republic of Yugoslavia
TO	Territorial Defence
UN	United Nations

INTRODUCTION

This thesis analyses the impact of legal and media representations of war crime trials on master narratives of the war and identity in Croatia and Serbia. Our research is situated on the interception of scientific fields of transitional justice, media studies and studies on nationalism. We explore the relationship between official narratives of the war, legal narratives of war crime trials and the way that the media conveys both the narratives and reports on these trials. The research addresses issues concerning war crime trials, collective memories and (re)construction of national identity, national narratives and the war in the former Yugoslavia.

Main research questions we explore are following:

- What kinds of legal and media representations about war crime trials are created in Croatia and Serbia?
- How, and if, these representations influence master-narratives about the war in the former Yugoslavia?
- How, and if, narratives shaping national identity are changed after the war crime trials?

In both personal and collective memories wars often occupy central position. There are multiple interpretations of the 'truth' about wars and break up of Yugoslavia and this thesis does not try to deal directly with establishing of the facts about the war events. Instead, it analyses *representations* of past conflict through prism of public portrayal and reporting on war crime trials. Changes in political and social contexts in post Yugoslav countries provoked changes in the very relationship to the past, causing constant need for creation of new

official memory policies or correction of the master-narrative. We question whether collective memory and master historical narratives are contingent on legal and media representations of war crime trials. War crime trials generate partial narratives as they deal only with historical facts directly connected to establishing the question of individual guilt. Therefore, those representations of the past events are fragmented and require processes of selection and interpretation in order to be transformed into public or media narrative.

This dissertation analyses master narratives of war and identity in Croatia and Serbia and traces the process of creation of political myths that constitute national identity. We used example of ICTY charisma to develop the concept of political myth making in post Yugoslavian era. Main topic of the dissertation is the analysis of two case studies: Ovčara and Medak pocket war crime trials and the impact of resulting legal and media representations on narratives of war and identity. We concentrate on national trials, held before local courts in Serbia and Croatia. We do not directly analyse trials organised by the ICTY or ICJ even though they do contribute to large extent in creation of narratives about the war. Nevertheless, in both case studies we observed how similar ICTY trials influenced the development of narratives on war and identity represented around domestic trials. National courts are chosen in order to explore states' ability in dealing with the past through war crime trials, made without explicit conditionality dictate by the EU and international community, as it was the case with the cooperation with the ICTY.

At this point it is necessary to outline the reasons for case selection of Croatia and Serbia. We wanted to do a comparative study

in order to capture the key element in identity making process – the 'us' versus 'them' dichotomy. Moreover, Croatia and Serbia have statehood as nation states and independent institutions of judiciary. Even though national narratives are not necessarily linked to sovereign states as understood by international law, i.e. as states having right and power of regulating its internal affairs without foreign dictation, Croatia and Serbia are certainly different from the case of Kosovo or Republika Srpska when it comes to national courts for war crime trials. Both Kosovo and Bosnia and Herzegovina, which consists of two entities – Republika Srpska and Federation of BIH, are de facto international protectorates and have hybrid courts or tribunals, composed of international and domestic justice actors.

Trial for war crimes committed at Ovčara, agricultural estate near Vukovar, was the first one before the newly formed Special Court for War Crimes in Serbia.[1] Although already during the 90s there were some trials for war crimes[2], it was the first trial for war crimes respecting high judicial standards. As it coincided almost simultaneously with the ICTY's 'Vukovar hospital' case, it reached major political significance as a test of Serbian judiciary. Moreover, even though only paramilitary unit members were accused, the trial reached noteworthy media salience. The matter of nature of conflict, number of victims, naming of November 18th as Vukovar's fall/liberation, responsibility and political consequences emerged together with the master narrative of Vukovar's victim. On the other hand, Medak pocket case was referred to Croatia by the ICTY and

[1] Special court is term used in public space for War Crimes Council of the Belgrade District Court

[2] Those were mostly show-trials resulting in acquittals of the accused.

caused major political crisis and protests. In contrast to Vukovar's victim narrative, this trial deals with hero narratives, but shares the weight of 'democracy test' for Croatian judiciary.

In order to give more information about the current state of art of existing analysis of impact of war crimes trials and other transitional justice mechanisms on historical narratives, this research starts with the critical survey of the existing secondary literature, theoretical literature and relevant methodology.

CHAPTER 1

LITERATURE REVIEW

On February 28th 2013 The Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) acquitted former Chief of the General Staff of the Yugoslav Army Colonel General Momčilo Perišić. This decision of the Appeal Chamber was the latest in a series of highly controversial judgments of this international body. Since 2012, the ICTY reversed its first instance judgments on the Croatian Operation Storm, acquitting Generals Gotovina and Markač and found the former Prime Minister of Kosovo Ramush Haradinaj not guilty in re-trial process.

As the closure of this ad hoc tribunal is rapidly approaching, a debate whether an international tribunal can fulfil its broader mandate of "contributing to a restoration and maintenance of peace"[3] and consequently to promotion of reconciliation is put back in focus of

[3] Mandate and Crimes under ICTY jurisdiction, accessed on: http://www.icty.org/sid/320

political elites, scholars and local societies. Refik Hodžić rightly noticed that the people of the former Yugoslavia were never seen as ICTY's primary constituency (Hodžić, 2013).

ICTY's judgments were aimed at developing and refining international humanitarian law and at the same time they tried to stay apolitical and impartial. Public discourse about the ICTY in Yugoslav successor states was extremely negative[4]. Nevertheless, many of the more and more narrowly interpreted legal criteria that motivated above mentioned verdicts triggered even more conflicting reactions in the region. ICTY is after all, just another UN institution, external to needs and expectations of the people of the Yugoslav successor states. In addition, Tribunal's strategies aiming at maintenance of lasting peace or establishment of credibility within the region were never truly explained.

Hence, more than twenty years after the break up of Yugoslavia, process of dealing with the past that could lead to reconciliation was never truly unfolded. Reconciliation understood as regain of trust of citizens in each other and in the state itself is not possible without recognizing the truth of what happened during the war. It is illusory to think that an international tribunal whose lengthy and complicated trials are sharply opposing atrocities and violence perpetrated could restore basic trust of citizens in members of other warring party or even in their own state institutions.

Some scholars propose that impartial national courts established by the state willing to deal seriously with war crimes can

[4] For example, OSCE, Belgrade center for human rights, Documenta (just to name a few) regularly publish wider public's attitudes towards the ICTY. Comprehensive results available on: www.bgcentar.org.rs

lead to reconciliation. This thesis is analysing the impact local courts have on creation of historical narratives, political myths and collective memory about the war. Are local court really catalysts of reconciliation? Or they have quite opposite effect in strengthening national ideologies? The ICTY provided full compliance of both Serbia and Croatia, but the cooperation was made possible only via judicial intervention performed by the international community, mainly the EU. Compliance with the ICTY was managed with great democratic deficit as political elites acted upon conditionality dictate. How can we then explain state behaviour and strategies for dealing with the past presented at local courts for war crimes? Domestic trials for war crimes offer a very challenging framework from which we can directly observe evolution and changing of states' institutions attitude towards war crimes and historical narratives. Moreover, this research analyses a development over time in media narratives. How and why those changes occur and what might be possible ways to tackle this problem in the larger context of global justice? There is continuous development in the way legal heritage is discussed and remembered. According to Osiel, trials are significant if they comprise the potential to trigger a public debate about past wrongdoings and society's wounds (Osiel, 1997). Hence, what is the influence of a legal narrative on the creation of political myths and remembrance of war? Are they selectively remembered in order to confirm official dominant public discourse about the war? How and why do media change their reporting policy and strategies about the representation of war crimes trials? This thesis seeks to address these questions by analysing historical narratives from legal documents and media reports in Croatia and Serbia.

1.1. THE NOTION OF TRANSITIONAL JUSTICE

The beginning of the research in the field of transitional justice is closely related to the study of democratic transition. Transitions literature, developed after authoritarian regimes, notably in Latin America and Southern Europe, were overturned in favour of democracies. Transitional justice mechanisms were not mentioned in democratic consolidation theory, as many countries simply chose to ignore their past. Nevertheless, among necessary elements for democratic transition Linz and Stepan included the rule of law, political and civil society. One of the most difficult questions to be answered by a country in transition from authoritarianism or armed conflict to a democracy based on the rule of the law is how the society shall deal with the atrocities and injustices of the past. The culture of impunity, questions of accountability and responsibility, lack of the respect for securing human rights tend to persist during the process of transition. Former Yugoslavia faced double transition: from communism to democracy regime and from violent conflict to peaceful societies. Both legal and political developments of measures concerning human rights gave as result notion of transitional justice. Ruti Teitel argues that precisely this "turn to legalism, however contingent, is emblematic of the liberal state, with transitional justice reconstructing the political identity on a juridical basis by deploying the discourse of rights and responsibilities." (Teitel, 2000: 225)

In the UN report "The rule of law in conflict and post-conflict societies" transitional justice is described as "the full range of processes

and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"[5]. Transitional justice may include either judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions. Its mechanisms consist of criminal justice oriented policies such as trials for war crimes or lack of trials. In addition transitional justice mechanisms are addressed to institutional reform (vetting and lustration), reparations and truth telling (truth commissions).

A milestone document that defines state obligations in case of great breaches of human rights is the judgment in the Velásquez Rodrigues vs Honduras case brought before the Inter-American Court of Human Rights. It clearly defines the objectives of transition justice asserting that "the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".

During democratic transition, legal systems of the state(s) are in constant change and even operational at the same time. Such heterogeneity of law and pluralism of legal systems largely undermined one of the main transition justice goals – dealing with the past. Lack of continuity from one criminal code to another is just too incompressible and vague, especially for the victims' understanding of

[5] Report of the Secretary General Kofi Annan, *The rule of law in conflict and post-conflict societies,* United nations Security Council, 2004

justice as just and fair. In this research we analyse some legal aspect that change over time and whose perception mass media and civil society often misuse or do not explain properly. Development of legal system can be also triggered by international law norms included into domestic legal order. For example, crimes committed under command responsibility or crimes against humanity did not exist per se in domestic legal system in Croatia or Serbia, but new interpretation of then existing legal norms managed to include them into trials. Thus, international law is used as a connecting tool for reconciling new and old identities of the same state, but its implementation can be hijacked by the lack of independence of judges, especially in immediate aftermath of the conflict. On the other hand, judiciary can be far more willing to prosecute individuals responsible for grave breaches of humanitarian law, and therefore set the precedent for the political power.

1.1.1. TRANSITIONAL JUSTICE IN CROATIA AND SERBIA

In all the successor countries of the former Yugoslavia so far, apart from seldom attempts of truth commissions and lustration, the focus of transitional justice has been on prosecution of war crimes. Transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes.

Thus, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by United Nations Security Council

resolution 827[6]. This resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

Among the aims of the ICTY, as reported in its Statute, appear statements such as:

Bringing a sense of justice to war-torn places;

Re-establishing the rule of law;

Providing a sound foundation for lasting peace;

Bringing response to victims and providing an outlet to end cycles of violence and revenge;

Demonstration that culpability is individual and not the responsibility of entire groups; and

In a didactic mode, explanations about what caused the violations, and illustrate particular patterns of violation[7].

The task of the ICTY is to understand the development of international criminal justice within a political context and not to detach justice from politics. The fact is that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bounds linking law and politics must be recognised. Transitional justice, although situated at the niche of human rights, represents its political development in many of its manifestations.

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[6] Full text of UNSC Resolution 827: http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement

[7] Statute of the ICTY: http://www.un.org/icty/legaldoc-e/index-t.htm

In the case of ICTY, the link between the law and the politics is unusually close and transparent. It was only in 1995 that the states created after the dissolution of Yugoslavia had an obligation to accept cooperation with the ICTY. Article IX of the "General framework agreement" (also known as Dayton agreement) requires full cooperation with all organizations involved in implementation of the peace settlement, including the ICTY[8].

Consequently, the EU made this an important condition of its accession policy vis-à-vis the Western Balkan countries concerned, making the start of negotiations contingent on full cooperation with the ICTY. Academic literature analyzing transitional justice in the former Yugoslavia mostly deals with the ICTY and its impact on international relations perspective as well as on domestic politics and society. One of the most influential studies dealing with the state compliance with international tribunals is Victor Peskin's work *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Peskin argues that international tribunals, acting outside the influence of domestic political forces, contribute greatly to the legitimacy of judicial processes held before such an international court. Moreover, international legal institutions are not just codifying new case law of international humanitarian law, but most importantly hold alleged perpetrators criminally accountable for their involvement in atrocities. However, Peskin rightly notes that international tribunals such as the ICTY and the ICTR are largely dependant on states that suppose to "facilitate investigations, indictments and prosecutions of

[8] Full text of Dayton Peace Agreement: http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement

members of its own national, ethnic or political group." (Peskin, 2008) Cooperation depends first of all on the willingness and the capacity of local government taking into account costs and benefits confronted with nationalist and modernist political currents reluctant to comply. Likewise, international tribunals rely on third parties helping the cooperation ("surrogate enforcers"), as for example the European Union in the case of the former Yugoslavia.

Peskin underlines the tribunals' independence as essential element to fulfil a broader mission of collecting an accurate historical record of past atrocities, aiming to contribute to reconciliation process in conflict affected areas. Even though, especially prior to establishment of special chamber for war crimes in the region, domestic judicial system suffers influences from the legislative and executive branches of government, this research focuses on domestic trials for war crimes for several reasons. The impact of international criminal tribunals on memory studies, reconciliation processes, commemoration practices, rule of law and similar has already been widely researched area. In addition, we precisely try to follow war crimes trials that did not start because of the external factors such as financial conditionality or EU membership conditionality. However, we are aware of the fact that nowadays domestic legal practices were put in action largely thanks to the international tribunals: in matters of judicial support, evidence transfer, investigation material just to name a few. Still, in his work Peskin does not explain reasons for domestic elites' potential compliance as he interprets them as rational decision-makers. Similarly, the work of Jelena Subotić labels domestic actors with pre-established and fixed identities and preferences. Subotić did an in-depth

comparative study on how Bosnia and Herzegovina, Croatia and Serbia respond to transitional justice norms imposed by The Hague conditionality. Instead of focusing on the internationalization aspect of transitional justice, she concentrates on issues of institutional design and optimal conditions for reaching the idealised goals of transitional justice. Subotić explains how the ICTY did not reach its objectives profoundly as the states did comply with international norms and standards, but nevertheless rejected the profound social transformation these norms require. Moreover, she claims that transitional justice was "hijacked by domestic political actors who use it as an international and domestic strategy to achieve very specific local goals – turf protection, domestic power, delegitimation of political enemies, and perpetuation of nationalist historical narratives, as well as obtaining international rewards – objectives all very far removed from international justice policy ideals" (Subotić, 2009). The weakness of this research lays certainly in the fact that the author labels each of the countries from her case studies as "norm resisters" (Serbia), "instrumental adopters" (Croatia) and "true believers" (Bosnia and Herzegovina) without taking into account the heterogeneity of political groups in question, policies towards the tribunal and regime change (Subotić, 2009). Subotić also admits that her model cannot be implemented at the domestic level, as coercion and conditionality are difficult to measure due to the absence of direct international involvement. Our research showed that at the domestic level cost-benefit reasoning and attribution of fixed identities to states is particularly misleading, especially as there are large gaps between state

behaviour at the international level, i.e. towards the ICTY, and at the domestic level before the local courts.

Croatian foreign policy and its attitude towards war crimes can be divided into two periods: first one includes period from 1990 to 1999 when Franjo Tudjman was on power and the second one is from 2000 until present. Main obstacles to Croatia's earlier membership were issues of transitional justice in general and long-delayed cooperation with the ICTY. When HDZ was on power, they developed a rhetorical strategy of equating "the tribunal's indictment against Croatia's war heroes with attacks on the dignity and legitimacy of the so-called Homeland war" (Peskin, 2010). Homeland war was one of the main elements of the official narrative about the political identity of the new Croatian state. For Croatian nationalists it was difficult to accept that one day, in an enlarged EU, there would be no heavily guarded border with Serbia or Bosnia-Herzegovina. Tudjman criticism of the EU was also based on its alleged failure to support Croatia during the most difficult times of the conflict – in particular prior to the destruction of Vukovar, in November 1991. Changes of the Croatian foreign policy came after the death of Tudjman. By 2000, the majority of Croatian electorate opposed the significant influence that Herzegovinan Croats, among whom extreme nationalists, suspected of being linked with organized crime, had over policy-making in Croatia during the time of Franjo Tudjman. The external factors played an important and largely constructive role in supporting the anti-extremist forces in Croatian politics.

Croatia finally started Stabilization and Association Process in 1999 which included both full cooperation with the ICTY and regional

reconciliation among the political conditions. In November 2000, SAA was launched in Zagreb and it was signed in 2001. The lack of cooperation with the ICTY halted the process of EU accession once again, and it was only in 2003 that Croatia realized that one possible road to Brussels leads via the capitals of the neighbouring countries primarily Belgrade and Sarajevo. Anyway, last obstacle was removed in December 2005 after the arrest of General Gotovina, accused before ICTY for war crimes.

Political changes in the Western Balkans following the end of Tudjman's and Milošević's regime in Croatia and Serbia respectively, opened a realistic perspective for all countries of the region to move closer to membership of the EU. The initial flurry of action and commitment to war crimes prosecution and corruption after 5 October 2000 ended with the assassination of Serbian Prime Minister Zoran Djindjić in March 2003. Djindjić was assassinated in a joint action of various groups belonging to the underworld network of organized crime and parts of the Serbian police Unit for Special Operation (Jedinica za Specijalne Operacije). This case demonstrated that the link between state structures that were loyal to the former president, Slobodan Milošević, and the criminal underworld are still strong in Serbia.

Serbia's history of reluctance to cooperate with the ICTY since 2000 had been in large part due to the machinations of first elected president in post-Milosević era, Vojislav Koštunica. Koštunica has never been pro ICTY and his increasingly nationalist stance highlighted his real opinions on the war, crimes and international justice. Suspicious surrounding the security sector and its involvement in

shielding war criminals Mladić and Karadžić, while at large, increased because of revelations that Mladić was in receipt of a military pension up until 2002, and that members of the MUP were involved in assuring his protection at least until 2005[9]. In practical terms, real cooperation with the ICTY was rendered almost impossible, because the different segments of the Serbian government and its security services were seemingly working in diametrically opposite directions.

After the death of Djindjić different governments made some feeble attempts to deal with the war crimes issue, with every attempt being severely undermined or criticised by large and vocal parties such as the SRS. Mechanisms of transitional justice, such as laws on war crimes, investigations, tribunals and commissions, were never fully developed or had no real political support. Denial of Serbian involvement and responsibility has remained almost constant among the civil society. ICTY was largely perceived by the Serbian public as an instrument of political blackmail on the part of Europe. As more, EU conditionality has always been strict and the Serbian government has been put under constant pressure in order to fulfil its promise to deliver Mladić. Latest developments showed that the price to pay for shielding notorious war criminals from justice proved to be too high for the Serbs. General perception is changing slowly, but constantly, especially after the arrest of the remaining fugitives.

For the ICTY to fulfil its broader mandate of contributing to peace and reconciliation it had to ensure that its "investigative and judicial work … [is] known and understood by the people in the

[9] it is significant that during the period of Mladić's protection, the Minister of Defense was actual Serbian president Boris Tadic

region." (McDonald, 1998) Unfortunately, during the first six years of the ICTY's work, the lack of resonance within the affected communities due to the lack of any kind of community outreach programs, resulted in broad misconceptions and understanding of the Tribunal's work. The legal professionals either took public relations for granted or as not being their concern; they were also mainly interested in the development of International Humanitarian Law; that is in 'the rules of the game' instead of 'the actual content of the game'. Even ten years after creation of ICTY over 60% of the population in former Yugoslav Republics did not know what laws govern war crimes and 66% had not received any information about the kind of crimes for which one can be indicted (Cibelli, Kristen and Guberek, 2000).

One of the main tasks of the media is to attempt to paint comprehensive narratives about the past atrocities, to tell stories that include everybody, regardless of his or her ethnicity or current residency. It is obvious that print media, radio and television may either aid the process of truth seeking and reconciliation, or be a major obstacle on that path.

In the Balkan's region there are multiple versions of the truth that build new national narrative traditions. The detainees' "shows and performances" in courtrooms are creating postmodern myths in ex-Yugoslav society. Those myths have been created together with the myths of rebirth of nationalism and their impact is huge although their appearance on the political scene is quite recent (Ramet, 2007).

It may seem to be a paradox, although one that can easily be explained, that in the times of Milošević and Tudjman, the Tribunal

had more support in Serbia and Croatia than it has now[10]. This had nothing to do with the opposition parties accepting the necessity of facing the bloody past and assigning personal responsibility in order to avoid being saddled with collective guilt, but because the Tribunal was seen exclusively as an instrument of political pressure which could be wielded to overthrow the regime.

Nevertheless, criminal justice intervention had, as former ICTY Chief Prosecutor Louise Arbour stated, "a weapon in the arsenal of peace"[11]. They realized it only after they had exhausted all other weapons in the traditional peace building armoury: diplomacy, conflict management, bilateral and multilateral negotiations and pressure, political and economical sanctions and more or less credible threats.

Social reactions to past war crimes and human rights abuses are today becoming more oriented towards establishing truth and punishing perpetrators. At present, more than 15 years after the end of the war there is very little consensus among the former republics on official narratives about what actually happened. In the successor states of Yugoslavia national identities came to be defined dialectically, in relation to one another. In terms of responsibility of war crimes, issue raised was the existence of double standards for "ours" and "theirs". Accused compatriots though still enjoy the status of public heroes. It is necessary to outline that failing to raise a voice about the committed crime is as if the crime never happened. Therefore, the work of Tribunal is to be legal, political and moral catalyst. In case of the successor states of the former Yugoslavia traumatic legacies of the past

[10] Report by SENSE News Agency, 21 April 2002
[11] Mirko Klarin, *Tribunal Update,* No. 141, September 1999

have to be dealt with in order to build a stable future; that special attention should go to the needs and rights of people including in victims in particular; and that only a comprehensive approach will rebuild trust among citizens and between citizens and the state.

One of the frequently stated goals of prosecuting individuals for violations of international humanitarian law through the ICTY is to lift the burden of collective guilt from the nations in whose names violations were carried out, by tying the violations to specific individuals who bear criminal responsibility. Still, clear distinction between collective responsibility and collective guilt should be made. Every nation in conflict is bearing collective responsibility for the acts its individuals committed in helping or not preventing them of doing it, while no nation can be named criminal nation[12]. All the criminals are individuals or are taking part of the criminal group or organization.

This raises two important political questions. Firstly, do legal institutions in general offer an appropriate arena for the resolution of issues relating to national identity and guilt? Secondly, is the way in which the ICTY functions effectively decoupling national identities from the notion of collective responsibility?

The reply to this question may be searched by looking towards another International Tribunal. At the International Court of Justice (ICJ), a permanent court of United Nations, only states are eligible to

[12] "Zločinačkih naroda i nikada, baš nikada, ne može cijeli jedan narod biti odgovoran i kriv za ono što su počinili pojedini njegovi pripadnici, ili organizirane skupine – ma kako velike i brojne bile. Postoje individualni zločinci, postoje i zločinačke skupine i organizacije, ali – kažem još jednom – zločinačkih naroda nema". ("There are no criminal nations and never, absolutely never, an entire nation can be responsible for acts of some of its nationals or organized groups – no matter how large they were. There are individual criminals, there are criminal groups and organizations, but – I' will repeat- there are no criminal nations") Croatian President Mesić's speach on 8th February 2007

appear before the latter in contentious cases. The issues of sentences between ex-Yugoslav republics, seems though not to contribute to the sense of collective responsibility. The case of Bosnia and Herzegovina against Federal Republic of Yugoslavia represented for the first time that a court had adjudicated whether a sovereign state could be held responsible for genocide in almost sixty years since the convention on the prevention and punishment of the crime of genocide was unanimously approved by the General Assembly of the UN. The widely commented sentence that basically acquitted Serbia of genocide turned the attention back to a group of individuals, mostly members of paramilitary units.

Apart from preventing war-time leaders from continuing their political careers, the ICTY trials play a crucial role in establishing truth. They are essential for initiating the process of truth-telling and acknowledgment by rendering denial impossible. In that sense, the ICTY does represent an important source for writing history and for collective memory. The truth established by the ICTY in its verdicts against indicted individuals is a court-established truth, which is not questionable by some other court, or challengeable by historical, political or moral tests.

In addition to the ICTY trials, domestic trials are a very important step towards the rehabilitation of renegade states, which can thus prove their willingness to establish the rule of law. In this context all states on the territory of former Yugoslavia have demonstrated a willingness to try war crimes. So called 'completion strategy' or the transfer of intermediate or lower rank indicted persons from the ICTY to competent national jurisdictions, is where the international

community expects the former warring parties to demonstrate their membership of the group of democratic countries and their 'capability' of acceding to the EU (Aucoin&Babbitt, 2006). In order for the ICTY to refer proceedings it must be sufficiently assured of the domestic judiciary's capability of conducting the proceedings fairly and adhere to internationally accepted standards.

In general, national courts have a greater impact on the society and its values and benefits than international tribunals. Through national proceedings, societies more directly face their own problems and mistakes and learn from them. It has been argued that for example, national proceedings had a much stronger psychological and moral impact on population and contributed more to the denazification of Germany than Nuremberg and other international trials (Šimonović, 2004).

At present, the ICTY is applying the back referral which is aimed at enhancing "the essential involvement of national governments in bringing reconciliation, justice and the rule of law in the region"[13]. Domestic institutions are carrying out the restoration of the rule of law in the region, since UN Security Council resolutions 1503 and 1534 project the end of Tribunal's investigations in 2004, the closing-down of trials in 2008/2009, and the completion of the appeal processes by 2010.

[13] *Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, UN Doc. S/2005/343, 25 May 2005, para. 12.

According to Rule 11bis of the ICTY Rules of Procedure and Evidence[14], so far 8 cases have been transferred to domestic courts, for a total of 13 accused. Ovčara trial was the first case that ICTY referred to Serbian justice system.

War Crime Council of the Special Department of the District Court in Belgrade was created on October 1st 2003. It has jurisdiction over crimes against humanity and international law established in Criminal code of Republic of Serbia, as well as for grave breaches of international humanitarian law, committed on the territory of the former Yugoslavia from 1991. If ICTY referrers the case to Serbian Special Court for War Crimes, the prosecutor applies domestic law during the criminal proceeding.

As opposed to the Office of the War Crimes Prosecutor which acts as a governmental institution, and not as a part of the judicial system, the War Crimes Trial Chamber of the Belgrade District Court performs its judicial duty in war crimes trials professionally and impartially. However, as provided by the law, judges are unable to amend and correct the indictments, which constitute a serious danger that some of the court's rulings, as may happen in the Scorpions case, will be contradictory to the already-established truth in the cases tried before the ICTY.

In Croatia, no special chamber has been established and war crimes trials are mainly held before district courts. Four investigative units are formed within district courts of Zagreb, Rijeka, Osijek and Split that are specialized for prosecution of alleged war criminals.

14 http://test1.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf

During the last few years, legislation related to war crimes trials as well as procedures and trial proceedings has improved, mainly due to the EU accession process. Still, ethnically biased prosecutions and convictions in absentia are prevalent. Those proceedings involved approximately 75 percent Serbs, many of them returnees, and 17 percent Croats[15]. The trial of General Mirko Norac before the Regional Court in Rijeka for war crimes against Serbian civilians in Gospić and the renewed trial of officers of the military police for the war crime against prisoners of war at the military prison Lora indicate a break with the practice prevailing in Croatia to exclusively indict and try Serbs. In the course of the trial, Serbian victims testified for the first time. This has contributed to recognition of this trial by the victims. This participation by Serbian victims resulted from cooperation of the Public Prosecutor's Offices from Croatia and Serbia.

One of the main obstacles for the beginning of trials is certainly the prohibition in the Serbian and Croatian Constitutions to extradite their citizens. This limitation was not relevant for transfer of the accused to the ICTY in The Hague, but creates problems if the trials are held in the country where the crime had been committed. In general, trials held in the country of the accused are rarely successful, as the witnesses are often unwilling to travel to the country of the former enemy. One of the most radical propositions was to abolish right of dual citizenship.

Regional cooperation between Serbia and Croatia started officially on October 13th 2006 by Agreement for prosecution war crimes, crimes against humanity and genocide, signed by Office of the

[15] OSCE Mission to Croatia 2005. *Background Report: Domestic War Crime Trials* 2004

War Crimes Prosecutor from Serbia and State Bar Association of Croatia. This agreement allows transfer of the war crimes trials in the country of the accused, which is not necessarily the country where the crime has been committed.

We already said that war crimes trials offer proper human rights response, but there is no broader strategy in implementing other transitional justice mechanisms such as truth-seeking, reparations and institutional reform. The main problem Yugoslav successor states are facing is the decisive switch from retributive to restorative justice. Restorative justice, as the final stage of transition, should involve all layers and structures in society.

Public opinion in Croatia is still divided, even almost 15 years after the end of the war. Political discussion about past two wars (World War II and 1991-1995 war in Croatia and Bosnia) is manipulated and polarized about questions of domestic criminals and war heroes. The process of dealing with the past means changing a narrow and myopic historical narrative which refuses to criticize fellow citizens.

The situation in Serbia is not much different. Diffused public opinion about the past war is that Serbia was not responsible for the break-up of Yugoslavia and that only paramilitary units were involved in fights. On one side some claim that it is a myth that the war in Yugoslavia was a civil war; others that it is a myth that it was a war of aggression. Indeed, dealing with the past means facing the role of proper nation in war dynamics.

Throughout the region no public debate about the past has been undertaken. This fact has a great impact on everyday life and

provokes constant "delay of grieving" and discrimination of the victims. In the successor states of the former Yugoslavia, there is still not a single official body that would systematically try to establish the fact about war crimes and other gross human rights violations.

National legal instruments are not enough in order to achieve truth telling and truth seeking. There is an obvious need for a regional level public agreement about the mechanisms for establishing and telling the facts about the past.

The regional dimension of the wars on the territories of former Yugoslavia and the subsequently established borders add a specific challenge to dealing with the past processes: on the one hand, certain very concrete and pressing issues, such as identifying missing persons, war crimes prosecution and witness protection, can only be addressed by taking a regional approach.

Since the end of 2005, representatives of the civil society for ex Yugoslav region, guided by Humanitarian Law Centre from Belgrade, Documenta from Zagreb and Research and Documentation Centre from Sarajevo, are working on a regional approach for establishing the truth. Regional approach and cooperation (RECOM) should give more chance to deal with the past than the national level perspective. RECOM certainly will not be able to operate without full support from the states, which are still not ready to give secret documents about the past.

The author of this text is strongly convinced that only by explaining the past from all the possible points of view; we can hope to mark the decisive step towards the reconciliation. In our search for the role in future reconciliation and integration processes, we must

consider numerous international cases in the past (Nuremberg, Tokyo, Rwanda, Sierra Leone etc.). To this horizontal timeline has to be joint also vertical one which investigates cited impact and mirco-marco linkages between individual identities, group behaviour and institutional structures.

The problem of reconciliation is one of the most important in post-conflict societies, and is made possible only by systematic, persistent, long-lasting confrontation with past in order to create a democratic environment.

1.2. DISSOLUTION OF YUGOSLAVIA

In the past twenty five years dramatic changes occurred on the political scene in Western Balkans region. The outbreak of 1991-1995 war in Yugoslavia was a result of ethnic nationalistic ambitions aiming at destroying the multiethnic federation. During the conflict approximately 150000 people had died, 250000 were injured while 2.5 million persons became refugees or IDPs after being expelled from their homes.

