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Facing the Past

The Coexistence Challenges and Prosecution of the War Crimes in Serbia

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FACING THE PAST: THE COEXISTENCE CHALLENGES AND PROSECUTION OF THE WAR CRIMES IN SERBIA

BIOGRAPHY

Meris Mušanović academic background includes a Master of Arts in Democracy and Human Rights, a LLM - Master Studies of International and European Public Law degree, and a Bachelor of Law. Since 2014 he is working as Legal Associate Professional and outspoken advocate of human rights in Bosnia and Herzegovina with particular interest on the topic of Transitional Justice and International Law.

ABSTRACT

This study aims to examine Serbia's capacities to face the past and prosecute war criminals as a necessary step toward achieving transitional justice and reconciliation. This is relevant because more than twenty years have passed since the conflicts in the former Yugoslavia ended, yet the region remains deeply unstable because of the gravity of crimes committed and lack of punishment for the perpetrators. For a long time, mechanisms to achieve justice, such as laws on war crimes, investigations, tribunals and commissions were underdeveloped and had no real political support. It was almost impossible to conduct fair trials because of the enormous public pressure and lack of training for court professionals. The justice mechanisms of the ICTY have played a major role in the prosecution of war criminals and have influenced the establishment of the War Crimes Chamber in Serbia. Nonetheless, aside from criminal court proceedings, there are other transitional justice approaches which are only being discussed and are not implemented in Serbia. This is because there is not enough support within the political and economic elites to fight denial and to face the past. Prosecution of persons accused of serious violations of international criminal law is particularly important now, at the moment when the ICTY is in the closing phase and the national courts are expected to continue this task. Therefore, Serbia requires a holistic approach towards transitional justice in order to have a chance to achieve reconciliation and coexistence.

TABLE OF ABBREVIATIONS

B&H	Bosnia and Herzegovina
ECHR	European Convention of Human Rights
EU	European Union
EULEX	The European Union Rule of Law Mission to Kosovo
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-Governmental Organization
OSCE	Organisation for Security and Co - operation in Europe
RECOM	Regional Commission for Truth Seeking and Truth Telling about War Crimes and Other Serious Violations of Human Rights in the Former Yugoslavia
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
SFRY	Socialist Federal Republic of Yugoslavia
TC	Truth Commissions
TRC	Truth and Reconciliation Commissions
UN	United Nations
WB	Western Balkan
WCC	War Crimes Chamber in Serbia
WWII	World War II

TABLE OF CONTENTS

1.

INTRODUCTION

INTRODUCTION

The concept of transitional justice can be understood as the way countries and societies come to terms with history of violence, war and human rights violations. The main debate, when it comes to transitional justice, is centred on dichotomies between peace vs. justice and truth vs. justice. Accordingly, authors that wrote on the topic of transitional justice in their work examine specific institutions and practices, as mechanisms to achieve transitional justice. This includes courts, special crimes prosecutors, amnesty, lustration, official apologies and truth and reconciliation commissions. What is common for all of these mechanisms is that they attempt to create accountability, truth and some form of justice. However, different transitional justice mechanisms should not be seen as separate policies, but rather as complementing each other, in order to be successful.

The countries that emerged from the former Yugoslav federation have inherited the legacy of war crimes committed during the wars of 1990s.[1] This legacy and subsequent victimisation of all communities involved have affected the process of transitional justice in the countries throughout the region. Appropriately, after the wars ended, the question that was asked is how to establish transitional justice among different ethnic groups that were involved in the conflicts. The countries in the region failed regularly

[1] The disintegration of the Socialist Federal Republic of Yugoslavia (hereinafter: the SFRY), which followed Slovenia's declaration of independence in June 1991, resulted in a number of international and internal armed conflicts: in Slovenia (June-July 1991), in Croatia (1991-1995), Bosnia and Herzegovina (1992-1995), Kosovo (1998-1999), and in Macedonia (February-August 2001). The wars in Croatia, B&H and Kosovo were marked by systematic atrocities against the civilian population, designed to ethnically cleanse whole territories.

to systematically investigate and try these crimes, mostly because the perpetrators available to them were coming from their own ethnic group. Additionally, after the dissolution of Yugoslavia, the national courts did not have adequate resources and capacities to handle complex cases against indicted high ranking political, military and police officials. This was one of the reasons why the International Criminal Tribunal for the former Yugoslavia (hereinafter: the ICTY) was established. The expectations from this *ad hoc* tribunal were great from all sides that were involved in the conflicts. Nevertheless, expectation that the ICTY, on its own, would bring peace and stability to the region, was unrealistic.

The region is still deeply unstable because of the gravity of crimes that were committed and lack of punishment for the perpetrators. In Serbia, serious measures to prosecute war criminals were taken only in 2003, with the creation of a special War Crimes Chamber in the Belgrade's District Court (hereinafter: the WCC). At the same time, the national judiciary in Serbia has dealt with the issue of the war crimes rather reluctantly. The major issues in the work of the WCC were: ethnic bias, lack of witness protection, inability to prosecute high ranking suspects and slow progress. On the other hand, the main motivation for conducting domestic prosecutions of the war criminals was political pressure from external actors. The European Union (hereinafter: the EU) put enormous pressure on Serbia to extradite the accused war criminals to the ICTY and it emphasized this as the most important part of its conditionality policy. In spite of that, the national prosecution of war criminals has never had adequate political support in Serbia.

The aim of this study is to investigate Serbia's judicial capacity to prosecute the war criminals and to analyse its readiness to face the past, as a necessary step for achieving transitional justice and reconciliation. Although after 2000s, Serbia achieved some success in the field of democratization, transitional justice and conflict resolution, there are still strong social currents that reject facing the past. Besides criminal court prosecution, there are other transitional justice approaches that are only being discussed and are not implemented. For instance, Serbia has adopted the National Strategy for the Prosecution of the War Criminals for the period from 2016 until 2020 (hereinafter: the National Strategy). During 2017, however, this Strategy was not implemented. In this sense, not implementing the National Strategy shows that there is still a strong culture of denial and low level of awareness that obstructs the attempts for reconciliation in Serbia.

This topic is relevant to democracy and human rights in South East Europe because it is a part of the broader discourse about the acceptance of the responsibility for the crimes committed and prosecution of the war criminals, as one of the most important pillars in achieving transitional justice. Moreover, the relevance of this topic lies in the need to analyse the capacities of the national courts when the ICTY is in the closing phase. This is crucial, bearing in mind that the national courts are the ones expected to continue prosecution of the persons accused of serious violations of international criminal law. In essence, this study intends to provide a new insight in the field, by addressing the significance that prosecution of the war criminals bears on coexistence between the ethnic groups that fought wars and committed atrocities. The trial records from war crimes proceedings can serve as a record of the events that were happening during the conflicts in the former Yugoslavia. Consequently, the recording of the truth is a very important element of rehabilitation for the victims and great step towards reconciliation.

In light of previously mentioned considerations, this study will answer the following research questions: what are the factors that shape Serbia's capacity to prosecute war crimes, and what are the implications of the national prosecution of the war criminals (or lack thereof) on the reconciliation of different ethnic groups in Serbia? This paper claims that Serbia does not possess adequate judicial capacities and political will to prosecute war criminals for war crimes to an extent that would achieve justice and serve as a deterrent against acts of private revenge. The lack of political will and support to prosecute all the war criminals is the main reason why Serbia is neglecting one of the pillars of transitional justice - dealing with its negative legacy of past wars and achieving coexistence.

The methodology in this case study will be developed and structured in three parts. The first part will analyse the theoretical framework and existing mechanisms of transitional justice. In order to do so, it will describe the origins and evolution of transitional justice, examine to what extent national prosecution of the war criminals contributes to transitional justice, while elaborating on other existing mechanisms of transitional justice. Furthermore, the theoretical part of this paper examines the role that EU conditionality played in Serbia's cooperation with the ICTY and in national prosecution of the war criminals. Establishing the rule of law is one of the main preconditions for EU membership. Therefore, the EU could play a more significant role in the

national prosecution of war criminals by applying pressure on Serbia to improve its record in this area. In addition, this part will contain content analysis of documents, international agreements, the EU progress reports, data of different international bodies and international judicial opinions that will be used to establish a theoretical framework on transitional justice.

The second part will examine the attempts to face the past and circumstances regarding the establishment of the WCC in Serbia. In this part analysis of legal documents, such as the Constitution of Serbia, Criminal and Criminal Procedure Codes and other relevant legislation of Serbia will be used. Likewise, in this part, the interviews with the expert working in the Prosecutor's Office, members of the NGOs that deal with transitional justice and the victims' organisations will be used. All interview subjects were questioned through semi – structured interviews and they were fully informed about the research topic. Moreover, this part will contain quantitative and qualitative in-depth analysis of the case law and reports of the NGOs and other organizations, analysis of domestic court verdicts and judicial opinions. Nonetheless, this part will also present the biggest limitation of this study, because the views of all sides that are involved in the war crimes proceedings, are not presented. This paper does not contain interviews with the judges of the WCC and Attorneys at Law that are involved in the war crimes proceedings. The reason for this is that the WCC official policy is that the judges are not entitled to give interviews regarding the trials, because this might compromise their position. However, the WCC allows access to its official data, based on the request made, in accordance with the Law on Free Access to Information of Public Interest of Serbia. On the other hand, the attorneys at law did not find time or interest to discuss on this topic.

The third part will examine the achievements and difficulties in bringing to justice perpetrators of the war crimes. In this part qualitative analysis of legal documents, such as the Criminal and Criminal Procedure Codes and other relevant legislation of Serbia will be used. As well, in this part, the expectations from the WCC in Serbia will be presented. The expectations from the WCC are high, especially now when the work of the ICTY is coming to an end. The fact that attempts to establish the Truth Commission (hereinafter: the TC) and to use other transitional justice mechanisms in Serbia have failed, makes the work of the WCC in Serbia even more important. Additionally, in this part,

the content analysis of the WCC's verdicts and judicial opinions will be used to determine the impact that the war crimes proceedings had on the transitional justice process and coexistence of different ethnic groups in Serbia.

Finally, this case study will combine scholarly fields of law, political science, sociology, social work, history and criminal justice. Therefore, the interdisciplinary approach to the judicial prosecution of war criminals, as the only official transitional justice mechanism in Serbia - and that is presented in this paper will give a new insight and a new dimension to existing studies that have focused on only one field. Likewise, the literature that is used in this paper on transitional justice is extensive and encompasses several academic fields, covering all geographical regions with majority of publications emerging from Eastern Europe, Eurasia, Sub Saharan Africa and Latin America. In the past decades a huge number of studies have been published on transitional justice. Notable authors are, among others, Pierre Hazan, Kritz J. Neil, Minow Martha, Teitel Ruti, David Backer, Oskar Thoms, James Ron and Roland Paris. When it comes to the region, notable authors are, among others, Iva Vukusic, Refik Hodzic, Edina Becirevic, Zarije Seizovic, Diana Delaye, Nezruk Curak, Zarko Puhovski, Goran Simic, Zoran Pajic, Iavor Rangelov and Kandic Natasa.

1.

TRANSITIONAL JUSTICE CONCEPT, SERBIA'S COOPERATION WITH THE ICTY AND THE EU CONDITIONALITY POLICY

This chapter will explore the concept of transitional justice and legal aspects of dealing with the past that comprises of criminalising certain activities and prosecuting their perpetrators. The concept of transitional justice[2] stems from the international human rights movement and it is increasingly adopted by the peace-building community. It aims to consolidate peace and prevent future violence at the time of transition following the violent conflict. This may include retributive justice in the form of punishment through trials or restorative justice aiming at restoring community relations[3]. Furthermore, this chapter aims to elaborate on specifities of the EU conditionality, as the most important political power behind the main transitional justice initiative in the former Yugoslavia – the ICTY. The ICTY for some time has been the only transitional justice mechanism in the former Yugoslavia. After the armed conflicts ended, because of the gravity of the crimes committed, criminal justice seemed an adequate way to face the violent past. In the war-torn region, initiatives for the TC were not possible, as the main concern was the reconstruction of the countries that were affected by atrocities. However, the work of the ICTY and later established domestic courts, have paved the way for further and complementary approaches of transitional justice.

[2] Over the past years hardly any term has acquired as much attention in such little time as transitional justice; organisations – such as the International Centre for Transitional Justice (New York) or the Transitional Justice Institute (Ulster) – have been established, conferences compete for participators, new journals are being founded, and academics as well as NGOs and governments support the new concept.

[3] Through for example the Truth and Reconciliation Commissions.

1.1. THE CONCEPT OF TRANSITIONAL JUSTICE

The term transitional justice[4] was first used in 1990s to describe 'transition' from a violent to a peaceful society and in that way it set the grounds for wider debate about peace building and democratisation in post-conflict societies.[5] One of the most comprehensive definitions of transitional justice was given in the report to the Security Council, in 2004, of the United Nations Secretary General: "The notion of 'transitional justice'…comprises 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. These may include both, judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[6] Particularly, the most important aims of transitional justice are: uncovering the truth about crimes, identifying those responsible and holding them accountable, restoring the dignity of the victims, encouraging reconciliation and peaceful coexistence, as well as preventing future conflicts and criminal offenses.[7]

Historically, the concept of transitional justice has developed through various stages. Ruti Tetel has identified three phases of transitional justice: the first phase began with the end of WWII and its symbols are the Nürnberg[8] and Tokyo Tribunals[9], that were established to prevent

[4] The International Centre for Transitional Justice (hereinafter: the ICTJ) has developed the definition of transitional justice: "Transitional Justice refers to a range of approaches that societies undertake to recon with legacies from widespread or systematic human rights abuses as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights."

[5] Teitel, Ruti. "Transitional Justice Genealogy" *Harvard Human Rights Journal* Vol. 16. (2003): 69.

[6] The Secretary General Report to the United Nations Security Council. *The Rule of Law and Transitional Justice in Conflict and Post – Conflict Societies.* Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO4/395/PDF/N0439529.pdf?OpenElement. (Accessed September 01, 2017).

[7] Crocker, David. "Transitional Justice and International Civil Society". *Social Philosophy Today*. Volume 14 (1998): 496.

[8] The main achievement of the Nuremberg trials was the establishment of individual criminal responsibility in international criminal law.

[9] The history of international criminal tribunals goes back all the way to World War I (hereinafter: WW I), when in the Treaty of Versailles, the provision was incorporated that stated: "For the establishment of a tribunal ... to try the former Kaiser of Germany, Wilhelm II ". After WW I, the international criminal tribunal was never established. The first international

repetition of crimes, such as the Holocaust and other grave war crimes through retribution; the second phase began with the slow ending of military rule in Latin America[10] and the collapse of the Soviet Union[11] and the third phase began with international and national common goal of re-establishing peace in the last two decades of the 20th Century[12] and normalization of transition, because it started to seem that all justice was becoming transitional and changing.[13]

The current concept of transitional justice is influenced by the democratisation trend that started at the beginning of the 1990s. Democratisation has put dealing with the past at the centre of the rule of law.[14] After violent conflict, statehood is limited and state institutions must be newly established. However, it is not enough to establish new institutions, but it is necessary to establish trust among all citizens in the work of these institutions. Once the war is over, conflicted societies are often more divided than before the conflict, and the way the violent past is remembered and accepted represents a key element in reconciliation and coexistence of war affected ethnic groups.[15] The theologian Nigel Bigger has stated that dealing with the violent past is: "Necessary since by ignoring it, hate and mistrust may brew silently to become a dangerous mixture and can, as demonstrated by the conflicts in Northern Ireland, Rwanda and the Balkans, lead to a wave of violence."[16] The new regimes can take a clear step away from previous regimes that committed crimes,

criminal tribunals that were established after WW II were the Nuremberg and Tokyo tribunals.

[10] Approach to the transitional justice which focused heavily on the Truth Commissions at the end of 1970s, in particular, in Latin America.

[11] At the end of 1980s in Eastern Europe the concept of transitional justice was used to describe the process of addressing human rights violations that are committed by the dictatorial or repressive regimes in the course of democratic transition.

[12] The term transitional justice came to be used for processing the war crimes and massive human rights abuses committed in the violent conflicts in the former Yugoslavia and Rwanda. The establishment of the International Criminal Court (hereinafter: the ICC) gave transitional justice the new prominence by turning criminal justice into a central part of transitional justice. This institution was established because states failed to live up to the international human rights obligations that they ratified. When it comes to the ICC, it sees transitional justice as a concept that is re – establishing the criminal accountability for the crimes committed.

[13] Teitel, Ruti. "Transitional Justice Genealogy" *Harvard Human Rights Journal.* Vol. 16. (2003): 71.

[14] Forsberg, Tuomas. "The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues." *JCMS: Journal of Common Market Studies*. Vol. 49, Issue 6 (2001): 1157.

[15] Buckley-Zistel, Susanne. "In-Between War and Peace: Identities, Boundaries and Change." *Transitional Justice*. Berlin (2006).

[16] Biggar, Nigel. "Making Peace and Doing Justice. Must We Choose?" In Biggar, Nigel. *Burying the Past. Making Peace and Doing Justice after Civil Conflict.* Washington (2001): 8.

by insisting on accountability of all of those who have committed crimes and in that way face the past. By doing so, they are turning a new leaf in the history book.

Accountability is directed against impunity and fighting impunity can help the new regimes to legitimate their power and to reestablish some balance between different ethnic groups that live in the community. Nevertheless, sometimes representatives of previous regimes may partly stay in power or have a strong influence on the new regimes. That is why, the lack of political will is very often the main reason for not confronting past atrocities. In the long run, fighting the impunity is the only way forward, because those who deny or forget the past are often condemned to repeat it.[17] Transitional justice is an ever-evolving concept that includes a variety of instruments: prosecution through international, hybrid and national war tribunals; recognition of the crimes through national and international truth commissions; reparations to victims of human rights violations including compensation, rehabilitation and symbolic recompense; reform of institutions such as judiciary, military and police; the lustration of corrupt and criminal persons and the construction of memorials and museums in order to remember the violent past.[18] All of these instruments can and should be combined, in accordance with existing circumstances, after the violent conflict.

Accordingly, criminal justice represents[19] an element of transitional justice that is based on the assumption that prosecuting crimes of the past through national or international tribunals[20] is necessary for the

[17] Biggar, Nigel. "Making Peace and Doing Justice. Must We Choose?" In Biggar, Nigel. *Burying the Past. Making Peace and Doing Justice after Civil Conflict.* Washington (2001): 8.

[18] Buckley-Zistel, Susanne. "In-Between War and Peace: Identities, Boundaries and Change." *Transitional Justice.* Berlin (2006).

[19] When we talk about justice, we need to make distinction, between punitive and restorative justice. The aim of punitive justice is retribution against the crime, while restorative justice has the aim of re-establishing social relationship between the parties to the conflict. Restorative justice sees crime as a conflict and that conflict is the property of those who are in it directly or indirectly involved; the offender, victim and community, and that is why they should be the ones to solve it, rather than legal professionals, which in the punitive justice system 'steal' the conflict from those to whom it actually belongs. The concept of restorative justice aims to restore or repair the effects of the committed criminal offence and to establish a balance between the needs and interests of the victim, offender and community members.

[20] The United Nations established *ad hoc* or hybrid courts: The International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, the Special Chamber for East Timor (Special Panel for Serious Crimes - SPSC) Extraordinary Chambers in the Courts of Cambodia (ECCC). Furthermore, since 2002, the International Criminal Court (ICC), based in The Hague, has been active. Based on the Rome Statute of 1998, it is responsible for the

transition to peace and security following violent conflict. As Ruti Teitel has stated: "Criminal justice offers normative legalism that helps to bridge period of diminished rule of law. Trials offer a way to express both public condemnation of past violence and legitimation of the rule of law necessary for the consolidation of future democracy."[21] Therefore, the aims of the criminal courts are to determine the facts regarding past wrongs, to find a balance between the crime and punishment, to reduce retribution, to acknowledge the victims of the crimes and to prevent future acts of violence.[22] The criminal courts try to individualise the guilt[23] and make a clear separation between the victims, on one hand and perpetrators, on the other hand. Although this is not always possible, it is believed that by individualising the guilt society is freed from implicit guilt and this can have a positive effect on the reconciliation process.[24] For justice to be established by criminal courts it is necessary that all of the perpetrators are arrested and prosecuted before the courts. This is not always possible, in many cases because of political and financial reasons. It is especially difficult in situations when there is a high number of perpetrators and because of this the decision has to be taken about who is to be prosecuted first. This decision is again highly politicised and it involves a danger that some of the perpetrators will not be prosecuted. That is why criminal court trials offer a selective picture of the past as not all of the perpetrators can be prosecuted. For the criminal court trials to achieve the goals of transitional justice, it is necessary that they are fair and equally applied, otherwise they undermine their objectives.

As an alternative to the judicial concept of transitional justice, the concept of TC has been developed. Until today, there have been over 40 such commissions[25], at first primarily in Latin America and later also

punishment of crimes when a state is not willing or able to do so itself. It only has jurisdiction over individuals (and not states) and crimes committed since its establishment in 2002.

[21] Teitel, Ruti G. "Transitional Justice." *Indian Journal of International Law.* Volume 55 (2015): 30.

[22] Minow, Martha. *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence.* Boston: Beacon Press, 1998: 26.

[23] The philosopher Karl Jasper has further identified three types of guilt: 1. the political guilt of those who legitimated the perpetrators in their roles, 2. the moral guilt of those who did not act but looked on, and 3. the metaphysical guilt of those who survived without having done everything to prevent the criminal act. According to Jasper, the guilt is not individual but it is a part of collective social and political context and because of it must be borne by the community, as a whole.

[24] Rigby, Andrew. *Justice and Reconciliation After the Conflict.* Colorado: Lynne Rienner Publications, 2001: 5.

[25] One of the latest established truth commissions is the National Commission for Truth

in Asia and Africa.[26] The initial idea behind the TC was to develop a concept that will serve as an alternative to the state-established criminal proceedings. However, they have taken a complimentary role. The TC are defined as: "Official inquiries into patterns of past abuse that seek to establish an accurate historical record of events."[27] The probably most known Truth and Reconciliation Commission (hereinafter: the TRC) was established by the Law, in 1995, in South Africa, after the abolition of apartheid, as a substitute for judicial prosecution.[28] As Mark Freeman and Priscilla B. Hayner have stated: "The greatest innovation of the TRC, and the most controversial of its powers, was its ability to grant individual amnesty for politically motivated crimes."[29] Compared to the criminal courts, the TC are temporary establishments, which have a main task to uncover the crimes of violent regimes or conflict crimes. The disagreement between the criminal court prosecutions and the TC lies in the strict justice position, that only the rule of law can lay grounds for transition. By uncovering the violent past the TC can contribute to the judicial prosecutions of perpetrators. After all, the TC are putting greater emphasis on national reconciliation than prosecutions.[30]

The main critique of the TC is that they are a weak form of justice and that the concepts of accountability and responsibility are not applied directly, as is the case in criminal justice. In the cases where amnesties are granted to the perpetrators, criminal justice was not met. This has made many victims unsatisfied with the TC and has contributed to very tense political situations in some post-conflict societies. The French philosopher Jacques Derrida has stated: "Truth and reconciliation commissions are both instruments of remembering and forgetting."[31] Once the TC establishes the truth and makes their

that was established by the Law in Brazil, in 2011.

