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DEMOCRATIZING JUSTICE IN THE POST-CONFLICT BALKANS: THE DILEMMA OF DOMESTIC HUMAN RIGHTS ACTIVISTS

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Abstract

Years of international and national accountability efforts in the former Yugoslavia have only partially helped post-conflict societies to transition. To complement retributive justice efforts more recently, human rights activists have launched a campaign to establish a regional truth commission. This article explores the intricate efforts among nongovernmental organizations (NGOs) in several states across the region – particularly Bosnia and Herzegovina, Croatia and Serbia – to coordinate this movement. Drawing on participant observation and in-depth interviews, this study illustrates the movement's struggle from within – caused by the conflicting interests of its members – and from outside, as it seeks support from international and region-specific organizations as well as national governments. While activists have remained unsuccessful in institutionalizing new truth spaces, this article argues that the state-centric strategy of human rights advocates during the campaign widened the gap between the activist leaders and victims' groups, their principal supporters.

Keywords: post-conflict justice, truth commission, human rights activism, former Yugoslavia.

1. Introduction

Throughout the 1990s the breakup of the former Yugoslavia led to horrendous conflict among the newly proclaimed independent states. Since, dealing with past war crimes and accounting for mass atrocities has constituted a very intricate and contentious process, mainly led by state-centric international retributive justice initiatives. In this context, the 1993 creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague constituted a watershed moment in international humanitarian law that led to a global spillover effect.¹ Within the last few years, an increasing number of national war crimes prosecution mechanisms have also been established, taking on transfer cases while The Hague Tribunal is winding down its activities. In fact, transitional justice processes in the Balkans relied primarily on international retributive justice mechanisms even while the conflict was still ongoing. This is quite different from other transitional countries that sought to address the issue of grave human rights violations in Latin America and Africa in the 1990s: in most cases, trials were deemed too risky to the newly

1 See for instance Ruti G. Teitel, "Global Transitional Justice," *Center for Global Studies Working Paper Series on Human Rights, Global Justice & Democracy*, no. 8 (Spring 2010).

established democracy or were simply off the table as a policy option due to negotiated pacts. Truth commissions, and sometimes amnesties, thus loomed large in the 1990s transitional justice lexicon. The ICTY put the issue of accountability after atrocity at the center of transitional justice debates.² While the ICTY has made many important contributions to international law and without a doubt has reshaped transitional justice debates and practice, the Tribunal was only partly successful in its mission to help society in the post-conflict Balkans cope with past mass atrocity. In many ways, the justice processes that took place faraway from the site of the conflict in The Hague did not fulfill the needs of victims of the Balkan wars.³ As a result, almost two decades after the establishment of the ICTY, a series of truth-seeking initiatives have emerged across the former Yugoslavia to establish facts about the conflict that ravaged the Balkans and left 140,000 victims in its wake.

These attempts, however, have been very elusive and problematic.⁴ I will draw on the most recent example, the Regional Commission for Establishing the Facts about War Crimes and other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia (RECOM), in order to illustrate the dilemma human rights activists were confronted with while launching their advocacy campaign for a truth commission. RECOM began as a grass-roots project in 2008 and sought to provide more victim-oriented transitional justice projects and focused on the local needs of victims and their families to cope with past mass atrocities committed during 1991 and 2001. In other words, this regional fact-finding movement was an attempt to democratize international humanitarian law—and globalized human rights concepts more generally—in local post-conflict settings. Yet, since the beginning its founders have struggled to gain the official endorsement of international organizations and governments (in form of domestic laws that provide the legal foundation for the commission and financial resources, among others) to institutionalize their regional fact-seeking body.

2 See for instance Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007); John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press, 2003).

3 Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2007).

4 See for instance Cécile Jouhanneau, "Les Mésaventures Des Projets De Commission Vérité Et Réconciliation Pour La Bosnie-Herzégovine (1997-2006): Une Étude De La Circulation Des Modèles Internationaux De Résolution Des Conflits Mémoriels," in *Le Passé Au Présent: Gisements Mémoriels Et Politiques Publiques En Europe Centrale Et Orientale*, ed. George Mink and Pascal Bonnard (Paris: Michel Houdiard Editeur, 2010); Brian Grodsky, "International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia," *International Studies Review* 11, no. 4 (2009): 687–706.

This article explores the elusive efforts among NGOs in several states across the region – notably Bosnia and Herzegovina (BiH), Croatia and Serbia – to organize a transnational campaign to cope with past mass atrocities. Through participant observation and in-depth interviews, I examine how these NGOs discuss, interpret, and identify meanings of human rights and democracy within and across state-boundaries of countries in the former Yugoslavia. My study reveals the movement's struggle from within—caused by differing interests of its members—and from outside, as it seeks support from international and region-specific organizations as well as national governments. I explain why the NGO campaign for political-legal institutional change within the region of the former Yugoslavia has been unsuccessful thus far.

Accordingly, I focus on the challenges of the legal influence on fact-finding processes. I analyze the ongoing political – and also legal-oriented – battle to institutionalize alternative transitional justice mechanisms. In fact, during the consultation phase to create a draft statute of the RECOM fact-finding body, the driving NGO forces of the campaign, particularly the Humanitarian Law Center, adopted a strategy that followed a state-centric logic, in order to gain support from governments and political leaders. As a result, the RECOM initiative employed lawyers to promote a legal-oriented and technical discourse at the expense of its primary target group of victims. I call this phenomenon the legalization of truth spaces. Against the backdrop of internal disputes and disagreements of its members, and the pressure from other sociopolitical actors in the region, I examine and discuss the problematic impact of this trend.