The Balkan wars of the 1990s were fought among several untied ethnic nationalistic fronts each seeking statehood and nationhood and each contesting borders, myths and identities of rival groups. Even though all the peoples of Yugoslavia have seen themselves as victims, they equally treasured right to national entitlement – for example in Serbia this was expressed with the

concept 'Heavenly Serbia'[16], while in Croatia that idea was described as 'thousand years old dream'. The wars in Croatia and Bosnia were one of first wars in history to be broadcasted live and to be fully covered by media. For the people in the areas of conflict it was a living hell, while for the growing international public the logical explanation of this reality show war-game had to be oversimplified. Therefore the caricature of the Yugoslavia's tragedy was described as a war of ethnicities or religions, a 'cultural' rather than 'ideological' war[17]. The reasons for the disintegration of Yugoslavia were certainly complex and could not be attributed to one single argument. Academic debates were concentrated around diversity of cultures and traditions, economic causes, political changes in global scene caused by the end of the Cold war, ever growing nationalism, strong leaders' personality, structures of institutions, ideologies and even ancient ethnic hatred (Jović, 2009).

Samuel Huntington in his book "The clash of civilizations" claimed that, after the Cold War, important distinctions among peoples were not ideological, political or economic, but cultural. Furthermore, Huntington argues that people and nations *in primis* attempting to answer the question: Who we are? The answer to the core question "who is who?" is given by two opposite versions: myth and anti-myth, i.e. from the "enemy" nations or from within. Myths of chosen people and martyrdom, as Kolstø described them, have been put on collective

[16]Notion Heavenly Serbia derives from the 1389 Battle of Kosovo Polje, in which a messenger from Saint Elias offered Prince Lazar a "heavenly kingdom" in accepting Serbian defeat

[17] For an overview of the theories of the break-up of Yugoslavia, see Dejan Jović, *Yugoslavia: A State that Withered Away* (Indiana: Purdue University Press, 2009), 13-33

level, in the greatest tradition of the communist collective identity legacy from the past. This research analyses panic and mourning rituals originating as consequence of post war mythmaking dynamics. Panic, understood as fear of the "Other", is made legitimate thanks to the sui generis myth of chosen people. As the similarity of cultural fabric of ex Yugoslav republic is so high, the only way of creating "exceptionality" of determinate nation is by putting it in relation with the other. Thus, an important factor of myth making is constant competition between "us" and "them" that converged though in the general self-consideration of all three nations – once war parties – as martyr peoples. Victimisation of the group is product of martyrdom myth and has self-mourning as consequence. Therefore, incentive for the mourning rituals on the collective level is still high and strictly dialectically addressed to the other "enemy" nation.

Considering the influence of culture in civil wars, we certainly cannot put aside economic problems and ideologies. Gagnon claimed that the wars of the 1990s in Yugoslavia were part of a "broad strategy in which images of threatening enemies and violence were used by conservative elites in Croatia and Serbia: not in order to mobilize people, but rather as a way to demobilize those who were pushing for changes in the structures of economic and political power" (Gagnon, 2004). Consequently, ethnic-nationalism was a strategic policy aiming to silence, marginalise and demobilise any opponent and, in extremis, violence changed the very meaning of identifying as Serb or Croat equalising "ethnic identity and political position" (Gagnon, 2004).

When explaining transitions in post-communist countries, factors like national question and stateness need to be added to

complex transformation from socialist one party system to democracy and from plan economy to market economy (Offe, 1991). After 1974 Constitution, SFRY's future disintegration was institutionally made possible by dividing the state, communist party, and economy along republic borders. The collapse of Yugoslavia encloses also economic decay, political illegitimacy of communist system, structural factors and the failure to develop a common historical narrative. Shared historical narrative, involving shared myths, shared heroes, shared challenges, shared experiences and shared resentments is what ties a community together. It is moreover a precondition for nationhood. For a multiethnic state to be stable over the long term, it is necessary that the historical narratives of the constituent peoples be purged of mutual resentment, mutual recrimination and mutual blame.

The failure of the socialist state of Yugoslavia was marked by ethnic mobilization but was it state which set the system on a trajectory in which ethnic mobilization became a logical choice for ambitious leaders, or was it ethnic mobilization which played the most critical role in breaking up the state? The assumption this research is based on is that it is actually the state that created new, post-war nations. Ambitious leaders saw their chance in fragile political structure and therefore reinforced nationalistic propaganda. The vast autonomy of the six republics, extending to the development autonomous educational and media systems, made its contribution to the dissolution of the country.

The differences in perceptions of both more remote and more proximate history also help to account for the receptivity of the

population to certain propaganda themes, indeed to different propaganda themes.

It was wide-spread belief that the economic struggles were caused by other nationality groups. The clash between "us" and "them" was strongly underlined, and each group had a tendency to see one's own country or nation or group as the victim of a conspiracy organized by other nation or group. Gellner argued that the national sentiment that relies on the relation and the comparison with the others would be politically more effective if nationalists had as fine a sensibility to the wrongs committed by their nation as they have to those committed against it[18].

Serbs, Croats, and Bosniaks remember the past differently and although there are differences of historical memory within each group, one can speak of there being a dominant but evolving historical narrative among each of these national groups. This diversity of historical memory created resources which may be tapped by ambitious leaders.

More than 150 years ago, John Stuart Mill warned that when members of different nationality groups in a multiethnic state read different newspapers and books and maintain alternative sources of information, democracy becomes difficult to establish or maintain. Nation itself could be interpreted as a product of communication and collective self-interpretation. Of course, as Jean Paul Sartre argued in his work, people operate within concrete historical contests, with given resources, opportunities and challenges. Indeed, not all Serbs

[18] Ernest Gellner, *Nations and Nationalism*, Cornell University Press, 1983

supported Milošević, not all Croats supported Tudjman, and not all Bosniaks supported Izetbegovic.

When the nation has a clear dominant historical narrative, then collective self-interpretation could be expected to have certain consequences for the political behaviour. Despite the fact that 'nationalist question' was largely present in the period of interwar Yugoslavia, master historical narrative could not be constructed due to "Serbian Unitarianism and Croatian independentism" (Banac, 1984). Unfortunately, Yugoslavism began as an idea people thought that if they did not already have a common historical narrative they could develop one.

Nationalism can be considered as a theory of political legitimacy, which requires that ethnic boundary should not pass across political one. Nationalism is therefore primarily a political principle, where political and the national unit should be congruent. Throughout the history, whenever nationalism has taken root, it has tended to prevail with ease over other modern ideologies.

A nation's historical narrative is refined gradually in response to dramatic events and as a result also of changes in school curricula, editorial policies and other factors. History textbooks in Serbia, Croatia and Bosnia became largely different, with the widespread characteristic aiming to minimize the common history. A number of historical facts necessary for understanding logical consequences leading to one mutual state were just left out, while periods of past conflicts were underlined and explained to details[19].

[19] Maria Todorova, *Balkan Identities: Nation and Memory*, NYU Press, 2004

For example, regimes of Slobodan Milošević and Franjo Tudjman were particularly interested in discrediting the anti-nationalism propounded by the socialist regime and therefore quickly set about demonizing Tito as a "totalitarian Bolshevik".

Serbian schoolbooks in Milošević time began to equate the Partisans and the collaborationist Četniks as equally "anti-fascist" while Croatian schoolbooks portrayed the Croatian collaborators as "heroes and defenders of national capitalism", representing the NDH[20] as a "victim" and demonizing the Partisans.

Croatian textbooks minimized World War II Ustaša crimes while magnifying the number of victims of communist repression and crimes committed against Croats by the World War II Serb guerilla Četniks. The apologist tendency reached its "natural" culmination in the adoption for Croatian elementary schools of history textbooks in which the NDH was represented as a "state of high culture" and in which the world "genocide" did not even appear.

Nationalistic tendencies in Serbia were explicitly revealed in 1986 Memorandum of the Serbian Academy of Sciences and Art (SANU) signed by number of academics and culturally influential persons[21]. Resentment centred on the federal system which the authors of the memorandum claimed had been devised to strip Serbia of its legitimate jurisdiction over Montenegro and much of Bosnia-Herzegovina. Moreover, there was also resentment in connection with the autonomous province of Kosovo.

[20] Nezavisna Država Hrvatska (Independent State of Croatia) was a World War II puppet state of Nazi Germany organized on a part of Axis-occupied Yugoslavia.

[21] Full text of Memorandum is available on: http://sr.wikisource.org/wiki/Memorandum_SANU

On the "other side" should be outlined the movement of 1967-1971 called "Croatian Spring" when Croats sought to expand their political, economic and cultural autonomy. It was an era of Croatian secessionism in which Ustaša-type ideas were revived.

As we already mentioned, nations in Western Balkans were the product of new-formed states. Thus, the primary theme in the way the Yugoslav meltdown played out in Bosnia was the concept of state. Milošević was seeking to establish a "Greater Serbia", Tudjman was excited at the prospect of restoring the borders of the Banovina, and Izetbegović wanted to preserve the Bosnian republic within its existing borders[22].

The identities in post-Yugoslav countries can be understand as a balanced game of inner centripetal forces such as ethnicity, religion, myths and language; and external centrifugal ones aiming to keep those nations together.

Culturally very close, but seeking the way out of fifty years old Yugoslavian dream, new countries developed to perfection "obsession for details". Differences that were previously easily overcame gained new meanings and suppressed common past.

Only after the end war new identities were formed on the basis of cultural factors, while the conflict itself started as a consequence of much broader set of issues: economic decay, unsustainable political

[22] Greater Serbia borders were proposed by Vojislav Šešelj's Serbian Radical Party in the late 1980s and the 1990s. They extend to the Benkovac-Karlovac-Pakrac-Baranja line in the north in present-day Croatia and to Vardar Macedonia in the south in the present day Republic of Macedonia.
Banovina Hrvatska was founded inside the Kingdom of Yugoslavia according to the political agreement between president of Yugoslav Government Dragiša Cvetković and the leader of HSS (Croatian Peasant Party) Vlatko Maček. Its territory was much wider than actual Croatian state.

system and convincement in the historical determinism. Culture is thus a consequence and not the cause of nation as a state product.

Nations are held together largely by force and by emotion. In the midst of the crisis of the 1980s, millions loved the united Yugoslavia and thought it would survive. When the federation began to crumble in the 1980s, the country was defended by emotions alone and by the fragile lost generation alone[23].

During the 1990s, although the name was appropriated by the Milošević regime in today's states of Serbia and Montenegro, vestiges of the former Yugoslavia began to disappear. A million-strong group known not long ago as "Yugoslavs by nationality" has vanished. As early as 1992 occurred the revival of the primordial identities at the expense of the Yugoslav identity. Some of the "Yugoslavs by nationality" were forced to change nationality and others became disillusioned and undetermined about who they are, while many discovered the traditional religious and ethnic identities and became neophytes.

Religion became very important for the identity mutations in Western Balkans, as it is thanks to the church and state, that one ethnic community becomes a nation. Peter Berger has written that "upsurges of religion" in the modern era are, in most cases, political movements "that use religion as a convenient legitimacy for political agendas based on non-religious interests". [24]

[23] Lost generation is a term referred to people born from 1950s and 1980s that experienced war, interrupted their education and were not able to adapt to the corruption, unemployment and growing tabloid culture

[24] Peter Berger, *National Interest*, 1996

New myths about the notorious war criminals as heroes were paradoxically strengthened after their appearance before the ICTY. Most probably this image will change once the transitional justice process is completed and national courts for war crimes start massive and unbiased trials. In general, national courts have a greater impact on the society and its values and benefits than international tribunals. Through national proceedings, societies more directly face their own problems and mistakes and learn from them. It has been argued that for example, national proceedings had a much stronger psychological and moral impact on population and contributed more to the denazification of the Germany than Nuremberg and other international trials[25].

Twenty years after the break up of Yugoslavia, relationships between political ideologies and narratives about the past in Serbia[26] and Croatia are still contested and vague. Once the common socialist narrative banning everything that could question the then proclaimed ideology of brotherhood and unity was discarded, the new successor countries had to challenge and re-invent their own national traditions.

Recent history in Serbia and Croatia is more of each nationality's collective emotional memory rather than common factual history. Mutually exclusive "truths" about war and the atrocities committed quickly developed, and were used by political elites and

[25] Ivan Šimonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses,* 2004

[26] At the beginning of domestic trials for war crimes Serbia was still part of Serbia and Montenegro. We will use name Serbia throughout the research in order to facilitate the reading.

mass media in the creation of new national narratives, reinforcing at the same time the fragmentation of post-war societies.

This research analyses the impact transitional justice mechanisms have on historical narratives and the creation of collective memory about the war. As the "existing empirical knowledge about the impacts of transitional justice is still limited" (Freeman, 2006) its influence on local societies is measured through its impact on political ideologies and historical narratives triggered by war crime trials. So far, in Serbia and Croatia, the main transitional justice tool has been the prosecution of war crimes. The rationale behind such choice was that transition towards a stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes.

Assuming that in contemporary societies media have considerable power in informing public knowledge about history and shared historical narrative, we analyse local media reports on domestic war crimes trials. Scholars like Peskin, Subotic, Akhavan, Orentlicher and others dealt with the impact that the international criminal tribunals had on the post-Yugoslav region and its transition towards democracy. Judicial intervention and compliance with international law, crucial for the trials before the International Criminal Tribunal for the former Yugoslavia, are not the main focus when it comes to war crimes trials in domestic, local courts. This dissertation explores different representations in the media of historical narratives established by local courts in Serbia in the Ovčara trial, and subsequently compares them to background, non-legal elements, i.e.

historical context, command structure, description of the events or historical facts found in judgements rendered at the ICTY.

How can we then explain state behaviour and strategies for dealing with the past presented at local courts for war crimes? Unlike the conditionality strategy applied for the state's cooperation with the ICTY, trials for war crimes at local level are not associated with imminent push factors such as the EU membership perspective. Therefore, various theories created around the impact of international tribunals or local political elites just cannot stand in this situation. This research analyses changes over time in media narratives. How and why those changes occur and what might be possible ways to tackle this problem in the larger context of global justice cascade? There is continuous development in the way legal heritage is discussed and remembered. According to Osiel, trials are significant if they comprise the potential to trigger a public debate about past wrongdoings and society's wounds (Osiel, 1997). Hence, what is the influence of a legal narrative on the creation of political ideologies and remembrance of war?

Political ideologies in Croatia and Serbia rely greatly on mutually contested historical master narratives about the nature of the wars from the 1990s. Nevertheless, judicial processes do not deal with the causes of war itself but with jus ad bellum aspects. Therefore legal documents describe only the context of war and represent historical material that is easily manipulated. In addition, the very understanding of the tribunals' legacies is not necessarily fixed, but may change over time as the domestic perceptions of the past and the domestic politics of the present change.

1.3. NARRATIVE OF IDENTITY – MAIN CONCEPTS

The debate over identities overrated ethnicity, religion, nationality and so-called identity politics in general, thus was concentrated only to one dimension of the general problem. In the Balkan's region there are multiple truth versions of recent war dynamics, which are building new narrative traditions of nations in question. The detainees' 'shows and performances' in courtrooms of International Criminal Tribunal for the Former Yugoslavia (ICTY) are creating postmodern myths in ex-Yugoslav society. Those myths have been conceived together with the myths of rebirth of nationalism and their impact is huge although their appearance on the political scene is quite recent[27].

Ex-Yugoslavia's successor states' nationhood is mostly symbolic, however, as for the past two decades the newly formed states worked continuously on nation making, identity analysis should focus on identification of the official historical narrative and political myths, imposed and maintained by the state. In the comparative perspective, this research considers the assessment of the new products compatibility with each other and with the democratization process and transitional justice implementation in the Balkans.

Ex-Yugoslav republics, now independent states, have passed through painful process of identity change influenced by various factors. The theoretical approach that the author is following is based

[27] Sabrina P. Ramet, *The Dissolution of Yugoslavia: Competing Narratives of Resentment and Blame,* 2007

on constructivism. The notion of change in international relations theory is closely linked with the importance that is attached to the structure of the international system. Traditional realist writers emphasized the adaptation of state behaviour to the structure of the international system. Structure was determined by the states' relative positioning in relation to other states based on military capabilities, economic resources and geostrategic position. The 'bureaucrat', by adapting its actions to the actual facts, was perceived as being ideal to cope with the requirements of international affairs.

Forty years after Carr introduced the notion of the bureaucrat, Kenneth Waltz challenged the idea of structure being only determined by the state level and the arrangements of its elements[28]. For Waltz, structure is determined by the ordering principle of the international system, anarchy. The self-help system, with which states are confronted, is causally determined by anarchy. In this conception of structure, change is beyond reach. Waltz' approach, based on the immutability of structure, provoked criticism that was particularly aimed at the static nature of structure.

The constructivist approach that became popular in international relations in the 1980s pointed to the reciprocity of structure and states that are acting under it. According to Alexander Wendt, the system of self-help is only one of various possible structures under anarchy[29]. The reason for the existence of a self-help system is not causally determined by anarchy. Rather, it has developed out of interaction and is reinforced by interaction – identities and interests of

[28] Kenneth Waltz, *Man, the State, and War,* New York, 1959
[29] Alexander Wendt, *Anarchy is what states make of it: the social construction of power politics,* in *International Organization*, vol. 46, no. 2, 1992

states arise only in relation to others. Interaction is based on intersubjective meaning, thus constituting the structure. Actors' identities play a key role in the process of achieving intersubjective meaning. Most important and unlike structural realism, Wendt considers identities and interests as acquired by the states through interaction, thus being socially constructed and not exogenously given.

By changing actors' identities, change of socially constructed realties is possible. Or, as Wendt puts it, "identities may be hard to change, but they are not carved in stone" (Wendt, 1999). Wendt distinguishes between two different concepts of agent identity: firstly, social identities, which are constructed through interaction at the international level. Secondly, he introduces the notion of 'corporate identity', which is comprised of a set of interests and can be found at the domestic level. This 'corporate identity' is regarded as being existent prior to the interaction with other actors. It is given exogenously.

Another theorist of constructivism, Martha Finnemore, has been influential in examining the way in which international organizations are involved in these processes of the social construction of actor's perceptions of their interests. This concept has been particularly important for the Western Balkans since the consolidation of cooperation with ICTY in 2003 and the beginning of EU integration process. In *National Interests in International Society*, Finnemore attempts to "develop a systemic approach to understanding state interests and state behaviour by investigating an international structure, not of power, but of meaning and social value"(Finnemore, 2006).

Historical aspect deserves certainly special place in this study. The study of identity construction is not an end in itself. National formation accompanied by identity mutations in the aftermath of the Croatia and Bosnia war will certainly become a 'new history' of lands and peoples under consideration.

Fragile national elements present in Western Balkan countries enter in Wuthnow's category of "communities of discourse" rather than in nation-states one (Wuthnow, 1990). Wuthnow's analysis demonstrates that ideological movements are best viewed as a combination of intellectual innovations and their realization in the production of cultural products. And, because the latter requires both resources and groups motivated to produce them, the success of new intellectual movements is always mediated by material and political conditions: "the shaping of ideology is thus historically contingent" (Wuthnow, 1990: 558).

Thus, previously utilized ethno-confessional labels for the Balkan groups have become outdated. Real social problems, such as poverty and class injustice merged into faith and ethnicities questions. This authentic search for the proper identity is now available only in the remaining sources, i.e. ethnicity, religion, myth and new forms of nationhood.

Already towards the end of the 80s 'national communism' or better 'Titoism' was changing decisively to ethnic nationalism under the guise of anticommunism, democratization, transition, even peace building and reconciliation. In consequence, followers of Marx had successfully transformed themselves into ethnic nationalist. The old

utopian union of all workers seems to dilate into new slogan: "Peoples of all Balkans, identify yourselves!"[30]

The following pages try to reconstruct identity and mythmaking of the past twenty years.

To understand the impact of change in historical, mass media and political narrative has on identities we must locate the notion of national identity within larger debate about 'grand narratives' of nationalism. At the beginning of the 1980s in the field of studies of nationalism a number of theories emerged. Dominant theories of the nation focus mainly on political economy and history, and the national cultural element in the domain of high culture, notably „invented traditions" (Edensor, 2002).

How and why the world became divided into nations, what are the different aspects in identity formation, how is it related to the politics, and why nationalism became the dominant ideology of modern times are just some of the questions developed by Ernest Gellner (1983), Benedict Anderson (1983), Anthony Smith (1986), Eric Hobsbawm and Terence Ranger (1983).

Primordialists' approach is founded on the idea that the nations derive from pre-existing 'ethnies', which is ethnic communities or groups. Smith underlines that a nation is subjective in nature; therefore any social group could lead to being described as nation. He assigns six characteristic to a nation: name, myth of common ancestry, shared historical memories, elements of common culture, homeland, and solidarity for significant sectors of the population. Smith acknowledges that the selection of national symbols often causes

[30]The Marx and Engels' slogan was: *Proletarier aller Länder, vereinigt euch!*

disagreement between different groups in power. This concept is particularly important for our research as we deal precisely with the notion of change in narratives over time. John Hutchinson defines cultural nationalism, lead by "historical scholars and artists" as agents of "moral regeneration" (Hutchinson, 1992). They are seen as "moral innovators", carriers of primordial myths, traditions and ancient heritage who send their message via mass media. Moreover, nations are "continually evolving in time, and it is to history that its members must return to discover the triumphs and tragedies that have formed them" (in Edensor 2002). Main critique against primordialist theory is precisely continuity over time, as history itself is characterised by discontinuity and political struggle. In addition, one person can possess multiple identities, which goes counter to primordialist concept of identity.

Modernists assume that the nation's origins are modern, developed in mass societies. Nation as such should therefore be regarded as invented or imagined community. Gellner gives major role in shaping national identities to the state, but ignores local cultures and traditional elements. For John Breuilly, nationalism must be thought in connection with the state, as it is the state to create the nationalist agenda. Paul Brass also underlines the role of political elites in creation of national identity and new forms of culture and symbols. As established identity and symbols are codified, it is the role of mass media to propagate also the culture 'from below'. This research tries to track the interaction between the popular and high cultural and symbolic elements of the identity, through the channel of mass media. Hobsbawm and Ranger, on the other hand, focus on 'invented

tradition', constructed to give an illusion of primordiality and continuity between past and present. The past is constructed in such way to incentivise social cohesion, legitimise authority and common culture. 'Invented tradition' consists of a "set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature" (Hobsbawm&Ranger, 1992). Nevertheless, symbols ought to be flexible in order to adjust to changing narratives and ideologies they are following. Anderson speaks about the nation as an "imagined community", interlinked by "deep, horizontal comradeship" (Anderson, 2006). According to Anderson it is the rise of print media that enabled the idea of the nation to spread. He mentions everyday life as the framework for the imagined identities.

In the 1990s the understanding of national identity defined by high culture, elements of spectacular and historical was not satisfactory anymore. Postmodernism introduced new approaches to national identity formation, analysing it not from the point of view of 'grand theories' but rather as an on-going process based on everyday practices. Liisa Mallki's work on historical memory suggests that "the construction of a national past is a construction of history of a particular kind" (Mallki, 1995). Narratives, called 'mythico-histories' are repeated on a daily basis and produce meanings influencing people's behaviour. Most important study on popular and everyday practices in creation of national identity is Michael Billig's work Banal Nationalism. By taking 'bottom-up' approach to study of the nationalism, Billig analyses how the nation is reproduced in everyday, 'banal' dimension. In order to reproduce daily, nations need to have "a whole complex of beliefs, assumptions, habits, representations and

practices" (Billig, 1995). Billig's main thesis is that there is continuous 'flagging' and accentuation of the notion of nationhood, which "provides a continual background for political discourse, for cultural products and even the structuring of newspapers" (Billig, 1995). In his book National Identity, Popular Culture and Everyday Life, Tim Edensor suggests that, besides traditional cultural forms and practices, "new images and activities are drawn from popular culture" (Edensor, 2002). Following Billig's work, Edensor asserts that "national identity is grounded n the everyday, in the mundane details of social interaction, habits, routines and practical knowledge" (Edensor, 2002).

Everyday practices, present time and small scale changes are rarely included in nationalism theories. For example, Nairin describes the "Janus face" of the nationalism from both perspective of looking forwards and backwards, while Bhabha analyses the phenomenon of "double time" of the part and the future. In our research we encountered numerous examples of calls for "dealing with the past" in order to build sustainable future, but, not surprisingly though, the present was somehow missed out from majority of public discourses or media reports (Bhabha, 1990). Besides notion of time, the space plays great part in symbolic nation building. Although "national identities can mean different things to different people" (Radcliffe&Westwood, 1996), definition of national territory draws important boundaries to support Benedict Anderson's theoretical framework. Spatial determinant transforms discursive elements of narration into material and imagined, embedded in collective and individual subjects. Moreover, Stuart Hall (1997) considered the nation as a "symbolic formation". The power of symbols and political myths is explained

more in detail in the following chapters. Nevertheless, nation should not operate only at abstract level, namely "formal nationalism" as Eriksen (2010) calls it, but must take into account local, everyday, "informal nationalism". In his book The Formation of Croatian National Identity, Alex Bellamy tries to reconcile official national identity narratives coming from 'high culture' and everyday social practices by dividing construction of national identity in three constituents: 1) big stories deriving from 'above', i.e. political elites, mass media, history textbooks, 2) legitimization undertaken by political and intellectual elites in order to contextualise the discourse and mobilise the people, 3) social practice embedded in individual subjectivity (Bellamy, 2003). Our research starts indeed from the big stories and follows changes in paradigm in the discourse of legal documents and their representation by the elite and the media. Even when we follow social practices and rituals such as commemorations, it has only purpose of elite speeches collection. The author nevertheless considers those kinds of social practices phenomena that are extremely important for the overall analysis, but the limit of the workload simply impeded us to concentrate on that side of the identity formation process. Instead, we focus on historical narrative – most important for the nation building – and how did it change after trials for war crimes? Katherine Verdery argues that national identity formation can be followed through a set of questions related to identity creation. Namely she analyses what the notion of identity consists of, and how do people organise and become national, what are the symbols of the nation, relationship between the nation and other social operators (Verdery, 1995).

Our study of the national identity practices in Croatia and Serbia is above all comparative in nature, therefore narratives and discourses about war crimes trials are analysed from the "us" vs "them" perspective. Fredrik Barth (1969) claimed that identity is constructed through contrast to other ethnic groups and it is expressed by the difference from the other. Enderson argued that "identity is continually reproduced in unreflexive fashion" and, in the same manner, the boundary between two groups is continually maintained and reproduced. Everyday practices, thus, turn our understanding of "'the' economy, government, countryside [into] our economy, government, countryside" (Enderson, 2002: 11). At the same time, by setting the boundaries from "them", narratives about the "other" are always narratives about "us". This research is analysing representations of the war crimes trials in Croatia and Serbia, the creation of "our" identity as opposite to the "other" side, but also the feedback each side has about "other"'s representation about "ourselves". We can speak about two dimensional representations: one created about the "other" and the "other"'s representation of "us" reflected back to "our" public space. Those discourses depend on each other, especially when, like in our research cases, the other, the "enemy" was the formerly part of "ourselves". When two groups are confronted against each other, elements of individuality are lost, and each individual is reduced to be just a mere member of the group. This phenomenon, labelled "logic of generic attribution" by Arne Johan Vetlesen (2006), is particularly important for this research, especially in the debate over individual guilt and collective responsibility and legal and extra-legal interpretations of historical facts. Such situation, Kolsto

argues, "requires considerable preparatory ideological work" (Kolsto, 2009). Ideology work involves creation of the political myths, whereas historical past is misused and the representation of the "other" is based on stereotypes. We are, however, interested in character of a change in identity. Common "collective" identity as expression of shared cultural practices is subject to change upon change of frames in historical discourses. How and why certain events trigger change whereas others do not affect at all the notion of "collective" identity? Is the boundary defining differences between "us" and "them" also subject to a change?

This research conducts an analysis of the new collective identities in Croatia and Serbia, created after the break up of Yugoslavia, by confronting the field of the "imagined", i.e. group self-perceptions and misperceptions, political myths against the of the "real", i.e. legal proceedings in war crimes trials and their media representation. We are focusing quite strictly on political myths, related to the founding of the state and in particular myths of the nation. Following the work of Emilio Gentile who argued that emergence of national states created a "religion of politics", we analyse those "systems of beliefs, myths, rituals and symbols that interpret and define the meaning of human existence" (Gentile, 2009: 18). Those myths are therefore important components of new national ideologies and many of them are recently constructed. Myths and politics are inherently intertwined. We analyse specific narratives containing links between political myths and national identity, because politics itself cannot be imagined without the use of myths: the myth about the chosen people, the myth about the brave nation, the myth about the bright future, the myth about Homeland war, the myth about

martyrdom, just to mention a few[31]. The specific matter of our research is the legitimisation of national identity and nation as such through means of historical narratives that rely greatly on historical and political myths. Such myths are complementary to everyday practices, as they do not reveal any mystical truth, but on the other hand "tell us a lot about the societies in which they were created and the way those societies operated" (Lévi-Strauss, 1981:639).

1.4. LAW AND LITERATURE

The theoretical framework for this research is Hegel's work on the direct relationship of historical narrative to law. Use is made of Hegel's idea of the State as divided into three parts: 1) immediate actuality of the state as a self-dependent organism, or constitutional law; 2) relations among states in international Law; and 3) world history. History represents the world's court of judgment; it is the "necessary development, out of the concepts of mind's freedom alone, of the moments of reason and so of the self-consciousness and freedom of mind" (Hegel, 1967).

Taking Brooks and Gewirtz's methodological approach, law is analysed not as set of rules and policies, but as a source of "stories, explanations, performances, linguistic exchanges – as narratives and rhetoric" (Brooks&Gewirtz, 1998.: 1). Furthermore, law is given a dimension of "cultural discourse through which social narratives are structured and suppressed" (Brooks&Gewirtz, 1998: 1). Thus, attention is given more to the actual facts than legal rules of procedure, and to

[31] More on myths can be found in Holy 1996, Popovic 1998

the way language is used as much as the idea expressed. While shaping reality through language, law uses distinctive linguistic methods, forms and expressions and requires strategies of interpretation. On trial, historical narrative is constantly questioned and challenged, so that "reality" is always divided into various versions of truth. The popularity of the law and narrative approach can be understood as "loss of faith in the idea of objective truth and the widespread embrace of ideas about the social construction of reality. Narrative, in other words, is seen as the social construction of reality" (Brooks&Gewirtz, 1998: 12). To sum up, law "brings together story, form, and power" (Brooks&Gewirtz, 1998: 1).

1.4.1. SELECTION OF MEMORY MATERIAL

Legal narratives might be the main source of the memory of war, but they are subsequently shaped by media representations and interpretations. Selection in news production and its interpretative structure of the courts' activities, may lead to biased reports inherited from the period of dissolution of Yugoslavia. Edited information reflects certain relations of power: it differs in news reports made by media supporting the official attitude of the state and its proposed main national ideology, or in relatively independent media. Both Croatia and Serbia are estimated as "partially free" and connected with the state elites in a non-transparent way. Therefore, relations of power and influence of party politics are very important factors that certainly have important effects on the creation of ideologies. In Serbia media ownership is unknown in 18 out of 30 media analysed by The Anti-

corruption agency[32] and state institutions have a clear economic influence on the work of media through different funding schemes. Croatia, on the other hand, has adopted very rigid legal norms in the past and thus suffers from a lack of pluralism.

In order to describe which topics in media coverage are important to the public we rely on agenda setting theory. This theory claims that the press and the media do not reflect reality, but filter and shape it. Shaw and McCombs theorised the influence of the media as not telling audiences what to think but what to think about. Furthermore, the media influence public policies by "establishing an information agenda ensuring information selectivity, limiting the view of the public of social and political realities, and giving an advantage and attracting attention to some issues and diverting it from others"(Windhauser, 1977; Grady, 1982). Media articles are performing ideological work on the past as they are interpreting the past following present perspectives, usually omitting the historical meaning of past arguments and viewpoints. In addition, media are translating legal documents into everyday language and therefore modifying and reconstructing the discourse content.

Reports on war crime trials are not simply dialectically opposite on the axis Serbian-Croatian media. The difference in reporting of state owned, independent or media heavily supporting certain political parties spreads over the geographical borders of the two countries. In addition, there is an important change in tone while reporting on war crime trials held before the ICTY or at the local level.