[26] Baines, Erin K. "Recht sprechen oder Frieden herstellen? Streit um die Bestrafung in Norduganda." *Der Überblick* 43 (2007): 28.

[27] International Center for Transitional Justice. "Truth – seeking." Available at: http://www.ictj.org/en/tj/138.html. (Accessed on July 20, 2017).

[28] The South African Truth Commission has offered a forum that for the first time gave victims the opportunity to tell their stories and to represent those who could no longer do so. In 1998, to a report was submitted, in five volumes to President Mandela, with analyses, conclusions and recommendations of the Truth Commission.

[29] Freeman, Mark and Priscilla B. Hayner. "The Truth Commissions of South Africa and Guatemala." *Human Rights Quarterly,* No.25 (2003).

[30] The South African Truth and Reconciliation Commission has, for example, grant exemption from punishment, in cases where there has been a guilty plea on the part of the perpetrator.

[31] Derrida, Jacques. *On Cosmopolitanism and Forgiveness.* London: Routledge, 2001.

reports, very often this truth is stored and forgotten. This is done with the aim that divided nations lay the past to rest and they build a nation with constructed national memory.[32] In the view of the former member of the Chilean TRC, Jose Zalaquett: "Peace should not be sacrificed at the expense of prosecution. Rather, governments should seek the truth and apply measures of justice appropriate to their situation which will not unduly jeopardise the peace process – truth and as much justice as possible."[33] The concept of the TC could help to compensate the limits of criminal justice. Truth telling has a high potential for reconciliation, as it establishes the truth, based on comprehensive investigations. Still, to promote reconciliation, the TC have very often a mandate to create a unitary historical account, which is jointly representing all sides of the conflict.[34]

Another notion, closely associated with the previously discussed transitional justice mechanisms, is reconciliation. Johan Galtung interprets reconciliation as: "The process of healing the traumas of both victims and perpetrators after violence, providing a closure of the bad relation. The process prepares the parties for relations with justice and peace."[35] For reconciliation to happen it is necessary that the truth is determined, perpetrators punished and that the perpetrators ask for forgiveness. This is essential for the victims to overcome their trauma to some degree. Nonetheless, forgiveness is a personal matter; if and when it can be given depends on the individuals involved. Forgiveness does not imply forgetting the past, but exactly the opposite, facing the truth and coming to terms with it. The concept of reconciliation is narrowly tied to trust, trust in the new ruling regime, the rule of law and fellow citizens. The International Center for Transitional Justice (hereinafter: the ICTJ) defines reconciliation as: "The condition under which citizens

[32] Sometimes the truth commissions are promoting only the truth that fits national reconciliation plan while other versions of the truth are left aside. This does not have a positive influence on the relationship between the parties to the conflict and does not help reconciliation. Also, as with criminal prosecution of perpetrators, when it comes to the truth commissions, their effectiveness is dependant on the political will and influence of the new government.

[33] Sangster, Kirsty. "Truth Commissions: The Usefulness of truth – telling." *Australian Journal of Human Rights* (2006).

[34] Teitel, Ruti G. "Transitional Justice." *Indian Journal of International Law.* Volume 55 (2015): 86.

[35] Mohamed, Abu – Nimer. *Reconciliation, Justice and Coexistence: Theory & Practice.* Maryland: Lexington Books, 2001: 3.

can once again trust one another as citizens."[36] There is no concept of transitional justice that is absolutely successful in contributing to peace and reconciliation after the violent conflict. The main reason for this is the fact that justice is dependent on the interests and goals of those who establish it. This does not always have a positive effect and it can lead to deeper division between parties to the conflict. One chosen concept of transitional justice cannot necessarily accomplish all of the set goals. Therefore, a combination of the transitional justice approaches can be helpful and complementary, in a way to enable opposing groups in society to resolve their differences and to make a first step towards reconciliation. For transitional justice the crucial factors are holistic approach and time. It is a slow process that needs to build trust among different ethnic groups step by step at all levels of society.

1.2. THE EU CONDITIONALITY POLICY TOWARDS SERBIA

The European Union conditionality (hereinafter: the EU conditionality) was developed with the aim of influencing potential member states to conduct the necessary reforms, by creating domestic policy and institutions, that are strong enough for membership in the EU. When it comes to the extradition of the war criminals from the former Yugoslavia to the ICTY, the EU became the main authority, through its conditionality policy. One of the most comprehensive definitions of conditionality is the one by Othon Anastasakis[37], who defines conditionality as: "A strategy with both a substantive and an operational dimension, referring, on the one hand, to the message and the designated political criteria, and, on the other, to the way the instrument is operated through deadlines, thresholds and practice of pressure from abroad."[38] The goals of conditionality can be: political, economic or commercial influence. Based on the goals of conditionality,

[36] International Center for Transitional Justice. "Reconciliation." Available at: http://www.ictj.org/en/tj/784.html. (Accessed on July 20, 2017).

[37] Another definition of conditionality is the one by Tony Killick, who defines conditionality as: "A set of mutual arrangements by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of financial assistance."

[38] Anastasakis, Othon. "The EU's political conditionality in the Western Balkans: Towards a More Pragmatic Approach." *Southeast European and Black Sea Studies*. (2008): 365 -377.

we can distinguish between positive and negative, legal and informal conditionality, political and economic, etc.[39] Positive conditionality considers that granting benefits and privileges to a country produces the cumulative progress in political, social and economic spheres. This conditionality can influence behaviour of the state in a way that it keeps *status quo* or to comply with certain objectives.[40] On the opposite, the concept of negative conditionality implies the use of sanctions like: reducing, suspending, 'freezing' or terminating benefits, if the country does not comply with the imposed criteria.[41] In the cases of the Western Balkan countries (hereinafter: the WB), the EU applied both positive and negative conditionality.[42]

The EU enlargement process applies criteria that are known as the Copenhagen criteria.[43] Besides these criteria, because of the specific situation that was caused by dissolution of the former Yugoslavia, when it comes to the WB[44], the EU has developed the Stabilisation and Association Process (hereinafter: the SAP), that along with the

[39] Killick, Tony. "Aid and the Political Economy of Policy Change". London: ODI (1998). Available at: http://www.crcnetbase.com/doi/pdf/10.4324/9780203446539.fmatt. (Accessed June 5, 2017).

[40] Puente, Carlos. "Historical Evolution of Conditionality Criteria in External Relations of the EU with CEEC. From the Cold War to the Accession: An Insider's Perspective." ROMANIAN JOURNAL OF EUROPEAN AFFAIRS 14, No. 4 (2014): 57. Available at: http://rjea.ier.ro/sites/rjea.ier.ro/files/articole/RJEA_2014_vol14_no4_art4.pdf. (Accessed June 31, 2017).

[41] Puente, Carlos. "Historical Evolution of Conditionality Criteria in External Relations of the EU with CEEC. From the Cold War to the Accession: An Insider's Perspective." ROMANIAN JOURNAL OF EUROPEAN AFFAIRS 14, No. 4 (2014): 67. Available at: http://rjea.ier.ro/sites/rjea.ier.ro/files/articole/RJEA_2014_vol14_no4_art4.pdf. (Accessed June 31, 2017).

[42] The effectiveness of the EU conditionality on the country to conform is constrained by the gap between the conditions and the reward. If the goal is achieved with planned resources, then conditionality was successful. The main argument in support of the conditionality is that the EU assistance will cause faster progress of the country. However, one of the biggest limitations of conditionality is countries' unwillingness to implement reforms. This causes delays or in the worst case termination of the benefits for the non complying country.

[43] Adopted at the at the European Council in Copenhagen, on June 21st and 22nd,1993. Any European country that submits its candidacy to the European Union to become a member state must comply first, with the obligations under Article 49 and the principles of Article 6 paragraph 1 of the Treaty of the European Union. The European Council in Copenhagen in 1993 established the "Criteria for Membership" which, subsequently were reinforced by the European Council in Madrid in 1995. Copenhagen criteria require: stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU, and the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.

[44] The Western Balkans countries are: Croatia, the Former Yugoslavia Republic of Macedonia, Bosnia and Herzegovina, Serbia, Montenegro, Albania and Kosovo.

Copenhagen criteria includes: "Full cooperation with the ICTY, respect for human and minority rights, the creation of real opportunities for the return of refugees and internally displaced persons and visible commitment to regional cooperation."[45] In Serbia, the main aims of the EU conditionality are reconciliation, reconstruction and reform. The EU has seen cooperation with the ICTY[46], development of the rule of law and protection of human rights, as essential steps to move away from the nationalistic past and to build the EU perspective for Serbia.

Accordingly, the EU plays an important role in transitional justice, because, by insisting on reforms, it is addressing the social and economic reality of Serbian society. However, the cooperation with the ICTY and domestic prosecution of the war crimes proved to be the most difficult part of the EU conditionality. Serbia's compliance in this area has often been unsatisfactory, limited or there was no compliance. According to the Iavor Rangelov: "Sheltering war crimes suspects from prosecution at the ICTY and domestic courts does not demonstrate commitment to the rule of law on the part of any country."[47] Failure to cooperate fully with the ICTY has often led the EU to soften its requirements and to make compromises. Consequently, the EU has applied its conditionality selectively in Serbia, in the hope of anchoring the country to the EU path.[48] Inconsistent conditionality resulted in the development of strong nationalism and opinion among Serbs that the war crimes procedures have been entirely out of their control and managed by the international community.[49]

At the same time, cooperation with the ICTY was a condition that

[45] European Commission. *Council Meeting – General Affairs.* Luxembourg: Press Release, 29/30, April 1997. Available at: http://europa.eu/rapid/press-release_PRES-97-129_en.htm. (Accessed July 29, 2017).

[46] The ICTY is the first international court for war crimes since the Second World War. The main goal of the ICTY was to punish those individuals who were most responsible for the human rights violations and to promote peace and reconciliation among the conflicted nations of the former Yugoslavia.

[47] Rangelov, Iavor. "Civil Society Initiatives for Dealing with the Past and Transnationalism in the Former Yugoslavia." The Center for Study of Global Governance, 26 – 27 November 2004. Conference: Transitionalism in the Balkans: The Emergence, Nature and Impact of Cross – national Linkages on an Enlarged and Enlarging Europe: 10.

[48] Cehulic-Vukadinovic, L. "Croatia's entry into the European Union and Perspectives of further EU enlargement to the Western Balkans." *Megatrend review.* Vol. 10 (2013): 49.

[49] After the October revolution, which brought Milosevic down from power, there were several positive steps taken towards integration with the EU. Serbia started accession process in 2003. The EU opened negotiation process of the SAA in 2004, but these negotiations were suspended when the ICTY requested from Serbia to arrest Ratko, Mladic.

challenged national identity the most.[50] The EU has been strict with the Serbian government to extradite Mladic to the ICTY.[51] The reluctance of Serbia to extradite war criminals to the ICTY has prolonged the process of EU integration. Only when Karadzic Radovan was extradited to the ICTY, in 2008, was visa liberation for Serbian citizens achieved. The arrest of Karadzic demonstrated the beginning of the cultural and political change in Serbia. In 2011, Mladic and Hadzic were finally transferred to the ICTY and the EU offered Serbia candidate status, in 2012.[52] Conditionality proved to be an effective mechanism to achieve cooperation with the ICTY and to facilitate the arrest of the most wanted fugitives. The former Chief Prosecutor of the ICTY, Carla Del Ponte, has acknowledged: "90% of all indictees brought to justice (before the ICTY) are a direct result of conditionality applied by the EU".[53] Although it took a long time for all of the war criminals to be extradited to the ICTY, it can be considered that this condition is fulfilled by Serbia.[54]

Along with the SAP the only transitional justice approach that was introduced was cooperation with the ICTY. That is why, when it comes to the domestic prosecution of war crimes, the EU had limited effect in Serbia. It could have contributed more to the war crimes prosecutions by ensuring sufficient resources for conducting fair trials and by promoting in its conditionality full establishment of the rule of law, human rights and minority rights. The aforesaid is especially important because the WCC is exposed to sensitive conditions and political pressures in its work. That is why different forms of support and help, especially the ones that are related to political and financial aid, can make conducting trials in surroundings that are not very benevolent easier. Thus far, the outcomes of the war crimes trials in Serbia show that the EU has

[50] For long time the ICTY held its view that the Kostunica government did not demonstrate adequate political will to cooperate with the ICTY.

[51] Serbia criticized the EU because of this, since it reduced the Serbia's cooperation with the ICTY to handover of a specific war crimes suspect.

[52] European Commission. *Serbia - European Neighbourhood Policy and Enlargement Negotiations - European Commission.* January 27, 2017. Available at: https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia_en. (Accessed January 30, 2017).

[53] Batt, Judy, Dimitrijevic, V., Hartmann, F., Jovic, D., Memisevic, T., & Obradovic-Wochnik, J. "War Crimes, Conditionality and EU Integration in the Western Balkans." *Paris: European Institute of Security Studies* (2009).

[54] Since July 2011, the Republic of Serbia has no defendants in custody. All of the defendants, 45 that were requested from Serbia, were transferred to the ICTY.

achieved only formal democracy in this country. Formal democracy can be defined as a state that has established democratic institutions without the existence of democratic values.[55]

Serbia[56] has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights) by the Law on ratification, adopted on December 26, 2003 and entered into force on March 3, 2004.[57] This ratification has enabled the European Court of Human Rights to bring verdicts against Serbia for the breaches of the European Convention on Human Rights.[58] The European Court of Human Rights has brought 14 verdicts for the breach of the right to fair trial and 18 verdicts regarding the unjust length of judicial proceedings (which represents a specific category of the human rights breach of the right to a fair trial) against Serbia.[59] These verdicts show that Serbia still needs to do a lot to improve respect for the rule of law, as one of the formal conditions for any candidate state to access into the EU. However, the implementation of international criminal justice can help to restore the rule of law and set the grounds for a functioning democracy. Therefore, it is necessary that Serbia commits itself to reconciliation, to be able to meet the requirements of EU conditionality.

By focusing on bringing peace and stability to the WB, the EU has missed out on an opportunity to encourage the government and society in Serbia to cope with its past and to accept responsibility for human rights violations. Not addressing this issue in the right way, has allowed the persistence of nationalistic ideologies that deny responsibility for the war crimes and in that way are obstructing the reconciliation process. The EU, as the most important initiator of the change and cooperation

[55] Rocamora, Joel. "Formal Democracy and its Alternatives in the Philippines: Parties, Elections and Social Movements." *Transnational Institute*. November 21, 2006. Available at: https://www.tni.org/en/archives/act/2100. (Accessed June 26, 2017).

[56] At that time Serbia and Montenegro.

[57] Registry of the European Court of Human Rights. *Annual Report 2010*. Available at: http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf. (Accessed September 06, 2017).

[58] The European Convention for the Protection of Human Rights and Fundamental Freedoms enjoys a preferential position in the constitutional system of Serbia. See: The Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms.* Adopted on November 4, 1950, entered into force on September 3, 1953. Available at: http://www.refworld.org/docid/3ae6b3b04.html. (Accessed September 12, 2017).

[59] Registry of the European Court of Human Rights. *Annual Report 2010*. Available at: http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf. (Accessed September 06, 2017).

among the WB countries, should use its position to re - establish trust among these countries and in this way serve as a positive force for transition in the region. In the case of Serbia, consistent and stronger EU conditionality policy would avoid the possibility that it comes to the end of the process without addressing the conditions that are primary for it becoming a member of the EU. For this reason, it is essential that the EU, when applying conditionality, makes sure that countries that are applying for membership are fully aware of their obligations regarding human rights and the rule of law.

1.3. THE INFLUENCE OF THE ICTY IN SERBIA AND ITS LEGACY

Transitional criminal justice as a concept contains two systems, the system of law and justice. It is an instrument that looks back in the past to be able to shape the future. The gravity of the war crimes[60] committed in the former Yugoslavia influenced the United Nations Security Council (hereinafter: the UN Security Council) to pass the Resolution 827, on May 25, 1993.[61] This resolution set the base for the creation of the ICTY[62], as *ad hoc* tribunal[63], that is located in the Hague, Netherlands,

[60] International humanitarian law (hereinafter: the IHL) is a branch of public international law which applies to the armed conflicts with the aim of regulating the means and methods of warfare and protecting persons who do not, or no longer, participate in the hostilities. The IHL rules are comprised of international conventions and customary international law. The bulk of the IHL rules are contained in the four 1949 Geneva Conventions /Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War) and their two 1977 Additional Protocols (Protocol Additional (I) to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts; Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non International Armed Conflicts/. Serious violations of this body of law are commonly referred to as the war crimes.

[61] The documents that preceded the acceptance of the Resolution 827 were: a report submitted by the Commission of Experts (reporting on the widespread violations of international humanitarian law in the territory of the former Yugoslavia); the adoption of the Resolution 80829 by the U.N. Security Council (decision that an international tribunal will be established) and a report by the U.N. Secretary-General (examination of the legal basis for the establishment of the ICTY and the proposal of the ICTY's Statute).

[62] Feinberg, Gary. "The International Criminal Tribunal for The Former Yugoslavia: The Establishment and Evaluation of a Unique Concept in International Justice Administration." *War Crimes, Genocide & Crimes against Humanity*. Vol. 2 (2006): 113.

[63] The main contribution of this *ad hoc* tribunal for development of the international criminal justice was the affirmation of the principle of the international criminal liability, the

and that has the task to prosecute "the persons responsible for serious violations of international humanitarian law in the former Yugoslavia."[64] The establishment of this institution raised many debates regarding its necessity, competence and ability to fulfil the tasks that it was set to do.[65] Upon its establishment, it was faced with many challenges, like the lack of political and financial will, and it had very limited physical and legal infrastructures.[66] On the other hand, expectations from all of those that were involved in the atrocities were high. In reality, no one knew or could have predicted what this tribunal would accomplish.[67]

After the conflict ended in the former Yugoslavia, criminal justice was seen as a proper way to face the violent past and the ICTY, for years, was the main mechanism of transitional criminal justice.[68] It was the primary court,[69] for the prosecution of the war crimes committed in the former Yugoslavia. The prosecution of the war criminals was seen as a political necessity in order to stabilize the states of the former Yugoslavia. At the beginning of the ICTY's work, the states of the former Yugoslavia were not cooperating in extradition of the war criminals.[70] From the

furthering definitions of crimes in international criminal law and their execution and support to idea of permanent international criminal court.

[64] Jones, Rachel K. "Untangling the Right to Self - Representation in The International Criminal Tribunal for The Former Yugoslavia." *Georgia Law Review.* No. 43 (2009).

[65] The ICTY was established with the following goals: bringing to justice individuals responsible for the international humanitarian law violations, including, among other atrocities the death, torture, maiming of an estimated 200,000 civilians and the forced migration of one million people; ensuring that the victims of these violations receive justice due to them; promoting the deterrence of similar crimes in the future, and forging a foundation for restoring peace in the former Yugoslavia by advancing the cause of reconciliation and healing.

[66] The ICTY in 1994 had a staff of 142, while in 2000 this number increased to a staff of 1011.

[67] Before the formation of the ICTY, in 1993 and the ICTR Rwanda, in 1994, the international criminal law was missing an institution that would develop international criminal law that would differ from the national criminal law. These two *ad hoc* tribunals made a significant contribution to the international criminal law creating more international law precedents than all other international and domestic war crimes cases combined.

[68] The ICTY has build on its own expertise and although it was placed far from the actual *loci delicti*, it has done a lot in development of international law.

[69] There are several factors that made the ICTY into the primary court, when it comes to the prosecuting of the crimes committed, in the former Yugoslavia. These factors are: for a long time, local courts either could not or would not try to prosecute these types of cases. The U.N. Security Council Resolution 827 and the ICTY Statute gave the ICTY primary jurisdiction over the war crime cases, committed in the former Yugoslavia, which entitled the ICTY to have the first pick of the cases. The ICTY has exercised its primary jurisdiction by focusing mostly on the top political and military leaders.

[70] The Article 29 (Co-operation and judicial assistance) of the ICTY's Statute prescribes: (1) States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law; (2) States shall comply without undue delay with any request for assistance or an order issued by

perspective of the Serbian leaders the establishment of the ICTY and its jurisdiction was seen as a 'paper tiger'[71]. They considered this institution to be weak and that is why the terrible war crime happened in Srebrenica, in 1995, two years after the ICTY was established. In Serbia, the perception of the ICTY was as biased against the Serbs, because the number of the accused and convicted Serbs was significantly greater than other former Yugoslav nations.[72] The statistic shows that the ethnicity of the accused[73] at the ICTY is: Serbs (109), Croatian (33) and Bosnian (7).[74]

The discourse of victimization of one ethnic group and blaming the other is still very prevalent among ethnic groups that fought wars in the 1990s. The reason for this is because these wars ended without declared winners or losers. This potentially created the environment in which the Prime Minister of Serbia, Zoran Djindjic, was murdered in 2003, and which led to the attempted murder of the chief prosecutor of the ICTY, at the time, Carla del Ponte.[75] In Serbia, the verdicts of the ICTY[76], have been seen through the number of convicted Serbs and the length of the sentence awarded, without any critical review of the gravity of the crimes committed or acceptance of guilt. They were followed by controversial statements in Parliament and in public, as well as protests. It was especially difficult, for the ICTY, in a situation of generalised responsibility, collectivization of guilt and victimhood, to separate the responsibility of the individuals from the responsibility of the State and whole population.[77]

a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal. See: United Nations. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia.* September 2009. Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. (Accessed August 31, 2017).

[71] Hazan, Pierre. "The Revolution by The ICTY: The Concept of Justice in Wartime." *Journal of International Criminal Justice.* Vol. 2.2 (2004): 533.

[72] Rangelov, Iavor. "International Law and Local Ideology in Serbia." Peace Review 16. No. 3 (2004): 331.

[73] See: Appendix 2 - Graphic Chart of the Ethnicity of the Accused at the ICTY.

[74] Fordt, Stuart. "Fairness and Politics at The ICTY: Evidence from The Indictments." *N.C.J. INT'L & COM. REG.* (2013).

[75] Hazan, Pierre. "Das neue Mantra der Gerechtigkeit: Vom beschränkten Erfolg international verordneter Vergangenheitsbewältigung." *Der Überblick.* No. 43 (2007):14.

[76] Between 1994 and 2004, the ICTY indicted 161 defendants, including some of the highest-ranking political leaders and military commanders of the parties to the conflicts, for the war crimes, crimes against humanity and genocide.

