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## Justice Beyond Borders? The Politics to Democratize Human Rights in the Post-Conflict Balkans

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JUSTICE BEYOND BORDERS? THE POLITICS TO DEMOCRATIZE  
HUMAN RIGHTS IN THE POST-CONFLICT BALKANS

by

Arnaud Kurze  
A Dissertation  
Submitted to the  
Graduate Faculty  
of  
George Mason University  
in Partial Fulfillment of  
The Requirements for the Degree  
of  
Doctor of Philosophy  
Political Science

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Justice Beyond Borders?  
The Politics to Democratize Human Rights in the Post Conflict Balkans

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of Philosophy at George Mason University

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# DEDICATION

My work is dedicated to those who suffered and still bear the scars of the past conflicts in the former Yugoslavia.

# ACKNOWLEDGEMENTS

My fascination with the Balkans dates back to the early 1990s when the conflict first broke out and many families from the region fled to the area where I lived in Southern Germany. I was only a teenager then and I was fortunate to become friends with several of the refugee kids from these families. At the time, the violence that spread across the former Yugoslavia seemed incomprehensible to me, and I decided to help collect and send aid packages with the local German Red Cross to the war-torn region. While in high school and as an undergraduate student, I tried to study and understand the roots of the conflict, the gross human rights violations and the aftermath. A decade later, I eventually travelled to Sarajevo in Bosnia and Herzegovina to visit a friend, Jasmina Viteškić. I had met her a few years earlier in San Francisco, before she moved back to her hometown to work as a trial monitor for the Organization for Security and Cooperation in Europe (OSCE). My visit turned out to be physically and emotionally overwhelming. I witnessed not only the beauty of a city surrounded by the Dinaric Alps in the Sarajevo valley with lavish forests and the Miljacka River, but also the deep social, political and economic scars of a war that ravaged the city and region for many years. These experiences in the Balkans and the recent conflict fueled my interest in further studying accountability efforts in the former Yugoslavia and pursuing this topic as part of my Ph.D. program.

My dissertation took shape molded by these experiences and motivated by a desire to better understand how people in the Balkans understood the cataclysmic events of the past two decades and used a variety of transitional justice mechanisms to address the legacies of the conflict. As a Ph.D. student in Political Science at Mason, I had many opportunities to conduct research on post-conflict and transitional justice in the Balkans. The Human Rights and Global Justice Working Group at the Center for Global Studies in particular was a great space and platform to interact with like-minded scholars to discuss how transitional societies across the world coped with the legacies of violence. Under the direction of the working group leader, Dr. Jo-Marie Burt, I also helped organize over half a dozen events related to accountability and transitional justice, including conferences on “Human Rights Tribunals in Latin America: the Trial of Fujimori in Comparative Perspective” (2008), “Accountability After Mass Atrocity: Latin American and African Examples in Comparative Perspective” (2009) and “Arts after Atrocity: Global Human Rights and Local Representations of Violence and Resistance” (2012), among others. This scholarly exposure, together with my long-held interest in the Balkans, helped shape my ideas and develop my research.



In this context, I would like to thank my dissertation advisor Dr. Jo-Marie Burt from the Department of Public and International Affairs (PIA) at Mason for her continuous support, availability and flexibility while researching and writing my dissertation. I am indebted to the other members of my committee as well, Dr. Johanna Bockman from the Department of Sociology and Anthropology at Mason and Dr. Peter Mandaville from PIA, whose timely and constructive feedback helped clarify my ideas and shape my argument over the years. Moreover, I greatly appreciate Dr. L. Earle Reybold's advice, from the College of Education and Human Development at Mason, inspiring me to use a combination of different qualitative methods to find adequate answers to my research puzzles.

I am also grateful to the institutional and financial support from Department of Public and International Affairs at Mason—with its past and current Department Chairs and Program Directors of the Ph.D. in Political Science. Several travel grant awards by PIA and the Mason Graduate Student Travel Fund offered me the opportunity to present my work at various conferences including the *International Studies Association* (ISA) annual convention, the *Association for Slavic, East European, and Eurasian Studies* (ASEES) annual convention and the *European Consortium for Political Research* (ECPR) general conference. A multiyear research fellowship at CGS at Mason as well as a dissertation completion grant awarded by the Office of the Provost provided additional support to complete my research in a timely manner.

Outside the Mason community I am appreciative of a *Foreign Language and Area Studies* grant, allowing me to enroll in an intensive Bosnian-Croatian-Serbian language class in the summer 2009 at Indiana University in Bloomington; as well as an *American Council of Learned Societies* grant to conduct preliminary fieldwork in the Balkans in the fall 2009. In this context I would also like to thank Dr. Lidija Cvikić, a linguistic professor from the University of Zagreb who helped me get settled in Croatia. Additionally I was offered a visiting scholar fellowship from 2010-2011 at the Centre d'Études et de Recherches Internationales (CERI) at Sciences Po Paris, France, thanks to Professor Didier Bigo and its current Director, Dr. Christian Lequesne; and a visiting scholar fellowship from 2011-2012 by the Faculty of Political Science at the University of Zagreb, which provided me with institutional support to conduct my research while I lived abroad.

Many colleagues of mine deserve to be mentioned here as well, and even if I was unable to list their names here, I am indebted because their insights, help and advice was tremendously valuable to my success, including Dr. Tvrtko Jakovina, Viktor Koska, Dr. Vjeran Pavlaković, Maria Tum, Iva Vukusić and Dr. Guy Ziv, among many others. A special thanks goes to my partner Allison Sherrier, Esq., for her patience, encouragement, and thoughtful editorial suggestions during the many hours that I dedicated to this project. Last but not least I could not have finished my dissertation in such a brief period of time without the generous support of my family and friends.

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# LIST OF ABBREVIATIONS

ANC	African National Congress
AWCC	Anti-War Campaign Croatia
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
CoE	Council of Europe
EIDHR	European Instrument for Democracy and Human Rights
EU	European Union
ELN	Ejército de Liberación Nacional (engl. National Liberation Army, Colombia)
FBiH	Federation of Bosnia and Herzegovina
FARC	Fuerzas Armadas Revolucionarias de Columbia (engl. Revolutionary Armed Forces of Colombia)
HDZ	Hrvatski Demokratska Zajednica (engl. Croatian Democratic Union)
HJPC	High Judicial and Prosecutorial Council
JSR	Justice Sector Reform
ICC	International Criminal Court
ICJ	International Court of Justice
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IPA	Instrument for Pre-Accession Assistance
KLA	Kosovo Liberation Army
LCY	League of Communists of Yugoslavia
MFA	Ministry of Foreign Affairs
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental Organization
Norad	Norwegian Agency for Development Cooperation
OECD	Organization of Economic Cooperation and Development
OHR	Office of the High Representative
OSCE	Organization for Security and Cooperation in Europe
OSI	Open Society Institute
RECOM	Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia

SAA	Stability and Association Agreement
SFRY	Socialist Federal Republic of Yugoslavia
Sida	Swedish International Development Cooperation Agency
TRC	Truth and Reconciliation Commission
UN	United Nations
UNDP	United Nations Development Program
USIP	United States Institute of Peace
WCC	War Crimes Chamber
YNA	Yugoslav National Army
YPA	Yugoslav People's Army

# ABSTRACT

JUSTICE BEYOND BORDERS? THE POLITICS TO DEMOCRATIZE HUMAN RIGHTS IN THE POST-CONFLICT BALKANS

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This dissertation examines the politics of post-conflict justice in the former Yugoslavia. It discusses the protagonistic role of human rights activists in challenging existing transitional justice models that emphasize international and domestic war crimes trials over restorative justice mechanisms—including truth commissions, reparations and memorials, among others. Using a political sociology perspective, this study goes beyond statist, normative and legalist scholarship on accountability after mass atrocity and builds on an emerging literature in the social sciences that focuses on the impact of global human rights on the national and local level. It analyzes human rights advocates' recent efforts to initiate a transnational fact-finding body—called the Coalition for RECOM Initiative—in the post-conflict Balkans against the backdrop of the successes and challenges of the UN-created International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the difficulties of national judiciaries to prosecute war crimes and gross human rights violations across the



region. This victim-centric fact-finding movement —whose primary goal is to establish a transnational commission in charge of collecting testimonies about human rights abuses and war crimes— is an attempt to introduce a holistic and complementary transitional justice strategy that goes beyond the unidimensional retributive justice approach in the Balkans. Concentrating on individuals and society, instead of high politics (such as the European Union enlargement process with its broad political and economic agenda) this bottom-up initiative is an important step to democratize transitional justice processes in the post-conflict Balkans. The study explores the efforts promoted by nongovernmental organizations (NGOs) in several Balkan states—particularly Bosnia and Herzegovina, Croatia and Serbia—to coordinate a transnational campaign to cope with past mass atrocities. It discloses the struggle that this movement faces from within—confronted by diverging interests of its members—and from outside, as it seeks political and financial support from international and region-specific organizations as well as national governments. Drawing on participant observation and in-depth interviews (along with archival material, including reports, policy briefs, strategy papers, press releases and news articles, among others) this research examines how these NGOs organize their relations with international actors (such as the ICTY), national judiciaries and their constituencies to discuss, interpret, and identify meanings of human rights and democracy within and across state-boundaries of countries in the former Yugoslavia. It traces how, the extent to which, and with what effect these meanings travel and transform through the movement's transnational networks and practices, and attempts to see whether and how they influence the NGOs' campaign for political and legal institutional change within the region.

# Chapter 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. The 1993 creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague constituted a watershed moment in international humanitarian law, leading to a global spillover effect.<sup>1</sup> 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.

Recent research on the Balkans, however, has pointed to the problems of politicized retributive justice on the international as well as national level. 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

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<sup>1</sup> 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).

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 to risky to the newly 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. 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. As I will illustrate later, 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. As a result, two decades after the establishment of the ICTY, a series of initiatives have emerged across the former Yugoslavia to pursue fact-finding missions to establish a definitive version of the conflict that ravaged the Balkans and left 140 000 victims in its wake. My research examines the most recent transnational fact-finding initiative in the former Yugoslavia—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)—and explains why thus far the social movement proposing this initiative has been unsuccessful in creating a regional truth commission.

As I will demonstrate in the next two chapters, my research looks beyond the state-centric driven analyses of retributive justice, focusing on state-society relations in a post-conflict justice context instead. Large parts of the literature in transitional justice have addressed

normative and policy oriented questions.<sup>2</sup> As a result, many ‘pracademics’<sup>3</sup> have provided insights ranging from legal advice to trust and institution-building. Notwithstanding, the field has yet to gain a broader knowledge of the *politics* of justice. In other words, my study aims at analyzing the complex political dynamics that necessarily play a role in the way transitional justice policies and mechanisms are put into place and implemented. The political objectives and stakes in these varying contexts provide an excellent opportunity for political scientists, and in particular for scholars of international relations (IR), to contribute new insights to the field of transitional justice. Yet, the defining factors of the international, the national and the local —as areas in which politics are carried out—have changed due to an increasingly globalized and interconnected world and therefore require a new methodological approach which I discuss in my literature review below as well as in chapter 2. The traditional boundaries of nation-states and the influence of state actors have shifted to a transnational space in which non-state actors form advocacy networks and as a result shape politics in various areas on different levels. Margret Keck and Kathryn Sikkink analyze these changes in their seminal work, *Activists Beyond Borders: Advocacy Networks in International Politics*, arguing that

[w]orld politics at the end of the twentieth century involves, alongside with states, many non-state actors that interact with each other, with states, and with international organizations. These interactions are structured in terms of networks

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<sup>2</sup> See for instance Siphiwe Dube, “Transitional Justice Beyond the Normative: Towards a Literary Theory of Political Transitions,” *International Journal of Transitional Justice* 5, no. 2 (2011): 177–197.

<sup>3</sup> A pracademic is someone who is both an academic and an active practitioner in their subject area. While the term has been in use for over 30 years, Paul Posner coined it in 2001. Since many scholars have used the term and discussed various related issues. For more detail see Paul Posner, “The Pracademic: An Agenda for Re-Engaging Practitioners and Academics,” *Public Budgeting & Finance* 29, no. 1 (2009): 12–26.

and transnational networks are increasingly visible in international politics. Some involve economic actors and firms. Some are networks of scientists and experts whose professional ties and shared causal ideas underpin their efforts to influence policy.<sup>4</sup>

This phenomenon of transnational politics drew further academic attention, with a couple of scholars conceptualizing the trend, such as Michael Smith and Luis Guarnizo:

Transnational practices do not take place in an imaginary “third space” [...] abstractly located “in-between” national territories. [...] Transnational practices, while connecting collectivities located in more than one national territory, are embodied in specific social relations established between specific people, situated in unequivocal localities, at historically determined times.<sup>5</sup>

Efforts to reckon with the past in the post-conflict Balkans are a good example of this trend, as different states, actors share (and compete in) overlapping geographical, sociopolitical and ideological spaces. As a consequence, I opt for a process-oriented framework—instead of other models, such as institutionalist, normative and statist analyses, among others—to examine the role of civil society in the quest for accountability in the former Yugoslavia.

I draw on the case of a transnational coalition of different civil society organizations in the former Yugoslavia, called the Coalition for RECOM Initiative, whose goal is to create a regional truth commission to establish facts about victims of war crimes and other serious human rights violations committed on the territory of the former Yugoslavia in the period

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<sup>4</sup> Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998), 1.

<sup>5</sup> Michael Smith and Luis Guarnizo, eds., *Transnationalism from Below*, vol. 6, Comparative Urban & Community Research (New Brunswick, NJ: Transaction Publishers, 1998), 11.

from 1991-2001. The origins of this campaign to institutionalize a regional fact-finding mechanism can be traced to an increasing non-governmental organization (NGO) activism in the region to support war victims (see chapter 4 and 5).<sup>6</sup> In a nutshell, I analyze different factors to explain why until today this NGO campaign has remained unsuccessful in recent years despite repeated attempts to complement the ongoing work of the ICTY. In fact, it has been over 17 years since the ICTY issued its first indictment.<sup>7</sup> As I will show in chapter 3 and 4 of my dissertation, although many have praised the work of the ICTY as a breakthrough in international humanitarian law, its work was not victim-centered. In other words, particularly the early cases in The Hague focused on successfully implementing legal procedures, instead of responding to individualized needs, including the recognition of witnesses as victims and reparations, among others. Many victim-witnesses and victims across the region thus felt that their dignity had not been restored and wanted a broader inquiry into the war crimes and political violence across the region (see chapter 4 for a detailed discussion on the issue). The RECOM Initiative therefore presents an effort to cope with the lack of victim-oriented transitional justice projects and focus on the local needs of victims and their families to cope with past mass atrocities. In other words, this regional fact-finding movement is an attempt to democratize international humanitarian law—and globalized human rights concepts more generally—in local post-conflict settings. With my research I explore the intricate efforts among NGOs in several states across the region—particularly Bosnia and Herzegovina (BiH), Croatia and Serbia—to coordinate a transnational

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<sup>6</sup> See for instance the work of Documenta Center for Dealing with the Past (Croatia), the Humanitarian Law Center (Serbia) and the Research and Documentation Center (Bosnia and Herzegovina), among others.

<sup>7</sup> It was issued against Dragan Nikolić, a commander of a camp in eastern Bosnia and Herzegovina, for crimes committed against non-Serbs in 1992.

campaign to cope with past mass atrocities by attempting to mobilize the support of the United Nations (UN)'s ICTY, other region-specific international organizations and national governments. In fact, the RECOM Initiative began as a grass-roots project in 2008 and since 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. Through participant observation and in-depth interviews, I examine how these NGOs organize their relations with international actors (such as the ICTY), national judiciaries and their constituency (war victims) to 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 conflicting interests of its members—and from outside, as it seeks political and financial support from international and region-specific organizations as well as national governments. To this end, I also trace how, the extent to which, and with what effect these meanings “travel” (and transform) through the movement's transnational networks of meaning and practice, and explain why the NGO campaign for political-legal institutional change within the region of the former Yugoslavia have been unsuccessful thus far.

In this introductory chapter, I will first present an overview of the political violence that escalated in the former Yugoslavia and that lead to bloodshed across the region from 1991 to 2001.<sup>8</sup> This is necessary to provide background information to understand the different

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<sup>8</sup> This time period refers to the interstate wars, including the wars in Croatia, BiH and Kosovo, among others. However, political violence still remains a problem particularly in areas such as Northern Kosovo where recent border

questions related to the quest of dealing with past mass atrocities in the Balkans, which are central to this study. Second, I review some of the foundational themes and concepts raised in the transitional justice literature, ranging from democratic transition theories to legal concepts, in order to illustrate why political science research continues to contribute new insights to the field. In this context, I also discuss a selection of more recent work within the transitional justice literature that has inspired this study. Last, I outline each of the chapters, summarizing key questions my study will address.

## **The Breakup of the Former Yugoslavia: A Devastating Chain**

### **Reaction**

After World War II, Marshal Josip Broz Tito implemented a policy called “brotherhood and unity” to forge a homogenous nation within the Socialist Federal Republic of Yugoslavia (SFRY).<sup>9</sup> Yet, the country’s political institutions and later its internal boundaries defined by its six republics (BiH, Croatia, Macedonia, Montenegro, Serbia and Slovenia) and its two autonomous regions (Kosovo and Vojvodina) eventually disintegrated after the Tito’s death

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clashes in the summer 2011 have provoked concerns of international actors, such as the UN and the European Union (EU).

<sup>9</sup> Tito’s goal was decrease the ethnic differences of each group that lived within the SFRY’s territorial boundaries. In fact, the SFRY included over a dozen different ethnic groups such as, Serbs, Croats, Bosniaks, Slovenes, Albanians, Macedonians, Yugoslavs, Montenegrins, Hungarians, Roma, Turks, Slovaks, Romanians, Bulgarians and Italians (listed according to their percentage during the census in 1981).



in 1980 (see figure 1 below).<sup>10</sup> Indeed, the 1980s were marked by economic instability and political turmoil. As a result, different political forces in the republics contested the Yugoslav leadership in Belgrade and attempted to gain more power.<sup>11</sup> In 1981, for instance, Kosovo Albanian students protested to demand that Kosovo become a republic within Yugoslavia. The protest spread and turned into riots that were crushed by the Yugoslav government.



Source: Wikimedia Commons

**Figure 1: General Map of the Socialist Federal Republic of Yugoslavia before the outbreak of the war in 1991**

<sup>10</sup> Sabrina P. Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the War for Kosovo* (Westview Press, 2002), 4.

<sup>11</sup> See for instance Lenard Cohen, *Broken Bonds: The Disintegration of Yugoslavia* (Westview Press, 1993).

Almost a decade later, in 1989, Slobodan Milošević, an ambitious young Serbian politician who would later turn into a war-waging Serbian dictator, used the Kosovo issue to support and strengthen the influence of Kosovo Serbs in the region and to buttress his power in Serbia.<sup>12</sup> The goal of this brief overview, however, is not to isolate specific nationalist or state-centric factors to determine the causes of the political violence that occurred during the 1990s. Instead, I aim at laying out different dynamics all of which contributed to the political and institutional chaos and which eventually escalated into violent conflicts and led to outright war. To this end, these nationalist tendencies also have to be viewed from a global perspective. In fact, the fall of the Soviet Union is crucial in this context. Mikhail Gorbachev's reforms of glasnost and perestroika, that helped fuel the peaceful revolutionary changes across Central and Eastern Europe<sup>13</sup>, also inspired leaders of the republics within Yugoslavia to follow suit. Yet, contrary to the nonviolent movements in the neighboring countries, the separatist nationalism across Southeast Europe turned out to be deadly.

In 1990, extremists of all political colors began to dictate the course of events. When the Kosovo Albanians rose up to demand their freedom from Serb domination, Croats and Slovenes made plans to declare their independence. In Serbia, the media prompted for calm, claiming that if Croatia and Slovenia were allowed to leave Yugoslavia, the horrors and atrocities of World War II would soon return. In Croatia, on the contrary, the media

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<sup>12</sup> Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the War for Kosovo*, 10.

<sup>13</sup> Not all transitions in Central and Eastern Europe were peaceful. Rumania is an exception. The government of the authoritarian leader Nicolae Ceaușescu was overthrown and the leader and his wife executed on December 22, 1989 after a short televised court session.

supported the Croatian cause, increasingly accusing Serbs of being terrorists.<sup>14</sup> The Croatian police began arresting Serbs, which worsened the relationship between the two ethnic groups. As police harassment increased, thousands of Serbs fled northern Croatia, while thousands of other Serbs sought refuge in the Yugoslav People's Army (YPA). As a response, Serbian extremists sent troops and armed volunteers to help their comrades. Around the same time, in June 1991 the war between the SFRY and Slovenia broke out after the Slovenian parliament declared the republic's independence from the SFRY. Croatia, which supported Slovenia's efforts politically, served as a geographic buffer zone between Serbia and Slovenia. Within 10 days Slovenian forces drove the YPA out of its territory, leaving only nine civilians dead. During the summer the war eventually spread to Croatia. Although the Sabor, the Croatian parliament, also declared Croatia's independence from the SFRY, contrary to Slovenia, the country had a significant Serb population. Inevitably, Serbian leader Milošević announced that if Croatia left Yugoslavia, the Serbs, who formed a majority in several Croatian regions, would leave Croatia. This sociopolitical context was one of the reasons why the Serbo-Croatian war was much more devastating and lasted much longer than the war in Slovenia.<sup>15</sup>

Croatia's war of independence—also referred to as the “Homeland War”<sup>16</sup> in official history books and state discourse—was waged from 1991 to 1995. After the Croatian declaration of

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<sup>14</sup> See for instance Mark Thompson, *Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina* (Luton, United Kingdom: University of Luton Press, 1999).

<sup>15</sup> See for instance Misha Glenny, *The Fall of Yugoslavia* (New York: Penguin Books, 1994).

<sup>16</sup> While the official discourse stresses the defensive nature of the war against the Serbian aggressor, it also conceals war crimes against non-Croatian ethnic groups because of the need to restore national unity during the violent conflict from 1991 to 1995. This discourse legitimizes in particular human rights abuses during Operation Storm in

independence on June 25, 1991, the YPA attempted to keep Croatia within the SFRY by occupying the entire Croatian territory. As the YPA failed to achieve its goal, Serb forces created the self-proclaimed Republic of Serbian Krajina<sup>17</sup>, which covered over one quarter of Croatia's territory. This republic was never recognized internationally and consisted of some Eastern parts of Croatia (including areas around the cities of Vukovar and Osijek) as well as Central and Southern parts of the country including cities such as Petrinja, Plitvice and Knin, among others (See Figure 2). Following the failed attempts to occupy Croatia's territory, Serbs implemented ethnic cleansing programs in areas dominated by Serbs in Croatia. They also relied on heavy artillery to attack urban areas, which caused many civilians to die and destroyed many buildings and sites, such as large parts of the United Nations Educational, Scientific and Cultural Organization (UNESCO)-protected city of Dubrovnik.<sup>18</sup> Less than six months after the initial fighting, Croats and Serbs negotiated an international ceasefire, the Vance plan, named after Cyrus Vance former US Secretary of State who was a UN special envoy to negotiate a peace deal between the warring parties.

After the ceasefire in January 1992 Croatia's independence was recognized internationally and its borders drawn at the existing battle lines. In addition, UN forces were deployed, resulting in only intermittent fighting during the next three years. During this period, the Republic of Serbian Krajina occupied almost 14,000 square kilometers (see red areas in figure 2). In 1995, Croatia launched two major offensives known as "Operation Light" and

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1995, when Croatian forces regained most of the territory that they had lost in earlier phases of the war, forcing non-Croatian civilians to leave. For more details on Operation Storm and the Homeland War see chapters 3 and 5.

<sup>17</sup> "Krajina" means frontier in Serbo-Croatian.

<sup>18</sup> Jerome Oberreit, "Destruction and Reconstructoin: The Case of Dubrovnik," in *Reconstructing the Balkans: A Geography of the New Southeast Europe*, ed. Derek Hall and Darrick Danta (Chichester: Wiley-Blackwell, 1996), 67–78.

"Operation Storm"<sup>19</sup>, which effectively put an end to the war in its favor<sup>20</sup>; however, Croatian armed forces committed numerous war crimes particularly against Serbo-Croatian civilians during these military operations.<sup>21</sup>



Source: Wikimedia commons

**Figure 2: Map of Croatia and surrounding Balkan states.**

The red-marked areas represent locations with dense Serbo-Croatian population. These areas also constituted the approximate territorial boundaries of the Serb Republic of Krajina.

<sup>19</sup> The private US military contractor Military Professional Resources, Incorporated (MPRI) had helped provide tactical training for the Croatian forces. See for instance Richard Liebl, "The Croatian Armed Forces Training Simulations Program," *DISAM Journal of International Security Assistance Management* 24, no. 3 (2002): 10–15.

<sup>20</sup> The rest of the United Nations Transitional Authority for Eastern Slavonia areas, Baranja and Western Sirmium (UNTAES) was peacefully reintegrated into Croatia in 1998.

<sup>21</sup> For more details on Operation Storm and the Homeland War see chapters 3 and 5.

The ceasefire between Serbia and Croatia allowed the Serbs to turn their attention to the situation in BiH, which was beginning to deteriorate. In the spring of 1992, the YPA began to take up positions around Sarajevo, the capital of BiH. Reminiscent to the Croatian case, Serbian leader Milošević declared that if BiH left Yugoslavia, Bosnian Serbs would form their own state out of BiH, by uniting with Serbia, thus backing the interests of Bosnian Serbs led by a local political figure Radovan Karadžić.<sup>22</sup> The war in BiH lasted from April 1992 to December 1995 with Bosnian Croats, Bosnian Serbs and Bosniaks (Bosnian Muslims) fighting against each other. While the self-proclaimed Serb Republic relied on military support from Belgrade, Croats of Herzegovina (the southern region of Bosnia) eventually joined the Republic of BiH's forces against the Serbs as I explain in more detail below. The war broke out following the referendum on February 29, 1992, when the multiethnic republic of BiH—which was inhabited by Bosnian Muslim-majority (44 percent), Orthodox Serbs (31 percent) and Croatian Catholics (17 percent)—decided to proclaim BiH's independence from Yugoslavia.<sup>23</sup>

The Bosnian war was marked by ethnic cleansing of Bosnian populations, particularly in eastern parts of the country. During the heavy fighting, indiscriminate bombing of cities and villages, mass rapes and systematic genocide occurred. Although initially all sides were fighting against each other—the Croatian government intended to secure territorial gains in

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<sup>22</sup> See for instance Steven Burg and Paul Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M.E. Sharpe Incorporated, 2000), chap. 3.

<sup>23</sup> Glenny, *The Fall of Yugoslavia*, chapter 5.

the southern region of Bosnia that was heavily populated by Croatian Bosnians<sup>24</sup>—Croatian forces ultimately joined the BiH Republic's forces to stop the Serbs from taking over the region. Events such as the siege of Sarajevo, the Srebrenica massacre<sup>25</sup> and the Omarska camp<sup>26</sup> became looming symbolic events characterizing the devastating conflict. While Serbs initially had a military advantage due to the equipment provided by the YPA, they lost their momentum as allied Bosnian and Croatian forces held up against the army of the Serb Republic. The Federation of BiH (including Bosniaks and Bosnian Croats) was created following the Washington Agreement in 1994. After the massacres of Srebrenica and Markale<sup>27</sup> in the summer of 1995 armed forces of the North Atlantic Treaty Organization (NATO) intervened and launched air raids against the positions of the army of the Serb Republic, which proved essential to stop the war. The war finally came to an end when the warring parties signed a peace agreement in Paris on 14 December 1995. The initial peace negotiations were long and complex, taking place in Dayton, Ohio, between 1 and 21 November 1995. The agreement is generally known as the Dayton Accords.<sup>28</sup> A United States (US) Central Intelligence Agency (CIA) report from 1995 found that Serb forces were

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<sup>24</sup> Croatian President Franjo Tuđman and Serbian President Slobodan Milošević had a series of meetings in 1991, known as the Karađorđevo agreement, which foresaw the redistribution of the territories in the former Yugoslavia. The meetings did not include the third largest ethnic group of Bosniaks.

<sup>25</sup> This massacre refers to the July 1995 killings of 8,000 mainly male Bosniaks in and around the town of Srebrenica in BiH by units of the Army of the Serb Republic under the command of General Ratko Mladić.

<sup>26</sup> Omarska camp was a concentration camp run by Bosnian Serb forces, in Omarska, a mining town near Prijedor in northern BiH. It was set up during the Prijedor massacre for Bosniak and Croat men and women. The Prijedor massacre is the second largest killings after Srebrenica. Over 5,000 Bosniaks and Croats are missing or were killed.

<sup>27</sup> These massacres were two artillery attacks carried out by the Army of the Serb Republic against civilians during the Siege of Sarajevo in the Bosnian War. They occurred at the Markale, a marketplace located in the historic core of Sarajevo, the capital of BiH. The first bombing took place on February 5, 1994 and killed 68 people, wounding 144. The second one occurred on August 28, 1995, killing 35 people and wounding another 90.

<sup>28</sup> For a detailed analysis of the negotiations see for instance Richard Johnson, *Negotiating the Dayton Peace Accords Through Digital Maps*, Virtual Diplomacy Report (Washington, DC: United States Institute of Peace, 1999).

responsible for 90 percent of war crimes committed during the conflict.<sup>29</sup> With over 200,000 civilian and military casualties and over 2.2 million displaced people, the Bosnian war has been the most devastating conflict since the end of World War II in Europe.<sup>30</sup>

The war in Bosnia, however, provoked stern international economic sanctions against Serbia, which fueled hyperinflation, weakening not only its economy but also Serbian society. As a result, Serbia's fragile position fueled old Kosovan independence claims. Some Kosovo Albanian leaders decided it was time to take up arms against weakened Serbs authorities, ignoring Kosovo's first president Ibrahim Rugova's policy of passive resistance of the early 1990s.<sup>31</sup> By 1996 a guerrilla war led by the Kosovo Liberation Army (KLA) began. To stop the KLA, Serbian police expelled hundreds of thousands of civilian Kosovo Albanians from their homes, forcing them to escape into the surrounding foothills and mountains. The winter of 1998 was particularly harsh for the refugees who were without food or shelter, appealing to the West for humanitarian aid. In the end, the international community decided to bomb Serbia and Serbian positions in Kosovo using NATO air power on March 24, 1999. 78 days after the first bomb hit Serbian soil, President Milošević capitulated and withdrew his forces. During the NATO raids hundreds of Serbian civilians died, while thousands of Kosovo Albanians died in the hands of Serbian forces.<sup>32</sup> Less than a year after the NATO bombing, a wave of popular protests forced Milošević to hold new elections. Although he lost the elections, he refused to resign as president of Serbia. On October 5,

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<sup>29</sup> Roger Cohen, "C.I.A. Report on Bosnia Blames Serbs for 90% of the War Crimes," *New York Times* (March 9, 1995).

<sup>30</sup> See for instance Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* (New York: United Nations Security Council, 1994).

<sup>31</sup> He was in office from 1992 to 2006.

<sup>32</sup> See for instance Tim Judah, *Kosovo: War and Revenge* (New Haven, CT: Yale University Press, 2002).



2000, hundreds of thousands of people took to the streets, declaring a national strike. Ten days later, demonstrators stormed the parliament and forced Milošević to resign.<sup>33</sup> In February 2002, the government of Zoran Đinđić<sup>34</sup>—a political opposition leader during the years of the Milošević regime and founder of the modern Democratic Party—cooperated with the ICTY and extradited the former President. Slobodan Milošević faced charges in The Hague for war crimes and genocide for his actions across the former Yugoslavia. Shortly before the conclusion of the trial in 2006, the former Serbian leader died of a heart attack.<sup>35</sup>

## **Crimes Against Humanity and the International Response**

The different conflicts across the former Yugoslavia during the 1990s were characterized by grave human rights abuses and the violation of international humanitarian law, including killings, mass murder, systematic rape, torture and other crimes against humanity. In fact, the term "ethnic cleansing" reappeared among the more frequently used terms in IR to describe the range of human rights violations, such as forced evictions and executions, in the former Yugoslavia while leaders attempted to create new nation states with sovereign territories that consisted of homogenous ethnic groups. While all parties to the conflict in the Balkans committed human rights violations, Serb paramilitary and armed forces carried

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<sup>33</sup> Florian Bieber, "Serbia After the Kosovo War: The Defeat of Nationalism and Change of Regime," in *Understanding the War in Kosovo*, ed. Florian Bieber and Židas Daskalovski (Oregon, WA: Frank Cass Publishers, 2003), 319–336.

<sup>34</sup> He was assassinated in 2003.

<sup>35</sup> Marlise Simons and Alison Smale, "Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies," *New York Times* (New York, March 12, 2006).

out a large number of them. Below I list and summarize some of the worst war crimes and atrocities.

- In fall 1991, Serb forces shelled the Croatian coastal city of Dubrovnik, an action without military justification that caused severe material damage and a number of casualties.
- In November 1991, Krajina Serbs took several hundred injured Croatian soldiers from a hospital in Vukovar in eastern Slavonia, executed them in a field, and buried them in mass graves. For years, Serbian authorities denied international investigation teams access to the sites.
- Throughout the conflict Sarajevo and other cities were exposed to indiscriminate bombing. Dozens of civilians were killed or wounded by snipers and artillery used by Bosnian Serb forces. Six of these cities were designated safe areas by the United Nations in May 1993, but this did not prevent further bombings.
- In early spring of 1992 entire enclaves, including towns like Prijedor, Bijeljina, Zvornik and Jajce, among others, and villages such as Foča and Cerska were "cleansed" of their Muslim and Croat inhabitants when Bosnian Serbs attempted to "purify" their occupied territories.
- In 1992 Bosnian Serbs set up prison camps and detention facilities where tens of thousands of Muslims and Croats were held. During the summer of 1992, international investigators were refused access to the camps, but the prisoners

who managed to escape described serious human rights violations, including torture and executions among others.

- During the summer of 1995 Bosnian Serb forces overran the towns of Srebrenica and Žepa, committing gross human rights violations. As many as 6,000 captured Muslim men were gathered and brought to surrounding farms, then shot and buried in mass graves. A Muslim population of over 42,000 people was "cleansed" from the region.
- Croatian military also committed serious human rights violations, including executions and torture, among others, against Serbo-Croatian civilians in Croatia in the summer 1995 when the Croatian military took over Serbian territories such Western Slavonia and the Krajina region in Croatia that were occupied by Serbs between 1992 and 1995.<sup>36</sup>

The international response to these atrocities consisted of creating a special investigation commission to verify the early human rights abuses and war crimes across the region. In August 1992, the UN Security Council gave the green light for the UN Commission on Human Rights to appoint a Special Rapporteur to conduct on-site investigations of crimes against humanity and to draft a report on its observations. The team comprised different observers in Sarajevo, Mostar, Zagreb and Skopje, who submitted a series of reports on

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<sup>36</sup> See for instance the Research and Documentation Center's online Bosnian War Crimes Atlas at <http://www.idc.org.ba>, accessed on December 2, 2011. See also OSCE, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010* (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2010); Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia* (Amnesty International Publications, 2010).

violations throughout the former Yugoslavia. In October 1992, the Security Council then approved the request for an impartial international investigation to identify those responsible for violations of human rights and to deter acts of violence on ethnic basis. The investigation was carried out based on the UN Security Council Resolution 780 the “Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771,” which followed the initial August 1992 request and which was led by the Special Rapporteur Cherif Bassiouni, an Egyptian international UN war crimes expert.<sup>37</sup>

Based on preliminary findings of the Commission in spring 1993 the UN Security Council concluded that the committed atrocities were war crimes and that international prosecutions against individuals responsible for these human rights abuses were necessary to ensure stability and lasting peace in the region. As a result, the Security Council adopted a resolution, creating the ICTY, which then took over the Committee’s work. As I will show in chapter 3, the US played a crucial role, leading international efforts to establish the Tribunal and contributed extensively to get the ICTY off the ground. This includes not only financial contributions but also the services of attorneys, investigators, and other experts. The impact of the ICTY’s work changed international humanitarian law and accountability efforts after mass atrocity. Unsurprisingly, there exists an extensive literature on the ICTY. Later in this chapter, and in chapters 2 and 3 I will discuss some of the work on the sociopolitical impact

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<sup>37</sup> Cherif Bassiouni, “The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” *The American Journal of International Law* 88, no. 4 (1994): 789–792.

of the Tribunal.<sup>38</sup> As mentioned earlier, however, my research focuses on state-society relations in post-conflict and transitional justice contexts. To this end, the following section consists of a short discussion on the evolution in past transitional justice scholarship in order to highlight some of the shifts in the literature and to illustrate how my own work builds on more recent studies that concentrate particularly on the relationship of civil society and the state in post-authoritarian and post-conflict settings.

## **The Growing Importance of State-Society Relations for Understanding Post-Conflict Justice**

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, among others.<sup>39</sup> However, the scholarly debate around these issues and the term itself was in particular coined by Ruti Teitel's early work published in Neil Kritz's edited volume *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.<sup>40</sup> 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

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<sup>38</sup> For legal analyses see for instance Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010); Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press, 2004); Gideon Boas and William Schabas, *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, 2003).

<sup>39</sup> 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).

<sup>40</sup> 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.

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.”<sup>41</sup> 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.<sup>42</sup> 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.”<sup>43</sup>

As a consequence, Teitel’s article describes a genealogy that is based on three phases. Phase I refers to the period immediately after World War II and the models of retribution based on victors’ justice, such as the Nuremberg and Tokyo Trials. Phase II moved beyond the retributive justice model of Phase I. This phase was concerned with broader issues than the question of how to punish perpetrators. Scholars and practitioners were seeking answers on how to heal and reconcile post-conflict and post-authoritarian societies, including sustainable peace processes and the rule of law. Thus, transitional justice moved

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<sup>41</sup> Ruti G. Teitel, *Transitional Justice* (Oxford University Press, USA, 2000), 6.

<sup>42</sup> Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

<sup>43</sup> *Ibid.*, 94.

away from focusing solely on judicial mechanisms of international law and made an attempt to integrate more complex processes, including for instance nation-building. Her third phase is characterized by an acceleration of transitional justice at the end of the 20<sup>th</sup> century with increasing political instability and violence. “In this contemporary phase, transitional jurisprudence normalizes an expanded discourse of humanitarian justice constructing a body of law associated with pervasive conflict.”<sup>44</sup> She refers particularly to the influence of different jurisprudence across different regions, including the creation of the ICC.<sup>45</sup> These interactive processes and dynamics on the local, national and global level are crucial for my study and will be discussed throughout my chapters. As for now, however, it is useful to discuss Teitel’s Phase II in more detail in order to understand the relationship between retributive justice and restorative justice mechanisms.