[32] http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/mediji/IZVESTAJ%20O%20MEDIJIMA,%20PRECISCENA%20VERZIJA.pdf

Therefore, this research is based on a more nuanced analysis, while bearing in mind external trials held internationally before the International Criminal Tribunal for the former Yugoslavia (ICTY) and domestic trials preformed simultaneously in Serbia and Croatia. While the ICTY indicted only high rank officials from military and political elites, domestic courts dealt with direct perpetrators. This research shows that the differences in legal proceedings have an impact on the way accountability and reckoning of crimes is represented within the interpretative framework that deals with the selection, omission, and preference of certain media material, i.e. the "news frame" (Gamson 1991).

Moreover, in some cases held at local level, indictments themselves represent a choice of narrative to follow, notably when excluding middle-ranking officials from a list of alleged perpetrators. Thus, even though war crimes have been proved before the ICTY beyond any reasonable doubt, responsibility can be operated through a comprehensive legal mastering of the past.

While historically war crimes were dealt with by executions or summary trials set up by victors after conflict or simply remained unpunished, they are now considered just like other crimes that demand a proper trial and due process. As there is "a misguided impulse to capture ineffable human suffering within the confines of the judicial process" (Akhavan, 2001), criminal trials for systematic violations of human rights rarely produce agreement. Mark Osiel stated that legal proceedings are actually founded on civil dissensus, given the discrepancy between widespread and organised political violence and individual guilt as the only mode of accusing perpetrators

for the crimes committed. War crime trials are defendant oriented with victims as tools in the pursuit of justice and therefore very rarely can victims reach the needed level of satisfaction with proceedings and judgements.

Legal processes before tribunals often neglect historical trajectories, and larger social and cultural forces, while focusing on proving individual guilt. One of the consequences of the described dissensus is precisely the process of attribution of collective guilt that relates post-war trauma and nationalist ideologies and creates greater social distances between ex-warring parties.

The transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was deemed possible only if backed by transitional justice mechanisms and accountability for crimes committed. Accountability cannot be understood and reduced only to trial and punishment, nor is it permissive of blanket amnesties. While war crimes remained barbaric acts, criminal justice mechanisms are constantly developing. Trials concentrate on defining the facts that can lead to eventual accountability of the accused for very specific crimes; they do not describe the historical causes of war itself.

1.4.2. LAW AND HISTORY

What is the impact of legal narratives on historical records in post-conflict societies in Serbia and Croatia? According to the "expressive theory of law", law's meaning can have significant consequences in shaping social norms. Legal actions, from the Durkheimian point of view, are particular rituals per se, they also

mean, symbolise or express the conscience collective. Thus, the legal impacts greatly affect the creation of collective memory after mass atrocities, as they involve highly effective rituals. Legal material directly influences collective memory, but in a very selective way. Judicial truth is often quite different from the official historical narrative. The notion of truth is related to the presentation of evidence in ritual practices and public discourse. Unlike the proceedings before the ICTY, in both Serbia and Croatia, there is no live coverage from the local courtrooms, which further narrows and shapes legal narratives, once they are transmitted by the media to the general public. This research analyses the specific use and/or misuse of certain key words carrying ideological connotations. Simultaneously, we emphasised strategies of "forgetfulness" and omission of parts of the narrative that could undermine some of the most widespread national ideologies.

Halbwachs pointed out that our understanding of the past is influenced by present-day interests. Media representations are in fact "reading" history backwards and reflect at the same time power relations within society. Thus, to sum up, there is a two level game going on: legal and political on one side, and doctrinal and historiographical on the other.

Many scholars argued that history should not be written in courts. Mark Osiel noted that the law is likely to discredit itself when it presumes to impose any answer to an interpretative question about the past. In addition, justice is "compromised because history occupies a central place in nationalist myth-making" (Wilson, 2005). Even more, in the region of the former Yugoslavia, wars in Croatia and Bosnia are deeply embedded in official narratives, up to the point of "civil

religion" in Croatia in particular (Jović, 2009). Hannah Arendt argued that questions of great importance for the entire society, related primarily to the causes of conflicts, will be neglected. The aim of this research is not to judge whether "correct" historical accounts of past events are described in trials for war crimes, but how those findings are represented in the media and consequently socially constructed.

War crimes' trials before domestic courts are important indicators of the politicization of history set up during the nation-building project. For example, show trials, trials in absentia or those directed against members of paramilitary forces serve to manufacture the legitimacy of the state and to lift up the collective responsibility for the past crimes. Accordingly, criminal trials against direct perpetrators of no interest for state institutions such as the army or police contribute to "removing from collective memory those larger social mechanisms that involve broader segments of the population in the establishment and execution of dictatorial regimes and their atrocities" (Edmunds, 2009).

Most transitional justice literature assumes that the movement for setting up judicial institutions dealing with past atrocities is internal, in the interest of the states willing to fulfil the transition towards democracy. The region of the former Yugoslavia is rather specific, as the first fair trials were triggered at the ICTY, an ad hoc tribunal founded by the UN Security Council. State collaboration with the tribunal was highly conditioned by different factors such as economic aid and European Union membership. This research deals with domestic trials for war crimes as they bare much less "judicial interventions" and make internal state strategies for dealing with the

past more visible. At the beginning of the work of the Special court for war crimes in Belgrade Bruno Vekarić, the deputy war crimes prosecutor, outlined that "societies need to deal with the past not to appease the international community but because of them". Nevertheless, Peskin challenges the Kantian version of international law founded in an idealized vision of human rights norms by explaining how international tribunals can cause domestic political crises and state instability.

Both Serbia and Croatia encountered serious problems in enabling fair trials for war crimes before domestic courts. The major problem was, and still is, the low domestic demand for normative change and the high degree of politicization of the judiciary. For example, the Serbian public largely refused to believe that Serbs had committed war crimes, and they blamed other nations and ethnic groups for starting the war. Some of the participants in recent wars, i.e. political elites, the church, elite intelligentsia, and the military, stayed in power after the transition and actively blocked transitional justice projects because of their own responsibility in creating, spreading and imposing old regime propaganda. Croatia institutionalized its official historical narrative about the Homeland War when in 2000 the Croatian Parliament approved a "Declaration on the Homeland War" as "just and legitimate defence" in order to "defend its internationally recognized borders against Greater Serbia's aggression".

Even when the institutional challenge such as local judicial capacity was met, judgments were put back on trial as in the case of "Ovčara" by the Serbian Supreme Court and none of the indictees was found guilty as in the "Lora" case by the Split district court. Moreover,

trials were organized almost uniquely against direct perpetrators, leaving a so-called "impunity gap" between high ranking officials brought before the international tribunal and the lowest ranked alleged criminals. Thus, the state has a decisive role in "historicizing only certain segment of culture and state structure, while presenting it as general and authentic".

Introductory chapter presents and contextualises the research topic within the broader context of the field of national identity and transitional justice. We position the study of national identity within constructivist theory and try to operationalise the research question by relating it to the complex field of transitional justice.

This research was conducted mainly with aim to analyse domestic factors of transitional justice that shape, change or develops national identities. Our premise, based on outline of contemporary state of art of transitional justice, is that great bulk of research was concentrated on external factors' impact on domestic transitional justice processes. We aimed to get rid of the necessary conditionality requirements that influence the behaviour of state actors.

Our research takes theoretical inputs from the study of law as literature and analyses legal and media documents as sets of narratives. We concentrate on historical, background discourse present in legal and media documents and try to connect the resulting story with the national identity building process.

The empirical part deals with the case of Serbia and Croatia and a summary of current transitional justice practices in both countries concludes this chapter.

CHAPTER 2
RESEARCH DESIGN AND METHODOLOGY

2.1. ARGUMENT OF THE THESIS

This research analyses identity changes triggered by legal discourses, namely domestic trials for war crimes, media discourses and representation of those trials and political discourses related to the past events. By way new historical narratives associated to war crimes trials are shaped, changed and challenged we draw conclusions of impact they have on national identity creation. National identity matters when it comes to any policy making and it is closely related to consideration about historical discourses of the nation. New wars erase images of old wars, but in our memory images of wars merge together and are easily manageable material.

Most scholars dealing with the transitional justice and its effect on local societies deal with war crime trials before the ICTY. The accent is put on compliance of local political elites with the ICTY conditionality or the impact the Tribunal has on local population. General model of previous researches focuses on international actors leaving domestic agents inactive or as mere recipients of the international policy. Rare researches have been made looking "from below" (Banjeglav, Obradović, Clark): the way local community is affected with the historical narrative formed around war crime trials. This thesis shifts attention from the ICTY and concentrates on domestic courts and consequently on domestic political dynamics in order to

give an internal picture of the impact of transitional justice on historical narratives and media representations. Nevertheless, we do use the ICTY's influence on national identity as "control variable", but we concentrate specifically on the notion of charisma and representations of two former political leaders. Moreover, we present the master narratives about the past events in both Serbia and Croatia and the way they are challenged or changed on the institutional level. Finally, two relevant case studies have been chosen in order to describe the problematique. We analyse following trials: in Serbia we deal with "Ovčara" case, while in Croatia we monitored trials for "Medak pocket" and case. Much has been said about coercion, reluctance and unwillingness of political elites to cooperate with the ICTY or to implement other forms of transitional justice mechanisms. Therefore this research tries to shed light on judicial processes that are far away from the international justice scene, that are motivated internally. We also explore what kinds of strategies the local media employed in order to represent the crimes and historical discourses created around those trials. This research uses comparative perspective for various reasons: we explore representations from both sides, but we are even more interested in mirror pictures one nation creates about the other and whether those strategies go beyond the simple scope of trial reporting. One should be very careful when looking at our sets of case studies: the two/two logic is not employed in order to equalize the guilt or responsibility of two ex warring parties, namely Serbia and Croatia, or to relativize the severity of the crimes committed in each one of them. The traditional positivist historiography considered historical events to be naturally explained as real, truthful stories where historians should

only "uncover or extract from evidence" the objective elements. Consequently, this found truth would be immediately and intuitively acquired by the reader, thus "narrative is regarded as a neutral 'container' of historical fact" (White 1992, 37). On the contrary, this research is absolutely not a quest for the truth about the past war atrocities: we are aware of multiple truths, even multiple "histories" and the fact that judicial truth and establishing the fact is just the material to be analysed in depth by historians. Instead, we are trying to analyse representations of the truth, changes in collective memory seen through the writing of the media about the past events.

Time frame of this study is practically based on the last decade, the only one that managed to set fair trials at the domestic level. We do mention some of the earlier ICTY indictments, motions or judgments related the case studies ("Ovčara" and "Medak pocket"), but we abstain from commenting and including show trials held before national courts especially in the 1990s. Our examination of this first decade of the successful, or rather non unsuccessful, legal processes is strictly related to political elites and mass media attitudes. However, the "bottom up" approach of "small people's" stories and testimonies will certainly serve in the future as a corrector of the past. Some authors already researched their attitudes related mainly to the ICTY judgments (Banjeglav, Clark, Nettelfield), and future comparison of this research with the "small people's" stories linked to domestic trials would be very challenging.

During this research, we covered legal documents related to trials for war crimes before national courts: indictments, hearings, preliminary investigations, testimonies, judgments as primary sources,

and norms of national and international law, treaties, Criminal Codes, Constitutions, customary law provisions as secondary source data. In addition, this research analysed articles from daily and weekly newspapers from both Croatia and Serbia related to trials before the ICTY or domestic courts, political speeches or regular journalistic comments. The analysis also covered parliamentary debates regarding war crime trials, conference proceedings, NGO reports from trial monitoring and other publications.

The unifying element of this vast body of empirical data is the notion of discourse. When using term discourse we concentrate more on the structure of the material, how certain concepts were brought into public sphere, what are the strategies of pointing out selected aspects in media reports, how is the very form of legal document influencing its interpretation from the wider public, which forms of discourse are easy to manipulate meaning with etc.

Besides notion discourse we use the notion of narrative. Representations of truth or history, just to name couple of them, are interpretative in nature. For White, historical argumentation is constructed and framed by paradigm choice and choice of ideological perspective (White, 1985). Such definition suits well our data of 'twisted' truths and 'reality' representations: legal documents as extremely selective compared to the real events and also 'packed' in legalistic discourse, media reports coloured by their own publishing guidelines and ideological positioning, and to a lesser extent political discourses aiming at establishing the most convenient historical narrative suitable for the current national identity determination. Narration developed from the literary studies but it is widely spread in

many interdisciplinary researches, comprising history, legal and media studies. Studies of nationalism understand narration as linking element of a group, as it serves both internal aspects of national identity formation, namely homogenizing, unifying and determinative elements, and external aspects aiming to define self-determination, identify the borders and define the "others". Wodak defines one nation's historical narrative as "presenting a history of a community imagining itself as nation, not strictly as a linguistic text-type with particular structural features, but as a somewhat wider, more abstract category." (Wodak, 2009)

2.2. METHODOLOGY FRAMEWORK – CRITICAL DISCOURSE ANALYSIS

When analyzing discourses of historical, legal and political narratives we use critical discourse analysis (CDA) that relates discourse with other forms of social practices. Relations of power, in the very focus of CDA are inevitably linked to ideologies, especially when it comes to creation of historical narratives. Therefore, we use Van Dijk's definition of ideology as a "hierarchically organized set of norms and values that defines fundamental goals of groups and their members." (Van Dijk, 1991:139). Ideology serves to legitimize the power relations in the society and it dictates the underlying tone of media reporting, political discourses and also shapes historical narration. When analyzing the impact legal, historical and media narratives have on national identities, we follow Cillia, Reisigl and Wodak's assumption that "national identities – conceived as specific

forms of social identities – are discursively, by means of language and other semiotic systems, produced, reproduced, transformed and destructed." (De Cillia, Reisigl & Wodak, 1999).

Foucault's definition of discourse being "practices that systematically form the objects of which they speak" (Foucault, 2002) is taken as the basis. Foucault conceptualises discourse analysis as "the understanding of rules and regularities in the creation/dispersal of objects, subjects, styles, concepts and strategic fields" (Foucault, 2002). For Foucault, the main subject of discursive analysis is not the same as that of linguistic analysis, i.e. the rules in accordance with which a particular statement has been made and rules in accordance with which other similar statements could be made; instead, he is concerned with "how is it that one particular statement appeared rather than another?" (Foucault 2002). Foucault's works showed that discourse has a direct impact on social relations and power structures in society. Nevertheless, for the use of this research, his theory is very difficult to operationalise as it often seems too broad to apply to specific contexts. In this research we use a narrower definition of discourse developed by critical discourse analysis theory, as our main focus is on the relationship between content and situational context in which observed documents are made. We observe the media's "discursive strategies" (Van Dijk 2009), i.e. their conscious or unconscious linguistic strategies used to establish, reproduce, transform or deconstruct the content of historical narrative present in trials for war crimes.

Critical discourse analysis is based upon the assumption that language is dialectically interconnected with other elements of social life. Legal heritage and memory are socially situated and developed

from the interaction of law and its language with the society itself. Discourse analysis effectively shows how each discourse is produced, distributed and interpreted in a particular conjuncture. We take into account Norman Fairclough's dialectic paradigm that understands discourse as both "socially constituted and socially constitutive" (Fairclough, 2003). The dissemination of media to wide parts of society enhances the constitutive effects of its shared discourses playing a significant role in the construction of social reality. Discourse is articulated within contextual structure, power and ideology in order to generate knowledge and belief. We follow the critical view of ideology as "representations of aspects of the world which can be shown to contribute to establishing, maintaining and changing social relations of power, domination and exploitation" (Faiclough, 2003). This view contrasts various descriptive understandings of ideology as positions, attitudes, beliefs, perspectives etc. of social groups without reference to relations of power and domination between such groups. Ideological representations constructed in the media after trial transcripts and legal documents are not used as an objective historical information reflecting "reality" but rather as a source for the analysis of ideological debates and constructing social reality in public spheres in Croatia and Serbia.

To analyse the representations (media discourse) of legal narratives (trials for war crimes) and the way they influence national identity we benefit from the interdisciplinary approach of CDA because of the special attention it gives to the role of ideology and power relations in the production of meaning. CDA determines whole *context* behind the discourse – it does not limit to just linguistic analysis, but describes the relationship between mass media,

production and reproduction of political myths as founding elements of national ideology and power structures in control. In other words, sole language analysis can be considered to be incomplete as it neglects important aspect of social practices and their two-ways relationship.

This research uses discourse-historical approach, i.e. it focuses on historical dimension of the legal and media discourse and uses it in order to analyse its impact on national identities. During the empirical research we extracted historical elements from the legal and media discourse; and gathered the "background situation" of the crimes tried before domestic courts. The way information related to historical circumstances, political decisions and other extra legal elements of trials is represented in the media reveals patterns of remembering strategies and selection of memory material imposed from above. This research follows the diachronic change of historical narratives and elements constituting national identity – by catching the shift of frames from the issue of indictment, via eventual regime change in course of the trial up to the final verdict and eventual social consequences of such judgement. Discourse can play an important role in constructing the national identity, but also in transforming, perpetuating or destructing it (De Cillia, Reisigl & Wodak, 1999). Comparative character of this research enables us to follow different types of strategies used in different situations and countries, triggered by the same historical event, but interpreted differently.

Primary sources analysed in this research range from judicial documents, media reporting and political discourses and they all have different "types" of discourse. For example, legal discourse contains many important constrains due to the very nature of its purpose: it is

selective and shapes the reasoning behind a very precise indictment or judgment, reducing other elements of the discourse to minimum. Media reporting is also framed by different editorial politics and has distinct strategies in covering war crimes trials. We cannot limit this research to *a priori* pointing out ethno-nationalistic discourses in the media or labelling each newspaper with fixed identity because the voice of the mass media is pluralistic in nature and changes over time even in the same editing house.

CDA reveals to be a very useful methodological tool especially in explaining the representation of the "other" in relation to "us". Linguistic strategies employed in media discourse before and after the trial or during some important events that eventually changed the course of trial assert the position of "other" in relation to "us." The way the "other" is represented in the public discourse is one of the main foci of interest of the CDA, consequently nationalism, inclusion/exclusion, racism and other forms of discrimination are broadly explained through this method.

Moreover, every discourse is in some way attached to an already expressed and historically positioned discourse. Foucault claimed that a discourse can be understood only in relation to past discourses. This thesis contradicts basic characteristic of media reporting – actuality. Nevertheless, in our case, many media reports of local war crime trials draw relation with the trials already performed before the ICTY. Therefore, we can observe the change in tone, the nature of "communication" between the old and the new discourse and future perspectives. This thesis tries to reconstruct the elements related to national identity from legal and historical narratives and their

representations in the media. Media reports on key elements such as the issue of indictment, hearings of the accused, important testimonies and judgment are analysed and compared.

We analyse the role of print media in the establishment of political memory of past wrongdoings. The media help substantively in the (re)creation of historical narratives about the past war and they stand in line with ideological discourses. Media influence also the creation of collective memory, even though "there is still no default understanding of memory that includes journalism as one of its vital and critical agents" (Zelizer, 2008). Zelizer points out that journalism's work on the past is often understood as in line with the main historical discourse than with collective memory. Nevertheless, "just what part of the past and what kind of future are brought into play depends on what editors and journalists believe legitimately belongs within the public domain, on journalistic conventions, and of course on personal ideologies." (Lang and Lang, 1989). The media's work on memory is selective and strategic: "once journalists begin to make decisions about which stories play in which medium and using which tools for relay, they find themselves squarely in the realm of memory's work (Zelizer, 2008). In addition, historical discourse offered by the media contributes in spreading a sense of shared history, as one of the main elements necessary to forge a collective identity and sense of shared identity.

Moreover, interests of political elites are expressed in proposed ways of dealing with the past, in determining responsibility, silencing or insisting on the discourse about the nature of war and in punishing the perpetrators. This research analyses media reports in Serbia and Croatia and concentrates on representations of historical and judicial

material. Gellner argued that the national sentiment that relies on the relation and the comparison with others would be politically more effective if nationalists had as fine a sensibility to the wrongs committed by their nation as they have to those committed against it (Gellner, 1983). On the other hand, Michal Billig's work on banal nationalism shows how our national identity and homeland constitutes the very core of everyday mass media content (Billig, 2009). This research tries to look at possible changes over time in media representations and perceptions of war crimes' trials, especially regarding those committed by one's own nationals.

2.2.1. ANALYSING NEWSPAPERS AND LEGAL DOCUMENTS

As already stressed before, CDA explains the way language is used, i.e. by linking linguistic analysis with social analysis: it focuses on social *context* in which it is being used and the *consequences* of such use. This element is particularly important for our research as we deal with extensive sets of data from various social contexts. Therefore, some linguistic tropes are not equally used at tribunal during trial for war crimes, in newspapers reporting on precisely same event or in political speeches during commemoration of cited war episode. Hence language use performs its own form of *identity.* When analyzing newspapers one has to be aware of the influence propaganda of the person or group holding political power has over journalism, but at the same time mass media manage to keep the distance and propagate their own editorial politics.

Specific importance of situational positioning of narratives to be analysed in this research needs broader interpretation of meanings than content analysis. Simple content analysis ignores textual absences that might be caused by oblivion or strategy of denial, which plays a significant role in ideological reconstruction of past events. In addition, we assume something which is not written because of our social knowledge (Cameron, 2001). To certain extent we can "assume that very aspect of textual content is the result of a 'choice'" (Richardson, 2007). Fairclough distinguishes three elements of discursive event: text, discursive practice and social practice. In textual dimension text content is analysed, then the production and reception of the text is explored (discursive practice) and finally, wider social perspective is observed (social practice).

While analyzing content we perform lexical analysis of the text. This is done on two levels: 1) structural, i.e. by explaining how the propositions are structured, what words are used and how and 2) sequential, which explains how the text is organized, whether events are presented in chronological order or with special rhetoric style.

First part of the analysis concentrate on choice of the words and how actors are represented in discourse named and referenced to. In our case studies from the point of view of national identity it is crucial to label "us" and "them" with adequate adjectives or titles. For example, in Ovčara trial for crimes committed by Serbian forces in Vukovar, vast majority of Croatian newspapers labelled victims as "Croatians" while Serbian counterparts used mostly "prisoners of war". Reisigl and Wodak name these choices "referential strategies" and they dictate purpose of the narrative presented in the media

discourse (Reisigl and Wodak, 2001). Teun van Dijk explained those strategies following so called "ideological square" where the author "emphasize *Our* good things, emphasize *Their* bad things, de-emphasize *Our* bad things and de-emphasize *Their* good things" (Van Dijk, 1999).

Further linguistic analysis leads to the choice of predication strategies which assign "qualities to persons, animals, objects, events, actions and social phenomena" (Reisigl and Wodak, 2001). One of the most common strategies is sentence construction which emphasizes agents/subject of action or transits the importance to other role important for the purpose of reporting by concentrating for example on the object of action, process itself or circumstances associated with the action. Examples of this strategy are the following: 1) 'Enemy army killed our soldiers', 2) 'The soldiers were killed'. Sentence construction can be altered also by the choice of modal verbs to be used in text. We distinguish between truth modality and obligation modality, for example whether something *can* be done, or *will* be done. Some texts require certain degree of social knowledge in order to understand them properly; this taken-for-granted claim is called presupposition. In our case studies it is a very common strategy, especially because thematically big sets of articles rely on each other. Finally, strategy of using rhetorical tropes serves to indicate specific meaning of the words.

Next step in CDA is to find out what are the discursive practices used by journalists. Discursive practices reveal the attitude of the author of the text towards an already existing narrative. For example, the way legal document is represented in media shows the discourse practice used by newspaper. Texts appearing in mass media

are necessarily selective, but how does the author of the text select the material? And why does he omit or add on the original source? Discourse is situated within certain social reality and the way it is set up "relates systematically and predictably to contextual circumstances". (Fowler, 1991) Here inevitably comes the question of objectivity of reporting. What is objective reporting? Is it the one where the journalist is silenced and just quotes speeches and reports directly primary sources? Neutral reporting does not mean the objective reporting. What is more, news reporting is certainly led by values like frequency, unambiguity, composition, references to certain people or nations. Even when the author uses quotations we must consider whether it is direct quotation, strategic or indirect one[33]. Newspaper articles are always put in relation to social context – this strategy is called intertextuality.

Finally, we place the observed discourse in relation to social practices. In our case studies we must consider political practices such as regime changes, official commemorations or apologies, changes in those practices, structural changes in political and legal institutions. Moreover ideological practices are important element related to shaping of national identity.

2.2.2. FRAME ANALYSIS

For the use of this research, it is desirable to concentrate on the media's "discursive strategies" (Van Dijk 2009), i.e. their conscious or

[33] Strategic quotation takes only parts of full quote and put them in "strategic" posticions, whereas indirect one gives us the summary of full quote.

unconscious linguistic strategies used to establish, reproduce, transform or deconstruct the content of historical narrative present in trials for war crimes. These strategies theoretically fall into a category of framing, where all texts, regardless of how clear or abstruse they may be, are comprised of packages of integrated idea elements held together by some unifying central concept (Gamson & Lasch, 1983). The "social setting *frames* and *structures* the language used" (Richardson, 2007) and links articulated idea into packages of meanings. Frames put certain perspective on what is being reported and stimulate the audience to adopt frames and the proposed view of reality. Therefore, some ideas are omitted or emphasized, i.e. frames "can construct reality, impact interpretations, and influence the audience responses toward a particular event after the event enters the public agenda." (Dimitrova and Stromback, 2005). According to Gamson every frame has its opposite competing frame. Usually the audience sharing ideological view of one newspaper chose a frame proposed by this particular source. Moreover, new concepts are accepted more easily if they are presented in frame similar to the already known one, which shows frames' persuasive nature and social function (Payne, 2001). Selection is a process that affects frames as well, in media studies it is treated as active and conscious. Frames are put in hierarchy, following analogy of metanarratives as grand ideas crucial for identity formation as they are common to all the members of a group. Result is conceptualization of three main masterframes: the ethno-nationalist frame, the liberal-individualist citizenship frame and the harmony with nature frame. Our research moves within the borders of ethno-nationalist frame, as it draws on already existing cultural codes related

to national identity building (Gamson&Modigliani, 1989) Media discourses are dominated by three groups of frames: namely, conflict, human interest, and economic consequences frames (e.g. de Vreese, 2002; Price et al. 1997: 484). For group conflicts main focus is reproduction of collective identities and their positioning in relation to the "other". Articles used in our case studies very often mention nationality of the actors, even when it is not relevant for the comprehension of the narrative. Therefore, frames about conflict contain linguistic strategies underlying collectivity such as the use of deictic forms, often put in first person plural and sometimes in third, or synecdoche. Moreover, national identity issues described under ethno-nationalist masterframe "always require an element of collective memory" and therefore associate past events with the present one. Thus, events collected to war crime trials, for which the indictees are not directly accused are recalled in media narratives. In this research which deals with representation of historical narratives, frame analysis is of great help for the analysis of discursive practices and understanding of the background information related to a larger metanarrative. Detailed historical narratives alone are rarely published in the media and do not appear before the domestic courts as detailed as before the ICTY. Therefore, structure, content and change of frames in media narratives about past events can bring this research closer to analyzing the dynamics of the impact representations of war crime trials have on national identity.

2.2.3. DATA SET

For the purpose of this research we analysed different sets of data. Our primary sources can be divided into three groups: 1) trial transcripts and reports from the organizations monitoring those trials, 2) legal document such as laws, provisions etc. and 3) printed media articles.

Most of the trial transcripts were obtained during my fieldwork research in Humanitarian Law Centre form Belgrade, Serbia. This human-rights non-governmental organization collected all the transcripts available on request directly at the Office of the War Crimes Prosecutor or War Crimes Chamber. Moreover, HLC carries out activities of research and documentation, justice and institutional reform and public information and outreach, so working in their archives enabled me to do an extensive research of their audio-visual material in order to better understand the context of the war crime trials held at local level. In addition, I have used their reports from trial monitoring. The part of the research conducted in Croatia was done with the help of NGO Documenta, centre for dealing with the past, which provided me with their publications regarding war crimes trials monitoring and other research material. Although I was not conducting official interviews as part of my research, I have received valuable comments and research insights from the employees from both organizations.

For the purpose of this research I have consulted a myriad of legal or other official documents: international humanitarian law practices as well as provisions of the international customary law,

Statute and Rules of Procedure and Evidence of the ICTY, Statute of the ICC, domestic Criminal Codes from 1990s to present days, Croatian and Serbian Constitution, and Parliamentary declarations.

This research analysed print media reports from 2001 onwards. Main part of the research was done during the course of war crime trials and sporadically for important dates such as military operation commemorations. For data on Serbia I used Ebart digital media archive that has data since 2003, which was a fortunate coincidence as main bulk of this research was done for that period. Therefore I included virtually every newspaper document written about the cases I was exploring. Later, I have individualized important dates and selected news in Croatian newspapers. This research was done in National and University Library, in media archive section. I have chosen to follow national newspapers like Vjesnik (until it ceased to be published in April 2012) , Jutarnji list and Večernji list and sporadically Slobodna Dalmacija, Glas Slavonije and Vukovarske novine.

Brief description of Serbian and Croatian newspapers' editorial policies and ideological affiliation is following. Politika is the oldest newspapers in Balkans, close to almost every regime and its policy is determined to large extent by the government. Pro-European, progressive newspaper Danas has a rather small number of copies compared to other Serbian newspaper, but it is the only one with clear socialist and progressive agenda. During the '90s it was a pillar of resistance against Milošević regime. Večernje novosti is nationalistic, but not completely tabloid newspapers like Kurir. More moderate newspaper is Blic. Croatian Vjesnik was state-owned daily newspaper of moderate conservative ideology. Večernji list have more nationalistic

and popular agenda with elements of tabloid reporting. Jutarnji was more left-wing oriented, but is turning towards popular and tabloid style of reporting. Finally, we included local newspapers mostly because of the voices of the victims and their organizations. Their editorial policies are rather moderate.

CHAPTER 3

MASTER NARRATIVE ABOUT THE WAR IN CROATIA AND SERBIA – AN INSTITUTIONAL VIEW

Trials for war crimes touch upon historical circumstances leading to outburst of violence and consequently, upon a constituent element of national identity – historical narrative. Even though judiciary branch of government is independent pillar of every democratic regime, legal narrative found in trial transcripts contains parts of historical master narrative about the war, which is approved by the political elites. Representations of the trials in mass media are, on their account, subject to metaframe that shapes media narrative. For example, in our case studies, which fit under masterframe of nationalism, representations are part of the discourse inevitably connected to ideology. We are interested in one constituting part of the nationalism ideology – political myths. Those myths, together with collective memory about past events are constituent part of national identities.

In this chapter we give an overview of the master narratives about the war, political myths surrounding those narratives and the actual product of the state in relation to cited narratives – parliamentary declarations which insitutionalise them.

3.1. CROATIAN AND SERBIAN MASTER NARRATIVE ABOUT THE WAR

The Myth about the Homeland War was constructed by the first Croatian President – and also professional historian – Franjo Tudjman. With this myth, he wished to emphasize the just and defensive character of the 1991-1995 war. Tudjman took a professional approach to the construction of this myth, because in the 1950s he was a highly-ranked federal military historian of communist Yugoslavia, and he specialized in studies of just, defensive wars, such as anti-colonial or partisan wars. According to Tudjman, the mass people's democratic movement – which unified all Croats – had won in Croatia in 1990, even though his party secured only a narrow victory over the reformed communists, and it is a question whether such a war would have broken out if the communists had won. Moreover, Tudjman argued that, following a democratic victory – which was also a plebiscite for Croatian national independence – an attack was made on Croatia by the Yugo-communist and – "greater Serbian" Army, which consisted of parts of the former JNA that operated under conservative pro-Russian and "greater Serbian" generals, as well as various Serbian extreme nationalistic paramilitary troops. Tudjman introduced the term *branitelji* (meaning "defenders") as an official title sanctioned by law for soldiers-participants in this war. The name in itself suggests that the Croats were leading a defensive war on their own territory even though the Croatian Army carried out numerous operations on territories where Serbs were the majority population, as well as in

Bosnia and Herzegovina, but it is also reminiscent of the word *domobrani* (meaning home guards or home defenders), officially the Croatian Home Guard, which was the Croatian army in the NDH (Independent State of Croatia) and earlier Croatian regimes, and the radical nationalists found this appealing.