[77] Gow, James, Rachel Kerr and Zoran Pajic "Prosecuting War Crimes." *Lessons and*

In this complex situation, where law and politics are intertwined, it was difficult to separate the political questions from legal ones.[78] As a result of this, many started seeing the ICTY as a political institution, and not a tribunal, which it essentially is. From the victim's side, it was difficult to accept the fact that some of the sentenced war criminals, after serving their sentences, have been welcomed in Serbia as national heroes and defenders of national interest. For example, in 2009, after serving her prison sentence, Biljana Plavsic, landed in Serbia, using the Serbian government plane that was rented by the officials of Republic Srpska.[79] This is just one of the examples, that shows that there is still a lot to be done at national level to encourage perpetrators of the war crimes to accept the guilt for the crimes committed and by doing so help the whole society to come to terms with its past. By showing their remorse and asking victims for forgiveness, perpetrators would open the window of opportunity for victims to grant them forgiveness and with time achieve coexistence.

Although, the ICTY has made some valuable contribution to the discipline of international criminal law, it is considered that its work had a modest influence on the reconciliation process in the former Yugoslavia.[80] In the first decade of its operation, the ICTY did little to promote the development of national courts or to enhance the capacity of national judicial institutions in the region. As well, it alienated itself from the people in the former Yugoslavia. The perception that the people had about the ICTY came from the media. The media coverage in many cases was very politicised and the work of the ICTY was portrayed in a negative way. Another reason why people from the former Yugoslavia could not relate to the ICTY was its international character. A joint survey, by the Organization for Security and Cooperation in Europe (hereinafter: the OSCE) and the Belgrade Centre for Human Rights in 2011, showed that 40% of Serbian citizens believe that the primary purpose of the war crimes trials before the ICTY was to assign

legacies of the International Tribunal for the former Yugoslavia. Routledge. 2014.

[78] Megret, Frederic. "The Legacy of the ICTY as Seen Through Some of Its Actors and Observers." *Goettingen Journal of International Law*. Vol. 3.3 (2011): 1013.

[79] Barlovac, Bojana. "Biljana Plavsic Arrives in Belgrade." *Balkan Insight*. October 27, 2009. Available at: https://www.balkaninsight.com/en/article/biljana-plavsic-arrives-in-belgrade. (Accessed September 20, 2017).

[80] Schrag, M. "Lessons Learned from ICTY Experience." *Journal of International Criminal Justice.* Vol. 2.2 (2004): 427.

blame for the war suffering to Serbs, and 17% believed it was to meet the demands of the international community. Moreover, 76% of the interviewees stated that they do not believe the trials before the ICTY were fair and that they do not believe in what was established in its judgements.[81]

However, since 2002, the ICTY's impact on the domestic judiciary has been more positive.[82] In 2002, the Law on Cooperation with the ICTY[83] was adopted, providing *inter alia,* rules on legal assistance for the transfer of defendants, including nationals, from Serbia to the ICTY.[84] Based on the above, we can conclude that the ICTY in Serbia has mostly had legal and judicial influence. Over time, the ICTY's assistance to Serbia has become increasingly important, especially in light of the Tribunal's Completion Strategy[85]. This form of cooperation, intended to reduce the ICTY's caseload and at the same time to strengthen the domestic judiciaries' capacity to deal with the war crimes cases. It consisted of capacity-building activities[86] and the following three forms of legal assistance: 1. referral of the ICTY cases or 'Rule 11bis'[87] (this procedure provides for the transfer of cases to domestic

[81] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[82] Burke-White, William W. "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for The Former Yugoslavia and The Creation of the State Court of Bosnia & Herzegovina." *Columbia Journal of Transnational Law*, Vol. 46 (2008).

[83] National Assembly of the FRY. *The Law on Cooperation with the International Criminal Tribunal for the Former Yugoslavia*. FRY Official Gazette. No. 18/02 and SaM Official Gazette. 16/03, *entered into force* April 20, 2002. Available at: http://www.paragraf.rs/propisi_download/zakon_o_saradnji_srbije_i_crne_gore_sa_medjunarodnim_tribunalom_za_krivicno_gonjenje_lica_odgovornih_za_teska_krsenja.pdf. (Accessed September 28, 2017).

[84] The law regulates the following matters: 1) the ICTY's investigative activities in Serbia; 2) transfer of criminal proceedings to the ICTY; 3) transfer of defendants to the ICTY; 4) provision of legal assistance to the ICTY and 5) enforcement of ICTY decisions in Serbia. See: National Assembly of the Republic of Serbia. *The Law on Cooperation of Serbia and Montenegro with the ICTY.* Official Gazette of FRY, No. 18/2002 and Official Gazette of Serbia and Montenegro, No. 16/2003. Available at: http://www.paragraf.rs/propisi_download/zakon_o_saradnji_srbije_i_crne_gore_sa_medjunarodnim_tribunalom_za_krivicno_gonjenje_lica_odgovornih_za_teska_krsenja.pdf. (Accessed September 28, 2017).

[85] United Nations. *Completion Strategy of the ICTY* (United Nations Security Council Resolution 1503, S/RES1503, August 28, 2003 and United Nations Security Council Resolution 1534, S/RES/1534, March 26, 2004). Available at: http://www.icty.org/en/about/tribunal/completion-strategy. (Accessed September 28, 2017).

[86] The ICTY has been sharing its expertise with judges, prosecutors and lawyers in the former Yugoslavia through organizing and participating in numerous training programs and study visit.

[87] United Nations. *The Rules of Procedure and Evidence of the ICTY*. Rev. 50, 8 July 2015. Rule 11bis ("Referral of the Indictment to Another Court"). Available at: http://www.icty.org/

jurisdiction after an ICTY indictment had been confirmed and prior to commencement of the trial); 2. transfer of the ICTY case files (this procedure provides for the transfer to national authorities of a number of case files containing evidence that did not result in an indictment),[88] and 3. access to the ICTY archives (this procedure provides for making the ICTY's documentation available to prosecutors from the region, who have access to evidence collected by the ICTY during a decade of investigations).[89]

One of the strongest legacies of the ICTY that has manifested over more than two decades of the tribunals work has been the public record of legally recognised facts from the conflict in the former Yugoslavia. As the tribunals' verdicts have already passed the appeal level, they can no longer be disputed, therefore these records represents an important source for the historical interpretation of the events that happened, and can therefore set the foundation for future initiatives in the field of transitional justice.[90] The legal facts determined in these verdicts are largely beyond contention and can be used as a powerful weapon against the politics of denial and thereby reduce the danger of revisionism.[91] This is mostly evident in the case of Srebrenica, where through court findings, many Serbs will acknowledge that many people were killed, although for various reasons they may resist calling what happened in Srebrenica genocide. Even in the cases like Milosevic', where we do not have a verdict because Milosevic died before the end of the trial, the trial record will still serve as a historic record that crimes

en/documents/rules-procedure-evidence. (Accessed September 28, 2017).

[88] Evidence obtained in this way can be used before the Serbian courts, according to Article 14 (a) of the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings. See: National Assembly of the Republic of Serbia. *The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/15, *entered into force* July 08, 2003. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

[89] Megret, Frederic. "The Legacy of the ICTY as Seen Through Some of Its Actors and Observers." *Goettingen Journal of International Law*. Vol. 3.3 (2011): 1040.

[90] The rich database of the ICTY in which there are tens of millions of documents pages, thousands of hours of video and audio recordings and other materials, will certainly serve historians and other academics and researchers in their work to determine the facts about the events that have happened during the conflicts in the former Yugoslavia.

[91] The best example for this is a genocide that happened in Srebrenica against Bosnian Muslims, for which General Krstic and other of his associates were found guilty by the ICTY. Verdicts against Serbian war criminals, for the genocide committed in Srebrenica, were seen from the Serbian side as an example of anti Serbian policy that the ICTY was conducting.

were committed.[92] Furthermore, in addition to establishing facts from the conflict, the findings of the ICTY have also served to develop legal interpretations targeting perpetrators of war crimes, and therefore guide future international legal standards. What the ICTY has succeeded in doing is developing new ideas in the area of law (that one should be liable for international crimes both internationally and domestically)[93] and to personalise guilt by convicting individual perpetrators of war crimes.

Having in mind that the ICTY is a tribunal, this form of legal legacy is more appropriate than the political legacy.[94] Subsequently, the ICTY can be accessed as a partly successful mechanism of transitional justice. After all, reconciliation is dependent on factors that are beyond the tribunal, like personal psychological trauma, which cannot be only overcome by criminal justice or any other transitional justice mechanism in itself. Now, as the work of the ICTY is coming to and end[95], the question that is asked is how to apply the lessons learned at the ICTY to the national courts to effectively deal with the past.

[92] Megret, Frederic. "The Legacy of the ICTY as Seen Through Some of Its Actors and Observers." *Goettingen Journal of International Law*. Vol. 3.3 (2011): 1042.

[93] Ibid.

[94] Ibid.

[95] In accordance with its Completion Strategy, in 2004, the ICTY concluded ongoing investigations and announced that it would no longer issue indictments. In 2005, it began transferring cases to the national judiciaries for prosecutions and trials, thus emphasizing the need for a greater regional capacity to address the war crimes cases at the domestic level. See: United Nations. *Completion Strategy of the ICTY* (United Nations Security Council Resolution 1503, S/RES1503, August 28, 2003 and United Nations Security Council Resolution 1534, S/RES/1534, March 26, 2004). Available at: http://www.icty.org/en/about/tribunal/completion-strategy. (Accessed September 28, 2017).

2.

THE ATTEMPTS TO FACE THE PAST AND ESTABLISHMENT OF THE WAR CRIMES CHAMBERS IN SERBIA

Based on the elaboration in the previous chapter, the following chapter will identify the attempts that Serbia made to face the past. Transitional justice is an important element of the process of repairing and rebuilding the war damaged relationships between the successor states of former Yugoslavia. After the political changes in the early 2000s, Serbia started to confront its legacy of the conflicts that had devastated the territory of the former Yugoslavia, during the previous decade, in a more systematic manner. There is evident progress made in restoring political, economic and cultural bonds, however, the opposing views of events from the 1990s and their legacy still remain the biggest strain on the reconciliation processes.[96] Specifically, this chapter will present the circumstances regarding the establishment of the main mechanism of transitional justice in Serbia, the WCC. Furthermore, the present chapter aims to elaborate on the main obstacles in dealing with the past, in order to accomplish accountability for the war crimes committed and to achieve reconciliation. Serbia was the most important participant in the wars of 1990s, both in the number of armed conflicts it took part in and the extent of the crimes committed by the forces under its direct or indirect control. Lack of political will to open a broad social dialogue on the role of Serbian institutions in initiating the conflicts and in the commission of crimes in former Yugoslavia is one of the key reasons for the slow process of reconciliation.[97] Consequently, the main question of

[96] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[97] Ibid.

the following chapter will be how the WCC deals with the challenges of transitional justice and what is its ability to face the past.

2.1. THE ATTEMPTS TO FACE THE PAST

After violent conflict ends, we can identify a variety of interest groups with different intentions and motivations when it comes to the prosecution of the war crimes. These groups also differ in visions of how transitional justice should be administered. Some of these interest groups include the new post-conflict government, the victims and the international community.[98] From these different interest groups and their priorities, when it comes to transitional justice, we can conclude that there is not only one form of justice. The new governments are interested in breaking away from the past by negating their involvement in committing war crimes. On the other hand, for the victims, punishment for the perpetrators is the most important priority. Victims, through testifying and telling their stories in criminal courts, want to make their suffering known and to be acknowledged. This can have a positive effect on rehabilitation of the victims and their coming to terms with survived trauma. In the criminal proceedings, the victims can ask for reparations and they can develop a heightened sense of belonging to a group that stabilises their position and influence in society. Nonetheless, in the case of the war crimes trials, sometimes the influence of the group that has legislative power can prevail. In this situation, the other interest groups feel that there is one-sided development of justice. Therefore, the criminal courts can sometimes influence deterioration of the post conflict situation, especially if one side feels that it is suffering from injustice. The goal of justice is to punish the guilty ones for the crimes committed and to establish the facts regarding the crimes committed. By doing so criminal courts are individualising guilt and opening possibility for reconciliation. When it comes to the international community, it asserts its norms through international criminal courts that by bringing judgments are developing new legal standards in international law.[99]

[98] Buckley-Zistel, Susanne. "In-Between War and Peace: Identities, Boundaries and Change." *Transitional Justice*. Berlin (2006).
[99] Ibid.

The wars[100] that were conducted in the former Yugoslavia during the 1990s were the outcome of a rise in nationalism and the coming to power of politicians like Milosevic Slobodan in Serbia, Tudjman Franjo in Croatia and Izetbegovic Alija in Bosnia and Herzegovina. These politicians promised salvation and prosperity to their ethnic groups at the expense of other ethnic groups living in the former Yugoslavia. This period was characterised by artificially creating or exacerbating differences between ethnic groups that would later result in war crimes[101] being committed because of these differences. Furthermore, the rule of Milosevic from the 1990s until 2000 was marked by extreme nationalism and human rights violations and as a result Serbia has to deal with the legacy of destructive nationalism from this era.

After the authoritarian rule of Slobodan Milosevic ended[102], Serbia began its transition towards democracy. To establish the rule of law and build a democratic society, it was necessary to accept responsibility for the war crimes committed by Serbian forces, during the wars in the former Yugoslavia. Although, since Milosevic's rule ended[103], Serbia has achieved some progress in democracy and the EU integration, the legacy of the violent past is still present and is jeopardizing the full enjoyment of human rights, democracy and rule of law. The fight for political power in Serbia, after the fall of Milosevic's regime, was characterized by conflict between the traditional and reformist views regarding the perspective of Serbia. The reformists aspired to and welcomed EU integration, while traditionalists especially opposed cooperation with the ICTY.[104] This

[100] The war crimes were conducted in the form of murder, mass rapes, forced displacement, deportation, destruction of villages, cultural and religious objects.

[101] Several top political, military and police officials from Serbia were convicted by the ICTY for the crimes committed by Serbian forces during the armed conflict in the former Yugoslavia. In addition, in the case of Bosnia and Herzegovina against Serbia, regarding Serbia's violation of the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice found Serbia responsible for failing to prevent the Srebrenica genocide and punish those responsible for the crime.

[102] In 2001, the new Serbian government, headed by Zoran Djindjic, transferred Milosevic to the ICTY, where he stood trial on charges of genocide, crimes against humanity and the war crimes for events that occurred in BiH, Croatia and Kosovo.

[103] In May 1999, Slobodan Milosevic, one of the main figures in the Balkan conflicts, was indicted for the crimes against humanity committed in Kosovo, to which were later added accusations of genocide, crimes against humanity and war crimes in Bosnia and Herzegovina and Croatia, which makes him the first Head of State to be tried for genocide and stand before a non – military International Tribunal.

[104] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed

cooperation is often used to develop political argumentation that the ICTY is illegitimate and to support the myth that Serbians are victims of the international community. Then, after making several successful steps in the process of political stabilization, the Prime Minister of the Republic of Serbia, Zoran Djindjic, was assassinated, in March 2003.[105]

In the elections that took place after the assassination of Prime Minister Zoran Djindjic, the coalition around the nationalist Democratic Party of Serbia (DPS) and a centre-left party, the Democratic Party (DP) held power, for two terms, in 2004 and in 2007. Later on, in February 2008, the DPS-DS coalition was dissolved, due to opposing attitudes toward Serbia's integration into the EU and Kosovo's declaration of independence.[106] After the 2008 elections, through its political coalition with the DP, the Socialist Party of Serbia (SPS), the party led by Milosevic Slobodan[107] until his death, entered government for the first time since Milosevic's government was overthrown in October 2000.[108]

Even though, in 2001, the President of the Federal Republic of Yugoslavia, Kostunica Vojislav, set up the TC in Serbia, this was a poor and failed attempt that was flawed from the start. "This TC was established without any public discussion or consultation on the issue."[109] The NGOs concerned were not involved in its work and its members included only two representatives of ethnic minorities, and no other member of the religious community, other than the Serbian Orthodox Church. Additional controversy with this TC was its mandate to conduct investigations "into the uncovering of evidence on the social, inter-ethnic and political conflicts which led to the war and to shed

September 09, 2017).

[105] He was killed in what turned out to have been a joint operation of the Special Operations Unit of the Ministry of Internal Affairs of Serbia and the criminal group known as the 'Zemun clan', one of whose objectives was to stop the country's cooperation with the ICTY.

[106] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[107] Although Milosevic's former associates began returning to power, during this government's mandate the remaining ICTY indictees, the Bosnian and Croatian Serb leaders, Radovan Karadzic, and Goran Hadzic and the Bosnian Serb Army General, Ratko Mladic, were arrested.

[108] Dzihic, V., Nadjivan, S., Paic, H., & Stachowitsch, S. "Europa – verflucht begehrt. Europavorstellungen in Bosnien –Herzegovina, Kroatien und Serbien". Vienna: *Braumüller* (2006): 213.

[109] Personal interview Milos Urosevic, NGO Zene u crnom/Women in Black, conducted on September 21, 2017.

light on the causal links between these events."[110] However, the lack of general public interest contributed to the fact that the three most esteemed members of the TC immediately resigned.[111]

Until the end of 2002, this TC, had not held even one public hearing, and in 2003 it was finally disbanded. As Ilic Dejan said, this TC "faded away into insignificance"[112] because it lost the battle against nationalism that refused to accept the past.[113] The main motivation for its establishment was to reconcile Kostunica's government with the international community and not to reconcile different ethnic groups that were affected by the atrocities in Serbia.[114] This example shows that despite the fact that the former Presidents of Serbia, Boris Tadic and Tomislav Nikolic, have apologized for the Srebrenica crime, and despite the Serbian Parliament's 2010 adoption of a Declaration condemning the crime committed in Srebrenica, in Serbia official and balanced truth-telling efforts are still missing. These and other symbolic steps of acknowledging the truth about the crimes have not been accompanied by concrete reparative measures designed to establish a culture of respect for the rights of the victims.[115]

At the same time, when it comes to other transitional justice mechanisms in Serbia, like screening, vetting or lustration of public officials, not much has been achieved in the area of institutional reform. Although, a large number of officials from Milosevic's era were removed, responsibility for the war crimes and massive human rights violations has not been established as a criterion for institutional reform.[116] In 2003, the Serbian Parliament passed the Accountability

[110] Freedman, Mark. "Serbia and Montenegro: Selected Developments in Transitional Justice." Case Study Series. *International Center for Transitional Justice* (2004).

[111] Ibid.

[112] Ilic, Dejan. "The Yugoslav Truth and Reconciliation Commission." *Eurozine.* April 23, 2004. Available at: http://www.eurozine.com/articles/2004-04-23-ilic-en.html. (Accessed September 06, 2017).

[113] Ibid.

[114] Ibid.

[115] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[116] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.* Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

for Human Rights Violations Act (hereinafter: the Lustration Law)[117]. Regardless of this, the validity of the Law expired in 2013, without it ever being implemented.[118] The aforementioned non-implementation of the Lustration Law is one of the reasons why there are still people from Milosevic's rule that are controlling the public and economic sector in Serbia. From all of the measures undertaken in Serbia to address the legacy of the war crimes committed during the 1990s, the only visible progress has been made in the prosecution and punishment of war criminals, although there are many problems and shortcomings in this procedure. Despite the fact that attempts to implement other mechanism of transitional justice have failed, it cannot be assumed that they could replace criminal courts. Nonetheless, they could complement the work of courts and contribute to a more holistic dealing with transitional justice.

In Serbia, all of the attempts to tackle the issue of human rights abuses from the past failed as a result of the strong influence of ethno-nationalists. According to Iavor Rangelov: "Persisting ideologies of nationalism and victimhood, as well as competing narratives of historical and 'judicialized' truth about the conflicts and their atrocities prevent inclusive debate and genuine interaction across post-conflict societies in the region."[119] To deal with the past it is necessary to go through a process that involves sharing personal stories, extensive investigations and compilation of truth that would bring healing and reconciliation. This is possible to achieve through the TC that are more comprehensive than the criminal tribunals because of their broader mandate.[120] The

[117] National Assembly of the Republic of Serbia. *The Accountability for Human Rights Violations Act*. Official Gazette of the Republic of Serbia, No. 58/03, *entered into force* July 15, 2006. Available at: http://www.unijassb.rs/dokumenta/zakoni/zakon_o_odgovornosti_za_krsenje_ljudskih_prava.pdf. (Accessed August 31, 2017).

[118] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.* Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[119] Rangelov, Iavor. "Civil Society Initiatives for Dealing with the Past and Transnationalism in the Former Yugoslavia." The Center for Study of Global Governance. 26 – 27 November 2004. Conference: Transitionalism in the Balkans: The Emergence, Nature and Impact of Cross – national Linkages on an Enlarged and Enlarging Europe: 2. Available at: http://www.theeuropean-magazine.com/iavor-rangelov--2. (Accessed June 5, 2017).

[120] The Srebrenica Commission is the most successful Truth Commission in the region. It was set up in 2003, by the National Assembly of Republika Srpska (hereinafter: the RS), with considerable pressure on the entity by the High Representative in BiH. As a consequence of its reports, the RS issued a statement acknowledging for the first time events in Srebrenica.

unwillingness to face the past is evident from the lack of initiative to establish other transitional justice mechanisms in Serbia. Therefore, there is a need for a regional approach to transitional justice in the countries of the former Yugoslavia, because the conflicts of the 1990s had regional character and different ethnic groups, who were victims of these atrocities, require regional platforms to tell their stories.

Namely, in 2008, after a series of talks, three NGOs (Documenta from Croatia, Humanitarian Law Center from Serbia and the Research and Documentation Center Sarajevo), started an initiative to establish Regional Commission for Truth Seeking and Truth Telling about War Crimes and Other Serious Violations of Human Rights in the Former Yugoslavia (hereinafter: RECOM).[121] This led to the formation of Coalition for RECOM[122] with the task of popularizing the proposal and putting pressure on national authorities to form the Commission. On March 26, 2011, the Coalition adopted a draft of the Statute for international agreement, for which ratification is requested from the former Yugoslavia states. Ratification would make the Statute a part of the international legal system. This Statute prescribes establishment of the official, independent commission that would proactively investigate all allegations regarding the war crimes and human rights abuses that are committed in the wars during the 1990s. At the end of the two-year mandate, the Commission would publish a report that would contain established facts, recommendations regarding reparations and other necessary steps.[123] Still, this initiative has divided politicians and has not found complete support in the region.[124] Formation of the regional TC should be motivated by the desire to hear other ethnic groups and to establish the truth together.

Unsuccessful war crimes prosecutions and the great number of the

[121] The coalition is made up of around 1.500 non governmental organisations, associations and individuals.

[122] The initiative had three objectives: to allow victims and civil society to express their opinion on how the process of dealing with the past should develop; to increase the support for a Regional Commission among citizens and political elites, and to draft a RECOM Statute.

[123] The coalition wanted to gather a million signatures from the citizens of all former Yugoslav countries, as a sign of support, to the establishment of the previously mentioned commission. Until mid 2011, the Coalition gathered around half a million signatures that were handed over to the President of Croatia, Presidency of Bosnia and Herzegovina and State Secretary of the Slovenian Government.