In her Phase II, Teitel analyzes the dilemma of assuring accountability through the rule of law on the one hand, and durable peace during regional democratization processes after World War II on the other hand, including Latin America, Africa and Eastern Europe, among others.<sup>46</sup> The main question during democratic transitions was whether dictators and their authoritarian rule could be dealt with using the model of international justice such as the Nuremberg Trials, or whether past wrongdoings should be addressed using domestic mechanisms. In many cases, as she points out, political realities and the power struggles of the successor regimes with national military elites in Latin America led to solutions that compromised the judiciary, often granting amnesties and immunities to these rogue

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<sup>44</sup> Ibid., 71–72.

<sup>45</sup> Ibid., 90.

<sup>46</sup> Teitel, “Transitional Justice Genealogy.”

leaders.<sup>47</sup> Yet, she continues that during this phase, there was also a dynamic that responded to transitional justice by looking for alternative strategies. According to her,

[t]he leading model in this phase is known as the restorative model. In this phase, the main purpose of transitional justice was to construct an alternative history of past abuses. A dichotomy between truth and justice therefore emerged. Thus, the Phase II paradigm largely eschewed trials to focus instead upon a new institutional mechanism: the truth commission. [...] The appeal of the model is its ability to offer a broader historical perspective, rather than mere judgments in isolated cases. Truth commissions are most popular where the predecessor regime disappeared persons or repressed information about its persecution policy, as was typical in Latin America. In contrast, truth commissions have been of less interest in post-Communist Europe, where the use of history by various governments was itself a destructive dimension of Communist repression. Accordingly, in Eastern Europe, the main critical response by the successor regime was not to create official histories but rather to guarantee access to the historical record.<sup>48</sup>

While her article 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 studied transitional justice from a historical and institutional perspective.<sup>49</sup>

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<sup>47</sup> Ibid., 75–78.

<sup>48</sup> Ibid., 79.

<sup>49</sup> For literature on institutional change during democratic transitions that has also influenced transitional justice scholarship see for instance Guillermo O'Donnell and Paul 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



Jon Elster's work *Closing the Books: Transitional Justice 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.<sup>50</sup> In fact, by defining the “comparanda and explananda”<sup>51</sup> of transitional justice—which he describes as the basic motivations, including emotions and interests that lead to specific actions—he discusses different institutional forms of justice. In his view, there are three of them: legal justice, administrative justice, and political justice. Instead of looking at them separately, however, he suggests to view them as a continuum. He then compares his selected historical cases and explains the different regime changes (along with the transitional justice mechanism that have been chosen in each of the contexts) according to his institutional justice framework.<sup>52</sup> His analysis is very valuable from a historical and comparative point of view. It also helps understand institutional processes within political structures during regime change. Yet, it does not include political processes between state and society actors, but its analytical lens remains focused on a state-centric view.

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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 J. 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).

<sup>50</sup> Elster, *Closing the Books: Transitional Justice in Historical Perspective*. Both words are Latin and stand for comparisons and explanations.

<sup>51</sup> Ibid., 79.

<sup>52</sup> Ibid., chap. 4.

My study, on the contrary, aims at strengthening the sociopolitical research agenda of post-conflict justice. In other words, 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 civil society organizations. 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. As a case in point, Joel Migdal in *State in Society* and James Scott with his *Seeing Like a State*, both provide detailed accounts on the relationship between the state and society.<sup>53</sup> Migdal, for instance, underlines the changes from traditional Weberian state-models, such as states as bureaucracies and planning units—by highlighting the power struggles from within and describing the role of civil society as a counterweight against state institutions such as the military.<sup>54</sup> Scott's analysis, on the contrary, explores the grotesque power that in particular authoritarian states yield over society, providing several case studies ranging from a German pine tree forestation model in the 19<sup>th</sup> century to a compulsory villagization in Tanzania.<sup>55</sup>

Earlier scholarship on transitional justice was less preoccupied with sociopolitical dynamics between the state and society; instead it was more concerned with finding appropriate mechanisms of rebuilding war-torn societies. Two contributions by Neil Kritz and Priscilla

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<sup>53</sup> Joel Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge University Press, 2001); James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

<sup>54</sup> Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another*, 3–5; 130–133.

<sup>55</sup> See for instance Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, chap. 1, 7.

Hayner that have shaped the scholarly debate on rebuilding post-conflict societies are particularly interesting.<sup>56</sup> Both authors are practitioners and their respective works provide detailed comparative analyses in order to understand specific transitional justice mechanisms in varying contexts. In Kritz's edited volume mentioned earlier, for instance, several authors describe different forms of transitional justice tools for states in transition periods—including retributive and restorative mechanisms. Each tool is discussed and illustrated by a different empirical case. Hayner, on the contrary, focuses only on one mechanism: truth commissions. Nonetheless, she compares over two dozen empirical cases in which truth and reconciliation commissions have been used in order to deal with past human rights abuses or mass atrocities. Her cases range from countries in Latin America, such as Peru or Argentina, to Asia, including South Korea and Indonesia, among others.<sup>57</sup> Kritz's volume was published at the height of the divide between scholars, practitioners and activists whether justice—in its punitive form—trumps truth in terms of healing and reconciliation. Hayner's book was written shortly after a general scholarly consensus emerged on the issue, which presented retributive and restorative mechanisms of dealing with past atrocities as complementary tools. In both books, however, the normative character of the research remains visible, as the ultimate goal of the rich empirical comparative studies consists of examining cases from a policy and practitioners' view to create tools for future post-conflict and post-authoritarian regime changes. Notwithstanding, the politics of transitional justice—put differently, the complex political

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<sup>56</sup> Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press, 1995); Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001).

<sup>57</sup> Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, chap. 4, 5.

dynamics that necessarily play a role in the way transitional justice policies and mechanisms are put into place and implemented—stayed underexplored.

Other more recent transitional justice scholarship on the former Yugoslavia has produced findings that address this issue, examining the politics of justice. As we will see in chapters 2 and 3, Jelena Subotić'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.<sup>58</sup> 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.<sup>59</sup> 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. [... To this end, 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 that occur prior to as well as during the courtroom trials; second, the political struggles and negotiations *within* states.<sup>60</sup>

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

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<sup>58</sup> Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, London: Cornell University Press, 2009).

<sup>59</sup> Viktor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge, NY: Cambridge University Press, 2008).

<sup>60</sup> *Ibid.*, 6.

representatives and diplomats, among others. His study, much as Subotić's work (as we will see later) focuses nonetheless on a state-centrist perspective—mentioning civil society efforts only fleetingly<sup>61</sup>— 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.”<sup>62</sup>

Recent scholarship that focuses particularly on transitional justice processes in Latin America has started to address issues of civil society and state-society relations. Jo-Marie Burt, for instance, based on a Peruvian case study, explores the global norm shift in favor of accountability for human rights violations and specific domestic factors in Peru that led to the extradition and prosecution of former President Alberto Fujimori.<sup>63</sup> Her article

locates the Fujimori trial in this broader international context but suggests that to fully understand the factors contributing to the successful prosecution of Fujimori, it

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<sup>61</sup> Ibid., 24.

<sup>62</sup> 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.

<sup>63</sup> A national court convicted him in 2009 for grave human rights abuses during his presidency from 1990 to 2000. For more information on Peru's transition see chapter 3. See also Jo-Marie Burt, *Political Violence and the Authoritarian State in Peru: Silencing Civil Society* (Palgrave MacMillan, 2007).

is necessary to examine the specific interactions between international institutions and actors and domestic actors in Peru that expanded the opportunities for a domestic accountability agenda.<sup>64</sup>

She describes how Peruvian civil society, in particular human rights and victims' groups, have played an important role in the successful prosecution of the former head of state. After the collapse of the Fujimori regime in 2000, the new government was confronted with a number of challenges, ranging from a problematic electoral system to direly needed reforms in the corrupted legislature and judiciary. As a result, interim president Valentín Paniagua put in place a special prosecutorial unit to investigate corruption cases. In addition, Paniagua brought Peru back under the Inter-American Court's contentious jurisdiction, from which in 1999 Fujimori withdrew Peru because he was angered about the Court's ruling on human rights cases. The new government also acknowledged the Peruvian state's responsibility in a series of human rights abuses committed under the Fujimori regime. Yet, in light of the Peruvian judiciary's inability to prosecute human rights cases due to certain amnesty laws, a national human rights organization called *Coordinadora Nacional de Derechos Humanos*<sup>65</sup> (*Coordinadora*)—who was established in 1985 and has a long history of advocating for human rights and democracy—started lobbying for cases to be heard by the Inter-American Court. Meanwhile, the *Coordinadora* also built up the momentum to create a national truth commission. In the midst of these debates, the Inter-American Court

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<sup>64</sup> 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): 385.

<sup>65</sup> The English translation is National Human Rights Coordinator.

ruled that the Peruvian state was responsible for the Barrios Altos massacre in 1991.<sup>66</sup> The ruling had drastic consequences. As Burt candidly put it:

The ruling effectively opened the door for prosecutors and judges to pursue human rights cases in court. Two weeks after the ruling, a judge ordered the arrest of two army generals and 11 members of the Colina Group death squad implicated in the Barrios Altos massacre.<sup>67</sup>

Her article therefore nicely illustrates how contrary to the case of international tribunals such as those of the former Yugoslavia and Rwanda (with their remoteness to crime sites and international judges, among other factors) Peruvian domestic actors were able to construct local ownership of these processes. Other studies have also underlined the importance of local actors in post-conflict and post-authoritarian contexts.

A comparative study *Post-Transitional Justice: Human Rights Trials in Chile and el Salvador* by Cath Collins, for example, provides an in-depth analysis of the struggle for justice in the aftermath of political violence and mass atrocity.<sup>68</sup> In her comparison she underlines the importance of domestic transitional justice initiatives carried out by local actors, including human rights activists and victims. As her title “post-transitional justice” indicates, she also introduces a new conceptual framework that goes beyond the transitional justice models of the 1980s and more recent theories, such as the “justice cascade” or the “boomerang

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<sup>66</sup> The Barrios Altos massacre took place on November 3, 1991 when members of a death squad called Colina Group—a part of the Peruvian Armed Forces—killed over a dozen people, including an eight-year-old child, who were mistaken for Shining Path rebels, a Maoist paramilitary organization.

<sup>67</sup> Burt, “Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations,” 390.

<sup>68</sup> Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania State University Press, 2011).

effect,” which underlines the role of international law in national courts and transnational civil society actors to advocate for accountability on the domestic level.<sup>69</sup> In fact, her book “adopts a more agnostic approach to claims that transitional factors drive national events, be it in legal activism, government policy, or judicial performance.”<sup>70</sup> To this end, she traces the domestic evolution of accountability issues and shows that

the interaction of domestic actors with local judicial institutions provides a delimited and accessible field of inquiry within which elements of change and continuity over time can be identified. Transnationalized cases can then be viewed as part of a succession or trajectory of accountability events in specific settings.<sup>71</sup>

According to Collins, domestic human rights organizations play therefore an important role in transnationalized accountability cases.<sup>72</sup>

Moreover, Naomi Roht-Arriaza’s *The Pinochet Effect: Transitional Justice in the Age of Human Rights* is an important contribution to transnational mobilization, examining the challenges in bringing human rights violators to justice in their home country. Drawing on the landmark Pinochet case, she explores the questions of extradition and universal justice

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<sup>69</sup> For a detailed explanation of the cascade model see Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* 2 (2001): 1. For the “boomerang model” see Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. Both concepts are further elaborated in chapter 2.

<sup>70</sup> Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*, 26.

<sup>71</sup> Ibid.

<sup>72</sup> For similar research see for instance Jo-Marie Burt, “Impunity and Accountability: Human Rights and Transitional Justice Struggles in Latin America,” in *Human Rights: Challenges of the Past and Challenges for the Future*, ed. Katherine Hite and Mark Ungar (Johns Hopkins University Press, 2012); Phil Clark, *Critical Perspectives in Transitional Justice* (Insentia, 2012); Victoria Sanford, *Buried Secrets: Truth and Human Rights in Guatemala* (Palgrave Macmillan, 2003).



and discusses the role of transnational prosecutions in national courts of countries other than those where the crimes took place.<sup>73</sup>

Naomi Roht-Arriaza also published a co-edited volume with Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, in which over a dozen academics provide in-depth case studies of ten different countries to illustrate various institutions and actors involved in transitional justice processes, describe community-level initiatives, and analyze traditional instruments, among other post-conflict justice mechanisms. The authors of this edited volume argue that more recent transitional justice efforts face challenges to legitimacy and local ownership in post-conflict and post-authoritarian transitions.<sup>74</sup> My study, which focuses on the former Yugoslavia, builds on these new research trends and examines the protagonistic role of human rights activists in challenging existing transitional justice models that emphasize international and domestic war crimes trials over restorative justice mechanisms. Below I summarize each of my chapters and outline the specific issues that are addressed in each of them.

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<sup>73</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights* (University of Pennsylvania Press, 2005).

<sup>74</sup> Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press, 2006).

## Chapter Outline

As we have seen in this introductory chapter, scholarship on global accountability efforts for mass atrocities, state violence, and grave human rights violations has been burgeoning in the last few decades. In recent years, the field of transitional justice research has integrated alternative approaches in the social sciences such as anthropology, arts, or cultural studies. Political science has also emerged among the disciplines. Yet, as noted above, more political science scholarship that embraces these new transitional contexts and analyzes the conditions in post-conflict societies to better understand the differences in the politics of justice needed. Chapter 2 therefore introduces the analytical tools from political sociology—the analysis of the relations between state and society, particularly advanced by political scientists and social scientists, such as Max Weber, Luc Boltanski and Barrington Moore, among others—to provide the tools for this study to analyze the international networks and groups producing legal knowledge, their practices and goals, and the relationship these driving forces sustain among national and local practitioners and activists. The combination of two qualitative research methods, *participant observation* and *narrative interviews*, provide suitable tools to tackle these analytical and methodological challenges. Drawing on the former, I observe 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 latter, complementing the first method, consists of formal and informal in-depth conversations with key individuals from human rights organizations, judicial institutions and governments, among others. I

demonstrate that this framework provides a flexible and contextually adaptable set of tools to analyze 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. Additionally it helps explain why the recent fact-finding initiative has thus far been unsuccessful to create a regional truth commission.

In the first two chapters, I introduced some of the fundamental social differences between the professional habitus of legal practitioners and human rights activists. In chapter 3, I expand this discussion, providing some of the 'socio-legal' context in which current NGOs engage in transitional justice initiatives against war crimes in the region. In fact, their activities and prevailing struggles to promote accountability efforts are conditioned by a problematic evolution of international humanitarian law that the ICTY spearheaded in order to promote international criminal law not only across the former Yugoslavia, but also around the world. The continuous difficulties the ICTY faced when putting into practice international humanitarian law on the ground finally helped increase the role of human rights activists and NGOs in the field of transitional justice. The next two chapters therefore trace the increasing importance of these actors in conjunction with the development of the ICTY's activities.

Far from being a linear and smooth process of applying legal norms to a war-torn area with the goal of restoring peace and stability in the conflict zone, the creation of the UN ad hoc tribunal was beset by numerous difficulties. Some are more obvious than others. The idea of an international court in charge of sentencing war criminals and human rights violators, for

instance, infringes on state sovereignty and therefore required a UN Security Council resolution supported by its members. In addition to supranational legal issues, in order to try alleged perpetrators the legal procedures at the tribunal had to be defined and applied. This task was easier to conceptualize than to put into practice. While the above obstacles concern issues at the international level, the implementation of these legal concepts on a national level—such as the ICTY request urging to governments to cooperate with the tribunal and to prosecute their own war criminals under domestic jurisdiction—constitutes yet another set of problems that still needs to be solved. Interestingly, it is this state-centric logic that remains one of the basic problems when it comes to democratizing human rights issues in the Balkans. Chapter 3 looks therefore at some of the initial problems international lawyers had to grapple with while advocating for an international tribunal to stop the conflict in the former Yugoslavia and deter further violence. In this context, I also explain their early reticence to rely on truth commissions. Moreover, I analyze the legacy of the UN tribunal after over 16 years of operation, in order to outline changes in legal practices and ideologies. Last, I focus on issues encountered at the national level when applying international humanitarian law in the former Yugoslavia, relying on a case study of Croatia.

Chapter 4 addresses the difficulties the ICTY faced and the increasingly important role of human rights activists to cope with these challenges. In fact, the selective case choice by the ICTY—guided by the need to establish precedents in international criminal law, including precedents on chain of command, genocide, and rape, among the most important war crimes—and the problematic use of witnesses during court hearings caught the attention of

human rights advocates. Indeed, the ICTY trial record illustrates the great importance judges and prosecutors accorded to international humanitarian law, applied from the top down in the former Yugoslavia. The intention of the tribunal was to leave behind a normative legacy that can be applied to cases of mass atrocities worldwide. Yet, such a strategy has left the voices of many victims silent or diminished in importance. For a large number of victims, their cases could not be processed due to the limited procedural capacity of the ICTY. For others, who had the chance to testify in front of the tribunal, a variety of other issues have arisen. These issues range from post-traumatic stress disorders to death threats upon their return home.

To this end, chapter 4 focuses in particular on those victims who were called to testify and consequently had to face some of the above issues. Drawing on examples of NGO programs centered around witness protection, including support in The Hague and in the home country of the witnesses, this chapter explores the understanding of international war crimes law that activists have gained since the creation of the ICTY and how they have integrated the normative work of the court in their own agenda to promote the voices of victims in society. Based on some of the difficulties witnesses in war crimes trials have to face, I first describe the challenges for NGOs providing support in this context. Then I conceptualize the changing meaning of international humanitarian law from a grand narrative, promoted by the ICTY, to individualized stories of victims supported by human rights activists. Last, I discuss a general trend shift in transitional justice strategies in which

restorative justice mechanisms have found their place within the broader discourse of the ICTY's retributive justice approach.

After discussing the difficulties of retributive justice mechanisms to cope with past atrocities in chapters 3 and 4, chapter 5 turns to restorative justice initiatives. These initiatives include truth-seeking projects, documentation of testimonies and the creation of a historic memory, which have found their way onto the agenda of NGO activities in the region of the former Yugoslavia. However, after several unsuccessful attempts in the past—including a highly politicized pseudo truth commission in Serbia between 2002-2003 and several initiatives in BiH since the end of the 1990s that did not result in any tangible progress over the past 15 years—the current regional initiative of RECOM, which will include all states of the former Yugoslavia, also faces serious problems. Referring to human rights activists' initial witness protection work from Chapter 3, I employ concepts of sociology of spaces—which focuses on the creation of spaces through action and the interdependence of action on spatial structures—to illustrate how activists move between different spaces constituted by narratives of justice and truth. This chapter analyzes thus the structural and institutional challenges of human rights advocates to promote this regional restorative justice initiative. I have organized it in three sections. First, I describe the continuous struggle of human rights activists to create a transnational extra-legal space—such as a regional fact-seeking body—to deal with the past across the former Yugoslavia. I particularly focus on internal and external obstacles the movement faces. Second, I discuss issues of multiple narratives of victimhood, partly because of the transnational character of the restorative justice efforts. I

draw on several different empirical cases for this. Third, I examine the issue of framing, which is practiced by the main NGO actors during the RECOM campaign—in other words the strategy to mobilize the widest possible support base—which comes at the cost of watering down their discourse for their cause.

While the previous chapters revealed the problematic rise of restorative justice mechanisms in the region, chapter 6 explores the legalist influence on truth commissions by examining the RECOM Initiative. In fact, at least on a conceptual level, truth commissions have been integrated into a broader legalistic framework. In the legal world, truth-seeking bodies have found supporters consisting of lawyers, judges and prosecutors, who acknowledge their complementary character (see ideological shift of the truth versus justice debate in chapter 4). Rather than discussing the normative stakes of this debate, however, this chapter analyzes and discusses the draft statute of the regional RECOM initiative to trace the influence of legal concepts on grassroots advocacy and point to persisting challenges. Indeed, recent fact-finding and documenting projects, such as RECOM, illustrate the creation and expansion of so-called truth spaces by activists. In the constitution phase of these spaces, put differently, the consultation meetings to establish the mandate for the RECOM commission, stakeholders (including activists, practitioners, representatives and experts) rely on tangible and practicable legal instruments.

The dominance of legal concepts in institutionalizing fact-finding measures, however, raises questions about the influence and consequences of “hard” justice (such as retributive mechanisms) on “soft” justice (such as restorative tools, including truth commissions). In

fact, human rights activists' attempt to create a deliberate space for victims within state institutions—which initially integrated views and opinions from the grassroots base—has become a technical and legalist process removed from local needs. A phenomenon I refer to as the legalization of truth spaces. Despite depoliticization attempts, activists still face highly politicized grounds. Indeed, politically, their goal remains highly disputed, preventing current national parliaments from passing the required legislation to create the legal framework for the body. The varying sociopolitical, geographical and historical contexts of each of the countries of the former Yugoslavia in which the RECOM body will operate, casts therefore shadow over the important bottom-up efforts to deal with the past. Although the relationship between human rights activists and judicial practitioners is complementary, this phenomenon illustrates the continuous political struggle of the former to institutionalize alternative transitional justice mechanisms.

In line with the argument of democratizing international humanitarian law in my earlier chapters, chapter 7 concentrates on the cost of justice and the politics of transitional accountability efforts, by investigating the role that human rights activists play in it. Drawing on a case study of BiH, I compare two main funders of transitional justice initiatives, Norway and Sweden, in order to explore the extent to which donors integrate civil society and local actors in their funding projects. Despite several report recommendations stating otherwise, both, Norway and Sweden, have kept a state-centric top-down approach—disbursing grants to their respective domestic non-profit organizations. Contrary to Norway, Sweden's policy strategy foresees a stronger streamlining with the EU enlargement agenda.



These aid strategies, however, face a number of challenges and affect the promotion of more holistic transitional justice projects in BiH. As a consequence, the lack of a broader transnational justice strategy in BiH—which could complement the 2008 national war crimes strategy, whose goal is to improve the efficiency of BiH’s judiciary—restricts donor investments mainly to state institutions. Hence, strengthening ties with NGOs and local actors therefore remains very limited. In fact, initially government development strategies were not tailored to the needs of local project funding. Over the years, donor governments have nonetheless attempted to target their aid and strategies more effectively. Yet, their current policy approaches remain focused on cooperation with state institutions and have difficulties reaching local civil society actors’ projects.

In my conclusion I point to future research projects that analyze the EU integration process of the Western Balkans and transitional justice strategies that go beyond the initial ICTY cooperation requirements. Moreover, I point to possible comparative research agendas including for instance country studies such as Colombia, South America, to draw parallels and highlight the differences between the transition and accountability efforts in the Balkans and a country in which continuous low-intensity conflict has hampered processes to deal with the past in society.

# Chapter 2

## Post-conflict Justice in the Balkans under the Gaze of Political Sociology

*“Analysts who rigidify the analytic process are like artists who try too hard. Although their creations might be technically correct, they fail to capture the essence of the objects represented, leaving viewers feeling slightly cheated.”<sup>1</sup>*

As already discussed in detail in chapter 1, within the past few decades, scholarship on global accountability efforts for mass atrocities, state violence and grave human rights violations has emerged from a political science literature concerned with democratic transition processes<sup>2</sup> and an incremental consolidation of human rights law studies and practice.<sup>3</sup> Coined “transitional justice” by a handful of scholars<sup>4</sup>, research on this topic

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<sup>1</sup> Anselm L. Strauss and Juliet M. Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Thousand Oaks, CA: Sage Publications, Inc, 1998), 129.

<sup>2</sup> Dankwart Rustow, “Transitions to Democracy,” *Comparative Politics* 2, no. 3 (1970): 337–363; Samuel P. Huntington, *Political Order in Changing Societies* (Yale University Press, 1968); Elster, *Closing the Books: Transitional Justice in Historical Perspective*; Huntington, *The Third Wave: Democratization in the Late Twentieth Century*; Linz and Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*.

<sup>3</sup> It should be noted that coming to terms with violence and seeking some form of accountability in times of regime change has been a frequent practice in history Elster, *Closing the Books: Transitional Justice in Historical Perspective*. However, the study of this phenomenon, particularly the relationship between human rights law, political and institutional transformations and society emerged more recently. For a critical and philosophical analysis of the

proliferated, including not only scholars, but also practitioners and activists from different fields, which range from legal studies to psychology.<sup>5</sup> Despite this diversity, 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 research<sup>6</sup>—and an inclination to employ large data aggregation and quantitative studies<sup>7</sup> in the literature. Fortunately as mentioned in the previous chapter, legal scholars, such as Ruti Teitel, who work at the borderlines of their discipline are aware of the lack of research between politics, law and society<sup>8</sup>, and thus, joining the ranks of growing community of scholars who have decided to emphasize the process character of transitional justice phenomena in society and who rely on sociological and ethnographic tools to do so.<sup>9</sup> Building on the latter methodology, this study takes a qualitative approach. While portraying a thick and in-depth picture of transitional justice processes, it also sketches and interprets the politics that are at stake. It focuses on and analyzes the international networks and groups producing legal knowledge, their practices and goals, and the relationship these driving forces sustain with national and

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evolution of human rights cf. Costas Douzinas, “The End (s) of Human Rights,” *Melbourne University Law Review* 26 (2002): 445.

<sup>4</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*; Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; Teitel, *Transitional Justice*.

<sup>5</sup> Vinjamuri and Snyder, “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice”; Christine Bell, Colm Campbell, and Fionnuala Ní Aoláin, “Transitional Justice:(Re) Conceptualising the Field,” *International Journal of Law in Context* 3, no. 2 (2007): 81–88.

<sup>6</sup> Shklar in Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 414.

<sup>7</sup> 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).

<sup>8</sup> “Transitional Justice Genealogy,” 85.

<sup>9</sup> Leigh Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008); Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights*.

local practitioners and activists. In order to analyze the politics of justice in these spaces from a political science perspective as mentioned earlier, some methodological adjustments are necessary. As a consequence, I employ two analytical tools, one based on anthropological research and the other one drawing from sociological analysis: participant observation and narrative interviews.

In fact, human rights and justice are not universal categories, but social constructs that are created, employed and appropriated by each social actor according to their context, needs and goals. Post-conflict and accountability efforts in the Balkans reveal the difficulties international and national judicial actors and human rights activists face when performing their activities. Interestingly, the initial scholarship in transitional justice centered around conceptions of justice and how to deal with war criminals and perpetrators of gross human rights violations in the aftermath of World War II.<sup>10</sup> In its early epistemology the field thus explored particularly the conceptual underpinnings of the war crimes and human rights jurisprudence. A second wave of the literature as mentioned above and in chapter 1 was subsequently concerned with democratization issues. The prevailing conflict resolution literature, which also influenced transitional justice scholarship after the end of the Cold war employed methods that were less concerned with capturing the dynamic processes between various actors who interact on different, intermeshed levels.<sup>11</sup> Instead these mainstream models were paying more attention to institutional change and state-centric

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<sup>10</sup> See for instance Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (The Viking Press, 1963).

<sup>11</sup> See for instance Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*; Teitel, *Transitional Justice*; Elster, *Closing the Books: Transitional Justice in Historical Perspective*.

analyses in order to establish stability and peace in former war-torn regions, notably in areas of weak or failed states.<sup>12</sup> Although this research took into account certain structural and contextual variables—particularly when for instance combined with process tracing, a methodological tool that attempts to recreates multi-faceted and accurate picture of a situation by looking at different contextual and temporal variables—these analytical frameworks do not intend to capture the interactive processes between actors. Jelena Subotić's recent work on international law and compliance mechanisms in international relations theory serves as an excellent case in point. Relying on process-tracing tools, she provides a multi-layered analysis of the impact of international retributive justice processes in the former Yugoslavia. Drawing on the cooperation requirements of Western Balkan states with the ICTY as a prerequisite to launch membership negotiations with the EU, she evaluates compliance vis-à-vis democratic transition trends in three of the former Yugoslav countries.<sup>13</sup> Yet, her level of analysis sacrifices sociopolitical processes within society for a broad political lens that remains limited to the state level. Following the same line of reasoning, yet focusing on judicial organization, Futamura's work grapples with the ramifications of retributive justice on Japan's post-World-War-II society.<sup>14</sup> Using time series analysis he tests the Nuremberg legacy hypothesis—which is based on the assumption to restore peace through justice— he draws from different fields to create an interdisciplinary framework that combines international relations theory and law. His research thus represents a constructivist design that reaches beyond the conventional research in the

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<sup>12</sup> See chapter 1 for detailed discussion.

<sup>13</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

<sup>14</sup> Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge, 2007).

field. Yet, his research, similar to Subotić's work, does not focus on interactive processes between different actors either.<sup>15</sup>

Notwithstanding, a new wave of scholarship has emerged that centers on this sociopolitical interaction between different actors within different spaces.<sup>16</sup> As discussed in chapter 1, my study draws from this emerging scholarship, arguing that a political science perspective, borrowing sociological tools, is better suited to analyze the politics of justice and truth and to identify exchanges, challenges and consequences of practices by each of the actors. This study thus uses a political sociology perspective, which focuses particularly on the relations between state and society. While this perspective originated in works by Max Weber and Karl Marx, American scholars such as Theda Skocpol and French academics, such as Luc Boltanski, have further developed the scholarship in the field on topics ranging from structural problems of capitalism to democracy issues. This framework, however, has found little attention in the study of transitional justice. It nonetheless offers the opportunity to analyze 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. By combining the two above qualitative research methods—participant observation and narrative interviews—I create a set of tools that can tackle these analytical and methodological difficulties. With the former, human rights and judicial actors can be observed in different environments, such as conferences, meetings, trials and hearings, while they perform or

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<sup>15</sup> For a detailed discussion on the evolution of transitional justice literature see chapter 1.

<sup>16</sup> Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights*; Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*. See also the special issue, "Whose Justice? Global and Local Approaches to Transitional Justice," of the *Oxford International Journal of Transitional Justice*, November 2009, 3(3): 295-475.

discuss retributive and restorative justice practices or a combination of both. The latter complements the first method, drawing on formal and informal in-depth conversations with key individuals from human rights organizations, judicial institutions and the government. Although there are hundreds of organizations across the region that deal with human rights issues, there is only a handful of active and influential NGOs whose work focuses specifically on war crimes trials, collective memory issues and related accountability efforts in the former Yugoslavia. I have listed the organizations and a partial list of the interviewees who were part of my study in the Annex of this dissertation. Other source material this study is based on includes scholarly publications and literature, government and NGO reports, programmatic statements, policy recommendations, press releases, news articles and archival material, such as UN documents, among others.

With this (slightly adapted socio-anthropological) methodology (in order to meet practical fieldwork needs) it is possible to observe the current context and environment in which actors perform and hence understand the processes of *how* social, professional and institutional boundaries affect each of their practices. Data collected from personal narratives not only provide insights into particular roles played by individuals *within* and/or *outside* of their institutions, but also disclose problems and challenges in the relationships between different actors. Information obtained from official documents and publications, on the contrary, can only partially reveal such trends.

We should not use documentary sources as surrogates for other kinds of data. We cannot, for instance, learn through records alone how an

organization actually operates day-by-day. Equally we cannot treat records—however "official"—as firm evidence of what they report ... That strong reservation does not mean that we should ignore or downgrade documentary data. On the contrary, our recognition of their existence as social facts alerts us to the necessity to treat them very seriously indeed. We have to approach them for what they are and what they are used to accomplish.<sup>17</sup>

This chapter aims at introducing the concept of international political sociology to the study of transitional justice, which, until recently, was dominated by normative analysis, legalism and more recently by causality-driven and variable-oriented scholarship. I point to the weaknesses of the latter to address actor-specific and sociopolitical research questions in post-conflict and accountability-oriented studies to help expand the existing literature in the field as mentioned earlier and in chapter 1. I then show how grounding research in anthropology and sociology-inspired analysis can be a promising alternative methodology to address these questions. For this, I describe two methods, participant observation and narrative interviews and explain why the combination of both methods can help foster new insights.

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<sup>17</sup> Atkinson and Coffey cited in David Silverman, "Analyzing Talk and Text," in *Handbook of Qualitative Research*, ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: Sage, 2000), 826.



## Actors, Processes and Spaces of Transitional Justice from a Political Sociology Perspective

The advent of what Samuel Huntington defined as the “third wave of democracy” in the late 20<sup>th</sup> century (particularly in Latin America and Eastern and Southern Europe) and the increasing local and regional conflicts across the globe in the 1990s have generated a new subfield of international studies concerned with accountability issues in post-conflict and transition settings. The debate on whether so-called transitional justice should be considered a discipline is still ongoing and far from being settled.<sup>18</sup> Whether it constitutes a league of its own, however, is secondary, notably since scholars addressing these issues and publishing in new journals dedicated exclusively to the transitional justice field hail from a variety of disciplines (ranging from anthropology to psychology) as well as professions, including scholars, practitioners and activists. Instead, it is more important to address methodological issues when studying the diverse mechanisms societies have developed and deployed to address past mass atrocities and human rights violations in various geographical contexts.

Current scholarship has largely relied on the use of traditional analytical tools and focused on well-established frameworks or categories for understanding problems ranging from trial mechanisms to reconciliation processes in society. Alas, these instruments leave out

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<sup>18</sup> The Oxford *International Journal of Transitional Justice* claims its disciplinary status and certain scholars categorize it as a new discipline in human rights, see for instance Kora Andrieu, “Transitional Justice: A New Discipline in Human Rights,” *Online Encyclopedia of Mass Violence*, January 18, 2010, <http://www.massviolence.org/Transitional-Justice-A-New-Discipline-in-Human-Rights-citation>. Others are more critical, underlining the interdisciplinary nature of it Bell, Campbell, and Ní Aoláin, “Transitional Justice:(Re) Conceptualising the Field.”

questions related to dynamic interactive process between different actors involved in promoting post-conflict justice. Additionally, current transitional justice research is at a crossroads—partly because of the post-World-War-II frenzy of social sciences to quantify sociopolitical issues. Indeed, this trend has now reached a group of transitional justice scholars who initially employed qualitative methods (particularly case studies or comparative case studies) in their research.<sup>19</sup> Such a development is problematic as deeper knowledge of complex processes and multiple interactions are buried and distorted in numeric data and statistical equations that provide only a snapshot of the various transitional justice questions and problems.<sup>20</sup> Some of these researchers, such as Leigh Payne’s project “Transitional Justice Data Base” housed at the University of Wisconsin-Madison, however, have initiated detailed and much more focused follow up studies to better understand the research results of their quantitative analysis with large case numbers.<sup>21</sup> Thus, as illustrated already in chapter 1, the following methodological discussion aims at bringing politics back onto the research agenda. Grounding my research in the tradition of political science, I develop an alternative and complementary epistemology for transitional justice research. I thus produce knowledge that is able to better understand the changing nature of human rights practices in truth and justice spaces, in other words how are human rights perceived in restorative as well as retributive justice mechanisms.

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<sup>19</sup> See for instance Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence*; Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*.

<sup>20</sup> The author is aware that quantitative analysis also offers tools, such as ‘time series analysis,’ that attempt to illustrate change over time. This method, however, still only provides a static picture of a given period instead of capturing the interactive process of change in its complexity.

<sup>21</sup> See the project’s website at <https://sites.google.com/site/transitionaljusticedatabase/home>, accessed February 19, 2012.

## ***Limits of Current Theories in Transitional Justice Contexts***

With the increasing awareness of human rights issues in academia over the past few decades, interest also grew in understanding retributive justice mechanisms to reckon with the past, and in particular, how to bring to justice perpetrators of state crimes against civilians. As of today, a prospering amount of academic literature exists that grapples with the creation, functioning and impact of international, regional and local war crimes tribunals.<sup>22</sup> These studies generally share a state-centric perspective. In other words, governments, or its official representatives sitting in international organizations are portrayed as principal actors in international relations advocating the rule of law through different types of institutions and legal procedures, such as the International Criminal Court (ICC).<sup>23</sup> Although certain political and some institutional changes can be demonstrated by this approach <sup>24</sup>, it evolves around institutional concepts organization theory as well as legal theory. Not only, however, do these above frameworks face difficulties with capturing more complex actor constellations, but they also overlook ontological issues. Put differently, the judiciary, for instance, is far from being a mechanism that renders justice only, but also reconstructs and produces different versions of historical facts (some also refer to this

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<sup>22</sup> See for instance Teitel, *Transitional Justice*; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007); Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press Boston, 1998), among others.

<sup>23</sup> Exceptions to the rule *do* exist and certain authors have used a sociological perspective to address some of macro-level and micro-level issues in the field. See for instance Ksenija Bilbija et al., *Accounting for Violence: Marketing Memory in Latin America* (Duke University Press, 2011); Alexander Hinton, *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (Rutgers University Press, 2011); John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press, 2003), and discussion in chapter 1.

<sup>24</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*; Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*; Elster, *Closing the Books: Transitional Justice in Historical Perspective*.

process as reconstructing truth and/or memory). Social actors also occupy different roles in these processes, ranging from fact-finding missions to psychological and political victim support. Unfortunately, the majority of the above concepts are based on research focused on *which* decisions will be made in *what* situation. Yet, it neither explains *why* and *how* the different options of a decision developed; nor how they might change based on interactions between actors. Although institutionalist approaches and legal theory perspectives have been complemented by more normative-oriented theory, advocated by constructivist and legal scholars in the field, it is still not clear, as discussed below, to what extent these perspectives further interactive and procedural knowledge of these issues.

International humanitarian law—the increasing legal framing of international war crimes—became a buzzword of the late 1990s and early 2000s, providing a normative framework to the mushrooming international and hybrid judicial structures that dealt with war criminals and human rights violators in different contexts and time periods in the world. While certain scholars refer to the new era as ‘global transitional justice’<sup>25</sup> to describe the expansion of legal mechanisms, others have developed concepts to explain the cascading effects of the law from the international to the national level by illustrating how international humanitarian law seeped through into domestic court systems.<sup>26</sup> Suffice it to say that such a perspective merely accounts for a norms change of main actors over time—capturing global political phenomena, such as the end of the Cold War—yet, leaving questions of *why* and *how* in the dark. These normative trends were supported by peace and conflict studies,

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<sup>25</sup> See for instance Ruti G. Teitel, “The Law and Politics of Contemporary Transitional Justice,” *Cornell International Law Journal* 38 (2005): 838.