Tudjman simplified and ideologised history and ignored the wider historical context, complexity and causes of the Yugoslav crisis throughout the last two decades of socialism. He fogged the complexity of the situation and possible options for a solution during the critical pre-war year, particularly the responsibility of ethnic/religious parties for the state of chaos, as well as the responsibility of extremists in his own party and various "greater Croatian" and neo-Ustasha tendencies which he himself had encouraged and later used in the war and towards consolidation the government. However, Tudjman's idea about the "Homeland" war (or patriotic/fatherland and defensive/just war) as an all-encompassing people's resistance to the aggression, uniting all patriotic forces of the same ethnic group against "the others", was one that appealed to all ethnic nationalist leaders of factions involved in the 1991-1995 war. Each faction had adopted it and applied it to its individual case, while perceiving itself as the just defender and the enemy(ies) as the aggressor(s).

The architect of the "Homeland War" concept, Franjo Tudjman, was a former communist general and military historian. The Croatian Homeland War is a translation and term borrowed from the Russian "Patriotic War" concept, which was invented as a philosophy, war strategy and patriotic mobilization instrument at the time of Napoleon's invasion of Russia in 1812. The "Patriotic War"

(Отечественная война) places primary emphasis on justice, i.e. the defensive character of war, on the existence of an invasion or aggression from, and on the concept of the homeland or, literally, the "fatherland" (отечество in Russian, although the words родина and страна are also used for the same concept). In the World War II the Communist Party of Yugoslavia called on the people to rise against the external aggressor (Germans, Italians, Hungarians, Bulgarians, etc.) in defence of their homeland (Croats for Croatia, Serbs for Serbia, Montenegrins for Montenegro, and so forth). The Partisan Army also recruited a number of officers from the former Royal Army, as well as Chetniks and members of the Croatian Home Guard. Naturally, they also introduced the "dual command system" with political commissars, members of the Party who taught Marxism to the soldiers, and they kept an eye on all non-members, particularly those in command structures. In the beginning of the war, Franjo Tudjman invited professional officers and generals – Croats who deserted the JNA – into the new army formed by the independent Croatia. They patriotically accepted the invitation in defence of their homeland. On 13 October 2000, the Croatian State Parliament at the time adopted the Declaration on the Homeland War. The purpose of this document was to sanction the Homeland War to prevent the possibility of it being dealt with by the left-wing, which after the Tudjman era had a chance of winning the elections and coming into power (the centre-left coalition was later in power from 2000 to 2003). In other words, the Myth about the Homeland War was an instrument for the continuity and legitimacy of Tudjman's Croathood. Most active in sustaining and consolidating the Myth about the Homeland War in Croatia today are Tudjman's ruling

HDZ party, the Catholic Church and associations of war veterans, or as they are officially called – defenders from the Homeland War. At the same time, Croatian historians are debating whether the war in question was a "homeland/defensive war that was also a civil war" (Neven Budak) or primarily an "aggression against Croatia", on which Ivo Banac insists.

Today only Belgrade views the 1991-1995 war as a "civil war in Yugoslavia", just like it views the other wars of that decade as the "Yugoslav wars of the nineties". This was seen for example even in a legal document such as indictment for "Ovčara" case. Even though the Prosecutor could have left the nature of the conflict to be undetermined, like it is the case at the ICTY, he opted for the "civil war" description, which is internal war option. The ICTY took a lot of effort to write an extensive background narrative, but was satisfied with the simple "armed conflict" definition, because it could use Geneva Conventions either way according to the customary international law. For other post Yugoslav state the war was a homeland, patriotic and liberation war waged by a specific ethnic nation against the greater Serbian aggression that was planned and orchestrated in Belgrade. Milošević's regime in Serbia was the only governing party trying to prove continuity with the former Yugoslavia and Communist Party, thus description of the war as civil one was the only option in order to present the others as betrayers willing to break up the SFRY. Bieber rightly pointed out that although nationalism in Serbia was expressed aggressively, it was nevertheless perceived as a self-defensive project. (Bieber, 2005) Therefore the war was presented as preventative, the one that is always seen as only defensive. (Jovic,

2012) Consequently, even Serbia could benefit from using self-victimisation. Other strategies that motivated national mobilization in Serbia and set up the framework for new national myths were recalling of the World War II narrative about Ustasha versus Chetniks' movement, the cult of Jasenovac concentration camp as the Serbian Golgotha and not only a war crimes scene. According to Bakić and Pudar victimization is created as a historical "pathetic and self-pitying perception of Serbian historical destiny inconstant confrontation with the worlds' greatest powers. Victimisation, along with the monopolization of the victim status, is the most frequently used discourse strategy." (Bakić&Pudar, 2009) Myths of chosen people and martyrdom, as Kolstø described them, have been put on collective level, in the greatest tradition of the communist collective identity legacy from the past. Panic, understood as fear of the "Other", is made legitimate thanks to the *sui generis* myth of chosen people. As the similarity of cultural fabric of ex Yugoslav republic is so high, the only way of creating "exceptionality" of determinate nation is by putting it in relation with the other. Thus, an important factor of myth making is constant competition between "us" and "them" that converged though in the general self-consideration of all three nations – once war parties – as martyr peoples. Victimisation of the group is product of *martyrium* myth and has self-mourning as consequence. Therefore, incentive for the mourning rituals on the collective level is still high and strictly dialectically addressed to the other "enemy" nation.

3.2. INSTITUTIONALISED NARRATIVES ABOUT THE WAR

Political elites express continuously their visions of history during political rallies, commemoration practices, electoral campaigns, but official versions of the past events can also be found in numerous documents produced by the government. In this chapter we analyse some of the documents related to 1991-1995 wars that were triggered by the ICTY judgments, changes in polices of facing the past or by the local political interests. The focus of this analysis are thus, once again, representations of the war events and not the real facts.

Some of the statements found during the course of our analysis politically instrumensalise history or contradict verdicts of highest international legal bodies like the International Court of Justice (ICJ) or the ICTY. Dejan Jović accurately notes that the international tribunals "are […] seen as the main threat to the process of writing history by Ourselves." (Jović, 2012).

3.2.1. CROATIA

The Croatian Parliament issued a number of declarations and legal acts about the Homeland war since the state proclaimed its independence in 1991. Direct addressing of the past events is found in Declaration on Homeland War, Declaration on Operation Storm and Declaration on Judgment of the ICTY for war crimes on "Ovčara" and on cooperation of the Republic of Croatia with the ICTY (herein after Declaration on "Ovčara" trial).

Declaration on Homeland War was issued on October 13th 2000 in order to safeguard "the values of Homeland war" before the inevitable cooperation with the ICTY. Hence, it is regarded as foundation of the Croatian history where all the basic "truths" about the war that secured existence of the modern country are listed. In preamble unanimous acceptance of the "core values of the Homeland War" is considered to be "accepted by entire Croatian nation and all citizens of Republic of Croatia". Therefore, it leaves no room for the contested narratives nevertheless present in the public space. (Banjeglav, 2012) At the beginning the independence of Croatia is described as "hundred years' old desires" and then the declaration asserts that "Republic of Croatia lead just and legitimate, defensive and libratory, and not aggressive and invasive war against any party, in which it was defending its territory from Greater Serbia's aggression inside the limits of internationally recognised borders". This statement was challenged by number of indictments from the ICTY where high ranked Croatian military and political officials were accused of taking part in co called Joint Criminal Enterprise. Still, that allegation was discharged in the Appeals Judgement against generals Gotovina and Markač when they were acquitted, but the role of Croatia in Bosnia and Herzegovina war remains questionable as the Trial Chambers in case Prlić et al. did found the existence of the JCE. The Appeals Trial is still on going in that case.

Motion to create Declaration on Operation Storm was presented in the Parliament after the arrest of general Gotovina in December 2005 and on 30 June 2006 the Declaration was adopted. This declaration did not have as much influence as the one about the

Homeland war, but it is interesting for this analysis for couple of reasons. First it assumes to become "part of Croatian useful past" that Snježana Koren defines as "compulsory meaning of the essential founding element of national narrative" that defines the strategy of selection of memory material. (Koren, 2011). Finally, this declaration asserts the power of political myths when it praises the operation Storm for having "destroyed myth […] of strength, courage and invincibility of Serbian Army."

The last declaration we analysed gives reaction of the Parliament to the ICTY judgement in "Vukovar three" case. Even though Croatia ratified all the necessary treaties and cooperated well with The Hague tribunal, after the relatively mild sentences the Parliament reacted calling the judgement "unacceptable" and "unsustainable from legal and moral aspect". At the beginning Republic of Croatia is mentioned as "the winner in imposed Homeland war". Yet, the "winner" identity is not the only one Croatia claimed to have in the Homeland war. It is the only country in the Yugoslav wars that has both the winner and the victim identity.

In the narrative about the Homeland war, town of Vukovar hold a central place of Croatian victimhood. Vukovar is marked as a special symbolic place of Croatian suffering in the war. In 1999 Croatian Parliament proclaimed November 18th to be Day of memory of victim of Vukovar. The very title and the deliberate use of singular personify the sacral place which was sacrificed so Croatia could have a better future.

3.2.2. SERBIA

In Serbia, narrative about the war concentrated on preventive element, thus imposed and not wanted. Therefore, the state policy toward dealing with the past was concentrated towards forgetting and denying. For example, the very presence of the Serbian Army in Bosnia was denied for a long time, blaming only Bosniak Serb Army of Republic of Srpska for its involvement in the war. The consequence of such narrative is the absence of declarations or documents praising military operations, as it is the case of Croatia.

Nevertheless, after Milošević's regime was overthrown and state control over media was lift off, multiple voices about the past war crimes started to spread in Serbian public sphere. Srebrenica genocide could not simply be ignored anymore. The NGO gathered around topic of dealing with the past started campaigning for broader discussions about the past atrocities committed in the name of Serbian state. In 2005 broadcasting of a tape showing the execution of six young Bosnian Muslims from Srebrenica by a Serb paramilitary unit called "Scorpions" did a snowball effect. It was the first time the NGOs asked the parliament to adopt a resolution acknowledging Srebrenica genocide. Another appeal to the parliament was done after the decision of the ICJ in the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide where Bosnia and Herzegovina filled a complaint against then Serbia and Montenegro. In 2007 the ICJ cleared Serbia from direct responsibility and involvement in the Srebrenica genocide, but it ruled that Serbia had breached the genocide convention by failing to prevent the genocide and to bring

perpetrators to justice. Finally in 2010 Serbian parliament adopted Declaration on Srebrenica after many MPs confrontation. Nevertheless, the Parliament failed to call Srebrenica genocide; instead it "severely condemned crime committed against Bosniak population in Srebrenica on July 1995". Discussions made during the debate on declaration resulted in confronting genocide in Srebrenica to the war crimes committed against Serbs in the nearby municipality of Bratunac. This relativisation of guilt, made Srebrenca events look like a consequence of the atrocities perpetrated by the Bosnian Army units in Bratunac. Consequently, the Serbian political elite and public opinion were deeply divided regarding this issue. While the Serbian President, Boris Tadić, attended the tenth anniversary commemoration of the Srebrenica massacre on 11 July 2005, the leaders of the second most important party, Serbian Radical Party attended the commemoration in Bratunac.

In addition, adoption of the Declaration on Srebrenica increased requests of condemning crimes committed against members of Serbian nation and citizens of Serbia. Therefore, on 14 October 2010 Serbian Parliament adopted another declaration, this time addressed to Serbian nation. This declaration "invited parliaments of other countries, and primarily countries from the territory of the former Yugoslavia, to condemn those crimes (against Serbs) and give full support to their states' institutions and international institutions in processing perpetrators and to […] pay respect to Serbian victims." Once again, the concept of "crime" in Srebrenica, against potential "myriad" of crimes committed against Serbian nation contributes only to relativise

the atrocities done by the Yugoslav People's Army, as Serbian forces were called during the war.

At the regional level, in Serbia's north province of Vojvodina, two declarations were issued. One concerned cooperation with the ICTY, and the other one again "condemns crimes against members of Serbian nation on the territory of the former Yugoslavia". This Declaration was initiated by the Serbian Progressive Party, originating from Serbian Radical Party, after the acquittal of two Croatian generals Gotovina and Markač at the ICTY for crimes committed during the Storm operation. Even though, all the MPs were in favour of the declaration, it had to be amended in order to contain the clause of "expressing grief to victims, members of all the other nations, and condemns crimes committed against them".

3.2.3. APOLOGIES AND REGIONAL COOPERATION

Transitional justice theories have also proved that acknowledging the suffering of victims is a pre-requisite for consolidation of societies and reconciliation among ethnicities and states. Commemorations, memorialisation initiatives, apologies and reparations provide space for such acknowledgement of the victims' suffering and restoration of their dignity.

Apologies made by members of political elite could have cathartic effect, but could also offend victims of done only pro forma. Social anthropology has already proved that memorialisation practices, and commemorations of war events in particular, organized by political elites, are used, first of all, to legitimize the ruling ideology

and building of a state/national/ethnic identity. From the perspective of the state, the goals of public commemorations and memorials are more often, in the words of Benedict Anderson, related to nation-building and defining an "imagined community" (Anderson 1983). The goal of those in power, therefore, may not be to commemorate victims and contribute to public dialogue about the past, but to assert particular identities in the public sphere that articulate narratives of political legitimisation, and these narratives may even be harmful for victims.

It was already in 2007 that incumbent Serbian President Boris Tadić asked, while participating to a talk-show, an apology from all the citizens of Croatia and to members of Croatian nation for misdeeds and crimes committed in the last war. Formal apology was made in November 2010 together with Croatian President Ivo Josipović during visits to two crime scenes: Paulin Dvor where 18 Serbian and on Hungarian civilian were killed and to Ovčara and Vukovar, site of the worst war crime committed during the Homeland war.

CHAPTER 4
ICTY AND CHARISMA

From (and owing to) the international tribunals for war crimes in Nuremberg and Tokyo after WWII to the tribunals for Rwanda and former Yugoslavia after the wars in the 1990s, the ideas of international justice and worldwide protection of human rights have made significant progress. National sovereignty is no longer a shield for the worst violators of human rights and perpetrators of crimes against

humanity. For that matter, the ICTY has introduced an important historic precedent by bringing before an international criminal court and accusing of crimes of genocide and crimes against humanity a head of state while he was virtually still in office. To be sure, even though some most powerful states in our times still resist authorizing a permanent international criminal court of justice under auspices of the United Nations (UN), it is hopefully only a matter of time when all UN members will undersign a charter founding and authorizing such a world court. The history-making role of the ICTY is undisputable; it is an invaluable and noble effort in service of civilization and humanity, and encouraging to all people who hope that what some scholars call a "global human rights revolution" will continue making progress as it has visibly done since WWII. However, a distinction needs to be made between this success of the ICTY perceived from a global vantage point and its specific impact on the most troubled European region of the ex-lands of former Yugoslavia. In other words, the ICTY has been a global success but regional controversy. Regarding this regional impact, the ICTY's achievements have been relatively less successful and encouraging, pregnant with a certain number of mistakes and accompanied by unintended outcomes which did not always assist and serve the chief objective of justice for all, regional stability, democratization and Europeanization.

More specifically speaking about the ICTY from this general vantage point and regardless of some of its particular hotly disputed decisions and ambiguous impact of its trials on the stability and politics of the troubled region in its post-war period, the important role of this international institution as a confirmation of the historic progress of the

ideas of human rights and international justice is undisputable, praiseworthy and encouraging. Consequently, one author of this new literature dealing with the Hague Tribunal points out at least that those studies also acknowledge that ―judged by more realistic standards, international law is seen to play a modest yet important role in post-war transitions (and even in the most complicated cases such as for example, Bosnia and Herzegovina, not to mention the relatively most successful case of Croatia), the underappreciated court has in fact made a substantial contribution to the transition to democracy. And last but not least, this ICTY's experience remains important and new contribution and supplement for the study and practice of international conflict management.

130 However, it is now in order to critically examine some specific problems, particularities and cases regarding the impact of the ICTY on the post-war situation in the region under consideration, as well as the influence of its trials and verdicts on local politics and, in particular, on nationalistic mythmaking. According to several most recent analyses, albeit general public interest in the role of the UN's ICTY has somewhat subsided, scholarly interest has increased, and new ambitious publications appear dealing with what the Tribunals have hitherto done.[34] Some of these recent studies do not hesitate to voice criticism about some aspects of ICTY's mission, such as, generally speaking, that much of the early rhetoric about the transformative

[34] See for example, Rachel Kerr. *The International Criminal Tribunal for the Former Yugoslavia: an exercise in law, politics, and diplomacy*. Oxford ; New York : Oxford University Press, 2004; Isabelle Delpla & Magali Bessone (eds.) *Peines de guerre. La justice pénale internationale et l'ex-Yougoslavie*. Paris: Ecole des hautes études en sciences sociales (EHESS), 2010; Lara J. Nettelfield. *Courting democracy in Bosnia and Herzegovina : the Hague Tribunal's impact in a postwar state*. New York : Cambridge University Press, 2010.

potential of international criminal law helped foster unrealistic expectations that institutions like the ICTY could not meet (Nettelfield, 2010). Often scholars and journalists blame the Tribunal for alleged mistakes outside its authority such as arrests and extradition of suspects for war crimes and crimes of genocide. It is the states, including the regional governments and the leading states in Western Europe and the USA, that are principally responsible for this aspect of the Tribunal's overall endeavour.

Yet, at this point it is fair to note that the Tribunal per se does not bear responsibility for several perhaps most unfortunate developments. First of all, it is true that international justice has not been applied to the three principal political culprits, namely the local ethnic nationalist leaders, Milošević, Tudjman and Izetbegović, who created and managed the movements that dragged the peoples who lived in peace and the mutually beneficial common state for half a century into a fratricidal war and later presided over corrupt nationalistic regimes. The widely believed principal instigator of the conflict in the Balkans, Serbia's Slobodan Milošević, suddenly passed away in his Hague cell in 2006 amidst the trial for crimes of genocide and crimes against humanity. Tudjman and Izetbegović, both ill men of advanced age, had died before the prosecution was prepared to bring them before the court because the states obliged to provide requested evidence and other relevant information for the court did not cooperate. Milošević's and Tudjman's closest aides in charge of the dirtiest jobs and gravest crimes of ethnic cleansing, political assassinations and legitimizing the results of genocide such as Željko Ražnatović Arkan (Serb paramilitary leader who was assassinated in a

mafia showdown), Nikola Koljević (Bosnian Serb political leader who committed suicide) and Gojko Šušak (Croatian defence minister and presumably the worst Croat war criminal who died of cancer) all died before coming to The Hague to face justice. The only top political leaders of the ethnic parties involved in war sentenced by the ICTY are Momčilo Krajišnik (20 years) and Biljana Plavšić (11 years, released after 9). The two leaders of the Bosnian Serb republic created through ethnic cleansing were found guilty of crimes such as genocide and crimes against humanity. Unfortunately, their imprisonment did not create a sense of victory of justice in the region particularly for Bosnian Muslims. Both were among the chief masterminds and top managers of genocide but received relatively soft sentences. Plavšić's case was particularly painful for the victims, all Bosnian Muslims, and human rights activists in the region. In prison she enjoyed a much higher living standard than 80% of the population of Bosnia and Herzegovina and when she came out she received hero welcomes and obtained privileges and a high reputation in the Serb Republic and in Serbia. This case is an insult to the victims but, unfortunately, is not the only such example.

In short: ICTY was an unlucky court because without sentencing the chief political leaders and masterminds of genocide it failed to significantly encourage the faith in a better future and just international order. It also failed to contribute to myth busting and writing an objective and complete history of the Yugoslav conflict. ICTY has produced only some fragments of this history, insufficient for grasping a truthful and clear picture and understanding of what really happened. Thereby, ICTY's function of retributive justice has did not

provide much comfort to the victims' families, for example, in the case of the Vukovar crimes, Srebrenica massacre, etc, which they frequently demonstrate in public.

Furthermore, Veljko Kadijević, the old-guard communist general former supreme commander of the SFRY Army who ordered the use of the Army in the beginning of the war, specifically ordered the bombings of civilian targets in cities such as Vukovar and Dubrovnik and sided with Milošević, has not been prosecuted and ICTY never explained to the public why. He lives in Russia and ICTY never published an indictment against him although he is still alive.

However, although ICTY is not largely and directly responsible for the non-prosecution of those persons, the fact is that those men are among the principal culprits most to blame for the Yugoslav catastrophe. And they have not been sentenced by this tribunal or any other court. It makes the ICTY's credibility fragile and leaves a lasting bitterness and disappointment among millions of victims and all people who fight worldwide for human rights and international justice. And whatever the court has achieved, the fact is that justice did not triumph over the worst among the worst criminals (e.g. Milošević, Šušak, Mladić, Hadžić). In addition, it is very sad that the principal victim-state of this war, namely Bosnia and Herzegovina and its majority Muslim population, has not received sufficient support from the international community necessary for becoming a viable state, for rebuilding and prospering after the war. This fact saddens and often enrages not only millions of Bosnians but also hundreds of millions of Muslims worldwide, which is definitely not good thing for the West. Actually, as noted earlier, the West would have done wisely (as a great

political investment) if it had thoroughly rebuilt and modernized Bosnia and Herzegovina as the notable and truly exceptional example of a secular European predominantly Muslim society (at least it used to be such and in major urban areas such as Sarajevo, Tuzla and Zenica also showed tendencies to renew the old socialist-era de facto western lifestyle).

Let us now turn to several specific ICTY cases and their implications. These selected are not the most important but only some exemplary cases chosen randomly due to big media coverage and heated political debates. For example, the following:

- The Mirko Norac et.al. case of 1993. war crime against Serb civilians at Medački džep near Gospić, Croatia, and,
- The case of Mrkšic, Šljivančanin et, all. regarding the 1991 mass execution without trial of the two hundred wounded and sick Croat prisoners of war captured at the city hospital at Vukovar, Croatia.

The two cases concern the key founding post-war national myths, namely the Croatian official perspective on the 1991-1995 war versus the Serbian. The Croatian view calls it the Homeland War (Domovinski rat) presented as just self-defence of a sovereign western-oriented nation against foreign aggression from the East. The Croatian official state ideology teaches that the war was masterminded and directed from Serbia by Greater Serbian nationalists allied with remnants of the old guard Communist militarists. This contradicts the Serbian view of a "pre-emptive action" by Serb minorities in Croatia and Bosnia (in Bosnia's part called Serb Republic it's the "Patriotic War" myth) remembering genocide against them in WWII, which along with Albanian nationalism against the Serb minority in Kosovo, caused

a "spontaneous civil war" within the SFRY (Popov, 2000). According to the Serbian view, the war was caused in the first place by Croatia's secession and the reasonable fear of Croatia's Serb minority of the repetition of the WWII Croat genocide against Serbs in Croatia. The Croatian view is closer to the truth but does not admit to the role of Croatian nationalist extremism of the late 1980s interacting with Serb nationalism thus jointly provoking war. The Serb perspective is not incorrect about the role of Croatian nationalism but remains silent concerning a ten-year-long upsurge of a massive Serb nationalist movement spreading from Serbia across the former Yugoslavia that precipitated the war and provoked nationalistic extremists from other groups.

Generally speaking, in these two largest states that came out of the former Yugoslavia, namely in Croatia and Serbia (and whose mutual conflict basically destroyed the common state) although the tribunal's proceedings and verdicts would temporarily destabilize those countries and also unintentionally give a political cause for offensives of the far right in domestic politics; however, the Tribunal's key success – looking at all completed cases -- is in making it difficult for the ethnic nationalist regimes to consolidate ideologically, feel secure and exercise power by means of a mass indoctrination of the people based on ethnic hatred and myth. In other words, the Tribunal prevented them from writing mutually-exclusive conflicting histories about the same issues and from continuing memory battles in autarkic ideological states isolated from the international community. In other words, the ICTY not only encouraged democratic opposition, human rights activism and civil societies in the two countries but also to some

extent frustrated attempts of ethnic nationalists' politics to keep the people in a state of mobilization for a "perpetual war" while mentally confined within the two conflicting "regimes of truth", imposed by two governments that interpret the common history according to the ruling elites' present-day interest and fantasies about the past and sustain the new national founding myths that legitimize their rule.

Croatia's long-ruling right wing nationalist regime (HDZ) found itself in a relatively more difficult position vis a vis cooperation with the ICTY than Serbia. Croatia wants to join the EU and therefore cooperates with the ICTY. However, in Serbia, which builds a special relationship with Russia and where traditional Serbian anti-westernism is a component of the prevalent nationalist ideology, cooperation with the ICTY is considered unpatriotic. Little has changed for that matter since the fall of Milošević: Serbia-ICTY have remained distrustful. Croatia imagined by the Croats as belonging "naturally" to the EU was not only about the national strategy leading to EU admission. It is also part of the nationalist mythology according to which Croatia must "return" to the West where it culturally belongs as a Roman Catholic country and former Habsburg domain. However, pressures from the West mounted on both countries insofar as both needed to break out of international isolation, and the prosecution of war crimes according to international law was one of the preconditions that the international community demands from former Yugoslav countries in order to advance their international status and ambitions (Peskin&Boduszynski, 2003). This accelerated the already mounting frustration in Croatia, especially at the end of the authoritarian nationalist Tudjman regime in 1999. A public opinion poll published in a national newspaper (Jutarnji

list, 28 August 1999) demonstrated that an overwhelming majority of the population primarily held the government and the ruling party responsible for the country's isolation and particularly bitter relations with the ICTY caused by Zagreb's refusal to send to The Hague war crimes suspects such as, notably, the generals Ante Gotovina and Mirko Norac. In the beginning of 2000, the opposition bloc of the six parties of the left and left-centrist orientation won the parliamentarian and then also the presidential elections. From then on, it was clear that the new top officials of Croatia would follow a policy line different from that of the HDZ under Tudjman's regime (1990-1999), as far as war crimes were concerned. The new president Stipe Mesić was one of the strongest supporters of unconditional cooperation with the ICTY. Almost immediately after the new government and the president took office, the HDZ-controlled media started to publish comments describing the new policies of cooperation with the ICTY as a humiliation of the Croatian nation (Slobodna Dalmacija, 22 February 2000). For the supporters of this point of view, especially for several war veterans'organizations, the equation was very simple: any move towards the investigation of war crimes allegedly committed by the Croat forces was an open insult to the integrity of the Domovinski rat, which was considered of sacred national value and a symbol of sovereignty. A massive right-wing movement came into motion ignited by the HDZ party, some Catholic Church circles and a group of militant generals/war veterans. President Mesić succeeded in maintaining order and later sent the generals into retirement. Afterward, General Gotovina was arrested abroad and extradited to The Hague (the trial is still in process). Mesić had earlier sent into early

retirement the accused General Mirko Norac. The Hague Tribunal indicted him for the 1993 summary executions of Serb civilians near the town of Gospić (this pre-war waiter in an obscure provincial town personally shot in the head an elderly woman and ordered the shooting of other Serb villagers captured from the area from which Serb rebels earlier shelled Gospić). Under the 2000-03 left-wing collation administration, the Croatian political right mobilized in defence of Norac. The accused war criminal was elected to a honourable title of the vojvoda (duke) of a traditional game Alka at the historic city of Sinj in Dalmatia. The movement grew so strong that the Zagreb government tried to appease opposition by asking the ICTY to return Norac for a trial in Croatia. The ICTY agreed and Norac was sentenced in Zagreb to 12 years in prison. Protests followed, and the nationalist HDZ party was returned to power, but under pro-EU leader Ivo Sanader. However, the accused Norac went to prison, and Croatia has significantly improved its record of cooperation with the ICTY. To be sure, the political right was furious when in 2004 the ICTY sentenced the Bosnian-Croat general, Tihomir Blaškić, to 45 years in prison for war crimes against Muslims in Bosnia. Yet, due to the subsequent discovery of the Bosnian Army's relevant confidential documents, the ICTY reduced Blaškić's sentence to 7 years and he was eventually released in 2006. The Croatian right was somewhat appeased, but critics of the ICTY in the region (and worldwide) exploited this to argue that the ICTY is both an incompetent and "political" court (the argument voiced by the accused Slobodan Milošević, as well as, when finally captured, his Bosnian accomplice in genocide, Radovan Karadžić).

The Croatian liberal and left-wing opposition was especially hurt (and right-wing nationalists unintentionally encouraged and acquired resources for political agitation) by the 2007 ICTY ruling in the case regarding the war crimes committed by the Serb military commanders, Mrkšić and Šljivancanin, in 1991, following the battle of Vukovar. The Vukovar battle is one of major battles of the 1991-95 war. In addition, the city of Vukovar has since become a martyr-city in new Croatian patriotic mythology because of its two-month-long siege by the JNA and Serb paramilitaries that razed it to the ground, its heroic defence by outnumbered defenders and a massive refugee tragedy after the fall of the city. On November 20th 1991, after the city fell and the refugee tragedy was shown on TV, the JNA and Serb paramilitaries captured between 200-300 wounded Croat defenders from the city hospital, transferred them to the city's suburb called Ovčara, and tortured and executed them without trial. Not only combatants, but civilians, journalists and others were among the victims of this crime. In 1995, the ICTY released an indictment for the war crimes at Ovčara against the supreme commanding general, Mrkšić, and the head of military intelligence, major Šljivančanin (both were officers of the Yugoslav Army, paid by the government in Belgrade). The first directed the siege and destruction of the city and approved the executions and expulsion of the Croat refugees, whereas the other led the summary investigation of the captives, decided which among them were to be executed, and then supervised the execution and hiding of the mass graves. In 2003, Šljivančanin was arrested in Belgrade where he lived freely eight years after the indictment, and extradited to The Hague. According to the ICTY verdict of September 27th 2007, Mrkšić

received a 20 year prison sentence, Šljivančanin received a 5 year sentence, and the third suspect by the name of Radić was released due to a lack of evidence. The 5-year sentence, in particular for one of directly responsible persons organizing and commanding the mass execution, caused media uproar and victims' families protests in Croatia. Anti-EU sentiments grew and both Croatian left and right-wing parties united in condemnation of the ICTY. Regarding the impact on national myths, the ICTY verdict challenged the Croatian view of the 1995-1995 war as purely defensive and added credibility to the Serbian nationalistic theory of a chaotic civil war for which all groups involved are evenly guilty as if there was no ten years-long unfolding of the Serbian nationalistic movement leading to war recognized by most scholars as the prime mover of the crisis with such catastrophic outcome (Ramet, 1996, etc.).

Further proceedings at the ICTY, considering appeal and including additional evidence, eventually resulted in overruling the 2007 verdict so that in May 2009 the accused Šljivančanin received a new sentence to 17 years in prison. The appealing judge, according to a Croatian leading daily newspaper, called the earlier verdict "unreasonable" and "evidently erroneous".[35] However, this verdict came following the 2008 arrest of Radovan Karadžić, the Bosnian Serb leader and principal mastermind of the 1992-1995 war and genocide in Bosnia and Herzegovina. This seemed as some kind of "appeasement" for Croatia which, in a final analysis, again encouraged the right-wing critics of the ICTY (in Serbia and Croatia alike) as a "political court". Thus, Miroslav

[35] *Jutarnji list*, 5 May 2009. http://www.jutarnji.hr/sljivancaninu-kazna-povecana-na-17-godina/204386/

Tudjman, the son of the late president, as a presidential candidate at the 2009 elections in Croatia, said in a speech that the Hague Tribunal, according to all sentences hitherto passed —punishes defenders and awards aggressors while confusing and obscuring historical truth.[36] Yet, the electoral results, with Tudjman's poor performance and triumph of a left-wing candidate who campaigned for further cooperation with the ICTY, have shown that Croatian democracy has advanced and EU-orientation prevailed despite of all the ICTY's mistakes. Meanwhile, in order to revitalize the official patriotic perspective on the Homeland War, the Croatian Parliament debated the possible inauguration of a national order of heroes-defenders of the homeland among war veterans that have not been indicted by the ICTY but sacrificed their lives on the battlefield, such as, notably, the commander of the defense of Vukovar, Colonel Blago Zadro.[37]

In Serbia, relatively less cooperative with the West than Croatia, anti-westernism is still vibrant. The recent canonization of anti-western zealot Justin by the Serbian Orthodox Church is another impetus to conservative nationalists and popular response to the pro-western rhetoric of the Tadić presidency. The popular negative view regarding the ICTY prevails as ever in all social strata except for small human rights advocate groups and NGOs in major urban centres. For example, the 2009 increase of the sentence to Šljivančanin caused an eruption of protests in various segments of the political spectrum, and a popular daily newspaper entitled it "The New Rape of Serbia by The

[36] At 21 December 2009 http://predsjednicki-izbori.com/tag/haaski-sud/

[37] Dnevnik.hr http://dnevnik.hr/vijesti/hrvatska/tko-su-heroji-domovinskog-rata-2.html

Hague".[38] Likewise, street rallies often take place across Serbia in support of the accused Hague prisoners on trial, namely, the Bosnian genocide mastermind Karadzić and the notorious Šešelj who was head of the wartime Serb paramilitaries and is still the president of the influential Radical Party. All this mentioned, maintains ICTY's credibility in the region fragile. Serbia's debt to the ICTY is still relatively the largest. After all, it was the up to recently inaccessible Mladić who, among other crimes he had committed, ordered the most single gravest crime in the wars of the 1990s – the massacre at Srebrenica, about which the National Assembly of Serbia has recently released a declaration condemning the crime but without mentioning the word genocide and the fact that Mladić was on the payroll of the Serbian government. All things considered, the earlier thesis stated in this text – that the ICTY willy-nilly helps the consolidation of the Serbian nationalist myths, holds water. Thereby, the ICTY has hitherto little contributed to the pending task of writing an impartial and accurate history of the period under consideration.