[124] The Coalition for RECOM. "The Voice of the RECOM Initiative." Available at: http://cdtp.org/wp-content/uploads/2014/05/RECOM-Initiative-Voice-01-2011.pdf. (Accessed September 28, 2017).

accused war criminals that are free make the coexistence challenges greater in Serbia. This has resulted in the situation that victims on their own have to fight for truth and acknowledgment. However, the true inter ethnic trust and peace cannot be achieved without justice. This justice is not only a judicial and retributive one that is directed on punishment against those who committed war crimes, in fair judicial proceedings. It has to be also restorative and preventive, aimed at securing legal remedies for the victims and ending impunity, as well as contributing to the acceptance of the past and coexistence in peace and security. The mechanisms that could be used to fulfil this purpose are judicial and non judicial, by combining initiatives for criminal prosecution, truth seeking process, reparations programs and institutional reforms.[125] The impunity is causing additional suffering to the victims; it is affecting negatively the rule of law and the trust of the public in the judicial system and state. The fight against impunity is something that should happen on a national level. At the same time, instead of government officials, the most active initiators of the quest for truth and reconciliation in Serbia are non-governmental organisations. They are gathering evidence, discovering crimes that were hidden for a long time, organising round tables and are offering forums where victims have a chance to publicly tell their stories.

2.2. THE ESTABLISHMENT OF THE WAR CRIMES CHAMBER IN SERBIA

After the wars in the states of the former Yugoslavia ended, the national courts did not have adequate resources and capacities to handle complex cases against the highest ranking political, military and police officials from the former Yugoslavia. This was one of the reasons why the ICTY was established. An important aspect of the ICTY's work was a number of initiatives launched during the years to support the work of legal experts and institutions in the region, which are concerned with matters related to the war crimes. The transfer of expertise from the ICTY's jurisdiction to the region has contributed to the establishment of specialized bodies for the investigation of war crimes and trials,

[125] Drazen Petrovic. „Ethnic Cleansing – An Attempt at Methodology." European *Journal of International Law* (1994): 342.

as well as strengthening the capacities of non-specialized courts to adjudicate the war crime cases. Although, the jurisdiction of the ICTY is concurrent with the jurisdiction of national courts, the ICTY has primary jurisdiction, which gives it the authority to prosecute the cases it wants and even to take jurisdiction away from domestic courts.[126]

The decision to establish the WCC in Serbia "was a matter of organizational nature and in the region there are different solutions for dealing with the war crimes prosecution."[127] This institution was necessary because the results of the courts of general jurisdiction were poor (the proceedings were lengthy, marked by lack of professionalism and expertise on the part of judges and prosecutors, lenient sentences for perpetrators and a complete lack of media and public attention).[128] "Since the democratic transition of the country was launched in late 2000, and because of the reforms and other steps undertaken in that period to build democratic state institutions, it was difficult to establish the WCC before 2003."[129] "The political elites of the 1990s were not ready to conduct trials for the war crimes committed in the region. If there were adequate war crimes trials conducted in the countries of the former Yugoslavia in 1990s, there would be no need to establish the ICTY. Given the fact that for war crimes there is no statute of limitation, by establishing the specialised institutions for the war crimes cases, Serbia made a substantial and timely step forward in dealing with the past."[130]

One of the most important steps in building judicial capacities is creating an adequate legal framework. This entails introducing adequate legal mechanisms into the area of the criminal substantive and criminal procedural law, that are making it possible for the local courts to process the most severe international criminal acts. Some of these mechanisms

[126] Burke-White, William W. "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for The Former Yugoslavia and The Creation of the State Court of Bosnia & Herzegovina." *Columbia Journal of Transnational Law*, Vol. 46 (2008).

[127] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

[128] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015*. Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[129] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[130] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

are: settlements, witness protection and confiscation of property that was gained by committing criminal acts. By setting up the WCC, Serbia has achieved better coordination for conducting trials, concentration of funds, better logistical support, creation of unified conduct in trials for the war crimes and better cooperation with the ICTY.[131] The WCC in Serbia acts under the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (hereinafter: the Law of War Crimes Proceedings)[132], that was passed in 2003. It was established with the goal of processing the war criminals and with its verdicts to create a historical record that will remove the grounds for denial of war crimes in Serbia.

The Law of War Crimes Proceedings gave Serbia jurisdiction over the war crimes committed on the territory of the whole former Yugoslavia, regardless of the nationality of the suspects or victims, and regardless of the presence of the suspects on the territory[133] of Serbia.[134] Founding of the WCC represents a major shift in addressing the legacy of the violent past and an important signal of Serbia's political will to fight impunity. With the entry into force of the Law of War Crimes Proceedings, on July 1, 2003, the specialized institutions for the prosecution of the war crimes were established.[135] State agencies and organizational units involved in the prosecution of the war crimes are: "The Office of the War Crimes Prosecutor (hereinafter: the OWCP), the Department for War Crimes of the Higher Court in Belgrade (Higher Court Department,

[131] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

[132] National Assembly of the Republic of Serbia. *The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/15, *entered into force* July 08, 2003. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

[133] So far, the Serbian authorities have only issued indictments in the cases where the defendants were available to them, mostly former members of the Serbian forces who reside in Serbia.

[134] National Assembly of the Republic of Serbia. *The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/15, *entered into force* July 08, 2003, Article 3. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

[135] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015*. Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

formerly the Special Chamber for War Crimes of the Belgrade District Court), the Department of War Crimes of the Court of Appeal in Belgrade (hereinafter: the Appeals Court Department), the War Crimes Investigation Service (hereinafter: the WCIS), the Protection Unit (hereinafter: the Unit), and the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade (hereinafter: the Service for the Support to the Victims)."[136] In accordance with the Law, in the jurisdiction of the OWCP and the WCC is to prosecute and conduct trials for the criminal acts prescribed by Article 370 to Article 384 of the Criminal Code of Serbia.[137]

Before the entry into force of the Law of War Crimes Proceedings[138], only a handful of the war crimes perpetrators had been tried in the courts of general jurisdiction in Serbia.[139] The vast majority of cases that were conducted at district courts were not able to meet the standards of fair and professional trials.[140] For example, in the Sjeverin case that involved four Serbs accused of kidnapping, torturing and killing seventeen Muslim men from Serbia, in 1992, two of the accused were tried *in absentia*, which raised serious concerns regarding the right to a fair trial.[141] This case was also criticized regarding the witness protection during the proceedings. The Sjeverin[142] case showed that the principle of command responsibility has not yet entered the Serbian criminal law.

[136] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[137] Ibid.

[138] The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings transferred the jurisdiction for the war crimes cases to specialized institutions for the prosecution of was crimes. This Law regulates the institution, organization, jurisdiction and powers of state bodies and their organizational units for the investigation and prosecution of offenders as defined by this Law.

[139] Until 2003 the number of the war crimes trials that were initiated in front of different general jurisdictions courts in Serbia was 10.

[140] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[141] Human Rights Watch. "Serbia and Montenegro: Sjeverin 'Test Case' Resumes." Published on March 15, 2003. Available at: https://www.hrw.org/news/2003/03/14/serbia-and-montenegro-sjeverin-test-case-resumes. (Accessed September 06, 2017).

[142] In the first stage of Sjeverina trial, the prosecutor, police and the court improvised to achieve some degree of witness protection, however the proceedings highlighted a general need for more thorough witness protection mechanism.

The establishment of the WCC gave hope that the difficulties that the Serbian district courts had will be overcome, because the legislation that created this institution also gave a mandate to a specialized prosecutor for war crimes, a special detention unit, and a special war crimes investigation services, within the Ministry of Internal Affairs.[143] Only two months after its creation, in December 2003, the OWCP filed its first indictment, in what is to date, the largest war crimes case prosecuted in Serbia.[144] Nonetheless, within five years from coming to power of the new regime in Serbia, its courts had prosecuted only a handful of low ranked soldiers, while they rejected to conduct trials based on the doctrine of command[145] responsibility.[146] The major issues in the work of the WCC were: "Ethnic bias, lack of witness protection, inability to prosecute high ranking suspects, lenient sentencing practices and slow progress."[147] Therefore, the problems in the national prosecution of the war criminals persist in Serbia.

In the period from 2004 until 2013, 162 defendants were tried in the course of 49 first instance trials.[148] As of December 31, 2014, only 27 trials had been completed with the final decisions, resulting in the conviction of less than 60% of the accused.[149] The other 22 trials were still ongoing at different procedural stages: thirteen on first instance[150],

[143] Human Rights Watch. *Justice at Risk*: *War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro.* World Report. October 2004. Available at: https://www.hrw.org/report/2004/10/13/justice-risk/war-crimes-trials-croatia-bosnia-and-herzegovina-and-serbia-and. (Accessed September 06, 2017).

[144] The trial is concerned with seventeen members of the Vukovar Territorial Defence, of 1991, which were back then part of Yugoslav People's Army (JNA) and who between 20th and 21st November,1991 had killed 192 people.

[145] The definition of command responsibility under international law is a type of individual criminal responsibility of superiors (either military or civilian) for war crimes committed by their subordinates. Superiors have an affirmative duty under international law to prevent persons under their effective control from violating international humanitarian law rules, or to punish them if violations have already occurred. Failure to discharge this duty is what entails the superior's criminal responsibility. The 1977 Additional Protocol I to the Geneva Conventions was the first international treaty to positively affirm the commander's duty to act. The ICTY and the ICTR, whose Statutes were the first international normative instruments to foresee command responsibility as a mode of criminal liability.

[146] International Center for Transitional Justice. "Serbia: Selected Developments of Transitional Justice." July 20, 2006. Available at: http://www.ictj.org/images/content/1/1/117.pdf. (Accessed September 07, 2017).

[147] Human Rights Watch. *Justice at Risk.* World Report 2007. Available at: http://www.hrw.org/legacy/wr2k7/. (Accessed September 5, 2017).

[148] See: Appendix 3 - Graphic Chart of the War Crimes Trials in Serbia - Convicted/Acquitted Rate in the Period from 2004 until 2013.

[149] The prosecution withdrew the indictment against 2 defendants, 45 defendants were convicted, while 28 were acquitted and one died before the end of the proceedings.

[150] One of these proceedings was suspended indefinitely because of the mental incompetence of the accused to stand trial.

five on retrials and four on appeal (either upon trial or retrial).[151] So far, the Court of Appeals has ordered 16 retrials, whose outcome for 97% of the accused was identical to the trial outcome.[152] Sentences imposed were in line with the statutory punishment foreseen for war crimes from five to fifteen or twenty years. In the first instance, a considerable number of defendants, 25, were sentenced to the statutory maximum of 20 years, and 15 more were sentenced to 15 years. Trial panels also sentenced 11 defendants to punishments below the statutory minimum of five years.[153] While the convicted belong to all main ethnic groups, the vast majority of them are Serbs.

Furthermore, the current practice of prosecuting war crimes in Serbia is characterized by frequent deviation of the courts from the facts established by the ICTY, as well as by the lack of reliance on the ICTY's jurisprudence. "The facts set out in the war crimes proceedings are important for creating a complete picture of events in the territory of the former Yugoslavia. However, there is a permanent rejection of the facts established before the ICTY, regardless of the large number of cases before the domestic courts which are based on the facts established before this Tribunal."[154] In several cases the Higher Court Department, the Appeal Court Department and the OWCP have taken completely opposite views from the ICTY, with regards to the facts that are established before the ICTY. Namely, in the seven completed cases involving war crimes in BiH[155], the OWCP and later the special

[151] See: Appendix 4 - Graphic Chart of the War Crimes Trials in Serbia - Number of Defendants that Were Tried in the Period from 2004 until 2013.

[152] Only 2 out of 64 defendants were acquitted upon retrial after having been found guilty on trial. Additionally, 10 defendants had their sentences modified upon retrial.

[153] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[154] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[155] The Judgment of the War Crimes Chamber of the Belgrade District Court in the Scorpions case of April 10th, 2007; Judgment of the War Crimes Chamber of the Belgrade District Court in the Zvornik I case of June 12th, 2008; Judgment of the War Crimes Department of the Higher Court in Belgrade in the Bijeljina case of June 4th, 2012; Judgment of the War Crimes Department of the Higher Court in Belgrade in the Prijedor case of December 1st, 2011; Judgment of the War Crimes Chamber of the Belgrade District Court in the Stari Majdan case of December 4th, 2009; Judgment of the War Crimes Department of the Higher Court in Belgrade in the Zvornik II case of November 22nd, 2010; Judgment of the War Crimes Department of the Higher Court in Belgrade in the Zvornik III and IV cases of December 8th, 2011.

councils took the position that between 1992 and 1995 in this country an internal armed conflict took place. Nevertheless, there are numerous ICTY judgments, from the very first judgment in the Tadic case[156], which all found that what had taken place on the territory of B&H was an international armed conflict, due to the significant involvement of Serbia and Croatia.[157] Likewise, it very often happens, that at the WCC proceedings, some important evidences that were used at the ICTY[158], remain unused in the process of understanding and solving some crimes. For example, in the Zvornik I and Zvornik II cases, the OWCP did not use the testimony of three witnesses on whose testimony the ICTY almost entirely based its findings in the Stanisic and Zupljanin case[159], regarding the crimes committed in Zvornik in May 1992.[160] Also, in the Scorpions case, the court rejected the proposal of the plaintiff's attorney to use as evidence, the statement of Aleksandar Vasiljevic[161] given before the ICTY, in the Milosevic case.[162]

[156] Judgment of the Trial Chamber of the ICTY in Prosecutor v. Dusko Tadic, case number: IT-94-1 of May 7th, 1997, para. 569; Judgment of the Appeals Chamber of the ICTY in Prosecutor v. Zejnel Delalic, case number: IT-96-21-A of February 20th, 2001, para. 33; Judgment of the Trial Chamber of the ICTY in Prosecutor v. Tihomir Blaskic, case number: IT-95-14-T of March 3rd, 2000, para. 744.

[157] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[158] The Law on Amendments to the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings created a formal legal basis for the use of evidence collected by the ICTY in the war crimes trials in Serbia. See: National Assembly of the Republic of Serbia. *The Law on Amendments to the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, No. 135/2004. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

[159] In Stanisic and Zupljanin, important evidence about the war crimes in Zvornik were held in the personal journal of the commander of the Army of Republika Srpska, Ratko Mladic, which was discovered by the Serbian police in Belgrade, in early March 2010. In the journal, Mladic explicitly describes the forcible expulsion of Muslims from Divic and Kozluk (in the municipality of Zvornik). However, the journal was not presented as evidence in the Zvornik II case, heard before the Higher Court Department, although the trial was concluded in November 2010, giving the OWCP enough time to become familiar with the contents of this document, and to ask that it be included as evidence.

[160] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[161] Vaslijevic, former deputy chief of the Security Service of the Yugoslav Army claims in this statement that the Scorpions were members of the Special Anti-Terrorist Unit of the Serbian Ministry of Interior in Kosovo.

[162] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours*

Notably, the question of the ICTY's work legitimacy was raised the most by the accused war criminals coming from Serbia. The most important case, that raised the question of the ICTY's legitimacy, was the Tadic case. This case has been described as one of the cases that contributed the most to the jurisprudence of the ICTY. The Trial Chamber in the Tadic case concluded that it did not have jurisdiction to review the action taken by the Security Council. Likewise, it concluded that it was a Tribunal with "a limited criminal jurisdiction"[163] derived solely from the Statute and that the Tribunal did not have the jurisdiction to determine the legality of its own creation.[164] On the contrary, the Appeals Chamber disagreed, maintaining that the ICTY had the inherent jurisdiction to determine its own jurisdiction.[165] In response to Tadic's argument, that the tribunal was not "established by law", as required, by *inter alia*, the International Covenant on Civil and Political Rights (hereinafter: the ICCPR), the Appeals Chamber upheld that this merely means that the ICTY is "established in accordance with the proper international standards"[166] and that it provides all the guarantees of fairness and justice in full conformity with internationally recognized human rights instruments. According to the Appeals Chamber these standards were met by the ICTY.[167] Following Tadic, challenges to the legitimacy of the war crimes courts became a 'routine defence' especially in the cases of the high profile accused.[168]

of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[163] Swart, Mia. "Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY." *Goettingen Journal of International Law*. 3 (2011): 985.

[164] The Trial Chamber stated: "The International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. It is to confine its jurisdiction to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council."

[165] The Appeals Chamber stated: "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council […] a 'creation' totally fashioned to the smallest detail by its creator and remaining totally in its power and at its mercy."

[166] Swart, Mia. "Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY." *Goettingen Journal of International Law*. 3 (2011): 985.

[167] Ibid.

[168] Ibid.

2.3. THE CAPACITY AND INDEPENDENCE OF THE WAR CRIMES CHAMBER IN PROSECUTION OF THE WAR CRIMINALS

Serbia has come a long way in the last decade on its path towards accountability for the past atrocities. Still, the independence of its judiciary is generally weak, public opinion is unsupportive of the war crimes prosecutions and the OWCP is increasingly subjected to undue interferences by other State organs.[169] Based on the research that was conducted by the Human Rights Center –Nis, among 150 public prosecutors and 150 judges, all members of the High Court Council and the State Prosecutorial Council[170] (hereafter: the examinees), found that half of the examinees (53.4%) thought that the judiciary was not strong enough to control executive authority and be considered responsible for its actions. One sixth of examinees (15.5%) see their position as secure enough to provide independence of the judiciary, while 53.5% do not agree with this view.[171] Also, the research showed that little less than two thirds (60.3%) of examinees have low confidence in executive authority. Namely, when it comes to judiciary independence compared to legislative authority, 17.1% of judges and 75% of prosecutors are not satisfied. Independence compared to executive authority causes discontent for 31.4% of judges and 85% of public prosecutors.[172] Both judges and prosecutors share identical views that the judiciary in Serbia is currently in no position to implement rule of law, obedience of law and control of the executive authority.[173]

The aforementioned shows that "the judiciary has only partly

[169] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[170] The research was realized during second half of 2013, where the Prosecutors' Association was in charge of organizing distribution of the questionnaire, and the Human Rights Center was in charge of sending the questionnaire via regular mail to the judges' addresses chosen based on the Table of random numbers. The questionnaires were submitted to the examinees both in hard copy and electronically through the Prosecutors' Association and the Judges Association of Serbia. Available at: http://www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf (Accessed on September 27, 2017).

[171] Human Rights Center. *Research of Professional Integrity of Public Prosecutors and Judges.* Published June 2014. Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

[172] Ibid.

[173] Ibid.

managed to isolate itself from political pressure. This is one of the main reasons why it did not achieve its aim – to prosecute the greater number of the war crimes criminals."[174] At the same time, there were a number of public statements by politicians trying to influence the OWCP, such as those of the Minister of Justice on the occasion of the arrest of 15 Serbian war crimes defendants in 2014;[175] the Minister of Interior who sided with the Serbian policemen arrested in 2009 on suspicion of committing crimes in Kosovo;[176] or the majority Members of Parliament who recently accused the OWCP of having deliberately ignored over 10,000 statements taken from the Serb victims.[177] These interferences and political pressures, on some occasions, had an effect on the OWCP. This is most evident from the OWCP's decisions to pursue cases involving the Serbian victims, even in the absence of solid evidence.[178] "These indictments, in the opinion of the expert public, represented an irrational use of resources, bearing in mind many other cases that have serious and substantial evidence, collected by the ICTY, in respect of which the OWCP has not yet initiated an investigation."[179] The vast majority of the cases, that involved non-Serbian defendants prosecuted by the OWCP, ended by acquittal because of lack of evidence.[180]

As well, the extradition requests against two non-Serbian defendants,

[174] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[175] While Minister Nikola Selakovicc welcomed the arrests of the former members of Serb forces suspected of committing the war crimes against Bosnian civilians, he also stated that he expects such actions to be taken in cases that involve the Serbian victims and that such actions currently seem to be missing. Available at: www.blic.rs/Vesti/Politika/516898/Selakovic-Pozdravljam-hapsenje-osumnjicenih-za-ratni-zlocin. (Accessed September 08, 2017).

[176] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[177] Ibid.

[178] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[179] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

[180] Of the 7 cases against non-Serbian defendants, the only 2 with a final conviction are the "Dakovica" case against Anton Lekaj and the "Rastovac" case against Veljko Maric. Defendants in the "Gnjilane Group" case (17 defendants), the "Celebici" and "Prizren" cases (one defendant each) were acquitted with the final judgements (the latter defendant in 2015). The two remaining cases are still pending; the one defendant in the "Orahovac Group" case was acquitted on first instance and is presently standing retrial, while the "Tuzla convoy" case (one defendant) is under appeal after a conviction on retrial.

who were investigated for crimes against Serbian victims, were rejected by courts in the United Kingdom[181] and Austria[182] in 2010 and 2011.[183] In both of these cases, the judges noted that the evidence against the defendants was largely insufficient and that the charges against them were "politically motivated". One more eminent example of the political pressure on the OWCP is that from May 4, 2012, two days before the general elections in Serbia, when the ethnic Albanians from Bujanovac were arrested on suspicion of committing the war crimes against Serbs during the conflict in South Serbia in the year 2001.[184] Again, all of the defendants were freed from all charges on May 29, 2012, less than a month after their arrest.[185]

The Serbian legislative framework leaves room for political influence on the judiciary, because the Serbian National Assembly, as the legislative power, appoints the first time judges and prosecutors.[186] This represents a concern from the perspective of separation of powers because the judges of the war crimes department are assigned to the department by administrative act. These shortcomings in the legal framework allow for a socio-political environment that is not conducive to the proper investigation and adjudication of war crimes cases.[187] Additionally, the assignment of judges lacks full transparency because they are not selected through a competitive procedure, among all of the judges in Serbia, but they are chosen by the presidents of the Court of Appeals and High Court in Belgrade, from among the judges who are already

[181] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[182] Ibid.

[183] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[184] Ibid.

[185] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017)

[186] National Assembly of the Republic of Serbia. *Constitution of the Republic of Serbia*. Official Gazette of the Republic of Serbia, No. 98/2006, *entered into force* November 10, 2006, Article 147. Available at: http://www.paragraf.rs/propisi/ustav_republike_srbije.html. (Accessed August 31, 2017).