<sup>26</sup> Lutz and Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America.”

highlighting the moral necessity to act and bring about justice. Thus, paralleling the wave of retributive justice scholarship, certain scholars and practitioners developed concepts and theories to understand truth and reconciliation processes in post-conflict societies.<sup>27</sup> They were mainly concerned with elaborating and advocating policy strategies to help and provide solutions for democratic transitions in former conflict zones (See previous chapter). The probably most well-known tool—which has also sparked trenching discussions on its impact and efficiency—is the concept of truth commissions to confront the past.<sup>28</sup> The purpose of this chapter is not, however, to evaluate which of the tools might be most appropriate to tackle these issues. In fact, scholars have already underlined their complementary, stressing the need to take into account sociopolitical and institutional contexts.<sup>29</sup> Instead, this project continues where other scholars have struggled to provide more convincing and alternative explanations due to their lack of appropriate analytical tools. In fact, by overlooking processes, they have ignored two-way phenomena and progressive reciprocity among actors. This chapter explores these issues by deconstructing traditional actors and opening the black box of transitional justice politics to examine the dynamic relationships between several actors who operate within different and intersecting spaces over time.

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<sup>27</sup> Some of the main works include for instance Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; Robert Rotberg I. and Dennis Thompson, eds., *Truth V. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000); Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*.

<sup>28</sup> Other mechanisms include mediation, confessions, lustration or shaming.

<sup>29</sup> Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*. While the impact of the South African truth commission remains a bone of contention, the failure of past truth-seeking mechanisms in the region of the former Yugoslavia demonstrates the impact of political contexts on reconciliatory processes.

## Political Sociology in Transitional Justice: Far more than just a Sociological Redux

By adopting a political sociology perspective to study questions of post-conflict accountability, this study introduces an analytical framework, which focuses on the meso-level in order to explore not only *what* kind of relationship different actors maintain with each other *within* certain structures and contexts, but it also examines *how* they interact in space and time. In so doing, this study goes beyond the statist and static analysis model and maintains complexity—which, alas, is too often lost in variable-oriented research. It hence provides a more complete understanding of particular transitional justice problems by emphasizing the dynamic processes that occur, for instance between activists and practitioners on the local, national and international level. Two aspects are of particular research interest in this context: the relationship between law and society in transition settings on the one hand, and the role of social movements in post-conflict societies on the other hand.

Notwithstanding scholarly work on traditional and customary differences in societies that grapple with past mass atrocities<sup>30</sup> and the attempt to trace a genealogy of transitional

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<sup>30</sup> For an introduction to the local grass root court system in Rwanda, so-called gacaca, and a discussion of their use in transitional justice cf. Peter E. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice* (New York: Writers Club Press, 2003); Phil Clark, "Hybridity, Holism, and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda," *George Washington International Law Review* 39 (2007): 765; Linda E. Carter, "Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda," *New England Journal of International and Comparative Law* 14 (2007): 41–309. For hybrid courts in Timor Leste and Cambodia, cf. Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003): 245–278; Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," *Criminal Law Forum* 12 (2001): 185–246; Padraic J.

justice <sup>31</sup>, the interactions between legal experts—i.e. elite, academic and professional networks—and their relationship to society in diverse sociopolitical contexts remains a widely neglected in studies. With, maybe, the exception of political sociology work by Yves Dezalay and Bryant Garth, which they applied to international and regional contexts. In one of their books, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*, they draw on Latin America, exploring the export of globalized legal knowledge by Western elites and their relationship to local elites educated in the West in order to scrutinize the emergence of specific rule of law trends in this region.<sup>32</sup> Thus, important sociological work in international relations to examine *which* actors have been involved in exporting international humanitarian law to other regions of the world and *how, where* and *when* these processes have been put in place remains yet to be done. As for recent trends in transitional justice processes and the evolution of human rights law in this context, Latin America has been a source and a laboratory of dynamic interactions, which is reflected in the seminal work of transitional networks and the dissemination of ideas across borders by Margret Keck and Kathryn Sikkink discussed below.<sup>33</sup> I address the above shortcoming in the second part of this chapter by describing how to apply specific qualitative methods for the Balkan region that can be used to capture the topography of the rule of law phenomenon and its consequences.

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Glaspy, "Justice Delayed-Recent Developments at the Extraordinary Chambers in the Courts of Cambodia," *Harvard Human Rights Journal* 21 (2008): 143–154.

<sup>31</sup> Teitel, "Transitional Justice Genealogy."

<sup>32</sup> *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago, IL: University of Chicago Press, 2002).

<sup>33</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*.

At this point, it is worthwhile to address a phenomenon that—despite some recent efforts to broach a broader cross-regional debate—has found little attention, in the discussions of the politics of transitional justice: the impact of transnational social actors. Some authors, such as Keck and Sikkink, have used network theory concepts to analyze transnational advocacy networks and trace the rise of human rights activists in the late 19<sup>th</sup> and 20<sup>th</sup> century.<sup>34</sup> To this end, their work illustrates these interactive processes between civil society and states, using a number of different case studies, including human rights, women’s rights and environmental issues, among others. Drawing on historical developments in their chapter on human rights in Latin America, they use sociological network concepts to show how transnational coordination between national and international NGOs pressured human rights violators, such as Argentine army general, Martin Balza, to acknowledge his responsibility in illegal methods, including executions, offering condolences to victims’ families.<sup>35</sup> Their various case studies serve to illustrate their so-called ‘boomerang pattern’—a concept which describes the transnational relationship between activists in authoritarian states and civil society actors in democratic countries who put pressure on their own democratic governments to impose sanctions on repressive political institutions abroad in order to generate democratic transition.<sup>36</sup> Yet, while this model has been useful to explain a variety of cases regarding different empirical cases, it nonetheless ignores the autonomous character of local NGOs. Often, local NGOs are struggling for international recognition and are left to mobilize their own resources. Other times, the policy strategies and activities are

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid., chap. 3.

<sup>36</sup> Ibid., 12.



not necessarily in line with the vision of bigger more established international NGOs. More recent research in transitional justice has stressed the need to point to these nuances.<sup>37</sup> Cath Collins, for instance, who examines transnational human rights activism and accountability for mass atrocity in Chile and El Salvador has argued that it “overstate[s] the extent of co-ordination and strategic collaboration between home and external accountability actors.”<sup>38</sup> In vein with Collins analysis and contrary to the premises of Keck and Sikkink’s model recent fieldwork data illustrates that human rights activists in the Balkans maintain strong network ties among one another. Despite connections with and the support of international non-profit organizations and regional intergovernmental organizations, such as the Organization for Security and Cooperation in Europe (OSCE), local actors are skeptical as external players are seen as entities with their proper roadmap. Human rights organizations in various parts of Southeastern Europe, in addition to the support of Western non-profit organizations, have developed their own network structures with local and national social actors across the region in different transition contexts. They have engaged in different activities, sometimes taking on several roles at once, in order to face the past. These nuances are crucial when trying to understand the impact of activists in post-conflict states and merit further attention.

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<sup>37</sup> Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights*; 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; Burt, “Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations.”

<sup>38</sup> Collins, “Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador,” 715.

In fact, over twenty years after the offset of the tumultuous situation in the former Yugoslavia that precipitated the region into over a decade of violent and atrocious conflict, societies are only slowly recovering, both physically and psychologically. Among the solutions to find answers and deal with the past are for instance war crimes tribunals—on the international and (to a lesser, but still noticeable extent) national level—and truth-seeking and fact-finding initiatives. In both settings, social activists and members of civil society organizations occupy a crucial intermediary function, communicating and interacting between two distinct spaces: a justice space and a truth space. The former consists of primarily political and state actors, such as the judiciary, in which laws regulate practices and interactions between different actors. The latter, in the case of my research, is made up of individuals and groups of people (mainly civil society activists), and constitutes an arena to form a voice for victims.<sup>39</sup> In fact, outside the courtroom, such as during public hearings, more victims will be able to testify under less stringent conditions—less formal protocol than in judicial proceedings. Yet, these forms of memory creation in society are far from being a panacea. Indeed both spaces face a number of challenges that I discuss in chapter 3 and 6. The phenomenon of interacting actors in these spaces is complex and raises several important research questions, for which the tools of political sociology are especially fit to address *prima facie*: (1) *who* exactly are these civil society actors (who are they composed of and who provides their operational resources); (2) *how* do they interact in different spaces (in other words: what practices do they use depending on their interlocutor and

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<sup>39</sup> Interestingly, the notion of victimhood has been a source of debate as well. Some of the veterans' associations in the region claim victim status, as they feel betrayed by society for the wars the fought in the name of their respective nations. The issue is developed further in Chapter 5.

objectives?); (3) *where* do these interactive process occur (which calls for a closer analysis of the contextual settings, such as public conferences, closed meetings, and court rooms, among others); (4) *when* do these processes take place; and finally (5) why do they shift or change over time?

Such a research puzzle faces a couple of conceptual hurdles, notably because the politics of transnational justice issues do not play out at a “higher” aggregated or homogenous level, i.e. the national or international level. Rather they occur at the boundaries where these spaces meet. To cope with these challenges properly, it is both methodologically and epistemologically advantageous to subscribe to a political sociology perspective. In fact, the interactions of various actors is not only complex and elusive—as it includes multiple actors such as different government officials (ranging from defense ministry employees to civil servants in the judiciary), human rights activist (who, in this case, fight against war crimes and impunity) and individuals (both, victims and alleged perpetrators)—but these interactions also occur in several separate and overlapping spaces. To capture and interpret these processes it is therefore pivotal to ground observations and analyses of these intertwined processes in multiple rich and deep layers of material sources. These sources include in-depth semi-structured interviews with key actors, and detailed descriptions and interpretations recorded by the author while participating and observing interactions of different individuals and groups throughout retributive and restorative justice processes. Only then, is it possible to address the question of *how* normative practices of both justice and truth advocates affect each other and as a consequence, also shape transitional justice

practices in the Balkan region. In other words, the concept of transitional justice as a norm model is not set in stone, but a dynamic interactive process with activists and practitioners as an intrinsic part of the political debates on accountability, reconciliation and reparations, among others.<sup>40</sup> The variable-oriented and causality-driven analytical tools mentioned earlier, however, are unable to face this challenge and to provide a satisfactory scholarly account of the previously described issues.

## **Mixing Methods: The Strength of Combining Participant Observation and Narrative Interviews for Research on Post-Conflict Justice and Human Rights Issues**

Having presented the epistemological importance of alternative qualitative methodology for capturing the dynamic relationship between actors in changing transition contexts earlier in this chapter, it is at order to turn to the actual tools used for collecting the data. Two ethnographical and sociological methods are particularly helpful to foster a better understanding: participant observation and narrative interviews. The first part of this section describes each of the methods, discussing *what* they are and *how* they are used, highlighting their strengths, and explaining *why* they are central for transitional justice

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<sup>40</sup> Despite the need for progress, reparations have slowly but surely found their place in the public debate over the years. The voices of other victims, such as rape victims, have also been heard and integrated in some of the transitional justice mechanisms “Forum for Transitional Justice #2” (Humanitarian Law Center, March 2009).

research, illustrated by empirical evidence from the field. Subsequently, the author clarifies why the combination of both tools is especially advantageous to cope with the methodological challenges that the field of post-conflict studies poses.

### ***Understanding Contexts and Dynamics in Post-Conflict Settings: The Use of Participant Observation***

The method of participant observation, as its name indicates, is a tool developed by social scientists, primarily anthropologists and sociologists, in order to capture specific behavior within a small group of individuals or local community. Applied techniques to gather the information range from informal interviews and observation to participation in certain group activities and living with the community. As I pointed out earlier, however, I will apply it for political science related research. One of its early advocates, Bronislaw Malinowski (1884-1942) a Polish anthropologist, describes some of its methodological characteristics in his widely acclaimed published dissertational work *Argonauts of the Western Pacific* (1922),

It is necessary for an Ethnographer to listen several times to such a narrative, in order to have a fair chance of forming some coherent idea of its trend. Afterwards, by means of direct examination, he can succeed in placing the facts in their proper sequence. By questioning the informants about details of rite and magic, it is possible then to obtain interpretations and commentaries. Thus the whole of a narrative can be constructed, the various fragments, with all their spontaneous freshness,

can be put in their proper places, and this is what I have done in giving this account of shipwreck.<sup>41</sup>

Applying techniques developed by anthropologists and sociologists to analyze problems of democratization of human rights in post-conflict societies is an original approach. It looks beyond institutional mechanisms and state-centric analyses because individuals and groups of individuals become the focus of the study. It helps to explore the motivations and practices of human right activists as a response to practices of legal professionals and other international actors in post-conflict justice settings.

The following presents an example of how participant observation was used during a regional conference on transparency of courts and media responsibility in transitional justice processes in the Balkans, held in Sarajevo, Bosnia and Herzegovina, in September 2009. Participants of the three-day symposium included representatives from international institutions, such as the ICTY, national judiciaries from Southeast Europe, journalists and human rights activists, among others. It was a warm Indian summer day, when I took the beige and grass-green-painted, shabby and dirty looking tram with faded Raiffeisenbank<sup>42</sup> stickers along its sides—a Viennese second-hand tram bought by the city of Sarajevo public transport company GRAS after the siege was over<sup>43</sup>—to the World Trade Center in Sarajevo. I was headed west, leaving from old town, the Baščaršija, a market and bazaar-like area

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<sup>41</sup> Branislav Malinowski, *Argonauts of the West Pacific* (London: George Rutledge & Sons, 1922), 258. Other scholars have also contributed to establish participant observation including, but not limited to Frank Hamilton Cushing, Edward Evans-Pritchard, Clifford Geertz and Margret Mead.

<sup>42</sup> It is the name of an Austrian banking group, created in 1927.

<sup>43</sup> During the siege Sarajevo's tram rail system, one of the oldest in Europe, was damaged badly and needed major repairs.

which had been renovated after the war and is at present the tourist epicenter in Bosnia and Herzegovina's capital. The tramline runs two streets north paralleling the Miljacka river along Mula Mustafe Bašeskije<sup>44</sup> street which turns into Marshall Tito avenue, passing the eternal flame of the unknown soldier. It struck me that some of the buildings still bear the marks of the nearly 4-year siege of the city, such as bullet holes and mortar-shell impacts, almost 15 years after armed conflict ended. When I arrived at my destination, the environment had completely changed. Only a few miles from the center, in New Sarajevo, the construction of a mall next to the World Trade Center was underway and diverse shopping facilities dominated the landscape. Although the conference organized by the Balkan Investigative Reporting Network's (BIRN)<sup>45</sup> was public, I only had heard of it by chance perusing BIRN's website a few days earlier for information on a war crimes case. When I entered the high-rise two-tower building, I had to walk up a flight of stairs to the conference room, which was located on the same level as the entrance to the offices of the OSCE Mission. Interestingly, while much of the discussion during the international symposium focused on—and even stressed the need for—transparency and access to information and how the media played bore an important responsibility to present the facts (rather than a distorted and manipulated yellow-press story when reporting on war crimes issues) I was surprised of how little ordinary citizens were present that day. In fact, while the room, which could seat around 200 people, was only less than half full, most of the attendees in the seats were either members of the international diplomatic community

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<sup>44</sup> Named after a famous Bosnian 18<sup>th</sup> century writer.

<sup>45</sup> BIRN is a network of professionals who promote investigative journalism on sociopolitical topics in the Balkans, including war crimes trials.

(such as the EU, OSCE or other embassy staff), representatives of major human rights associations across the region, and members of the local press as well as from neighboring countries of the former Yugoslavia. Hence I found myself in a very closed-off environment of selective actors, who were attempting to negotiate their conflicting interests during meetings and panel discussions over the span of three days.

Attending and observing the conference helped me to explore and understand the relationships between these different actors. As a case in point, Nataša Kandić, director of the Serbian non-profit organization Humanitarian Law Center was cited in a publication put out by the organizers of the event: “Neither judges nor prosecutors are fond of human rights organizations. They are neither fond of me nor the Humanitarian Law Center in general. They cannot however function without us.”<sup>46</sup> Yet, what the report didn’t mention is the interaction between an attendee—David Re a then-international judge at the Bosnia and Herzegovina state court war crimes chamber—and Ms. Kandić during the question and answer session of the discussion panel. His comments about the differences of the work of documentation centers, such as Humanitarian Law Center, and courts or the prosecution, underline the vocational and professional gap that exists between social actors and state actors.

Additionally, it raises questions about the current role of activists in transition processes. These questions include, but are not limited to: To *what* extend can the work of non-profit

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<sup>46</sup> Nidžara Ahmetašević and Anna McTaggart, eds., “Court Transparency and Media Responsibility: Regional Conference 1-3 September 2009” (The Balkan Investigative Reporting Network in Bosnia and Herzegovina, BIRN BiH, 2009).



organizations support the role of the judiciary in its accountability efforts? And *how* do legal-oriented human rights practices—in other words any support of the judicial institutions that involves legal practices or the knowledge thereof—affect the relationship between activists and their base (in particular victims of human rights violations)? Formal interview techniques would have required multiple sessions. And in some cases, particularly for interviews with high-level officials, such as the then-President of the War Crimes Chamber of the Belgrade District Court, Siniša Važić, the value of collected data is very limited. The President's responses merely reflected the general official discourse of the Serbian government in view of ICTY war crimes cooperation criteria and the EU enlargement process.<sup>47</sup>

Participant observation has several other advantages for a transitional justice research agenda. Paul Atkinson and Martyn Hammersley perceptively point out that “[t]he epistemology of participant observation rests on the principle of interaction and the “reciprocity of perspectives” between social actors.”<sup>48</sup> As the researcher becomes part of the community or of the group he or she is studying an extended fieldwork period facilitates reciprocity while the researcher builds mutual trust with his or her subjects. It also allows for observations or changes that develop over time, which—in the case of regular face-to-face interviews—would require multiple interventions and/or field trips. More importantly, however, the established relationship between the researcher and his or her subjects results in a change of how the researcher’s role is perceived within the community and can

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<sup>47</sup> Interview conducted in Belgrade, Serbia, on 14 September 2009.

<sup>48</sup> “Ethnography and Participant Observation,” in *Handbook of Qualitative Research* (Thousand Oaks, CA: Sage Publications, 1994), 256.

help disclose information that the subjects are generally hesitant to reveal publicly, especially during a more formal or official interview. While in the eyes of his subjects the researcher's role has changed, it is not set in stone; rather it constantly evolves.

Interaction is always a tentative process that involves the continuous testing by all participants of the conceptions they have of the roles of others. In other words, ethnographers and their collaborators do not step into fixed and fully defined positions; rather their behaviors and expectations of each other are part of a dynamic process that continues to grow ... throughout the course of single research projects.<sup>49</sup>

The following fieldwork experience underlines Angrosino and Mays de Pérez's point. While conducting research in Croatia, a human rights leader from the organization Documenta Center for Dealing with the Past (Documenta) scheduled an interview with another international academic researcher, inviting me to join the meeting. This situation was epistemologically very valuable, as I was able to observe the interaction between the researcher and his subject, thus taking on a third-person view during the interview. Although the international researcher asked pertinent questions throughout the entire interview process, it became obvious that the activist (in)voluntarily held back information. The point here is not to stress and interpret the politics of human rights activists' public relations strategy when reporting on their activities. Instead this experience underlines the importance of immersing oneself into the research context. Notwithstanding, interviews constitute an essential part of gathering valuable data during fieldwork.

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<sup>49</sup> Michael V. Angrosino and Kimberly A. Mays de Pérez, "Rethinking Observation: From Method to Context," in *Handbook of Qualitative Research*, ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: Sage Publications, 2000), 683.

## ***Complementing Observations: Employing Narrative Interviews***

Interviews, despite some of the limitations described above, can still serve as useful analytical tools when studying the relationship between justice and human rights. This section concerns a specific type of interviews that is particularly beneficial for research on process-oriented and relational questions, so called *narrative interviews*. In order to explain this method in further detail, it might be helpful to put it into the appropriate socio-academic context. Until the early 1980s, little literature on interviewing for qualitative research purposes was available. Yet, already in Ancient Greek, Thucydides or Socrates used a form of interviews to obtain knowledge. Of course, at the time, it wasn't labeled as "interview" per se; rather it was conversations that both thinkers relied on. Only in recent decades have interviews become a more structured analytical tool and have developed more systematically. This evolution was in part fueled by the technical progress such as small portable tape recording devices in the 1950s that allowed researchers to accurately capture interview conversations and finally, the advent of computer technology and tools to transcribe data in the 1980s.<sup>50</sup> As a result, in recent decades industrialized societies have veritably turned into "interview societies."<sup>51</sup> With the open-ended interview style of many TV talk shows or news interviews "we see a persistent romantic impulse in contemporary sociology: the elevation of the experiential as the authentic."<sup>52</sup> This authenticity is fueled by

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<sup>50</sup> For a detailed history on the evolution of interview techniques in the social sciences cf. Steinar Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (Thousand Oaks, CA: Sage Publications, Inc., 1996).

<sup>51</sup> Jaber F. Gubrium and James A. Holstein, "From the Individual Interview to the Interview Society," in *Postmodern Interviewing*, ed. Jaber F. Gubrium and James A. Holstein (Thousand Oaks, CA: Sage Publications, 2003), 21–50.

<sup>52</sup> Silverman, "Analyzing Talk and Text," 823.

a highly descriptive technique in the field, which is also referred to as a “*realist* approach to interview data.”<sup>53</sup>

Notwithstanding Silverman’s critique, the selected interview type for this research, narrative interviews (or in-depth interviews), could best be described as a constructivist research tool. When applying this form of interviews, the researcher is aware that the stories of his subjects are embedded in different sociopolitical contexts. Respondents do not only answer according to their cultural settings—which requires a cultural understanding on the part of the researcher—but additionally, their stories might also be associated with different meanings, depending on their experiences and situations.<sup>54</sup> Fieldwork experience interviewing international representatives at the Office of the High Representative (OHR)<sup>55</sup> and at the United Nations Development Program (UNDP) in Sarajevo, Bosnia and Herzegovina, illustrates the benefits of this type of interview technique for my post-conflict justice research. During interviews in fall 2009 and spring 2011 I noticed that the sociopolitical and cultural context on the ground—in which staff of international organizations operate—constituted several challenges despite their professional experience, which should have readied the international aid workers for their

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<sup>53</sup> Ibid., 823. Emphasized in original.

<sup>54</sup> Ibid., 823–825.

<sup>55</sup> The OHR is an international organization in charge of overseeing in particular the political and institutional implementation of the Dayton Peace Agreement, signed in 1995. The High Representative is also the European Union Special Representative (EUSR) for Bosnia and Herzegovina. The OHR has used his veto power several times in the past to push for reforms in the security, defense and judicial sector. One of the more recent and spectacular interventions was when the High Representative, Valentin Inzko, decided to unilaterally extend the mandate of international judges at the Bosnian State Court in Sarajevo shortly before it expired in December 2009. The delegates of the Republika Srpska (one of the two main politico-institutional entities that constitute Bosnia and Herzegovina; the other one is the Federation of Bosnia and Herzegovina) had voted against it earlier in September 2009, heightening tensions between the different ethnic groups within the federation.

tasks on the ground.<sup>56</sup> As a result, practices in the field aim to include increasingly local staff who works hand in hand with their international colleagues. “Every interview...is [thus] an interpersonal drama with a developing plot.”<sup>57</sup> And embracing this particular quality of interview techniques opens the door to a better understanding of the context the interviewee is situated in, as well as his or her relationship to other important actors.

### ***Combining Methods to Gain Adaptable Tools to Capture Changing***

#### ***Contexts***

The strength of a mixed method qualitative approach—in this case the combination of the two aforementioned analytical tools, *participant observation* and *narrative interviews*—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.”<sup>58</sup> Empirical evidence from my field experience during data collection procedures further corroborates the advantages of such a combined approach.

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<sup>56</sup> Their past professional experiences generally consist of a patchwork of diverse field missions in various conflict regions of the world that generally last for three to four years.

<sup>57</sup> Pool, 1957, 193 quoted in Andrea Fontana and James H. Frey, “The Interview: From Structured Questions to Negotiated Text,” in *Handbook of Qualitative Research* (Thousand Oaks, CA: Sage Publications, 2000), 663.

<sup>58</sup> Silverman, “Analyzing Talk and Text,” 828.

A number of factors support my claim why researchers in post-conflict justice settings should employ these analytical tools, including in particular feasibility, externality, and confidentiality. In fact, a research project is generally limited to a specific time period and the studied community is not isolated from outside effects, but rather part of a larger social system. I have thus 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 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 formal and/or informal interviews with other key transitional actors to complement the constantly collected data through participant observation. Moreover, supplementing participant observation with interviews can help overcome confidentiality issues. Indeed, while the researcher becomes part of the community it might occur that information sharing through informal conversations reveals findings that are not meant for public use.<sup>59</sup> Sometimes, the subjects specifically mention not to use certain types of information for research purposes, whereas other times, it might be more implicit. To ensure that all the gathered information during participant observation can be used for research purposes, it is very practical to rely 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—of the conversation allows thus to

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<sup>59</sup> Here I refer to facts and information that cannot be found in public records or documents in hindsight.

double-check which information is available with the community's consent. Any concerns that this self-censorship might come at the expense of crucial research information that might not be used anymore are ungrounded, as certain specific details do not always play an important role to understand the conceptual underpinnings of the social phenomenon under scrutiny.

## Conclusion

This chapter has sought to provide a complementary methodological approach for scholarship on global accountability efforts for mass atrocities, state violence and grave human rights violations, which has been very influenced by a variable-oriented and causality-driven methodology. More precisely, it helps better understand the changes of transnational contexts, such as during post-conflict justice processes, to which various actors, and in particular human rights activists, are exposed and in which they have played an increasingly important role. To this end, my research design helps especially to examine (1) *who* these civil society actors are; (2) *how* they interact in different spaces; (3) *where* these interactive process occur; (4) *when* these processes take place; and finally (5) *what* shifts and changes happen over time.

I have shown that despite the panoply of disciplines engaged in transitional justice studies, including not only scholars, but also practitioners and activists from different fields, larger

categorical trends in the study of these phenomena remain visible. The heavy influence of legalism (when transitional justice studies emerged) and the current inclination towards quantitative studies in the literature highlight this trend. Notwithstanding, transitional justice studies benefits from complementary thick and in-depth qualitative methods to analyze post-conflict justice from a political science perspective. Thanks to participant observation and narrative interviews, international networks and groups can be studied using political sociology tools to elucidate how these actors produce legal knowledge; to understand their practices and goals; as well as to examine the relationship between different actors and how their activities affect each of the groups and transitional justice processes more broadly. In sum, this alternative and complementary methodology proposed in this chapter is not intended to turn legal scholars, social scientists and practitioners into anthropologists, ethnographers or sociologists. Instead, it aims at opening the burgeoning studies of transitional justice to an alternative epistemology grounded in political science that will provide a different perspective and offer unique theoretical insights to the fundamental questions that have found little scholarly attention up to today.



# Chapter 3

## Prosecuting War Crimes: Whose Justice?

*"Truth is a thing of this world: it is produced only by virtue of multiple forms of constraints."*<sup>1</sup>

In the previous chapters, I have introduced some of the fundamental social differences between the professional habitus of legal practitioners and human rights activists. In the following chapters I expand this discussion, providing some of the 'socio-legal' context in which current NGOs engage in transitional justice initiatives against war crimes in the region. In fact, their activities and prevailing struggles to promote accountability efforts are conditioned by a problematic evolution of international humanitarian law that the ICTY spearheaded, in order to promote international criminal law not only across the former Yugoslavia, but also around the world. The continuous difficulties the ICTY faced when of putting into practice humanitarian law on the ground finally helped increase role of human rights activists and NGOs in the field of transitional justice. The next two chapters therefore trace the rise of these actors in conjunction with the development of the ICTY's activities.

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<sup>1</sup> Michel Foucault and Colin Gordon, *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Press, 1980), 131.

Far from being a linear and smooth process of applying legal norms to a war-torn area with the goal of restoring peace and stability in the conflict zone, the creation of the UN ad hoc tribunal was beset by numerous difficulties. Some are more obvious than others. The idea of an international court in charge of sentencing war criminals and human rights violators—as elaborated earlier—has been a watershed moment in international human rights and criminal law as it moved beyond the concept of victors’ justice, an issue that scholars have pointed to by referring particularly to the post-World-War-II trials in Tokyo or Nuremberg.<sup>2</sup> Yet, in order to operate, such an international judicial body infringes on state sovereignty, which requires a UN Security Council resolution backed by its members. Putting in place the ICTY was therefore a shaky and difficult mission, in which its advocates—including international lawyers, politicians and diplomats—had to rely on diplomatic relations, endless negotiations and back channeling, so that the tribunal could see the light of day. On May 25, 1993, the UN Security Council finally passed a resolution 827, establishing the statute of the ICTY.<sup>3</sup>

This process occurred in the midst of conflict, and was driven by the goal to cease fighting, restore peace, and guarantee stability by deterring future acts of violence. One main concern the drafters of the statute expressed was to avoid a self-contained criminal. Put

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<sup>2</sup> Viktor Peskin, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” *Journal of Human Rights* 4, no. 2 (2005): 213–231; James Meernik, “Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia,” *Journal of Conflict Resolution* 47, no. 2 (2003): 140–162. For a historical analysis on the Nuremberg and Tokyo Trials after World War II see for instance Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge, NY: Cambridge University Press, 2003); Richard Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton University Press Princeton, NJ, 1971).

<sup>3</sup> Cf. UN resolution 827, UN Doc S/Res/827 (1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>, accessed January 3, 2012.

differently, the drafters granted the ICTY jurisdiction over a very general set of crimes, with the specific definition and content available in customary international law. As a result the crimes that are listed in articles 2, 4, and 5 of the statute remain very broadly defined. Article 2, for instance, grants the tribunal the right to try “grave breaches” of the Geneva Conventions.<sup>4</sup> While article 3 confers jurisdiction over the laws and customs of war, articles 4 and 5 refer to genocide and crimes against humanity respectively. War crimes include for instance the use of illegal weapons and the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>5</sup> Moreover, it sanctions the destruction or seizure of educational, religious and charity-related buildings. Crimes against humanity include according to the list in article 5 murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecutions, among “other inhuman acts.”<sup>6</sup>

In fact, this intricate conflict situation also meant that transitional justice mechanisms that had been used in the past, such as truth commissions, to help democratic transitions in countries like Argentina, were not part of the peacemakers’ repertoire. The reluctance of using a truth commission were the continuing war-like conditions in the Balkans, which crushed the idea of inviting different heads of state across the region sit down and discuss the prospects of such a commission, let alone to negotiate a ceasefire. In fact, the ongoing fighting during the 1990s in the Balkans contrasted sharply from the transitional contexts in other countries around the world, such as Peru or South Africa that initially used truth

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<sup>4</sup> The Geneva conventions date from August 12, 1949 and comprise four treaties and three additional protocols that establish the standards of international law for the humanitarian treatment of the victims of war.

<sup>5</sup> See ICTY statute available at <http://www.icty.org/sid/135>, accessed March 1, 2012.

<sup>6</sup> Ibid.

commissions to cope with past atrocities. The initial difficulties that the ICTY was facing as it started its prosecutions and trials—which, according to the general view of the ICTY staff, could have potentially been undermined by alternative post-conflict justice measures—led to ICTY’s founders and legal practitioners’ very skeptical view of restorative justice instruments.

In addition to supranational legal issues, the legal procedures at the tribunal itself were inexistent at first and the initial team of lawyers, judges, prosecutors and legal aids, among others, had to elaborate and define the procedural rules for indicting and trying alleged perpetrators in accordance with the ICTY statute. This task was much easier conceptualized than put into practice. I describe this in the first section of this chapter when I present an overview of the ICTY’s early years. The above obstacles concern issues at the international level. Yet, the implementation of these legal concepts on a national level—such as the ICTY’s request of urging governments in the region to cooperate with the tribunal and to prosecute their own war criminals under domestic jurisdiction—constitutes another set of problems situated at the border of international and national law. Conflicting interests between international actors, such as the ICTY, and domestic governments are a case in point of the persisting tensions and struggles to implement international humanitarian law in a national context. States still insist on the prerogative principle of state sovereignty to protect political interests on the domestic level. I will demonstrate in the chapters following this one that interestingly, it is this state-centric logic that remains one of the basic problems when it comes to democratizing human rights issues in the Balkans.

This chapter looks at some of the initial problems international lawyers had to grapple with while advocating for the creation of an international tribunal to stop the warring factions in the former Yugoslavia and deter further violence. It particularly explains their early reticence to rely on truth commissions. Moreover, I analyze the legacy of the UN tribunal after over 16 years of operation, in order to outline changes in legal practices and ideologies. Last, I focus on the issues encountered at the national level when applying international humanitarian law in the former Yugoslavia, relying on a case study of Croatia.

## **The ICTY's Early Years: Problems Getting off the Ground**

In order to understand the tremendous difficulties the ICTY faced in the early years of its existence, it is important to provide some historical and sociopolitical background of the conflict in the former Yugoslavia and the international political climate at the time. Despite Marshal Tito's motto "brotherhood and unity," the SFRY—which the emblematic communist leader ruled for over 35 years since World-War-II until his death in 1980—was a very heterogeneous federalist state facing power struggles from different political and ethnic groups (as seen in chapter 1). While in the beginning, he crushed early threats to his emerging state apparatus—including peasants, political opponents and other potential dissidents—he nonetheless had to cede politically, amending for instance the constitution in 1974 in order to provide Albanians in the Kosovo region an autonomous status.<sup>7</sup> After his

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<sup>7</sup> Sabrina Ramet, *The Three Yugoslavias: State-building and Legitimation, 1918-2005* (Indiana University Press, 2006).

death, however, nationalist tendencies increased, and in the late 1980s the region witnessed the rise of Slobodan Milošević (as discussed earlier), a Serbian political leader whose nationalistic zeal and ambitions were to assure Serbia's dominant position within the federation. In order to do so, he stripped ethnic Albanians of the formerly autonomous Kosovo region of their constitutional freedoms, thus supporting Kosovo Serbs' demands to be part of Serbia again. This was the beginning of a decade-long occupation, ending only when NATO-strikes hit Serbia in 1999.<sup>8</sup> Yet, the Kosovo issue was only one of many political issues that led to the escalation and eventually to the conflict.

The 1980s remained very tumultuous, economically and politically, in particular with the rotating presidency that Yugoslavian leaders had established after Tito's rule. Serbia had taken over the presidency in 1987, when at the Congress of the League of Communists of Yugoslavia (LCY) in January 1990, Milošević tried to impose his political agenda against the will of the other republics within the federation. This congress was the last meeting of all communist leaders across the region, before the SFRY fell apart. In fact, during the session, the Slovenian and Croatian delegations walked out, disagreeing with the Serbian political plans and domination in the League: the beginning of the end of the LCY. Only a few months later, in June 1990, the Slovenian parliament declared its independence from the SFRY, seceding and leaving a crumbling federation with a fading Serbian role and inspiring other republics within the region to follow its lead.<sup>9</sup> The secession of Slovenia, one of the

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<sup>8</sup> Florian Bieber, "Nationalist Mobilization and Stories of Serb Suffering: The Kosovo Myth from 600th Anniversary to the Present," *Rethinking History* 6, no. 1 (2002): 95–110.

<sup>9</sup> This development resulted also in a wave of multi-party elections during 1990s, including countries such as Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Serbia, among others. The series of events also has to be

former Yugoslavia's richest republics happened relatively peaceful—the Yugoslav National Army (YNA) was defeated and retreated within a matter of days. Yet, the spillover effect, which incited the Croatian republic to follow suit, resulted in a devastating armed conflict that lasted several years, spreading East to the rest of the region, including Bosnia and Herzegovina and Kosovo (as already described in the previous chapter).<sup>10</sup> Unfortunately, external interventions to stop these mass atrocities were doomed from the beginning due to a number of factors.

The international political climate during the Yugoslavian breakup consisted of a series of reactions, ranging from oblivious disbelief to dismal unpreparedness. Several tectonic geopolitical shifts in the late 1980s and 1990s contributed to the reluctant and questionable responses of various states and international organizations to stop the bloodshed in the region. First, the fall of the Iron Curtain and the peaceful democratic transitions in Central Europe<sup>11</sup> buttressed European leaders' beliefs in democratic institutions and the EU as a vehicle to foster stability, peace and prosperity.<sup>12</sup> In this context, it is also telling that the German government, reunified since the early 1990s, dissented from the international cooperation when the Slovenian and Croatian governments declared their independence. Instead of deciding to back the central power in Belgrade to keep the federation intact, the

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looked at from a global perspective of the demise of communism, after Gorbachev's glasnost and perestroika reforms led to the fall of the Soviet Union. The right to auto-determination across Central Europe also inspired leaders in the republics of the SFRY.

<sup>10</sup> Misha Glenny, *The Balkans: Nationalism, War and the Great Powers, 1804-1999* (Viking Books, 1999).

<sup>11</sup> The violent and bloody regime change in Romania, with the execution of former leader Nicolae Ceaușescu, remains an exception.

<sup>12</sup> See Maastricht treaty and enlargement process of Central Europe. The EU treaty is available at [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_maastricht\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm), accessed on May 14, 2011.

German Foreign Minister, Hans-Dietrich Genscher, supported the independence of both secessionist republics, shaping a bold, new German foreign policy.<sup>13</sup> The decision ineluctably led to the armed confrontation between the dissident factions in the region.<sup>14</sup> Furthermore, when the violence in the Balkans intensified in 1991-1992 (particularly with the war in Bosnia and Herzegovina), the EU was in the middle of negotiating the Maastricht Treaty, the foundation of its political pillar that included a Common Security and Defense Policy. This policy comprised the Petersberg tasks—military and security priorities—that consist of peacemaking and peacekeeping missions.<sup>15</sup> Predictably, however, the embryonic humanitarian and peacekeeping cooperation among European countries was incapable of facing the challenges that lay ahead in the former Yugoslavia, therefore requiring an intervention of UN forces. The above overview of the intricate internal and external politics during the breakup of the former Yugoslavia helps us to better understand the context in which the early work of the ICTY took place.<sup>16</sup> Below, I will describe the initial challenges, drawing on existing scholarship as well as data from fieldwork gathered at the tribunal.

In his book *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal*, John Hagan provides a substantial scholarly contribution with a thorough examination of the inner workings of the ICTY. He takes a close look at the actors involved, their intentions and their impact on the development of the court. His analysis is helpful for our case, as it

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<sup>13</sup> Beverly Crawford, "Explaining Defection from International Cooperation: Germany's Unilateral Recognition of Croatia," *World Politics* 48, no. 04 (1996): 482–521.

<sup>14</sup> Ibid.

<sup>15</sup> See Maastricht Treaty at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>, accessed January 15, 2012.