The first section includes a review of theoretical issues in post-conflict justice scholarship on the Balkans, outlining the importance of strengthening research that focuses on state-society relations. It is followed by a description of the research design, qualitative research methods, and data selection procedures that this study is based on. Next, after briefly introducing the RECOM Initiative and its difficulties, I describe the early grass-roots discussions of RECOM's mandate drawing on two local consultations in Knin, Croatia and Kruševac, Serbia. Then, in the subsequent section of this article, I rely on data collection of my participant observation of RECOM's last regional forum on transitional justice in October 2010 before the RECOM campaign members finalized the draft statute in March 2011. This forum highlights the dilemma of NGO activists' struggle to legitimize the commission at the state-level. I illustrate how, paradoxically, activists—in their effort to institutionalize the RECOM campaign—distanced themselves from their main support group, victims and victims' families. Finally, I discuss some of the broader conceptual implications of this phenomenon and outline ideas for future research.

2. From State-Centric to State-Society Analysis: A Critical Review of the Literature

Different forms of transitional justice mechanisms have been applied for millennia, especially in times of regime change, including Antiquity, the French Revolution, and after World War II.⁵ The scholarly debate around these issues and the term itself was in particular shaped by Ruti Teitel's early work published in Neil Kritz's edited volume *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.⁶ Only a few years later, in 2000, Teitel published her groundbreaking book, *Transitional Justice*, in which she argues that the role of justice in political transitions is not a universal norm, but instead has a unique and constructivist character. Grounding her research in legal analysis, she posits that "[l]aw is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective."⁷ In her subsequent work she explores this concept further, providing a broad timeline of transition cases since 1945 in order to conceptualize political shifts and the role justice plays during these processes.⁸

Teitel's post-World-War-II genealogical work on transitional justice demonstrates how law and politics closely relate to each other. With her historical analysis she provides a synthetic and aggregative view, disclosing the changes of political institutionalization from the early trials after World War II, to the recent developments that have solidified the transnational justice phenomenon in a globalized world. As she precisely states: "The genealogical perspective situates transitional justice in a political context, moving away from essentializing approaches and thereby illuminating the dynamic relationship between transitional justice and politics over time."⁹ Her article thus frames the changes in post-conflict societies from a legal perspective—discussing the effects of alternative models on international law and analyzing the impact of the rule of law in different contexts.

Other authors have followed suit, studying transitional justice from a historical and institutional perspective.¹⁰ Jon Elster's work *Closing the Books: Transitional Justice*

5 For a historical account on different forms of justice applied after regime changes see for instance Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

6 Ruti G. Teitel, "How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (United States Institute of Peace Press, 1995), 146–154.

7 Ruti G. Teitel, *Transitional Justice* (Oxford University Press, USA, 2000), 6.

8 Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69.

9 *Ibid.*, 94.

10 For literature on institutional change during democratic transitions that has also influenced transitional justice scholarship see for instance Guillermo O'Donnell and Paul

in Historical Perspective, for instance, constitutes an account of different cases in history—ranging from Ancient Greece to the East German transition in the 1990s—and provides a good example of expanding the institutional debate by scholarship on democratic transition in post-authoritarian and post-conflict justice contexts.¹¹ Both analyses are very valuable from a historical and comparative point of view. They help us understand institutional processes within political structures during regime change. Yet, neither one of them includes political processes between state and society actors, but its analytical lens remains focused on a state-centric view.

While more recent transitional justice scholarship on the former Yugoslavia has provided excellent insights on the politics of justice, it still says very little about state society relations. As a case in point, Jelena Subotic's *Hijacked Justice: Dealing with the Past in the Balkans* discusses the politicization of the ICTY's compliance requirements of prospective European Union (EU) member states from the Western Balkans.¹² Another scholar, Victor Peskin reasons along similar lines. In fact, Peskin compares state cooperation with the International Criminal Tribunal for Rwanda (ICTR) and the ICTY.¹³ He argues that:

[t]hese ad hoc tribunals can effectively become victor's courts insofar as the winners of a conflict may be able to control a tribunal's prosecutorial agenda. By the same token, the losers of a conflict may be able to control the courts by blocking investigations and prosecutions of their nationals. [... His] book focuses on two levels of such political activity beyond the courtroom: first, the political struggles and negotiations *between* tribunal, state, and powerful international community actors

Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Johns Hopkins University Press, 1986). Their edited volume provides different case studies on several political shifts and regime changes in the 1980s, focusing on Latin America. They explore different democracy models and political efforts to build democratic foundations in times of uncertainty. While Laurence Whitehead describes international factors in chapter one of the volume – discussing for instance foreign policy tools – other contributors, such as Adam Przeworski, raise methodological questions, examining ways in which different data sets could be analyzed to help researchers better understand these processes. This type of literature concentrates especially on the sociopolitical factors of democratic transitions, including political institutions and in some cases the role of civil society during these processes. See also Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press, 1996); Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1993).

11 Elster, *Closing the Books: Transitional Justice in Historical Perspective*. Both words are Latin and stand for comparisons and explanations.

12 Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, London: Cornell University Press, 2009).

13 Viktor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge, NY: Cambridge University Press, 2008).

that occur prior to as well as during the courtroom trials; second, the political struggles and negotiations *within* states.¹⁴

More precisely, Peskin examines why state cooperation with the ICTR has decreased compared to a state cooperation increase with the ICTY over the years. For this, he analyzes various relationships between powerful actors, including judges, politicians, government representatives and diplomats, among others. His study, much as Subotic's work focuses nonetheless on a state-centric perspective – mentioning civil society efforts only fleetingly¹⁵ – and therefore leaving the story of state-society relations in the dark. Both authors are part of a group of international relations scholars who have engaged in transitional justice research that emphasizes agency centered around states and international organizations as primary actors to implement international humanitarian law on the international and domestic level. Interactive processes and the sociopolitical dynamics between states and society are therefore of less interest to them. As Leslie Vinjamuri and Jack Snyder put it, "international relations scholars have a wealth of knowledge about the factors that shape the successes or failures of postwar reconstruction efforts and nation building. Strategies of justice are one component of these frameworks."¹⁶ Dominant trends in the study of these phenomena remain visible, such as the heavy influence of legalism – which sets apart legal analysis from social or political sciences research¹⁷ – and an inclination to employ large data aggregation and quantitative studies in the literature.¹⁸

On the contrary, this article aims at strengthening the sociopolitical research agenda of post-conflict justice. To this end, I analyze the importance of political objectives of different actors in transition contexts. In particular, I look at the relationship between the state (or its representatives) and society, characterized by

14 *Ibid.*, 6.