[187] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

assigned to those courts. The Law of War Crimes Proceedings foresees that each assignment lasts for a period of six years[188], to guarantee a minimum level of stability and professionalism of the judges and to ensure that they are not removed for reasons of political convenience. The Court presidents have maximum discretion in assigning judges to the WCC, which also has considerable financial implications for the judge in question.[189]

Likewise, the Serbian National Assembly appoints the War Crimes Prosecutor among candidates nominated by the Government, and at the end of the six-year mandate decides on the possible re-appointment.[190] "The assessment of a different expert, but also the personal feelings of the people that work at the OWCP, is that the capacities of this institution should be strengthened."[191] "Prosecution's capacities for the war crimes are extremely low, especially when it comes to the number of people who work effectively on cases. According to the National War Crimes Prosecution Strategy for the period 2016-2020, the OWCP consists of a prosecutor, six deputy prosecutors, two counsellors and three assistants, which is significantly disproportionate to the number of criminal reports and cases at the investigative stage."[192]

One more issue in the work of the OWCP was the fact that Serbia has been without a Chief War Crimes Prosecutor for almost two years, since the expiry of the term of the former Chief War Crimes Prosecutor, Vladimir Vukcevic, on December 31, 2015. In 2016, Deputy Prosecutor Milan Petrovic was the acting head of the OWCP.[193] After the failed elections of a new war crimes prosecutor in 2015, because none of the

[188] National Assembly of the Republic of Serbia. *The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/15, *entered into force* July 08, 2003, Article 10 paragraph 4 and 10a paragraph 4. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

[189] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[190] Ibid.

[191] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes in Serbia, conducted on July 6, 2017.

[192] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[193] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

candidates managed to get a simple majority in the Serbian Assembly, which has 250 seats,[194] the State Prosecutorial Council (hereinafter: the SPC) launched a new open competition for that post in February 2016.[195] Having ranked the candidates, the SPC submitted its final shortlist to the Government of Serbia, in September 2016. This list consisted of the three highest-ranking candidates, namely Snezana Stanojkovic, Milan Petrovic and Dejan Terzic.[196] In spite of this, it took the Serbian Government seven months to send the list of candidates to the Assembly, on April 24, 2017.[197]

"The inactivity of the government authorities in the appointment of the war crimes prosecutor is evidence of the lack of political will to improve Serbia's track record of war crimes prosecution."[198] After all, the work of the OWCP is not only crucial in the Serbia's efforts to deal with atrocities committed during the wars of the 1990s, but also for its connection with the opening and closing of Chapter 23 in the EU accession negotiations.[199] Accordingly, Serbia's government has faced criticism for its failure to appoint the Chief War Crimes Prosecutor for so long. The European Commission has reported this delay in appointment as being of a particular concern.[200] Finally, on May 15, 2017, Snezana Stanojkovic was elected as the new Chief War Crimes Prosecutor, with 153 votes from the 250 members Assembly.[201]

[194] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[195] Five candidates applied and presented their programmes, on June 10, 2016. On September 23, 2016, the State Prosecutorial Council (hereinafter: the SPC) drew up its final list of candidates for the job, including their rankings. The SPC ranked the candidates as follows: 1) Snezana Stanojkovic (69.6 points), 2) Milan Petrovic (63.6 points), 3) Dejan Terzic (61.6 points), 4) Milorad Trosic (59.2 points) and Dorde Ostojic (40.8 points).

[196] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[197] Insajder. "Serbian Assembly finally deciding on a new War Crimes Prosecutor." *Insajder*. Available at: https://insajder.net/en/site/news/4632/. (Accessed September 28, 2017.)

[198] Personal interview, Marina Kljajic, Humanitarian Law Center, conducted on June 28, 2017.

[199] Insajder. "Serbian Assembly finally deciding on a new War Crimes Prosecutor." *Insajder*. Available at: https://insajder.net/en/site/news/4632/. (Accessed September 28, 2017.)

[200] European Commission. *Serbia Progress Report, October 2016.* Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf. (Accessed on September 20, 2017).

[201] Newsmax. "Serbia Parliaments Appoints New Chief War Crimes Prosecutor." May 15, 2017. Available at:http://www.newsmax.com/World/Europe/EU-Serbia-War-Crimes/2017/05/15/id/790184/. (Accessed September 18, 2017).

The programme suggested by the new Chief Prosecutor is severely critical of Croatia, contrary to the adopted National Strategy, and puts emphasis on prosecuting war crimes against Serbs, as well as holding trials in absentia.[202] This programme proposes activities which would focus the prosecutorial activities on cases where the victims belong to one specific nationality.[203] Additionally, this appointment was criticised because the evaluation procedure was not transparent regarding the methodology and criteria used to rank the candidates.[204] The evaluation results suggest that the political suitability of a candidate was also taken into account.[205]

This lack of full guarantees of independence in appointment makes judges and prosecutors more vulnerable to the influence of other State powers. "The war crimes proceedings are still coloured with political influence. This is evident from the address that the former state President made to the state prosecutor, and by the refusal of the Attorney at Law Chamber to grant membership to the former war crimes prosecutor, as well as the delays in the appointment of the new Prosecutor for war crimes."[206] The representatives of the political authorities repeatedly

[202] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[203] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[204] The way of evaluating the candidates for the War Crimes Prosecutor was completely nontransparent. Namely, the State Prosecutors Council gave the maximum number of points to all candidates for their expertise and competence, although their career backgrounds were very different, since half of the candidates did not have any experience in the war crimes cases whatsoever. In addition, the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings provides that "when proposing candidates for the War Crimes Prosecutor [...] an advantage is given to candidates who have the necessary expertise and experience in criminal law, international humanitarian law and human rights. "One of the two candidates, who were given the maximum number of points, by the State Prosecutors Council, does not meet the qualifications. Namely, Dejan Terzic is a Judge of the Appellate Court in Novi Sad and does not have any prosecution experience in cases of international criminal law, humanitarian law and human rights. The other candidate, Snezana Stanojkovic, has relevant experience in war crimes cases, but the cases she was acting in were more simple in scope; they were mainly cases transferred from other prosecutor's offices through regional cooperation.

[205] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[206] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

commented on the work of the OWCP in an inappropriate manner, at times amounting to open threats.[207] For this reason, the European Commission highlighted in all of its latest progress reports how political pressure is generally one of the main factors undermining the independence of the judiciary in Serbia.[208] In its 2014 report on Serbia, the Freedom House described the country's judiciary as "inefficient and vulnerable to political interference."[209] The World Economic Forum's 2014 report ranks Serbia 118th out of 144 countries, when it comes to judicial independence.[210] Consequently, in 2013, the Parliament adopted a national judicial reform strategy for the period 2013- 2018, with the aim of strengthening the High Judicial Council and State Prosecutorial Council and making them accountable, as the bodies mandated by the Constitution to guarantee the independence of the judiciary.[211]

Nevertheless, most Serbian judges and prosecutors, as highlighted in some recent surveys, do not perceive themselves as being in a position to administer justice in an independent fashion[212], and still consider affiliation with a political party as the most powerful factor influencing the judiciary.[213] Based on the research, conducted by the Human Rights

[207] The most extreme example was a statement by the Republic of Serbia President, regarding the work of the Prosecutor for War Crimes, in relation to the mass grave with the bodies of Kosovo Albanians, in Rudnica, discovered in 2014. Namely, after publication of the "Rudnica" Dossier which gives serious indications on the role of the current Chief of Staff of the Serbian Armed Forces, Ljubisa Dikovic, in the crimes and concealment of bodies in the mass grave in Rudnica. President Tomislav Nikolic said that the Prosecutor for War Crimes "should be careful about what he is digging up in Serbia."

[208] For instance, the Report highlighted: "Some judges from higher and appellate courts were confronted with direct attempts to exert political influence over their daily activities without the High Judicial Council properly defending their independence. The practice of publicly commenting on trials and announcing arrests and detentions in the media ahead of court decisions risks being detrimental to the independence of the judiciary and raises serious concern." See: European Commission. Serbia Progress Report, October 2014. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf. (Accessed August 31, 2017).

[209] Freedom House. *Nations in Transit 2014.* Available at: https://freedomhouse.org/sites/default/files/23.%20NIT14_Serbia_final.pdf. (Accessed on September 16, 2017).

[210] The World Economic Forum. *The Global Competitiveness Report 2014–2015.* Available at: https://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf. (Accessed August 31, 2017).

[211] Human Rights Center. *Research of Professional Integrity of Public Prosecutors and Judges.* Published June 2014. Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

[212] CeSID. *Jačanje Položaja, Nadležnosti i Integriteta Državnog Veća Tužilaca.* Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

[213] Human Rights Center. *Research of professional integrity of public prosecutors and*

Center –Nis, it was determined that if the member of the political party is also a high official coming from a state governing institution, a total of 69% of judges and public prosecutors find that it has influence on the judiciary, i.e. investigative procedure, and 36.2% find that it has strong or decisive influence.[214] Research findings show that during the last five years there were attempts to exert influence on 74% of judges and public prosecutors, whereas 36.2% of them experienced attempts to exert influence from three or more sources. Most often the influence was attempted through a common acquaintance, a judge/public prosecutor and a political party (43.1%). If only the frequency of influences was observed (5 or more times in five years), this influence is most frequently performed by the court presidents or superior prosecutors (8.6%). In relation to corruption as a means of influence on the judiciary, judges and prosecutors find that approximately 17% of cases were solved in a corrupt manner.[215] In another research, conducted by the Centar za slobodne izbore i demokratiju (hereinafter: CeSID), among prosecutors and deputy prosecutors (hereafter: the respondents), the attitudes of the respondents as to what exerted the most influence over the selection of prosecutors[216], were: political party pressure (47%), followed by the authority and knowledge of prosecutors (37%), followed by kinship and friendships (13%) and ultimately the interests of large capital and criminal organizations (3%).[217] By the same principle, the attitudes of respondents were taken into consideration as to what is important in the selection of prosecutors and deputy prosecutors in the State Prosecutor's

judges. Published June 2014. Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

[214] See: Appendix 5 - Graphic Chart of the Judiciary Independence in Serbia.

[215] The research was realized during second half of 2013, where the Prosecutors' Association was in charge of organizing distribution of the questionnaire, and the Human Rights Center was in charge of sending the questionnaire via regular mail to the judges' addresses chosen based on the Table of random numbers. The questionnaires were submitted to the examinees both in hard copy and electronically through the Prosecutors' Association and the Judges Association of Serbia. Available at: http://www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf (Accessed on September 27, 2017).

[216] See: Appendix 6 - Graphic Chart of the Influence on Selection of Prosecutors.

[217] The research was conducted by the Centar za slobodne izbore i demokratiju (CeSID), for the needs of the Prosecutors' associations of the Republic of Serbia, in 2014, on a sample of 521 respondents (prosecutors and deputy prosecutors). See: Centar za slobodne izbore i demokratiju (CeSID). *Jačanje Položaja, Nadležnosti i Integriteta Državnog Veća Tužilaca.* Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

Office. Unlike the selection of prosecutors for their regular function, the selection of prosecutors in the State Prosecutor's Office has, in a slightly greater sense, been guided by non-professional criteria. Therefore, an average rating of 51% was given to political influence, followed by the authority and knowledge of prosecutors (31%), followed by kinship and friendships (13%) and ultimately the interests of large capital and criminal organizations (5%).[218]

These circumstances, in addition to not being conducive to the witnesses coming forward to testify, do not create the preconditions for police, prosecutors and judges to carry out their duties independently. Another considerable problem that is influencing the work of judiciary is insufficient financial resources. The departments do not have their own budgets. Instead, their work is funded through the allocation of funds from the budget of the Higher Court or the Court of Appeal. The budget structure of the Higher Court Department includes: judges' salaries, the costs of court appointed experts, translation, interpreting, court appointed defence counsels and other expenditures.[219]"Due to the lack of financial means in the last few years, there is no precise record of potential war crimes cases in the prosecutor's offices of general jurisdiction."[220] In addition, the implementation of the National Strategy is conditioned by the savings rates of the Government of Serbia. In accordance with the aforesaid, the greater independence of the court budget is required.

Furthermore, since the establishment of the WCC, the number of judges that are appointed has not changed. The justification for this is a relatively small number of ongoing cases and that there is no need to hire additional judges. Also, the number of courtrooms is inadequate given the total number of cases handled by the Chamber and the Department,

[218] The research was conducted by the Centar za slobodne izbore i demokratiju (CeSID), for the needs of the Prosecutors' associations of the Republic of Serbia, in 2014, on a sample of 521 respondents (prosecutors and deputy prosecutors). See: Centar za slobodne izbore i demokratiju (CeSID). *Jačanje Položaja, Nadležnosti i Integriteta Državnog Veća Tužilaca.* Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

[219] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[220] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

and the number of defendants in each of these cases.[221] "The judges have at their disposal a total of only four court rooms. This is directly connected with a small number of scheduled main trial hearings per year, because these courtrooms are shared with the judges that are appointed to bring verdicts in the cases of organised crimes."[222] In 2003, the WCC appointed judges with no previous training to work in the field of international criminal and humanitarian law. In spite of this, the authorities have not provided training for judges in the implementation and application of international humanitarian law. The training in this field was provided by the NGOs or on the own initiative of the judges.[223]

Respect for the rule of law is one of the formal conditions for Serbia's EU accession. The legacy of systematic and largely unpunished human rights violations from the 1990s is one of Serbia's greatest challenges in meeting that requirement.[224] The unwillingness of the authorities to bring the majority of the war crimes perpetrators to justice deepens suspicions about the sincerity of Serbian officials' declared commitment to achieve reconciliation. Still, there is a hope that implementation of the adopted National Strategy could strengthen the area of the war crimes prosecution. This Strategy emphasizes that the war crimes trials are one of the most important steps in the process of reconciliation, development of good neighbourly relations and in building lasting peace in the region. It aims to improve the efficiency of the war crimes investigations and prosecutions through "curtailing impunity for the war crimes, by punishing those responsible, regardless of their capacity and status; supporting the judiciary through the promotion of regional judicial cooperation and harmonization of the case law in order to achieve proportionality of punishment; enhancing witness and victim support mechanisms; improving cooperation between government bodies responsible for uncovering and prosecuting war crimes, and by raising the level of societal awareness about the importance of punishing the war crimes perpetrators."[225]

[221] Due to an insufficient number of courtrooms some war crimes trials, such as the *Lovas* case were held in the Palace of Justice, a courthouse inadequately equipped for a trial of this kind in terms of its physical characteristics and its technical and security capacities.

[222] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[223] Ibid.

[224] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[225] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal

Explicitly, the National Strategy asserts the strengthening capacities of all institutions involved in the war crimes prosecutions, as well as improving the legal framework, witnesses and victims' protection and support systems. However, the vacuum of two years without appointing the new War Crimes Prosecutor and Deputy Prosecutor, non-adoption of the prosecution strategy, and the OWCP only raising seven indictments in 2016, all of which were simple cases transferred from B&H, shows that Serbia is still very far from fulfilling the aims that are set by the National Strategy. In 2016, not a single indictment was raised for the crimes in Kosovo, and the number of persons still missing was not reduced, with the proceedings in the main cases such as Ovcara, Lovas, Cuska and Skocic, still not completed.[226]

Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[226] Ibid.

3.

THE INFLUENCE OF THE WAR CRIMES CHAMBER PROCEEDINGS ON THE TRANSITIONAL JUSTICE PROCESS AND COEXISTENCE

Criminal transitional justice, which Serbia has chosen as the way to address its past, should be focused on the identification and recognition of responsibility for the human rights violations, care for victims and conducting comprehensive trials that will guarantee non-repetition of the crimes. Nonetheless, to accomplish these aims it is necessary to determine criminal responsibility, to acknowledge victims by providing material reparations and symbolic gestures, which will help preserve memories and restore dignity to the victims, to determine and publicly state the facts about human rights violations and to conduct reforms of institutions, which are responsible for the human rights violations.[227] The war crimes trials in Serbia are characterised by multiple, long-standing problems that have continued to hinder establishing criminal justice for the past crimes.

Despite the enormous importance of this issue, the victims of the war crimes committed in the territory of the former Yugoslavia have not been consulted regarding the state approach towards the past, administering of justice and punishment for the war criminals, both of which are crucial for the establishment of long-lasting peace and security in Serbia.[228] The victims are especially unhappy regarding the length of the punishment awarded to the perpetrators for the war crimes committed during the conflicts. Based on the elaboration in the previous chapters, this chapter will discuss the expectation from the

[227] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015*. Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).https:/er.net/en/site/news/4632/ne zlocine nad Srbim", 2017).

[228] Personal interview Milos Urosevic, NGO Zene u crnom/Women in Black, conducted on September 21, 2017.

WCC in Serbia, provide analysis of the cases and verdicts of the WCC, as well as assess the impact that the WCC prosecutions have on the transitional justice process and reconciliation. The applied transitional justice mechanism in Serbia – the war crimes trials is the result of the requests made by the international community, and in practice is under a strong influence of the political authorities and their ideologies.[229] So far, the concrete measures in establishing transitional justice are mainly lacking or do not receive sufficient support from the political actors. Finally, the present chapter will examine how these relate to transitional justice, denial and memorialisation.

3.1. EXPECTATIONS FROM THE WAR CRIMES CHAMBERS IN SERBIA

There is a huge gap between what the victims were expecting from the WCC in Serbia and what it is able to achieve. The WCC is a court with judges that have the primary task to hear a case, to examine the evidence, to establish the level of responsibility and guilt and to deliver the sentence. If the role of the WCC judges were to go beyond this then their independent judgment would be jeopardized.

Some general criticisms of the courts' work are that they neglect: information (victims search for answers to the questions of why certain events were allowed to happened), truth telling (important element in healing is giving an opportunity to the victims to tell the story of what happened), empowerment (involving victims in the case that directly concerns them can be an important way to bring back a sense of empowerment and dignity to them), and restitution and vindication (compensation by offenders is important for the victims because of their actual loss, but also because of symbolic recognition that compensation implies).[230] Therefore, 'court justice' cannot on its own address huge frustrations that are the result of a massive violation of fundamental human rights during a conflict.[231]

Although, the victims expected from the verdicts of the WCC that they

[229] Personal interview Milos Urosevic, NGO Zene u crnom/Women in Black, conducted on September 21, 2017.

[230] Gow, James, Rachel Kerr and Zoran Pajic "Prosecuting War Crimes." *Lessons and legacies of the International Tribunal for the former Yugoslavia.* Routledge. 2014.

[231] Ibid.

will bring them justice, the judgments failed to meet their expectations. So far, the cases prosecuted in Serbia have covered crimes committed against over 1,100 victims of violent crimes: 111 belonging to all main national groups (Albanians, Bosnians, Croats, Roma and Serbs). Moreover, there is a predominance of cases involving crimes against victims of Croatian (35% of the cases and 34% of the total number of victims) and Bosnian ethnicity (28% of the cases and 20% of the victims), while there are fewer cases involving Kosovo Albanian victims (14% of the total number of cases).[232] However, these cases on average involve larger-scale crimes, so that Kosovo Albanians make up 22% of the total number of victims. There are even fewer cases involving Roma victims (7% of the cases, and 3% of the victims), while cases involving crimes against Serbian victims are 16% of the total number of cases and involve 21% of the total number of victims.[233] Based on the aforementioned statistics, it is understandable why the victims feel that by processing so few war criminals, the WCC showed that their suffering and lost is not so significant. "The victims have lost trust in the work of institutions and developed the attitude that because the state is not capable to protect them, to acknowledge their loss, they have to resort to alternative means of protection."[234]

The role of the victims, as witnesses, in the war crimes proceedings is very important because in some cases their testimonies are the only evidence available. Therefore, in these cases, the success of the court proceedings depends on them. On the other hand, giving testimony in a court can be a traumatic experience, especially for the victims/witnesses. The witnesses have a legal and civil duty to testify in the criminal proceedings for the war crimes, however, these procedures must be organized in such a manner to avoid violation of the witnesses' rights. This standard was established in international law, as well as in the European Convention on Human Rights and it has primacy over all other laws. It includes the rights of the victims/witnesses to life, freedom, security and respect for private and family life.[235]

[232] See: Appendix 7 - Graphic Chart of the War Crimes Trials in Serbia – Nationality of the War Crimes Victims in the Period from 2004 until 2013.

[233] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[234] Personal interview with Milos Urosevic, representative of NGO Zene u crnom/Women in Black, September 21, 2017.

[235] Evans, Christine. "Reparations for Victims in International Criminal Law." N.p. (2015). Available at: http://rwi.lu.se. (Accessed on September 10, 2017).

However, the national approaches towards transitional criminal justice in Serbia are influenced by the political and social situation that has such a character that it destimulates the victims/witnesses to testify in the ongoing proceedings about the facts that are known to them.

In Serbia, the existing mechanisms for the protection of victims/witnesses from intimidation and assaults on their integrity are just partly fulfilling their function. Therefore, the protection of witnesses, in the war crimes trials, continues to be the most vulnerable element of the war crimes proceedings. Serbia has not made efforts to address its long-standing problems in the implementation of the Witness Protection Programme. As well, the protection of witnesses has been criticised by many relevant international institutions[236], including the EU.[237] There were a number of instances of witnesses being addressed in an inappropriate manner by defendants and their lawyers during the war crimes trials. In these instances, the judges did not use the statutory measures, such as a formal reprimand or fine, to protect the integrity of witnesses that were questioned.[238] For example, in the Qyshk/Cuska Case, the Presiding Judge just gave an informal warning to the defendant, who, while a former member of the 'Jackals' paramilitary unit, Zoran Raskovic, was giving his testimony, said to him that he is not a Serb, hinting that Raskovic's testimony amounted to treachery.[239]

Another concern, when it comes to the witness protection during the war crimes proceedings, was the fact that Serbia did not have a detailed witness protection law. As a result of the aforesaid, many witnesses refused to testify. That is why efficient witness protection measures are essential to ensure that more witnesses safely cooperate with the investigating authorities. Nonetheless, in some cases, judgements

[236] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[237] Ibid.

[238] National Assembly of the Republic of Serbia. *The Criminal Procedure Code of Serbia*. Official Gazette of the Republic of Serbia, Nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14, *entered into force* October 06, 2011,

Article 102. Available at: http://www.paragraf.rs/propisi/zakonik_o_krivicnom_postupku.html. (Accessed August 31, 2017).

[239] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).https:/er.net/en/site/news/4632/ne zlocine nad Srbim", 2017).

indirectly disclosed the identity of the protected witnesses by making reference to the names of relatives or other personal circumstances. In the Gnjilane Group case, for example, the first instance judgement mentions the full names of close relatives of the protected witness, so that the protected witness's identity could easily be discovered.[240] A similar shortcoming can be found in the Zvornik I case.[241] Exposure of protected witnesses' identity unnecessarily exposes them to additional danger and distress, therefore ultimately deterring other potential witnesses from coming forward to testify.

The new Criminal Procedure Code (hereinafter: the CPC) foresees a series of measures that the judge can apply to ensure that the witness's identity is not revealed to the public. These include: excluding the public from the courtroom,[242] examination of the witness from a separate room, face and/or voice distortion.[243] Under the current CPC, protected witnesses are always given a pseudonym[244], however, the defence is in any case entitled to know their identity, at the latest 15 days before the start of the trial.[245] When it comes to out-of-court protection, Serbia has a specialized Witness Protection Unit (hereinafter: the WPU) within the Ministry of Interior, which is tasked with ensuring the physical safety of particularly sensitive witnesses[246] in the war crimes, organized crime and other serious cases.[247] However, several war crimes

[240] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).https:/er.net/en/site/news/4632/ne zlocine nad Srbim", 2017).