<sup>16</sup> For a discussion on the principal factors that led to the political violence in the Balkans, see chapter 1.



further our general understanding of the evolution of humanitarian law, because he avoids to merely assessing the successes and failures of the ICTY. Drawing on individuals who contributed a great deal to build the institutions from the ground up—a “loosely coupled system,”<sup>17</sup> as he calls it—his research traces the consolidation of the ICTY into an effective international judicial body. The ICTY is fuelled by liberal idealism, a concept that other scholars, such as Ruti Teitel and Gary Bass discuss in their own work. Interestingly, all three authors directly or indirectly refer to Judith Shklar’s notion of legalism, which she defines “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”<sup>18</sup> In this context, Bass’s comparative study of tribunals, for instance, focuses more on the evolution of ideas and themes in international relations. Based on international relations theory—such as realist theory and other mainstream concepts of the field—he argues that liberal states might be reluctant to support international criminal justice mechanisms:

liberal states almost never put their own soldiers at risk in order to bring war criminals to book [and they] are more likely to seek justice for war crimes committed against their own citizens, not against innocent foreigners.<sup>19</sup>

As we will see later, Teitel’s reasoning is similar to Bass’s argument, stressing the importance of political contexts for the functioning of international justice. Yet, as Hagan illustrates, the creation of the court was not only the evolution of ideas and ideological

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<sup>17</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, 129.

<sup>18</sup> Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964), 1.

<sup>19</sup> Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2002), 8.

concepts, but in particular the diverse and unique experiences and professional backgrounds of the persons involved.<sup>20</sup>

Describing the Nuremburg trials, Hagan provides key insights into the ideology and perspectives that led to the rise of international humanitarian law. Two legal practitioners, for instance, Sheldon Glueck (a law professor at Harvard University and pragmatist advocating for an international tribunal) and Ben Ferencz (an activist who became one of the prosecutors at Nuremberg) were instrumental in planning the Nuremburg trials and helping to bring alleged perpetrators of World-War-II war crimes to justice.<sup>21</sup>

Almost half a century later, liberal legalism became the instrument of last resort by a number of concerned and committed international legal practitioners and experts, among them, Cherif Bassiouni—a an Egyptian Muslim international UN war crimes expert who led the 1992 UN commission to investigate grave human rights violations in the former Yugoslavia<sup>22</sup>—once it became apparent that war crimes were being committed across the former Yugoslavia and that international military interventions, under the banner of the UN, were difficult to implement, as discussed earlier.<sup>23</sup> Crime sites then included not only Sarajevo and other parts of Bosnia, but also Croatia and Kosovo. Bassiouni, the UN's first war crimes investigator, faced enormous difficulties due to the political situation in the

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<sup>20</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*.

<sup>21</sup> *Ibid.*, chap. 1.

<sup>22</sup> The commission was created following the UN Security Council resolution 780 from 8 October 1992. See also <http://daccess-ods.un.org/TMP/7327786.08798981.html>, accessed on December 12, 2011.

<sup>23</sup> Then US ambassador, Madeleine Albright, urged the creation of the commission as a political substitute for meaningful military intervention in the region to stop mass atrocities.

region during the initial evidence-collecting stage.<sup>24</sup> Additionally, he had to fight against reluctant persons within the ranks of the international community. A British politician-diplomat, David Owen, for instance, was working against Bassiouni's efforts, afraid that they were a threat to the peace negotiations process. Despite the politics to obstruct the commission's work, Bassiouni eventually created a database centre in Chicago, along with the evidence collection project in Sarajevo directed by a Canadian lawyer, Bill Fenrick. Both of these efforts led to the necessary—and impressive—case building, which was indispensable to the emergence and creation of the tribunal.<sup>25</sup>

Hagan's book traces several of the key figures that helped get the Tribunal off the ground and shaped its development over time, notably including: Richard Goldstone<sup>26</sup>, the ICTY's first chief prosecutor, and Louis Arbour<sup>27</sup> his successor who was chief prosecutor at the ICTY and the ICTR from 1996-2000. Although he fondly writes about the latter—criticizing extensively the former's little meaningful attempts to set the tone of the tribunal's work—he eventually gives Goldstone some credit toward the end of his book, underlining the difficult political and international circumstances at the beginning of the ICTY's existence. His sociological analysis of the ICTY's initial years is surprising, as most of the mainstream

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<sup>24</sup> Since the creation of the UN, fighting war crimes was an important issue of the organization's agenda. The Nuremberg trials and the difficulties of establishing a legal procedure after World War II in order to punish perpetrators for mass atrocities is telling in this context. Contrary to the case of the former Yugoslavia, however, lawyers, prosecutors, judges and other legal professionals, worked in an Allied occupied territory and the trials had the more of a symbolic, showcase trial, function. As for the former Yugoslavia, the ICTY's staff faced enormous difficulties regarding state cooperation, because the involved countries were still at war and the alleged perpetrators still in power.

<sup>25</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, chap. 2.

<sup>26</sup> In addition to his international career, he was a former South African judge, and very important in helping set up the South African TRC.

<sup>27</sup> Before her appointment she was a legal scholar and held numerous legal functions in the Canadian judiciary. Since the end of her term, she served as the UN High Commissioner for Human Rights and as a justice at the Supreme Court of Canada.

literature in transitional justice thinks highly of Goldstone's work to help set up the ICTY in the beginning.<sup>28</sup>

Interestingly, the author also criticizes Goldstone's media-savvy role and even compares his efforts to advance the work of the prosecution to a show trial. According to Hagan, the tribunal turned into a virtual court under Goldstone's term:

The Rule 61<sup>[29]</sup> hearing of Karadžić<sup>[30]</sup> and Mladić<sup>[31]</sup> in the closing months of the Goldstone period was the most significant effort to aim tribunal resources at more highly placed targets. [... However] the statute that created the tribunal explicitly forbade trials in absentia, because without a defendant and a defense, the procedure risked the appearance of a theatrical performance, or worse, a show trial. The absence of defendants or their legal representatives in the Rule 61 proceeding gave the tribunal [therefore] a "virtual" quality.<sup>32</sup>

While it is true that Louise Arbour's style differed from Goldstone's strategy—attempting to alter the organizational pattern of the fragmented tribunal at the time—it is important to recall that the former South African judge had to tackle substantial logistical issues when

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<sup>28</sup> See for instance, Laura Moranchek, "Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY," *Yale Journal of International Law* 31 (2006): 477; Meernik, "Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia"; Carla Del Ponte, "Prosecuting the Individuals Bearing the Highest Level of Responsibility," *Journal of International Criminal Justice* 2, no. 2 (2004): 516–519. Interviews between October 2009 and June 2006 with several official employees at the ICTY further underline the pride expressed of Goldstone as someone who helped establish the tribunal's international reputation.

<sup>29</sup> Rule 61 of the ICTY statute enabled the court to have hearings in absentia, notably to determine whether or not to indict a suspect and issue and arrest warrant. The rule was subsequently applied as a quasi-absentia trial. . Shuichi Furuya, "Rule 61 Procedure in the International Criminal Tribunal for the Former Yugoslavia: a Lesson for the ICC," *Leiden Journal of International Law* 12, no. 3 (1999). See also ICTY rules of procedures and evidence at <http://www.icty.org/sid/136>, accessed November 11, 2011.

<sup>30</sup> Radovan Karadžić, a former Bosnian Serb politician, is currently standing trial at the ICTY. He is accused of war crimes committed against Bosnian Muslims and Bosnian Croats during the Siege of Sarajevo, as well as ordering the Srebrenica massacre.

<sup>31</sup> Ratko Mladić is a former Bosnian Serb military leader accused of committing war crimes, including the siege of Sarajevo and the Srebrenica massacre. He is currently standing trial in The Hague.

<sup>32</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, 90.

the court first started its work. Hence, what exactly were Arbour's contribution to the tribunal and the evolution of international criminal law, and what were some of the principal initial shortcomings that early members of the ICTY had to grapple with?

Arbour and her team, including Nancy Paterson<sup>33</sup> (an international war crimes prosecutor who helped develop the Foča rape case) and Jean-Rene Ruez (a French police officer who carried out the Srebrenica genocide investigation) contributed significantly to ground the tribunal. Their first hand experience, such as Arbour's work in Rwanda prosecuting alleged perpetrators who committed genocidal crimes, and Ruez's frequent visits to excavation sites where he supported the work to uncover and document the systemic ethnic cleansing particularly in Srebrenica, motivated and inspired all of them to form a powerful team to indict and try alleged war criminals and human rights violators in the region.<sup>34</sup>

In this context, Arbour also altered the original strategy of obtaining indictments. In fact, secret indictments were found to be more effective in minimizing the risk of violence after arresting suspects compared to public ones. These fundamental changes, however, were only possible thanks to the continuous funding that the ICTY eventually received from the UN. Secured funding, however, was far from being obvious at the beginning. Originally, in the summer of 1992, the budget was only projected for the first six month and the UN Security Council had to incrementally extend the budget authorization before the ICTY

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<sup>33</sup> Prior to her U.N. commission, Paterson was a prosecutor for the Manhattan district attorney's office.

<sup>34</sup> Hagan refers to social movement theory and the concept of 'alternation experience'—a turning point in someone's life that leads to drastic changes, in Hagan's case to intensive work of the ICTY team members—when he describes the strategy of Arbour's team. McAdam in *Justice in the Balkans: prosecuting war crimes in the Hague Tribunal*, 32.

eventually was able to operate with secured funding.<sup>35</sup> In fact, the tribunal was also confronted several logistical shortcomings in its early stage, including not only the issue of ad hoc salaries for its personnel<sup>36</sup>, but also problems with its facilities—the first court room was a rebuilt conference room that used to house businessmen working for one of the world’s largest insurance companies called Aegon—and procedural issues, such as during the ICTY’s first case, the trial of Blaškić.<sup>37</sup> Gary Bass points out the problematic situation at the time:

The mere fact that Blaskic was in court at all was an anomaly. On the day Blaskic walked into the dock, only eight of the seventy-five men publicly indicted by the tribunal were in custody.<sup>3</sup> Blaskic was the only high-ranking one. Over the three years after the UN set up the first international war crimes tribunal since World War II, all it had to show for it were these eight men: whiling away their days by playing chess, reading a spy novel by John Le Carré, and, in the case of a man who had brutalized prisoners at the Omarska concentration camp, doing a series of paintings for an exhibition in a London restaurant. [...] What was missing, as the tribunal’s staff constantly says, was the world’s political will.<sup>38</sup>

The political context, as pointed out earlier, is without a doubt crucial for the implementation of international justice and “contemporary legal responses do not

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<sup>35</sup> In the last part of his book Hagan concedes that Goldstone laid the groundwork of international support and recognition for the tribunal that gave Arbour the resources to improve drastically its internal structure.

<sup>36</sup> See ICTY’s annual report 1994, A/49/342, S/1994/1007, 29 August, p. 15-17, at <http://www.icty.org/sid/14>, accessed on March 3, 2011. The staff was eventually put on a regular UN payroll after the UN Security Council approved the ICTY’s annual budget in 1994. The staff was eventually put on a regular UN payroll after the UN Security Council approved the ICTY’s annual budget in 1994.

<sup>37</sup> The author interviewed ICTY officials and had several informal conversations with staff in the period of September 2009 and June 2011.

<sup>38</sup> Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, 3–4.

necessarily express an unequivocal sense of a progressive rule of law.”<sup>39</sup> In fact, when the cruel pictures of the hundreds of thousands of refugees made it onto the TV screens in millions of homes after the war broke out in the former Yugoslavia in 1991—spreading steadily east, contaminating Croatia, Bosnia and Herzegovina and eventually Kosovo and Macedonia—the media across the world called for an international intervention. Yet, Western democracies, including the US and Britain, were slow to take a decisive political stance—despite the risk of a European Vietnam. Additionally, the UN Security Council, which had only operated on a limited scale during the Cold War, lacked experience to take effective measures to stop the bloodshed. In the end, the UN decided to act, after a series of preliminary resolutions and warnings to the fighting parties in the former Yugoslavia.<sup>40</sup> In 1993, resolution 808 of the Security Council eventually requested that the Secretary General prepare a report on the creation of an international criminal tribunal to deal with crimes that had been committed on the territory of the former Yugoslavia since 1991.<sup>41</sup>

As discussed above and in chapter 1, the work of the ICTY since the beginning of its existence was marked by a rocky international cooperation (including indictment procedures and arrest warrants, all of which required the collaboration of the perpetrator’s country of origin), which also hampered the work of the prosecution and as a consequence the overall trial procedures in The Hague. Notwithstanding, the countless efforts of the tribunal’s staff and a changing international political climate that led to the fall of former

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<sup>39</sup> Teitel, “The Law and Politics of Contemporary Transitional Justice,” 840.

<sup>40</sup> Grant Niemann, “The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000,” *Journal of International Criminal Justice* 2 (2004): 435.

<sup>41</sup> See UN Security Council resolution 808, S/RES/808 (1993), at <http://www.un.org/docs/scres/1993/scres93.htm>, accessed June 20, 2011.

Serbian president Slobodan Milošević and his extradition to The Hague—where he was eventually tried in 2002—were remarkable. The prosecution of a political leader in an international court could thus be considered as a watershed moment—despite the trial’s abrupt halt due to Milošević’s death in his prison cell in 2006. Furthermore, the evolution of the ICTY’s sentencing demonstrates the complementary character of international criminal law due to the spillover effect on domestic prosecutions.<sup>42</sup> However, these developments depend on the democratic processes and institutional changes in each of the political settings, which vary in each country. The sociopolitical underpinnings are also a reason why alternative transitional justice mechanisms, such as truth commission, failed in the early years of the ICTY’s operation.

## **Opting Out of Truth Commission**

The political situation and persistent armed conflict in the early to mid-1990s in the former Yugoslavia is one of the main reasons why—contrary to other democratic transition contexts, including countries such as South Africa or Peru, in which truth commission have been used to cope with mass atrocities—restorative justice mechanisms were not employed by international peacemakers. In fact, due to the ongoing conflict that lasted until the late 1990s, and the political stronghold of former war criminals such as Franjo Tuđman and Slobodan Milošević, who continued to stay in power even after the end of the war,

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<sup>42</sup> Teitel, “The Law and Politics of Contemporary Transitional Justice,” 841–842.



international actors, such as the UN and the EU, opted for peacekeeping operations and the creation of the UN tribunal to restore peace and stability in the region. On one hand, this decision led to a watershed moment in international criminal law, establishing a precedent with an ad hoc UN tribunal that would serve as a model for an entire series of additional courts and hybrid tribunals across the world—ranging from Sierra Leone in Africa to Cambodia in Asia. On the other hand, this evolution of retributive justice mechanisms as compared to restorative justice instruments was also to some extent unsurprising, when comparing the conditions for democratic transition in the Balkans to the African and Peruvian context during these political shifts.

The South African TRC, for instance, was the work of the leaders who took power after the abolition of the apartheid system in order to account for gross human rights violations during the period from 1960 to 1994. In stark contrast to the war-torn Balkans, however, in 1994, the political situation in South Africa was peaceful and the country in the middle of a democratic transition phase. Its first multi-racial elections were held in 1994 at the end of a series of negotiations from 1990 to 1993 that eventually dismantled the apartheid regime.<sup>43</sup> The commission was thus created by national legislation in 1995 and the body's administrative and institutional seat was established in Cape Town. While the commissioners investigated human rights abuses, they were also in charge of restoring the dignity of victims and formulating proposals to rehabilitate affected communities. Many public hearings were held and to avoid politicization of the body, no side was exempt from

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<sup>43</sup> For a detailed account on South Africa's transition cf. Ramet, *The Three Yugoslavias: State-building and Legitimation, 1918-2005*.

appearing in front of the commission. It also had the right to grant amnesty to perpetrators, as long as the persons “make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts.”<sup>44</sup> The impact and legacy of the South African TRC has been the object of different studies, including peace and conflict research and psychological research. Richard Wilson, for instance, has conducted anthropological fieldwork and provided an analysis that suggests that the TRC was put in place by the elites of the African National Congress (ANC)<sup>45</sup>—South Africa’s Africanist political party often seen as the symbol of national liberation in the post-apartheid period—to legitimize their power. It has been the ruling party since 1994. In fact, Wilson argues that contrary to human rights discourses elsewhere, the South African leadership pursued a nation-building strategy that deprived victims from their right to punitive justice:

[R]etributive justice was defined as ‘un-African’ by some, such as former Archbishop Desmond Tutu. Human rights became the language of restorative justice and forgiveness of human rights offenders in South Africa, whereas at the same time in international contexts, human rights were developing in just the opposite (punitive) direction with the creation of an International Criminal Court and the prosecutions brought by the UN war crimes tribunal for the former Yugoslavia and Rwanda.<sup>46</sup>

As Wilson unequivocally points out, there is a difference between transitions fueled by domestic actors versus change in a post-conflict context fostered by external actors.

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<sup>44</sup> See Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at [http://www.fas.org/irp/world/rsa/act95\\_034.htm](http://www.fas.org/irp/world/rsa/act95_034.htm), accessed January 20, 2012.

<sup>45</sup> Its predecessor organization was the South African National Congress (SANNC) created in 1911.

<sup>46</sup> *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge, United Kingdom: Cambridge University Press, 2001), xvi–xvii.

The Peruvian case is another example in which society dealt with—and is currently still grappling with—its atrocious past on a national and local level instead of international actors taking on the lead role to carry out these processes. It also highlights the preliminary use of truth commissions, before domestic retributive steps were initiated in order to cope with the years of state violence and Marxist terror from 1980 to 2000. More precisely, the Maoist insurgent group Shining Path launched a bloody quest to overthrow the Peruvian state in 1980, while the state's response resulted in its own brand of terror. It included scorched-earth tactics that resulted in the destruction of more than 300 indigenous rural communities, extrajudicial executions, forced disappearances, and the widespread use of sexual violence and torture.<sup>47</sup> When the responsible political leader, former President Alberto Fujimori, lost the elections in 2000, the path was clear to address these mass atrocities. Hence, in 2001, the Peruvian Truth and Reconciliation Commission was created to analyze the political, social and cultural conditions that contributed to the situation of violence; to contribute to the administration of justice; and to make proposals for moral and material redress of violations. As a result, the TRC emitted a 9-volume report in 2003. In order to get at the truth it was trying to reveal, the TRC also compiled a registry of 1700 photographs documenting the years of violence. At present, Peruvian society is still grappling with the legacy of political violence and human rights abuses. In recent years, however, the national judiciary, fueled by a few bold judges, has stepped up to prosecute its former head of state—after a long struggle of requesting the extradition of the fugitive

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<sup>47</sup> More than 69,000 Peruvian citizens perished in the conflict, the vast majority of them poor, indigenous, rural peasants. More than 15,000 people were forcibly disappeared; in most cases, their fate remains unknown to this day. Over 600,000 people were displaced, and some 200,000 children left as orphans. See also Burt, *Political Violence and the Authoritarian State in Peru: Silencing Civil Society*.

former president Fujimori from Chile— sentencing him to 25 years in prison in 2009.<sup>48</sup> Similar to the case of the South African transition, it was the political situation, namely the peaceful and democratic elections in this process that allowed for the creation of a truth commission. Yet, the historical and sociopolitical context in the Balkans during the same period differed enormously from both of the above comparisons.

In the case of the former Yugoslavia, as mentioned earlier, the situation was far from being peaceful at the time. Thus, international criminal justice was envisaged as a means to halt the violence, long before the Dayton Peace Agreement was signed in 1995. It is unsurprising then, that international lawyers—who had invested time and energy in the years prior to international diplomats and policymakers meeting in Paris to sign the peace deal reached in Ohio—insisted on the tribunal being the only instrument to manage the post-conflict situation in the region. Indeed, the first chief prosecutor of the ICTY, Richard Goldstone, was instrumental in advocating against amnesties during the negotiations that led to the Dayton Accords.<sup>49</sup> The adamant agenda that Goldstone pursued was politically motivated, as he did not want to jeopardize the work of the nascent UN tribunal in The Hague. Sequencing and the issue of other alternative transitional justice mechanisms (as discussed in the introduction) were therefore not within the broader peace and stability strategy of the ICTY's advocates. This also meant that truth commissions or similar fact-finding bodies were not on the radar of the international actors involved in transitional justice processes in the

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<sup>48</sup> BBC News, "Fujimori Gets Lengthy Jail Term," *BBC News Americas*, April 7, 2009, <http://news.bbc.co.uk/2/hi/7986951.stm>

<sup>49</sup> Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, 41–43.

region. Notwithstanding, since its creation the tribunal had to face numerous obstacles. Below, I will draw on a few key issues, which help illustrate the case why eventually, the idea of restorative justice mechanisms has gained ground in the post-conflict Balkans.

## **The ICTY Legacy: A Bumpy Justice Cascade**

In December 2009 during one of the multiple discussions on the closure of the ICTY, its presiding judge, Patrick Robinson, addressed the UN Security Council underlining the challenges that the court is facing vis-à-vis its completion strategy.<sup>50</sup> He stressed that the failure to arrest war criminals, such as former Chief of Staff of the Army of the Republika Srpska, Ratko Mladić, would “tarnish the Security Council’s historic contribution to peace-building in the former Yugoslavia.”<sup>51</sup> While Mladić was eventually arrested in spring 2011,<sup>52</sup> the ICTY’s days are numbered. In chapter 7 I present a comparison of the cases tried before the ICTY and the BiH Court’s War Crimes Chamber over several years of operations of both judiciaries. In fact, since 2003, when the ICTY was working at its full capacity, the UN Security Council decided in resolution 1503 and 1534 to layout a three-phase completion strategy for the tribunal. The first phase consisted of finishing all investigations by 2004, completing the first instance trials by 2008 and wrapping up appeals trials by 2010.

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<sup>50</sup> The ICTY completion strategy is the slow phasing-out of the court operations in The Hague launched in 2000, but which has been continuously postponed due to various circumstances, including e.g. still-at-large indictees and difficulties in transferring cases to domestic judicial institutions.

<sup>51</sup> See ICTY website at <http://www.icty.org/sid/10280>, accessed January 19, 2010.

<sup>52</sup> Radio Free Europe/Radio Liberty, “Serbian Police Arrest War Crimes Fugitive Ratko Mladic”, May 26, 2011.

Different circumstances, such as the late arrest of fugitive Goran Hadžić in July 2011—a Serbo-Croatian politician and former president of the Republic of Serbian Krajina accused of war crimes, including the expulsion of non-Serb populations in the Krajina region and the persecution of non-Serbs in the city of Vukovar, Croatia—have led to postponing the closure of the ICTY. Recent projections published on the ICTY’s website suggest that the tribunal will be operating until at least 2016. After that a residual mechanism will be in place to process any remaining case of issue on an ad hoc basis.<sup>53</sup>

Once the ICTY passes a sentence, the convicted person does not remain in the ICTY’s detention unit, as it is not a penitentiary. In fact, several states have signed bilateral agreements on the enforcement of ICTY sentences. Although the tribunal is an international UN ad hoc institution, most agreements have been established with European countries or states adjacent to the EU. The majority of sentences are served in Scandinavian and Western European countries, including Sweden, Norway, Finland, France, the United Kingdom, Germany, and Austria, among others, with an average of 3 to 4 convicted persons serving their sentences in each of the countries. Non-EU countries, such as the Ukraine, have also signed agreements with the ICTY, but in the case of Ukraine, the treaty has not been ratified yet. The only Southeast European country with an agreement is Albania, which does not have any transferred cases at present.<sup>54</sup> In this context, it is opportune to ask what role justice has played in post-conflict national contexts of the Balkans. While several scholars have discussed the impact of the ICTY in generating stability and peace in the

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<sup>53</sup> See ICTY website at <http://www.icty.org/sid/10016>, accessed February 3, 2012.

<sup>54</sup> For a detailed map and the specific transfer cases of convicts see the ICTY website at <http://www.icty.org/sid/10276>, accessed March 5, 2012.

region, at present, little research has addressed the work and ramifications of war crimes trials on the domestic level.

Indeed, past scholarship on the special court has focused on a variety of issues, including its creation, mandate and effect on peace efforts. For examples, it was the lack of a cohesive international military intervention strategy during the Balkan conflict in the early 1990s that incited the elaboration of diplomatic, political and legal alternatives, which, in 1993, led to the creation of the UN ad hoc court.<sup>55</sup> Although the court was in charge of prosecuting serious war crimes committed during the Balkan wars and trying their alleged perpetrators, its early mandate was undermined by the implementation of low-level perpetrator trials only, with high-profile war criminals remaining at large and in power until the late 1990s.<sup>56</sup> In retrospect, however, the ICTY did not only produce questionable results. Several authors have highlighted the positive impact of its work in the region and globally, notably with regards to the norms cascade—a phenomenon that describes how international law permeates domestic politics<sup>57</sup>—and benchmarks for practice standards in local trials and prosecutions.<sup>58</sup>

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<sup>55</sup> Fausto Pocar, “Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY,” 656.

<sup>56</sup> Minna Schrag, “Lessons Learned from ICTY Experience,” *Journal of International Criminal Justice* 2, no. 2 (2004): 428–9; Lilian Barria and Steve Roper, “How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR,” *The International Journal of Human Rights* 9, no. 3 (2005): 349–368. The court also fell short of launching a broad public education campaign that could have generated support from society, especially in Bosnia and Herzegovina Schrag, “Lessons Learned from ICTY Experience,” 429. The topic of court transparency and media responsibility was recently discussed for the first time during a regional conference, including representatives of the judiciary, the government, the media and non-profit sector from BiH, Croatia and Serbia. The symposium, “Transitional Justice in the Balkans—Judicial Transparency and Media Responsibility,” was held in Sarajevo, BiH, between September 1 and 3, 2009.

<sup>57</sup> For a general discussion on norms in international politics cf. Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 04 (1998): 887–917. See also Ellen Lutz and

Since the creation of the ICTY, legal experts, practitioners and advocates, particularly its presiding judges, have highlighted the importance of the court's broader mission that goes beyond retribution and deterrence.<sup>59</sup> Some of the judges that have served or are currently still on the bench include Theodore Merton (USA), Jean Claude-Antonetti (France), Alfons Orie (Netherlands) and Patrick Robinson (Jamaica), among many others. This sample nicely illustrates the ethnic and national diversity of the ICTY judges. More importantly, however, the diverse backgrounds of the judges and other practitioners at the tribunal have shaped the functioning and output of the cases that were seized by each of the chambers, as I have demonstrated relying on Jon Hagan's work earlier in this chapter. Judge Merton, for instance, is a leading scholar of international humanitarian law, human rights, and international criminal law and the former co-editor of the *American Journal of International Law*. In several watershed decisions, he even described the tribunal's work as almost taking on a legislative role.<sup>60</sup> Hence, the court has, at least on a macro-level, fueled a normative spillover effect with hundreds of indictees awaiting or currently standing trial in national judicial institutions in Croatia, BiH and Serbia, among others.<sup>61</sup> Since the creation of the ICTY, the sentences and precedents set in its encompassing case law—ranging from precedents of genocide to rape—have pressured national judiciaries in the region to integrate

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Kathryn Sikkink, "Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America, The," *Chicago Journal of International Law* 2 (2001): 1 for initial article on the concept of justice cascade.

<sup>58</sup> Jon Hagan and Ron Levi, "Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice," *European Journal of Criminology* 1, no. 4 (2004): 445; Sikkink and Walling, "Errors About Trials: The Emergence and Impact of the Justice Cascade," 25–6. Drumbl also highlights the significant impact of the international tribunals in terms of substantive international criminal law. More precisely, he analyzes e.g. the evolution and expansion of the meaning of the term genocide, which now also includes sexual violence against women *Atrocity, Punishment, and International Law*, 131.

<sup>59</sup> Nadège Ragaru, "Les Réceptions Du TPIY En Croatie Et En Serbie" (Centre d'analyse et de prevision, Ministère des Affaires Etrangères, France, August 2006).

<sup>60</sup> Theodor Meron cited in Teitel, "Transitional Justice Genealogy," 13.

<sup>61</sup> Teitel, "Global Transitional Justice."



international humanitarian law concepts into their legal frameworks. Several Ministries of Justice, such as Serbia and Bosnia and Herzegovina, created for instance a war crimes chamber within the institutional judicial structures to prosecute alleged perpetrators on a national level. Moreover, the 11 bis rule of the ICTY, a legal rule that allows the transfer of ICTY cases to national courts, also demonstrates the increasing cooperation between the tribunal in The Hague and national judiciaries.<sup>62</sup> In this context, however it is opportune to point to a critical gap between the symbolic values of the law—or, put differently, the perception of institutional and legal structures as well as the work of war crimes tribunals in society<sup>63</sup>—and the actual daily judicial procedures held at the institutions and the eventual application of legal decisions in post-conflict societies. To understand this problem, it is useful to review some of the practical challenges the ICTY has grappled with since its creation and subsequently, expand the discussion to national institutions that have started to take over the tasks of the judges and prosecutors working in The Hague.

Notwithstanding the many tributes paid to the ICTY, its work, particularly in the beginning, has been conducted in geographical, political and legal isolation from the affected societies. The decision to hold trials in a remote location from the conflict region was mainly based on the fact that hostilities were still ongoing in former Yugoslavia.<sup>64</sup> Understandably, however,

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<sup>62</sup> See for instance Thierry Cruvellier and Marta Valiñas, *Croatia: Selected Developments in Transitional Justice*, Occasional Paper Series (New York, December 2006); Bogdan Ivanisevic, “Against the Current - War Crimes Prosecutions in Serbia” (International Center for Transitional Justice, 2007); OSCE, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010*.

<sup>63</sup> Ragaru, “Note De Consultance.”

<sup>64</sup> Marie Ursula Kind cited in Janine Clark, “International War Crimes Tribunals and the Challenge of Outreach,” *International Criminal Law Review* 9, no. 1 (2009): 100.

this remoteness sparked also criticism,<sup>65</sup> as the cathartic effect of a tribunal<sup>66</sup> is limited to a narrow circle of witnesses who are willing to travel. Furthermore, as Laura Moranchek candidly points out “using secret evidence [such as confidential documents provided by a state’s intelligence service] may win individual battles in court, but lose the broader war of reforming societies and healing victims.”<sup>67</sup> The politicization of the death of former Serbian president Slobodan Milosevic in his detention cell in The Hague<sup>68</sup> is perhaps the most emblematic case, which fueled particularly populist propaganda that was carried out by various media in Serbia. A couple of authors show for instance, how one of the most popular Serbian newspapers *Večernje novosti* reframed the former Serbian leader’s death in line with the prevailing media discourse of his regime years (1987-2000), which helped generate and propagate the Serbian myth of Milošević as a great Serbian leader.<sup>69</sup>

Yet with the court’s legitimacy still under question in the region BIRN, as mentioned earlier in chapter 2, convened a cross-regional symposium in September 2009 in Sarajevo, BiH, that brought together practitioners, policy makers and activists to discuss issues related to the transparency of justice and the responsibility of the media. For instance, with the ICTY example of having initially failed to integrate local judges on the bench as reference, subsequent war crimes courts, such as the special court for Sierra Leone, East Timor or Cambodia, have adapted a hybrid approach to cope with this shortcoming and strengthen

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<sup>65</sup> Cf. “Transitional Justice in the Balkans—Judicial Transparency and Media Responsibility,” conference organized by the Balkan Investigative Reporting Network (BIRN), Sarajevo, BiH, September 1-3, 2009.

<sup>66</sup> Aurélien Colson, “The Logic of Peace and the Logic of Justice,” *International Relations* 15, no. 1 (2000): 59–61.

<sup>67</sup> “Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY,” 479.

<sup>68</sup> (Ibid.)

<sup>69</sup> Karmen Erjavec and Zala Volcic, “Rehabilitating Milosevic: Posthumous Coverage of the Milosevic Regime in Serbian Newspapers,” *Social Semiotics* 19, no. 2 (2009): 125–147.

the ties between the tribunals and society.<sup>70</sup> In spite of realizing that communication is key to create a sustainable relationship between the court and society—fostered by numerous public events, training sessions and workshops after the official launch of an outreach program in 1999—the court’s public image still doesn’t shine.<sup>71</sup> While special courts and other human rights tribunals following the ICTY created outreach programs immediately after they began operating,<sup>72</sup> the issue of improving the relationship between law and society might not lie in more personnel, better strategies and on-site presence, but in the way that those who suffered most during the conflicts, are integrated into efforts to cope with the past. This is particularly the view of human rights activists, who in spite of their support for retributive justice mechanisms have criticized also its shortcomings. The activities of several non-profit organizations—that often started working at the outbreak of violence in the early 1990s<sup>73</sup> or shortly after—highlight the role of victims in transitional justice processes in the Balkans. Yet, these conflicting views of who might best serve society to promote justice and establish a memory of past atrocities beg the question of who prevails in the battle over memory? In the next couple of chapters I explore this tension in the relationship between the judiciaries (at the international and national levels) and human rights activists. Before exploring and understanding the crucial link between international and domestic judiciaries and human rights activism in the region it is helpful to

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<sup>70</sup> Gabrielle McDonald, “Problems, Obstacles and Achievements of the ICTY,” *Journal of International Criminal Justice* 2, no. 2 (2004): 569–70.

<sup>71</sup> Clark, “International War Crimes Tribunals and the Challenge of Outreach.”

<sup>72</sup> *Ibid.*, 116.

<sup>73</sup> Cf. for instance the activities of the Humanitarian Law Center in Belgrade, Serbia, that documents war crimes in the former Yugoslavia and promotes victims rights, based on various initiatives, at <http://www.hlc-rdc.org/stranice/Linkovi-modula/About-us.en.html>, accessed on December 5, 2009.

pay further attention to the problematic implementation of global humanitarian law on the ground.

Perhaps the toughest nut to crack is the establishment of legally binding norms with the power to enforce them.<sup>74</sup> When the ICTY started its trials, it was working in a legal vacuum, filled by local and domestic political power structures in the region that were reluctant to abide by international norms to extradite, let alone prosecute alleged perpetrators. The dilemma of issuing arrest warrants serves as a case in point. Lacking the means to arrest at-large war criminals, the ICTY has depended (and still depends) on the cooperation of the indictee's country of origin or any neighboring country if the person were to travel in order to bring at-large criminals to justice in The Hague.<sup>75</sup> Interestingly, however, this handicap has much broader ramifications, including not only the ICTY and the states in question, but also affecting the EU. In fact, it turned into a crucial bargaining chip for an entire region to become members of the EU. During EU accession negotiations, for instance, the cooperation with the ICTY has become one of the pillars of the rule of law the EU requires states of the former Yugoslavia to fulfill before advancing to a potential membership status in pre-accession talks. Notwithstanding, such a narrow transitional justice view of dealing with past atrocities that primarily focuses on war crimes trials is questionable, as suggested by certain authors.<sup>76</sup>

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<sup>74</sup> Moranchek, "Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY," 559–67.

<sup>75</sup> Ibid.

<sup>76</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*. Some authors have criticized the single-track transitional justice approach of the EU, which solely focuses on retributive justice mechanisms (cf. "European

Moreover, establishing the rule of law on the domestic level—using rules, which originally were created on the international level—was, and still remains, a difficult undertaking. In certain cases, such as the EU during its member talks, pressure from the international level is not always sufficient to sustain sustainable reforms on the national level. Certain states, such as Croatia, serve as a good case in point to illustrate this dilemma. After the Croatian government finished its negotiations with the EU to become a candidate country in June 2011, the formal signature ceremony was scheduled for December 2011. Yet, during this process, a few months after the negotiations were closed, the national parliament, the Sabor, passed legislation in October 2011 that prohibits any war crimes investigation in Croatia by the judiciary of Serbia or any other former body of the Yugoslav state.<sup>77</sup> Needless to say that such an evolution of the rule of law in a EU accession country is evidently against Brussels' intention of promoting accountability against war crimes and regional cooperation within the geographic space of the former Yugoslavia.

Despite these praises of the ICTY's global justice mission, recent research has painted a more nuanced picture of transitional norms dynamics, focusing especially on political actors and the state.<sup>78</sup> In her work, Jelena Subotić concludes that in international relations theory, state compliance with global norms is not linear but a complex phenomenon. In fact, her

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Integration And Transitional Justice: From Retributive To Restorative Justice" conference organized by the Humanitarian Law Center, Belgrade, Serbia, February 7, 2009).

<sup>77</sup> Boris Pavelić, "Croatia Risks Row, Annuls Serb War Crimes Charges," *BalkanInsight.com*, October 21, 2011, sec. Croatia, <http://www.balkaninsight.com/en/article/croatia-risks-row-annuls-serb-war-crimes-charges>; Boris Pavelić, "Croatia's HDZ Shifts Right in Hunt for Votes," *BalkanInsight.com*, October 26, 2011, sec. Croatia, <http://www.balkaninsight.com/en/article/croatia-s-hdz-shifts-right-in-hunt-for-votes>.

<sup>78</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

case studies of states of the former Yugoslavia reveal that domestic elites have “hijacked” transitional justice norms for domestic political ends, such as aspirations to enter the EU.<sup>79</sup>

All of these examples represent macro-analyses of globalized humanitarian law, leaving an in-depth exploration of the application of these meta-models of transitional justice in domestic institutions in the dark. Yet, since 2003, Serbia, Croatia, and BiH have passed legislation and implemented institutional changes to prepare their national judiciaries for taking on war crimes prosecutions. At first sight, these developments confirm concepts of complementarity positing that the effects of international humanitarian law have spilled over into the national level (or are cascading down to the domestic level—to use for instance Ellen Lutz and Kathryn Sikkink’s metaphor).<sup>80</sup> Yet, to what extent did the establishment of the ICTY help create incentives for reforms in domestic judiciaries and trial procedures? Although local courts already rendered justice shortly after end of the violent conflicts in Croatia and BiH in the mid-1990s, their sentences did not follow international standards.<sup>81</sup> In each of these cases the application of legal instruments to account for past human rights violations is far from obvious. Various national political contexts and international conditions have played out differently within the three countries, generally hampering transfer efforts. What institutional, political and ideological challenges did (and still do) war crimes prosecution face? In the following I will draw on the case of Croatia to

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<sup>79</sup> Ibid., 6.

<sup>80</sup> Lutz and Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America.”

<sup>81</sup> “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles” (Organization for Cooperation and Security in Europe, Human Rights Department, March 2005), 4; Ivana Nizich, Zeljka Marki, and Jeri Laber, *Civil and Political Rights in Croatia* (New York: Human Rights Watch, 1995), 84–9.

explore some of the sociopolitical underpinnings that affect the global-to-local justice cascade in the former Yugoslavia.