4.1. ICTY AND CONSTRUCTION OF CHARISMA

Following Gardner and Avolio's theatrical approach in explaining charisma, we analyse causes and consequences of post-Yugoslav society's need for extreme characters. Impression management present in dramaturgical and interactive perspective of charisma matrix delineates clear steps that enabled myth making

[38] Reakcije povodom presude Zalbenog veća MKS Veselinu Šljivancaninu http://www.pescanik.net/content/view/3110/103/

around political leaders. The research explores myths created in and around International Criminal Tribunal for the former Yugoslavia (ICTY). This special *mis-en-scène* is not chosen by chance since it stages the last act of many charismatic leaders' careers. The detainees' "shows and performances" in courtrooms represent some new postmodern myths in ex-Yugoslav society. Those myths have appeared together with the myths of rebirth of nationalism and their impact is huge although their appearance on the political scene is quite recent (Ramet, 2007). The "swan song" of once active national and military leaders, later ICTY detainees, is incentivizing new forms of nationalism practiced by young generations that never experienced the war.

Since the beginning of live media coverage related to the ICTY, the Tribunal prompted strong reactions ii Yugoslav successor states. It may seem a paradox, although one that can easily be explained, that in the times of Milošević and Tudjman, the Tribunal had more support in Serbia and Croatia than it has now.[39] This had nothing to do with the opposition parties accepting the necessity of facing the bloody past and assigning personal responsibility in order to avoid being saddled with collective guilt, but because the Tribunal was seen exclusively as an instrument of political pressure which could be wielded to overthrow the regime. Once a great part of the old political establishment was transferred to the ICTY, the Tribunal regained again its unpopularity. Public survey results depicted the ICTY as yet another institution aiming to obstruct Serbian, Croatian or Bosniak nationhood.[40]

[39] Report by SENSE News Agency, 21 April 2002

[40] For example, OSCE regularly conducts surveys in relation to the general public's attitude towards the ICTY. http://www.naslovi.net/2012-02-29/e-novine/mladic-i-karadzic-heroji-u-srbiji/3228509

This chapter describes the myth making mechanisms from the viewpoint of relations between the charismatic leader and their followers. Special attention is given to the socially constructed support that evolved into new martyrdom and chosen people's myths. Nevertheless, those myths could not be preserved in their original form after leaving Tribunal's courtrooms, and hence they mutated in the speeches of non-charismatic leaders who inherited a drained political scene. This "new age tragedy" breaks up with portentous war rhetoric and concentrates on much more concrete framework, in this case – difficulties of a country in transition.

The sociological elements of legal rituals, and especially criminal trials, were first described by Emile Durkheim as exogenous to the consciousness of individuals, and thus belonging to the collective consciousness of the social system. Crime and punishment allow and require the ceremonial affirmation of the social norms upon which any society is founded. For Durkheim the essence of the ritualistic experience lays in the power of an event to function as the nation's integrative cultural force, creating collective emotional awareness and a feeling of togetherness. When it comes to the trials held before the ICTY, the situation becomes much more complex. We cannot expect to attend an act of catharsis of the entire society while watching individuals accused for war crimes on trial. Collective consciousness of social norms interferes largely with detainees' charismatic behaviour and changes therefore conventionally accepted customs and beliefs. Throughout the abovementioned dramaturgical processes, an

interactive progression of joint identity construction between both leaders and followers takes place.

William Gardner and Bruce Avolio's model of the charismatic relationship between leader/actor and follower/audience is dynamic, reciprocal and iterative. Leaders' charisma is the result of impression management process performed theatrically in acts of framing, scripting, staging and performing to which followers react by creating situated, collective identities. Framing involves communications that shape the general perspective of the audience. Benford and Hunt described scripting as "development of a set of directions that define the scene, identify actors and outline expected behaviour" (Benford&Hunt, 1992). Staging "refers to appropriating, managing, and directing materials, audiences and performing regions" (Benford&Hunt, 1992). Special attention is given to the development and manipulation of symbols, settings and even physical appearances. In the final – performing phase, the charismatic leader implements previously developed strategies such as exemplification, self-promotion, ingratiation, intimidation and supplication, in order to present his vision for the future.

ICTY's trials have acquired ideological dimension due to the charismatic relationship between accused and audience in front of their TV receivers. The Hague Tribunal is the scene where nationalistic leaders depart from accounts of historical events and enter postmodern soap-operas with widespread live coverage. We will analyse two most relevant cases for myth making analysis: Milošević and Šešelj trials. This choice is made because of the extremely marked theatrical atmosphere in the courtroom deriving from the charismatic leaders'

self-representation. Particularly relevant are the continual changes of definition of the individual and the social understanding of the past. Reinventing past events and trying to offer another *version* of recent history provides material to construct mythical beginning for the society's founding events. The final aim of the new truth offered by the leader is to prove that he was unfairly accused, but is willing to carry the burden of whole nation as a martyr *par excellence.* Victimisation of the group is product of *martyrium* myth and has self-mourning as consequence. Therefore, the incentive for the mourning rituals on the collective level is still high and dialectically addressed to the other "enemy" nation. Consequently, once followers accept the leader's vision and values, the nation itself becomes the object of indictment. Finally, second *a posteriori* generated myth is that of "chosen people".
The next chapter analyses first phase in new political myth making initiated by Slobodan Milošević and Vojislav Šešelj. We deal with definition of leader as social actor and try to estimate his behaviour from the viewpoint of a dynamic charisma matrix.

Gardner and Avolio's charismatic relationship model triggers with leader identification process, which applied to our case has to be modified to certain extent. Recall that both Milošević and Šešelj were affirmed as charismatic leaders long before coming to the ICTY detention unit. We follow the definition given by House which states that a leader is not charismatic unless described by followers as such (House et al., 1991). Therefore, the actual question would be: how did Milošević and Šešelj manage to *preserve* their leadership charisma once brought before the face of international justice?

Three factors are crucial for the leader identification: leader identity, high self-esteem and high self-monitoring. The leader has his own personal identity that is socially constructed over time and "situated identity", constructed in a specific situation at determined point of time (Schlenker, 1985). For example, Milošević was firstly seen as a grey bureaucrat pushed by Ivan Stambolić, and later on developed his charismatic identity to become most powerful Yugoslav politician after Tito. When he was sure to be transferred to the Scheveningen detention unit, former Serbian president started working on a self-victimization in order to acquire situated identity of martyr. Milošević's arrest on April 1st 2001 was a grand opening of his 'ICTY tragedy' filled with absurd surreal elements. The special police unit action that lasted for several hours was a cheap show intended to provoke catharsis among the audience. This live coverage did not have functional but symbolic relevance, as it tried to "clean" the society from its difficult past.

On the other side, Slobodan Milošević constructed his situated identity as a part of worldwide conspiracy against the Serbian people. He represented himself as a chosen martyr of a chosen people, who should not bother to prove not being guilty, but should announce a general "*j'accuse*" against the international community. Milošević's defence was based on justifying his ruinous politics as an expression of "people's will" and "state interests". In his opening statement he stressed that "…this show which is supposed to take place under the guise of a trial is actually a crime against a sovereign state, against the Serb people, against me." (Armatta, 2010) Therefore he sought to

transform the trial into discussion about the responsibility for the war and dissolution of Yugoslavia.

Vojislav Šešelj prepared with much attention his "heroic departure" to The Hague Tribunal. During a massive rally organized by Serbian Radical Party (SRS) held on February 23 2003, Šešelj stated to be "convinced" to defeat the ICTY.[41] The difference in attitudes between Milošević and Šešelj was quite evident: Šešelj spoke out loudly what Milošević thought silently. Therefore, he did not opt for martyr image management, but chose caricatured image of Serbian knight ready to fight for "honourable cross and golden freedom".[42] Šešelj could avoid the indictment of the ICTY by laying the blame to the State Security Agency (Državna Bezbednost), Milošević, Martić and Karadžić, but remained locked in his nationalistic hero role. Nevertheless, he changed his behaviour when the ICTY Trial Chamber wanted to assign him a defence counsel. The newly situated identity, "set up" in order to obtain the right of self-representation, was much more similar to a Milošević one.

The image of martyr was proposed on two different levels: physical and mental. As mentioned before, mental one is a result of presumed aggression and complot international community exercised against charismatic leaders. Physical level was expressed by "stoic" sufferance necessary for fulfilments of indictees' requests. Milošević refused to follow the medical cure assigned doctors gave him, and when he died in detention unit from heart attack on 11 March 2006, there was a large debate surrounding his presumably provoked death.

[41] http://www.youtube.com/watch?v=3fMSKdqCnS8

[42] Citation from Ivan Mazuranic's epic poem 'Smrt Smail-age Cengica'. Relates to heroic resistance and values any knight is ready to die for

Šešelj started a hunger strike as a sign of protest for not being accepted as litigant in person. Gandhi's methods proved to be successful for Šešelj, although image of empty spoon had a completely different symbolical function for Šešelj when he threatened to use it to kill Croats.[43]

Bass suggests that charismatic leaders possess high levels of self-esteem that helps them sustain a confident image in public even in hard times. During the Dayton Peace Agreement negotiations, Balkan warlords felt so untouchable in their new role as "peace makers" and "pillars of the peace process" that they filed to bargain for guarantees for immunity against any future proceeding at the Tribunal, in exchange for their signatures. (Klarin, 2005) Years before being arrested, the leader of SRS was making telephone calls to the ICTY in front of journalists expressing the "wish" to be indicted and sent among "Serbian heroes in The Hague casemate".[44]

The final step in the leader identification process is a leader's self-promotion, which has to be monitored and limited since he has to represent ideally "one of us". According to Anderson, self-monitoring represents the ability to pick up cues from followers regarding their needs and aspirations and to implement them into leader's message. Even though the ICTY has the task to prosecute individuals responsible for war crimes committed on the territory of the former Yugoslavia and national interest of every successor country is to condemn crimes, the

[43] http://www.youtube.com/watch?v=Y5g8YifGqiA; Some twenty years ago, Šešelj became notorious in media for having allegedly boasted of "tearing out the eyes of Croats with rusty spoons".

[44] Dejan Anastasijevic, 'Fatalna privlacnost "antisrpskog kazamata"', *Vreme*, number 943, January 29, 2009

Serbian nation still lives in the state of denial *vis-à-vis* Serbia's responsibility in war. Such atmosphere in the society, where the majority *normally* hates the ICTY[45], was a fertile ground for myth making. Proverbial proud defiance, stubbornness and self-presentation were traditionally believed to be characteristics of a "model Serbian". Consequently, collective identity was built on the same principles putting Serbia alone against major Western states – a detail that deserved the classification of "chosen people". Among their followers, both Milošević and Šešelj were considered representatives of chosen people, modern actors in Heavenly Serbia's saga.[46] New element of their "situated identities" is sufferance, resulting from the exogenous "bad treatment", but also because of the betrayal on the national level.

The next step we need to explain in this tragic myth making is leaders' motivation. House argues that an exceptionally high need for power explains why charismatic leaders develop the persuasive skills to influence others and to gain satisfaction from leading. In our case it is difficult to assert that Milošević and Šešelj were convinced in the first place that they would ever leave the detention unit, and even if they would, it is quite unlikely that they were thinking about regaining power in Serbia upon their release. Therefore, the drive for power is, in our opinion, not a relevant motivational element. Another proposed variable is McClelland's "activity inhibition" (McClelland, 1985), i.e. the use of available power to achieve institutional or social goals. The

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45 http://www.bgcentar.org.rs/index.php?option=com_content&view=article&id=358%3Astavovi-prema-ratnim-zloinima-hakom-tribunalu-i-domaem-pravosuu-za-ratne-zloine-&catid=125&Itemid=1

46 Myth of Heavenly Serbia was created to explain the defeat of Serbian army in battle of Kosovo. Allegedly, the Serbs chose to save their souls instead of winning the battle.

higher the activity inhibition level, the more leaders are seen as trustworthy and self-sacrificing. Vojislav Šešelj stayed within the frame of Greater Serbia ideology which foresees the Serbian state constituted by all territories where Serbs are majority. He structured the attitude of constant defiance in the courtroom for the sake of spreading and preaching the idea of Greater Serbia. Similarly, Slobodan Milošević depicted that everything he did was for the sake of Serbia. Even during the trial he never tired of "patriotic discourse" stating that Serbia never participated in the war, but was just defending its national interests.

More leaders' goals are idealized and utopian; amount of charisma attributed to the leader grows (Conger, 1989). Conger describes idealized "vision" as mental image of desirable future that followers accept. Followers are more devoted to the leader who provides them with more meaningful goals and consequently, provides them with a deeper sense of purpose. In the former Yugoslavia, ambitious leaders saw their chance in fragile political structure and therefore reinforced nationalistic propaganda. Thus, almost 25 years after Serbian Academy of Sciences and Arts published its *Memorandum,*[47] ideas of a modern Serbian state of all Serbs still attracts considerable number of supporters.

The next chapter tries to explain the mechanisms of charismatic relationship between leader and followers, applied to Milošević and Šešelj's ICTY context. How is their "on-stage" behaviour influencing

[47] Nationalistic tendencies in Serbia were explicitly revealed in 1986 Memorandum of the Serbian Academy of Sciences and Art (SANU) signed by number of academics and culturally influential persons. Resentment centred on the federal system which the authors of the memorandum claimed had been devised to strip Serbia of its legitimate jurisdiction over Montenegro and much of Bosnia-Herzegovina. Moreover, there was also resentment in connection with the autonomous province of Kosovo.

myth making? What are the team performances necessary for their long lasting charisma? And finally, what are the practical outcomes present in the society?

This chapter deals with dynamic relationship between charismatic leaders and their followers, which is how their play is set up and performed. Socially constructed reality proposed by leaders and accepted by followers is the frame in which the act is realized. Milošević and Šešelj built their power on the streets, organizing mass rallies in search for the people's support. Team performance aiming to mobilize the masses was persistent, carefully prepared event of "happening of the people".[48] Economic and political crisis that marked Milošević's rise to the power helped him underline the importance of ethnic belonging and national tradition in the former Yugoslavia. A leader certainly has the choice whether to deal with the problems in a productive manner or to create fear and hate and direct major frustrations of his people against specific groups.

The revival of national myths started with vast Serb processions with a high concentration of Serbian imaging and symbolism of domination. Nationalism found a fertile soil due to many historical reasons. Except for a period of the later Middle Ages, it was not until the late 19th and 20th centuries that Yugoslav countries became independent. Having missed the nation building that other societies experienced, Yugoslavs were always insecure in their cultural and political status and constantly compensating by insisting pathetically on their chosen superiority. Milošević succeeded in

[48] "The happening of the people" was a term for protests organised by Milošević's supporters. Its name was taken from a writer Milovan Vitezović's speech during one of rallies.

disabling the transition from the post-communist society into the democratic one by reducing politics to the Serbian people's striving for survival. Milošević left a legacy of political rule that was backed largely on use of mythology, history and political symbols in order to maintain power. Subsequent Serbian elites have failed to pursue policies that diverged significantly from the goals of their former leader. The political program that was proposed by the democratic opposition was never a real alternative to the Socialistic Party of Serbia. This was primarily because the opposition tried to beat Milošević on the national card, but without having an alternative national program. It was therefore predictable that Radical leader Vojislav Šešelj would have been the only serious rival to Milošević and the SPS, especially when the economic situation became the dominant theme in Serbian society.

Milošević and Šešelj based their leadership on distancing themselves from other "politicians",[49] defined as such in the pejorative sense of the word. Their rhetoric was crafted on "national interests" and not on policies: Milošević converted the war into a great Serbian victory or neutralized it to a complete denial of atrocities committed by Serbian side, while Šešelj stood further on populist extreme right proposing the pursue of Greater Serbia dream. An interesting parallel could be drawn on national and personal level behaviour. Serbian politics under Milošević passed "secretly" from defensive nationalism centred on Kosovo Serbs under Kosovo Albanian communist administration, to an affirmation of aggressive nationalism. Contrarily, on a personal level, both Milošević and Šešelj, once transferred to the

[49] Term "politician" acquired a negative connotation in public space

ICTY, have passed a long road from legitimizing the violence to auto-victimization.

Slobodan Milošević tried to transform the trial against him into an ideological discussion about responsibility for the outbreak of war and dissolution of Yugoslavia. Living the myth of martyr, his role was to depict the process as an accusation to his historical figure of the leader of Serbs. Unfortunately, the ICTY was neither ready nor willing to play a political game, but tried Milošević as individual, responsible not for the war intended as some kind of evil mystical product, but for very precise and concrete war crimes. Milošević was held individually responsible for the crimes alleged against him, and for the crimes or omissions of his subordinates. He was charged for the crimes committed in Croatia, Bosnia and Kosovo, such as genocide, crimes against humanity and violations of laws or customs of war. Moreover, he was not charged for ending up Yugoslavia, but for being a war criminal. Consequently, he avoided speaking at any cost about war crimes. Milošević stated that he had no intentions to deal with the "fake indictment", or to communicate with "fake court". On August 30th 2001 he said the following: "I want to remind you, I'm not recognizing this tribunal, considering it completely illegitimate and illegal, so all those questions about counsels, about representations, are out of any question."[50]

Vojislav Šešelj had same attitude matrix towards the ICTY. In his opening statement he declared to consider The Hague court "illegal and illegitimate" and founded upon "dictate of the United States of

[50] Simon Jennings, Institute for war and peace reporting, Self representation under scrutiny, November 6th 2009

America."[51] He went further in accusing the ICTY by calling it anti-Serb Tribunal that falsified genocide in Srebrenica. Such extreme rhetoric was motivated furthermore by the problem Prosecutor was facing regarding Šešelj's indictment. That is to say, Šešelj, unlike other indictees, never had any control of the army and formally, he did not take part in the government when the crimes were committed. Still, Šešelj is charged on the basis of individual criminal responsibility with persecutions on political, racial or religious grounds, deportation, inhumane acts, murder, torture, cruel treatment and other violations of the laws or customs of war[52].

The apparent lack of communication between the accused and representatives of the ICTY was foreseeable and used in function of myth making. Nevertheless, modern martyrs, victims of imperialistic complots, despite a desire to seem extremely emotional and impulsive, calculated well their reactions. Milošević held long political speeches that supposed to convince the audience of his innocence. Šešelj's hunger strike was the only possible communication he could perform in order to get from the Tribunal what he wanted, but at the same time contributed to his representation of victim.

Former leaders' tragedy was staged in a way it resembles a theatrical play. Every ICTY's courtroom is disposed in semi circle with material separation between the audience and the stage. Costumes are chosen carefully: the ICTY representatives wear robes and occasionally wigs, while Milošević had always red tie as a sign of his socialist ideology.

[51] http://www.b92.net/eng/news/crimes-article.php?yyyy=2007&mm=11&dd=08&nav_id=45217

[52] http://www.icty.org/x/cases/seselj/cis/en/cis_seselj_en.pdf

His behaviour was symbolic as well: to show how much he despised the Tribunal, Milošević refused to address the ICTY representatives in a proper way (he called the presiding judge of the Trial Chamber "Mister May") and refused to stand up while talking.

During his political career, Milošević could rely on his party, but also the entire communist heritage. He counted also on other forms of power such as army and police; however his success was made possible only by exercising a media monopoly. It was precisely the media that diffused the image of a victorious Serbia guided by the great leader. Another virtual reality was created, where every connection with real life was busted. Milošević continued playing in this parallel dimension in the courtroom as well. He symbolically refused to appoint an attorney, but his performance functioned on a larger, metaphorical level as well. Milošević was trying to change the past in order to regain the attention of the imagined future audiences that would contemplate the historical record of his trial.

Šešelj's performance was full of excessive statements that developed to a level of non ethical comedy. Leader of the Serbian Radical Party insulted many ICTY representatives, but almost never judge Antoinetti who was largely criticized of fulfilment of many of Šešelj's absurd requests. Šešelj claimed that the right to self-representation cannot be denied in the "civilized world", although it is by no mean "an absolute right".[53] He succeeded in obtaining it only

[53] By rules and procedures In accordance with Article 21 of the Statute, an accused person may elect to represent himself in person. While this right is not unlimited, in several ICTY cases, Chambers have recognised the right to self-representation and allowed the accused to conduct their own defence. In those cases, the Tribunal, through the Registrar, ensures the provision of adequate facilities to the self-represented accused, including the assignment of legal advisers and other support staff to assist the self-represented accused

after two months of hunger strike, but self-representation prolonged largely time spent in the courtroom. His long political rallies simply continued, depicting incredible Western complot against Serbian people that detained him, fervent fighter for justice, illegally. Šešelj included a myriad of his books as evidence exhibits, had inspiration to make jokes and generally, behaved as someone who is greatly amused. The atmosphere was frequently that of a football game, where Šešelj played against the ICTY and the audience "back home" was cheering for him. Vojislav Šešelj protested on several occasions against his indictment, calling it "extremely unserious"[54] and accusing the ICTY for not having a fair trail because of the rather long process, additionally extended because the indictee conducted his own defence. Those statements contributed pretty much in creating an image of unlawfully detained victim that was imprisoned because of verbal offenses.

The general impression regarding the ICTY trials is the missed opportunity to question impartially events from the past and to understand the consequences of the politics of the 1990s. Unfortunately, due to the detainees' shows and performances, backed with the majority of media, a wider audience became convinced that the entire Serbian people were accused. Manipulation of the media was feasible because of the low interest of the population in case law and

in the preparation of his case, privileged communication with certain categories of defence team members, photocopying and storage facilities. Furthermore, in line with an Appeals Chamber decision in one of the cases involving a self-represented accused, the Registrar adopted a special Remuneration Scheme for persons assisting indigent self-represented accused. A provision was also made for the assignment of an investigator, a case manager and a language assistant where necessary, to assist with translation.

[54] http://dnevnik.hr/vijesti/svijet/sudi-mi-nelegalni-i-nelegitimni-sud.html

the functioning of the Tribunal, and was additionally reinforced since the majority is politically illiterate. Still, for the ICTY to fulfil its broader mandate of contributing to peace and reconciliation it had to ensure that its "investigative and judicial work … [is] known and understood by the people in the region."[55] However, during the first six years of the ICTY's functioning the lack of resonance within the affected communities due to non existence of an outreach section resulted in broad misconceptions and understanding of it. The fact that the Outreach programme is still not part of the main budget of the Tribunal shows that some people in the UN Headquarters in New York apparently still do not realize the importance of its task.

The legal professionals took public relations either for granted or as not being their concern; they were also mainly interested in the development of International Humanitarian Law; that is in "the rules of the game" instead of "the actual content of the game". Even ten years after creation of ICTY over 60% of the population in former Yugoslav Republics did not know what laws govern war crimes and 66% had not received any information about the kind of crimes for which one can be indicted (Cibelli, Kristen and Guberek, 2000). Therefore, even though interest in the Milošević trial was huge, people remained uninformed and biased. Milošević's behaviour during the four year trial provoked a lack of confidence in Tribunal itself, in the fairness and efficacy of the processes. Vojislav Šešelj had and still has big support of followers of the SRS that actively promote his release. Still some university professors, politicians and public figures often diffuse false information

[55] Judge McDonald, 'Outreach Symposium Marks the First Successful Step in Campaign for Better Understanding of the ICTY in the Former Yugoslavia', 1998

about the functioning of the ICTY and about the indictment issued against Šešelj.

Justice, though, cannot be bargained for the truth, since both of them are relevant elements for facing the past. International humanitarian law through the ICTY is trying to lift the burden of collective guilt from the nations in whose names violations were carried out, by tying the violations to specific individuals who bear criminal responsibility. Still, a clear distinction between collective responsibility and collective guilt should be made. Every nation in the conflict bears collective responsibility for the acts its individuals committed in helping or not preventing them of doing so, while no nation can be named a "criminal nation".[56] All the criminals are individuals or were participating as a criminal group or organization.

A noticeable shift in attitudes towards ICTY came only after the June 2005 showing of a video on Serbian television which implicated Serb paramilitaries in the Srebrenica atrocities. The showing set into motion an "avalanche" of diverse public reactions. Following the broadcast, some SRS deputies stepped up their attacks on media outlets and organizations they declared were "enemies of the people," maintaining that the massacre photographs were an insult to the dignity of the Serbian people. Ever since the showing of the Srebrenica video, something has fundamentally changed in Serbia, the "wall of

[56] "Zločinačkih naroda i nikada, baš nikada, ne može cijeli jedan narod biti odgovoran i kriv za ono što su počinili pojedini njegovi pripadnici, ili organizirane skupine – ma kako velike i brojne bile. Postoje individualni zločinci, postoje i zločinačke skupine i organizacije, ali – kažem još jednom – zločinačkih naroda nema". Croatian President Mesić's speach on 8th February 2007

denial… began to crack… [and] Serbs are becoming … more sober after being drunk all these years of wars."[57]

The denial of the crimes is structured in a very postmodern way. One can either believe that the ICTY's facts about the war crimes are true or not. We speak about two different *versions* that one can chose or not. First one follows the myths created in the courtrooms, and closes eyes in front of evident proofs. Already in 1964 Radomir Konstantinović stated that the endurance of the nationalist myths cannot be adequately understood without recognizing the baleful role regressive provincialism plays in Yugoslavia. As far as we go away from the reality, there is more and more need for violence. Therefore, political myths created around individuals responsible for the grave breaches of the international law will not vanish once all the alleged perpetrators are brought before the face of justice. Increasingly present urban violence, illegal detentions and nationalistic movements have a lot in common with war criminals considered heroes. The current state of denial present in the society will persist as long as the past is not confronted in a serious way in order to know the truth.

The lack of active charismatic leaders and the end of the era of strong "social bandits", as Hobsbawsn called them, turns the ideals into absurd reality. Almost fifteen years after the end of war, general attention started to turn slowly towards real social problems, such as poverty and class injustice. General atmosphere in the society showed, to some extent, saturation with topics like "Heavenly Serbia" and other myths of "chosen people". Šešelj and Nikolić, as well as Milošević and

[57] Barry Wood, 'Serbs Slowly Come to Terms with Srebrenica Massacre', *VOA News*, 13 July 2005

Dačić followed very similar ideological doctrine, but the later, actively present in Serbian political life, lack the charisma.

Charismatic characters are likely to be created in the time of major crisis. If the contextual situation is favourable, i.e. audience is in a need for strong characters, the mechanism of charisma construction is triggered easily. Charisma construction was used as a main strategy for Vojislav Koštunica's arrival on political scene as a key actor. Koštunica won the 2000 presidential elections against Slobodan Milošević. The democratic opposition he was representing had chosen him because he was relatively unknown to the wider public, and therefore they wanted to socially construct his charismatic identity during the electoral campaign. The main slogan used during the campaign was "Who can always look you in the eyes?" intended to depict Koštunica's non corrupted and morally acceptable past, clean even from communist party membership. Following impression management, election posters showed only his eyes, which were described as magnetic and hypnotic. In public, the leader of Serbian Democratic Party (DSS), professor of law until he was removed from the faculty back in 1974 for opposing constitutional amendments, had a reputation of closed, serious and rigid politician. He represented a separate line within a wider Serbian democratic opposition parties as he was ready to compromises with Milošević and never rejected SPS' legacy. Vojislav Koštunica succeeded Milošević not only within the time dimension, but he also continued prominence of illiberal, chauvinistic nationalism in Serbia. Nevertheless, his constructed charisma melted as a society was entering *de facto* democratic transition. His calls for any kind of mobilization were bland and unconvincing.

The lack of openly nationalistic rhetoric led to absurd declarations nobody believed in. For example, in 2005, under strong pressure of European Union, the governing coalition partners guided by then Prime Minister Koštunica invited alleged war criminals at large to "be responsible and surrender".[58] His government was not willing and capable to deal with past, but was hiding at the same time behind "national interests" and "moral awareness"[59] of Serbian people. Current Koštunica's political ideas and rallies are following completely ideas left by Slobodan Milošević. Still, his party rapidly lost support of the wider electoral body and Koštunica himself is definitely deprived of any charisma. In 2008, when DSS turned out to be the loser of the parliamentary elections, Vojislav Koštunica had chosen campaign with important anti-European aptitude based solely on the slogan "Kosovo is Serbia". But while in 1987 Slobodan Milošević started his political career calling for nationalism in Kosovo, twenty years later Koštunica was let down by new kind of nationalists who gave up on Kosovo for a pair of sneakers.[60]

If there was to point out one person as the winner of Serbian parliamentary elections held on May 6th 2012 that would be Ivica Dačić, ex spokesman of Milošević's Socialistic Party of Serbia. Only twelve years after the 5th October revolution that overthrown Milošević's regime Ivica Dačić managed to recycle himself and the entire party he belonged to since its foundation. Surprisingly enough his victorious

[58] International Crisis Group, Brifing za Evropu broj 39, 23,.05.2005.
[59] Milan Milošević, Ozbiljna kriza Kostunicine vlade, *Vreme*, broj 800. 04.05.2006.
[60] Protest against the Kosovo's unilateral declaration of independence gathered small group of people that broke shop windows in Belgrade centre. One video filmed during the protest shows two young girls robbing sneakers from a non guarded shop

strategy was not focused on creation of charismatic leader, but rather on undermining any kind of distinction of distance and the common voters, "the people".[61] His political discourse focused on presenting his party as leftist, socialist, "on the side of those in need for social justice".[62] In order to erase any kind of resemblance of SPS lead by Milošević, Dačić openly admitted some of his previous errors when he apologised for "the mistakes from the 90s".[63] In addition, couple of politically incorrect statements depicted him as more human, prone to react as everybody else from the "audience". Dačić used impression management techniques to underline his and his party continuity, dating back to Tito's Communist League.[64] He avoided skilfully to relate much to Milošević and preferred to use well known *topos* such as "October 5th" or "democratic changes" when speaking about the period when SPS lost the elections and power on the political scene.

Tomislav Nikolić already had a long political experience within Serbian Radical Party when Šešelj was transferred to the ICTY in 2003. He was therefore chosen to lead the party. His early statements were in line with radical solution for Serbian question Šešelj was proposing; he pretended to protect the entire nation saying that "[n]o Serb or citizen of Serbia should ever be transferred to The Hague Tribunal". Turbulence on the Serbian political scene caused by 2008 elections marked the need of SRS for modernization. Inner quarrels after the net defeat and lack of possibility to enter the government, provoked radical

[61] Dačić used construct "the people" in every single rally of his, calling himself "the candidate of the people"
[62] Dačić: Jedino socijalisti na strain siromasnih, *Dnevnik*, 27.04.2012
[63] Ja se izvinjavam za greske iz devedesetih, *Nedeljnik*, 04.01.2012
[64] Dačić: Socijalisti su "nastavljaci Titove partije", *Politika*, 23.04.2012

ideology "make-up", necessary for the European future Serbia had chosen. Media supporting Nikolić rapidly "cancelled" his alleged war crimes past and "Greater Serbia" project. Once Vojislav Šešelj's radicalism was judged incompatible with Serbia's new image, Nikolić's identity was socially constructed and "standardized". He was presented as new (*sic!*) moderate current within Serbian Radical Party, with high moral principles. Nikolić could not take over directly the party lead from Šešelj, thus he "recycled" himself in newly formed Serbian Progressive Party. Memory loss, symptomatic on the Serbian political scene, made the wider audience forget almost instantly Nikolić's previous career as "Chetnik Duke".