[241] Ibid.

[242] National Assembly of the Republic of Serbia. *The Criminal Procedure Code of Serbia*. Official Gazette of the Republic of Serbia, Nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14, *entered into force* October 06, 2011, Article 106 paragraph 1. Available at: http://www.paragraf.rs/propisi/zakonik_o_krivicnom_postupku.html. (Accessed August 31, 2017).

[243] Ibid, Article 108 paragraph 2.

[244] This rule is implicitly stated in National Assembly of the Republic of Serbia. *The Criminal Procedure Code of Serbia*. Official Gazette of the Republic of Serbia, Nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14, *entered into force* October 06, 2011, Article 108 paragraph 2 and paragraph 6. Available at: http://www.paragraf.rs/propisi/zakonik_o_krivicnom_postupku.html. (Accessed August 31, 2017).

[245] National Assembly of the Republic of Serbia. *The Criminal Procedure Code of Serbia*. Official Gazette of the Republic of Serbia, Nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14, *entered into force* October 06, 2011, Article 106 paragraph 2 and paragraph 3. Available at: http://www.paragraf.rs/propisi/zakonik_o_krivicnom_postupku.html. (Accessed August 31, 2017).

[246] Including measures of 24/7 surveillance, change of identity and relocation.

[247] The WPU's modus operandi foresees 4 types of measures: physical protection of person and property, relocation, concealing identity and information about ownership, and change of identity. The first three measures can be applied as emergency measures, which is

witnesses assigned to the protection of the WPU publicly complained to various degrees about improper behaviour of the WPU's members.[248] In recent years, a number of entities raised concerns[249] as to the WPU's reliability, professionalism and even impartiality. In 2011, a Council of Europe's Special Rapporteur highlighted that "inappropriate behaviour by members of the WPU towards witnesses has sometimes resulted in the witnesses either changing their testimony or simply deciding not to testify at all".[250] Also, the European Commission has repeatedly highlighted deficiencies in Serbia's witness protection programme, in its progress reports.[251]

The example of the witness Slobodan Stojanovic, former member of the Serbian police, and witness of the crimes committed in Kosovo during 1998, by members of the 37th Special police battalion of Serbian police, clearly shows that the Serbian authorities are preventing prosecution of war crimes. In this case, Slobodan Stojanovic was the object of repression by persons who were perpetrators of the crime. Instead of protection, the authorities of Serbia, the OWCP and the WPU, further aggravated the situation by contesting his credibility and preventing him from testifying with the aim to protect 'higher national interests'. All of this resulted in the circumstances that none of the war crimes perpetrators was prosecuted and that Slobodan Stojanovic and his family's safety was put in danger. This case is not the only one of this kind. At the same time, there were proceedings against Natasa Kandic because she presented evidence that the current Chief of Staff of the

not the case with the change of identity. The latter has never been applied since its application requires adoption of several bylaws, which different ministries have not adopted.

[248] In 2012, an insider witness in the "Cuska" case, publicly stated that he received threats from one high-ranking MoI official and members of the WPU. In 2011, three former members of the Special Police Forces, who were supposed to testify against their colleagues for crimes committed in Kosovo in 1999, harshly accused the WPU. One of them publicly alleged that members of the WPU were threatening and blackmailing him in order to make him "give up on his testimony against his former comrades".

[249] The European Parliament similarly pointed out serious deficiencies in the functioning of the witness protection programme regarding cases of the war crimes, which have resulted in a number of witnesses voluntarily opting out of the programme after being systematically intimidated.

[250] Council of Europe. Rapporteur Jean-Charles Gardetto. *The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans*. Published on January 12, 2011. Available at: http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf. (Accessed August 31, 2017).

[251] European Commission. *Serbia Progress Report, October 2013.* Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/brochures/serbia_2013.pdf. (Accessed August 31, 2017).

Serbian Army, General Ljubisa Dikovic, was involved in organizing and concealing war crimes in Kosovo. In both cases, the proceedings are taking place against people who provided evidence against the perpetrators of war crimes, instead of conducting an investigation against persons that on the basis of this evidence committed the war crimes.[252]

Additionally, the CPC of Serbia does not prescribe any specific protective measures for sexual abuse survivors. Because of this, rape victims are exposed to additional traumatization while testifying in court. For example, in the Skocic Case, the rape victims were exposed to offensive and derisive comments by the defendant.[253]Although the Presiding Judge showed a certain degree of sensitivity during their examination by warning the defendant to behave in a civil manner, he failed to reprimand him formally or fine him for inappropriate behaviour.[254] The mechanism for the protection of particularly vulnerable witnesses was used only once, in the Qyshk/Cuska Case, where the panel that conducted the proceedings ordered that a sexual abuse survivor be examined indirectly, only via the judicial panel.[255] All of this has contributed to the fact that in some cases, the injured parties refuse to continue to take part in the proceedings because of the trauma they had undergone and the absence of adequate support and protection.[256]

In Serbia, transitional justice approaches are still very dependent on civil society. This is obvious from the Putjevo case, in which, the witness protection was secured, not by the state authorities, but by the Humanitarian Law Center.[257] Accordingly, it is crucial to protect those who decide to testify in war crimes proceedings because of the great risk

[252] Medenica, Mirko. "The Trial Against Witness of War Crimes Slobodan Stojanovic." *Zene u crnom/Women in Black.* Belgrade - Sudski procesi. December 2, 2015. Available at: http://zeneucrnom.org/index.php?option=com_content&task=blogcategory&id=39&Itemid=68. (Accessed on September 12, 2017).

[253] Ibid.

[254] Ibid.

[255] Ibid.

[256] An injured party in the Bijeljina II Case decided not to appear at the court for the retrial. Protected witness "Gamma" (Skocic Case) refused to testify in the retrial. Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* (2016): 106-107 and 120.

[257] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.* Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

of retaliation against them or members of their families. The majority of the victims who decided to testify at the WCC are still living in the areas of conflict and are in great fear of retaliation. Therefore, it is necessary to ensure that every effort is made to make it easier for victims/witnesses to participate in the proceedings.[258] On the other hand, the excessive length of the proceedings produces serious consequences because, as the years pass, defendants and witnesses die or witnesses simply refuse to testify at repeated trials. "There are a great number of cases where the first instance ruling was abolished and the proceedings had to be conducted again."[259] Some of the ongoing trials are not completed, not even after five years. The length of these trials, gives opportunities to those standing trial to find out the identities of the protected witnesses and to influence their testimony. As a result, the witnesses are faced with threats and are giving up from their testimonies. In this way, the credibility of the national judiciary is being ruined and it is sending a very negative message to the victims and their family members. The most striking example of excessive and unjustifiably long proceedings is the Ovcara Case, in which, four years after the final judgment was rendered, and 10 years after the indictment was issued, the judgment has been quashed and the case remanded to the WCC, of the Court of Appeal, for reconsideration on appeal. Only two trial days were held in this case during 2016, in contrast to the average 33 trial days per year in the period from 2004 until 2008.[260]

Another striking example is the Lovas case, where during very long proceedings, one defendant died and many victims/witnesses declined to testify again, to avoid re-traumatization from repeating their testimony and also because they had lost faith in the procedures and institutions. Besides, the excessive length of the proceedings and their repetition sends a negative and discouraging message to future witnesses and victims – that it would be difficult, if not impossible for

[258] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[259] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[260] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

them to receive justice from the Serbian institutions. Likewise, these delays have caused that the media stops sending their reporters to cover the war crimes trials, further reducing trials accessibility.[261] Providing information to the general public regarding the war crimes is a key prerequisite to fostering a more objective understanding of the past and creation of a social memory about the past crimes. The state has a duty to ensure that its citizens know what happened in the recent past and who the key protagonists and actors in those events were.[262] "Notifying the public about the war crimes trials and established facts is an important element of the process of coping with the past. Adopting court determined facts about the crimes committed is one of the key preconditions for an objective view of the past and creation of a war crimes social memory."[263]

In the United Nations Principles for Combating Impunity it is stated: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances […] that led […] to the perpetration of those crimes."[264] As television is the main source of information in Serbia[265] coverage of the war crimes trials by this media could substantially raise their profile and public visibility. Although the legal framework allows for the recording and broadcast of the war crimes trials,[266] in the 14 years of domestic war crimes prosecutions, the general public in Serbia has not had a chance to see a single testimony of a victim, perpetrator or witness participating

[261] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[262] Ibid.

[263] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

[264] United Nations. *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (New York*, February 8, 2005) E/CN.4/2005/102/Add.1. Available at: http://www.derechos.org/nizkor/impu/principles.html. (Accessed on September 20, 2017).

[265] The Bureau for Social Research. *The Serbian Media Integrity Research.* Available at: http://www.birodi.rs/barometar-integriteta-medija-bim/. (Accessed on September 20, 2017).

[266] National Assembly of the Republic of Serbia. *The Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings*. Official Gazette of the Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/15, *entered into force* July 08, 2003, Article 16a. Available at: http://www.paragrafco.co.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html. (Accessed August 31, 2017).

in the trials, or a court delivering a judgment in a war crime case.[267] In practice, the requests for recording trials are regularly denied, contrary to the Law, by the authorizing party, namely the President of the Higher Court in Belgrade.[268] This is the main reason why the latest opinion polls, that were organised in Serbia, have shown that the majority of citizens cannot name even one war crime trial conducted by domestic courts, or any institution involved in the prosecution of war crimes.[269] "The fact that the war crimes trials are excluded from the public may be a reflection of the government representatives attitude that the public should not be fully informed regarding the war crimes proceedings."[270]

Another important aspect of the war crimes proceedings is the right to reparations. The right to reparation represents a transitional justice mechanism that is the most victim-oriented. The main aims of reparations are compensation for the loss of the family member, returning victims' property, assisting them in rebuilding their lives, but also restoring their dignity. Nevertheless, numerous legal and institutional barriers have impeded victims' effective access to material reparations. If we observe the rights and protection of the witnesses, in the international criminal law, we can determine that they have evolved through international tribunals to their current state at the International Criminal Court (hereinafter: the ICC). The ICC has changed how the victims are treated at an international criminal tribunal, from being regarded only as witnesses to the position where their views and concerns can be heard and achieve reparations. It has built upon the success and worked to correct the mistakes that the previous *ad hoc* tribunals have made.

The reparations have provided help to the victims in the form of rehabilitation opportunities. Many victims consider that the concept of justice is not satisfied unless it is accompanied with reparations. The reparation is especially important for the victims coming from the areas

[267] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[268] Ibid.

[269] Belgrade Center for Human Rights. *Public Opinion Survey: Attitudes towards War Crimes, the ICTY and the National Judiciary 2011.* Available at: http://www.bgcentar.org.rs/istrazivanje-javnog-mnenja/ stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosudu-za-ratne-zlocine/. (Accessed on September 20, 2017).

[270] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

that are affected by the war, to help them re-establish their dignity and resume their lives. Going back to the Nuremberg and Tokyo tribunals until today, it is evident that important progress has been made with regards to the victims' rights and reparations in the international criminal justice. However, there are still some challenges remaining to ensure that the rights of the victims are effectively enjoyed, not only in law, but also in practice. In Serbia, the state institutions have not been committed to fulfil their obligation to the victims' reparations in accordance with the international standards. The administrative proceedings for the realization of the right to reparations have been regulated by the retrograde and discriminatory Law on the Rights of Civilian Invalids of War, which deprives a large number of victims from the right to seek reparation.[271]

Very often, in practice, the victims, who turn to the courts for monetary compensation for suffering inflicted on them by members of the Serbian forces during the war, have their application rejected or they are subjected to inappropriate conduct towards them by judges and sometimes they are humiliated by the mergers of financial compensation awarded to them.[272] "Inevitably, the system of reparations is almost non-existent in Serbia. In several cases the victims may have been indemnified in litigation, but the most common problem, in addition to extremely low amounts, is that it is necessary to have a verdict finding that the crime was committed, which again slows down the process because trials last for a long time."[273] It is apparent that Serbia should work to improve its victims' reparation system and make it more gender sensitive.[274] Also, it should make it more effective and available to all of the victims and their family members, including free legal aid, that would allow them effective access to justice and reparations.

[271] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).https:/er.net/en/site/news/4632/ne zlocine nad Srbim", 2017).

[272] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[273] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

[274] This should be done with the use of guidelines that are prescribed by the United Nations Resolution on Women and Peace and Security. See: Security Council of the United Nations. *Resolution on Women and Peace and Security* (New York, June 19, 2008): 1820. Available at: http://www.un.org/press/en/2008/sc9364.doc.htm. (Accessed September 06, 2017).

The aforementioned shows that there are shortcomings in dealing with the truth about the war crimes in Serbia. The main obstructions to the progress of transitional justice is refusal to face the past and collective memory that is dominated by one-sided view which identifies Serbs as victims and winners. The pattern of memorialization in Serbia shows that attempts of creating an indisputable historical record have failed. To overcome this, it is necessary to have the combined efforts of the politicians in power, civil society and the greater public. Nevertheless, this is not an easy task, having in mind that any attempt to change one-sided common memory stirs up nationalistic feelings of fear that this memory will be erased, and these attempts are immediately rejected.

3.2. ANALYSIS OF DEFICIENCIES IN THE WAR CRIMES CHAMBER PROCEEDINGS

Compared to the holocaust and the Rwanda genocide, the armed conflicts[275] and the war crimes committed in the former Yugoslavia were characterised as ethnic cleansing, rather than genocide.[276] The law applicable to the war crimes requires determining whether the acts committed are prohibited both under domestic and international law[277]. Defendants in Serbia are charged with offences under the Criminal Code of the Federal Republic of Yugoslavia (hereinafter: the CCFRY), which was the law in force during the 1990s and is generally recognized as more favourable.[278] The Law of the War Crimes Proceedings, that

[275] According to the widely accepted definition of "armed conflict" given by the ICTY: "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."

[276] Frisso, Giovanna M. "The Winding Down of The ICTY: The Impact of the Completion Strategy and The Residual Mechanism on Victims." *Goettingen Journal of International Law.* No 3 (2011).

[277] Customary international law requires a series of elements for an act to be considered a war crime: (a) there must be an armed conflict; (b) the act committed must be prohibited; (c) there must be a "nexus" between the conflict and the crime; (d) the victim must belong to a protected category. An additional principle is that (e) the official capacity of the perpetrator is irrelevant.

[278] The 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter: the CCSFRY) and the 1993 Criminal Code of the Federal Republic of Yugoslavia (hereinafter: the CCFRY) are almost identical codes. Articles 142 (War Crimes against Civilian Population) and 144 (War Crimes against Prisoners of War) of the Criminal Code of the Socialist Federal Republic of Yugoslavia adopted in 1976 each foresaw a punishment of "at least 5 years, or the death penalty". Article 38 paragraph 1 of the CCSFRY establishes that, when not otherwise prescribed, a term of imprisonment cannot be longer than 15 years. The same Article 38, in

was adopted in 2003, stipulates that the war crimes cases, in which the indictment had been confirmed before the entry into force of this Law are to be completed before the courts which previously had jurisdiction over them, meaning the courts of general jurisdiction. From 2013 until 2015, the courts of general jurisdiction heard three cases in Serbia. "The main characteristic of these war crimes trials is the unreasonably long duration of the proceedings, the slow speed of scheduling main trial hearings and judges not possessing the specialized knowledge in the area of the war crimes."[279]

There are several notable examples of unreasonably long trials conducted at the courts of general jurisdiction: in the Rahovec/Orahovac case, in which the trial lasted for more than 12 years[280]; the trial in the Milos Lukic case lasted for over 15 years[281]; and the proceedings in the Kushnin/Kusnin case, which started on September 16, 2002, are still ongoing.[282] The long duration of these proceedings can be ascribed to the lack of professionalism of the acting prosecutors and judges, the low level of expertise in the field of international humanitarian law and also the tolerance of the procedural rights abuse by the defence in order to delay the proceedings.[283] Apart from the long duration of the proceedings, the final judgments in Rahovec/Orahovac and Milos Lukic case were characterized by the inappropriately low sentences imposed – three years imprisonment and five years imprisonment.[284]

its paragraph 2, foresees that the court can also impose a punishment of 20 years for crimes "eligible for the death penalty." The 1992 Constitution of the Federal Republic of Yugoslavia abolished the death penalty for federal crimes (including the war crimes). In 1993, legislative amendments formally abolished the death penalty from the Criminal Code (Article 37), and provided that instead imprisonment of 20 years can be imposed for the most serious offenses (Article 38 paragraph 2. As a result, the 1993 Criminal Code of the Federal Republic of Yugoslavia foresees a punishment for war crimes from 5 to 15 years of imprisonment, or a fixed term of 20 years of imprisonment. See: National Assembly of the SFRY. *The Criminal Code of the Federal Republic of Yugoslavia*. SFRY Official Gazette, Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 45/90 and FRY Official Gazette, Nos. 35/92, 37/93 and 24/94, *entered into force* October 26, 1976. Available at: https://searchworks.stanford.edu/view/2973694. (Accessed August 31, 2017).

[279] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[280] The main hearing started on June 20, 2000 and finally ended on December 18, 2013.

[281] The main hearing started on June 25, 1999 and finally ended on October 9, 2014.

[282] Humanitarian Law Center. *Report on war crimes trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[283] Ibid.

[284] Ibid.

From its establishment, in 2003, the OWCP has processed 275 people. In the period from 2003 until the end of 2014, the OWCP charged 162 defendants with war crimes against civilians and prisoners of war. The overwhelming majority (86%) of defendants are former members of Serbian forces.[285] Most members of non-Serbian forces were Albanians indicted in a single case, which resulted in the acquittal of all 17 defendants. Only three defendants belonged to Bosnian or Croatian[286] forces.[287]

One more aspect that has to be taken into consideration during the war crimes proceedings is the nature of the armed conflict. The international humanitarian law makes a clear difference between international and non-international armed conflicts. This difference is of great importance in the war crimes cases, since protected persons enjoy a different level of protection depending on what type of conflict is in question. However, the WCC judgments are characterised by lack of reasoning on the qualification of armed conflicts or qualification of an armed conflict in certain cases deviates from the character of the conflict determined by the ICTY in relation to identical events.[288] What is especially important to emphasize is that in the cases where the character of conflict is decisive for the existence of an criminal act[289], both the OWCP and the courts have failed to provide adequate rationales.[290] "The general belief is that Serbia did not participate in the wars that were conducted in Croatia and BiH. This view is so strongly held in Serbian society that even the OWCP never includes Serbia's involvement in the neighbouring countries wars in its indictments. That is why in the courts proceedings, the courts are only determining the facts regarding the crimes committed by low-ranked soldiers. The Skorpion verdict provides one relevant example. In

[285] See: Appendix 8 - Graphic Chart of the War Crimes Trials in Serbia – Nationality of the War Criminals Charged at the WCC in the Period from 2003 until 2014.

[286] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.* Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[287] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014)*. Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[288] Indictment in the case of Luka Camp.

[289] Cases of Sremsksa Mitrovica and Tuzla Column.

[290] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

the verdict it is stated that when people from Srebrenica were killed in Trnovo, Skorpion were acting as paramilitary formation. The verdict fails to mention that Skorpion were in fact receiving direct support from the Serbian state."[291]

"Serbia cannot be satisfied with the number of the processed war crimes cases. A low number of confirmed indictments, involvement of executive authorities in judicial work and insufficient capacity building for knowledge on matters relevant to the prosecution of war crimes is one of the main issues that the Serbian judiciary faces. Moreover, it is facing the downward trend in the number of indictments, with fewer indictees and prosecutions focusing solely on direct perpetrators."[292] According to OWCP data, over 800 war crimes cases are still at the preliminary investigation stage.[293] "If the OWCP continues to work at its present pace, it will solve over the next 10-year period less than 10 percent of the war crimes cases."[294] In the time period from 2014 until 2016 no charges were brought against any individuals who held high military, police or political office during the conflicts.[295] Likewise, there were no indictments for the crimes against humanity or for command responsibility.

"The judges and prosecutors in Serbia have not taken joint and official stance when it comes to the application of the international law standard, with regards to command responsibility."[296]"The criminal offense of command responsibility is prescribed by Article 384 of the Criminal Code of Serbia and it is introduced in Serbia's criminal law in 2005, following the adoption of the Rome Statute of the International Criminal Court, whose provisions partially harmonized the elements of the offense. With this, the dilemma that existed in the professional

[291] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[292] Ibid.

[293] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[294] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

[295] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[296] Personal interview Natasa Nikolic, Legal Officer at Belgrade Centre for Human Rights, conducted on July 05, 2017.

and experts circles regarding whether command responsibility should be treated as an institute of the general part of the criminal code and as a specific form of responsibility or as a special criminal act of non-acting, which enters into a special part of the CC, was solved, in the favour of second option."[297] Nevertheless, "the commonly-used argument by the judges is that the use of command responsibility is not possible, because command responsibility was not prescribed by the Law that was in force when the crimes were committed. If the courts applied this institute and conducted trials based on command responsibility, they would violate the constitutional principle of legality according to which *'no one can be convicted for an act that was not foreseen in the law at the time of execution and for which no punishment was provided'*."[298]

Consequently, in Serbia, no discernible progress was made towards establishing the role in past crimes of individuals who currently hold high office or have close ties with the government.[299] The first time the OWCP launched an investigation into a high-ranking officer of the Serbian or Yugoslav Armed Forces was only in 2014, and it was against General Dragan Zivanovic.[300] Although, the investigation against Zivanovic was concluded in December 2016, the OWCP has still not brought charges against him.[301] The absence of investigations and charges against high-ranking perpetrators is contrary to the adopted National Strategy, in which Serbia has made its priority to investigate the cases against the high ranking suspects.[302] Also, until the end of 2008 only three sentences of the WCC became final (Ovcar 2 – Milan Bulic, Anton Lekaj and Skorpions).

In accordance with the present CC of Serbia, the statutory punishment for the war crimes against the Civilian Population and the war crimes

[297] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

[298] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[299] Ibid.

[300] The Humanitarian Law Center, Belgrade, Serbia filed a criminal complaint against him in 2010 and published a dossier in 2013 on crimes committed in the area of responsibility of the brigade under his command.

[301] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

[302] Ibid.

against Prisoners of War is five to forty years of imprisonment. However, since the offences occurred at a time when the Yugoslav Criminal Code was in force, the punishment from five to fifteen, or twenty years of imprisonment[303] foreseen by the latter is applied as it is more favourable to the defendant.[304] Although the WCC has often received criticism for its lenient sentencing practice, an analysis of the punishments imposed[305] shows that the average punishment imposed is 11.7 years (11.5 years when considering only final judgments).[306] Further, the WCC's policy of handing down excessively light sentences without giving reasoning for such judgments has been criticised by the legal community. The established mitigating and aggravating circumstances are only listed in the judgments, without explaining how the given sentence achieves the purpose of punishment – "the suppression of socially dangerous activities that violate or jeopardize the social values protected by criminal legislation."[307]

The CC of former Yugoslavia stipulates that the court is entitled to mitigate a sentence below the statutory minimum of five years for a war crime in cases of "particularly mitigating circumstances" for the defendant.[308] The WCC applies this institute as well, however, without any elaboration on the mitigating circumstances. For example, while sentencing the two defendants in the Qyshk/Cuska case, the court found there was room to mitigate their sentence below the statutory minimum since "it was not established that they had shown cruelty".[309]

[303] Prison terms higher than 15 but lower than 20 years are not statutory punishments and cannot be imposed.