15 *Ibid.*, 24.

16 Leslie Vinjamuri and Jack Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," *Annual Review of Political Science* 7, no. 1 (2004): 359.

17 Shklar in Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 414.

18 Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace, 2010); David Backer, "Understanding Victim's Justice: Evidence from Five Countries in African Countries," in *Conference "Accountability After Mass Atrocity: Latin American And African Examples In Comparative Perspective" May 6* (Washington, DC, 2009); Kathryn Sikkink and Carrie B. Walling, "Errors About Trials: The Emergence and Impact of the Justice Cascade" (Paper presented at the Princeton International Relations Faculty Colloquium, March 27, 2006).

civil society organizations.¹⁹ Several important political scientists have paved the way studying state-society relations in different contexts and eras, including Charles Tilly, Theda Skocpol, Barrington Moore, James Scott and Joel Migdal among others. A growing community of scholars are aware of the lack of research between politics, law and society, and decided to emphasize the process character of transitional justice phenomena in society using sociological and ethnographic tools to do so.²⁰ Moreover, several authors have explored the sociopolitical role of NGOs in society using a sociology-of-space perspective in order to illustrate their active involvement in shaping policy processes.²¹

Drawing on MirafTAB and Wills' notion of invited spaces—more precisely, spaces in which state institutions provide opportunities for civil society to participate actively in certain problem areas—Alex Jeffrey recently analyzed the creation of space (invented space) by human rights organizations in Bosnia and Herzegovina to allow for deliberate conceptions of justice that go beyond legal institutions and processes.²² His study defies a legalist approach, illustrating how activists who initially cooperated with the judiciaries have established alternative ways to implement transitional justice in post-conflict settings. While I employ these concepts to investigate regional transitional justice activities of a number of NGOs across the former Yugoslavia in this article, I concentrate on the difficulties human rights activists are confronted with during the creation of these regional restorative justice efforts or truth spaces.

19 I focus on human rights organizations, excluding other advocacy groups, such as veterans' organizations. For a discussion on the latter cf. Kurze, Arnaud and Iva Vukusic, "Afraid to Cry Wolf: Human Rights Activists' Conundrum to Define Narratives of Justice and Truth in the Former Yugoslavia," (forthcoming) in Olivera Simic and Zala Volcic, *Transitional Justice and Civil Society in the Balkans* (New York: Springer, forthcoming).

20 Leigh Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008); Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights* (University of Pennsylvania Press, 2005); Jo-Marie Burt, "Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations," *International Journal of Transitional Justice* 3, no. 3 (2009): 384; Cath Collins, "Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador," *Journal of Latin American Studies* 38 (2006): 711–38.

21 Faranak MirafTAB and Shana Wills, "Insurgency and Spaces of Active Citizenship," *Journal of Planning Education and Research* 25, no. 2 (2005): 200. For an extensive discussion on time and space, see John Urry, "Sociology of Time and Space," in *The Blackwell Companion to Social Theory* (Oxford, United Kingdom: Blackwell Publishers, 2000), 416–444.

22 Alex Jeffrey, "The Political Geographies of Transitional Justice," *Transactions of The Institute of British Geographers* (2011).

3. Research Design

Building on qualitative research methods, I portray a thick and in-depth picture of transitional justice processes, while also sketching and interpreting the politics that are at stake. Although I analyze the politics of justice from a political science perspective, I employ two qualitative analytical tools, one based on anthropological research and the other one relying on sociological analysis: participant observation and narrative interviews. I draw from over three-dozen interviews and two-dozen participant observations.²³ The data was collected systematically, using snowball sampling, in which existing study subjects recruited future subjects from their acquaintances and professional networks. As for the observation of meetings, events and other activities, I selected a proportionate number of different settings, including local, national and transnational conferences. While most of them were public, some of them were also closed off to the public. These design choices were made according to Chaim Noy's findings, who has illustrated that snowball sampling helps investigate social knowledge from particular sociopolitical groups' organic social networks and social dynamics.²⁴ The strength of a mixed method qualitative approach is that scholars can use their "theoretical resources" to: i) analyze a small set of data in which context and change are crucial; ii) underline that coding plays a less important role, as data is dynamic and subject to change; and iii) "show how the (theoretically defined) elements we have identified are assembled or mutually laminated."²⁵

Empirical evidence from my field experience during data collection procedures further corroborates the advantages of such a combined approach for my research question, including in particular feasibility, externality, and confidentiality. In fact, my research project was limited to a specific time period and the studied community was not isolated from outside effects, but rather part of a larger social system. I followed and 'lived' with leaders and activists of human rights organizations during their daily activities across the region, reminiscent of the work of ethnographers who explore remote and indigenous tribes. However, it was not feasible to apply these participant observation techniques to all of the involved

23 The data was collected from September 2009 to October 2011. Interview participants include activists from principal human rights organizations involved in the RECOM Initiative in the selected country, such Documenta Center for Dealing with the Past (Croatia), Humanitarian Law Center (Serbia), Research and Documentation Center (Bosnia), among others. I observed staff meetings, consultations, forums and conferences associated with the fact-seeking efforts, among others. For a list of interviewees see Appendix.

24 Chaim Noy, "Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research," *International Journal of Social Research Methodology* 11, no. 4 (2008): 327–344.

25 David Silverman, "Analyzing Talk and Text," in *Handbook of Qualitative Research*, ed. Norman K. Denzim and Yvonna S. Lincoln (Thousand Oaks, CA: Sage, 2000), 828.

actors in transitional justice processes in the region. In order to reconcile the paradox of collecting sufficient information of different actors crucial to understand the dynamics I relied on additional open-ended informal and formal interviews with other key transitional actors to complement the constantly collected data through participant observation.