## **Croatia's Selective Justice: The EU, the ICTY and Domestic Trials**

To comprehend the difficulties of Croatian judicial structures in order to implement a transitional justice agenda in line with the ICTY objectives, calls for analyzing potential procedural, political and ideological issues through the lens of the EU enlargement process. While trying to implement its integration strategy with Croatia, the EU has—with regards to its war crimes requirements—mainly focused on one international compliance condition: the extradition of former war hero, General Ante Gotovina.<sup>82</sup> As a consequence, the pressure exerted by international norms to foster institutional and normative change stopped at Croatia's border, leaving the country's elites with ample leeway in their efforts to advance domestic attempts to account for mass violence.<sup>83</sup> Despite Subotić's optimistic outlook of Croatia's path to justice and truth in the larger context of acquiring the long hoped-for EU membership in the foreseeable future,<sup>84</sup> national-level practices to try alleged perpetrators for war crimes remain a victim of Croatia's national identity dilemma. I refer to it as a dilemma, because in its haste to forge a homogenous and united nation, the Croatian government has maintained a state discourse that glorifies the nation-state's military forces

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<sup>82</sup> He was a member of the Croatian army, indicted by the ICTY in 2001 for war crimes against Krajina Serbs from Croatia in 1995 during Operation Storm at the end of the Croatian War.

<sup>83</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, 120.

<sup>84</sup> Ibid.

and their heroic engagement in the 1992-1995 Homeland War, as the Croatian war is generally referred to in official discourses, statements or documents. This discourse explains the armed forces' involvement as a purely defensive act in order to free the nascent nation of terrorist and other enemies that represented a threat to its institutional structure and territorial integrity of the country.

In particular the conservative political party, the Hrvatska Demokratska Zajednica (HDZ, engl. Croatian Democratic Union) has promoted this discourse of impunity despite the knowledge of human rights abuses by Croatian armed forces. In fact, HDZ has been in power, holding the majority of the seats in the Sabor until the last elections in December 2011. It was also then-president Franjo Tuđman's political party. He was responsible for war crimes during Croatia's war of independence, but died eventually in December 1999 before any legal procedure was put in place to prosecute him. I will elaborate on these politics further below. As for the alleged war crimes of the Croatian armed forces, during the military operations "Operation Storm" and "Operation Lightning" the Croatian military did not only oblige Serbian forces to retreat, but that also forced hundreds of thousands of civilians to flee their homes, mostly Croatian Serbs, from the occupied territories in 1995, thus establishing Croatia's current borders.

Hence this collective identity and strong feeling of unity among Croatian's is based on an image and understanding society has of the country during the Homeland War and its role in it. Although Croatia has also prosecuted an important number of perpetrators in recent years, trial records show that the judiciary indicted an uneven number of Croatian Serbs,



sparing Croatian military leaders. The politicization of accountability efforts poses still an obstacle to fair and impartial trials in the country.<sup>85</sup> These selective justice trends are grounded in the nation's persisting identity struggle that is a consequence of its relatively recent independence. In order to pursue its quest for historical memory, political elites fueled patriotic beliefs and a foundational myth, which ignore war crimes against ethnic Serbs.

During the 1990s, Croatia's political elite was confronted with the elusive task of not only defining a national image distinct enough from Tito's Yugoslavia and Serbian patriotism and that would provide sufficient glue to hold together its imagined community, but also legitimize the new nation- and statehood. Moreover, it needed to break with its Ustasha past—a dark period of its history when it acted as a Nazi puppet regime during World War II.<sup>86</sup> The image of the '1991-95 Homeland War,' created by the Tuđman regime—a reference to Croatian military operations against non-ethnic Croats, particularly ethnic Serbs in Eastern Croatia, as a legitimate defense against rebels and terrorists—therefore illustrates how politicians manipulated and constructed a national myth to legitimize Croatia's embryonic identity.<sup>87</sup> Yet, the crushing defeat of the right-wing party HDZ in the 2000 parliamentary elections following Franjo Tuđman's death underscores the dynamic character of identity formation.<sup>88</sup> While internationally, Croatian political elites have

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<sup>85</sup> Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*.

<sup>86</sup> Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the War for Kosovo*.

<sup>87</sup> Viktor Peskin and Mieczysław Boduszynski, "International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia," *Europe-Asia Studies* 55, no. 7 (November 2003): 1124.

<sup>88</sup> Alex J. Bellamy, *The Formation of Croatian National Identity: A Centuries-Old Dream* (Manchester: Manchester University Press, 2003), 1–2.

managed to walk a very thin line of reshaping national identity according to a politically acceptable image in the context of EU accession talks, domestically, strong national symbolism remains a bone of contention and is reflected in the questionable institutional practices of Croatia's justice system. Referring to the case of General Gotovina and the Medak Pocket trial helps explain persisting shortcomings of court decisions in national war crimes trials.

Before Ante Gotovina a former commander of the Croatian armed forces eventually had to stand trial in The Hague, however, years went by. Croatian authorities were reluctant to cooperate with the ICTY and extradite the indicted general allegedly responsible for war crimes committed during the liberation of Croatia, a military strike Operation Storm in 1995. The Croatian government was hesitant because at home, and in particular in the central and southern coastal parts of the country, he had gained a strong popularity among the people as a war hero who helped free Croats from the yoke of the Serbian oppressor. I explain the identity politics of this case in more detail in chapter 5. In the context of judicial cooperation and Croatia's goal to join the EU—which required, among other things, the cooperation with the ICTY—the reluctance to comply with international humanitarian law did not bode well for the rule of law in Croatia's process of democratic transition and efforts to account for past atrocities. While international pressure and the threat of a stalemate in the EU accession negotiations with the Croatian conservative HDZ government eventually led to Gotovina's extradition, judicial practices on the domestic level are still heavily biased, sparing alleged Croatian war criminals from prison sentences in Croatian courtrooms.

As a case in point, recent war crimes prosecutions, such as the Medak Pocket case before the Zagreb County Court in 2008—a trial in which two former Croatian generals were accused of crimes against ethnic Serbian civilians during a military operation in the fall of 1993 in the south-central region of Croatia—highlight the judiciary’s reluctance to apply legal procedures in compliance with international transitional justice norms.<sup>89</sup> Human rights organizations monitoring trials have criticized the prosecution’s lack of interest “in identifying and punishing other commanders and direct perpetrators in the Medak Pocket crime, in spite of evidence pointing to certain persons, members of certain military formation.”<sup>90</sup> These drawbacks within national judicial institutions are not exceptions, but a trend in how transitional justice is struggling to permeate from the international to the national level.<sup>91</sup>

While the number of indictments and trials in Croatia is impressive compared to the selected symbolic cases at the ICTY—and increased following Croatia’s application to access the EU in 2003—a 2010 Amnesty International report still criticizes the lack of transparency and the selective justice process that besets the Croatian justice system in its efforts to account for war crimes during the 1991-1995 Homeland War.<sup>92</sup> The human rights watch dog

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<sup>89</sup> In an unpublished manuscript, “Croatia: Parody of Justice, Case Đermanović,” (2010), Mia Psorn highlights the problematic rule of law situation in Croatian county courts.

<sup>90</sup> Nataša Kandić, “Trials for War Crimes and Ethnically and Politically Motivated Crimes in Post-Yugoslav Countries” (Humanitarian Law Center, 2009), 131.

<sup>91</sup> Mirjana Lazić, Eldar Jahić, and K. Kruhonja, eds., “War Crime Trials Monitoring-Regional Trial Monitoring Team Report 2004-2008” (Center for Peace, Non-Violence and Human Rights Osijek, 2009), 18–24; Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, 101–106; Vjeran Pavlaković, “Better the Grave Than a Slave: Croatia and the International Criminal Tribunal for the Former Yugoslavia,” in *Croatia Since Independence. War Politics, Society and Foreign Relations*, ed. Sabrina P. Ramet, Konrad Clewing, and Reneo Lukić (München: Oldenburg Verlag, 2008), 446–477.

<sup>92</sup> Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, 6.

organization based its numbers on a report by the High Commissioner for Human Rights of the Council for Europe Thomas Hammarberg who visited Croatia in the summer of 2010. In his final report Hammarberg noted in his report that

since 1991 more than 600 people have been convicted for war-related crimes, another 600 have been indicted and several hundred more are under investigation in Croatia. Croatia has issued 700 international arrest warrants for war crime suspects. However, it has been reported that from 2005 to 2009 only 80 war-related criminal cases have been prosecuted. Many cases still remain unresolved, and in a number of cases the perpetrators of war-related crimes have not been identified.<sup>93</sup>

Additionally, despite the 2009 Criminal Procedure Act, which allows re-opening in particular in absentia cases of primarily Croatian Serb indictees concerning war-related cases, in absentia trials continue to be practiced by Croatian courts.<sup>94</sup> While Croatian authorities' awareness of ethnic bias in war crimes trials is increasing, overall progress remains relatively slow.

As a result, trials have raised the question of some fundamental principles that lie behind the concept of justice. While the ICTY had not only set the goal of promoting an international humanitarian law model and deter future mass atrocities by punishing those responsible for grave crimes against humanity, its mandate also aimed at promoting

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<sup>93</sup> Thomas Hammarberg, *Report by the Commissioner for Human Rights of the Council of Europe: Following His Visit to Croatia* (Strasbourg, June 17, 2010), 16.

<sup>94</sup> Ibid.

reconciliation in the formerly war-torn region.<sup>95</sup> The intention here is not to assess the efficacy of retributive justice in fostering healing of society, but instead to underline the consequences of a particular modus operandi of judicial institutions for society. As a case in point, despite the claim of serving society, courts often operate in isolation from the public, protected by intricate procedures and—particularly in the context of war crimes prosecutions—to a certain extent by confidentiality.<sup>96</sup> Suffice it to say that the facts generated by trials—due to the limited capacity of the judiciary to try all the cases—represent only glimpses of the full story. Non-governmental human rights organizations have deplored these issues and gained sufficient momentum to counteract and advocate for victims’ rights while at the same time supporting the positive developments in international and domestic prosecutions.

Several human rights activists, with the help of international non-profit and government donors have set out to complement these processes by collecting testimonies and creating immense archives of audio, video, and written files and documents of survivors. These social actors have set in motion a wave of restorative justice processes that, by now, have taken cross-regional proportions. Despite their ambitions, however, they are also struggling to institutionalize their current efforts.<sup>97</sup> Notwithstanding, non-profit activities to support the work of war crimes trials in each national context run in parallel to bottom-up accountability attempts. In the next chapter I draw on a concept called travel theory, to explain the

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<sup>95</sup> Cf. UN resolution 827 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>, accessed January 3, 2010.

<sup>96</sup> See for instance Harvey Weinstein and Laura Fletcher, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24, no. 3 (2002): 573–639.

<sup>97</sup> See chapter 5 for a detailed discussion on these issues.

difficult rise of human rights activists in post-conflict societies by analyzing the *process* of how international legal concepts travel and are being transformed from the macro to the micro level.<sup>98</sup>

## Conclusion

The goal of this chapter was twofold. Initially, I provided background analysis of the ideological and institutional underpinnings of the ICTY's early years. I have not only demonstrated the importance of emerging concepts and ideas, but also underlined how key figures have influenced the course of the ICTY's evolution through their agency. Subsequently, I also discussed the intricate relations among: the tribunal's work in The Hague that is currently winding down; struggling domestic judiciary efforts to account for war crimes; and the growing requests by victims to establish the facts about the war in the former Yugoslavia due to a continuing culture of impunity, as discussed in chapter 1. In the first section I thus highlighted the initial struggles of international experts and politicians to create enough momentum to pass a UN Security Council resolution and then maintain it in order to get the ad hoc UN court started. In the next part I revealed the difficulties even after the preliminary obstacles were overcome. In fact, applying international norms and rules on a domestic level turned out to be a bone of contention that different actors, such as international policymakers, legal experts and domestic political actors in favor of war

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<sup>98</sup> For spatial analysis of international law concepts and the role of human rights activists cf. chapter 5.

crimes prosecutions still grapple with. To highlight these problems empirically, I used the case of Croatian politics. These struggles within national judiciaries, however, are not an exception limited to the Balkans, as several authors have pointed to.<sup>99</sup> Instead they are part of a trend showing that transitional justice is grappling with in order to expand from the international to the national level. In the following chapters, I will turn my attention to NGO actors in order to portray their understanding of international humanitarian law, their early involvement in transitional justice processes as well as their motivations to implement alternative and complementary mechanisms to deal with the past.

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<sup>99</sup> See for instance Burt, "Impunity and Accountability: Human Rights and Transitional Justice Struggles in Latin America", forthcoming; Clark, *Critical Perspectives in Transitional Justice*; Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*.

# **Chapter 4**

## **NGOs Serving Justice: First Steps to Democratize Human Rights**

Above I have discussed the role of international humanitarian law in the sociopolitical and geographical context of the ICTY and the former Yugoslavia and underlined the obstacles of applying legally binding international norms on a national level. The selective case choice by the ICTY—guided by the need to establish precedents in international criminal law, including chain of command, genocide, and rape, among the most important war crimes—and the problematic use of witnesses during court hearings caught the attention of human rights advocates. Indeed, the ICTY trial record illustrates the great importance judges and prosecutors accorded to humanitarian law, applied from the top down in the former Yugoslavia. The intention of the tribunal is to leave behind a normative legacy that can be applied to cases of mass atrocities worldwide. Yet, such a strategy has left the voices of many victims silent or diminished their importance along the way. For a large number of victims, their cases could not be processed due to the limited procedural capacity of the ICTY. For others, who had the chance to testify in front of the tribunal, many other issues



have been looming. They range from post-traumatic stress disorder to death threats upon their return home. This chapter looks in particular at those victims who were called to testify and consequently had to face some of the above issues. Drawing on examples of NGO programs focused around witness protection, including support in The Hague and in the witnesses' home country, the following chapter explores the understanding of international humanitarian law that activists have gained since the creation of the ICTY and how they have integrated the normative work of the court in their own agenda to promote the voices of victims in society. Thus, my research builds on an emerging field of victim-centered literature in transitional justice that underlines the complexity of issues that victims in post-conflict settings are exposed to and that go beyond a stereotypical dichotomy of perpetrator versus victim narratives.<sup>1</sup>

For this, I turn away from state institutions and focus my attention on civil society actors,<sup>2</sup> in particular human rights activists, to describe not only how they perceive these legal concepts, but also how they reinterpret them and apply them using alternative transitional justice mechanisms that complement the work of war crimes tribunals in a domestic setting. The emphasis of the next few chapters, however, lies not in providing a detailed description

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<sup>1</sup> Erica Bouris, *Complex Political Victims* (Kumarian Press, 2007); Claire Hackett and Bill Rolston, "The Burden of Memory: Victims, Storytelling and Resistance in Northern Ireland," *Memory Studies* 2, no. 3 (2009): 355–376; Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations After Wrongdoing* (Cambridge, United Kingdom: Cambridge University Press, 2006); Roman David and Susanne Choi Yuk-ping, "Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic," *Human Rights Quarterly* 27, no. 2 (2005): 392–435.

<sup>2</sup> Civil society actors are an umbrella term, including, among others, veterans' associations that advocate for a status quo on impunity and thus hamper the work of NGOs promoting accountability for war crimes. I briefly address the conflicting issues between different civil society actors in chapter 5.

of these NGO activities—and potential obstacles thereof.<sup>3</sup> Instead, I examine the local meaning of international humanitarian law that activists have attributed to the normative work of the ICTY since the creation and how they have integrated these abstract legal concepts into their own work, in particular vis-à-vis their efforts to support victims in society.

In order to trace the impact of international humanitarian law in post-conflict society, I focus on the meaning of law in different sociopolitical contexts. Laws, in fact, are not simply rules to be followed, but constitute a set of social practices that change and evolve depending on the sociocultural milieu or environment in a given society. In this chapter, my goal is to describe the process of *how* legal concepts travel from one set of social actors to another group of actors. More precisely, I discuss how international humanitarian law—as defined and practiced by lawyers, judges and legal practitioners—has influenced human rights activists in their own daily practices and how their concept of these international norms varies. To this end, I examine why their perception of international human rights differs and then analyze how they apply these reinterpreted concepts locally. Drawing on a large data set of semi-structured interviews with government officials, international actors, activists and experts, I thus illustrate how international humanitarian law is undergoing a process of democratization. In other words, human rights activists have given it a new, more individualized importance, including victims’ needs. Yet, as I will further develop in chapter

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<sup>3</sup> Chapter 5 provides discussion on some of the key issues during the campaign of the fact-finding initiative RECOM.

6 when I focus on the local-regional divide between NGO activists, such a local, more democratic meaning of human rights is also problematic and not always desirable.

To analyze this phenomenon, I use a sociology-of-law concept, which is the systematic and empirical study of law as a set of social practices. The French Belle-Époque sociologist Émile Durkheim and his German counterpart Max Weber were both founders of studying sociological theories of the law in society. Weber in particular defined sociology of law in relation to other conceptual frameworks of the rule of law in society.<sup>4</sup> It wasn't until after World War II that Talcott Parson, Niklas Luhman and, especially, French philosopher Michel Foucault brought a revival to the study of law in society. While the former scholars developed a system-based theory of law arguing that legal systems are operating in a closed system, the latter, using a poststructuralist perspective addressed issues of power relations of various social actors in society.<sup>5</sup>

To introduce the discussion of the democratization of human rights in the case of my selected NGO examples—this discussion is expanded throughout the rest of the chapters of this study—I divided this chapter in three sections. Based on some of the difficulties witnesses in war crimes trials have to face, I first describe the challenges of NGOs providing support in this context. Then I conceptualize the changing meaning of human rights from a grand narrative promoted by the ICTY, to individualized stories of victims supported by human rights activists. Last, I draw on the case study of the International Center for

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<sup>4</sup> Nonetheless, the field gained very little traction besides a handful of scholars in the first half of the twentieth century, including Eugen Ehrlich, Nicholas Timasheff and George Gurvitch, among others.

<sup>5</sup> Mathieu Deflem, "Sociological Theories of Law," in *Encyclopedia of Law and Society: American and Global Perspectives*, ed. David Clark (Thousand Oaks, CA: Sage Publications, 2007), 1410–1413.

Transitional Justice (ICTJ) in order to discuss a general trend shift in transitional justice strategies in which restorative justice mechanisms have found their place within the broader discourse of the ICTY, and ultimately, the UN's retributive justice approach.

## **Witnesses, Victims and NGOs: A Bottom Up View of Human Rights**

One of the goals of creating the ICTY and prosecuting "persons responsible for serious violations of international humanitarian law ... [was to ensure that] such violations are halted and effectively redressed."<sup>6</sup> In other words, the punitive effect, in addition to the deterrence factor discussed in Chapter 3, aimed at bringing justice to victims and victims' families. Several authors, even until recently, have stressed this important function of the UN ad hoc tribunal. While Vesna Zimonjic criticizes delays in the ICTY's Radovan Karadžić case as a hindrance to the demands of justice by victims and survivors, Amnesty International announces in one of its statements after The Hague tribunal sentenced Croatian general Ante Gotovina<sup>7</sup> in April 2011, that justice has been brought to victims after all.<sup>8</sup> Such broad claims about victims and their call for justice, however, tell only part of the story, not fully appreciating the experiences and demands of victims and survivors after

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<sup>6</sup> Cf. UN resolution 827, UN Doc S/Res/827 (1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>, accessed January 3, 2012.

<sup>7</sup> See chapter 3 for more details on the case.

<sup>8</sup> Vesna Zimonjic, "War Crime Victims Stretch Wait for Justice," *Inter Press Service News Agency*, November 10, 2009; Amnesty International, "Croatia: Key International Court Ruling Delivers Justice to Victims of War Crimes", April 15, 2011.

mass atrocity. One of the recurring requests from victims' communities, such as the Association of the Women of Srebrenica—a non-profit organization representing the victims and survivors of the Srebrenica massacre in Bosnia and Herzegovina in 1995—is the excavation of their family members' remains so that they can be buried properly to mark a symbolic closure.<sup>9</sup> Thus, victims do not necessarily long for a sentence by the tribunal; especially, since many trials only affect a limited number of victims, leaving many other cases unprocessed. In fact, while in the Inter-American human rights system victims have the right to truth and justice, including not only trials, but also reparations<sup>10</sup>, reports by international organizations working in the former Yugoslavia, such as the Council of Europe, have made similar claims<sup>11</sup>; yet with little impact on actual policies to implement these victims' rights.<sup>12</sup>

In his book, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, Eric Stover discusses some of the issues that have surfaced vis-à-vis the demands to bring justice to victims and the work of the ICTY.<sup>13</sup> He focuses on the role of witnesses who have testified at the ICTY, thus providing several noteworthy observations which further underline why NGOs have emerged in the transitional justice space of the former Yugoslavia, which was a

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<sup>9</sup> See comments by an association's representative during the Question & Answer session at the BIRN regional conference, "Court Transparency and Media Responsibility," in Sarajevo, 1-3 September 2009.

<sup>10</sup> See the Inter-American Commission on Human Rights website at <http://www.oas.org/en/iachr/>, accessed on February 2, 2012.

<sup>11</sup> See for instance Jean-Charles Gardetto, *The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans*, Report - Committee on Legal Affairs and Human Rights (Council of Europe, January 12, 2011).

<sup>12</sup> See for instance Linda Popić and Belma Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina* (Sarajevo: Royal Norwegian Embassy in Bosnia and Herzegovina and Embassy of Switzerland in Bosnia and Herzegovina, 2010).

<sup>13</sup> Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2007).

space initially created by the ICTY's legal procedures. First, the author explains how witnesses have not always occupied a crucial role during past war crimes trials, such as the Nuremberg Trials after World War II. In fact, Justice Jackson was determined "to put on no witnesses that we could reasonably avoid."<sup>14</sup> At the time the intention of the Allies to stage war crimes trials was to showcase the atrocities committed by Nazi Germany as well as making sure that the world knew that justice had been done. In the end, it was an illustration of the Allied forces' power and their willingness to render victors' justice. Almost half a century later, international criminal justice rendered through the institutional framework of the ICTY was based on a very different strategy. The multipolar world that had emerged after the end of the Cold War called for a justice approach that was legitimate in the eyes of a diverse international community, and more importantly, from the region in question. Hence, during the trials at the UN ad hoc tribunal witnesses became very central to hold together certain cases the office of the prosecutor was processing, since the prosecution relied heavily on eyewitnesses. This was particularly important during the ICTY's first years of operation, while the conflict was still ongoing in the region and cooperation efforts of states in the former Yugoslavia were either inexistent or unreliable. Yet, this strategy also bore many shortcomings.

While there are several cases that could serve as an example here, Stover provides valuable background information for the Lašva valley cases, which refer to numerous war crimes committed by the Bosnian Croats against Bosnian Muslim civilians in the Lašva Valley in

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<sup>14</sup> Cited in *ibid.*, 19.

Bosnia and Herzegovina during the Bosnian war of 1992-1995.<sup>15</sup> The first round of ICTY trials related to these crimes concerned cases of high-ranking military personnel and political leaders, as the prosecution was trying to prove the chain of command and command responsibility. In the sentencing of the ICTY a local politician, Dario Kordić, was eventually found to be the planner and instigator of this plan. The prosecution drew less on eyewitnesses in these first few cases, but instead examined criminal design or plans by those in charge. The second round of trials, on the contrary, aimed at proving the guilt of “the so-called small fry, like the Kupreskic, the foot soldiers that allegedly committed atrocities on their own or while following orders.”<sup>16</sup> These prosecutions relied on eyewitness accounts, including fellow combatants who happened to be present as the perpetrator committed the crime. In this particular case, the dropout rate of eyewitnesses was very high<sup>17</sup> and those who testified during the trial were disappointed, as the initial sentences of the alleged low-level perpetrators were later overturned, acquitting them on appeal. Additionally, the limited capacity to carry out adequate witness protection was also expressed by death threats against some of the witnesses.<sup>18</sup>

At this point, it is important to briefly describe the initial logistical issues at the ICTY, as its staff tried to provide witness protection. In the previous chapter, I have mentioned some of the difficulties regarding courtroom space and salary payments of the staff. In fact, the ICTY’s early budgetary difficulties also resulted in improper preparation and handling of the

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<sup>15</sup> See also ICTY indictments relating to the case at <http://www.icty.org/case/bralo/4#ind>, accessed on June 12, 2010.

<sup>16</sup> Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, 108.

<sup>17</sup> Reasons for witnesses dropping out include: social pressure, fear and stigma, among others.

<sup>18</sup> Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, 106–108.

first witnesses from the Balkans to The Hague. According to Wendy Lobwein<sup>19</sup>, a former support officer at the victims and witnesses unit of the ICTY, as the first individuals arrived at the ICTY to testify the tribunal received them “without anything in place with regard to their physical and psychological comfort and security.”<sup>20</sup> Undoubtedly, in this first phase of the ICTY’s work, the tribunal was preoccupied finding witnesses across the region and bringing them to The Hague. This was a very elusive task, since many witnesses did not have the required travel documents, such as passports and visas. As the war was still ongoing in some of the parts of the region, it was a challenge to obtain any of these documents from the local authorities. One staff member of Lobwein’s team, drawing on a story of the initial set of witnesses, explained that they “put the first set of witnesses in bulletproof vests and got them in a helicopter to Split [in Croatia] where they could be photographed and issued identification, and then brought them back to Bosnia for transport to The Hague.”<sup>21</sup> Once they arrived in the Dutch capital, however, there were no witness waiting rooms. When they eventually built rooms, they were lacking bathrooms, smoking areas, and a cafeteria area, among others. Very little was done initially to ensure witnesses’ basic comfort during the trial process, thus not paying attention to the witness’ human dignity.

Notwithstanding, dignity in this context should also be looked at from a larger perspective and not only with regards to these basic needs of comfort and respect. In fact, the choice of a victim to get involved in the entire process of testifying during a war crimes trial has

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<sup>19</sup> Lobwein is now based in Cambodia, where she is coordinating the Witnesses and Experts support unit for the Khmer Rouge Tribunal.

<sup>20</sup> Cited in Julie Mertus, *Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina* (Washington, DC: Hunt Alternatives Fund, 2004), 15.

<sup>21</sup> Cited in *ibid.*



consequences that reach far beyond the act of appearing in the courtroom and either telling a narrative that provides evidence to the accusations or identifying alleged perpetrators. While many of the witnesses were also victims of war crimes, their statement during a trial was only recorded and archived as a piece of information in the larger mosaic of prosecuting and sentencing war criminals. They did not appear in their role as victims<sup>22</sup>, having suffered emotional and physical distress and bound to relive the past trauma again in the courtroom when they were asked to retell their version of the events. Instead, they were merely witnesses.<sup>23</sup> The role of female witnesses is telling in this regard.

Female testimonies have generally played a less important role in hearing proceedings at the ICTY. The percentage of women versus men who have given eyewitness testimony in a trial at The Hague is only around 21 percent.<sup>24</sup> The cases in which they were asked to testify primarily, unsurprisingly, were rape or sexual violence cases, such as the Foča case. During the massacres in the Foča region of Bosnia and Herzegovina committed by Serb military, police and paramilitary forces against non-Serb civilians during 1992 and 1994, many women and girls were sexually abused. They were held in so called rape camps, including the infamous Karaman's house, in which minors as young as age 15 were detained and raped repeatedly, including mass rapes.<sup>25</sup> These crimes were committed with the full

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<sup>22</sup> The notion of victim and victimhood, more generally, has drawn much scholarly attention, as alleged perpetrators have also claimed this status when telling their version of the events. See for instance Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*.

<sup>23</sup> Hendrik Kaptein and Marijke Malsch, *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate Publishing, Ltd., 2004), 133.

<sup>24</sup> Mertus, *Women's Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina*, 15.

<sup>25</sup> See also the ICTY ruling against Dragoljub Kunarac et al. at <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>, accessed November 3, 2011.

knowledge of local Serbian authorities, such as the head of the Foča police forces, Dragan Gagović, who was also indicted by the ICTY, but died during the attempt to arrest him in 1999.<sup>26</sup> Although the ICTY investigated and eventually established a legal precedent with rape charges in international criminal law with the Foča case in 2001, in the first phase of these investigations, the prosecution focused on other mass atrocities, such as the execution of civilians.<sup>27</sup> Furthermore, similar to the witness-victim issue mentioned above, a report of the Institute of War & Peace Reporting points to the limited moral support provided by the judiciary and few convictions despite wide-spread practices of rape as an ethnic cleansing tool during the war.<sup>28</sup> With its eyes focused on the advancement of legal norms of international criminal law, the work of the ICTY did not leave much room for individualized support of witnesses (despite the creation of a victim support unit at the ICTY) and the tribunal therefore relied for the most part on the cooperation of NGOs to provide adequate assistance and support.<sup>29</sup> This legalistic approach and the ambition to implement the rule of law—which many times leaves the needs and demands of individual victims to the side—have created a strong relationship between NGO representatives and the victim community. The following example of a court contempt case of several Croatian journalists in this context highlights the critical response of activists to the formalist strategy of the ICTY.

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<sup>26</sup> Human Rights Watch, “Foca Confronts Its Past”, October 14, 2004, <http://www.hrw.org/en/news/2004/10/14/foca-confronts-its-past>.

<sup>27</sup> For a detailed analysis on the role of women at the ICTY trials, see Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Surrey, PT: Ashgate Publishing, 2011).

<sup>28</sup> Institute for War and Peace Reporting, *International Justice Failing Rape Victims*, Special Report, International Justice - ICTY (Washington, DC, February 15, 2010), <http://iwpr.net/report-news/international-justice-failing-rape-victims>.

<sup>29</sup> International Criminal Tribunal for the former Yugoslavia, *Annual Report* (The Hague, Netherlands, 1994), 24–26.

In 2005, the ICTY indicted several Croatian journalists for contempt of court, as they had allegedly revealed the identity and parts of the statements of two protected witnesses who testified in the Blaskić<sup>30</sup> case.<sup>31</sup> One of the indicted journalists was Josip Jović, the former editor-in-chief of Slobodna Dalmacija a Croatian daily newspaper. He continued to publish extracts of the transcript of the testimony of the protected witness, the then-Croatian president Stjepan Mesić, even after the tribunal had ordered him to stop any future publication of the confidential material, and sentenced him to pay a fine of 20,000 Euros. Interestingly, while the ICTY affirmed in its sentence that the deliberate violation of a court order would undermine the capacity of the ICTY to protect its witnesses, one of the judges expressed concerns about the inappropriate use of court resources. As a result, in the course of the trial the prosecution requested to withdraw the indictments against three of the five initially indicted journalists, stating that it would be in the interests of justice and judicial economy. The tribunal then accepted the motion.<sup>32</sup> A similar contempt case involved for instance a former ICTY spokesperson, Florence Hartmann<sup>33</sup>, who published confidential information from her time at the tribunal in her book on the politics of the ICTY.<sup>34</sup> In other cases, however, such as the judgment of Jelena Rašić, former case manager

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<sup>30</sup> In this case the ICTY sentenced Tihomir Blaškić, a Bosnian Croat army officer, to 45 years in prison in 2000. The ICTY found him responsible for war crimes as part of the Lašva valley ethnic cleansing. His sentence was commuted to 9 years after the appeal in 2004, as his command responsibility for most of the charges was found non-existent.

<sup>31</sup> See for instance Ivica Marijačić and Markica Rebić, contempt case at <http://www.icty.org/sid/8809>, accessed May 5, 2011.

<sup>32</sup> For the summary of the sentence see the ICTY website at [http://www.icty.org/x/cases/contempt\\_jovic/tjug/en/060830\\_summary\\_en.pdf](http://www.icty.org/x/cases/contempt_jovic/tjug/en/060830_summary_en.pdf), accessed December 8, 2011.

<sup>33</sup> She was the official spokesperson to Carla Del Ponte, chief prosecutor of the ICTY, from October 2000 until October 2006.

<sup>34</sup> Florence Hartmann, *Paix Et Châtiment: Les Guerres Secretes De La Politique Et De La Justice Internationale* (Paris: Flammarion, 2007).

of the defense team of Milan Lukić<sup>35</sup>, the contempt of court cases play a crucial role to the core function of the tribunal to carry out its mission. In this case, Rašić pled guilty to having bribed witnesses to give false testimonies during the Lukić trial.<sup>36</sup>

In the first two cases, the ICTY judgment—despite its legal dimension of violating court orders—had, more importantly, a political dimension. The protected witnesses in the Croatian case were not victim-witnesses, but public figures. Human rights activists in Croatia reacted immediately to this situation, stating that “[i]t compromises the whole concept of witness protection,” which in their eyes was a measure to make sure that vulnerable victim witnesses would not be harassed, threatened or harmed upon their return home by malevolent neighbors or other individuals. Activists were thus defending the journalists’ freedom of expression.<sup>37</sup> While high-profile witnesses deserve the right to be protected, it is easy to imagine that a head of state benefits already from high-security measures even after he or she leaves office. Witness protection measures for ordinary citizens, however, are still at a deplorable stage across the Balkans.<sup>38</sup>

Given the lack of a state-sponsored support system, it is little surprising then, that NGOs have stepped in offering witnesses helpful assistance during legal proceedings, ranging from arranging travel to the war crimes court to providing psychological support. The emotional support is important, as many of the witnesses have never traveled outside their own

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<sup>35</sup> He was the head of the Serbian paramilitary group White Eagles and sentenced to life in prison. He was in particular responsible for crimes against humanity during the Bosnian war notably in the municipality of Višegrad between 1992-1995.

<sup>36</sup> See ICTY website at <http://www.icty.org/sid/10907>, accessed February 6, 2012.

<sup>37</sup> Cruvellier and Valiñas, *Croatia: Selected Developments in Transitional Justice*, 12.

<sup>38</sup> Gardetto, *The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans*.

country and are generally unfamiliar with the court procedures.<sup>39</sup> Additionally, the testimony, far from being a cathartic moment, is often only the beginning of the reemergence of post-trauma, as witnesses relive their past in hearings while exposed to the sometimes technical and discomfiting questions from the prosecution as well as the defense. In the following I will draw on the case of the Humanitarian Law Center, a Belgrade-based human rights organization that has helped victims since 1992. The center's executive director, Nataša Kandić, is a long-time Serbian human rights activist who was already seriously involved in fighting human rights abuses under Tito's regime long before she was recognized internationally for her instrumental work during in the anti-war movement, including the Candles for Peace Campaign in 1991 and the Ribbon March in 1992. Ever since, she has pursued a provocative working style, not missing an opportunity to reveal elusive war crimes cases, which has irritated many fellow Serbian citizens, in particular military leaders.<sup>40</sup> When she founded the Humanitarian Law Center, George Soros's foundation, the Open Society Institute, provided the necessary financial support to get the center off the ground.<sup>41</sup> Since then, the center has managed to build an extensive donor list, including governmental development agencies, embassies, several foundations and international organizations, such as the UN and EU.<sup>42</sup> All these funds are necessary to implement her agenda of documenting past and present human rights and humanitarian

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<sup>39</sup> Since the war crimes occurred across the former Yugoslavia and as of today, several new states have emerged. Yet, war crimes trial often require witnesses from bordering countries thus requiring the proper travel documents and enough courage to leave to go to a former enemy country.

<sup>40</sup> See interview with Nataša Kandić on 19 May 2011. Rachel Tiplady, "Natasa Kandic," *Bloomberg Businessweek.com*, May 30, 2005, sec. 2005 Stars of Europe - Agenda Setters, [http://www.businessweek.com/magazine/content/05\\_22/b3935405.htm](http://www.businessweek.com/magazine/content/05_22/b3935405.htm).

<sup>41</sup> Open Society Institute, *Building Open Society in the Western Balkans 1991-2011* (New York, 2011), 13.

<sup>42</sup> For more details on the donors go to the center's website at [http://www.hlc-rdc.org/?page\\_id=14397](http://www.hlc-rdc.org/?page_id=14397), accessed February 1, 2012.

law violations across the former Yugoslavia. As mentioned above, victim-witnesses particularly benefitted from her support.

The repeated involvement in witness protection activities led the Humanitarian Law Center's team to write a report outlining a counseling and legal representation guide. It includes detailed case studies of several Serbian war crimes trials and stresses the importance of Humanitarian Law Center's tireless commitment:

The victim participation was critically important to determine accountability of the accused and acknowledge crimes committed against the victims. Legal representation proved to be very important also because of attempts of prosecutors and the defense of the accused to hide or misinterpret facts regarding Serbian institution's role (police and the military) in armed conflicts on the territory of the former Yugoslavia.<sup>43</sup>

The report further underlines the importance of not only encouraging victims, but also securing and identifying them. More precisely, in the Suva Reka Case<sup>44</sup> for which the Serbian Office of the War Crimes Prosecutor initiated investigation in 2005, Nataša Kandić was unable to get the consent of victim witnesses to testify at the court in Belgrade. A former ICTY witness, who was part of the Suva Reka community refused to testify before a Serbian court and had enough influence to impose his views to other potential victim witnesses.<sup>45</sup>

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<sup>43</sup> Humanitarian Law Center, *Victim/Witness Counselling and Legal Representation: A Model of Support - Project Implementation Report* (Belgrade, February 27, 2007), 1.

<sup>44</sup> This case refers to the Suva massacres when Albanian civilians were killed by Serbian police forces on 26 March 1999 in Suva Reka, Kosovo.

<sup>45</sup> Humanitarian Law Center, *Victim/Witness Counselling and Legal Representation: A Model of Support - Project Implementation Report*, 10.

Moreover, in the several other cases before the Serbian War Crimes Chamber related to war crimes committed in Bosnia and Herzegovina, the Humanitarian Law Center was able to convince several victims, former prisoners, to travel from BiH to Belgrade in order to testify at a hearing. Yet, two members of the group refused to embark on the journey, stating they did not trust Serbian institutions. Upon arrival, the group was afraid to be under the protection of the Serbian interior ministry and the witness protection unit. All of them were anxious to be escorted by Serbian police, requesting the director of the Humanitarian Law Center to accompany them.<sup>46</sup> While the above examples pertinently illustrate the problems related to witnesses in war crimes trials and the tasks and challenges NGOs are confronted with when striving to support victims, activists have also engaged in victim support outside the courtroom, which I will discuss below.

NGOs across the regions have established programs and projects in order to raise victims' voices to respond to practical needs in each of the post-conflict contexts, including for instance Croatia, Bosnia and Herzegovina and Serbia. However, the scope and nature of their work varies, as the conditions on the ground in each of the countries' societies faces different challenges.<sup>47</sup> To emphasize some of the programmatic differences I draw on the Croatian case of the human rights organization, Documenta, which was created in the mid-

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<sup>46</sup> Ibid., 3–4. The report also goes into issues of legal representation and war crimes trials monitoring.