[304] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

[305] A considerable number of defendants - 25, were sentenced to the statutory maximum of 20 years, and 15 more were sentenced to (15) years.

[306] Humanitarian Law Center. *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013*. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf. (Accessed September 09, 2017).

[307] National Assembly of the FRY. *The Criminal Code of the Federal Republic of Yugoslavia*. FRY Official Gazette, Nos. 35/92, 37/93 and 24/94, Article 5 paragraph 2. Available at: https://searchworks.stanford.edu/view/2973694. (Accessed August 31, 2017).

[308] Ibid., Article 42 paragraph 1 item 2.

[309] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

Nevertheless, the fact that the defendants did not show cruelty in committing the crime cannot be considered mitigating. The usual way of committing the crime does not imply cruelty, and therefore, the lack of this circumstance cannot be deemed mitigating.[310] Thus, it can be determined that the WCC mitigates the sentences below the statutory minimum when it does not have enough evidence to establish the criminal responsibility of the defendant or in "easier" cases of the war crimes which have not resulted in the victim's death.[311]

In accordance with the above, it can be concluded that it is unreasonable to expect that the trials at the WCC, on their own, can achieve processing of the all remaining war criminals. In the case of Serbia, the successful prosecution of the war crimes' cases is dependent on international cooperation. For that reason, it is fundamental to set up good cooperation with the international tribunals and national courts in the region. When it comes to the ICTY, it is especially important that the WCC uses evidence and the facts that the ICTY has already established. This would speed up the criminal proceedings and would make the work of the prosecution easier. Still, one of the most important aspect of cooperation is cooperation on a regional level. As a result of goodwill on all sides in the region, the war crimes cooperations are agreed by the cooperation agreements between Serbia, Bosnia and Herzegovina, Montenegro and Croatia. Even though, in the practice, the best cooperation in the war crimes cases is realised between Serbia and Croatia. When it comes to Kosovo, cooperation with the European Union Rule of Law Mission in Kosovo (hereinafter: the EULEX)[312]

[310] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015*. Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[311] Ibid.

[312] The European Union Rule of Law Mission in Kosovo (hereinafter: the EULEX) is assisting Kosovo judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and custom service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices. The Mission in full co-operation with the European Commission Assistance Programmes implements its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities. In order to facilitate continued and sustainable progress by the local authorities, including judicial authorities and police services, the Mission provides monitoring, mentoring and advice at headquarters and senior management level of relevant Rule of Law institutions to strengthen the chain of criminal justice, with the emphasis on fighting political interference and monitoring of sensitive cases.

needs to be systematized, as it is presently based solely on informal relations.[313]

In the regional conflicts, like the one in the former Yugoslavia, the accused, witnesses and other evidence can be found scattered in different countries, therefore making the success of most investigations contingent on assistance received from the other jurisdictions. The best way to overcome these obstacles is by constituting good cooperation among neighbouring countries. This type of cooperation can help in extradition procedures (the extradition of their own citizens, which Serbia has achieved in the cases of war crimes with Montenegro), more simplified assignment and/or joint use of evidence, easier access to the witnesses of one state to the courts of another state, as well as other aspects of legal cooperation. Besides, the regional agreements between prosecutors have proven to be an extremely useful tool in the prosecution of war crimes, enabling the transfer of cases between different national prosecutors.[314] Moreover, the possibility of assigning a case is of special importance, when it is not possible to execute the extradition of the defendant, or where most of the evidence is outside the country where the trial takes place. Therefore, regional cooperation is fundamental in order to strengthen the trust among the countries that fought wars against each other.

3.3. THE IMPACT OF THE WAR CRIMES CHAMBER PROCEEDINGS ON THE TRANSITIONAL JUSTICE PROCESS AND COEXISTENCE

The purpose of a war crimes trial is to render justice. However, the sentencing policy of the WCC has been frequently criticised by the legal community and victims. "The penalties of the WCC are disproportionate in relation to the crimes committed, and the proceedings are too long. In some cases, despite many pieces of evidence, the perpetrators are being freed."[315] Even though, the length of sentence for offences such

[313] Organization for Security and Co-operation in Europe, Mission in Serbia. *War Crimes in Serbia (2003-2014).* Available at: http://www.osce.org/serbia/194461?download=true. (Accessed September 28, 2017).

[314] The number of exchanged cases, in 2012, of the Office of the Prosecutor for War Crimes of the Republic of Serbia with Croatia amounts to 54, with Bosnia and Herzegovina 8, with Montenegro 4, with EULEX/UNMIK 19.

[315] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za

as war crimes has been narrowed down to range between five to twenty years, it seems that the courts failed to give due consideration to all aspects of the war crimes cases at hand in the sentencing process. The judges at the WCC showed a tendency to impose punishments in their verdicts which are even lighter than the mandatory minimum penalty prescribed for the offences.[316] They are justifying these lenient verdicts by emphasising the presence of mitigating factors such as defendants' "family circumstances", their young age, the amount of time that has passed since the commission of the crime and the lack of prior convictions. At the same time, the courts very rarely take into account the aggravating circumstances, although some of the cases involved numerous extremely cruel and inhumane acts.[317]

By analysing the verdicts and the length of sentence that the WCC delivered, we can conclude that it has had a modest influence on the reconciliation process among the different ethnic groups in Serbia. "The WCC had its inconsistencies, based on which it can be concluded that it tried to achieve politically suitable verdicts to avoid political pressure. Acting in this way shows weakness, and demonstrates that the WCC is not independent of political pressure."[318] On the other hand, the excessive length of proceedings affects the efficiency and credibility of the trials.[319] On average, the trials before the WCC last more than three years and the length of trials in more complex war crimes cases is more than five years. "It is noted that the First Instance Courts showed inclination to uncritically accept all of the allegations in the indictment, which resulted in the abolition of the first instance verdicts or the release

ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[316] Skocic, Ovcara V, Bijeljina, Licki Osik, Bosanski Petrovac, Logor Luka, Qyshk/Cuska. See: Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf.

[317] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[318] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[319] In the Bijeljina II Case, for instance, the witnesses refused to give testimony at the retrial because it had taken them too long to recover from the trauma caused by their testimony at the first trial. In the Lovas Case, the victims and witnesses, annoyed by the long drawn-out proceedings, refused to testify one more time.

of the accused in the second instance proceedings."[320] For instance, in the Lovas and Qyshk/Cuska cases, the indictments were raised in 2007 and 2010 respectively, and the cases are still at the trial stage.

Until now, it has been shown that all of the war crimes convictions and judgments at the ICTY and the judgment before the domestic courts only stir up the national hatred. This is because both the political leaders and people, belonging to different ethnic groups, have never accepted the accused coming from their nation as war criminals. Instead, they have been celebrated as heroes. Such a reaction is also influenced through the wrong signals sent to the public by the authorities and the media, as well as from general misinformation. This, combined with the tendency to identify the whole ethnic group with the person that committed the war crimes, creates a setting that makes it almost impossible to achieve reconciliation. Furthermore, this situation is worsening by the failure of Serbia to arrest and punish the responsible perpetrators.

On the other hand, the greater number of verdicts in the war crimes cases might help minimize the tendency to attribute collective guilt to ethnic groups and instead emphasize individual guilt, which would greatly help the reconciliation process in Serbia. For this reason, the WCC's verdicts against the persons found guilty of war crimes are an indispensable and important step in opening a possibility to ease the reconciliation process.[321] Moreover, the successful prosecution of the war criminals in Serbia would finally give the chance to those who remained silent to be heard, to acknowledge them as victims, give them chance for social reintegration and to achieve coexistence. The testimony of the victims is a great chance to gather evidence, to fight against impunity and denial. "In some cases, judgments and indictments really write history. They are important from the victim's point of view as messages that victims have not been forgotten, but also from the position of the perpetrators, as a message that these types of crimes must not be repeated."[322] According to Richard Goldstone, the former Prosecutor of the ICTY: "If there is no justice, there is no hope of reconciliation or forgiveness because these people do not know who to

[320] Personal interview, Marina Kljajic, Humanitarian Law Fund, conducted on June 28, 2017.

[321] Kandic, Natasa. "The ICTY Trials and Transitional Justice in Former Yugoslavia. *"Cornell International Law Journal*. Vol. 38, Iss. 3 (2005): 790.

[322] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

forgive".[323] For this reason, from the victim's perspective justice is the condition for peace and reconciliation.

Another important aspect of successful work of the national courts is the public support and trust. In theory, the judiciary is independent, fair, impartial and the epitome of integrity. However, the WCC's general lack of efficiency and effectiveness to deal with the war crimes proceedings has had a profoundly negative impact on public confidence in the criminal justice system. Evidently, as the analyses in Serbia show, the general public does not trust in the judiciary and perceives it as corrupt.[324] Based on the research, conducted by the Human Rights Center –Nis, two thirds (67.2%) of the examinees recognized the importance of public perception on independence of the judiciary, and half of the judges and public prosecutors find that citizens do not trust in the judiciary, while only 17.2% have the opposite opinion.[325] Accordingly, the Serbian judiciary requires reforms to enhance and sustain its independence. This is especially important bearing in mind the fact that judiciary, which is influenced by politics, is constantly undermined in its integrity and looses the credibility, trust and confidence of the public.

From the victims' side, they are especially dissatisfied with the glorification of the convicted war criminals and the official welcomings organised by the state, like in the case of General Vladimir Lazarevic, who was coming back to Serbia after serving the sentence passed on him by the ICTY for crimes committed against Kosovo Albanians.[326] Another convicted war criminal, Veselin Sljivancanin, has become a regular speaker at public forums organised by Serbia's ruling Serbian

[323] Schrag, M. "Lessons Learned from ICTY Experience." *Journal of International Criminal Justice.* Vol. 2.2 (2004): 427.

[324] Transparency International. *Global Corruption Barometer 2010.* Available at: https://www.transparency.org/gcb201011. (Accessed September 06, 2017).

[325] The research was realized during second half of 2013, where the Prosecutors' Association was in charge of organizing distribution of the questionnaire, and the Human Rights Center was in charge of sending the questionnaire via regular mail to the judges' addresses chosen based on the Table of random numbers. The questionnaires were submitted to the examinees both in hard copy and electronically through the Prosecutors' Association and the Judges Association of Serbia. Available at: http://www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf (Accessed on September 27, 2017).

[326] Humanitarian Law Center. "Victims Mocked by Government Reception for Lazarević." December 4, 2015. Available at: http://www.hlcrdc.org/?p=30815&lang=de. (Accessed on September 22, 2017).

Progressive Party - SNS.[327] In April 2016, Momcilo Krajisnik[328], a former Speaker of the Bosnian Serb Assembly during the war in B&H, promoted his book "How Republika Srpska was Born – Notes from the Hague Prison", despite protests by civil society organisations[329] at the Belgrade Youth Centre, a cultural and educational institution founded by the City of Belgrade.[330] In this book, Krajisnik denies the crimes of which he was convicted.[331] However, the most upsetting case for the victims is the case of Vojislav Seselj, a war crimes indictee, whose case is still on appeal before the ICTY. The acquittal of Seselj by the ICTY's Trial Chamber has sparked an outcry in the legal community.[332] In spite of this, he was elected to the Serbian National Assembly in the 2016 parliamentary elections.[333] Also, Seselj was elected to the National Parliament's Security Services Control Committee.[334]

The criminal proceedings are often criticised for their lack of empathy for the victims. Although, the criminal trials contribute to one of the most important components of the post war justice, to determine the facts regarding the serious human rights abuse, they do not provide a forum for victims to discuss about their suffering. This is where the TC are supposed to step in. Nevertheless, for a long time in Serbia, even mechanisms to achieve criminal justice, such as laws on war crimes, investigations, tribunals and commissions were underdeveloped and

[327] This party provides him with opportunities to promote himself in exchange for his public support for the SNS. e during the confl itical offi e mechanism - the WCPO, is that ion, thacy of the OWCP. itnesses. It is crutial to protect those

[328] Krajisnik has previously been convicted by the ICTY for extermination, murders, persecution on political, racial and religious grounds, deportation and inhumane treatment of non-Serbs during the war in BiH. See: The International Criminal Tribunal for the former Yugoslavia. *Momcilo Krajisnik Case Information Sheet.* Available at: http://www.icty.org/x/cases/krajisnik/cis/en/cis_ krajisnik_en.pdf. (Accessed on September 22, 2017).

[329] Ibid.

[330] N1. "NVO: Dom omladine da ne promovise knjigu Momcila Krajisnika", [NGOs: Belgrade Youth Center should not promote Momcilo Krajisnik's book], April 15, 2016, Available at: http://rs.n1info.com/a152138/Vesti/ Vesti/NVO-Dom-omladine-da-ne-promovise-knjigu-Momcila-Krajisnika.html. (Accessed on September 20, 2017).

[331] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).https:/er.net/en/site/news/4632/ne zlocine nad Srbim", 2017).

[332] Ibid.

[333] Ibid.

[334] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2014 and 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf. (Accessed on September 18, 2017).

had no real political support.[335] The problem with the lack of political will to deal with the past is most evident when it comes to the war crimes trials. Consistently, the representatives of the executive authority have commented on the court verdicts followed by personal stances, stigmatizing the judiciary in the wider public. There are numerous examples of Serbian politicians applying pressure in the cases of the war crimes prosecution. For example, in January 2015, only a day after the publication of the allegations linking the Chief of General Staff of the Army of Serbia, Ljubisa Dikovic, with war crimes in Kosovo[336], Serbian President Tomislav Nikolic received Dikovic and expressed support to him.[337] At the same time, Nikolic directly issued a warning to the chief War Crimes Prosecutor, Vladimir Vukcevic, to "beware of what he digs up in Serbia"[338], adding that Vukcevic was "not an organ of the Hague Tribunal and was not appointed just to attack Serbia"[339] and that he should "think over whether the accomplishment of a task given to him by someone else is worth all those lies he has been telling".[340]

Previously mentioned reality that judiciary in Serbia is subject to considerable influence from the executive branch is something that raises serious concern, as it is acknowledged, among the international community. In a report following his visit to Serbia, in March 2015, the Commissioner for Human Rights of the Council of Europe criticised the political pressures and verbal threats against the OWCP, as well as the lack of specialised training in international humanitarian law for members of the judiciary.[341] The European Parliament resolutions on

[335] Batt, Judy, Dimitrijevic, V., Hartmann, F., Jovic, D., Memisevic, T., & Obradovic-Wochnik, J. "War Crimes, Conditionality and EU Integration in the Western Balkans." *Paris: European Institute of Security Studies* (2009).

[336] Humanitarian Law Center. "Rudnica." January 29, 2015. Available at: http://www.hlc-rdc.org/?p=28016&lang=de. (Accessed on September 19, 2017).

[337] A month later, the Serbian President awarded Dikovic with the Order of the White Eagle "for extraordinary merits in developing the defence system and commanding military units".

[338] B92. "President again criticizes war crimes prosecutor", March 3, 2015. Available at: http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=03&dd=04&nav_id=93370. (Accessed September, 20, 2017).

[339] N1. "Nikolic: Vekaric iznosi neistine o meni." [Nikolic: Vekaric is telling lies about me], April 3, 2015. Available at: http://rs.n1info.com/a48791/Vesti/Nikolic-o-Vekaricu-Seselju.html, (Accessed September 20, 2017).

[340] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[341] Nils Muiznieks, The Council of Europe Commissioner for Human Rights. *Report*

Serbia stressed the importance of strengthening domestic war crimes proceedings and regional cooperation in the processing of war crimes and establishment of an adequate legal framework.[342] Further, the last three European Commission reports on the progress made by Serbia towards meeting the criteria for accession to the EU identified the impunity of senior army and police officials, lenient penal policy and failure to address the serious problems in the witness protection system, as the key challenges in the prosecution of the war criminals.[343]

One more reason why the WCC did not make a bigger impact on the transitional justice process in Serbia is because of its bad practice of frequently changing judges at the Higher Court and Court of Appeal departments. The aforesaid is having very severe consequences on the war crimes proceedings. The presidents of the Higher Court and the Court of Appeal in Belgrade, by using their discretionary powers in determining the annual work schedule, transfer judges from the war crimes trial panels to other panels or departments. Such transfers are contrary to the Law of War Crimes Proceedings, which prescribes that judges serve a six-year term. In spite of this, the presidents of the Higher Court and the Court of Appeal in Belgrade have moved the judges[344] dealing with war crimes to other departments before their term of office, guaranteed by the said Law, has expired.[345]

to the Council of Europe Following the visit to Serbia, from 16 to 20 March 2015. Available at: http://www.coe.int/en/web/commissioner/country-report/serbia/-/asset_publisher/mLRlkOZweJs0/content/serbia-impunity-for-war-crimes-discrimination-and-lack-of-media-freedom-hamper-human-rightsprogress?101_INSTANCE_mLRlkOZweJs0_languageId=srME. (Accessed September 20, 2017).

[342] European Commission. *Serbia Progress Report, October 2014.* Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf. (Accessed August 31, 2017).

[343] Humanitarian Law Center. *Transitional Justice in Serbia in the Period from 2013 to 2015.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf. (Accessed September 28, 2017).

[344] Judge Snezana Nikolic Garotic was transferred to the First Instance Criminal Law Department of the Higher Court in Belgrade, a transfer effective as from January 1, 2015, while handling six war crimes cases. Judge Bojan Misic, the presiding judge in the Lovas Case, was also moved to the Criminal Law Department of the Higher Court in Belgrade, a transfer effective as from January 1, 2016. In February 2015, judges Olivera Andelkovic and Tatjana Vukovic filed a complaint with the High Judicial Council against the President of the Court of Appeal for not reassigning them to the Department of War Crimes of the Court of Appeal in Belgrade.

[345] Humanitarian Law Center. *Report on War Crimes Trials in Serbia during 2016.* Federal Department of Foreign Affairs of Switzerland. Available at: http://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016_eng.pdf. (Accessed September 20, 2017).

"The courts are not the ones that need to strike a balance between law and politics, but to apply the law. On the other hand, it is clear that politics continues to interfere with the work of judges, by often dismissing the judges that were engaged in the war crimes cases without a clear explanation or justification for their dismissal."[346] Every time the judge would change, the proceedings had to be started again. However, in most of cases, the newly appointed judges had no experience or expertise in the field of international humanitarian law. This has caused further delays in the proceedings, as new judges require some time to become familiar with the case they are assigned to.[347] "These delays and passing of time have their effects. The perpetrators and witnesses are dying and it is increasingly difficult to conduct the war crimes trials."[348] For this reason, the WCC must work to strengthen the integrity of judges and to prevent political interference in the allocation of cases, transfer of judges or appointments. Also, the WCC needs wider political support from the state establishment, which needs to affirm it as an essential and valuable contribution to the efforts of Serbia to secure complete respect and protection of the rule of law and human rights.

Another important aspect that has to be taken into consideration when assessing the impact of the war crimes proceedings on transitional justice is motivation. "When we look into the motivation for conducting the war crimes trials, we can conclude that in Serbia, the main motivation for conducting domestic prosecutions of the war criminals is political pressure from the external actors. There are still no clear indications that Serbia wants to face the past, since some of the files about the members of the army or police, who are suspected of having committed the war crimes, are still kept as a state secret. Another argument is the already-mentioned lack of processing of middle and high ranking profiled perpetrators. If the adopted National Strategy is implemented properly, this would be an initial indicator of progress towards facing the past."[349] So far, the domestic war crimes prosecution in Serbia was not initiated to redress its past, but as it

[346] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

[347] Ibid.

[348] Personal interview, Bruno Vekaric, Deputy of the Prosecutor for the War Crimes, conducted on July 6, 2017.

[349] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

moves closer to the membership into the EU, to please the EU, with the aim of gaining membership.

Moreover, one of the ICTY's aims was to establish criminal justice among the former Yugoslav countries and help them restore the rule of law. That is why, the EU, in its conditionality policy, stressed cooperation with the ICTY. Despite the judgments of the ICTY and domestic prosecution of the war crimes, denial of responsibility for the committed war crimes has persisted as the main obstacle in the process of rebuilding the rule of law and reconciliation in Serbia. According to Ruti Teitel: "For trials to realize their constructive potential they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times. Must be fair otherwise they can backfire. They walk a thin line between the fulfilment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice."[350]

Nonetheless, for reconciliation to happen, it is crucial to gain support from society as a whole. "Past experience has shown that trials as a retributive mechanism of justice contribute little to the process of reconciliation. It is necessary to establish some other transitional justice mechanisms, together with the adequate prosecution of the war crimes, to strengthen the process of coping with the past and to accept the established facts, in order to potentially lead to true reconciliation in the region."[351]After all, in Serbia, there was no clear action plan about providing information to the general public, which resulted in the public being insufficiently informed and in some cases misinformed about the goals and activities of the ICTY and the local authorities. All of this has contributed to an increase in mistrust and in an environment that had already been negatively affected by these legal activities.

The case of Serbia shows that special attention has to be dedicated to the relationship with the public, letting the public know the reasons for conducting the war crimes proceedings, as well as public availability of the information that are related to the development of these proceedings. For this purpose, the most important thing is the existence of objective

[350] Teitel, Ruti. "Transitional Justice Genealogy." *Harvard Human Rights Journal.* Vol. 16 (2003).

[351] Personal interview, Katarina Golubovic, Attorney at Law at Komitet pravnika za ljudska prava/Lawyers' Committee for Human Rights (YUCOM), June 26, 2017.

reporting that is without political messages and propaganda. Also, it is necessary to pay attention to collaboration with media, current and future decision makers and the victims. The public needs to have at any moment, through transparent and easily accessible sources, access to the precise and unbiased information regarding the committed war crimes, their perpetrators and victims, current court proceedings and cooperation with external courts. All of the aforementioned measures are contributing to the strengthening of the rule of law and are helping in building a democratic society with the capacities to face the past.

CONCLUSIONS

Transitional justice represents a multi-layer process that assists people in restoring their human dignity through various mechanisms (retribution, truth, recognition and reconciliation). The choice of transitional justice mechanism and its application is motivated by the political goals of the new regime. As one mechanism of transitional justice can only address one part of the violent past, it is necessary to combine different mechanisms of transitional justice, so that they complement each other, in attempts to re-establish rule of law and democracy. Analysis presented in this master thesis was motivated by the discussions surrounding the ICTY's work that is coming to an end and responsibility of the national judiciary to take on the torch of prosecuting the remaining war criminals. Hence, in this paper, the case of Serbia was chosen, to analyse judicial capacities to prosecute the war crimes, as one of the mechanisms of transitional justice, and its influence on the reconciliation process among different ethnic groups.