Moreover, supplementing participant observation with interviews helped me overcome confidentiality issues. Indeed, while I became part of the community it occurred that information sharing through informal conversations revealed findings that were not meant for public use.²⁶ Sometimes, the subjects specifically mentioned not to use certain types of information for research purposes, whereas other times, the right to use this information was stated more implicitly. To ensure that I could use all the gathered information during participant observation for my research purposes, I relied on periodical semi-structured interviews with the community members. The more formal character—as compared to the informal conversations and daily interactions with the members—allowed me to double-check which information was available with the community's consent. Any concerns that this self-censorship came at the expense of crucial research information that was not used anymore were ungrounded, as certain specific details did not always play an important role to understand the conceptual underpinnings of the social phenomenon under scrutiny.

4. The Origins and Initial Challenges of the RECOM Process

As mentioned above, recent attempts to institutionalize an interstate fact-finding body to account for past human rights violations and war crimes in the former Yugoslavia emerged as a response to the rising critique of international and domestic war crimes prosecutions in the region. Retributive justice mechanisms to cope with the past, such as the ICTY, have only partially fulfilled the goal of helping war-torn and post-conflict societies in the region transition. Some of the issues include: the geographical distance of the court between the Netherlands and the crime scene sites—which has often been condemned by victims and witnesses; the trying of selective cases only (both at the international as well as domestic level); and the politicization of cooperation processes between countries of the former Yugoslavia and the United Nations (UN) tribunal in The Hague.²⁷ Increasing criticism from victim associations and human rights organizations were therefore crucial in helping launch an alternative process to deal with the past. The idea was that progress does not lie in more personnel, better strategies, and on-site presence

26 Here I refer to facts and information that cannot be found in public records or documents in hindsight.

27 Ruti G. Teitel, "The Law and Politics of Contemporary Transitional Justice," *Cornell International Law Journal* 38 (2005): 837–862.

of the judiciary system, but in the way that those who suffered most during the conflicts are integrated into projects to cope with the past.

The activities of several non-profit organizations—many of which often started working at the outbreak of violence in the early 1990s²⁸ or shortly after—demonstrate the increasing efforts to raise victims' voices in transitional justice processes in the former Yugoslavia. In fall 2005, three established non-profit organizations in the region—the Humanitarian Law Center in Serbia, Documenta Center for Dealing with the Past in Croatia, and the Research and Documentation Center in Bosnia and Herzegovina²⁹—discussed the prospects of an independent regional commission that would investigate and disclose the facts about war crimes and other serious human rights violations in the territory of the former Yugoslavia.³⁰ By May 2008, these organizations had gained enough momentum and launched the Coalition for RECOM Initiative in Priština, Kosovo, with over 100 NGOs from the region.³¹

Since the official constitutional meeting of the RECOM coalition in Priština in 2008 the initiative has faced internal politicking and difficulties. The driving coalition partners of RECOM, such as Documenta and the Humanitarian Law Center, in particular, have grappled with mobilizing coalition partners from Bosnia and Herzegovina, after the head of the Bosnian Research and Documentation Center, for different reasons, refused to give his official support to the coalition at one of

28 The activities of the Humanitarian Law Center in Belgrade, Serbia, are a good example of documenting war crimes in the former Yugoslavia. The center also promotes victims rights, based on various initiatives, at <http://www.hlc-rdc.org/stranice/Linkovimodula/About-us.en.html>, accessed December 5, 2009.

29 These various organizations have as their core mission to document and disclose facts about the human rights violations and war crimes committed during the 1990s to educate society and create a voice for victims. Various forms of implementing this mission exist. Documents, for instance, among other things, engages in commemorative culture, history teaching, and dealing with the past initiatives, thus emphasizing the interactive dialogue with society. The Research and Documentation Center, concentrates its work on documenting missing persons, and has published a comprehensive account of all the war victims in Bosnia and Herzegovina, *The Bosnian book of the dead* (2009), as well as an interactive Google map that shows location, nature of the crime and number of victims. The Humanitarian Law Center, despite its involvement in commemorative culture, is known for its strong legal activities, providing support for victims in court and vis-à-vis state institutions.

30 The International Center for Transnational Justice (ICTJ) and other prominent NGOs in the region also participated in this discussion.

31 Coalition for RECOM, *Report About the Consultative Process on Instruments of Truth- Seeking About War Crimes and Other Serious Violations of Human Rights in Post-Yugoslav Countries*, 2009, <http://www.korekom.org/>, accessed June 6, 2010.

the meetings in winter 2008.³² Void of an essential Bosnian member—BiH constitutes a symbolic member country due to its weighty history during the 1992-1995 conflict—Humanitarian Law Center director, Nataša Kandic, managed to fill the gap created by the loss of the influential Research and Documentation Center by partnering with the Association of BiH Journalists.³³ Yet, the fact that this organization did not essentially concentrate on war crimes reporting affected its legitimacy within the coalition, according to a prominent member of the initiative.³⁴ Critique has also come from participating organizations that deplored the lack of transparency in RECOM's decision-making process.³⁵ Moreover, the uncertain outcome of the commission and the long process in rallying financial and political support—both of which were fluctuating and vague—also led to a RECOM fatigue with each of the main partner organizations focusing their energy and resources on domestic and local programs in their respective home countries.³⁶ In addition to internal obstacles, the initiative's institutionalization process faced difficulties fueled by other political and international actors in the region.

Although the political and institutional structures in the former Yugoslavia have become more favorable for the Coalition for RECOM Initiative in recent years, numerous obstacles still impede the creation of a fact-finding body.³⁷ In the following I describe the fragile political progress across the region and outline some of the inherent problems. The first important political wave of change in the former Yugoslavia occurred in the early 2000s. Tudjman's death in 1999 allowed the conservative nationalist era to end in which the narrative of the glorious homeland war to defend the young nation didn't leave any room for discussion of war crimes and human rights violations. Serbia's notorious leader Milošević was booted out of power after his 2000 electoral defeat amid rising protests from the streets after he attempted to unilaterally remain in power.³⁸ This reckoning with the past, however, was only the tip of the iceberg of a long process that is still ongoing.