<sup>47</sup> Croatia became an ethnically homogenous country after Operation Storm, a military operation in 1995, chasing the remaining Croatian Serb population off Croatia's current territory. Bosnia, on the contrary, has still all three main ethnic groups on its territory, including Bosnian Muslims, Bosnian Croats and Bosnian Serbs, causing political and social tensions. Serbia has remained homogenous as well, with the exception to its former Kosovo province, in which tensions rose between Kosovo Serbs and the Albanian population.

1990s.<sup>48</sup> In comparison to the Humanitarian Law Center above, this organization's activities—despite its involvement in judicial processes, such as trial monitoring—focuses in particular on a project called 'Oral History,'<sup>49</sup> which consists of documenting (often untold) memories of the war. The goal of this project, as put by the activists, is

to hear and to save from oblivion the memories and experiences and put them back in the form of publications or videos in order to affirm their view of the war and documented the multifaceted nature of events.<sup>50</sup>

In order to document and collect these personal accounts, a team of trained human rights activists travel through the different rural and urban regions of Croatia, seeking individuals and groups to record their experience and memories of the war. It suffices to say that in certain cases, victims and survivors relive their trauma, requiring team members to also function as psychologist. This constitutes a difficult balancing act, combining the need to work for a greater goal, that of transmitting different stories of past mass atrocities to society at large, while at the same time providing suffering individuals psychological support. More recently, the NGO has uploaded an entire series of narratives in form of video clips onto its website, including a selection of diverse stories. Some narratives or testimonies of the past, however, can be shocking, traumatizing and accusatory. In post-conflict Croatia, where a culture of denial and oblivion of past war crimes has until now

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<sup>48</sup> Other organizations, such as the Research and Documentation Center in Sarajevo, Bosnia and Herzegovina, could also have served as an empirical example.

<sup>49</sup> The Humanitarian Law Center also has documentation programs, but its past work has mainly focused on witness support and legal representation.

<sup>50</sup> See Documenta website at <http://www.documenta.hr>, accessed on September 12, 2011. Translated by the author.



dominated the political scene<sup>51</sup>, Documenta carefully chose a select number of testimonies for their website. This auto-censorship could be criticized; yet, it is a cautiously tailored strategy that the activists at the Zagreb-based NGO pursued to avoid jeopardizing the slow and elusive process of dealing the past.<sup>52</sup> In contrast to the Croatian case, the collection of testimonies and narratives of victims during the Bosnian war by the Research and Documentation Center, a Bosnian NGO documenting human war losses, are entirely kept locked away from the public in the center's archives. Only researchers and government officials are granted access.<sup>53</sup> It serves as an example of how the political situation in BiH is still very unstable, making a public debate on memories of the past very difficult.<sup>54</sup>

Interestingly, the origins of Documenta's victim-oriented work go back to activism that focused on conflict resolution practices during the Balkan war. In fact, carried by political activism and pacifist movements of the 1980s in the Western Balkans<sup>55</sup>, Katarina Kruhonja (director of the Center for Peace, mentioned below) and Vesna Teršelić (Documenta's current director) launched a Croatian peace and non-violence movement at the outbreak of

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<sup>51</sup> Until last fall, the conservative party HDZ, led by Jadranka Kosor, who has been directly implicated in the country's war of independence, promoted the Homeland War discourse (see chapter 3 for more details). Since the last elections in December 2011, however, a left-wing-led coalition has taken over the reins of the government, which has already engaged in a more constructive dialogue to deal with the past.

<sup>52</sup> See informal discussions with Vesna Teršelić, the director of the NGO in May 2011.

<sup>53</sup> This is also true for most of the archived testimonies of victims and survivors collected by the Humanitarian Law Center.

<sup>54</sup> See interview with Research and Documentation Center director, Mirsad Tokača on 17 May 2011 in Sarajevo.

<sup>55</sup> Mladina (a political radical magazine), Pankriti (a punk band) and NSK (Neue Slovenische Kunst or New Slovenian Art) are some of the examples that constituted driving vectors of a new social movement in the Slovenian Republic of Yugoslavia. In the Ljubljana trial, or the 'proces proti četverici' (the Trial against the Four), for instance, four men (some of which were employed by the provocative magazine Mladina) were arrested in 1984 for publicizing sensitive military documents found at the Mladina offices. While this incident boosted the publication's reputation in Slovenia and across Yugoslavia, it paradoxically underlines the growing pacifist support to counter rising national tendencies during this period and increasing Slovenian aspirations for independence from the federation.

the war in 1991.<sup>56</sup> The latter, of Slovenian descent, was instrumental in setting up the Antiwar Campaign of Croatia (AWCC)<sup>57</sup> in 1991, which today, consists of a network of over two dozen member organizations. AWCC engages, among other things, in educational activities for nonviolent conflict transformation, human rights protection, social reconstruction and reconciliation, support for refugees and displaced persons. In particular, it aims at acting as a spokesperson and missing link between refugees and governments and to provide practical conflict resolution training.<sup>58</sup> Yet, as a Croatian history professor from the University of Rijeka, Vjeran Pavlaković, underlined, all of these peace-building activities were the collective work of a young and dynamic network of activists who lend their help and support to this cause.<sup>59</sup> The second woman, Kruhonja, a physician specialized in nuclear medicine from the East Slavonia region in Croatia, eventually created the Centre for Peace, Non-Violence and Human Rights in Osijek in 1992. According to her vision, she believes that

We, as citizens or members of people's organizations, can preserve and nourish basic principles needed for long-term efforts aimed at transforming a totalitarian and war-torn society into a democratic one.<sup>60</sup>

While her words emphasize the political engagement and grassroots efforts in order to bring about changes in society from within, certain authors have been more critical about conflict resolution and non-violence activism, arguing that the restrained political

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<sup>56</sup> Other peace movements, in the Eastern parts of Yugoslavia, include the famous Candles for Peace Campaign in 1991 in Belgrade (Serbia), led by Serbian human rights activist Nataša Kandić.

<sup>57</sup> Also referred to as ARK in Croatian, which stands for Anti Ratna Kampanja.

<sup>58</sup> Goran Božičević, "Antiratni čin Prkosa," *H-Alter*, July 5, 2010, <http://www.h-alter.org/vijesti/ljudska-prava/antiratni-cin-prkosa>.

<sup>59</sup> See interview with Vjeran Pavlaković, historian (University of Rijeka), and member of the RECOM for overview of human rights activism in Croatia. 6 September 2010.

<sup>60</sup> The Right Livelihood Award, <http://www.rightlivelihood.org/kruhonja.html>, accessed September 14, 2010.

interpretation of such activism would result in a lack of engagement with the political party sphere.<sup>61</sup>

The current interactions of this generation of activists on the local, national, regional and international level with lawmakers, practitioners, scholars and other activists (which I expand upon by further drawing on their transnational fact-finding initiative in the next chapter) illustrates that these concerns were unfounded. Notwithstanding, the early main goal of the AWCC, to stop the war, could not be maintained in the long run, as the members of the coalition pursued diverging sociopolitical goals.<sup>62</sup> While Kruhonja's center was originally part of the AWCC, it eventually became an independent body. One of the reasons for this is the large number of activities in the city of Osijek, as well as across the country and the region, which requires a local anchor to work effectively. While still remaining associated with the AWCC, many other members of the coalition also pursued their own sociopolitical goals, leaving behind a loosely structured network.<sup>63</sup> The Human Rights House in Zagreb, Croatia, established in 2008<sup>64</sup> is a good example of the diverging interests of each of the original AWCC members. While several non-governmental human rights organizations, most of which were part of the AWCC founders, share a common space—a

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<sup>61</sup> Bogdan Denitch, "Seeds of Change in the Former Yugoslav States," *War Report* 27 (1994): 6–7.

<sup>62</sup> Srdjan Dvornik, *Croatia: The Politics of the Yugoslav Breakup: War and Reconstruction in Yugoslavia* (Institute for War & Peace Reporting, 1992).

<sup>63</sup> In 2006, AWCC's 15th anniversary, its members, led by one of its founders, Vesna Teršelić, gathered in order to revive the organization's political momentum and discuss the fate of its archives, in order to create an institutional memory and establish a legacy about the movement for future generations Marina Kelava, "Antiratna Kampanja Hrvatske: 15 Godina Poslje," *H-Alter*, April 24, 2006, <http://www.h-alter.org/vijesti/hrvatska/antiratna-kampanja-hrvatske-15-godina-poslije>.

<sup>64</sup> Already in 2001, several human rights organizations expressed their interest in collaborating and signed an open letter to create a human rights house in Zagreb. This project is in large part supported by funding from the Norwegian Ministry of Foreign Affairs.

building located east of the Croatian capital's center—the implemented programs by each NGO do not (or barely) overlap, ranging from Documenta's past war crimes issues to B.a.b.e.'s<sup>65</sup> focus on present gender and equality problems in Croatia.<sup>66</sup>

In the above section, I provided several illustrations of some of the issues victims face within society when grappling with past mass atrocities. Starting with witness support and protection problems not only in places such as The Hague, but also on the national level, I segued into related activities that NGOs are performing to help create a voice for victims across the region. Subsequently, I shift from the more empirical and descriptive analysis to a conceptual framework of the changing notion of human rights among activists. In fact, I conceptualize the NGOs' awareness of shortcomings and their reinterpretation of the meaning of human rights to bring the victim's voices into the center of attention. I do this also in view of the next chapter, when I discuss the fact-finding initiative spearheaded by these NGOs, its challenges and the significance of the activists understanding of human rights in their particular context.

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<sup>65</sup> B.a.b.e. stands for "Be active, be emancipated."

<sup>66</sup> See formal and informal interviews with some of the leaders of the member organizations conducted between August 2010 and January 2011.

## Conceptualizing the Democratization of International

### Humanitarian Law and Human Rights

In the past, some literature has already grappled with normative issues on the international level and examined *how* globally institutionalized norms are applied on a national and even local level. Certain authors argue, for instance, that

human rights norms are well institutionalized in international regimes and organizations, and finally they are contested and compete with other principled ideas.<sup>67</sup>

Focusing on transnational advocacy networks, they then delineate the process of implementing—or rather socially reconstructing—international law on a domestic level.<sup>68</sup> These scholars thus explore the conditions of how transnational actors are able to change domestic settings to build an argument about transnational network's norm diffusion. Some parts of their conceptual framework are indeed relevant to the case of the former Yugoslavia—such as the general spillover effect of international humanitarian law in domestic courts. Yet, it is important to note that in the case of my selected geographic area, region-specific characteristics apply. Perhaps the most striking distinction to be made here: domestic NGOs working on war crimes issues in the Balkans, despite their openness towards international actors and institutions, are rooted in particular sociopolitical contexts

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<sup>67</sup> Thomas Risse, Steve Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, United Kingdom: Cambridge University Press, 1999), 4.

<sup>68</sup> Kathryn Sikkink, "Construction of Legal Rules," in *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, ed. Yves Dezalay and Bryant G. Garth (Ann Arbor, MI: University of Michigan Press, 2002), 38.

that show less of a international-national linkage than previously expected by scholars.<sup>69</sup> While past research focused on large categorizations, more recent research has explored increasingly and extensively the sociology of individuals, groups and processes—including courts and judges, among others. Yves Dezalay and Bryant Garth, for instance, integrate Bourdieusian concepts—such as social capital and habitus—in order to show that “social capital and political capital can be turned into legitimate legal capital.”<sup>70</sup> Drawing on Bourdieu’s work they show that the higher education system is a space in which social and political capital is rearranged, and that law schools have therefore become central to the legitimacy of the law.<sup>71</sup> According to these concepts, the transformation of ideas is thus contingent on education, time and space.

At this point, it suffices to say that academic work on concepts traveling through time and space is not a new idea. Edward Said has extensively written on the topic, providing a detailed archeology of traveling theory, discussing particularly the scholarship of Georg Lukács, a 20<sup>th</sup>-century Hungarian Marxist philosopher, whose ideas reverberated during the heydays of French postconstructuralism in the 1960s and 1970s. In the following I will outline some of Said’s conceptual underpinnings to help us understand the importance of changing and adapting existing ideas into a new temporal and spatial context, which I consequently apply to my case study. One immediate and important question in this regard is: what exactly is theory? “Theory for [Lukács] was what consciousness produced, not as an

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<sup>69</sup> *The Power of Human Rights: International Norms and Domestic Change*.

<sup>70</sup> Yves Dezalay and Bryant G. Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor, MI: University of Michigan Press, 2002), 264.

<sup>71</sup> *Ibid.*

avoidance of reality but as a revolutionary will completely committed to worldliness and change,” Said wrote.<sup>72</sup> This is a relatively large meaning of theory, but it underlines Lukács’s concern about applying theory to the real world. In fact, the ideas he referred to were eventually implemented into policies, social practices or other tangible ways for society to regulate the collective. His interpretation is therefore very useful for the transformation of international human rights and criminal law into social practices in the former Yugoslavia.

Despite Said’s different stages, for the purposes of my current study I concentrate only on the *process* itself, that is the moment when ideas get a new use and are employed in a new place by different users.<sup>73</sup> This excludes origins, travel distance and conditions. Time and space remain nonetheless crucial for understanding the phenomenon, as Said made clear:

I am arguing, however, that we distinguish theory from critical consciousness by saying that the latter is a sort of spatial sense, a sort of measuring faculty for locating or situating theory, and this means that theory has to be grasped in the place and the time out of which it emerges as a part of that time, working in and for it, then, consequently, that first place can be measured against subsequent places where the theory turns up for use.<sup>74</sup>

For my analysis, the origins of the legal and conceptual underpinnings of international human rights, and in particular international humanitarian law, are secondary and the brief

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<sup>72</sup> “Traveling Theory,” *The World, the Text, and the Critic* (1983): 165.

<sup>73</sup> See Chapter 5.

<sup>74</sup> Said, “Traveling Theory,” 173–174.

discussion of its evolution in chapter 3 is largely sufficient for my analytical purposes.<sup>75</sup> It is the question of when, how and why the human rights legacy is applied by various NGOs across the region that is of particular interest to me. For this, I will trace the historical and sociopolitical development of the truth versus justice debate below using an empirical case study. As mentioned earlier, however, my goal is not to expand the discussion on the normative foundations of each of the concepts. Rather I aim at sketching a conceptual crossroads when jurists, scholars and peace-and-conflict practitioners initiated a dialogue in the early 1990s that fueled important changes in policy strategies in the field of transitional justice. As a matter of fact, not only did it lead to the integration of the concept of truth commissions into the repertoire of state-centric institutions, such as the UN, but it also helped shape and define a less politicized notion of truth commissions.

## **From Truth-Seeking to Fact-Finding<sup>76</sup>: The Rise of the International Center for Transitional Justice**

In chapter 3 I have laid out the political realities of why truth commission did not appear as a viable option in the war-torn former Yugoslavia. Bearing in mind these sociopolitical

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<sup>75</sup> See for instance Teitel, "Transitional Justice Genealogy"; Dezalay and Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*; Sikkink, "Construction of Legal Rules."

<sup>76</sup> The notion of truth has been widely debated in the literature. The title here refers to the attempt of scholars and practitioners to establish mechanisms that avoid biased narratives of the past, but instead focus on revealing the facts about mass atrocities. See for instance Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*; Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*.



conditions mentioned earlier, next I examine how international legalism in transitional justice—dominated by legal scholars and jurists—has seen the rise of conflict-resolution practitioners in the field<sup>77</sup>, who in turn have pursued their agenda, advocating for restorative-oriented instruments in transitional and post-conflict conditions. In order to emphasize this trend, below I present a brief history of the emergence of the ICTJ, a 2001-created US-based non-profit organization with the goal of “assist[ing] countries pursuing accountability for past mass atrocity or human rights abuse.”<sup>78</sup> While the ICTJ provides services in post-conflict or transitional societies, it also works in established democracies where past injustices still remain unresolved. During the past decade, the New-York-headquartered organization has grown rapidly, opening field offices across the world, including Beirut, Bogotá, Brussels, Cape Town, Geneva, Jakarta, Kampala, Monrovia, Nairobi, and Nepal.<sup>79</sup> Although it serves as an excellent example to illustrate these developments in the field of transitional justice, I could also have used other, less prominent organizations as my empirical case.<sup>80</sup>

The Center opened its doors a year after a strategy meeting organized by the Ford Foundation in April 2000. During this workshop, over two-dozen participants, consisting of legal scholars, human rights activists, and practitioners, among others, came together to brainstorm about ways to put the concepts of the quickly rising field of transitional justice to practice. The overall consensus reached at the meeting consisted of large support of the

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<sup>77</sup> Charles Tenenbaum, *La Médiation Internationale. Acteurs Et Pratiques De La Résolution Des Conflits* (Paris: Presses de Sciences Po, 2012).

<sup>78</sup> International Center for Transitional Justice, *Annual Report 2004/2005* (New York, 2006), 3.

<sup>79</sup> See ICTJ website at <http://ictj.org/about/contact>, accessed December 6, 2011.

<sup>80</sup> See for instance organizations such as Interpeace, swisspeace, or TRANSCEND, among others.

participating workshop members to establish an organization whose work centers on transitional justice. As a consequence, the Ford Foundation hired three consultants who eventually became co-founders of the center to develop a business plan for such an organization. When they applied for funding for various grants to support their project, they managed to receive funding for their original 5-year proposal from the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, the Carnegie Corporation of New York, the Rockefeller Brothers Fund, and the Andrus Family Fund. The organization's total revenue for 2001 was about 5 million US dollars of which 4 million dollars were a grant of the Ford Foundation to the Tides Center, a San-Francisco based non-profit organization specializing in launching NGOs.<sup>81</sup>

All three co-founders had gained extensive experience working in transitional and post-conflict contexts.<sup>82</sup> First, there was Alex Boraine, a South African politician who became its first president, who was instrumental in crafting the South African truth and reconciliation commission and was appointed in 1996 by President Nelson Mandela to serve as the TRC's deputy chair under chairman Archbishop Desmond Tutu for two years. At present, he remains involved with the organization, sitting on its advisory board. Then there was Priscilla Hayner, an expert on truth commission who strategically published a comparative study of 20 truth commissions the year of the center's creation.<sup>83</sup> She also held different director positions at the ICTJ in the past. The third co-founding member is Paul van Zyl, a 'pracademic' currently directing the New York University School of Law's Transitional Justice

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<sup>81</sup> Ford Foundation, *Annual Report* (New York, 2001), 127.

<sup>82</sup> See informal conversation with ICTJ official in March 2011.

<sup>83</sup> Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*.

Program. Growing up under the South African apartheid system, he was trained as a lawyer and has worked as an advisor to many NGOs and governments. Since its creation, the center has been a social platform for transitional justice professionals, including prominent figures such as Juan Méndez (former political prisoner under the Argentinean military regime, General Counsel at Human Rights Watch, UN Special Rapporteur for the Prevention of Genocide—all well before he became president at the ICTJ—and currently UN Special Rapporteur on Torture, among others) and its current president David Tolbert (a former UN employee who served as Assistant Secretary General and former Deputy Chief Prosecutor at the ICTY).

Although the mission statement of the ICTJ emphasizes that it “assists in the development of integrated, comprehensive, and localized approaches to transitional justice,”<sup>84</sup> the ICTJ provides consulting services around the world to advise governments and non-state actors on different strategies to employ adequate tools during the post-conflict transition process.<sup>85</sup> In the case of the former Yugoslavia, Eduardo Gonzalez, a former member of the Peruvian truth and reconciliation commission and director of the transitional justice and memory program at the ICTJ, has consulted for the Coalition for RECOM Initiative in the Balkans several times. In addition to traveling to Belgrade, Serbia, he has also supported several transitions in regions ranging from Africa to Southeast Asia.<sup>86</sup> While ICTJ sponsored workshops focus on local contexts, needs and capacity building, its professionals, drawing

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<sup>84</sup> International Center for Transitional Justice, *Annual Report 2004/2005*.

<sup>85</sup> See for instance Sandrine Lefranc, “La Professionnalisation D’un Militantisme Réformateur Du Droit: L’Invention De La Justice Transitionnelle,” *Droit Et Société*, no. 3 (2010): 561–589.

<sup>86</sup> See interview with Eduardo Gonzalez on 10 September 2010 in Belgrade, Serbia. See also financial report of RECOM available at <http://zarekom.org/documents/Financial-Report.en.html>, accessed November 3, 2011.

oftentimes on their own extensive experience in transitional contexts, have contributed to the construction of a globalized discourse of transitional justice. In this context, chapter 5 and 6 further discuss how the composition of the Peruvian truth and reconciliation has served as a model during the constitution phase of the RECOM Initiative.

As I have shown above, some of the center's past and current members are strongly implanted in the international community, particularly UN institutions. The experts' sphere of influence within the UN structure has led to the introduction of these concepts to policy and strategy guidelines. As a case in point, one of the ICTJ's co-founders, Priscilla Hayner, has also worked as a consultant for the Office of the UN High Commissioner for Human Rights. In a report published in 2004, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, then-Secretary General, Kofi Annan, not only defines key terms, such as transitional justice, retributive justice and restorative justice, but it also integrates all of these tools into the international repertoire to deal with post-conflict settings around the world. The publication of this report nicely illustrates the concept of traveling ideas mentioned in the previous section of this chapter. However, as I will discuss in chapter 5, the integration of these tools into policy strategies at the international level, such as the UN, does not imply that this evolution necessarily translates to the local level. In fact, international organizations in the former Yugoslavia were reluctant to the fact-finding initiative RECOM. To this end, the selected approach in the report still emphasizes the rule of law and retributive justice mechanisms as the main objective. It remains a very state-centric model. In fact, it is only after an extensive discussion of the rule of law and the

lessons learned from ad hoc war crimes tribunals and the current work at the ICC that Annan provides two short paragraphs on restorative justice measures. One evokes the importance of fact-finding to cope with past mass atrocities:

Another important mechanism for addressing past human rights abuses is the truth commission. Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centered approach and conclude their work with a final report of findings of fact and recommendations. [...] Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.<sup>87</sup>

The subsequent paragraph enumerates the conditions that have to be met in order for it to be successful:

Factors that can limit these potential benefits include a weak civil society, political instability, victim and witness fears about testifying, a weak or corrupt justice system, insufficient time to carry out investigations, lack of public support and inadequate funding. Truth commissions are invariably compromised if appointed through a rushed or politicized process. They are best formed through consultative processes that incorporate public views on their mandates and on commissioner selection. To be successful, they must enjoy meaningful independence and have credible commissioner selection criteria and processes. Strong public information

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<sup>87</sup> This definition concisely captures Priscilla Hayner's analysis of truth commission aims, see *Unspeakable Truths: Confronting State Terror and Atrocity*, 21.

and communication strategies are essential to manage public and victim expectations and to advance credibility and transparency. Their gender sensitivity and responsiveness to victims and to victims of discrimination must be assured. Finally, many such commissions will require strong international support to function, as well as respect by international partners for their operational independence.<sup>88</sup>

Particularly the last sentence of the second paragraph, stressing the need for international actors, underlines how these academics have established and consolidated their expertise in the field. Much like Bourdieusian concepts in the higher education system that explain education, time and space as central variables for the legitimacy of the law in Dezalay and Garth's work mentioned earlier,<sup>89</sup> transitional justice practitioners have sought to legitimize their status and expertise. The case of the current ICTJ director, David Tolbert, illustrates this trend. In an interview given for the ICTJ's 10-year anniversary, he describes the tasks of his center as a valuable addition to the work of the ICC and other ad hoc tribunals. Their work, in his words, "is now much more focused on making complementary work on the ground."<sup>90</sup> The implementation of this groundwork, however, is a very elusive process.<sup>91</sup> As I will show in the next chapter, obstacles to put transition models into practice range from external lack of support to internal differences of involved actors. These global trends shifts of ideas including the introduction of the transitional justice concept to the post-conflict discourse in international relations are therefore an important evolution. This is particularly

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<sup>88</sup> Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (United Nations, 2004), 17.

<sup>89</sup> Dezalay and Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*.

<sup>90</sup> Geraldine Coughlan, "ICTJ: One Decade of Justice," *Radio Netherlands Worldwide*, April 22, 2011, <http://m.rnw.nl/international-justice/node/41924>.

<sup>91</sup> As a case in point, on March 23, 2012, the UN Human Rights Council appointed Pablo de Greiff as the first Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence.

true for the integration of fact-finding bodies into the repertoire of international organizations, such as the UN. The implications and consequences of this global trend will also help us to better understand the human rights activist's struggle to establish the regional fact-finding initiative RECOM, which I discuss next.

## **Conclusion**

In this chapter, I looked at accountability practices of different NGOs across the former Balkan region to highlight how these activists have not only helped to promote the human rights discourse of fighting impunity and war crimes, but more importantly, how they have also contributed to strengthen bottom-up approaches. Humanitarian law and human rights as interpreted by the early ICTY cases have therefore gained a new victim-centered dimension. By redefining the meaning of who should be the object in focus, NGOs have taken the first steps towards democratizing human rights. They have underlined the importance of the local space and increased the victims' voices in societies across the region. The first part, which discussed the difficulties witnesses (who are also often former war victims) have to face in war crimes trials, also described the challenges of NGOs that provide support in this context. After the more empirical and descriptive analysis, I provided a theoretical framework to conceptualize the changing meaning of human rights from a grand narrative, promoted by the ICTY, to individualized stories of victims supported by human rights activists. In the last part, I pointed to a broader shift in transitional justice

strategies in which restorative justice mechanisms have found their place within the broader discourse of the ICTY's retributive justice approach. In Chapter 5 I will explore the politics during the campaign to establish a fact-finding body across the former Yugoslavia, focusing on internal and external difficulties of NGOs to expand their sphere of influence and continue to transform the human rights discourse.



# Chapter 5

## Afraid to Cry Wolf: The Struggle of Transnational Accountability Efforts<sup>1</sup>

*"If he has a conscience he will suffer for his mistake. That will be punishment-as well as the prison."<sup>2</sup>*

In the previous chapter, I have analyzed several victim issues in trial processes and the role of NGOs supporting victims in these retributive justice settings. In fact, despite the ICTY's advocacy and strategy to account for past war crimes and human rights violations and the spillover effect of international criminal law into domestic judicial systems in the region<sup>3</sup>—as

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<sup>1</sup> The author is grateful for Iva Vukušić's research assistance and editorial suggestions. The author also wishes to thank Jo-Marie Burt, Earle Reybold, Olga Martin-Ortega, Peter Mandaville, Harvey Weinstein and Nahla Valji for reading earlier drafts of this chapter and providing valuable comments to help clarify certain aspects and is indebted to Vjeran Pavlaković, Christopher Lamont, and other colleagues and friends for the many conversations that helped improve this chapter.

<sup>2</sup> Fyodor Dostoyevsky, *Crime and Punishment*, trans. Keith Carabine (Wordsworth Editions, 2000), 226.

<sup>3</sup> Teitel, "Global Transitional Justice"; Olga Martin-Ortega and Johanna Herman, *Hybrid Tribunals & the Rule of Law Notes from Bosnia & Herzegovina & Cambodia*, Working Paper (Department of Political Science, Lund University, Sweden, 2010).

mentioned earlier—the impact of this justice cascade is questionable.<sup>4</sup> On the one hand, civil society actors have supported these retributive justice efforts participating in and/or running various programs, including witness protection support and trial monitoring. On the other hand, recent research on this topic affirmed that civil society actors, as a result, expanded their influence and impact. NGOs went beyond the initial judicial support to which they are invited to participate by state actors and created a deliberative space to increase victims’ voices in society, so-called ‘invented spaces.’<sup>5</sup> Such scholarly insight is important, as several past restorative justice attempts across different countries in the region resulted in only limited success.<sup>6</sup> Notwithstanding, social activists and civil society organizations have incrementally increased their role and reach in transitional justice processes.<sup>7</sup> In this chapter, I discuss the ongoing 2008-transnational fact-finding initiative, called Coalition for RECOM Initiative, to elucidate the sociopolitical struggle of coalition members to advocate for alternative models to cope with mass atrocity in the former Yugoslavia.

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<sup>4</sup> Some authors and reports have criticized the effectiveness of this justice cascade. See for instance Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, London: Cornell University Press, 2009) and annual activity reports of NGOs, such as Documenta and Humanitarian Law Center, among others.

<sup>5</sup> Alex Jeffrey, “The Political Geographies of Transitional Justice,” *Transactions of The Institute of British Geographers* (2011).

<sup>6</sup> 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 Mémoires,” in *Le Passé Au Présent: Gisements Mémoires 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; Jelena Pejic, “The Yugoslav Truth and Reconciliation Commission: A Shaky Start,” *Fordham International Law Journal* 25 (2001): 1.

<sup>7</sup> Several authors have addressed the question of human rights activism in transitional justice processes and in particular highlighting the important impact of local NGOs in different regions Roht-Arriaza, *The Pinochet Effect: Transnational Justice In The Age Of Human Rights*; Collins, “Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador”; Burt, “Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations.”

Drawing on concepts of sociology of spaces—based on the study of establishing spaces through action and the interdependence of action on spatial structures <sup>8</sup>—I illustrate how activists move between different spaces constituted by narratives of justice and truth. The study is based on over two-dozen semi-structured interviews with key actors, such as human rights activists, representatives of domestic and international judicial institutions, and international organizations, among others.<sup>9</sup> Early on, human rights organizations in the region acted primarily within the legal space. As we can see, they contributed for instance to improving domestic war crimes prosecutions by providing support to witnesses and victims. Some the witnesses and/or victims were initially exposed to intimidation and death threats due to the absence of anonymous testimonies in the courtroom during hearings and the lack of media responsibility.<sup>10</sup> Subsequent projects of human rights activists were (and still are) an attempt to expand their space from domestic justice-oriented activities to regional fact-finding efforts.

Interestingly, however, the expansion of so-called truth spaces poses myriad challenges. The attempt of establishing a fact-finding body for the former Yugoslavia has faced different types of opposition, ranging from external critique and politicization across the region to internal disapproval by certain of its members. With the aim of creating a broad regional fact-finding initiative, the Coalition for RECOM campaign also grapples with different types of victims (including families of victims, prisoners, and veterans, among others) who have,

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<sup>8</sup> John Urry, “Sociology of Time and Space,” in *The Blackwell Companion to Social Theory* (Oxford, United Kingdom: Blackwell Publishers, 2000), 416–444.

<sup>9</sup> Additionally, the study draws from various reports and other documentation.

<sup>10</sup> See chapter 4.

sometimes, conflicting needs and/or demands. Different narratives of the past, however, also result in elusive consensus building attempts. Conceptually, I base this part of the chapter on framing and social movement theories coined by sociological work of Erving Goffman and further developed by social movement theorists such as Jeffrey Goodwin and Jaswin Jasper.<sup>11</sup> In other words the question on how to frame the collective action—in order to guarantee that the social movement RECOM is eventually able to gain enough traction and support from its actors to realize its initially defined goals—is a delicate process that merits further attention. This is particularly true, since the initiative's members are part of a regional network from different states that were initially united under of one federal nation-state before the conflict. As I will explain later, concepts of collective action framing, such as the work of David Snow et al. are especially noteworthy in this context, since they provide insights into the challenges of mobilizing transnational actors.<sup>12</sup> In fact, in spite of commonalities among participating actors across the region several obstacles still impede a successful mobilization as of today.

This chapter is organized in three sections. First, I describe the continuous struggle of human rights activists to create a transnational extra-legal space—in particular a fact-finding commission—to deal with past atrocities across the former Yugoslavia. I focus on internal and external obstacles the movement faces. Second, I discuss issues of multiple narratives of victimhood, partly because of the transnational character of the restorative

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<sup>11</sup> See for instance Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New York: Harper Colophon, 1974); Jeffrey Goodwin and Jaswin Jasper, "Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory," *Sociological Forum* 14 (1999): 27–54.

<sup>12</sup> David Snow et al., "Frame Alignment Processes, Micromobilization, and Movement Participation," *American Sociological Review* (1986): 464–481.

justice efforts. In order to do so, I draw on several different cases. Third, I examine issues associated with framing collective action. In other words, I analyze the difficulties that the main NGO actors during the RECOM campaign had to cope with in order to gain support for their cause.

## **The RECOM Initiative: Struggling to Create an Extra-Judicial Space**

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.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>13</sup> 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 Urry, "Sociology of Time and Space."

<sup>14</sup> Jeffrey, "The Political Geographies of Transitional Justice."

activities of a number of NGOs across the former Yugoslavia in this chapter, I concentrate on the difficulties human rights activists are confronted with during the creation of these regional restorative justice efforts.

The 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.<sup>15</sup> In fact, retributive justice mechanisms to cope with the past, such as the ICTY, despite its great global impact on and model character for international humanitarian and criminal law, has only partially fulfilled its mandate to help war-torn and post-conflict societies in the region transition.<sup>16</sup> Some of the issues include: the geographical distance of the court between the Netherlands and the crime scene sites—which has often been criticized by victims/witnesses; the trial of selective cases only (both on the international as well as domestic level); and the politicization of cooperation processes between countries of the former Yugoslavia and the UN tribunal in The Hague.<sup>17</sup> Victims thus felt alienated by international and domestic accountability efforts.

Increasing critique from victim associations and human rights organizations were therefore crucial in helping launch an alternative process to improve the relationship between law and society. The idea was that progress does not lie in more personnel, better strategies, and on-site presence of the judiciary system, but in the way that those who suffered most

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<sup>15</sup> See chapter 3.

<sup>16</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

<sup>17</sup> Teitel, “The Law and Politics of Contemporary Transitional Justice.”

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 1990s<sup>18</sup> 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—all of which I introduced already in more depth in the previous chapters—the Humanitarian Law Center in Serbia, Documenta in Croatia, and the Research and Documentation Center in Bosnia and Herzegovina,<sup>19</sup> discussed the prospects of an independent regional commission that investigates and discloses the facts about war crimes and other serious human rights violations in the territory of the former Yugoslavia.<sup>20</sup> 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.<sup>21</sup> Due to the still highly politicized landscape of war-crimes-related issues in the region, the founders of the initiative stressed the importance of establishing a platform offering victims an opportunity to express themselves and to

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<sup>18</sup> See chapter 4. 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/Linkovi-modula/About-us.en.html> , accessed December 5, 2009.

<sup>19</sup> 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. Documenta, 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.

<sup>20</sup> The International Center for Transnational Justice (ICTJ) and other prominent NGOs in the region also participated in this discussion.

<sup>21</sup> 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.

counter the relativization of any crimes against humanity by local and national authorities or justification of crimes committed against opposing sides in the conflict.<sup>22</sup>

The movement was organized in three phases. The first phase consisted of assessing the needs and expectations of victims in view of creating an extra-judicial mechanism to establish facts about past mass atrocities across the region. In phase two participants were incited to provide suggestions and recommendations for creating a regional commission. This took place in local, national and regional consultations and meetings. The last phase aimed at discussing and crafting a draft statute for the commission and started in May 2010 and lasted until the adoption of a draft statute in on March 26, 2011.<sup>23</sup> The initiative comes as a response to other transitional justice mechanisms, such as international and domestic courts, which have proven to be limited in their success to cope with the violent past in the region.<sup>24</sup>

According to article 13 of RECOM's final draft statute the commission has six primary objectives. The main goal is to establish facts about war crimes and other grave human rights abuses that occurred during the conflicts in the former Yugoslavia from January 1 to December 31, 2001.<sup>25</sup> Moreover, it will also look at the sociopolitical circumstances that led to these crimes and their consequences. The commission also aims at acknowledging "injustices inflicted upon victims in order to help create a culture of compassion and

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<sup>22</sup> Coalition for RECOM, "Why Coalition for RECOM?", 2010, <http://www.zarekom.org/>, accessed September 12, 2010.

<sup>23</sup> The statute is discussed in more detail in chapter 6.

<sup>24</sup> See chapters 3 and 4. See also reports published by human rights organizations, including Documenta, the Humanitarian Law Center, Human Rights Watch, Amnesty International, among others.

<sup>25</sup> See chapter 6 for a discussion on how the Coalition for RECOM Initiative members decided to define this specific timeframe.



solidarity with victims.”<sup>26</sup> Other goals consist of promoting victims’ rights, clarify the fate of missing persons and help prevent future human rights violations and atrocities. The RECOM commission’s specific functions are listed in article 14 of the final draft statute. Its main tasks consist of collecting information on war crimes and other gross human rights violations as well as information on missing persons. The collected information is then stored in a regional database. Public hearings of victims and other persons about war crimes and human rights violations are also part of the commission’s functions. Finally the commissioners will provide policy recommendations to help prevent further atrocities and human rights abuses, which will be published in a final report.

As a result, RECOM aims at creating a space for victims to be heard in society, fueling sympathy and understanding. According to its advocates, RECOM is to provide a mechanism that takes into account the context of past conflicts. Several countries were involved in the breakup of the former Yugoslavia, thus dealing with past war crimes issues does not stop at national borders, but goes beyond the sovereign territory of the current states. Additionally, RECOM coalition members plan on creating a comprehensive database of victims to end the perpetual politicization of the number of victims in the region. RECOM also aspires to help war crimes prosecutors with evidentiary material, witness handling and searching for the missing. The initiative’s ambitious goals, however, are tainted by internal disagreements of different coalition members.

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<sup>26</sup> See final draft RECOM draft statute of March 26, 2011. Available at the Coalition for RECOM website, <http://www.zarekom.org/>, accessed on March 1, 2012.

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 the meetings in winter 2008.<sup>27</sup> 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 Kandić, managed to fill the gap created by the loss of the influential Research and Documentation Center by partnering with the Association of BiH Journalists.<sup>28</sup> Yet, the fact that this organization does not essentially concentrate on war crimes reporting has affected its legitimacy within the coalition, according to a prominent member of the initiative.<sup>29</sup> Critique has also come from participating organizations that have deplored the lack of transparency in RECOM's decision-making process.<sup>30</sup> Moreover, the uncertain outcome of whether the commission will be created and the long process in rallying financial and political support—both of which have been fluctuating and vague—has 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.<sup>31</sup> In addition to internal obstacles, the

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<sup>27</sup> See interview with Mirsad Tokača, director of the Research and Documentation Center in June 2011.

<sup>28</sup> See interview with Nataša Kandić, director of the Humanitarian Law Center, in May 2011.

<sup>29</sup> See interview with official member of Coalition for RECOM in Zagreb in February 2011.

<sup>30</sup> B92, "NGOs Fall Out over Donations," *Život*, June 30, 2011.

<sup>31</sup> See supra note 29. See also programs by Documenta, <http://www.documenta.hr> or the Humanitarian Law Center <http://www.hlc-rdc.org>, accessed November 23, 2010.

initiative's institutionalization process has 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.<sup>32</sup> 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.<sup>33</sup> This reckoning with the past, however, was only the tip of the iceberg of a long process that is still ongoing.