The measures to confront the past in Serbia were only taken after 2000s and they were the result of the request made by the international community. The EU was the main motivator of democratic change and in its conditionality policy it insisted on full cooperation with the ICTY. It believed that this tribunal represents a key factor in rebuilding the rule of law and reconciliation in the region. Although, the prospect of membership in the EU was the best motivator in the case of Serbia to cooperate with the ICTY, focusing primarily on cooperation with the ICTY, the EU has neglected one of its primary goals - respect for the rule of law. Reconciliation among different ethnic groups that fought wars during the 1990s can be effective only if rule of law is established and the war crimes punished, both on international and domestic level. That is why, the EU, in its conditionality policy, should have insisted

more on the national prosecution of war crimes. As Antonio Cassese, one of the ICTY's previous presidents, has acknowledged: "Justice is a necessary element of the process of national reconciliation. It is crucial for the restoration of peaceful and normal relations between people who were forced to live in a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus justice and peace are closely connected".[352]

Although it is clear that Serbia has made some positive steps in the reconciliation process (all of the accused war criminals are extradited to the ICTY, the WCC is established, the National Strategy for the prosecution of the war criminals is accepted and there was even an attempt to establish another transitional justice mechanism – the TC), there are still obstacles when it comes to implementation of the adopted transitional justice mechanism. The opposing views of the 1990s events and its legacy remains an impediment in the reconciliation process. In such settings, it is no surprise that attempts to establish a regional TC are not welcomed, because this requires cooperation with other ethnic groups that one is indoctrinated not to trust. The legacy of the ICTY is indisputable, however, there is still a need for the regional TC that will continue with construction of historical narrative that this Tribunal has started. Serbia, as a gesture of readiness to accept its past, should support the establishment of such institution and provide it human and financial resources necessary for its effective work.

Furthermore, this analysis has highlighted that impunity for serious human rights violations is increasing mistrust and is creating an environment that is weakening the process of coping with the past. Serbia's relation towards the war crimes prosecution has to be improved in a way that the WCC becomes an effective mechanism against impunity which is a constant issue and a major obstacle in the reconciliation process. The capacities of the WCC, as the only transitional justice mechanism, are not sufficient to successfully indict a greater number of the remaining war criminals. This necessitates strengthening of the WCC capacities (increasing budget, number of judges, number of courtrooms, etc.), so that is able to process more war crime cases and to speed up the existing proceedings. Additionally, the practice of frequent

[352] Cassese, Antonio. "Reflections on International Criminal Justice." *Journal of International Criminal Justice*. No. 1 (2011).

deviation by the courts from the facts established by the ICTY and lack of reliance on its jurisprudence has to be stopped. Quite simply, the verdicts of the ICTY must be respected and executed effectively and entirely in Serbia.

As has been argued, the Serbian legislative framework leaves space for political influence on judges and prosecutors because the National Assembly, as the legislative power, appoints them. This is especially problematic from the perspective of separation of powers and that is why Serbia has to complete the process of institutional reforms, starting from the judicial system and the establishment of the rule of law. This is essential, in order to prevent recurrence of human rights abuses, to conclude the process of transitional justice and to create social cohesion and peace. However, in the case of Serbia, it is a slow process that appears to be both difficult and unattainable. Yet, there is no other way for Serbia to become a democratic state, other than bearing responsibility for the past and applying mechanisms that will promote and help its society to re-build trust, mutual respect and overcome the conflict that has divided it.

The major challenge that the war crimes proceedings are facing is witness protection that is lacking implementation of the Witness Protection Programme. The measures adopted for the protection of witnesses from intimidation and assault on their integrity are not fulfilling their function. Serbia should work on strengthening its Witness Protection Programme by allocating more human and financial resources, under the supervision of an independent body that will guarantee autonomy from the police or criminal investigators, as the cornerstone of reconciliation. Moreover, from the victims' perspective, the judgments of the WCC have failed to meet their expectations. What is especially unsatisfactory is the length of the proceedings and punishment awarded to the perpetrators of the war crimes. Victims are not acknowledged through material reparations and symbolic gestures that would help preserve memories and restore dignity. This is proven by the fact that the legislation regulating reparations is retrograde, discriminatory and deprives a large number of victims from the right to seek it. Therefore, Serbia should work to improve its victims' reparation system by making it more effective and available to all of the victims and their family members.

The low profile and public visibility of the war crimes trials in the media reflects the attitude of the Serbian authorities that the public

should not be fully informed. Notifying the general public about the war crimes proceedings is a key prerequisite to gain more objective understanding of the past and to create a social memory regarding the past crimes. What is also required are systematic campaigns for raising awareness about the war crimes that are followed by public apologies. Public apologies by the new ruling regime that includes confirmation of established facts as well as acceptance of responsibility can be a good step in the direction towards reconciliation, and it can provide comfort to the victims. Consequently, by doing so, the new government is sending a message, that it has moved away from the nationalistic past, that it wants to restore social harmony and that it aspires towards a democratic future.

Although, there are many shortcomings and criticisms of the WCC's work presented in this paper (the length of the trials, the number of cases, the number of convicted criminals, the length of the punishments, etc.), it is important that this institution is established. This is especially important now, when the ICTY is in its closing phase, and when the national courts are expected to carry on the task of sentencing the remaining war criminals. Establishing criminal justice is a precondition for reconciliation and forgiveness, as an important step in breaking the cycle of hate, rage, revenge and guilt. Reconciliation is both a goal (something to achieve) and a process (a means to achieve that goal) that is a part of the peace-building and democratization process which post-conflict societies go through. At this point, it is clear that for reconciliation to happen in Serbia, it is necessary to stop generalising things and accept responsibility of individuals coming from its own ethnic group. It seems that the politicians in power are unwilling to challenge a dominant narrative, where the same person in one ethnic group is a criminal, while a hero to another.

Likewise, the prosecution of war criminals by no means has promoted peace and it has shown that transitional justice is a political process that has to take into account interests of the local power holders and international actors. Without reconciliation between the different ethnic groups living in Serbia, there is no sustainable peace, moving forward and shared future. Although Serbia has adopted the National Strategy, that emphasizes the war crimes trials as the most important step in the process of reconciliation, development of good neighbourly relations and in building lasting peace in the region, this Strategy was not implemented in 2017. Serbia should successfully implement the

National Strategy because this would internalize the efforts to deal with the past and make them part of social culture. On the other hand, failure to implement the adopted National Strategy may put the success of transitional justice at risk.

In conclusion, the war crimes prosecution, on its own, is not sufficient to achieve transitional justice and address the massive violation of fundamental human rights that happened during the conflicts. The case of Serbia demonstrates that attempts to achieve coexistence have to be profound, multilateral and pervasive in order to have a chance to be successful. Having in mind the interrelatedness of the discussed transitional justice mechanisms, all of them - if combined- can contribute to success of transitional justice in Serbia and can support reconciliation among different ethnic groups. Nevertheless, to administer transitional justice is extremely difficult task, the completion of which is directly bound to the will of the political elite and society to accept the past. In this paper, it is shown that Serbia does not possess adequate judicial capacities and political will to prosecute the war criminals for war crimes to an extent that would achieve justice and serve as a deterrent against acts of private revenge. The lack of political will and support to prosecute all of the war criminals is the main reason why Serbia is neglecting one of the pillars of transitional justice - dealing with its negative legacy of past wars and achieving coexistence.

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APPENDICES

APPENDIX 1 - TABLE OF THE WAR CRIME CASES PROCESSED AT THE WCC IN SERBIA

Case Name	Case Number	Cooperation with other institutions	Accused	The year of accusation	Phase	The number of acquitted	The number of convicted	The number of rejected or susp.	Beginning of trial
Ovčara I (Vujović i dr.)	KTRZ 3/03	ICTY	18	2003	The main trial before the Appellate Court	4		1	9.03.2004.
Ovčara II (Bulić)	KTRZ 4/03	-	1	2005	Completed 09.02.2007.		1		27.01.2005.
Zvornik I (Slavković i dr.)	KTRZ 17/04	ICTY	4	2005	Completed 08.04.2009.	1	3		28.11.2005.
Sinan Morina (Orahovačka grupa)	KTRZ 1/07	-	1	2005	The main trial pending before the Supreme Court				17.10.2007.
Đakovica (Lekaj)	KTRZ 7/04	-	1	2005	Completed 26.02.2007.		1		12.10.2005.
Škorpioni (Medić I dr.)	KTRZ 3/05	-	5	2005	Completed 2009.	1	4		20.12.2005.
Suva Reka (Mitrović I dr.)	KTRZ 5/05	-	8	2006	Completed 30.06.2010.	3	4		2.10.2006.
Bitići	KTRZ 5/06	--	2	2006	Completed 18.01.2013.	2			13.11.2006.
Dubrovnik	KTRZ 5/07	ICTY	1	2007	The District Court in Belgrade (War Crimes Chamber) dismissed the indictment on the basis of neuropsychiatric expert testimony defendent Kovacevic			1	/

Slunj (Pašić)	KTRZ 11/07	DORH, The county court in Karlovac	1	2007	Completed		1		1.02.2008.
Tuzlanska kolona (Jurišić)	KTRZ 5/04	-	1	2007	Completed 25.12.2015.	1			22.02.2008.
Lovas (Devetak i dr.)	KTRZ 7/07	-	14	2007	The main trial before the High Court (repeated proceedings)			4	17.04.2008.
Velika Peratovica (Trbojević)	KTRZ -4/07	DORH, The county court in Bjelovar	1	2008	Completed		1		26.09.2008.
Ovčara III (Sireta)	KTRZ 4/03	-	1	2008	Completed 24.06.2010.		1		23.12.2008.
Zvornik II (Grujić I Popović)	KTRZ 17/04	-	2	2008	Completed 08.04.2009.		2		28.11.2005.
Zvornik III (Savić I dr.)	KTRZ 8/07	-	2	2008	Completed 14.10.2012.		2		4.09.2008.
Podujevo + 1 (Đukić I dr.)	KTRZ 12/07	-	4	2008	Completed 11.02.2011.		4		8.09.2008.
Banski Kovačevac (Bulat)	KTRZ 13/07	DORH, The county court in Karlovac	2	2008	Completed 14.02.2011.		2		2.09.2008.
Medak (Đaković I dr.)	KTRZ 10/07	DORH, The county court in Gospić	5	2009	Completed 11.01.2012.	1	3		23.11.2009.
Stara Gradiška (Španović)	KTRZ 14/07	DORH, The county court in Požega	1	2009	Completed 24.01.2011.		1		17.09.2009.
Prijedor (Kesar)	KTRZ 2/08	The Republika Srpska Prosecutor's Office, the District Court in Banja Luka	1	2009	Completed 30.11.2012.	1			05.03.2010.
Gnjilanska grupa Ajdari I dr.)	KTRZ 16/08	-	17	2009	Completed 13.11.2013.	17			23.09.2009.
Stari Majdan (Malić)	KTRZ 3/08	Ministry of Justice of BiH, Cantonal Court in Bihać	1	2009	Completed 26.03.2010.		1		18.09.2009.
Tenja (Radivoj)	KTRZ 9/08	DORH, The county court in Osijek	1	2010	Completed 11.04.2011.		1		6.05.2010.
Zvornik IV	KTRZ 1/10	-	1	2010	Completed 14.10.2012.	1			04.09.2008.

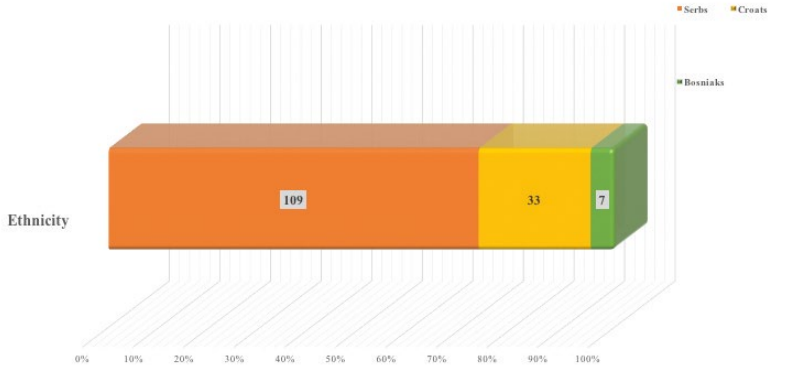
Skočići (Zvornik V) (Bogdanović I dr.)	KTRZ 7/08	-	8	2010	Appellate proceedings before the Appellate Court			2	14.09.2010.
Vukovar S. Vujanović)	KTRZ 3/09	DORH, The county court in Osjek		2010	Completed 18.03.2011.		1		20.05.2010.
Rastovac (Marić)	KTRZ 5/10	-	1	2010	Completed		1		7.10.2010.
Beli Manastir (Vukšić I dr.)	KTRZ 5/09	DORH, The county court in Osijek	4	2010	Completed 12.02.2016.		4		1.11.2010.
Ćuška, Pavljan (2011), Zahać (2011) i Ljubenić (2011) (Miladinović I dr.)	KTRZ 4/10	-	13	2010	The main trial before the High Court (repeated proceedings)			2	20.12.2010.
Lički OSik (Budisavljević I dr.)	KTRZ 06/10	DORH	4	2010	Completed 13.03.2013.		4		4.10.2010.
Bijeljina (Jović I dr.)	KTRZ 7/10	Ministry of Justice of BiH	3	2011	Completed 25.02.2013.		3		4.07.2011.
Ovčara IV (Ćirić)	KTRZ 6/11	-	1	2012	Completed 03.11.2014.		1		15.11.2012.
Bosanski Petrovac (Sovilj I Vekić)	KTO 3/12	Cantonal Court in Bihać (BiH)	2	2012	Completed 27.03.2017.	2			13.11.2012.
Kašnjeti (Kašnjeti)	KTO 4/12	-	1	2012	Completed 20.03.2015.	1			13.09.2012.
Tenja II (Vidaković I Ćubrilo)	KTO 1/12	DORH	2	2012	Completed regarding the defendant Žarko Čubril 23.12.2015. Indictment dropped regarding Vidakovic´ 19.09.2016.	1			29.10.2012.
Sotin (Milošević I dr.)	KTO 9/13	County State Attorney's Office in Osjek	5	2013	Completed 18.11.2016.	3	2		04.02.2014.

Bihać (Đuro Tadić)	KTO 3/13	Cantonal Court in Bihać (BiH)	1	2013	Completed 12.12.2014.		1		25.06.2013.
Ključ (Škrbić)	KTO 4/13	Cantonal Prosecutor's Office in Bihać (BiH)	1	2013	Completed SPK		1		13.09.2013.
Sanski Most (Gvozden)	KTO 2/13	Cantonal Court in Bihać (BiH)	1	2013	Compleeted 22.02.2016.		1		12.06.2013.
Čelebići (Hondo)	KTO 6/13	-	1	2013	Completed 09.06.2014.	1			11.09.2013.
Sremska Mitrovica (Crevar)	KTRZ 1/09 KTO 5/14	DORH, The county court in Zagreb	1	2013 2014	Completed SPK		1		05.02.2015.
Trnje (Gavrilović I Kozlina)	KTO 7/13	-	2	2013	The main trial before the High Court				27.03.2014.
Ljubenić (Krstović i dr.)	KTO 8/13	-	3	2014	The main trial before the High Court connected to the case Ćuška				10.03.2015.
Logor Luka (Pop Kostić)	KTO 1/14	Basic Court of Brcko District (BiH)	1	2014	Completed 28.03.2016.	1			02.07.2014.
Bihać II (Svetko Tadić)	KTO 2/14	Cantonal Court in Bihać (BiH)	1	2014	Indictment Rejected 06.07.2016.				26.03.2015.
Gradiška (Šinik)	KTO 3/14	District Court in Banja Luka	1	2014	Completed 22.02.2017.	1			16.09.2014.
Sanski Most - Kijevo (Čanković)	KTO 4/14	Cantonal Court in Bihać	1	2014	Completed 12.12.2016.		1		15.09.2014.
Bijeljina II (Živanović)	KTO 6/14	Ministry of Justice of BiH	1	2014	Completed 29.06.2016.	1			13.02.2015.
Bosansk Petrovac – Gaj (Dragišić)	KTO 7/14	The Prosecutor's Office of BiH	1	2014	The main trial before the High Court				03.03.2015.

Štrpci Gojko Lukić i dr.)			5	2015.	Unconfirmed indictment				
Srebrenica - Kravice (Nedeljko Milidragović i dr.)	KTO 2/15		8	2015. Potrvdena 2016.	The main trial before the High Court		1		12.12.2016.
Doboj (Dušan Vuković)	KTO 2/16	County Court in Doboj	1	2016.	The main trial before the High Court				13.05.2016.
Ključ (Milanko Dević)	KTO 3/16	Cantonal Court in Bihać	1	2016.	The main trial before the High Court				24.05.2016.
Bratunac (Dalibor Maksimović)	KTO 4/16	The Prosecutor's Office of BiH	1	2016.	The main trial before the High Court				27.05.2016.
Tomić Ranka	KTO 5/16	Cantonal Court in Bihać	1	2016.	The main trial before the High Court				20.06.2016.
Ključ-Kamičak (Dragan Bajić)	KTO 6/16	BiH	1	2016.	The main trial before the High Court				08.09.2016.
Kamičak 2 (Marko Pauković)	KTO 7/16	BiH	1	2016.	The main trial before the High Court				08.09.2016.
Srebrenica (Brano Gojković)	KTO 1/16	BiH	1	2016	Completed SPK 27.01.2016.				27.01.2016.
Total 59			172 (without double counting of cases Vujanović, Đurd ević & Đekićka)			43	54	10	

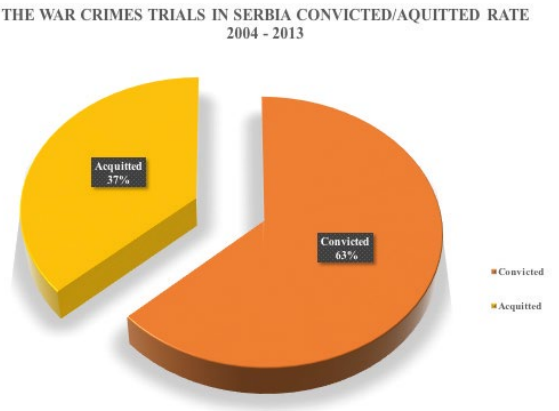
Source: *Humanitarian Law Center, Belgrade, Serbia (Last updated on June 28, 2017).*

Appendix 2 - Graphic Chart of the Ethnicity of the Defendants at the ICTY



Source: *Fordt, Stuart. "Fairness and Politics at The ICTY: Evidence from The Indictments." N.C.J. INT'L & COM. REG. (2013).*

Appendix 3 - Graphic Chart of the War Crimes Trials in Serbia - Convicted/Aquitted Rate in the Period from 2004 until 2013

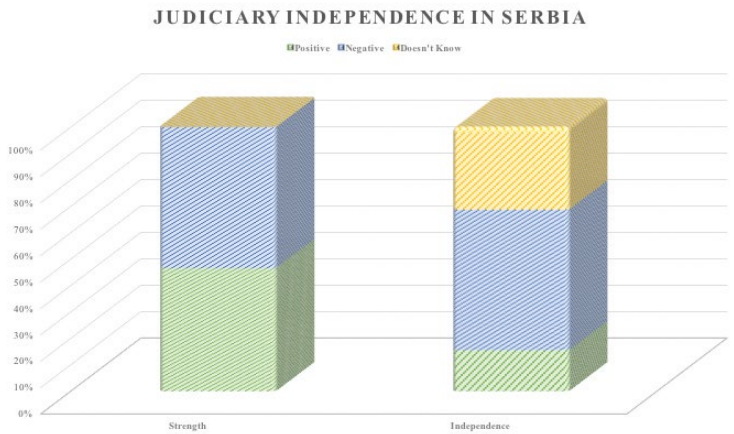


Source: *Humanitarian Law Center Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.*

Appendix 4 - Graphic Chart of the War Crimes Trials in Serbia - Number of Defendants that were Tried in the Period from 2004 until 2013

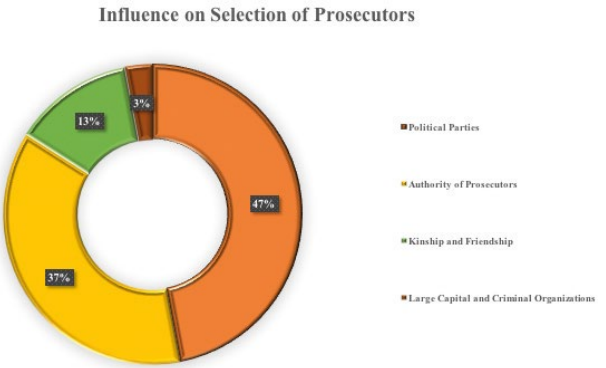
Source: *Humanitarian Law Center Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.*

Appendix 5 - Graphic Chart of Judiciary Independence in Serbia



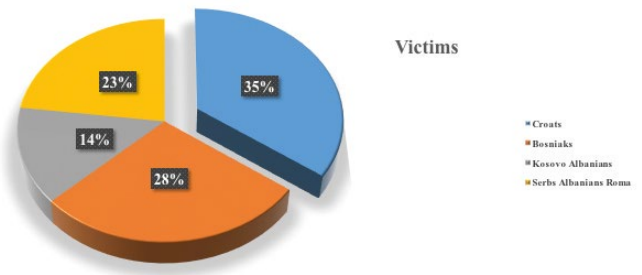
Source: *Research conducted by the Human Rights Center –Nis, Available at:* http://www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf *(Accessed on September 27, 2017).*

Appendix 6 - Graphic Chart of the Influence on Selection of Prosecutors



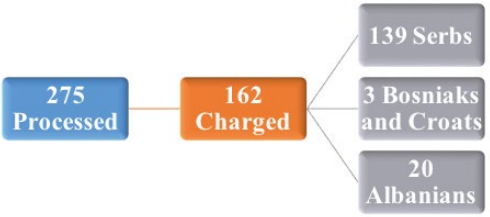
Source: *The research conducted by the Centar za slobodne izbore i demokratiju (CeSID)* - Jačanje Položaja, Nadležnosti i Integriteta Državnog Veća Tužilaca, Available at: www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-andjudges-summary.pdf. (Accessed August 31, 2017).

Appendix 7 - Graphic Chart of the War Crimes Trials in Serbia – Nationality of the War Crimes Victims in the Period from 2004 until 2013



Source: *Humanitarian Law Center Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia 2004-2013.*

Appendix 8 - Graphic Chart of the War Crimes Trials in Serbia – Nationality of the War Criminals Charged at the WCC in the Period from 2003 until 2014



Source: *Organization for Security and Co-operation in Europe, Mission in Serbia "War Crimes in Serbia (2003-2014)." Available at:* http://www.osce.org/serbia/194461?download=true. *(Accessed September 28, 2017).*

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