32 See interview with Mirsad Tokaca, director of the Research and Documentation Center in June 2011.

33 See interview with Nataša Kandic, director of the Humanitarian Law Center, in May 2011.

34 See interview with official member of Coalition for RECOM in Zagreb in February 2011.

35 B92, "NGOs Fall Out over Donations," *Život*, June 30, 2011.

36 See supra note 34. See also programs by Documenta, <http://www.documenta.hr> or the Humanitarian Law Center <http://www.hlc-rdc.org>, accessed November 23, 2010.

37 Particularly during electoral campaigns, history is manipulated and old nationalist sentiments exploited by certain political parties or social groups.

38 Sabrina Ramet, "Politics in Croatia Since 1990," in *Central and Southeast European Politics Since 1989*, 2010, chap. 12 and 13.

Indeed, political leaders in both countries, Ivo Josipovic the president of the Republic of Croatia (who began his first term in February 2010), and Boris Tadic the president of the Republic of Serbia from July 2004 to April 2012, have both made important strides to foster a climate of rapprochement in the region. They represent a new political generation that has not been personally involved (be it directly or indirectly) in war crimes or the human rights violations of the 1990s conflicts.³⁹ More recently incumbent President of Serbia, Tomislav Nikolic, founder of the right-wing Serbian Progressive Party, might delay this process.⁴⁰

Interestingly, support from international organizations to create RECOM's institutional framework also remains limited and further complicates human rights activists' efforts to account for war crimes. While the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe (CoE) released a report expressing its support for regional reconciliatory justice mechanisms among states of the former Yugoslavia, such as the regional fact-finding initiative RECOM⁴¹, other organizations, including the UNDP and the EU, among others, avoid public statements that engage in direct political or financial support of RECOM.⁴²

5. Early Grass-Roots Efforts: Local Consultations in Croatia and Serbia

The process of gaining grassroots support for the campaign was the result of numerous consultations with local communities. Below, I draw on comments by participants of two of these consultation processes in order to sketch the evolution of the initial ideas and issues raised during the early stages of the campaign. After discussing these two cases, I illustrate the increasing local-regional gap during the later phases of the campaign between the movement organizers and local

39 In the 1980s, Josipovic was a member of the League of Communists of Croatia, playing a key role in the democratic transformation of this party as the author of the first statute of the Social Democratic Party of Croatia (SDP) after Croatia's independence. He left politics in the mid-1990s, pursuing his academic career as a law professor at the University of Zagreb and only reentered the political realm in 2003, when Ivica Racan, then acting Prime Minister, invited him to join the government. Serbia's president, Boris Tadic, a trained psychologist, was part of the Democratic Opposition of Serbia, which was key in overthrowing Milosevic in 2000. Politically part of the Democratic Party, he made multiple symbolic reconciliatory public statements that are a sign of collaboration and understanding of both countries.

40 Dan Bilefsky, "Nationalist Wins Serbian Presidency," *New York Times* (New York, May 20, 2012), sec. Europe.

41 Pietro Marcenaro, *Reconciliation and Political Dialogue Between the Countries of the Former Yugoslavia*, Parliamentary Assembly Rapporteur Report (Council of Europe, 2011).

42 See interview with United Nations Development Program and European Union officials in Sarajevo in May 2011.

communities. During one of the early consultations, organized on August 4, 2009⁴³ in Knin, Croatia—a city situated in a region that many Croatian Serbs had to escape during the Croatian 1995-military intervention, Operation Storm—one of the pressing issues raised by participants was the ability of the RECOM Initiative to help establish a different version of the past. Revealing the ‘truth,’ as some of the victims participating at the roundtable phrased it, was one of the most important achievements they expected from the commission in order to counter the prevailing discourse of the Homeland war—patriotic nation-building war in which Croatian soldiers did not commit any war crimes but only helped defeat terrorists who threatened the young state’s territorial integrity, according to the official discourse of the Croatian government.

Jovan Beric, a Serbian victim from Zadar, Croatia, believes in the RECOM movement as it can help to uncover perpetrators of different crimes. His comments underline his urge to reveal facts of past war crimes and atrocities:

What do you have to talk to them about, they killed your parents, and you are sitting with them. [...] That’s not how I think [...] because I do not believe that every Croat is responsible for the crimes committed, but individuals, whose names are unfortunately not yet known. That is why I am looking forward to seeing this initiative up and running because I truly hope this can help name all war crime perpetrators, which will help us go in a better direction.⁴⁴

Participants at the consultation several weeks later in Kruševac, Serbia, on September 7, 2009, expressed similar opinions regarding the need to establish facts about the past. Miško Radonjic, a representative of a local NGO called Euro Contact underlined that:

I personally believe that RECOM should only deal with the facts, that it should not even [...] tackle the issue of causes, because that leads straight into politics, which will definitely create additional problems.⁴⁵

In fact, political groups, governments and other actors have continuously politicized many war-related issues across the region in the post-conflict Balkans.⁴⁶ The

43 The organizers chose to hold the consultation meeting one day before the Croatian national holiday, Victory and Homeland Thanksgiving Day and the Day of Croatian defenders, which honors Croatia’s veterans and is celebrated in Knin by the political establishment, the military, veterans and the public. The event is a very nationalist and conservative celebration of Croatia’s young nationhood.

44 See RECOM consultation with the local community, Knin, Croatia, August 4, 2009.

45 See RECOM consultation with the local community, Kruševac, Serbia, September 7, 2009.

RECOM Initiative's intention was to overcome this politicking. To this end, campaign members also wanted to reach out to a larger public.

While many of the consultations with local communities centered on victims, the organizers of the RECOM campaign carefully drafted a strategy that would reach beyond this target group. Youths constituted a group on which members of the RECOM Initiative focused in particular. During the earlier consultation in Knin Emina Bužinkić a member of the Young People of Croatia Network thus emphasized the significance of engaging younger generations in a dialogue about past mass atrocities. According to her,

It is very important to me to stress that young people want to know the facts. We want to know the truth; we want to be a part of the dealing with the past process. That is very important for us because it influences the way we are going to build our future. For us, this commission is important at the level of dealing with the past and learning about the events of the past. For us it is important at the level of transferring something to new generations.⁴⁷

These earlier consultations with local communities focused on fundamental principles of the commission's mandate; yet, in some of the later consultations especially during 2010—such as the ones held by Documenta in Croatia's rural and urban areas—the draft statute had grown into a relatively complex legal document, hampering the dialogue between the local community and the NGO activists promoting the RECOM Initiative.