Description of Koštunica's and Nikolić attempt to "construct the charisma" inevitably demonstrates the failure of their intentions. According to the Gardner and Avolio's theoretical framework charismatic leaders became such after interaction with the audience. In post war "democratic era" of Serbia, people, i.e. the electorate body, did not promote their leaders into charismatic ones. This statement leads us to a very important conclusion. It is not the genuine "lack of dramaturgical talent" that refused the attachment of charisma to Koštunica or Nikolić, but the lack of *charismatic situation*. Charisma is always strongly empowered by the crisis in the society, which in Milošević and Šešelj's case was a decade of conflicts in Western Balkans. Nevertheless, none of them managed to be considered by any group "founding father of the nation". Charisma was never "institutionalized". Discourse about the nation and the state, despite being compelling, was never used by governing politicians in Serbia. In "democratic era" of Serbia, from 2000 elections onwards, Koštunica and

Nikolić had no power to mobilize the masses, which, on the other side, had no need to recognize their new saviours. Once the "scene decorations" were taken away from theatre and were replaced by the *recognition* of real life situations, charisma disappeared from the scene as well.

CHAPTER 5
DOMESTIC COURTS VS. INTERNATIONAL TRIBUNALS

In recent years a number of analyses of so called transguidicial communication have been made, as the importance of comparative law grew steadily. Relationship between different courts can be horizontal and vertical (De Vergottini, 2010). The former deals with tribunal of same level: i.e. relations between various state courts or supranational courts, while the latter studies relations between state and supranational courts. The conditionality established among compared court is subject to variations: we can speak about "direct dialogue" when a norm coming from supranational tribunal triggers a response at the domestic level, whereas De Vergottini names "indirect dialogue" the situation in which supranational tribunal causes reaction at domestic courts of various states. This research deals mainly with the indirect dialogue local courts in Croatia and Serbia have with the ICTY. Even though the judiciary of the cited states is of course independent, it is subject to influences from the ad hoc tribunal from The Hague. The international legal framework pushed national courts with a major responsibility to enforce norms of the international humanitarian and criminal law. In their research on Serbian War Crimes Chamber, Weill and Jovanović (2012) argue that "it has been hoped that the growing

practice of courts would gradually replace the political enforcement of international law", i.e. that the international law would be incorporated into national legal orders which would serve primarily as agents of international legal system.

In terms of readjustment of trials arriving at the national courts we trace two important steps: implementation of international norms and adaptation of the ICTY's Rules of Procedure and Evidence, and legal reasoning for choosing older or more recent national Criminal Codes.

5.1. READJUSTMENT 'ICTY – DOMESTIC COURTS'

The ICTY, according to the Article 8 of its Statute, has the territorial jurisdiction over the territory of the former Socialist Federal Republic of Yugoslavia for breaches of humanitarian law committed after January 1st 1991. In addition, Article 9 asserts that the ICTY and national courts have concurrent jurisdiction to prosecute alleged war criminals, but it is The Hague tribunal who has primacy over national courts. It can request domestic jurisdiction to defer at any stage of the procedure if this proves to be in the interest of international justice. This fact, however, does not limit the competence of national courts in prosecuting individuals responsible for war crime, neither was it "the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts."[65] In twenty years of existence, the ICTY has set new standard of human rights protection and dealing with

[65] Report of the UN Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)

violations of laws or customs of war, crimes against humanity and genocide. It traced the path for the Statute of the International Criminal Court and other ad hoc tribunals, but also set a new standard for domestic courts in the region of the former Yugoslavia.

During the wars in Croatia and Bosnia and in the period of Milošević and Tudjman's regimes, trials for war crimes in Croatia and Serbia happened very sporadically, ending almost unanimously in acquittals. The impunity backed by political power and unanswered question of responsibility for war crimes, created issues of double standards for guilt – that of "our" and " their" individuals. In Croatia, even in the case of most severe violations of humanitarian law done by members of Croatian Army or other military formation, the perpetrators were rarely punished, whereas the trials against other warring party members were conduct mostly in absentia and without basic elements of right to fair trial. On the other hand, trials held in Serbia prior to the establishment of War Crimes Chamber were based on incomplete indictments, where acquittals resulted often from the lack of evidence. In both countries, legal standards were corrupted by the interference of other branches of government, generally legislative, and by the lack of competence for dealing with such severe judicial processes. After the war there was no systematic lustration process and thus many elements of the previous state structure were not clear and publically contemned, which resulted in poor investigation of the past war crimes.

New democratic regimes established in Croatia and Serbia after the year 2000 traced the path towards more systematic and competent trials for war crimes. Political environment did permit the ICTY to act

according to the Rule 11bis of the Rules of Procedure and Evidence and hand over certain number of cases to authorities of the Yugoslav successor states. This so called "back referral" strategy proved domestic ability – *lege artis* – to perform trials at local courts. In Serbia the establishment of the WCC was seen as a strengthening element of the government, mostly because the public attitude towards the ICTY was extremely negative, and the preferred strategy was the one of transferring trials back home. Similarly, transfer of trails in Croatia was considered to be some sort of political victory, as it reconfirmed successful transition and capacity of the judicial, but also moved the public sphere's attention from the supposedly biased anti-Croatian Tribunal from The Hague. Once a case before the ICTY is judged to be transferred to the local courts, the War Crimes Prosecutor in Serbia or Croatia changes the indictment and adjusts it to a domestic legal system, accepting the evidence gathered at the ICTY. Moreover, the accusations presented before the ICTY are ultimately changed, mostly due to incompatibility of the case law; for example, crimes against the humanity and command responsibility, which did not exist in domestic Criminal Code prior to 1990s when those crimes were committed.

5.2. CRIMES AGAINST HUMANITY

The work of UN created *ad hoc* Tribunals for the former Yugoslavia and Rwanda has reaffirmed the status of international criminal law as customary law, recognized previously within the principles of the *Charter of the International Military Tribunal at Nuremberg*. The mission of the ICTY is to persecute and judge

individuals accused of perpetrating war crimes, crimes against humanity and genocide on the territory of the former Yugoslavia since 1991.

Currently, the ICTY is approaching the end of its mandate and has undertaken the completion strategy. After all, the ICTY will have adjudicated only a relatively small number of cases involving the most serious crimes by the time it ceases operating. All other war crimes cases, whether initiated domestically or referred back from the ICTY, are supposed to be tried by national courts in the states of the former Yugoslavia.

This research focuses on the development of legal persecution of crimes against humanity – from its basic definition to the full implementation into judiciary systems of BiH, Croatia and Serbia. Topic seemed interesting to the author because of the "domestic element" of crimes against humanity, first transposed and described within the Nuremberg Charter under the section of "crimes against peace", and then consequently "brought back" to national legal systems. Choice of analysed cases is not casual, as it was precisely the ICTY that gave the biggest contribution to the international criminal law in the field of crimes against humanity. Once places of war atrocities, Yugoslav successor states have finally started establishing the rule of law and reformed their Criminal Codes.

Traumatic legacies from the past have to be dealt with in order to build a stable future; special attention should go to the needs and rights of people including in particular victims; and only a comprehensive approach will rebuild trust among citizens and between citizens and the state. So far, the focus has been on prosecution

of war crimes. Transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes. Accountability for crimes committed during armed conflicts in Croatia and Bosnia should lead to re-establishment of peace and prevention of future breaches of international humanitarian law, in addition to the impediment of revisionism and bringing justice to victims.

5.2.1. CRIMES AGAINST HUMANITY – HISTORICAL OVERVIEW

Crimes against humanity are mass crimes committed against a civilian population. Most serious is the killing of entire groups of people, which is also characteristic of genocide. Crimes against humanity are broader than genocide: they need not target a specific group, but a civilian population in general. Thus they also include crimes against political or other groups. Also, unlike genocide, it is not necessary for the perpetrator to intend to destroy a group, as such, in whole or in part.

The classical law foundations of crimes against humanity have the roots in the laws of war. Treaties like the Hague Conventions have been widely accepted by "all civilized nations" before exact definition of crimes against humanity and, thus, were by then part of the customary laws of war and binding on all parties.

The term "crimes against humanity and civilization" was used for the first time in a 1915 declaration of Great Britain, France and Russia regarding Turkish massacres of Armenians.[66] Nevertheless, it

[66] http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html

was not until the Nuremberg Charter and trials before International Military Tribunal for Germany that international law recognized and prosecuted crimes against humanity.

The definition of crimes against humanity is particularly difficult to describe. Scholars, judges, and diplomats addressing this issue since 1945 have reached various conclusions regarding its required elements. International criminal justice requires the demarcation of a sphere of jurisdiction distinct from the domestic sphere. Most of the single crimes that are enclosed within the definition of crimes against humanity are punishable under the domestic law of "civilized" states. Their sovereignty to deal with crimes at inner level is revoked in the case of crimes against humanity because of the conviction that such crimes violate not only the individual victim but all of humanity. Crimes against humanity must therefore draw a clear distinction between an inhumane act of domestic concern and one that rises to the level of an international crime. Perpetrator's knowledge of committing or participating in a widespread or systematic attack against civilians is the key element that transforms a domestic crime into crime against humanity.

International criminal law protects "peace, security and well-being of the world" as the fundamental values of the international community. International criminal law is thus based on a broad concept of peace, which means not only the absence of military conflict between states, but also the conditions within a state. Therefore, a threat to world peace can be presumed even as a result of massive violations of human rights within one state. Moreover, inflicting the punishment for crimes against humanity in not the only purpose

international criminal law is aware of. The definition of crimes against humanity must include general goals of international criminal law such as the reaffirmation of international legal order and deterrence. By doing so, international legal system gives the voice to the victims and reassures the absence of impunity for high ranked perpetrators. Former UN Secretary General Kofi Annan underlined the importance of international criminal law recognition: "There can be no global justice unless the worst of crime-crimes against humanity-are subject to the law."[67]

Crimes against humanity were first explicitly formulated as a category of crimes in Article 6(c) of the Nuremberg Charter. Article 6 of the Nuremberg Charter contains three types of crimes: crimes against peace, war crimes and crimes against humanity.[68] While the

[67] See United Nations Conference of Plenopotentiarieso n the Establishment of an International Criminal Court, http://www.un.org/icc

[68] ARTICLE 6 The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing; (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,14 or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution

criminalization of war crimes serves to protect the rights of foreign citizens, crimes against humanity include offences against one's own citizens if crimes in question systematically targeted a specific civilian population. This innovative aspect initiated debate regarding its conformity with the principle of *nullum crimen sine lege*. The principle of *nullum crimen sine lege* is not an obstacle to grounding criminality in customary law. Customary international law exists if actual practice (*consuetude*) can be found, based on a sense of legal obligation (*opinio juris*). Lack of legal precedent for this provision was justified by the fact that it was firmly rooted in general principles of law and therefore did not violate the principle of legality. The general principles of law are usually used in the absence of specific legal provisions or of custom, and the Statute of the International Court of Justice stipulated that 'the general principles of law recognised by civilised nations' constitute one of the sources of international law.

Domestic crimes against one state's own citizens entered for the first time in the frame of international law. Thus, international criminal law extended its competence over crimes for which domestic laws did not prevent prosecution. During the proceedings before International Military Tribunal, French prosecutor stated that "body of crimes against humanity constitutes,…, nothing less than the perpetration for political ends and in a systematic manner, of common law crimes such as theft, looting, ill treatment, enslavement, murders, and

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of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

assassinations, crimes that are provided for and punishable under the penal laws of all civilized states". [69]

Second international legal instrument that included a provision concerning crimes against humanity was. [70] The Control Council Law No. 10 definition of crimes against humanity differs in some significant aspects from the one contained in the Nuremberg Charter. First, it adds imprisonment, torture, and rape to the enumerated inhumane acts. Nuremberg Charter left space for those crimes under the clause "other inhuman acts". Moreover, Control Council Law No. 10 clarifies that the enumerated acts are exemplary and not exhaustive of the inhumane acts that qualify as crimes against humanity. The most important novelty is that Control Council Law No. 10 eliminates the requirement that the acts be connected with war. Later on, when the ICTY Statute states, in Article 5, that a crime must occur "in armed conflict, whether

[69] International Military Tribunal at Nuremberg

[70] Article II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

international or internal in character," it is simply drawing a connection in place and time to the Yugoslavia conflict. This is by no means a reintroduction of the long-abandoned supplementary requirement of the Nuremberg Charter.

Legal sources of international criminal law, namely international treaties, customary international law and general principles of law recognized by the world's major legal systems, were further developed by establishment of Geneva Conventions. Of particular importance were the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and the four Geneva Conventions of 12 August 1949, including the two Additional Protocols of 8 June 1977. At this point it is important to outline the difference between crimes against humanity and genocide. The major difference is that genocide requires the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[71] Accordingly, genocide is often considered a sub-set of crimes against humanity because acts of genocide also generally constitute crimes against humanity.

During the Cold War legal instruments for prosecuting crimes against humanity were barely used. In the early nineties violent war in the Balkans and genocide in Rwanda moves UN Security Council to create two international criminal Tribunals as "subsidiary organs", which legal basis was not an international treaty, but a resolution of the UNSC on the basis of Chapter VII of the UN Charter.

[71] Article 2 Convention on the Prevention and Punishment of the Crime of Genocide http://www.hrweb.org/legal/genocide.html

In Resolution 827 of 25 May 1993, the Security Council decided, "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined… to adopt the Statute of the International Tribunal."[72] ICTY's Statute and case law is a milestone for the further development of international criminal law. Greatest achievement from the legal point of view is the assimilation of the scope of criminal law applied in international and in non-international armed conflict. In the new legal order, characterized by a great number of human rights conventions, state borders became no longer judicially inviolable. ICTY Statute accepts the concurrent jurisdiction of national courts. Collisions are resolved according to the principle that international courts take precedence: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal."[73]

Human rights abuses occurring within sovereign states are now considered the legitimate concern of the international community. The human rights-protecting function of international criminal law is especially clear for crimes against humanity, which criminalize systematic attacks on fundamental human rights, such as rights to life and physical integrity, to freedom of movement and human dignity. Crimes against humanity represent attack on the fundamental human

[72] Full text available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

[73] http://www.icty.org/sid/7610

rights of a civilian population. The idea of humanity as the foundation of human rights protection and international criminal law is visible here. At present protection under criminal law is limited to so-called first generation human rights.

In addition, the ICTY has in many respects added precision to the definitions of crimes against humanity and genocide.[74] The definition contained in Article 5 of the ICTY Statute does not require a connection between the enumerated acts and an international armed conflict, though it does require a nexus with some sort of armed conflict. Moreover, the ICTY definition clarifies that discriminatory intent is required only for persecution and not for other inhumane acts.

On 17 July 1998, the Rome Statute of the International Criminal Court was adopted in plenary session with 120 votes. The ICC Statute is the core document of international criminal law today. Although the ICC definition binds only that institution, it also represents convincing evidence of the customary international law of crimes against humanity.

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[74] Crimes against humanity are described in the Article 5 of ICTY Statute:
Article 5
Crimes against humanity
The International Tribunal shall have the power to prosecute persons 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.

Article 7 of the ICC Statute enumerates crimes against humanity.[75] ICC Article 7(1) describes individual acts that become crimes against humanity when they are committed in the course of the widespread or systematic attack on a civilian population. First important element is that crimes against humanity no longer contain any nexus with armed conflict, whether internal or international. The decision to reject a requirement of a nexus with armed conflict evidences the erosion of the traditional approach to state sovereignty.

Gradual spreading of competences for prosecution of crimes against humanity demonstrates that the definition of crimes against humanity has evolved to include only two chapeau elements: 1) the existence of a widespread or systematic attack; 2) against a civilian population. Article 7(1) of the ICC Statute explicitly provides that the

[75] ICC statute: Article 7
Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

perpetrator must act "with knowledge" of the attack on the civilian population. This so called mental element *de facto* distinguishes acts of domestic criminal law domain from those punishable under international criminal law. Therefore the perpetrator must be aware that attack on a civilian population is taking place and that his action is part of this attack. The mental element requires intent and knowledge (Article 30 of ICC Statute) regarding the material elements of the crime, and including the contextual element. The crime thus affects not only the individual victim, but also international community as a whole. [76]

Contrary to the crime of genocide, not the entire population of a state or territory must be affected by the attack. Civilian character of the attacked population applies both in war and in peacetime. Most important in demonstrating membership in a civilian population is the victims' need for protection. Hence present or former members of one's own armed forces, in particular, who are not protected by international humanitarian law, can become direct objects of a crime against humanity (for example soldiers *hors de combat*).

For crimes against humanity, one of the key elements such as context of organized violence consists of a widespread or systematic attack on a civilian population. The contextual element is formed from the sum of individual acts and attack itself is described as multiple commissions of acts of violence. The perpetrator does not need to act

[76] Prosecutor v. Erdemovic, ICTY (Appeals Chamber), judgment of October 1997, separate opinion of Judges Kirk McDonald and Vohrah, para. 21: "[R]ules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind… It is therefore the concept of humanity as a victim which essentially characterises crimes against humanity…Because of their heinousness and magnitude they constitute an egregious attack on human dignity, on the very notion of humaneness."

repeatedly him or herself. A single act of intentional killing can constitute a crime against humanity if the single act fits within the overall context. [77] A military attack is not necessary nor is use of force against the civilian population, it is compulsory though to show its widespread or systematic character. "Widespread" describes quantitative element of attack. It can consist even of a single act, if a large number of civilians fall victim to it. The criterion of a "systematic" attack is qualitative in nature. It refers to "the organized nature of the acts of violence and the improbability of their random occurrence." [78]

International criminal law is prosecuting individuals, but in the case of crimes against humanity the individual act follows a predetermined plan or policy. This provision was followed as well by the ad hoc Tribunals' case law. Article 7(2)(a) of the ICC Statute requires that the attack on a civilian population be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack." Very important statement was made within the judgement in case *Posecutor v. Tadic* before ICTY's Trial Chamber : "[S]uch a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis, that demonstrates a policy to commit those acts, whether formalized or not".[79]

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[77] Prosecutor v. Tadic, ICTY (Trial Chamber), judgment of 7 May 1997, para. 649: "[E]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution."

[78] Prosecutor v. Kunarac et al., ICTY (Appeals Chamber), judgment of 12 June 2002, para. 94.

[78] Prosecutor v. Kunarac et al., ICTY (Appeals Chamber), judgment of 12 June 2002, para. 94.

[79] Prosecutor v. Tadic, ICTY (Trial Chamber), judgment of May 1997, para. 653.

Significant evidence for existence of plan to commit attack against civilians includes actual events, political platforms or writings, public statements or propaganda programs and the creation of political or administrative structures. The policy of a state or organization can consist of taking a leading role in commission of the crime, but also in actively promoting the crime or in merely tolerating it. The very act of a state looking away, refusing to take measures to protect the population, and failing to prosecute perpetrators can be effective tools in a policy of terror and extermination.

Individual accountability makes it clear that it was not an abstract entity, such as state, that committed crimes under international law. But crimes under international law and wrongful acts by a state will often coincide. For example, the state-sponsored extermination of a group would justify both the criminal prosecution of the persons involved for genocide and the state's duty to compensate the victims or their relatives.

In the territory of the former Yugoslavia, major part of the war crimes was committed by "next-door murderers". The decisive motive for perpetrating the crime wasn't individual conflict but belonging to a certain ethnic or religious group. Criminal accountability for crimes against humanity did not exist in the Criminal Code of Socialist Federative Republic of Yugoslavia. Consequently, following the principle *nullum crimen sin lege,* individuals not tried before the ICTY could not be prosecuted for the crimes against humanity before domestic courts. Even though each of the signatories of the Dayton Peace Agreement committed itself to respect and cooperate with the

ICTY, the absence of laws that implement international criminal law created impunity gap. The punishment of the most serious crimes under international law should "make humankind conscious of the fact that international law is law and will be implemented against lawbreakers." The same should be considered also for domestic laws, especially of those countries that went through events that comprised massive breaches of humanitarian law. Next chapter deals with this specific issue and analyses new criminal codes of BiH, Croatia and Serbia.

5.3. RULE 11BIS AND COMPLETION STRATEGY

As explained in previous chapter, in the first ten years after the signing of Dayton Peace Agreement, individuals were tried for crimes against humanity committed during the wars in Croatia and BiH (1991-1995) exclusively before the ICTY. Criminal codes of newly formed states did not have article that addressed crimes against humanity, as they all inherited SFRY 's Criminal Code from 1977.

The prosecution of war crimes, crimes against humanity and genocide has been a hallmark of the past two decades of international law. However, the implementation of international law is still a delicate task essentially left to states. States together make the rules of international law and they implement international law within their own jurisdictions, demonstrating with their conduct that international law is effective. Prosecuting crimes against humanity at the local level, is of great importance, because this takes into consideration the broader

context in which such crimes were committed and the policies that motivated them.

In general, national courts have a greater impact on the society and its values and benefits than international tribunals. Through national proceedings, societies more directly face their own problems and mistakes and learn from them. It has been argued that for example, national proceedings had a much stronger psychological and moral impact on population and contributed more to the denazification of the Germany than Nuremberg and other international trials.[80]

ICTY formulated officially its "Completion Strategy" in United Nations Security Council Resolutions 1503 (2003) and 1534 (2004). "Completion Strategy" is commonly understood as a transfer of intermediate or lower rank indicted persons from the ICTY to competent national jurisdictions. It is where the international community expects the former warring parties to demonstrate their membership of the group of democratic countries and their "capability" of acceding to the EU.[81] At present, the ICTYs back referral is aimed at enhancing "the essential involvement of national governments in bringing reconciliation, justice and the rule of law in the region".[82] In order for the ICTY to refer proceedings it must be sufficiently assured of the domestic judiciary's capability of conducting the proceedings fairly and adhere to internationally accepted

[80] Ivan Šimonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses,* 2004

[81] Louis Aucoin and Eileen Babbitt, *Transitional justice: Assessment Survey of conditions in the former Yugoslavia,* June 2006

[82] *Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, UN Doc. S/2005/343, 25 May 2005, para. 12.

standards. Simultaneously, recipient state should uphold the international rule of law, prevent impunity and share the ICTY's institutional knowledge and jurisprudence.

Rule *11bis* of the ICTY Rules of Procedure and Evidence provides for the transfer of cases, by order of the Trial Chamber, to domestic jurisdictions. So far thirteen individuals indicted by ICTY were brought under the competence of national courts of BiH, Croatia and Serbia. Rule *11bis* covers also files of so-called "second category" that deals with individuals for whom ICTY investigation remained unfinished.

Moreover, the Tribunal has amended its Rules of Procedure and Evidence to allow direct petition by local actors to modify protective measures and thereby receive confidential material from the Tribunal's archives. Through these and other measures, the ICTY has adopted a strategy of "continued legacy building" in the region of the former Yugoslavia that will facilitate the growth of local institutional capacity to handle the numerous cases that remain to be prosecuted and tried effectively. Thus, in its essence, the "Completion Strategy" is an unprecedented attempt to contribute to the development of the rule of law, both in the region of the former Yugoslavia and beyond.

5.3.1. SERBIA

Until July 1st 2003, when Law on Organization and Competence of Government Authorities in War Crimes Proceedings was issued, on war crimes trials in Serbia only provisions from Criminal Code Procedure and FRY Criminal Code were applied. The

Organisation for Security and Co-operation in Europe (OSCE) issued a report in October 2003, where it concludes that "the national judiciary lacks full capacity to conduct war crimes trials in accordance with universally adopted standards".

Republic of Serbia's Parliament adopted Law on Organization and Competence of Government Authorities in War Crimes Proceedings on July 1st 2003 and amended it on December 21st 2004. This law represents a milestone in cooperation with the ICTY and gives the possibility for credible trials. Special legal institutions were established: Office of the War Crimes Prosecutor and Special Department for Adjudicating in Trials against Perpetrators of War Crimes. Within Ministry of Inner Affairs Special services for revealing war crimes were founded. Special Department for Adjudicating in Trials against Perpetrators of War Crimes consists of six professional judges, while its president is incumbent president of Belgrade District Court. This solution gave good results so far, as the quality of trials for war crimes is highly improved.

2003 Law is applied for prosecution of alleged perpetrators of war crimes defined in Chapter XVI of Basic Criminal Law (Crimes against humanity and international law)[83] and for acts described in Article 5 of ICTY Statute (Crimes against humanity). The amendment made in 2004 created a possibility for War Crimes Department to use evidences presented before the ICTY or collected during its

[83] *"Official Gazette SFRY", no.44/76, 36/77 - amend. 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 - amend. i 54/90 and "Official Gazette FRY", no. 35/92, 16/93, 31/93, 37/93, 41/93, 50/93, 24/94, 61/2001 and "Official Gazette RS", no. 39/2003*
It is important to outline the absence of specific definition of crimes against humanity, as the Chapter XVI describes war crimes and genocide. It was only in 2006 that Serbia included precise definition of crimes against humanity into its Criminal Code.

investigation. This amendment was made in the process of legal harmonisation with ICTY Statute and especially its Rule *11bis*.

In the case of referral, the Prosecutor for war crimes can issue indictment based on the ICTY's indictment. He can also use evidences transferred by the International Tribunal, even in the absence of back referral like in the case of "Zvornik" trial.[84]

Finally, domestic jurisprudence of Serbia included crimes against humanity as single act in its new Criminal code of Republic of Serbia that came into force on January 1st 2006. Article 371 states that "[w]hoever in violation of the rules of international law, as part of a wider and systematic attack against civilian population orders: murder; inflicts on the group conditions of life calculated to bring about its complete or partial extermination, enslavement, deportation, torture, rape; forcing to prostitution; forcing pregnancy or sterilisation aimed at changing the ethnic balance of the population; persecution on political, racial, national, ethical, sexual or other grounds, detention or abduction of persons without disclosing information on such acts in order to deny such person legal protection; oppression of a racial group or establishing domination or one group over another; or other similar inhumane acts that intentionally cause serious suffering or serious endangering of health, or whoever commits any of the above-mentioned offences, shall be punished by imprisonment of minimum five years or imprisonment of thirty to forty years."

From the description of the Article 371 of the Criminal code of Republic of Serbia it is clear that the legislator accepted the approach

[84] For more information about this trial, see http://okruznisudbg.rs/content/2005/zvornik/view?searchterm=zvornik OR зворник

expressed in the Statutes of ICTY and ICTR and "imported" international criminal law provisions into domestic jurisprudence.

5.3.2. CROATIA

Until the end of 1991, in the Republic of Croatia, the principal relevant legal source of internal law relating to punishment of war crimes or important for it was the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia. It was then taken over in 1993 into the Croatian legal system as a Croatian law and later amended in content and renamed the Basic Criminal Code of the Republic of Croatia. The Basic Criminal Code as adopted in April 1993 contained the applicable substantive standards for prosecution of crimes against international humanitarian law committed during the 1991 to 1995 armed conflicts. The offences in Articles 119 to 132 of the Criminal Code include most parts of the major crimes against international humanitarian law. Genocide and war crimes in various forms were specifically prescribed by the Criminal Code, whereas crimes against humanity were not included in the Criminal Code. An explicit element of most domestic crimes is that the prohibited acts are committed "in violation of the rules of international law."

In 1996 Croatia, being a signatory of Dayton Peace Agreement, had an obligation to issue Constitutional Act on Co-operation of the Republic of Croatia with the ICTY. In 2003 Act on Application of the Statute of the International Criminal Court and Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law came into force and triggered process of legal

harmonisation. It is worth mentioning that the 2003 Act has specific provisions supplementing domestic legislation and pertaining to the prosecution of war crimes, independently of the ICC's jurisdiction. These provisions are also applicable for the prosecution of perpetrators of crimes committed during the war. Therefore, certain solutions were purposely created to facilitate the conduct, and improve the efficiency of proceedings for crimes of that period, particularly those referred to the national judiciary by the ICTY.

Croatia is also bound by all the most important international conventions relating to war and humanitarian law, accepted by succession after gaining independence, including the 1949 Geneva Conventions on the protection of war victims and their two 1977 Additional Protocols, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Moreover, Article 140 of Constitution of the Republic of Croatia confirms that International agreements ratified by the Parliament are directly incorporated into the Croatian legal system and are superior to other laws.[85]

Nevertheless, it was only in 2004 that Croatian legislation system included a separate offence of crimes against humanity in its Criminal Code, in a way which almost entirely follows the Rome

[85] "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects." Such a formulation clearly indicates which international contracts form part of the internal legal system, but it also clearly (a contrario) excludes international customary law from direct application.

Statute definition. [86] Still, acts committed during the 1991 to 1995 conflict can only be prosecuted under the substantive law in force at the time. Even if new war crime provisions were adopted by Parliament,

[86] "A person who, violating the rules of international law within the context of a broad or systematic attack aimed against civilian population, knowing about that attack, issues an order to kill another person; to impose living conditions upon certain civilian population for the purpose of complete or partial extinction, which living conditions could lead to the annihilation of that population; to conduct trafficking against a person, primarily woman or a child or to enslave a person for sexual exploitation in such a manner as to perform particular or all powers stemming from the ownership right over that person; to forcibly remove other persons from the area in which they legally reside, by way of expulsions or other forcible measures; to illegally confine a person or deprive of freedom in other manner to torture a person who was deprived of freedom or who is under surveillance in such a manner as to intentionally inflict severe physical or mental pain or suffering against him/her; to force to prostitution, to rape a person or perform some other form of sexual violence against that person or to keep a woman, who forcibly got pregnant, intentionally imprisoned in order to influence the ethnic composition of a particular population; to prosecute another person in such a manner as to intentionally, and to a large extent, deprive that person of his/her fundamental rights, because he/she belongs to a certain group or community; to deprive other persons of their reproductive ability without their consent and what is not justified by medical reasons, to arrest other persons, keep them imprisoned or kidnap them, on behalf of, or with permission, support or consent of the state or a political organization, without afterwards admitting that those persons were deprived of freedom or to deny the information about the destiny of those persons or the place in which they are kept, or that, within the framework of an institutionalized regime of systematic oppression and domination of one racial group over another racial group or groups, and with the intention of maintaining such a regime, a person commits an inhuman act described in this Article or an act similar to one of those acts (the crime of apartheid), or a person who commits some of the above mentioned acts, shall be punished with a prison sentence of at least five years or a long term imprisonment."

they cannot be applied to conduct during the Homeland War[87] to the extent that they are more severe than the pre-existing law. However, Article 7.2 of the European Convention on Human Rights provides as an exception to the general prohibition against the retroactive application of criminal law "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[88]

As a result, not even one indictment that contained crimes against humanity was ever issued in Croatia. However, it is hard to imagine a situation in which some forms of conduct qualified in international law as a crime against humanity (especially those listed in Article 5 of the ICTY Statute) could not be considered as one of the forms of war crime in Croatian legislation.

In November 2003, extra-territorial jurisdiction of the county courts in Rijeka, Split, Osijek and Zagreb in matter of war crimes was established in addition to courts otherwise competent pursuant to the Law on Criminal Procedure. Moreover, Croatian police formed special department for war crimes and Office of the State Prosecutor named State Prosecutor for war crimes. The ICC Law allows the Chief State Prosecutor to initiate new proceedings in one of these four courts or to move an ongoing case to one of the four courts if the President of the Supreme Court gives his consent. Similarly to the Serbian case, *Rule 11bis* of the ICTY Statute allows issuing of direct indictment, i.e. "State Prosecutor can, in base of evidences collected by ICTY, issue an

[87] In Croatia, 1991-1995 armed conflicts are called Homeland War (*Domovinski rat*)
[88] European convention on Human Rights: http://www.hrcr.org/docs/Eur_Convention/euroconv3.html

indictment without previous investigation or acceptance of the investigation judge."[89]

Croatia has since 1991 undertaken large-scale prosecution of war crimes. The overwhelming majority of proceedings were against Serbs for crimes against Croats and the vast majority of convictions were obtained against *in absentia* Serb defendants. Special competence and more neutral setting of abovementioned four county courts enabled better safeguard of the fair trial rights of accused, improved interests of justice and encouraged witnesses participation.