Indeed, current political leaders in both countries, Ivo Josipović the president of the Republic of Croatia (who began his first term in February 2010), and Boris Tadić the president of the Republic of Serbia (in his second term, which started in February 2008), 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

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<sup>32</sup> Particularly during electoral campaigns, history is manipulated and old nationalist sentiments exploited by certain political parties or social groups.

<sup>33</sup> Sabrina Ramet, "Politics in Croatia Since 1990," in *Central and Southeast European Politics Since 1989*, 2010, chap. 12 and 13.

indirectly) in war crimes or the human rights violations of the 1990s conflicts.<sup>34</sup> In 2007, for instance, Tadić released a statement on Croatian national TV on the eve of Croatia's 16<sup>th</sup> independence anniversary, June 24, 2007, apologizing for crimes committed against the Croats by members of the Serbian population.<sup>35</sup> While then-president of Croatia, Stjepan Mesić welcomed the remarks, nationalist hardliners at home, such as Aleksandar Vučić, secretary general of the Serbian Radical Party, ferociously criticized him as a national traitor.<sup>36</sup> Already in 2004, the Serbian president has made similar remarks while on a visit to Sarajevo, Bosnia and Herzegovina.<sup>37</sup> More recently, on November 4, 2010, Tadić apologized for the massacre that took place 19 years ago in Vukovar, a town in Northeastern Croatia.<sup>38</sup> He said that "[b]y acknowledging the crime, by apologizing and regretting, we are opening the way for forgiveness and reconciliation"; yet not everyone received him with wide open arms. Several mothers of those killed in Vukovar, for instance, turned their backs while he

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<sup>34</sup> In the 1980s, Josipović 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 Ivo Račan, then acting Prime Minister, invited him to join the government. Serbia's president, Boris Tadić, a trained psychologist, was part of the Democratic Opposition of Serbia, which was key in overthrowing Milošević in 2000. Politically part of the Democratic Party, he has made multiple symbolic reconciliatory public statements that are a sign of collaboration and understanding of both countries.

<sup>35</sup> The rising wave of apologies in the region of the former Yugoslavia is not limited to Serbia and Croatia. In November 2010, Bakir Izetbegović, Bosniak member of Bosnia-Herzegovina's tripartite presidency, apologized for deaths caused by his ethnic group among other ethnicities. This trend started in 2000 with Montenegrin President Milan Djukanović, when he apologized for the 1991 shelling of the Croatian coastal city of Dubrovnik in which his country was involved. Since, the Serbian and Croat heads of state have apologized in 2003, and Tadić apologized to Bosnians in Sarajevo in 2004 for Serbian atrocities committed there. Additionally, Josipović has apologized at Jasenovac, a World War II concentration camp, where tens of thousands of people were killed during World War II. Public apologies are not the only trend, as there have been political and judicial conciliation as well. The Parliament of Serbia, for instance, voted on a resolution on the 1995 Srebrenica massacre, while Croatia is assisting Serbia in its bid to join the EU. Nenad Pejić, "The Weight Of Wreaths And Words," *Radio Free Europe / Radio Liberty*, November 4, 2010, [http://www.rferl.org/content/The\\_Weight\\_Of\\_Wreaths\\_And\\_Words/2211082.html](http://www.rferl.org/content/The_Weight_Of_Wreaths_And_Words/2211082.html).

<sup>36</sup> Lidija Popović, "Tadić Apology to Croats Divides Serbia," *Balkan Investigative Reporting Network*, June 26, 2007, <http://birn.eu.com/en/89/10/3417/?tpl=30>.

<sup>37</sup> See "Tadić se izvinio građanima Hrvatske," *B92*, 24 June 2007.

<sup>38</sup> Vukovar is situated close to the Serbian border and a war site where Serbian forces took over 200 hospitalized Croats to a nearby pig farm in Ovčara and massacred them in November 1991.

gave his speech.<sup>39</sup> Both of these examples illustrate how the political landscape equals a minefield, as not only right-wing nationalist veterans feel betrayed, but also victims express their discontent with political symbolism that does not go far enough in their eyes. Tadić's Croatian counterpart, Josipović, reciprocated these symbolic steps, and during the November 4, 2010 ceremony in Vukovar, he laid down a wreath in commemoration of over a dozen Serbs that had been killed in a nearby village.<sup>40</sup> In addition, both leaders expressed their political backing of the Coalition for RECOM initiative in fall 2010 when RECOM members publicly asked for their support.<sup>41</sup>

However, in spite of the symbolic gestures and discourses by heads of state in both of these countries (and across the region) institutional drawbacks remain—ranging from the lack of investigations of war crimes involving high-profile Croatian politicians, such as the former speaker of the parliament, Vladimir Šeks<sup>42</sup>, to the appointment by the current Serbian government of Zoran Stanković as head of the Serbian Ministry of Health, despite his close ties with indicted war criminal Bosnian Serb General Ratko Mladić.<sup>43</sup>

Interestingly, support from international organizations to create RECOM's institutional framework also remains limited and further complicates human rights activists' efforts to

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<sup>39</sup> Associated Press, "Serbian President Apologizes for Wartime Massacre", November 4, 2010, <http://www.wtop.com/?sid=2105540&nid=105>.

<sup>40</sup> Ibid. Already in spring 2010, when giving a talk in front of the Bosnian Parliament, Josipović apologized for crimes committed against Bosnians by the Croatian people. He also visited the site of the Ahmići massacre with Bosnian Catholic archbishop cardinal Vinko Puljić and the head of the Islamic Community reis Mustafa Cerić. See "Josipović apologizes for Croatia's role in war in Bosnia," *Croatian Times*, 15 April 2010.

<sup>41</sup> Gordana Andrić and Eldin Hadžović, "REKOM Initiative Collects Signatures Across Balkans," *BalkanInsight.com*, April 26, 2011, <http://www.balkaninsight.com/en/article/million-signatures-for-the-victims-of-balkan-wars>.

<sup>42</sup> Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*.

<sup>43</sup> Radio Free Europe/Radio Liberty, "Mladic Friend Approved As Serbian Health Minister," *News*, March 17, 2011, [http://www.rferl.org/content/mladic\\_friend\\_serbian\\_health\\_minister/2339279.html](http://www.rferl.org/content/mladic_friend_serbian_health_minister/2339279.html).

account for war crimes. While the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe (CoE) has released a report expressing its support for regional reconciliatory justice mechanisms among states of the former Yugoslavia, such as the regional fact-finding initiative RECOM<sup>44</sup>, other organizations, including the UNDP and the EU, among others, avoid public statements that engage in direct political or financial support of RECOM.<sup>45</sup> Politicking among Coalition members and the lack of external support, however, are not the only challenges the RECOM initiative has to overcome. During the creation of this truth space a debate about the meaning of victimhood has emerged, producing different opposing narratives.

## Multiple, Conflicting Narratives of Victimhood

Recent scholarship has grappled with the question of victimhood in post-authoritarian regimes. Drawing on interviews with war criminals and reports of the confessions of perpetrators in post-conflict settings in Argentina, Brazil, Chile and South Africa, for instance, Leigh Payne analyzes the behavior of perpetrators (in terms of remorse, heroism, denial, or sadism) and the reaction of victim groups.<sup>46</sup> In the case of the former Yugoslavia, denial still remains an important phenomenon in society. Partly, as I will demonstrate in the following, because state institutions have sustained certain political discourses—such as the

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<sup>44</sup> Pietro Marcenaro, *Reconciliation and Political Dialogue Between the Countries of the Former Yugoslavia*, Parliamentary Assembly Rapporteur Report (Council of Europe, 2011).

<sup>45</sup> See interview with United Nations Development Program and European Union officials in Sarajevo in May 2011.

<sup>46</sup> Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence*.

foundational myth of the Croatian Homeland War 1991-1995. In this context, veterans have generally enjoyed financial support in form of pensions provided by the state.<sup>47</sup> On the contrary, state institutions across the region have often ignored the fate of civilian war victims and their families. During the RECOM consultation process participating victims association have therefore stressed the need to define the meaning and status of a victim, illustrating RECOM initiators' conundrum of integrating different narratives of the region's looming past.

As a member of a local victim association from Zvornik, a town in northeastern Bosnia from which nearly all Muslims were expelled during the 1992-1995 war, underlined:

Persecution of the civilian population can't be compared to the persecution of those who bore rifles and were members of a military formation. Today, these numbers are being made equal. It is impossible to make a balance in this war: they are trying to make it up with the previous war. (...) This means that a civilian is a civilian, a soldier should not be mentioned because after all he was a member of the army, those are separate issues. However, here I exclusively speak about civilians, people who were taken and killed at their doorsteps or a bit further depending on where one was killed.<sup>48</sup>

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<sup>47</sup> Veterans in Bosnia and Herzegovina, for instance, have also benefitted from financial and political support by their respective governments. See Popić and Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*.

<sup>48</sup> Cited in 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*, 8.

This narrative, however, stands in opposition to the RECOM members' goal to establish facts about human rights violations and war crimes of *all* victims.<sup>49</sup> And indeed, in some cases, the meaning of victim includes social groups that do not match the Zvornikan's above definition but include former members of the armed forces. Although the Coalition for RECOM Initiative counts only six veterans associations versus well over one hundred victims associations, this situation demonstrates the inherent predicament of RECOM's leading members to draw bridges among different local and regional civil society organizations during their consultation meetings.

In local and regional consultation meetings, such as in Vukovar in summer 2010 and in Skopje in winter 2010, for instance, members of different branches of the Association of Underage Volunteers of the Homeland War also participated in the discussion.<sup>50</sup> These organizations have been created for persons, who at the time of the war were not considered adults, yet fought in the 1991-1995 Croatian war. As underage participants in the hostilities, however, they are not entitled to any veteran pensions from the Croatian state.<sup>51</sup> Hence, the concerns of one of their representatives with regards to RECOM's task of registering human losses stands in contrast with the statement given by the member of the Zvornika victims association:

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<sup>49</sup> The final draft of the statute was adopted on the fourth Coalition for RECOM Assembly Meeting on 26 March 2011 in Belgrade. The draft is available at <http://www.zarekom.org/documents/Proposed-RECOM-Statute.en.html>, accessed on May 2, 2011.

<sup>50</sup> See reports of the consultation meetings at <http://www.zarekom.org/Consultations.en.html>, accessed on February 11, 2011.

<sup>51</sup> See informal interview with Documenta director Vesna Teršelić in Vukovar on 14 July 2010.



I am in favor of a register of all losses, which would include both civilians and military men, and that list must inevitably include foreign nationals who participated in those conflicts. How are we going to register them? We should include them in the same register, together with the members of international forces. And a separate register should be created for victims, primarily victims of war crimes.<sup>52</sup>

RECOM's policy strategy therefore does not necessarily receive the approval from its main target and support groups of war victims. As a result of its holistic approach, some victims' organizations, such as the Mothers of Srebrenica, do not participate officially as a member of the RECOM coalition because their members insisted on the exclusive definition of noncombatants.<sup>53</sup> Narratives by political actors and state institutions also complicate RECOM's mission to establish a regional commission.

Nationalist discourses generated by (particularly populist) political actors across the region still pose an impediment to the successful creation of truth spaces by human rights activists. As a case in point, after the arrest of Ratko Mladić on 26 May 2011, the Serbian Radical Party organized a rally consisting of about 10,000 nationalist protestors who rallied—with a small amount of participants rioting—in front of the Serbian parliament in Belgrade to demonstrate against Mladić's extradition to The Hague.<sup>54</sup> A few months earlier, Croatia faced a similar situation with nationalists and veterans mobilizing large parts of Croatian society across the region in order to protest against the ICTY first instance verdict in the

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<sup>52</sup> Supra note 50.

<sup>53</sup> 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*, 8. See also Supra note 29.

<sup>54</sup> Steven Erlanger, "Pro-Mladic Demonstrators in Serbia Rally Against His Extradition," *New York Times*, May 29, 2011.

General Ante Gotovina case.<sup>55</sup> The verdict was handed down two days before the initial start date of the RECOM signature campaign in Croatia. Given the very tense political climate in the country, human rights activists postponed the launch of the signature campaign to a later date in order to prevent violence among their campaign volunteers and demonstrators.<sup>56</sup> Drawing on the latter case, I will explore the question of state victimhood, which acts as an institutional hurdle to the constitution of truth spaces in society—in addition to the differing narratives of victims mentioned above—and which further exacerbates the work of NGO activists in the field.

Political symbolism has a very strong effect on the community if it is grounded in lived experience. Ben Anderson explores the sociopolitical consequences on employing symbols for political means in a longitudinal studies stretching over centuries<sup>57</sup>, Alex Bellamy analyzes the question temporally and spatially more concise, focusing on Croatia.<sup>58</sup> Not surprisingly, the foundational myth of former Croatian army commander, Gotovina—who has risen to an emblematic war hero figure in Croatian society, and who represents the ontological core of the nation’s nascent identity incarnated in a fight of good (Croatia) against evil (Serbia)—has sparked ferocious criticism at the intersection between international and national politics. Despite the Croatian government’s international cooperation which led to his arrest and transfer to the ICTY in December 2005, the normative shift in favor of international humanitarian law in the endlessly dragging—and

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<sup>55</sup> Radio Free Europe/Radio Liberty, “Hague Tribunal Sentences Croatian Generals To Long Prison Terms,” News, April 14, 2011, [http://www.rferl.org/content/un\\_judgments\\_due\\_in\\_croatian\\_war\\_crimes\\_case/3557888.html](http://www.rferl.org/content/un_judgments_due_in_croatian_war_crimes_case/3557888.html).

<sup>56</sup> See interview with Signature Campaign officials of the Coalition for RECOM in May 2011.

<sup>57</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

<sup>58</sup> Bellamy, *The Formation of Croatian National Identity: A Centuries-Old Dream*, 1–6.

politically highly explosive—extradition issue of Gotovina was incomplete. In fact, during the entire period, politicians strategically reopened debate on Croatia's national foundational myths.<sup>59</sup> After the verdict, the Croatian government even took the necessary steps to initiate an appeals process and provide questionable amounts of legal and financial assistance to Gotovina's defense team in The Hague.<sup>60</sup>

Unsurprisingly, human rights activists have geared up to provide alternative spaces of deliberation for victims in society. Yet, in addition to the multiple narratives of the Coalition for RECOM Initiative's members mentioned above, the campaign leaders also grappled with communicating their common strategy and goals to participating members, which is a very fragile process given the transnational context of the fact-finding movement. Below I discuss the problem of mobilizing collective action by first drawing on conceptual frameworks and then by providing empirical evidence from the RECOM consultation campaign.

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<sup>59</sup> Pavlaković, "Better the Grave Than a Slave: Croatia and the International Criminal Tribunal for the Former Yugoslavia."

<sup>60</sup> Croatian Times, "Croatian Government Forms Team to Help Gotovina, Markac," *Croatiantimes.com*, April 18, 2011.

## The Difficulties of Framing a Transnational Discourse: The Local-Regional Divide

The notion of frames, and more precisely the concept of frame analysis, is used to analyze how people understand situations and activities in particular social contexts. Rather than being home to one particular discipline, it has been applied in different research areas.<sup>61</sup> The extensive use of this research methodology in sociology, however, is generally attributed to the work of Erving Goffman and his 1974 book *Frame analysis: An Essay on the Organization of Experience*.<sup>62</sup> Since the 1980s, framing concepts have also been applied most extensively to social movement studies, making them—along with resource mobilization and political opportunity processes—a crucial tool to understanding the nuts and bolts of collective action in the field.<sup>63</sup> More recent research has continually expanded the analytical scope of framing in order to cope with the structural bias as a result of political opportunity models, focusing on more dynamic phenomena.<sup>64</sup> In addition, some authors have also examined transnational mobilization and the challenges social actors have to confront when working across national boundaries.<sup>65</sup> Two particular aspects of the

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<sup>61</sup> The different research areas include linguistics and discourse analysis; communication and media studies; political science and policy studies and sociology. For a review of the different concepts in these areas see Robert Benford and David Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* (2000): 611–639.

<sup>62</sup> Goffman, *Frame Analysis: An Essay on the Organization of Experience*.

<sup>63</sup> For an extensive list of authors see Benford and Snow, "Framing Processes and Social Movements: An Overview and Assessment," 612.

<sup>64</sup> Goodwin and Jasper, "Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory."

<sup>65</sup> Donatella della Porta and Sidney Tarrow, *Transnational Protest and Global Activism* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005).

abundant scholarship are especially helpful in order to shed light on the current RECOM campaign process: cultural framing and transnational framing.

Jeffrey Goodwin and Jaswin Jasper's analysis, for instance, points to a very important observation in social movement theory. According to them, the political opportunity thesis—principally developed by the prolific efforts of senior scholars such as Charles Tilly, Sidney Tarrow and Doug McAdams in their political process approach—provides only a limited explanation to understand the success or failure of how a movement is able to mobilize its base. As a consequence, they center on additional dynamics that social movements research should integrate within its analytical tools: agency and culture.<sup>66</sup> For the purpose of our RECOM case study it is noteworthy to explore the latter. More precisely, Goodwin and Jasper refer to countercultural movements including "literary, musical, and other artistic movements that challenge dominant beliefs and symbols, influence, collective identities, and even penetrate more state-oriented movements."<sup>67</sup> Thus, they go beyond process theorists' analyses on solely challenging cultural codes that are oriented towards the state or political institutions such as feminist movements or gay rights. Goodwin and Jasper posit that

all these factors are affected by conscious strategies, decisions, and (ultimately) actions of protestors, their opponents, and state actors. These factors tend to get

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<sup>66</sup> Goodwin and Jasper, "Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory."

<sup>67</sup> Ibid., 35.

treated as though they were stable structures rather than the outcomes of actions informed by strategic calculations.<sup>68</sup>

Their work seamlessly lines up with earlier research by David Snow and his colleagues on frame alignment processes, which is “the linkage of individual and [social movement organization] SMO interpretive orientations, such that some set of individual interests, values and beliefs and SMO activities, goals and ideology are congruent and complementary.”<sup>69</sup> In the case of the RECOM Initiative, participating members were indeed hoping to bring together different backgrounds and experiences, expecting to find the kind of congruence and complementarity Snow’s research team was referring to. As an example, a member of the Serbian NGO Women for Peace, Jelena Cakić, expressed exactly these hopes during a national consultation of the RECOM campaign in Fruška Gora, Serbia, on October 10, 2008:

I think it would be good to organize meetings of associations of, let’s say, mothers from Srebrenica [and] some women from Serbia, who went through some similar tragedies; to connect them and give them space in media (...) That would be very efficient in the sense of sensitization of the society.<sup>70</sup>

Yet, the regional and transnational character of the initiative is precisely the crux of problem the Coalition for RECOM campaign members are grappling with. In fact, the issues to be dealt with vary in form, scope and intensity. For instance, the problems that Slovenia (which has joined the coalition recently in the summer of 2010) has to face, differ entirely

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<sup>68</sup> Ibid., 40.

<sup>69</sup> “Frame Alignment Processes, Micromobilization, and Movement Participation,” 464.

<sup>70</sup> Cited in 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*, 64.

from the problems, with which Croatia, Serbia or Kosovo let alone Bosnia are confronted. Without going into detail about each of the cases, I chose the examples of Croatia and Slovenia to illustrate this point.

As discussed earlier, Croatia's intricate balancing act when dealing with the repercussions of the 1992-1995 conflict is due to a question of identity politics. Post-Tudjman governments not only have faced difficulties in transforming the official narrative Croatia's national freedom and independence struggle, but also turned a blind eye to human rights abuses and war crimes within the ranks of Croatian military forces. Recent efforts, however, illustrate that political and human rights initiatives have moved the right direction of changing this public discourse, without, necessarily, discrediting the independence struggle the young state had to go through.<sup>71</sup>

Slovenia, on the contrary, barely succumbed to violent conflict, and the little fighting that occurred, only lasted for a few days. Its secession from the former Yugoslavia was, at least in this regard, fairly uneventful. The country has, however, its own dark chapter of the 1990s: a register of residents from other parts of the former Yugoslavia, which was erased by the Slovenian government, the people on the list become known as the 'Izbrsani' (the erased). In fact, after Slovenia declared its independence, a majority of non-Slovenians were

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<sup>71</sup> Civil society, however, is far from being homogenous. Instead, it is made up of different factions ranging from human rights activists to defenders of the status quo. See for instance Vukašin Pavlović, *Društveni Pokreti i Promene* (Beograd: Udruženje za političke nauke Jugoslavije, 2003). While human rights organizations, focusing on issues of dealing with the past, advocate for change (including accountability, memorialization and transparency), veterans' organizations maintain a tight grip on Croatia's Homeland War discourse, protesting against ICTY rulings and urging the government to oppose cooperation. See for instance "Thousands Protest Croatia War Crime Arrests," *France24*, December 26, 2009, <http://www.france24.com/en/node/4956665>.

able to legalize their status and gain Slovenian citizenship. Yet, those who didn't have this privilege, had to bear the fate of the undesirable and fell through the intentional bureaucratic cracks of the administration. According to naturalization laws passed shortly after Slovenia's newly acquired sovereignty, they became illegal alien residents and had to face judicial charges, often leading to the expulsion from the country. Although the Slovenian constitutional court recognized the erasure as unconstitutional in 1999 and 2003, discriminatory practices continued. Only since 2002 have the victims initiated steps to fight for their rights and gain recognition for their cause. Over the past two decades, however, silence and amnesia eroded their cause and their cases.<sup>72</sup> The Coalition for RECOM Initiative organized a regional consultation meeting in September 2010 in conjunction with Slovenian human rights organizations that advocate for the *Izbrsani* cause, hence underlining their commitment to cope with different injustices that were committed during the split up of the former Yugoslavia. The difficulties lying ahead for a regional approach in dealing with the past consist of creating sufficient momentum for a common cause, while in parallel, acknowledging and integrating very different issues and traumas of war victims.

The breakup of the former Yugoslavia has led to the creation of multiple nation-states, which makes state politics across the region a matter of international politics and foreign policy. Although these new countries share a common history and broke off from the same former federalist state, current interstate relations are considered high politics and each of the young states' sovereignties represent a sacred cow. Therefore, RECOM's campaign

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<sup>72</sup> Jasminka Dedić, Vlasta Jalušič, and Jelka Zorn, *The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia* (Ljubljana: Mirovne Institute, 2003).



efforts across the region—in spite of the different countries sharing a historical and sociopolitical background—is an example of transnational politics par excellence. Recent research that has focused on transnational framing theory thus provides rich insights for the RECOM case. In their edited volume, *Transnational Protest and Global Activism*, the editors Donatella della Porta and Sidney Tarrow, present a collection of different case studies to discuss issues of transnational collective action, a term they use to “indicate coordinated international campaigns on the part of networks of activists against international actors, other states, or international institutions.”<sup>73</sup> Interestingly, in some of these case studies they show how the role of the state was transformed for its activists. More precisely, they argue that the transformations occurred based changes in the *environment*, such as the development of electronic forms of communication and inexpensive international travel, among others; *behavior*, including learning processes among international actors to adapt policy strategies or activities; and *in state-society relation*. And it is notably the latter, they stress as a factor for change:

Relations between movements and governments are a major source of change. Social movements do not act in a vacuum, and, in fact, the strongest influences on their behavior and tactics are the behavior and tactics of the government they challenge. The last decade has shown that governments also imitate one another, therefore leading to increasing similarities in the contexts in which movement campaigns and protests take place.<sup>74</sup>

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<sup>73</sup> Donatella della Porta and Sidney Tarrow, “Transnational Processes and Social Activism: An Introduction,” in *Transnational Protest and Global Activism* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 7.

<sup>74</sup> Ibid., 9.

Interestingly, the changes at the state level in the former Yugoslavia fostered by the RECOM campaign and its members are yet to bear the fruit of their labor. As of today, the movement is still struggling to create enough momentum to establish the independent fact-seeking body with government support across the region. However, even if the institutionalization of such a transnational truth commission for the war crimes in the Balkans might never materialize, the incessant efforts and the numerous local, national and regional consultations have contributed to sensitize and educate society about these grave human rights violations.<sup>75</sup> While the bottom-up approach is still struggling to get its feet off the ground, state cooperation regarding war crimes issues have increased in recent years. Earlier, I outlined several symbolic gestures of heads of state across the region to apologize and recognize heinous crimes committed during the conflicts. Recently, leaders in the former Yugoslavia have even taken a step further to expand and consolidate their cooperation regarding war crimes prosecution.<sup>76</sup> On February 3, 2012, Croatian president Ivo Josipović, Serbian president Boris Tadić and the tripartite Bosnian leadership, including Bakir Izetbegović, Zeljko Komsić and Nebojsa Radmanović, met in Bosnia Herzegovina at Mount Jahorina, outside Sarajevo, where Josipović proposed that the three countries sign a three-state agreement on prosecution of war crimes. According to this initiative each of the signatory parties will prosecute its own citizens, regardless of whether the crime took place

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<sup>75</sup> Jelena Subotić, "The RECOM Initiative: The Promise and Peril of Regional Truth Seeking in the Balkans," *Puls Demokratije*, February 10, 2010. See also interview with Vjeran Pavlaković, history professor at the University of Rijeka, Croatia, on 6 September 2010.

<sup>76</sup> Some case-by-case bilateral cooperation between the different states in the Western Balkans exists already, such as I have illustrated with the Glavaš case in chapter 2.

on its territory or on a territory outside of the country's jurisdiction. The other participating states will also make available documents and evidence relevant to the case.<sup>77</sup>

This above example illustrates how state-level institutions and civil society actors have two different agendas when it comes to dealing with the past. Although governments primarily seek legal mechanisms to account for mass atrocities in the region, they also engage in symbolic activities, including memorials and apologies, among others. Yet, these political actions are predominantly associated with problems and questions of concern to society at large, while human rights activists have spearheaded a movement that promotes individual rights. Thus activists are moving the human rights debate on war crimes from a state-centric to a victim-centered approach in transitional justice processes in the former Yugoslavia. Nonetheless, as I discuss in the following, human rights advocates have to engage in more abstract and legal-oriented strategies in order to implement their restorative justice campaign across the region.

## Conclusion

This chapter has examined the recent regional restorative justice mechanisms in the former Yugoslavia, the Coalition for RECOM Initiative, which is currently taking shape and recently finished its consultations process and meetings to define its mandate and the institutional

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<sup>77</sup> Denis Dzidic, "Josipovic and Tadic Hatch War Crimes Deal," *BalkanInsight.com*, February 3, 2012, sec. News, <http://www.balkaninsight.com/en/article/serbia-and-croatia-to-sign-agreement-on-prosecution-of-war-crimes>.

character of its body. After the violent disintegration of Yugoslavia in the 1990s, the region has witnessed several retributive and restorative mechanisms to cope with the past, including war crimes tribunals—on the international and (to a lesser, but still noticeable extent) national level—and fact-finding initiatives. During these processes human rights activists have occupied an important intermediary function, communicating and interacting between spaces created by varying justice and truth narratives. The aim of this chapter was to analyze these different, intersecting spaces and the role of civil society within these spaces to help understand recent practices to establish a transnational fact-finding mechanism. The first part of this chapter addressed the ongoing internal and external struggle of human rights activists to establish an extra-legal space to deal with the past across the former Yugoslavia. In this context, I also analyzed the conflicting impact of different victims groups' narratives that accompanied the institutionalization process. Finally, I examined the emerging issues in RECOM's regional approach to find support for its cause by discussing and employing framing concepts from social movement theory. In Chapter 6, I will look at how legal concepts have influenced the institutionalization of fact-finding measures—a trend, which I refer to as the legalization of truth spaces.

# **Chapter 6**

## **The Legalization of Truth: Analyzing the RECOM Statute**

In Chapter 5 I analyzed the sociopolitical struggle of human rights activists to launch the Coalition for RECOM Initiative in order to establish a deliberative space for victims. I pointed not only to the internal disputes and disagreements of its members, but also to pressure from other civil society groups and social as well as political actors in the region. In this chapter, I expand on the notion of truth spaces described earlier, illustrating how activists—in their effort to institutionalize the RECOM campaign efforts—distanced themselves from their main support group, victims and victims families. Put differently, during the consultation efforts to create a draft statute of the RECOM fact-finding body, the driving NGO forces of the campaign, particularly the Humanitarian Law Center, have adopted a strategy that follows a state-centric logic, in order to gain support from governments and political leaders. To this end, the meetings involved legal practitioners and experts to define the details of the scope and powers of the commission. While other voices, such as ordinary citizens (notably victims) and other specialists—such as historians, sociologists and other

scholars—also contributed to the elaboration of the current draft statute, the impact of legal frameworks and ideas on the statute are especially telling in order to explain the changing notion of human rights on the local level in the region of the former Yugoslavia.

The dominance of legal concepts in institutionalizing fact-finding measures raises questions about the influence and consequences of hard justice (such as retributive mechanisms) on soft justice (such as restorative tools, including truth commissions). In this chapter, I refer to this trend as the legalization of truth spaces. In fact, with the process of legalizing truth spaces activists have increased their ‘invented’ space to foster deliberative spaces of justice for civil society.<sup>1</sup> Yet, they also attempted (and currently still are attempting) to embed their newly created space in the space originally provided by state institutions to depoliticize transitional justice efforts in the region. In other words, without legal and official recognition by member states across the region, these grassroots efforts will remain without legitimacy and the commission will not likely be created. I show, however, that their goal of legal-oriented depoliticization of restorative justice processes remains still highly political, as they struggle to establish an officially institutionalized truth space.

This chapter therefore focuses on the challenges of the legalistic influence on fact-finding processes. More precisely, I analyze the ongoing political—and also legal-oriented—battle to institutionalize alternative transitional justice mechanisms. To this end, I structured my chapter into four different sections. Firstly, I describe the early grass-roots discussions of RECOM’s mandate drawing on two local consultations in Knin, Croatia and Kruševac, Serbia.

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<sup>1</sup> See chapter 5 for more detail.

Secondly, I discuss some of the earlier, fundamental questions that arose in light of crafting a proper mandate for the regional fact-finding body. Then, in the main section of this chapter, 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, resulting in what I call the legalization of truth spaces. To conclude, I discuss some of the conceptual implication of this phenomenon, especially because this juridification of fact-finding bodies bears its roots in a broader law-society development.

## **Early Grass-Roots Efforts: Local Consultations in Croatia and Serbia**

As mentioned in chapter 5, during the first meeting in the fall of 2005 several renowned NGOs from the former Yugoslavia—including Documenta, the Research and Documentation Center and the Humanitarian Law Center, among others—discussed the idea of a regional truth commission. Their initial idea eventually led to a follow-up regional meeting in May 2008, the first regional forum on transitional justice in Podgorica, Montenegro. During this forum the organizers and participants decided to initiate a consultation process to materialize a fact-finding body for the former Yugoslavia. This process took nearly three

years, before the members of the Coalition for RECOM Initiative—the official name of the campaign—voted on a final draft for the commission’s mandate in March 2011. NGO activists hope to introduce the current draft statute to national parliaments across the region in the near future. Their goal is to have each legislative adopt and ratify the body’s institutional framework and mandate—a 27-page legal document with over 50 articles, divided into thirteen parts—before creating the commission.

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 communities. During one of the early consultations, organized on August 4, 2009<sup>2</sup> 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

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<sup>2</sup> 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.



war crimes but only helped defeat terrorists who threatened the young state's territorial integrity, according to the official discourse of the Croatian government.<sup>3</sup>

Jovan Berić, a Serbian victim from Zadar, Croatia, believes in the RECOM movement as it can help to uncover perpetrators of different crimes. His comments thus 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.<sup>4</sup>

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 Radonjić, 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.<sup>5</sup>

In fact, political groups, governments and other actors have continuously politicized many war-related issues across the region in the post-conflict Balkans.<sup>6</sup> The RECOM Initiative's

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<sup>3</sup> See chapter 3 for further details on Croatia's Homeland War.

<sup>4</sup> See RECOM consultation with the local community, Knin, Croatia, August 4, 2009.

<sup>5</sup> See RECOM consultation with the local community, Kruševac, Serbia, September 7, 2009.

<sup>6</sup> 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.

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.<sup>7</sup>

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.

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<sup>7</sup> Ibid. supra note 4.

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.

Some of my transcribed notes from my fieldwork at the Croatian nonprofit during this period highlight these intricate processes. The meeting at Osijek took place on July 14, 2010, a hot and dry summer day with temperatures well above 95 degrees Fahrenheit. A small team of Documenta staff, including director Vesna Teršelić, media liaison Eugen Jakovčić, and the young dynamic program coordinator Darija Marić had left their office in Zagreb early in the morning to embark on a 3-hour drive east through Slavonia's rolling hills along the northern border of Bosnia and Herzegovina in order to reach to Osijek, situated in Croatia's northeastern territory about half an hour west of the Serbian border. Earlier that week, Eugen Jakovčić had asked me whether I would like to join them to meet with local NGOs in Slavonia's capital, Osijek, and on Thursday, I was sitting with the entire staff in a small silver Opel Corsa, riding to a local consultation in a place that I had read about in history books about the Balkan wars in the 1990s, but to which I had never been before. Needless to say that my heart was pounding, knowing I would be not only be able to witness a local consultation meeting, but also be able to visit the city after we finished work.

When we arrived, the first impressions of the city reminded me of a typical German medium-sized town. The red roof tiles were shiny and the plastered walls of the two and three story houses were painted in different colors, including pale blue, lemon yellow and salmon. Some houses looked relatively new, leading me to believe that those were destroyed during the war and renovated in the years since the armed violence had stopped. Others, looked more withered, but still in good shape.

This picture of Osijek was in stark contrast with the image of Vukovar I have kept in my memory. I visited Vukovar in one of my later consultations with Documenta's activists. The city is about half an hour south of Osijek, directly at Serbia's northwestern border. In fact, the people of Vukovar wanted to send a message that they will never forget the atrocities of the past war. As a result, the heavily damaged water tower at the town entrance is still looming over the houses and buildings around it. More strikingly, however, was the still completely destroyed theatre-looking building (from which only its walls, a few wooden beams and the onion-shaped towers in each corner of the building remained) in the city center next to the modern and transparent glass-facade of the current town hall building that was rebuilt in recent years. The inhabitants of Vukovar insisted on keeping this somber dismal site of annihilation in the heart of their city, as a reminder and warning for generations to come. The sight of such destruction surely left a haunting impression and a feeling of unease lingering inside of me.

As we finally parked the car in a side street in the city center Osijek, I did not have these looming pictures in my head. We walked for less than a block before entering a courtyard,

which looked like it could have served as the residence of a “ban”, a local lord during the Austro-Hungarian Empire. Now, it was home of the NGO the Center for Peace, Non-Violence and Human Rights in Osijek, ran by Katharina Kruhonja.<sup>8</sup>

The atmosphere at the Center was very collegial and good-humored. The entire group that met this day consisted of roughly two-dozen of local activists, many of them part of tiny associations from small villages around Osijek and Slavonia. The consultation with these activists—which lasted several hours and which was video taped by a film team Documenta hired for its consultation campaign—was very telling in how these bigger, more established NGOs in the region struggle to integrate the needs of local populations within the larger framework of the Coalition for RECOM Initiative. As a case in point, while Documenta members set up stage for their consultation performance—a conference-style setting including a long panel table with microphones for the talks by Documenta staff about the RECOM draft statute and several additional rectangular tables put together in a u-shape to accommodate all of the participants—the room slowly filled up with local activists from diverse backgrounds, including young dynamic NGO activists, a few ordinary citizens, and older members of various smaller associations. After media spokesperson Eugen Jakovčić gave a brief introduction on the importance of the RECOM Initiative, he led the more technical-oriented roundtable discussion about each of the statute’s articles. Documenta’s director Vesna Teršelić was complementing his explanations. During this dialogue, which resembled a Q&A session during a regular conference or panel discussion, an elderly woman

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<sup>8</sup> For more detail on Kruhonja’s work see chapter 4.

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 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 Vorkapić, 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.<sup>9</sup>

Vorkapić 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 mentioned in chapter 6. 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 illustrated 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. In the next section I further elaborate on some of the many issues human rights activists grappled with during the multiyear campaign, which included over 100 gatherings at the regional, national and local level.

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<sup>9</sup> See Local Consultation with Civil Society Organizations on the Draft RECOM Statute, July 13, 2010, Osijek, Croatia.

## Fundamental, Recurring Questions during the Campaign Process

One of the issues that the drafters of the RECOM statute incessantly had to deal with was the question of how to define certain terms in the statute. While certain terms, such as “war crimes” or “civilians” were more easily determined referring to international law and existing treaties, other ones, such as the term “commission” or the difference between “veteran” and “combatant” were more difficult to define and to decide upon. For the term “commission” of the fact-finding body, the final draft statute of March 21 therefore clearly defined that:

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 is an international regional organization established by this Agreement.<sup>10</sup>

Interestingly, however, the decision of whether to use “veteran” or “combatant” in the final draft statute requires us to look at the semantics of both terms. A veteran, according to the *Oxford American Dictionary* is “a person who has served in the military,” while a combatant is “a person or nation engaged in fighting during a war.”<sup>11</sup> The drafters eventually settled on combatant, because the larger meaning of the term, that of a person engaged in fighting did not necessarily belong to an institutionalized and national military force, but rather could imply that the person belonged to other armed forces, such as a paramilitary group. The statute defines them as “members of the armed forces of one side in a conflict as well as

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<sup>10</sup> See final RECOM draft statute March 21, 2011, p. 6, at <http://www.zarekom.org/documents/Proposed-RECOM-Statute.en.html>, accessed May 13, 2011.

<sup>11</sup> Angus Stevenson and Christine Lindberg, *New Oxford American Dictionary* (Oxford University Press, 2010) at <http://www.oxfordamericandictionary.com>, accessed January 15, 2012.



members of militia and volunteer corps forming part of such armed forces.”<sup>12</sup> Moreover, they underline that as a member of any of these groups, a person does not necessarily have to engage in fighting on his or her own territory and that any civilians who “spontaneously take up arms to resist the invading forces” also falls into this category.<sup>13</sup>

Additionally, the term “veteran” has a distinguished meaning in society, and particularly in Croatia (but also across the region and in most nation-states) the defenders of the nation, former military veterans, remain a prestigious social actor group within the state, glorified not only by the conservative political party HDZ, but also by large parts of rural Croatian society. The choice to use combatant then, strips this connotation from the term, stressing instead the action of fighting in an armed conflict. Such an image, however, is far from being more neutral than the picture that the term “veteran” evokes. While it might be more objective in political terms, it still refers to images of violence and war. Slavko Kecman, member of the Association for Peace and Human Rights in Bilje, Croatia, expressed his opinion with respect to whether to chose the term veteran or combatant during one of the many RECOM consultations:

You mention here, under point b) Veterans whose death or disappearance is a direct consequence of the armed conflict/wars. I understand it in terms of the Convention on the Prevention and Punishment of the Crime of Genocide, so I think it would be better to rephrase it to read combat participants.<sup>14</sup>

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<sup>12</sup> Ibid. see supra note 10, p. 4.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid. supra note 9.