The case of a consultation meeting with civil society organizations in Osijek, Croatia's third largest city that was heavily destroyed during the 1992-1995 war is a good case in point to emphasize the problem of RECOM Initiative members to cope with the regional-local divide. Put differently, while the organizers made an effort to be connected to their community at the base and to integrate local concerns into the regional project, these attempts were very difficult and did not always lead to the expected results.

During the Osijek meeting on July 14, 2010, an elderly woman who was part of a one-person association in her village interrupted the formal discussion on provisions in the statute, in order to tell her story and experience of the war. After she explained to the participants that she had lost a family member and the missing person's remains had still not been found yet, she pulled out a handmade photo album sharing pictures and memories of her loved one. Her question to

46 Issues range from the manipulated and distorted accounts of the number of dead in the Srebrenica massacre in BiH to the involvement of politicians in war-related bribery scandals and arms deals.

47 *Ibid.* supra note 44.

Documenta's team evolved particularly around one issue: what would RECOM do for her and her personal situation? Could they initiate a process that would allow her to exhibit her photos and voice her cause across the nation? And would they be able to help her find the remains of her family member? While the official response of RECOM members supported her request, the conversation quickly turned back to more technical and abstract questions of the statute, leaving the woman's concerns to the side. Yet, she was not the only one, questioning RECOM's objectives.

Other members also had troubles following the big-picture objectives of the campaign put forward by Documenta's staff. Branislav Vorkapic, a representative of the Organization for Civil Initiatives in Osijek, raised his concern vis-à-vis the discussed goals:

The longer I analyze this statute, the more confused I feel. I keep wondering if it is possible to create a diagram to reflect the stipulations of the statute to help us see the organization more clearly. For example, it says here that members will be professionally engaged individuals. [...] What exactly is, then, the management mechanism? Who makes strategic decisions? Then, as I see further down in the text, there are these members and it is not clear where they belong according to this scheme. Then, there are investigation teams, and then there is this executive secretariat, which is further divided. Each of those segments has its leader, so to speak, and that segment is supposed to conduct a certain type of work. So, when I try to picture all of this, trying to understand the whole mechanism, I get confused.⁴⁸

Vorkapic's concerns illustrate the growing disconnect between the movement's early motivations of creating a victim-oriented institution and a non-judicial space for victims and those who suffered in order to complement existing retributive mechanisms. In fact, the complex structure of the organization—illustrated by the different organizational components of the Coalition for RECOM participants with its different working groups and the Council—is a consequence of the various contexts and interests the movement tried to integrate within its mandate. As a result, both examples above, the early 2009 consultations in Knin and Kruševac and the later ones in 2010, such as in Osijek, have revealed the troubles the main NGOs of the RECOM movement faced during the campaign to present the concept of a regional truth commission to local populations and incorporate the ideas at the grassroots level into the draft statute. As I will show below, this disconnect exacerbated over time.

48 See Local Consultation with Civil Society Organizations on the Draft RECOM Statute, July 13, 2010, Osijek, Croatia.

6. Finalizing the Statute: Swerving from a Bottom-Up to a State-Centric Approach

In the final stages of drafting the RECOM statute, consultations intensified again on the national and regional level, and the discussed issues centered on state-related questions, including the commission's interaction with the judiciary, the election of its members and its broader goals and assignments, among others.⁴⁹ In the following, I draw on my participant observation of the 7th Regional Forum on Transitional Justice held in Zagreb, Croatia, from October 15-17, 2010 in order to highlight how the focus of the principal RECOM campaign members, notably the Humanitarian Law Center, have shifted from local, victim-oriented issues, to larger legal and state-centered questions.⁵⁰

Due to the limited time, several workshops about different sections and topics of the statute were organized simultaneously. Nataša Kandic, the director of the Humanitarian Law Center, headed the group discussing legal issues, especially the relations of the commission with the judiciaries across the Balkans, with the title "The Mandate of RECOM and its Authority with Respect to the Authority of National Judiciaries." The organizers had set up the roundtable discussion for this group in one of the hotel's upstairs meeting rooms, with barely enough space for a few extra seats around the roughly 20 chairs placed along the oval-shaped conference table and a half-open translation booth with two interpreters sharing the tiny available space in one of the corners of the room.

This sloppily organized workshop setting clashed with the lavishly catered and designed inaugural cocktail party the night before. Many participants and conference guests arrived at the workshop with some delay and the discussants had already started debating several issues in regards to different articles and paragraphs of the current draft statute. While some participants were crouching on top heaters in front of a large window with panoramic view of the city, a growing horde of interested individuals continued to pile into the room. Overwhelmed by the never-ending flow of people Ms. Kandic grew impatient with the crowd and advised the latecomers that it would be better to participate in one of the other workshop. She explained that this meeting would be less interesting for the press and the general public because the issues concerned many legal and technical details of the commission's statute.

49 See for instance different working groups during the 7th regional forum on transitional justice held in Zagreb, October 15-17, 2010.

50 The overall data for these findings are based on participant observation and interviews of consultations held by the Coalition for RECOM Initiative from spring 2008 to summer 2011. Over 100 consultations were held during this period at the local, national, and regional level.

Despite a handful of baffled expressions by some individuals in the crowd about her boldness to send interested listeners out of the room, many of these seatless guests—who were either standing or leaning against the wall—remained in the room and followed the discussion. The participants sitting around the table mainly included lawyers, legal experts and practitioners, such as Nikola Bešenski, a judge at the County Court of Vukovar, Croatia (County Courts in Croatia have jurisdiction over war crimes), Velija Muric from the Montenegro Lawyers' Committee for Human Rights, and Ibro Bulic from the Office of the War Crimes Prosecutor of Bosnia and Herzegovina, among others. They addressed several legal concerns with the current statute.