In 2006, the first transfer from the ICTY to a special court was granted. Indictments against Rahim Ademi and Mirko Norac were different form the ones that ICTY issued, as the ICTY indictment alleges the crime against humanity of persecution of Serb civilians, while crimes against humanity were not part of the Criminal Code during the conflict and hence are not used for charging in the Croatian indictment in this or other war crimes cases. Nevertheless, they were tried for war crimes as acts described in new Croatian Criminal Code are punishable in accordance with customary law and other international agreements that Croatia ratified in past.

5.3.3. REGIONAL COOPERATION AND BEYOND

A regional meeting in November 2004 in Palić, hosted by the OSCE Mission to Serbia and Montenegro, provided an early opportunity to begin defining mechanisms for improving regional judicial co-operation in war crimes proceedings. The process of

[89] http://www.icty.org/sid/97

regional co-operation begun in Palić continued in 2005 with meetings in Brioni (Croatia) and Mostar (Bosnia and Herzegovina). The Brioni meeting was attended at the level of ministers and deputy ministers of the three participating states. Since the Palić process started, important steps were taken and results achieved. For example regular and unimpeded exchange of evidence, information and expertise in war crimes proceedings among the judiciaries of Bosnia and Herzegovina, Croatia and Serbia became finally a reality. Other bilateral agreements provide for obtaining evidence in one country upon the request of the authorities of the other as well as trying individuals in one country for acts committed on the territory of the other.

Despite these positive steps, BiH, Croatia and Serbia's legal framework continues to significantly limit inter-state judicial co-operation. In large number of cases related to grave breaches of humanitarian law on the territory of the former Yugoslavia, crime was committed in one and the perpetrators and/or testimonies are in other state. It thereby facilitates impunity for those who committed war crimes on one state's territory but remain outside it. All three neighbour countries prohibit the extradition of nationals and the transfer of proceedings for serious crimes such as genocide, crimes against humanity and war crimes. In Croatia, extradition is prohibited by Constitution, while in BiH and Serbia such orders are stated in the criminal codes.

Regional cooperation showed to be of extreme importance, like in case "Lora", held before Split county court in Croatia, where Serbian and Croatian office of Prosecutor collaborated intensively. Crucial element of regional agreements is the fact that their application will

contribute to stop the praxis of impunity, created by legal barriers. Still, harmonization and stabilization of the regional cooperation is a must for successful future functioning of domestic courts for war crimes.

Nevertheless, rule of law reforms and war crime trials are not sufficient for moral renewal of the society. Other non-legal transitional justice mechanisms must be taken into account, especially truth seeking and naming and shaming. Political, legal and executive institutions should show will and promptness to take the responsibility for serious war crimes prosecution. Tihomir Blaškić, ex chief commander of Bosnian Croats, sentenced before the ICTY to 45 years imprisonment at the first instance and 9 in the appeal trial, underlined himself the importance of war crime trials: "It would be horrible if the ICTY was never established, because then we would have lived in conviction that mass crimes, for which nobody is accountable, are possible."[90]

5.4. COMMAND RESPONSIBILITY

Principle of legality in criminal law, so called rule nullum crimen, nulla poena sine lege, defined by both Croatian and Serbian Constitution, limits the norms of international law in case that both a crime and a penalty were not defined in domestic law when crimes were perpetrated. Thus, some provisions of international law are impossible to apply directly, but treaties and customary law standards can be included and used in broad interpretations of Criminal Codes of Croatia and Serbia. While the international courts such as the ICTY or

[90] Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, Oxford, 2009

the ICJ (International Court of Justice) issue indictments made on doctrinal level, local courts concentrate on fact-finding and direct evidences. (Weill, Jovanović: 2012)

One of the most discussed provisions coming from the international humanitarian law is the doctrine of command responsibility. The Article 7 of the ICTY Statute and especially its paragraph 391 allows Tribunal to indict individuals holding military or political positions of power if they were knowledgeable of crimes committed by their subordinates but failed to prevent those acts. Command responsibility with an organisation, either military or political, requires the existence of a superior – subordinate relationship. Moreover, the knowledge of superior about commission of crime or about a plan for such deed is necessary, although differently from the joint criminal enterprise doctrine, the superior need not to plan the crime or actively take part in its commission. That is, the joint criminal enterprise requires a contribution in committing crime, whereas command responsibility is established even on the ground of omission.

[91] Article 7
Individual criminal responsibility
1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

To sum up, the alleged perpetrator need to be in control over the subordinates and not to enable them to commit crimes. The *mens rea*, i.e. knowledge about the crime or a risk of its commission, plays a crucial role in command responsibility norm, as the person in command, having acted by norms of conduct in case of war, if ignorant of act committed by her subordinates is not hold responsible for cited crimes. Up to date the most complete definition of command responsibility is codified in the Article 28 of the International Criminal Code Statute[92], where the superior is punished not only for the omission, but also for the crimes of his subordinates. Command responsibility role intended as a guarantor was drawn back in The

[92] Article 28
Responsibility of commanders and other superiors
In addition to other grounds of criminal responsibility under this Statute for crimes within the
jurisdiction of the Court:
(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Hague Convention of 1907[93] Geneva Convention III of 1949[94] and Additional Protocol I of Geneva Convention[95] where the duties of the superior are enlisted. All the above mentioned provisions enter in practice rule of customary international humanitarian law regarding the command responsibility. Those rules were initially designed for the State Parties and not for the individuals, thus only with the Rome Statute they entered national legislation for countries signatories of the treaty.

Interpretation of command responsibility in public space in Croatia and Serbia are often negative. Following negative attitude

[93] Article 1(1) of the 1907 Hague Regulations lays down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents "to be commanded by a person responsible for his subordinates"

[94] Article 4 (2)

2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

[95] Article 86(2) of the 1977 Additional Protocol I provides:

The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach

Article 87 of the 1977 Additional Protocol I provides:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

…

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof

towards the ICTY, a provision coming "from The Hague" is frequently considered to be directed against the entire nation; what is more, in the case of command responsibility that sentiment is even stronger, as the accused is not a direct perpetrator of the crime. Command responsibility and joint criminal enterprise faced strong resistance in the post-Yugoslav states, being those doctrines understood as highly politicized or even irrational in countries that lead defensive war like Croatia.

Once Croatia and Serbia ratified the Rome Statute which defined jurisdiction of the International Criminal Court, they have introduced command responsibility in domestic legal systems. However, those are future provisions, as for the past violations of humanitarian law no such norm was provided by the former Yugoslavia's Criminal Code and thus by the rule of legality there is no retroactivity. The solution, i.e. more interpretative approach to legislation, was rather unusual, but permitted local courts to introduce the command responsibility related to crimes of omission. In following chapters actual cases are explained more in detail, and an analysis of the media representation is done in relation to war crime trials in question.

Before the back referral procedure was established between the ICTY and Croatian judiciary, almost all indictments against Croatian nationals were issued against direct perpetrators of lower rank. The exceptions were high rank officers of Serbian nationality belonging to the Serbian or Yugoslav armed forces. Those trials were nevertheless held in absentia, which is rather controversial provision from the point of view of fair trial. In addition, many of the possible witnesses that

have left Croatia refused to give testimonies. Courts in Serbia, on the other hand, did not apply command responsibility provisions from Geneva Protocols, as the Constitutions from SFRY, FRY and also Serbia require that the criminal offence and applicable punishment must be provided in domestic legislation, i.e. Criminal Code. Domestic legislation introduced direct norm of command responsibility after the ICC Statute ratification and therefore application of command responsibility *strictu sensu* would have been a violation of the *ex post facto* clause of the Constitution.

Once the ICTY's Completion strategy did start, The Hague tribunal opted for the possibility of referring cases to national courts. Bosnia and Herzegovina, Croatia and Serbia were very much favourable of that practice, particularly because the international tribunal faced negative attitude in the region and because the political elites on power wanted to show their capacity in dealing with their own citizens' misdeeds or with crimes committed at their territory. Two of the case studies in this research were subject to the Rule 11*bis*. In a trial against Mrkšić, Šljivančanin and Radić, the so called *Vukovar Three* case, the Office of the Prosecutor (OTP) filled a motion to the Tribunal to refer the trial to a local court. However, Croatia demanded the accused to be tried in the country where the crimes were committed, i.e. Croatia, while Serbia wanted to get the case on the basis of accused nationality and because the extradition of Serbian citizens to the third countries was unconstitutional. The problem was solved by holding the trial at the ICTY, but the ICTY transferred to War Crimes Chamber in Belgrade enough material to open a trial against direct perpetrators at the agriculture farm Ovčara near Vukovar. Vukovar

three and Ovčara trials were held almost simultaneously and are subject of our analysis in the coming chapters. The second case study from this research was also subject to back referral strategy. The process against the Croatian generals Ademi and Norac for crimes committed in Medak pocket was proposed to the Croatian judiciary. The eventual acceptance of the referral showed the confidence in Croatian legal system in relation to trails of its own nationals for the crimes committed against Serbian population in Medak. The main problem posed before the ICTY was the capacity of Croatian judiciary to transform the indictment issued for crimes committed under Article 7(3) command responsibility. Eventually *amici curiae*[96] judged it possible with a "creative interpretation of the existing legislation"[97]. As in Serbia, the main by-pass is via crime of omission, i.e. that the guarantor filed to take necessary measures to prevent a crime or punish its perpetrators. In Ademi and Norac case command responsibility was proven on the basis of Articles 120, 122 and 128 of the Croatian Criminal Code, namely war crimes against civilians, prisoners of war and ill treatment of wounded, sick and prisoners of war. Detailed analysis of that case is given in a later chapter.

[96] Rule 74 - Amicus Curiae (Adopted 11 Feb 1994)
A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.
[97] Transcrip available in the icty judcial database

5.5. READJUSTIMENT – CRIMINAL CODES

The readjustment on the axis international humanitarian law – domestic law is explained above, but it represents only one side of the problem to be solved before organising fair trials for war crimes in Croatia and Serbia. Domestic courts face also temporal readjustment, namely the application of Criminal Code adequate for processing war crime trials happened between 1991 and 1995. In the Socialist Federative Republic of Yugoslavia national statutory laws were the only direct source of criminal law. Criminal Code of 1977 was in power when most of the crimes during the wars in Croatia and Bosnia happened. In addition the content of the Constitution of 1974 acknowledged the state to respect norms of international law and to apply them directly.

Nevertheless, there are two principles to observe from the point of view of applicability of one legal tool or another: 1) principle of legality - *nullum crimen, nulla poena sine lege,* and 2) principle of *tempus regit actum* with *in dubio mitius* exception. The principle of legality in the SFRY was regulated in its Constitution, under the Article 3: "No punishment or other criminal sanction may be imposed on anyone for an act which, prior to being committed, was not defined by law as a criminal act, and for which a punishment has not been prescribed by statute". In Croatia, the principle of legality is included in the Article 31 of the Constitution of the Republic of Croatia: "No one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by

law. If a less severe penalty is determined by law after the commission of said act, such penalty shall be imposed". Article 34 of the Constitution of the Republic of Serbia concludes in similar manner: "No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act. The penalties shall be determined pursuant to a regulation in force at the time when the act was committed, save when subsequent regulation is more lenient for the perpetrator. Criminal offences and penalties shall be laid down by the law."

Provisions of Criminal Codes of SFRY and its successor states are very similar in nature and content. Thus, there is no need for such broad interpretation explained in previous chapter where some provisions of the ICTY Statute were not present in the former Yugoslavia's legal system. Major differences are in the length of punishment. For example, the 1977 SFRY Criminal Code permitted the death penalty, although only for the most serious crimes, otherwise the length of the punishment varied from fifteen days to fifteen years, and in particularly serious crimes could rise to twenty years of imprisonment.

All Criminal Codes ranging from 1977 one to the Serbian 2006 one respect the rule of *tempus regit actum* which states that the law that was in force when the criminal act was perpetrated shall be applied. Still if the law has been changed or amended after the commission of the crime, a less severe law for the alleged criminal would be applied.

This rule is known also as *in dubio mitius*. To conclude, the chosen law has to be less severe in relation to the offender, not in general terms.

CHAPTER 6
THE "OVČARA" TRIAL

On December 4th 2003, War Crimes Council of the Belgrade District Court[98] issued its first indictment against eight alleged perpetrators of war crimes committed at farm building Ovčara, close to Vukovar, Croatia. Based on documentation ceded to the Serbian Authorities by the ICTY, the indictment accused members of Territorial defense of Vukovar (TO Vukovar) and paramilitary formation "Leva Supoderica" for the crimes against prisoners of war, according to the Third Geneva Convention of 1949 on the Treatment of War Prisoners and Geneva Convention Annexed Protocol on Protection of Victims in Non-international Armed Conflicts. In particular, indictees were accused of violence, murder, cruel treatment and torture, as well as outrages upon personal dignity, humiliating and degrading treatment. The events described regard execution of at least 200 war prisoners at Ovčara farm, transferred from Vukovar hospital to Yugoslav People's Army (JNA) barracks.

Almost simultaneously, in The Hague, before the ICTY, three former JNA high officers were tried for the same crimes. The indictment issued by the ICTY against Mrkšić, Radić and Šljivančanin[99]

[98] After the judicial reform Belgrade District Court became High Court, therefore we will use hereinafter its commonly widespread name: Special Court for War Crimes

[99] The initial indictment was confirmed on 7 November 1995, was later amended to include Slavko Dokmanovic, mayor of wartime Vukovar. Following the death of the

describes events dating from the beginning of siege of Vukovar in Late August 1991, fall of the city to Serb forces, forced removal of about 400 non-Serbs from the Vukovar hospital and killing of at least 264 Croats and other non-Serbs. JNA generals are accused of participation in so called Joint Criminal Enterprise (JCE) with aim of persecution of "Croats and other non-Serbs present at Vukovar hospital after the fall of the city, through the commission of murder, torture, cruel treatment, extermination and inhumane acts". The international tribunal's indictment also differs in the nature of crimes and in criminal procedure undertaken in order to prove those crimes. Namely, the "Vukovar three" were accused for crimes against humanity and violations of the laws or customs of war according to the Statute of the ICTY; therefore victims are presumed to be also civilians and not only prisoners of war[100]. Moreover, they are charged on the basis of

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fourth indictee, the indictment was changed three more times and was finalised on 15 November 2004

[100] According to the Third Geneva convention from 1949 prisoners of war are described in the Article 4:

Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:[
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the

individual criminal responsibility and superior criminal responsibility, whereas the Serbian indictment deals only with direct executors and thus prosecutes exclusively individual responsibility. The detainees were transferred to Ovčara from JNA barracks, but the indictment issued by the War Crimes Prosecutor in Belgrade did not include any of the events before the arrival on Ovčara farm, and accordingly did not question responsibility of various army officers that allegedly agreed to render the prisoners to the TO and paramilitary. Consequently, such a selective indictment cleared *a priori* any involvement in the crime of the state institutions such as army or military police. However, both the indictment and the judgement agree on Vukovar TO and paramilitary unit Leva Supoderica being components of the then JNA.

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armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

On the other hand, Article 5 of the ICTY statute defines crimes against humanity in the following way:

The International Tribunal shall have the power to prosecute persons 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.

Punishment for the offence described by the Serbian indictment is regulated by the Article 144 of Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY). Hence the rule of *tempus regit actum*, i.e. that the law that was in force at the time a criminal act was committed shall be applied to the perpetrator of the criminal act. Yet, when trying war crimes committed during the conflicts in the former Yugoslavia, as a general rule, the Serbian courts apply the 1993 FRY Criminal Code as the law more favourable to the accused. The reason behind is that if after the perpetration of an act a less severe punishment is determined by law, such punishment shall be imposed. In case of Article 144 (war crime against prisoners of war) of the SFRY Criminal Code, the maximum punishment was death penalty, whereas in the SRJ Criminal Code the maximum punishment was twenty years of imprisonment.

6.1. MEDIA COVERAGE OF THE TRIAL IN SERBIA AND CROATIA

Three domestic trials addressed by the War Crimes Prosecutor's Office in Belgrade for the war crimes committed at Ovčara farm near Vukovar have been resolved by final judgements. This research focuses on the case Ovčara I – Vujović et al., started before the Special Court for War Crimes in Belgrade on March 9th 2004. First instance judgement was rendered on December 12th 2005, but was reversed by the Serbian Supreme Court a year later and the case was put back on trial due to "procedural mistakes". New first-instance judgement was rendered by the District Court's War Crimes Chamber on March 12th 2009. On September 14th 2010 the Appellate Court in Belgrade has confirmed the first instance judgement.

Length of the trial as well as specific circumstances such as the opening trial for newly founded Special Court and controversial decision of Supreme Court or even the simultaneity of the ICTY case Vukovar hospital secured relatively good media coverage in both Serbia and Croatia. In Serbia, differently from the reports concerning trials held before the ICTY, the tone of the articles describing Ovčara case tried to get an impartial, almost indifferent quality. On the other hand, Croatian press mainly showed scepticism, being the case processed in Serbia and not in the country were it was perpetrated, Croatia. Croatian media remained victim oriented, but at the same time insisted on relationship of Ovčara crimes within general frame of Serbian aggression led by the JNA forces.

The choice of the indictment to bring charges against the alleged perpetrators for criminal offence of war crimes against prisoners of war avoided discussion about background situation in which the crime was committed. Instead, the case held before the ICTY, brought charges for crimes against humanity. For persecutions on political, racial, and religious grounds, extermination; murder, torture, inhumane acts the court has to prove that the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his acts for purely personal motives completely unrelated to the attack on the civilian population. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict. The role of context is therefore crucial in trials of crimes against humanity. Nevertheless, the presence of

official historical narratives about the causes of war could be noticed in sometimes free interpretation of legal material exposed in the courtroom.

In Serbia, in 2003 there were about 70 newspapers articles dealing with the investigation process and later indictment for crimes committed at Ovčara. News were usually short and regarded investigatory work before the indictment was issued. Therefore, very often headlines are main sources of information, as most of the newspapers used agency news in articles' body of text. All the accused were caught during police operation "Sablja" in the immediate aftermath of ex Prime Minister Djindjic's murder. Therefore, most of the articles depicts political will to deal with the past atrocities, but at the same time recalls constantly that the accused were members of paramilitary units or Serbs from Vukovar attached to the TO. Croatian media also paid little attention to the issue of indictment. This is quite predictable, considering how unsuccessful were other attempts to coming to terms with the past, for example show trials set up throughout the region or Truth commission formed by the Government of Serbia and Montenegro in 2001 and faded away in 2003.

Once the start of the trial has approached, it gained much more attention in the media. Serbian newspapers had headlines mostly related to the start of the trial, but also some of them underlined the fact that the accused were members of TO (for example *Dnevnik* -For "Ovčara" eight accused from the TO Vukovar, *Blic* – The Duke surrened, *Glas javnosti* - Chetnik duke voluntarily at court), or that the crime has been committed *(Večernje novosti* – The injured were also

executed, *Večernje novosti* – 192 war prisoners killed, *Danas* – Guilty for murder of 192 war prisoners).

On March 10th 2009 many newspapers in Serbia cited first defendant's initial statement already in the title. Vujović accused some JNA officials for ordering massacre and therefore triggered debate about the role of the JNA and consequently Federal Republic of Yugoslavia in war in Croatia: *Balkan* – Defendant demands the arrest of Aca Vasiljević, ex chief of KOS (Counter-intelligence service), *Blic* – General Vasiljević knows who ordered massacre of civilians, *Glas javnosti* – General Vasiljević keeps the secret of Ovčara, *Politika* – Indictee accuses general Vasiljević. Others opted for the historical moment of the trial: *Politika* – Historical event for the judiciary, *Politika* – From Zvornik to Ovčara, *Blic*- Turning point for Serbia, *Večernje novosti* – Test for Belgrade, *Danas* – History in the courtroom, *Dnevnik* – Ovčara trial – test for Serbian judiciary.

Croatian newspapers reported with great interest the beginning of the Belgrade trial. They concentrated on the fact that the victims were mostly Croatian nationals. Unlike Serbian media who gave attention to defendants' statements, Croatian ones looked first on the crime itself. On the visual plan there are also significant differences: while in Serbian papers the photos are depicting mostly the courtroom of new modern tribunal the Serbian state should be proud of, the Croatian ones have chosen photos of the monuments in Vukovar or portraits of victims' families. Main headlines announcing the beginning of the trial were*: Jutarnji list* – Death squad at Ovčara was killing Croats for seven hours, *Večernji list* – 50 witnesses to testimony for Ovčara crimes, *Vjesnik* – Only Perić admitted killing of prisoners at Ovčara.

As already mentioned in the introduction, this research is trying to operationalise how certain statements appear in the discourse, legal and media, rather than another. We explore the circumstances that made possible certain kinds of definitions regarding several key concepts present in war crime trials reporting in Serbia and Croatia: 1) number of victims; 2) who were the victims: prisoners of war, civilians or wounded; 3) nation labelling; 4) role of the JNA; 5) use of history; 6) what happened in Vukovar beforehand?

The indictment issued by the War Crimes Prosecutor in Belgrade named at least 192 victims (200 after amendment), differently from the ICTY one that based its case on 261 victims (around 60 are still treated as missing). Even though judicial truth differs from history or official narrative about the war, some of the media, mostly Croatian[101], insisted on the facts provided by The Hague tribunal. Numbers are particularly important when it comes to the penalties. On December 12th 2005 Special Court for War Crimes rendered judgement in Ovčara case. Eight persons were sentenced to 20 years imprisonment (maximum penalty), three to 15, one to 12, one to 9 and one to 5 years. Two were released due to the lack of evidence. *Večernji list* highlights "Only a year for each killed at Ovčara" and "Murderers at Ovčara (punished) as for thief of mobile phone" (March 12th 2007) and gives a short survey in which everybody asked more severe punishments. *Jutarnji list* announces "20 years of imprisonment for eight worst executors from Ovčara", and *Vjesnik* also quotes "Criminals from Ovčara got from 5 to 20 years". Serbian newspapers *Glas javnosti,*

[101] *Glas Slavonije* – Pokajnik Stuka imenovao zlocince koji su 1991. strijeljali 260 Hrvata na Ovcari; *Jutarnji list* – Pokajnik s Ovcare […] ispitivan o masakru 260 Hrvata pokraj Vukovara

Danas, Blic, Politika, Dnevnik report mainly by stating overall number of prison years, 231, which definitely makes sentencing look severe and adequate. *Večernje novosti* and *Kurir* underline maximum punishment. When in March 2009 Special Court diminished punishments to some of the previously convicted war criminals, in Serbia only *Politika* daily reported that fact already in the headline. Belgrade's strategy was again to announce overall years of imprisonment for the crimes committed. Croatian dailies remembered that the sentence was lighter and, even though articles were shorter than couple of years ago, assumed more emotional comments about "shame" (*Večernji list*) , "difference between sentence and punishment" (*Jutarnji list*), "(ir)responsibility" (*Vjesnik*).

Second problem analysed in media material is labelling of the victims. Croatian newspapers keep on underlining that nearly 200 victims were "Croats" or "Croatian prisoners" (*Jutarnji list, Vjesnik, Glas Slavonije, Vukovarske novine*), whereas *Večernji list* calls them "defenders, civilians and wounded". Only one article from *Vukovarske novine* ever mentioned "Croatian war prisoners". This omission is very important as it is absolutely necessary in order to explain the indictment. Moreover, this is precisely the point in which the ICTY and Special Court legal arguments differ. As for reports of Serbian media the situation turns out to be more complex. Usually prisoners' nationality is never mentioned, they are mainly labelled as "prisoners of war". *Danas* varies largely in labelling the victims: it mentioned on March 9th 2004 that 192 members of Croatian army were killed, two days later that „prisoners of war, civilians and army members" were executed, and in 2005 calls them „civilians taken from Vukovar hospital". Most alarming is the case of *Politika* that on March 11th 2004 analyses „Croatian view

point on trial" in the article entitled „Victims without nationality". While the author claims that media outlined that the victims were „civilians, wounded and hospital staff", mainly „Croats and other non-Serbs", it comments that „this statement is partially true, because among executed victims there were *Serbs* as well" [emphasise added]. Nevertheless, just couple of lines afterwards the author mentions „trials in Split where the accused were *Croatian* army militiamen for crimes against *Serbian* prisoners". [emphasise added] However, the War Crimes Chamber noted the accused's knowledge that victims were protected:

[t]he fact that among the prisoners there were wounded and civilians, as well as the Serbs belonging to the "opposing side" […] is beyond doubt. However, this Court believes […] that the awareness of the accused and their intent point to the fact that those were perceived as the members of the opposing party, prisoners of war (as all those who do not acknowledge the perpetration of the offence, as well as witnesses heard and witnesses-collaborators used the term "prisoners" in relation to the injured parties). Hence, bearing also in mind such awareness of the accused, the Court qualified the act as the offence from Article 144 FRY CC.

Serbian newspapers carefully avoided defendants' nationality, whereas Croatian one insisted on it. Even if there is a hint about it, it is usually put in a form of witness statement, as in article published by *Blic* on September 15th 2005 "Witness: Serbs were killing imprisoned Croatians at Ovčara". For the Serbian media the nationality becomes important issue once accused half Serbian – half Croat Ivan Atanasijević admits shooting at the prisoners. Titles like "Admits to

have shot Croatian prisoner" (*Danas*) in perspective of Atanasijevic being a Croat is not a problem, because it still leaves "clear" the Serbian side. Moreover, when the 2005 sentence was revoked suddenly "Croats were not satisfied" (*Gradjanski list*), "Ovčara case made Croats angry" (*Blic*).

Even though the Ovčara case was put back on trial, overall impression is that the Trial Chamber with presiding Vesko Krstajić contributed greatly to dismantle ideological narratives about the events in Vukovar. Unfortunately, the indictment did not include JNA commanders not soldiers, but the court was satisfied that the army "deliberately left prisoners to the members of TO and paramilitary". This trial triggered precisely the debate over the role of Belgrade in controlling the JNA. Almost simultaneously with the beginning of the trial in Belgrade and The Hague charges were pressed at Croatian district court, involving some of the JNA ex officials. During the trial all defendants accused the JNA for organising massacre at Ovčara and described that it was the army that commanded over TO. Croatian media accused JNA officers for exercising "Milošević's concept based on mass killings and ethnic cleansing" (*Vjesnik* March 9th). Večernji list also remembers on various occasions the JNA General Staff that "initiated formation of paramilitary units and let them make war in Vukovar". *Jutarnji list* as well underlines that "a number of very high officers that appeared on court as witnesses are clearly responsible for what happened" in Vukovar. Some Serbian newspapers underlined that the Ovčara trial was the "first time that direct responsibility of JNA was transferred to the Serbian forces in Vukovar" (*Dnevnik*). The sentence established that the regular army of JNA did not take part in

the crime at Ovčara and that its members did not know that colonel Mrkšić decided to render prisoners of war to the TO. To sum up, anonymous members of TO were convicted, JNA's responsibility managed to disappear and the state continued to escape broader public debate about responsibility in the war.

Finally, is there a possibility to reach some kind of ideal truth and factual history? "We will not talk about the causes of war, this should be left to the course of history", underlined judge Krstajić at the end of trial, "what is indisputable is the fact that crimes happened at Ovčara". Nevertheless, this trial marks the process of alienation from long-time official version of "liberation" of Vukovar, to "Vukovar conflict", "operation" and finally "fall of the city". Even though the indictment for Ovčara crime was really narrow, some background information regarding the role of the army and the FRY state were indisputably proven. Dismantling of the old ideologies related to the war in Serbia was perhaps best described by defendant Predrag Dragović's statement: "I feel sorry for the victims and for the Serbian history".

The innovative element this project is dealing with is the impact of domestic tribunals for war crimes on creation of historical narratives. In addition it gave a comparative perspective on Croatian and Serbian media reporting on war crime trials. The problem of judicial responsibility is tackled on two levels: international and domestic. International Tribunal for the former Yugoslavia (ICTY) provided full compliance of both Serbia and Croatia, but the cooperation was made possible only by judicial conditionality

performed by the international community, mainly the EU. Domestic trials for war crimes offered a very challenging framework in which the main aims of transitional justice were set apart and political strategies of denial were put in action. Different ways to deal with proceeding for serious breaches of humanitarian law are analysed in depth.

This research tracks the process of domesticating of the war crimes trials. Crimes described in detail during ICTY trial Vukovar hospital were referred to local courts: in Ovčara trial part of the material gathered during the investigation process war used to indict lower ranked perpetrators. According to the Statute of the ICTY the indictees can be accused of crimes against humanity, violations of the laws and customs of war, genocide and breaches of the Geneva Convention. Consequently, the ICTY gave broader political and historical context of the war situation as the Tribunal builds its cases around the practice of proving Joint Criminal Enterprise and command responsibility. War Crimes Chamber in Belgrade cannot prosecute crimes that were not included in the legislation at the time the crimes were committed. At the domestic level, Prosecutions have no incentive to examine the context as they do not need to prove systematic violations of humanitarian law, but concentrate on separately on each single crime. In those circumstances, the truth-telling capacity of the domestic war crimes trials is extremely limited.

This research compares notions of collective and individual responsibility, guilt and accountability and their relation with new political ideologies. Even though the ICTY's jurisprudence can establish only individual guilt, the defendants rather insist on collective guilt when accusing The Hague Tribunal. The reasoning again derives from

the attempt to discredit international humanitarian law's possibility to pursue command responsibility and by extension, general responsibility. On the other hand, accused at domestic courts carry no political weight and belong mostly to paramilitary formations outside the official army. Nevertheless, recent trials for war crimes in both Serbia and Croatia see former military officers accused for wrongdoings and there is a change in tone of the reports thought time.

Ostojić argues that it is "the pacification of the domestic political scene and the strengthening of democratic institutions that gradually improved prospects for establishing accountability" (Ostojić, 2011). This research support the hypothesis that post-conflict societies accepted consequences of past atrocities, but still did not take full responsibility for the crimes committed. Instead, twenty years of instrumental denial and subsequently little or no interest for dealing with the past "cleared" the terrain for more objective and fair trials. In addition, historical knowledge and continuity with the past is broken in attempt to create a new political community, cleared of past wrongdoings.

In Serbia, war crime trials pertain to be a minor topic in the public sphere. There is a great deal of silencing and auto-censure about the nature of the war itself that balances between "possible responsibility for war" and "responsibility of the other party" and therefore trails are represented mostly in a very technical, seemingly objective manner. On the other hand, Croatian identity is strongly connected to the Homeland war and crimes are understood mostly as legitimate defence. Scholars like Peskin and Subotić explain the scarce response to transitional justice mechanisms by power balance between

nationalistic and liberal political elites and model their identity and behaviour. This research's thesis is that instead of triggering truth seeking and truth telling processes that would lead to reconciliation, the focus on war crimes has multiplied the mutually exclusive historical narratives that are increasingly determining national collective identities. Politics of interpretative denial does not deny "the raw facts; rather, they are given a different meaning from seems apparent to others" (Cohen, 2001). War crimes and legal heritage hence become consciously distant. In addition, general argument for not dealing with the past is fragility of newly established democracy of countries in transition from conflict.

Artificially isolated question of transitional justice and democratic transition justified no apparent need for systematic dealing with the past. The ICTY trials have lifted away any kind of denial of committed crimes. Nevertheless, there is little public interest in domestic war crime trials due to the fact that the democratic transition was conducted separately and with no mean of connecting issues of dealing with past wrongdoings with the regime transition. Still, transitional justice helped judicial reform and rule of law practices, but only once the democratic consolidation process has already started. Compliance with the ICTY was managed with great democratic deficit as political elites acted upon conditionality dictate. Nevertheless, the continuous process of collecting "judicial truths" through domestic war crime trials might overcome political and institutional influence courts are dealing with.