One of the issues raised during the workshop were perpetrator statements during hearings of the commission. The RECOM statute article on "Public Hearings of Victims and Other Persons" envisages public hearings to provide a space for victims to speak about their sufferings and their families' sufferings. In addition, the article contains also a paragraph on the possibility of perpetrators who committed war crimes or serious human rights violations to testify on a voluntary basis. Such a clause, however, opens up a deluge of issues with regards to accountability and dealing with the past. The issues range from amnesty or immunity for the testifying perpetrator to judicial questions, such as whether the tasks of a commission would impede on the work of the judiciary in the region and/or to what extent the involvement of a commission could be complementary to the already existing retributive justice mechanisms. Ibro Bulic, Prosecutor at the Office of War Crimes Prosecutor of Bosnia and Herzegovina, raised his concerns with regard to the scope and tasks of the national judiciaries in this context, insisting that "we cannot invite perpetrators for questioning, or for deposition taking without the presence of their defenders."⁵¹ His argument clearly reflected his consternation with possible violations of judicial procedures. As long as there was a guarantee to abide by the existing legal framework, testimonies of perpetrators could be integrated into the public hearings.

The mandate and power of the commission vis-à-vis perpetrators was further discussed in the statute's article on "Findings on Perpetrators," which will be published after RECOM's mandate ends, when it will provide a final report to governments and the public across the region. An early version of the draft that was circulated during the forum stated that:

51 See the 7th Regional Forum on Transitional Justice, Working Group: "The Mandate of RECOM and its Authority with Respect to the Authority of National Judiciaries, Zagreb, Croatia, October 16, 2010.

The Commission is mandated to indicate in its Final Report based on established facts whether an individual committed a criminal act of war crime or serious human rights violation. Such finding will have no impact on court decisions.⁵²

The wording this particular paragraph in the statute was subject to a very lively debate during the workshop. Participant Jasminka Biloš, a Croatian lawyer, for instance rightly wondered:

Who will act on behalf of the Commission, who will be the competent individual to decide if the facts we have collected point to the criminal responsibility of an individual?⁵³

Representatives from international organizations, such as Ivan Jovanovic from the OSCE Mission to Serbia, however, did not question the RECOM's authority in this regard. On the contrary, he underlined the great importance of the commission's ability to point to alleged perpetrators in its final report:

I think that RECOM must absolutely have it in its mandate to be able to indicate in the Final Report that an individual may have committed a war crime. Because if RECOM is only allowed to make a compilation of victims' testimonies, the results of its work will be insignificant.⁵⁴

In the final draft statute that was eventually adopted by its members several months after the forum, the drafters slightly modified the initial text and harnessed the commission with a less powerful mandate with regards to what statements it could publish on alleged perpetrators. Its current version was printed as follows:

The Commission may conclude in the Final Report that the established facts lead to a serious suspicion that an individual committed a war crime or other gross violation of human rights. Such findings shall not have the effect of a court decision and shall not prejudice the outcome of criminal proceedings, if any.⁵⁵

Ironically, during the debate Ms. Kandic underlined the importance of the Coalition for RECOM Initiative, notably because the retributive justice mechanisms in the former Yugoslavia and The Hague led to accountability efforts that ignored victims' needs. Yet, the abstract and technical comments and discussion on legal questions of the commission during the workshop underlined the new direction the RECOM campaign had taken: less victim-centered and eager to find support from governments in the region. Regardless, the goal here was not to assess the normative value of NGO activists to build a momentum of states in the region

52 *ibid.*

53 *ibid.*

54 *ibid.*

55 *ibid.*

endorsing the commission. Instead the collected data from my observations and interviews on this strategy highlights the dilemma activists were facing in order to establish alternative transitional justice mechanisms in the Balkans.

7. Beyond Legalizing Truth Spaces and Future Research

This article explored the struggle of domestic human rights activists to define the local meaning of international humanitarian law and transitional justice practices across the former Yugoslavia. I analyzed the development of NGO activists to increase their 'invented' space to foster deliberative spaces of justice for civil society. For this, I concentrated on the challenges of the legalistic influence on truth seeking and I investigated the ongoing political barriers to institutionalize alternative transitional justice instruments. Drawing on diverse consultation processes that I observed during my fieldwork in the region, I examined the current legalization of truth spaces to demonstrate how human rights activists attempted to embed their newly created space in the space originally provided by state institutions to depoliticize transitional justice efforts in the region. While the process of institutionalizing new truth spaces has remained unsuccessful, I showed that the state-centric strategy of human rights advocates also widened the gap between the activist leaders and the needs of their principal supporters, the victims.

The legalization of truth spaces describes the process through which activists, practitioners, and experts employ tangible and practicable legal instruments during the consultation meetings in order to establish the mandate for the regional commission. There are a few broader conceptual implications of this process. Indeed, the institutionalization of truth-seeking bodies raises questions about the influence of hard justice, such as retributive mechanisms, on soft justice, such as restorative tools, including truth commissions, as mentioned earlier. The former is based on measurable results, notably the number of processed cases and rendered verdicts, whereas the latter, at least initially, have relied on outcomes which seem, at first, less quantifiable. Yet, sociologist and director of the Truth-Seeking Program at the International Center for Transitional Justice (ICTJ), Eduardo Gonzalez – who has consulted and participated in many different local, national and regional initiatives around the world to set up commissions and bodies that deal with the past⁵⁶ – has stressed the need to think differently when it comes to implementing successful strategies for truth commissions.⁵⁷ The reason why judicial mechanisms are able to produce a quicker, and often – in terms of output such as the number of verdicts – more successful track record, is because law has turned the notion of

56 He also consulted the RECOM members during meetings in Serbia and Kosovo in spring and summer 2010.

57 See interview with Eduardo Gonzalez on 10 September 2010 in Belgrade, Serbia.

justice into something tangible and applicable despite its disputable value and impact on a subject, in time and in space.