CHAPTER 7

"MEDAK POCKET" TRIAL

On November 1st 2005 the ICTY transferred a case to Croatia under the Rule 11bis of the Rules of Procedure and Evidence for the first and so far the only time. Impending closure of this ad hoc tribunal under completion strategy and a growing confidence in Croatian judiciary concluded in handing over of the "Medak Pocket" case to local judicial institution. General Rahim Ademi was indicted on June 8th 2001 before the ICTY for "persecutions on political, racial and religious grounds; murder; [crimes against humanity] plunder of public or private property; wanton destruction of cities, towns or villages [violations of laws and customs of war]"[102] under command responsibility while he was acting commander of the Gospić District during military operation in Medak Pocket from September 9th to September 17th 1993. General Norac was indicted three years later, on May 20th 2004, for the same criminal acts and their cases were joined and indictments consolidated. Ademi and Norac were accused of having "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of persecutions of Serb civilians of the Medak Pocket on racial or religious grounds". The indictments charged two generals on the basis of their individual criminal responsibility according to the Article 7(1) of the ICTY Statute and on the basis of command responsibility according to the Article 7(3) of the same Statute.

[102] Case information sheet accessed on the icty's web page: http://icty.org/x/cases/ademi/cis/en/cis_ademi_norac.pdf

In 2006 State Attorney's Office issued a direct indictment against Rahim Ademi and Mirko Norac. As we already explain in Chapter 3, until it was introduced in 2004 in Criminal Code, command responsibility was unknown to local judiciary. Moreover, the rule of legality - *nullum crimen, nulla poena sine lege* – turns unconstitutional any decision to retroactively take use of provisions non existent at the time of commission of the crime. Consequently this trial was important because it set the standard of legal practice in cases dealing with the superior criminal responsibility.

Norac and Ademi were accused for criminal acts under Article 120, par. 1[103] of 1993 Basic Criminal Code of Republic of Croatia, i.e. war crimes against civilians, and under Article 122[104] of 1993 Basic

[103] Ratni zločin protiv civilnog stanovništva
Članak 120.
(1) Tko kršeći pravila međunarodnoga prava za vrijeme rata, oružanoga sukoba ili okupacije naredi da se izvrši napad na civilno stanovništvo, naselje, pojedine civilne osobe ili osobe onesposobljene za borbu, kojega je posljedica smrt, teška tjelesna ozljeda ili teško narušavanje zdravlja ljudi, napad bez izbora cilja kojim se pogađa civilno stanovništvo, da se civilno stanovništvo ubija, muči ili da se nečovječno postupa prema njemu, ili da se nad njim obavljaju biološki, medicinski ili drugi znanstveni pokusi. da se uzimaju tkiva ili organi radi transplantacije, ili da mu se nanose velike patnje ili ozljede tjelesnoga integriteta. ili zdravlja, da se provodi raseljavanje ili preseljavanje ili prinudno odnarodnjivanje ili prevođenje na drugu vjeru, prinuđivanje na prostituciju ili silovanje da se primjenjuju mjere zastrašivanja i terora, uzimaju taoci, primjenjuje kolektivno kažnjavanje, protuzakonito odvođenje u koncentracione logore i druga protuzakonita zatvaranja, će se provodi lišavanje prava na propisno i nepristrano suđenje, prinuđivanje na službu u oružanim snagama neprijateljske sile ili u njezinoj obavještajnoj službi ili administraciji, da se prinuđuje na prinudni rad, izgladnjuje stanovništvo, provodi konfiskacija imovine, da se pljačka imovina stanovništva, protuzakonito i samovoljno uništava ili prisvaja u velikim razmjerima imovinu što nije opravdano vojnim potrebama, uzima nezakonite i nerazmjerno velike kontribucije i rekvizicije, smanjuje vrijednost domaćega novca ili protuzakonito izdaje novac, ili tko počini neko od navedenih djela, kaznit će se zatvorom najmanje pet godina ili kaznom zatvora od dvadeset godina.

[104] Ratni zločin protiv ratnih zarobljenika
Članak 122.
Tko kršeći pravila međunarodnoga prava naredi da se ratni zarobljenici ubijaju, muče ili da se prema njima nečovječno postupa, nad njima obavljaju biološki, medicinski ili drugi

Criminal Code of Republic of Croatia – war crimes against prisoners of war, both in relation to the Article 28[105] of the same Criminal Code – modalities of committing a crime. Although superior and command responsibility is not explicitly recognized in none of those articles, putting them in relation to Article 28 which states that the criminal act may be committed by commission or *omission* resulted in following interpretation: the accused knew about the crimes perpetrated by his subordinates, but did not act to prevent them, thus he is responsible for those crimes on command responsibility ground. Omission is possible only when the perpetrator has failed to perform the act which he was obliged to – in this case to respect Geneva Conventions on Civilians and Prisoners of War and Additional Protocol I. Article 120, par 1 describes crimes against civilians as stipulated by international law and prescribes punishment from five to twenty years of imprisonment. Article 122 in similar vein describes crimes against prisoners of war and prescribes equally severe punishment.

On May 30th 2008, the Zagreb District Court sentenced general Norac to seven years' imprisonment and acquitted general Ademi of all charges. Supreme Court of the Republic of Croatia confirmed trial judgment as it established requisite of *mens rea* for Norac who

znanstveni pokusi, da se uzimaju tkiva ili organi radi transplantacije, da im se nanose velike patnje ili ozljede tjelesnoga integriteta ili zdravlja, da se prinuđuju na obavljanje službe u neprijateljskim oruenim snagama, ili da se lišavaju prava na propisano i nepristrano suđenje, ili tko počini neko od navedenih djela, kaznit će se zatvorom najmanje pet godina ili kaznom zatvora od dvadeset godina.

[105] Način izvršenja krivlčnog djela
Članak 28.
(1) Krivično se djelo može počiniti činjenjem ili nečinjenjem.
(2) Krivično djelo može biti počinjeno nečinjenjem samo kad počinitelj propusti činjenje koje je bio duzan izvršiti.

committed a crime by omission as he, in the capacity of guarantee, did not do anything to prevent the direct perpetrators from committing crimes. However, the Supreme Court found that, even though the trial confirmed his guilty of knowing, Mirko Norac could not be criminally liable for the crimes which were committed by the units under his command on the first day of the military operation "Medak Pocket" because he could not have prevented them until he learnt that those crimes took place. The Basic Criminal Code did not have *de facto* command responsibility provision and thus no causal links between subordinate and superior actions were defined. The only possible norm to use was the Article 176 of the Criminal Code of 1993, which penalizes failure to report a crime, but it went into absolute prescription as the double time lapse of maximal punishment for that crime has passed. Still, at the time of commission of crimes Croatia was a signatory of international treaties, which in judicial hierarchy were under Constitution but above statutory laws. Therefore according to the rules of customary law Articles 86 and 87[106] of the Additional

[106] Article 86 - Failure to act
1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
Article 87 of Additional Protocol I to the Geneva Conventions sets out the duty of commanders
1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol[....]

Protocol I could have been used. In that case new Criminal Code prevails following the *in dubio mitius* rule.

This trial brought many pioneer steps into Croatian legal practice. The case law for command responsibility war the wars of 1990s is established as an important precedent for the future. Nevertheless, during the presentation of evidence many witnesses confirmed the existence of a parallel chain of command led by the Special units of the Ministry of Interior, but no other indictment has been issued for crimes perpetrated in Medak Pocket. Moreover, no investigation took place which included officers in charge of the area holding higher positions than Ademi and Norac.

Finally, Norac was charged with the least severe punishment prescribed by Articles 120 and 122 of the Basic Criminal Code of 1993. In addition, at the end of 2011 Norac was granted early release one year before serving entire sentence even though he never publicly expressed regretting the victims. The complexity of the trial reasoning combined with the apparent "light" sentence and political crisis caused by general Norac's arrest in 2001, made this legal narrative easily manageable in media discourse.

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3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

7.1. MEDIA COVERAGE OF THE TRIAL IN SERBIA AND CROATIA

After the death of Croatian president Franjo Tudjman in 1999 parliamentary elections saw the Croatian Democratic Union (HDZ) government replaced by a centre-left coalition with Ivica Račan elected prime minister. The new government amended the Constitution changing the political system from a presidential system to a parliamentary system which enabled democratic transition of this Western Balkan country. Račan's government faced with obligations towards ICTY. Domestic politics of cooperation dealt with several war crimes indictments against high ranked military officers: Mirko Norac indictment in early 2001, the Ante Gotovina and Rahim Ademi indictments in mid-2001, and the Janko Bobetko indictment in the autumn of 2002.

The decisive electoral victory that swept democratic leaders into power in 2000 did not remove the nationalist right-wing parties from the political landscape. Nor did it undercut the right wing's ability to mobilise around defending the sanctity of Croatia's war of succession by protesting against the ICTY's indictments of several Croatian generals who have become national heroes for their role in this war. Croatia had a very special position during the war. Country's national identity is built on the myth of the Homeland war (Domovinski rat) and any arguing about the acts and eventual war crimes committed by Croatian army is a direct attack on the Croatian state itself. Croatia has a status of both victor and victim, as in 1991 was obviously attacked by Serbian forces, but exercised aggression on

Bosnia and Herzegovina. Therefore questions related to the perpetration of war crimes in Croatia are particularly sensitive.

On 8 February 2001 State Attorney's Office issued an arrest warrant for war crimes committed in Gospić area. Ex General Mirko Norac went into hiding the following day as he feared transfer to the ICTY and wanted a guaranty of facing the process in Croatia and not in The Hague. The arrest warrant accusing Norac of crimes against humanity and war crimes against civilians was the first of a kind issued for a Croatia general. This situation provoked outrage in the public space and gathered as many as 100 000 protesters in Split expressing their solidarity for the fugitive. So called Committee for the Protection of Homeland War, backed heavily by the HDZ, threatened already fragile political power centre-left "coalition of six" and provoked a major crisis in the country. Main idea behind "We are all Mirko Norac" protests slogan was that of "paradox" of trying generals of the winning party in the war. In this research we abstained from analyzing this case because of the strong political connotation it was bearing along. Moreover, domestic trials for war crimes were at the very low judicial quality level at the time, especially in the matter of fair trial and bias towards non-Croatian nationals. It was only with extreme personal ethic and skill that the judge Ika Šarić managed to conduct professional trial. In addition, the media were more concentrated on the personality of Norac and political games happening around this trial. Nevertheless, it is worth noting that, unlike two years before when massive protests occurred, the day the sentence was pronounced in March 2003 only couple of thousands of people gathered to express their disagreement. When the judicially proven fact of general Norac shooting an old lady

and being responsible for other people's executions reached the public sphere, the consequence was visible and transformative. Mirko Norac was sentenced to 12 years' imprisonment for planning and organizing killing of about 50 civilians of mainly Serbian nationality.

As early as June 2001 the ICTY made public the indictment against General Rahim Ademi for crimes committed during the military operation "Medak pocket". On 20 September 2002 another indictment was issued for the ex Chief of the Main Stuff of Croatian Army Janko Bobetko who deceased before the beginning of the trial proceedings. Finally, in May 2004 the ICTY issued the indictment against ex General Mirko Norac and his case was joined with Ademi's one.

As we already stressed in the first part of this chapter the ICTY decided to transfer this case to the Croatian judiciary under the Rule 11*bis* and therefore the indictment itself needed to be readjusted with the domestic Criminal Code. One of the main sources of media manipulation is precisely based on different indictments, definition of the operation itself or severity of the crimes. Therefore, the news frame built around the nature of the operation and to larger extent is our first point of analysis. Moreover, the qualifications of two Generals vary from country to country, from newspaper to newspaper. In addition, the exact number of victims and the question whether they were civilians or not is another source of the debate and framed "victims' ideologies" or "victors' narrative". We also follow twisted interpretations of the legal documents and norms, whether they were done on purpose and what strategy, if there is any, is used. Another important aspect is the "mirror" image one nation has of the other, and

how do media report on "their" representations of "us", i.e. what is the representation of the representation. Finally, we analyse the media space given to the voices of victims.

When in 2004 the ICTY issued consolidated indictment against Croatian generals Rahim Ademi and Mirko Norac for war crimes in Medak Pocket the first reactions sparked the debate whether the trial is going to be hold before the local court in Croatia. It was not the severity of heinous crimes that drew attention of the media both in Croatia and in Serbia, but the possible transfer of the case to the Croatian judiciary. Croatian public remembered well the political crisis provoked in 2001 when Norac refused to be tried before The Hague tribunal and went into hiding when the indictment for Gospić group was issued. He was then reassured by the Government that he will not be transferred to The Hague and therefore the main topic three years later lead inevitably to the same problem. Ten years after the war, a public debate concerning the role of the Croatia in Homeland war did not happen and the majority supported the idea that the army leading just, defensive war could be responsible for war crimes. Nevertheless, Croatian judiciary had to demonstrate its capacity to try its own nationals on the basis of just and fair trial.

On the 26 May 2004, one day after the indictment became public, the news made headlines in all Croatian newspapers. *Vjesnik* put on its front page a big picture of Norac took at the courtroom during his previous trial for war crimes with a headline "Norac indicted for "Medak Pocket", trial in Croatia". Besides listing the counts of indictment the major attention was given to the fact that the trial would most definitely take place in Croatia. Incumbent Minister of

Justice Vesna Škare-Ožbolt argued that it "is important that the indictment against Norac does not contain the arrest warrant and his surrender to The Hague". Second article dealing with the matter was extremely emotionally coloured as it represented some kind of *vox populi* of Sinj, hometown of Norac. Inhabitants expressed their shock and disbelief; some argued that "he would have faced more fair trial in The Hague", that "they want to destroy us as nation, make us fight each other and extinguish our Croatian seed". Norac was also called "Croatian saint" who "went to war with his heart and because of his love for homeland". In article titled „First trial in Croatia based on command responsibility" *Vjesnik* than concentrates on more legal issues guessing who else could be indicted for crimes in Medak Pocket area and quotes the text of the indictment. They proceed with the critique of the tribunal saying that it "has already raised a lot of distrust both in Croatia and in some expert circles in the West, because of the common law system practice, frequent discontinuities in workload, political prejudices of some of its high officials and outrageous constructions that equal roles of the aggressor with the victim." Once again, apart from the incorrect information about the ICTY being based on common law, the newspaper assumes again the thesis that the victim, which in the Homeland war is Croatia according to the already mentioned Declaration on Homeland war, cannot be responsible for the war crimes, otherwise her role would be levelled with the role of the aggressor. *Vjesnik* then reports on war veterans' organisation from Sinj which said to be ready to protest if the Government does not respect Declaration on Homeland War and does not protect the dignity of heroes of the Homeland war". *Jutarnji list* titled the headline news

"The Hague indicted Norac, trial in Croatia" and collected mainly reaction of the politicians, but gave also an emotional statement of Norac's mother who was "convinced that he would never raise his hand against anybody". *Večernji list* opened with "New indictment against Norac", and put his mother's statement "This is betrayal!" already on the front page. The newspaper analysed what are the benefits of holding a trial in Croatia, for example maximal punishment of 20 years of imprisonment. Twenty years sentence is also maximal punishment for most of the war crimes before the Belgrade War Crimes Chamber. Nevertheless, no comparative analysis of Serbian and Croatian legal system is done by the media and the "other's" sentences are always judged to be too mild.

Serbian newspapers published the news with much less attention. They also dealt with the fact that the trial would be referred to Croatia and expressed doubt in fair trial and accused the ICTY once again of being anti-Serb. *Politika* argued that "Croatian judiciary does not consider command responsibility for establishing criminal responsibility for war crimes, except when the accused are Serbian nationals". *Danas* "forgot" to put that Norac is "accused of" but presented the following as wide-known fact: "During the operation done by the Croatian Army, Mirko Norac, together with general Janko Bobetko and Rahim Ademi, planned, ordered and organised killing of Serbian civilians in Medak Pocket." *Glas javnosti* accused the ICTY of being "too busy so that the responsibles for "Medak Pocket" will face the trial before Croatian court". *Večernje novosti* assumed that "Croatian general Mirko Norac will finally have to go to The Hague".

When the case was referred to Croatian authorities, the indictment had to be readjusted according to the local Criminal Code. Once it was issued at the beginning of the 2007 reactions it sparked in both Croatia and Serbia were completely not grounded. Many newspapers argued that the original indictment had the clause of "joint criminal enterprise", while it had only the one for command responsibility. The difference of these two provisions is huge as the JCE requires active planning of the crime, while the command responsibility can be attributed to a person that did not plan crimes, but failed to prevent them. Moreover, JCE is very complex and difficult issue to prove and thus is used mainly for very vast scale programming of crimes. When *Dnevnik* published article "Croatian indictment less severe from The Hague one" it explained that "Croatian State Attorney's Office pointed out that, differently from The Hague indictment accusing Ademi and Norac of participating to JCE aimed at prosecution and ethnic cleansing of the Serbian population, new Croatian for "Medak Pocket" describes it as legitimate military operation and liberation of the occupied territory." It is really incredible to think that the Croatian State Attorney could give such information. Many other newspapers reported in the same manner. Večernje novosti from January 12th 2007 point out that the accused "are not charged for criminal enterprise". Politka reports in an article titled "Milder indictment against Norac and Ademi" even falsely "quotes" the Prosecutor saying that the JCE practice is not implemented because of the lack of legal capacity in the Criminal Code. Finally, Glas javnosti brought the news with the title "They forgot about the JCE".

The beginning of the trial on June 18th 2007 attracted lot of attention, especially in the Croatian media. Jutarnji list opened with "Trial against Ademi and Norac will be monitored by the OSCE" reminding once again the need to conduct a fair trial as a "test of readiness of Croatian judiciary to put Croatian nationals on trial". Many media underlined the fact that Norac is transferred from prison to attend the trial, while Ademi was not in the custody. Content of indictment is judged to be the same as the ICTY's one, which is followed by description of counts, but without mentioning the nature of crimes. Večernji list also gave the information about the process, for example technical information regarding the look of the courtroom, and finishes with the interviews to family members of accused. Ademi's wife saw him as regime's scapegoat, while Norac is reminded that not only relatives think of him, but inhabitant of Otok, region of Cetina and further more. The next day while describing the initial appearance of two generals before the court Jutarnji list mentions "horrible details" without going more in detail of crimes. Vjesnik opens with "We are not guilty!" and similarly also Večernji list with "We are not guilty for Medak crimes". Večernji list added that names of thirty three victims, mostly civilians, were listed, and that some of them were "allegedly" brutally tortured. For the first and only time we get to know that victims had their representatives in the courtroom and that they still haven't declared whether they would ask for reparations. Already on the second day of the trial a clash between Ademi and Norac broke out. Jutarnji list explains in the article "Ademi denounced Norac to The Hague Tribunal" how the ICTY started investigation against Norac after the information given by Ademi. Večernji list also

reports that Norac was indicted because of Ademi's statement before the ICTY.

In this research, we concentrated on a number of themes – leitmotivs, which help us explain better the representations of legal narratives and master framework of nationalism. Those are: 1) representation of the accused, 2) definition of the military operation and the underlying conflict, 3) representation of the victims and their numbers.

Mirko Norac was one of the youngest members of the Croatian Army to reach a very high military rank. He was a protégé of the first Croatian Minister of Defence Gojko Šušak and, as was shown during the trial, enjoyed confidence of then Head of Main Staff Janko Bobetko. When the 2001 indictment for crimes in Gospić was issued he fled and gained charismatic popularity like general Ante Gotovina. He was promoted to general by the late president Franjo Tudjman and became Duke of Alcari with his blessing. However, in an open letter signed in 2000 together with other eleven active or retired generals, he criticised the government for opening investigations about war crimes committed during the Homeland War and improved cooperation with the ICTY. They expressed concern about description of the Croatian War of Independence as "something bad, problematic, even shameful, while in fact it was the foundation of Croatia's freedom, independence and sovereignty." President of Croatia Stipe Mesić sent them immediately to force retirement, but the letter put more visibility on Norac and made him even more popular. In media representations concerning trial for Medak Pocket, Norac was never described as a war criminal (he was serving the other sentence for war crimes), but as an

individual extremely devoted to his homeland. When Norac was sent to The Hague to plead on his guilt before the court, Jutarnji list described the moment of the decision of Trial Chambers to transfer Norac back to Croatia as one that "entice him to smile" (July 9th 2004.) On the other hand, almost all Serbian media called him "retired general" except tabloids that used words like "butcher", "murderer" or similar.

Rahim Ademi is of Albanian nationality, originally from Kosovo and was regarded with far less sympathy than Norac. He was dismissed of duty after Medak Pocket operation, being officially the highest ranked officer in the area and was treated as lower category general. Newspapers often reminded of his Albanian origin, reporting that he for example refused the translation in Croatian during the trial. But his biggest "misfortune" was that he was confronted to Norac during the process. He was labelled whistleblower right from the start, as additionally he reported Norac to the ICTY's investigators. Already from the beginning of the trial there were allegations about so called parallel chain of command which excluded Ademi and put Norac into the position of high responsibility over army forces and special police. Finally, the court confirmed the existence of such strategy and shed new light on the events in Medak Pocket, which description were ranging from Serbian armed civilians insurgent to Canadian UNPROFOR battalion fighting against Croatian army. Instead of regular official military hierarchy, Norac had the effective command over newly formed "Sector 1" that excluded Ademi (superior to Norac) and put special police forces under general Norac's command.

One of the central narratives is certainly the one regarding the nature of the operation Medak Pocket and, on the larger scale, the war itself. Already its location is subject of controversy, being part of Republic of Serbian Krajina, self proclaimed Serb state within the territory of Republic of Croatia. Therefore, in Croatian newspaper, is it always described as "so called" or directly put into quotation mark. Serbian media call it often Republic of Serbian Krajina, even those happening to be more progressive. Moreover, Serbian media uncritically diffused the communication of the Organisation of families of missing persons from Krajina which regularly conveys commemorations for "murdered and missing persons during Croatian aggression on Republic of Serbian Krajina" (Večernje novosti, September 10th 2005.) Politika stated that the UN report made after the Medak Pocket operation explains bloody action of Croatian army (October 31st 2007.) In the same article, Politika expressed consternation because only Ademi and Norac have to respond for this "bloody feast of Croatian army". In another article Politika notes that the text of the ICTY's indictment states that the Medak Pocket operation was planned and implement aiming to prosecute Serbian population, whereas in Croatian indictment this was changed into "liberation of occupied territory".

For Croatian media there was never a shadow of doubt that the operation was liberation of occupied territory. There were also political proposals to establish a medal for those particularly meritorious during the action. Still, when the ICTY indictment was rendered public, for example Vjesnik reported that the tribunal wanted to "change the sense of the military, liberating action" and warns that "The Hague wants to

demonstrate on small scale action with big crimes the same criminal behaviour found in the indictments for operations Flash and Storm."(May 28th 2004.) Voices were given to HVIDRA veterans' association who ask the government and Ministry of Justice to deny "very heavy and false indictment against general Norac, and consequently entire Croatian nation."

Another important aspect related to any war event is the actual number of victims. Serbian rather controversial NGO Veritas has been collecting the lists with the names and details about killed and missing persons, but was not invited to the trial in Zagreb to testify. They estimated that around Gospić area about one hundred Serbs were killed, while some fifteen villages with three hundred houses were destroyed and only four persons live there now (Politika Julz 4th 2004.) In an article describing commemoration of Medak Pocket operation, Dnevnik wrote that "Croatia marked twelve years of military operation "Medak Pocket", remembering members of the army and police who died. Nobody remembered hundreds of killed Serbs." (September 10th 2005.) The ICTY indictment mentioned thirty four victims, whereas the Croatian one was described killing at least twenty three civilians and five war prisoners. Politika reported this numbers by noting that "murdered were many more". (May 31st 2008.)

While analysing media articles about the trial, the striking element is almost total absence of the voices of the victims. The only person that sporadically appears in the reports is the leader of Veritas Savo Štrbac, "a declared enemy of Croatia" as Norac's Attorney called him. Nevertheless, apart from one sentence from Večernji list saying that in the courtroom families of the victims assisted a trial, those

persons were always absent from the narrative. The only person that was interviewed by the Serbian media was again Štrbac. Even the question whether the victims were just the elderly persons not wanting to flee from their homes was question couple of times. There was an attempt to use recording of a certain woman holding a rifle as suggestion that all civilians in Medak Pocket were armed, but the Trial Chambers found it incongruous. First Croatian Minister of Interior Ivan Jarnjak was invited as witness and stated that "civilians were not killed, because entire local Serb population war armed during the Croatian military action in Medak area". (Danas, July 17th 2007). Finally, reports called victims simply "the Serbs", and not Serbian civilian population, "as if all of them served paramilitary units". (Danas, March 28th 2003.)

The last phenomenon this research is dealing with are the discourse strategies used in Serbian and Croatian media aiming to distract, shock or scandalise the reader. As already stressed, in Serbian newspapers this trial was followed much less than in Croatia, especially as the political elite was not interested in giving the space or much of a concern to the victims. Therefore, the trial was much more followed in tabloid newspapers like Kurir or openly nationalistic like Večernje novosti, as they could attract the audience with disturbing titles or aggressive tone of reporting. Titles like "Remembering bloody feast of the Croatian army of 13 years ago" (Glas javnosti, September 15th 2006.), "Sick mind" (Kurir, September 23rd 2007.), "They burned the Serbs alive" (Večernje novosti January 18th 2008.), "Serb on trial against Ademi and Norac: My wife was impaled alive" (Jutarnji list September 27th 2007), "Croats impaling Serbs!" (Press September 27th 2007.), "Ethnic cleansing!" (Glas javnosti, October 30th 2007) are just some

examples of that strategy. Strangely enough, the rest of the article might be just newspapers agency news, but the shocking title serves to influence the audience. We are not denying that some of the articles follow this strategy in their integrity, but their number is much smaller than expected. Almost all the titles in Serbia were not shown as quotes; even if in many cases it appeared to be the topic of the witness' statements, whereas in Croatia strong titles were always used as direct quotes, usually for very short articles. Another strategy was generalisation, especially in the title, where the axes Croatian-Serbian were well manipulated. Titles like "Croatian court about burning down of Serbian houses" (Dnevnik March 18th 2004), "Croatian colonel: Serbs were tortured" (Blic September 28th 2007.) are extremely reductionist, do not give information if the victims were civilians, but simply serve to underline the difference, the border between "us" and "them". On the other hand, in Croatia many articles were packed with irrelevant or purely technical information. Therefore, often family members or the accused were interviewed in relation to their love story and happy life ("Behind us is our most beautiful white night", Jutarnji list July 10th 2008.), marriage, children, then there were technical description of flying to The Hague, comparison of Sheveningen prison to the local one, etc. Finally, often selected news from the "other" was transmitted in "our" newspapers in order to give an impression of multiple voices, but the choice was made only when confirming "our" narrative.

Final remark should be given for reporting of the judgment in Medak Pocket case. Serbian media usually agency news about the sentence, but an interesting article was found in Danas where an interview was made with the Prosecutor's Office PR. Bruno Vekarić

argued that the punishment given in this judgment was very mild and wondered whether war crime trials would be done only to please the international community. Jutarnji list opted for political elite's comments, but the incumbent Prime Minister Kosor replied that "the government does not comment on trials". Večernji list depicted the trial as "marked by conflict between ex combatants", as if the severity of the crimes or pioneer judgment of Croatian judiciary in the matter of command responsibility just did not attract much attention.

Emotional scene from the courtroom was also described and a survey was done in Norac's hometown. Only Jutarnji list reminded that "four new names of direct perpetrators were revealed during the trial". Still, it was only after the confirmation of the judgement by the Supreme Court of Croatia that Norac was deprived from his medals earned during the war. Mirko Norac was sent to serve unique sentence of 15 years because of the crimes committed in Gospić and Medak, but at the end of 2011, four years prior to the end of punishment, was granted early release.

CONCLUSION

This thesis analysed challenges and changes of national identity by exploring the impact of legal discourses and media representations of war crimes trials on historical master narratives. We assumed that a sense of shared history is one of the main elements of nation building and sought to find a shift in historical narratives resulting from domestic trials for war crimes. In this research we concentrated on domestic war crimes trials, as they are to lesser extent conditioned or constrained by the international community. Still,

domestic trials for war crimes would have not been possible without the previous judicial intervention of external factors. By supporting the capacity of judiciary and transferring evidence gathered during investigation process, the ICTY contributed in helping states in transition like Croatia and Serbia to establish the rule of law. Domestic institutions managed to inform the public about the atrocities committed during the war by their own nationals, but could not influence much the process of reconciliation.

The main reason is the reluctance of change in master historical narrative about the war. In Chapter 3 we describe main finding leading to creating of specific historical master narrative. In case of Croatia, the Homeland war narrative is embedded in almost every aspect of everyday life. Thus this narrative "is easier to make irrelevant and to ignore than to openly challenge" (Jovic, 2012). Moreover, the fact that the ICTY's Prosecutors' long time strategy of proving the joint criminal enterprise in milestone operation Storm was rejected, only strengthened the narrative about the Homeland war as just and defensive. On the other hand, official narrative of Serbia in the past war is not even well defined, because it is rarely the topic of any public debate. Even though the involvement of each state's nationals in serious breaches of humanitarian law is not refused unconditionally, it is still considered to be isolated action undertaken by paramilitary units or individuals not behaving according to issued commands. This problem is also due to a so called "impunity gap" between high ranking officials brought before the international tribunal and the lowest ranked alleged criminals tried at domestic courts.

Chapter 4 analyses the representations of the ICTY and creation of new political myths about leaders defending and scarifying themselves as martyrs for the sake of patria. We track the process of rise and fall of new national leaders and heroes in Yugoslav post-war states. Following Gradner and Avolio's theatrical approach in explaining charisma, the author identifies causes and consequences of society's need for "extreme" characters. Image of political leaders in role of saviours and martyrs of the nation was substituted by real social problems. Pattern of state transition to democracy can be traced through case studies of leader pairs that differ almost exclusively in existence or absence of charisma.

Differently from the ICTY, where for serious violations of humanitarian law contest is important element as it can determine *mens rea* aspect, at the domestic level, judicial processes do not deal with the causes of war itself but with jus ad bellum aspects. Therefore legal documents describe only the context of war and represent historical material that is easily manipulated. In addition, the very understanding of the tribunals' legacies is not necessarily fixed, but may change over time as the domestic perceptions of the past and the domestic politics of the present change.

In a situation like this already the political will and judicial capacity to organise fair and just trial seems an achievement. In Chapters 6 and 7 we analyse two cases held at the local level. Trials for Ovčara and Medak Pocket raised awareness of the public about crimes committed by their own nationals. Still, the decisive factor leading to reconciliation is certainly giving the voice to the victims. Transitional justice process in Croatia and Serbia has been limited so far only to war

crime trial if we exclude miserable attempt of the Serbian Truth and Reconciliation Commission failed before it even published one report. Limiting such an important process only to criminal persecution is not enough. Voices of victims were not heard in the courtroom and certainly not outside of it. Victims of different nationalities are not equally treated in the same country. Even when appearing in role of witness, a victim cannot freely tell her own story – she serves only to describe the consequences leading to a crime. Likewise, victims' narrative disappear from the public discourse once the official narrative meets the judicial one, as it was the case with some acquittal judgments before the ICTY. For example, when the Storm operation was confirmed to be a libratory one with no intent of a joint criminal enterprise behind it, members of political elite and the media reported that some crimes nevertheless happened and that at least direct perpetrators should respond. It all ended up in words.

Furthermore, local judiciaries suffer a considerable amount of pressure from the political actors. Not rarely the indictments abstain from taking "broader picture" of the crime and are filled only against direct perpetrators. Even when it is possible to trace mid rank or high rank officials' involvement in crimes, they remain left out of the legal narrative and gain "amnesty" and broader political discretion. In such circumstances, the potential of domestic trials for bringing perpetrators to justice and challenging dominant frameworks for interpreting the past is inherently limited. What happened more often is that certain judicial facts became official "truths" depending whether they do not contradict the dominant master narrative about the war. To conclude we argue that transitional justice, instead of triggering truth seeking

and truth telling processes that would lead to reconciliation, multiplied mutually exclusive historical narratives that determined national collective identities. Therefore, a holistic approach to transitional justice process in very much needed in the region. Main objective of reconstruction of post-conflict societies is a creation of just and durable peace. It should be implemented jointly by international and local actors, by using systematic, persistent, long-lasting confrontation with past in order to create a democratic environment for the future.

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