As mentioned earlier, this research is original and important for the study of accountability after mass atrocity because it looks beyond the state-centric driven analyses of retributive justice, focusing on state-society relations in a post-conflict justice context instead. The combination of participant observation and narrative interviews, two qualitative research methods, provide suitable tools to tackle potential analytical and methodological challenges. As a case in point, thanks to participant observation I was able to trace and monitor human rights and judicial actors in different environments, such as conferences, meetings, trials and hearings, while they perform or discuss retributive and restorative justice practices or a combination of both. The other tool, formal and informal in-depth conversations with key individuals from human rights organizations, judicial institutions and governments, among others, complemented my observations. As a consequence, this design allowed capturing and analyzing different, intersecting spaces and the role of key actors within these spaces to help understand current practices of truth and justice in post-conflict settings. This methodology also lends itself to other regional cases such as Africa, Asia, or Latin America.

The notion of truth, however, cannot easily be quantifiable or be constrained in a body of legal texts.⁵⁸ To this end, RECOM coalition members intend to create a large database, tracking cases and human losses across the region.⁵⁹ Such a project is in line with policy strategies implemented by the UN ad hoc court—which has a large electronic database of its cases—and local institutions, such as the Bosnian state court, which has one of the most state of the art databases to document its cases and help the coordination between different judiciaries on the entity level in BiH.⁶⁰ These observations are merely the beginning of a trend that transforms restorative practices into more concrete and result-driven projects. Projects, such as the work of Centro de Estudios Legales y Sociales (CELS) in Argentina, Latin America, confirm this trend. Funded by the Ford Foundation, CELS uses and populates large databases with trial information and analyses in order to spearhead collaboration between organizations across the Global South with the goal to elaborate best practices in transitional societies. Further comparative research on

58 Retributive justice mechanisms, however, have also a truth-disclosing component and therefore are considered by some as history-setting institutions. For a discussion on the history-defining capacity of the ICTY cf. Richard Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 27, no. 3 (2005): 908–942.

59 See interview with RECOM coalition members in June 2011.

60 See interview with Sven Marius Urke, secondee of the Norwegian Foreign Ministry and currently international advisor at the Bosnian High Judicial and Prosecutorial Council in May 2011.

these projects in the futures might help evaluate the consequences of this phenomenon for victims and post-conflict societies.

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Appendix 1: List of Selected Organizations and Interviewees

For confidentiality reasons the names of many interview participants do not appear in the list below. Instead their institutional affiliation is listed.

Organizations

BiH Court, Sarajevo. September (9-10 September 2009, 45-60 min. each)

International and local judges and prosecutors

Other Staff and representatives

Belgrade District Court, Serbia. (15-16 September 2009, 45-60 min. each)

Sinisa Vazic, President of the War Crimes Chamber

Ivana Ramic, Media Spokesperson of the Court

Bruno Vekaric, Deputy War Crimes Prosecutor

Other Staff and representatives

Center for Peace Studies, Zagreb, Croatia. (15-16 February 2011, 45-60 min. each)

Gordan Bosanac

Other Staff and representatives

Croatian Disabled Homeland War Veterans Association (14 February 2011, 45-60 min. each)

Renato Selj, President

Other Staff and representatives

Delegation of the European Union to BiH. (17 May 2011, 45-60 min. each)

Several leading country experts

Other local staff

Delegation of the European Union to Croatia. (17 February 2011, 45-60 min. each)

Several leading country experts

Other local staff

Documenta Center for Dealing with the Past, Zagreb, Croatia. (September 2009 to May 2011, 10-90 min. each; repeated interviews)

Vesna Teršelic, Director

Eugen Jakovcic, Media Spokesperson

Darija Maric, Regional Coordinator

Other Staff and representatives

Muslim-Croat Federation's Veterans Association, Sarajevo, BiH (16 October 2010, 30-45 min. each).

Senad Hubijer, President
Other Staff and representatives

Research and Documentation Center, Sarajevo, BiH.

Mrsad Tokaca, Director (17 May 2011, 60 min.)
Lejla Mamut, Regional Coordinator (8 September 2009, 45 min.)
Other Staff and representatives (8 September 2009, 30-60 min.)

Humanitarian Law Center, Belgrade, Serbia. (September 2009 to May 2011, 30-60 min. each, repeated interviews)

Nataša Kandic, Director
Sandra Orlovic, Deputy Executive Director
Matthew Holliday, Outreach and Development Director
Dragan Popovic, Program Director
Lazar Stojanovic, RECOM Media Spokesperson
Other Staff and representatives

International Center for Transitional Justice, New York, United States. (April 2010 to March 2011, 30-60 min. each)

Eduard Gonzalez, Director, Truth and Memory Program
Several transitional justice and Balkans experts
Other local staff and representatives.

International Crisis Group, Sarajevo, BiH. (2-3 September 2009, 30-60 min each)

Several Balkans experts
Other local staff

International Criminal Tribunal for the former Yugoslavia, The Hague, Netherlands. (5-9 November 2010, 30-60 min. each)

Current and former judges and prosecutors
Other staff and representatives

International Criminal Tribunal for the former Yugoslavia, Outreach, Zagreb, Croatia. (28 September 2010, 30-60 min. each)

Several leading country experts
Other local staff

Office of the High Representative, Sarajevo, BiH. (28-31 August 2009, 45-60 min. each)

Several leading country experts
Other local staff

Organization for Security and Cooperation in Europe, Mission in Sarajevo, BiH. (10 September 2010 and 12 May 2011, 60 min. each)

Several leading country experts
Other local staff

Coalition for RECOM Initiative (September 2009 to May 2011, 10-90 min. each; repeated interviews)

Coordination Council members
Expert members
Partner organizations including victims' association and veterans' organizations

United Nations Development Program, Sarajevo, BiH. (16 May 2011, 60 min. each)

Several leading country experts
Other local staff

Youth Initiative Croatia (21-24 May 2011, 45-60 min. each)

Mario Mažić
Other local staff

Youth Initiative Serbia (20 May 2011, 45-60 min. each)

Maja Micić, Director
Other local staff