In addition to selecting the proper terminology for the statute, the drafters also had to grapple with the notion of time in various different ways.

Firstly, the planners of the commission faced several difficulties regarding the timeframe of RECOM's mandate. In other words, for how long should the body investigate war crimes and gross human rights violations? After several hour-long debates, the drafters decided to define the timeframe of operation of the commission to three years. This, however, does not include the initial preparation time to set up the institutional framework. Additionally, the commission might extend its work for an additional six months if necessary. The extension was added in view of writing and publishing the commission's final report and meant to provide extra time if further investigations were found to be crucial for the outcome of the report.<sup>15</sup> Furthermore, the question of the temporal and territorial scope of the commission's inquiry presented yet another bone of contention.

While the final version of the statute states that:

The Commission shall establish the facts about war crimes and other gross violations of human rights committed in the period from January 2, 1991 to December 31, 2001 in the states formed on the territory of the former Yugoslavia, inquire into the political and societal circumstances that decisively contributed to the outbreak of wars or other forms of armed conflict and to the commission of war crimes and other gross violations of human rights, and inquire into the consequences of the crimes and violations, including those which became manifest after 2001;<sup>16</sup>

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<sup>15</sup> Ibid. supra note 10, p. 7.

<sup>16</sup> Ibid. supra note 10, article 15, p.11.

the members of the working group spent session after session splitting hair on defining the appropriate timeframe for the commission.<sup>17</sup> The final timeframe includes all of the years that—during and after the dissolution of the former Yugoslavia—led to armed conflicts, starting with the first conflict between Croatia and Slovenia in mid-1991 and the end of the last one in Macedonia, in September 2001. Yet, violence in the Kosovo region, for instance, continued long after 2001. In 2004, mass violence against Serbs and Roma in Kosovo intensified, partially as a reaction to the violence against Kosovo Albanians in 1998-1999.<sup>18</sup> The last clause of article 15 in the final draft statute (cited above) “including those [war crimes and human rights violations] which became manifest after 2001,” therefore illustrates that the drafters of the statute were concerned about recurring violence in the region. As a consequence, they also intended to empower the commission to investigate into more recent human rights abuses.

Last but not least, already during RECOM’s early consultation process participants raised the question of amnesties.<sup>19</sup> While Saša Radovanović from the Institute for Serbian Culture in Serbia and several other participants during the local RECOM consultation in Kruševac made it clear that they were strongly against amnesty in the context of the former Yugoslavia, some participants were divided over the issue and the role that the regional fact-finding body RECOM could play in this regard.<sup>20</sup> Given the prevailing rule of law and the inclination

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<sup>17</sup> See informal discussions with Vjeran Pavlaković, historian (University of Rijeka) and member of the RECOM working group to establish its mandate in May 2011.

<sup>18</sup> See informal discussions with Documenta’s director Vesna Teršelić in July 2010 and May 2011.

<sup>19</sup> Some authors used quantitative analysis to analyze sequencing of amnesties with questionable success. See for instance Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*.

<sup>20</sup> Ibid. supra note 5.

of international and national policymakers across the region to employ war crimes courts to account for past atrocities, it is unlikely that blanket amnesties, such as some of the participants referred to, would ever be a serious point of discussion. However, conditioned amnesties reminiscent of plea-bargaining arrangements in the courtroom could be considered a way of including perpetrators in the commission's public hearings. Such an idea has, of course, very little support from representatives of judiciaries in the states of the former Yugoslavia. It remains therefore a highly controversial subject. Above, I described some of the more pertinent fundamental questions with regards to establishing a regional fact-finding body. Below, I draw on additional fieldwork data in order to address more legal-related issues that emerged particularly in the last phase of the RECOM campaign.

### ***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.<sup>21</sup> In the following, I draw on my participant observation of the 7<sup>th</sup> 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

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<sup>21</sup> See for instance different working groups during the 7<sup>th</sup> regional forum on transitional justice held in Zagreb, 15-17 October 2010.

members, notably the Humanitarian Law Center, have shifted from local, victim-oriented issues, to larger legal and state-centered questions. 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.<sup>22</sup> To this end, I first provide some background on the setting of the conference and the context in which it took place. I then describe the workshop session on the relations of RECOM with the judicial institutions in each country. This workshop also addressed other state-related problems.

### ***The Rocky Road to Organizing the 7<sup>th</sup> Regional Forum on Transitional Justice***

When the organizers and sponsors first decided to hold the forum, the original date was scheduled for late September 2010. The main campaign NGO actors, Documenta and Humanitarian Law Center, had the goal of generating an effective transnational public relation impact with the organization of their last regional transitional justice forum in Zagreb before the launch of their signature campaign for the Coalition for RECOM Initiative in spring 2011 to assure public support for the movement.<sup>23</sup> As a consequence, their guest list did not only include human rights activists, but also government officials, international state representatives and other public figures, such as scholars, experts, and journalists, among others. Even the Croatian President's office had agreed months in advance to save

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<sup>22</sup> Over 100 consultations were held during this period at the local, national, and regional level.

<sup>23</sup> See chapter 7 with details on the challenges of the signature campaign.

the date in president Ivo Josipović's calendar upon a request from Documenta's spokesperson and media representative Eugen Jakovčić, but the initial schedule had to be changed due to international events.<sup>24</sup>

In fact, after the International Court of Justice (ICJ) finally expressed its advisory opinion on July 22, 2010 that "the declaration of independence of 17 February 2008 [of the Republic of Kosovo] did not violate general international law,"<sup>25</sup> Josipović urged leaders in both countries to cooperate and find grounds for a dialogue at the annual UN General Assembly Meeting in September.<sup>26</sup> Hence, Josipović decided to travel to New York in order to be able to facilitate a dialogue if necessary, exactly during the week of the initially scheduled 7<sup>th</sup> Regional Forum of Transitional Justice. When the president's office communicated to the Croatian human rights activists that the head of state could not participate in person during the conference, but that they would send a spokesperson, the directors of Documenta and Humanitarian Law Center were concerned that the regional political impact would seriously be diminished if Josipović were not present. Thus, tremendous resources were mobilized in order to postpone the international symposium.

When the conference finally took place from October 15-17, 2010, the Croatian president was able to attend, sending a strong political signal to the states in the former Yugoslavia about the importance of the campaign. It was held in a conference room inside the upscale

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<sup>24</sup> President Josipović officially expressed his support for the Coalition for RECOM Initiative on August 30, 2010. The following day, his Serbian counterpart, Boris Tadić declared his official support to the campaign.

<sup>25</sup> See ICJ advisory opinion, 22 July 2010, General List No. 141, available at [www.icj-cij.org/docket/files/141/15987.pdf](http://www.icj-cij.org/docket/files/141/15987.pdf), accessed September 12, 2011.

<sup>26</sup> B92, "Croat President: Belgrade, Priština to Turn to Dialogue," *B92 News*, July 24, 2010, [http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=24&nav\\_id=68660](http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=24&nav_id=68660).

Westin Hotel in downtown Zagreb, slightly to the Northeast of the capital's botanical gardens, making it not only easily accessible for international participants and visitors, but also for the Croatian public at large. White tablecloths and champaign served at the reception during the nocturnal inauguration ceremony were a sign of how important NGO activists considered their event to be. Moreover, the entire staff, who during their regular work usually dressed casually wearing jeans and button-up shirts—generally not tucked into the pants—had traded in their daily wardrobe for dress pants, suits and cocktail dresses. For a couple of days, this forum turned Croatia's generally sleepy capital Zagreb into a buzzing beehive, with several hundreds of local politicians, the press and international representatives discussing transitional justice issues across the region. All eyes were focused on the final touches of the RECOM draft statute.

### ***The Legal Debate and Issues of the RECOM Draft Statute at the 7<sup>th</sup> Forum***

Due to the limited time, several workshops about different sections and topics of the statute were organized simultaneously. Nataša Kandić, 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. As many other participants and conference guests, I 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 I was crouching on top a heater in front of a large window with panoramic view of the city, I unpacked my laptop to take notes and started my voice recorder. Meanwhile, there was a growing horde of interested individuals piling into the room. Overwhelmed by the never-ending flow of people, I made eye contact with Nataša Kandić who was sitting directly across the room from me. A few moments later, Ms. Kandić grew impatient with the crowd and advised me—in a tone that made clear that no was not an option—I would be better off participating in one of the other workshops, implying that the rest of the latecomers do the same. 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.

After I had spent several semesters delving into RECOM's history and evolution, I was not ready to sit in with a workshop that discussed broader issues, but wanted to remain with this roundtable, in order to collect valuable data for my research. Despite being baffled by her boldness to send me out of the room, I kept a straight face insisting that I knew enough about the movement and would indeed be interested in staying to listen to the participants'



suggestions and comments. My frank response also encouraged many of the other seatless guest, who were standing or leaning against the wall to stay and follow 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 Murić from the Montenegro Lawyers' Committee for Human Rights, and Ibro Bulić 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 Bulić, 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.”<sup>27</sup> 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:

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.<sup>28</sup>

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?<sup>29</sup>

Representatives from international organizations, such as Ivan Jovanović from the OSCE Mission to Serbia, however, did not question the RECOM’s authority in this regard. On the

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<sup>27</sup> See 7<sup>th</sup> 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.

<sup>28</sup> Ibid. supra note 27.

<sup>29</sup> Ibid. supra note 27.

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.<sup>30</sup>

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.<sup>31</sup>

Ironically, during the debate Ms. Kandić 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 is not to assess the normative value of NGO activists to build a momentum of states in the region endorsing the commission. Instead this strategy highlights the dilemma

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<sup>30</sup> Ibid. supra note 27.

<sup>31</sup> Ibid. supra note 27.

activists faced in order to establish alternative transitional justice mechanisms in the Balkans.

In concluding this section, it is necessary to say a few words on RECOM's role vis-à-vis the work of national war crimes prosecutions. This part calls for a brief reflection on critically embedding fact-finding in a legal and/or judicial space. According to the draft statute, institutionally, RECOM will be an official body endorsed by the various governments of the former states of Yugoslavia, but will function independently, as mentioned earlier. In order to emphasize the institutionalized grassroots effort, the organizers launched a signature campaign after the forum in spring 2011 to collect over one million signatures across the region. The idea was to generate enough public support and buttress lobbying efforts with respect to introducing legislation in each of the RECOM member countries to establish the official institutional structure.<sup>32</sup>

In theory, the body has a non-judicial character, however, the consequences of certain powers exerted by the members was a touchy subject in numerous consultation and workshop meetings between coalition members who discussed the mandate and role of the commission in view of finalizing the draft statute. This issue illustrates the problematic character of truth commission mandates in general. On the one hand, their objective is to disclose facts about human rights violations by providing victims a space to have their voices heard—a form of soft justice to deal with the past. On the other hand, their goal is also to

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<sup>32</sup> See interview series with several NGOs across the region in May 2011. Currently, the campaign collected over 500,000 signatures and now continues to collect signatures online.

account for violence and war crimes, which, in many cases, require some form of retributive justice.<sup>33</sup>

In this context, article 49 of the statute ‘The role of the Commission in criminal prosecution,’ has repeatedly been discussed in multiple consultation sessions.<sup>34</sup> The article comprises three paragraphs relative to the role of RECOM with respect to alleged perpetrators that participate in public hearings and reveal “information leading to the discovery of a mass grave location or information significant for discovering other perpetrators.” While the first paragraph stipulates a suggestive power to RECOM vis-à-vis a war crimes court to recommend mitigating circumstances if any information is obtained from an alleged perpetrator that could lead to either the discovery of missing persons in mass graves or other perpetrators, the second and third paragraphs propose pardons if the collected information from an alleged (paragraph two) or sentenced (paragraph three) perpetrator lead to further discoveries that help the overall fact-finding mission about past atrocities. Prima facie, this discussion seems purely legal, concerning the definition of the roles between the judiciary and RECOM. This issue, however, when examined more closely, reveals a set of problems that range from defining the scope of amnesties—which in the case of RECOM have a conditional character—to the current judicial system’s effectiveness in the region, thus turning the scope of legal issues into political challenges.<sup>35</sup> To this end, I briefly

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<sup>33</sup> While Rwandan Gacaca courts have dealt with mass atrocities on a local scale (including shaming and other forms of sanctions for less grave crimes), the Peruvian truth commission cooperated with the domestic judiciary to prosecute perpetrators.

<sup>34</sup> The following information is based on the statute from 26 March 2011. See RECOM website at <http://www.zarekom.org/documents/Proposed-RECOM-Statute.en.html>, accessed June 12, 2011.

<sup>35</sup> Several case studies discuss the legal problems of amnesties, elaborating on the political difficulties of amnesties to foster democratic transition and arguing that that amnesties or pardons should only be considered in exceptional

address some conceptual problems of law society relations vis-à-vis the work of fact-finding bodies in the following, before turning to political and funding-related questions that not only concern the RECOM process, but also transitional justice processes in the region more broadly in chapter 7.

## **Beyond Legalizing Truth Spaces**

At the beginning of this chapter I introduced a trend I refer to as the legalization of truth spaces—describing the phenomenon how activists, practitioners, and experts employ tangible and practicable legal instruments during consultation meetings in order to establish the mandate for the regional commission. Above I also provided an in-depth discussion of the legal issues that the members in charge of drafting the statute had to deal with. In the following section I will discuss some of the conceptual ramifications of this phenomenon, because the juridification of truth-seeking bodies bears its roots in a broader law-society development. It describes the interactions between legal experts—such as elite, academic and professional networks—and their relationship to society in diverse sociopolitical contexts. Though Yves Dezalay and Bryant Garth have not applied this concept of legalization to post-conflict justice mechanism, they studied this trend in a more general

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cases as to not jeopardize the retributive justice efforts and only if other forms of justice mechanisms, such as restorative instruments, are in place Carsten Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court,” *Journal of International Criminal Justice* 3, no. 3 (2005): 695; James Gibson, “Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa,” *American Journal of Political Science* 46, no. 3 (2002): 540–556.

international and regional context as I have already discussed and further developed in chapters 2 and 4.<sup>36</sup> The conceptual underpinning of their study can also be applied to the current analysis of the RECOM fact-seeking initiative.<sup>37</sup>

In fact, earlier I described how they used Bourdieu's work in order to show how the transformation of ideas is contingent on education, time and space. Here I would like to come back to Bourdieusian concepts such as social capital and habitus to underline the process of legitimizing truth-seeking initiatives. While social capital is a sociologist concept that refers to the value of social relations and the role of cooperation to get collective results in our particular case, habitus is defined as the set of socially learned skills.<sup>38</sup> As I have shown at the end of chapter 4 with the emergence of the ICTJ, transitional justice processes have gained a more holistic meaning, including restorative practices, such as truth commissions. The network and social relations that practitioners at the ICTJ created around the concept of fact-finding projects thus reverberated during the RECOM campaign, especially in RECOM reports that underlined the continuous support of ICTJ staff during the various phases of the campaign. In other words, the existing social capital was used to legitimize alternative transitional justice mechanisms in the region and the reference to established actors and practitioners by members of the RECOM Initiative was used to bolster the movement's credibility. The practices and skills associated to implement truth

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<sup>36</sup> See chapter 4 for a discussion of some of their other work.

<sup>37</sup> For a detailed analysis on how ideas and knowledge travel in the case of legal concepts in the former Yugoslavia see chapter 4.

<sup>38</sup> Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977).

commission, however, as I will show below, are far from being clearly delineated from other fields. Rather these fact-finding initiatives are built on overlapping skill sets and practices.

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, 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 past (see chapter 4)<sup>39</sup>—has stressed the need to think differently when it comes to implementing successful strategies for truth commissions.<sup>40</sup>

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 justice into something tangible and applicable despite its disputable value and impact on a subject, in time and in space. The notion of truth, however, cannot easily be quantifiable or be constrained in a body of legal texts.<sup>41</sup> Nonetheless, RECOM coalition members intend to create a large database, tracking cases and human losses

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<sup>39</sup> He also consulted the RECOM members during meetings in Serbia and Kosovo in spring and summer 2010.

<sup>40</sup> See interview with Eduardo Gonzalez on 10 September 2010 in Belgrade, Serbia.

<sup>41</sup> 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.



across the region.<sup>42</sup> 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.<sup>43</sup>

Despite the meticulous and ongoing attempts to fit the mandate of a regional commission neatly into a legal document, the statute, the strengths of this initiative might lie elsewhere. For instance, various efforts—e.g. numerous congressional bodies of inquiry on specific massacres or death squads—preceded the creation of the Peruvian truth commission, which was put in place in the early 2000s and delivered an 8000-page report at the end of 2003. In fact, the institutionalization of RECOM—no matter how desirable by its proponents—is far from being a *fait accompli*. Many factors, ranging from the regional political climate to internal consensus of the coalition members demonstrate that this initiative still requires ample support from within and outside. Notwithstanding, according to a member of the RECOM draft statute advisory board, even if all these efforts would not result in the creation of the commission, many positive side effects have taken root in the region. The legacy includes strengthening local grass roots efforts, improving a commemorative culture, and inciting transnational cooperation between governments and civil society, among others.<sup>44</sup>

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<sup>42</sup> See interview with RECOM coalition members in June 2011.

<sup>43</sup> 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.

<sup>44</sup> See interview with Vjeran Pavlaković, historian (University of Rijeka) and member of RECOM for an overview of human rights activism in Croatia. September 2010.

The efforts put into setting up RECOM, however are proof that stakeholders (including activists, practitioners and lawmakers), are not merely copying a fact-finding body that is for instance modeled on the concept of the South African truth commission. Instead, they are aware that the context, conditions and objectives in the Balkans are unique. Hence, to cope with the dominant influence of legal experts in shaping an adequate body for dealing with mass atrocities in the former Yugoslavia, RECOM members have tried to expand the range of consultants and experts that the future commission will draw from. Similar to the Peruvian truth commission—which involved political scientists, anthropologists, sociologists, psychologists and historians, among others—the Coalition for RECOM has invited scholars, practitioners and experts from different fields that range from history to psychology.<sup>45</sup> While the ratio of non-legal experts remains still relatively low, this trend highlights the attempt to tackle political and institutional challenges differently.<sup>46</sup> Each of the experts brings a unique set of assets and knowledge to the discussion table, which—notably for the preparation and consultation to define the mandate of the commission—was very crucial. While psychoanalysts will be able to evaluate or address questions related to victims and how they deal with trauma in certain forms of testimonies or public hearings, forensic anthropologists can help define practical parameters when it comes to determining the role of RECOM in mass grave discoveries, and historians prove useful to delineate the historical period for which the commission should be designed for.

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<sup>45</sup> Supra note 44, and informal conversations with Vesna Teršelič in August 2010.

<sup>46</sup> As a case in point, when one of the founding organizations Documenta held national and regional consultations in Croatia and BiH attempting to get non-legal scholars involved in their workshops (in particular academics from the social sciences) the response rate of political science, history, and sociology professors, among others was very low. The data is based on participant observation and interviews during my 2009-2011 fieldwork.

It is too early to assess the impact of one choice over another. Notwithstanding, the short history of the evolution of the draft statute, in particular its final phase, has cast a doubt on whether NGO activists can remain close to their local base. While human rights advocates engage in victim-oriented activism, the need for state-level political support—and financial support, as I will examine in the following chapter—has put them into a difficult position. In order to implement the regional fact-finding commission they have to address broader, more symbolic questions and issues reminiscent to the ones described about state-level cooperation earlier.

## **Conclusion**

Building on the sociopolitical struggles described in chapter 5, in this chapter I analyzed the development of NGO activists to increase their ‘invented’ space to foster deliberative spaces of justice for civil society. 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. To this end, I discussed the process of NGOs attempting to draft a very detailed legal document that serves as the commission’s mandate. Hence, my analysis of

the 7<sup>th</sup> Regional Forum on Transitional Justice in Zagreb, Croatia during October 15-17, 2010 illustrated the activists' struggle to strike the right balance between victim-oriented advocacy and legitimizing their campaign with the required state-level support.

To address these issues I divided my chapter into four different sections. In the beginning, I sketched the initial grass-roots debates of RECOM's mandate presenting two local consultations in Knin, Croatia and Kruševac, Serbia. Subsequently, I explored several questions associated with drafting a mandate for the regional fact-finding body. For my main section, I relied on fieldwork data from my participant observation of RECOM's last regional forum on transitional justice in October 2010 before the members finalized RECOM's draft statute in March 2011. The forum emphasized the conundrum of NGO activists' efforts to institutionalize the commission at the state-level, resulting in what I call the legalization of truth spaces. Finally, I elaborated on some of the conceptual consequences of this phenomenon, as this juridification of truth commissions is grounded in a larger law-society development. My goal in this chapter was to show that activists' strategy of legal-oriented depoliticization of restorative justice processes, despite their repetitive efforts, remain still highly political, as activists continue to struggle to establish an officially institutionalized truth space. I further explore the conflict between state-centric transitional justice initiatives and bottom-up efforts across the region in the next chapter, when I discuss questions with regards to post-conflict justice funding using the case of Bosnia and Herzegovina.

## Chapter 7

### Picking Up the Tab for Transitional Justice:

#### A State-Centric Business

After a close-up of the RECOM draft statute and the impact and politics of legal concepts on institutionalizing the fact-finding body in the previous chapter, this chapter complements my argument of democratizing international humanitarian law that I developed throughout this study by addressing a couple of questions vis-à-vis the price of transitional justice. In fact, chapter 7 looks at the case of BiH and discusses the politics of aid in post-conflict settings by drawing on two case studies of Norway and Sweden in order to highlight the challenges in particular with regards to civil society efforts. BiH was particularly ravaged by the violent conflicts in the 1990s. As mentioned briefly in my introduction, BiH has been under the tutelage of different international and regional actors since the signing of the Dayton peace agreements in 1995, including the OHR<sup>1</sup>; first to rebuild physical and

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<sup>1</sup> While its current head the Austrian Valentin Inzko used to also be the European Union (EU) Special Representative for BiH, since 2011, the EU has decided to appoint a separate representative for this position. Currently, Peter Sørensen, from Denmark has been chosen for the EU Special Representative position. The aim of decoupling both positions is to prepare BiH for the EU accession process, according to the EU.

infrastructural damage and subsequently to monitor BiH's democratization process, strengthen its political institutions, and help its war torn society during the post-conflict transition. Several authors explain that despite numerous reform initiatives BiH's society continues to grapple with ethnic divisions, which fuel persistent political crises and institutional instability.<sup>2</sup> In addition to the political turmoil at the state (national) level of BiH's institutions, the development of Bosnian civil society has not met the expectations of Western aid actors—and NGOs that work for these donors.<sup>3</sup> International development efforts still struggle to strengthen state-society relations in BiH. This sociopolitical malaise is very visible with regard to donors' accountability efforts for past mass atrocities. In this chapter I explore this phenomenon, analyzing how the international understanding of the conflict has translated into donors' agendas and activities in transitional justice processes.

Although the cost of rebuilding and developing post-conflict societies has found scholarly attention<sup>4</sup>, very few studies have addressed the price of justice to cope with past mass atrocities and the politics that it entails. Some scholars have grappled with the question of

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<sup>2</sup> Florian Bieber, "Constitutional Reform in Bosnia and Herzegovina: Preparing for EU Accession," *Policy Brief European Policy Center* (2010); Roberto Belloni, "Bosnia: Dayton Is Dead! Long Live Dayton!," *Nationalism and Ethnic Politics* 15, no. 3–4 (2009): 355–375; Bruce Hitchner, "From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina," *Fletcher Forum of World Affairs* 30 (2006): 125.

<sup>3</sup> Roberto Belloni, "Civil Society in War-to-Democracy Transitions," in *From War to Democracy: Dilemmas of Peacebuilding*, ed. Anna Jarstad (Cambridge, United Kingdom: Cambridge University Press Cambridge, 2008), 182–211; Martina Fischer, *Peacebuilding and Civil Society in Bosnia and Herzegovina: Ten Years After Dayton* (Lit, 2005); Adam Fagan, "Civil Society in Bosnia Ten Years After Dayton," *International Peacekeeping* 12, no. 3 (2005): 406–419; David Chandler, "Democratization in Bosnia: The Limits of Civil Society Building Strategies," *Democratization* 5, no. 4 (1998): 78–102.

<sup>4</sup> See for instance Graciana del Castillo, *Rebuilding War-Torn States: The Challenge of Post-Conflict Economic Reconstruction* (Oxford University Press, USA, 2008); Sultan Barakat, *After the Conflict: Reconstruction and Development in the Aftermath of War*, vol. 1 (IB Tauris, 2005); Michael Brown and Richard Rosecrance, *The Costs of Conflict: Prevention and Cure in the Global Arena*, vol. 118 (Rowman & Littlefield Pub Inc, 1999); Alcira Kreimer, *The World Bank's Experience with Post-conflict Reconstruction* (World Bank Publications, 1998). For studies specifically on BiH see for instance Vladimir Gligorov, "Bosnia and Herzegovina," *Southeast European and Black Sea Studies* 1, no. 1 (2001): 132–139; Wei Ding and Christine Wallich, *Bosnia and Herzegovina: Toward Economic Recovery* (World Bank Publications, 1996).

the price of international war crimes trials, comparing different UN ad hoc and hybrid tribunals as well as some domestic courts, such as the War Crimes Chamber of the Court of BiH. In an article published a few years ago, for instance, Rupert Skilbeck details the cost of different tribunals and courts, ranging from the ICTY to the hybrid court in Cambodia. He argues that the huge budget costs of earlier UN courts for the former Yugoslavia and Rwanda need to be replaced with more sustainable models in the future.<sup>5</sup> While Skilbeck's work provides a general overview of the different costs, an earlier study by Cesare Romano explains in detail which budget models his eleven-selected court cases employ and discusses the pros and cons of each.<sup>6</sup>

Existing scholarship primarily focuses on the overall cost of legal procedures; yet, it doesn't address the politics of it. In other words, little is known about the reasoning for donors' policy and strategy choices. In fact, several questions still remain partly unanswered in this context: Who is paying for these retributive accountability efforts? What are the donors' goals and motivations? And what challenges, problems and risks result from these international strategies to promote transitional justice projects in BiH? It is beyond the scope of this chapter to provide a comprehensive answer to all of these questions. Instead my research aims to explore the politics of the cost of justice in BiH by concentrating on only a few actors and their funding activities. My goal is to provide an overview of aid processes for post-conflict justice projects and examine problems and tensions that arise in relation to broader transitional justice efforts, including in particular civil society initiatives.

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<sup>5</sup> Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials," *The Human Rights Brief* 15, no. 3 (2008): 2.

<sup>6</sup> Cesare Romano, "The Price of International Justice," *Law and Practice of International Courts and Tribunals* 4 (2005): 281.

An important number of international development actors, such as EU member states, the EU itself, the US, and the UN, among other states and international organizations, have and currently still are assisting BiH during its transition phase and help the country to deal with its burdensome past. In spite of BiH's donor panoply, this chapter concentrates mainly on Norway and Sweden. While the latter is—in monetary terms—among the largest single-country donors in BiH, I selected the former (which still ranks among the larger donors in BiH) in order to include a medium-sized member country of the Organization for Economic Cooperation and Development (OECD) that is also part of the Development Assistance Committee of the OECD. In fact, large donor countries like the US are less interesting, as the US is currently phasing out regional support, contrary to Norway, which foresees a steady assistance flow in the years to come.<sup>7</sup> Additionally, Norway is not part of the EU, which is yet another important observation for Norwegian aid strategies, as I will show later. While it is possible to provide longitudinal data on general development assistance trends in BiH and data that show both donors among various other development actors—including single donor countries and international organizations (see figure and table 1 below)—it is difficult to break down the exact cost of transitional justice assistance of Norway and Sweden. I briefly discuss several reasons for the lack of such specific data.

First, as laid out in an evaluation report on Norwegian development aid in the former Yugoslavia, the government created only one formal policy document about its aid

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<sup>7</sup> Interview with Deputy Chief of Mission of the Norwegian Embassy in Sarajevo on 18 May 2011.



strategies between 1991 and 2008 for parliamentary debate, which was published in 1999.<sup>8</sup> Moreover the government, respective ministries—such as the Ministry of Foreign Affairs (MFA)—and other agencies—such as the Norwegian Agency for Development Cooperation (Norad)—didn't maintain a central archive of development activities in order to create an institutional memory including performance tracking of its earlier projects and funding activities.<sup>9</sup>

At this point it is also helpful to distinguish between the concepts of transitional justice and justice sector reform (JSR) vis-à-vis these development activities discussed in this article. Although transitional justice has become an encompassing umbrella term to describe a variety of mechanisms to deal with past gross human rights abuses—ranging from retributive justice tools to restorative justice practices<sup>10</sup>—interestingly, in BiH's post-conflict context, transitional justice refers particularly to supporting and improving war crimes trials.<sup>11</sup> As war crimes trials are part of the regular court system, it is unsurprising that accountability efforts against mass atrocities overlap with broader reform processes within the judicial system.<sup>12</sup> Although this article does not intend to address JSR issues in particular, it expands on a few general justice reform problems, such as some of the work of

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<sup>8</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*, Evaluation (Oslo: Evaluation Department, Norwegian Agency for Development Cooperation, 2010), 7.

<sup>9</sup> Ibid. In interviews in May 2011, Norwegian officials underlined, however, that the cooperation between government agencies and the creation of shared internal archives had been started as a result of the publication of Norad's 2010 evaluation report.

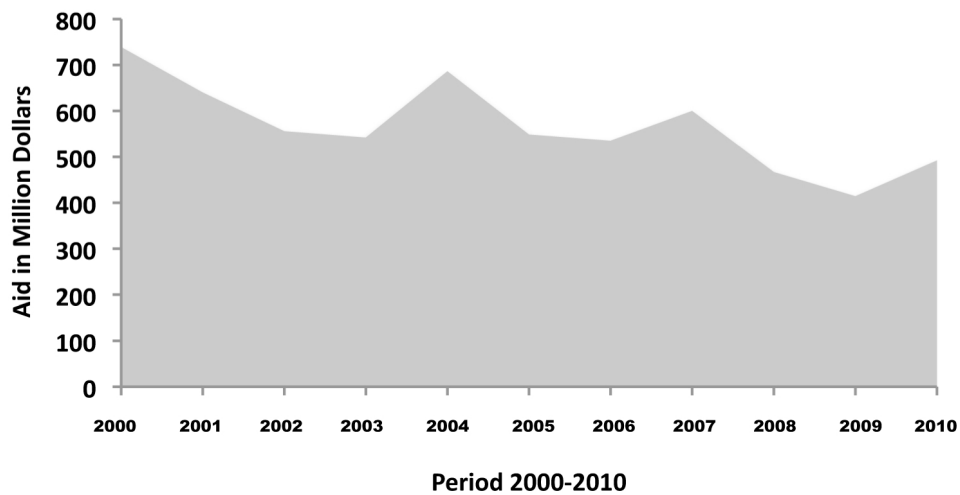
<sup>10</sup> For a detailed discussion see for instance Teitel, *Transitional Justice*.

<sup>11</sup> Despite a number of international actors, including the United States Institute for Peace, that backed national and local truth commission initiatives in BiH, the success rate has been limited. 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).

<sup>12</sup> Many interviewees stressed the programmatic overlap in this regard.

the High Judicial and Prosecutorial Council (HJPC). The HJPC is a national institution in BiH that serves as a watchdog for many aspects of the judicial system. Members of the Council appoint, train, and discipline judges, among other things. Additionally, they also advise the government about judicial budgets. Addressing some of these broader issues that are indirectly related to war crimes can thus clarify certain donor strategies and their perceptions of transitional justice processes in BiH.

As mentioned above, the following figure and table 1 with general data from the OECD's website are helpful to provide an overview of the development situation in BiH during the past decade. The figure below on BiH's net official development assistance and official aid that the country received in the period from 2000 to 2010 (including international donors, such as the UN, EU and World Bank, among others; as well as single country donors, such as Austria, Japan, Norway and Sweden, among others) shows that the sum of aid disbursements has dropped 44 percent from 738 million US dollars in 2000 to 492 million US dollars in 2010. This was to be expected, as the early 2000s were a period in which reconstruction aid decreased with assistance programs emphasizing more on technical services and democratic transition projects, such as electoral reforms and public sector reforms, among others.



**Figure 3: BiH's Total Net Development Assistance**

The statistical data on development assistance to BiH by single donor country below—with the exception of multilateral aid by EU Institutions at the bottom of table 1—confirms the above trend that aid flows have been decreasing lately. While Sweden's assistance to BiH was around 30 million US dollars in recent years, Norway's total aid was a little under 20 million during the same time period. Interestingly EU funding—despite some cuts after 2005, is still very important and amounted to 105 million dollars in 2010, mostly due to its enlargement agenda in the Western Balkans. These numbers, however, should only help to paint a general picture of development assistance in BiH during the last decade. More importantly, the goal of this chapter is not to provide extensive statistical data on foreign

aid in BiH's transitional justice processes, but instead to discuss aid politics and point to the challenges donors face when implementing and investing in post-conflict justice projects in the country.

**Table 1: BiH's Total Aid Flow in Million US dollars of Selected Donors from 2000-2010**

Donor(s)	Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Australia		—*	0.01	—	—	—	—	—	0.02	0.01	0.01	0.01
Austria		22.52	14.19	10.89	15.2	18.59	25.93	29.07	33.08	38	28.59	31.38
Germany		91.51	27.04	19.42	21.81	29.92	26.1	26.68	29.03	46.91	27.63	29.95
Netherlands		43.3	52.91	37.34	25.16	24.82	21.09	18.92	21.1	31.27	21.75	14.26
Norway		30.78	16.87	23.83	21.62	17.01	17.69	19.01	17.38	19.01	15.85	18.23
Sweden		23.89	29.02	26.98	35.4	34.08	46.88	40.2	37.03	28.67	32.43	28.02
United States		85.75	135.06	75.78	68.74	61.92	49.46	66.04	31.61	26.44	31.07	28.33
EU Institutions		196.06	154.26	129.26	135.83	124.56	164.52	89.29	69.29	85.87	72.62	105.09

\*Note: No data was available for the blank cells

Source: OECD

Furthermore the comparison between the two Scandinavian countries is of particular interest, since Norway is not part of the EU and Sweden, in spite of its EU membership, still pursues an independent development agenda (and funding) on top of its contribution to larger EU funds. Although BiH has been a big laboratory of emergency, reconstruction and

development aid since the outbreak of the war in 1992, for the purpose of this chapter I focus only on the period from 2000 to the present and examine aid allocations to projects that are specifically related to transitional justice efforts.

My research is based on extensive fieldwork in BiH between 2009 and 2011, including over three-dozen interviews with official representatives of donor countries, activists and experts. Embassy representatives from the Swedish and Norwegian Missions in Sarajevo kindly responded to my interview requests, providing valuable reports and official documentation to help better understand the development activities of both countries. Additionally, I interviewed staff of the HJPC, the UNDP, the OSCE, the EU Special Representative, and the OHR. I also had several interviews and discussions with human rights activists including staff from the Coalition for RECOM (a transnational fact-finding initiative created in 2008), the Research and Documentation Center, and the Youth Initiative for Human Rights in Sarajevo. I chose the interviewees by their relevance to the current transitional justice process in BiH and did not encounter any resistance scheduling meetings for interviews. Notwithstanding the openness of interview participants to provide helpful answers and information to my questions, some of them were particularly cautious about their statements, emphasizing that the information—albeit not confidential—should not be quoted directly with their name in any published material. This vigilant behavior and carefully crafted public relations demeanor underlines the persisting politicization of important sociopolitical and socioeconomic issues and debates in BiH.

I employ concepts from international political economy, an interdisciplinary field of study, which concentrates on how political forces, such as states, institutions and individual actors, shape economic structures and systems in international relations. A range of authors treated a variety of issues addressing the political issues of different economic activities and sectors in BiH.<sup>13</sup> Although my research does not directly focus on the effects of development aid on economic interactions in BiH, it addresses the cost of transitional justice and the politics behind foreign aid that is disbursed in BiH's post-conflict justice settings. In this chapter I demonstrate that initially international development strategies were not tailored to the needs of local project funding. Over time, however, government reports illustrate that donors have attempted to target aid and funding strategies more effectively.

The first part of this article outlines the state-centric concept behind post-conflict development support in BiH. I then illustrate this approach by drawing on the different transitional justice development strategies of the Norwegian and Swedish governments. In the second part of my piece, I discuss the challenges and problems associated with these strategies and development projects. I show that current development approaches nonetheless focus on cooperation with state institutions and have difficulties reaching local civil society actors and their projects.

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<sup>13</sup> See for instance Timothy Donais, *The Political Economy of Peacebuilding in Post-Dayton Bosnia* (Routledge London, 2005); Michael Pugh, "Postwar Political Economy in Bosnia and Herzegovina: The Spoils of Peace," *Global Governance* 8, no. 4 (2002): 467–482; Peter Andreas, "The Clandestine Political Economy of War and Peace in Bosnia," *International Studies Quarterly* 48, no. 1 (2004): 29–52.

## Post-conflict Aid Strategies in BiH: A State-Centric Concept

The following is a brief historical analysis of the creation and legacy of the ICTY as well as the spill over effect of international humanitarian law to the national level in BiH—I will summarize some of the War Crimes Chamber's (WCC) work at the BiH State Court<sup>14</sup>—in order to understand donors' preferences to invest in retributive justice rather than restorative justice mechanisms. In fact, due to the difficult rise of the UN ad hoc tribunal in The Hague, ICTY advocates, such as its first Chief Prosecutor Richard Goldstone, were initially against any truth commission attempts, as they believed this would undermine the initially fragile work of the Tribunal.<sup>15</sup>

From a historic point of view, the UN Security Council resolution 827 establishing the ICTY in The Hague (Netherlands) in 1993 required considerable legwork from a committed and ambitious transnational network of international legal experts, lawyers and diplomats.<sup>16</sup> Yet, since its creation, the future of the UN ad hoc war crimes tribunal with the goal of accounting for mass atrocities committed during the violence in the 1990s was far from certain. On the one hand, the lack of funding rendered its initial work extremely difficult. On

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<sup>14</sup> The BiH State Court is an internationally established hybrid court, modeled after the ICTY for war crimes committed in BiH. It was created in 2002.

<sup>15</sup> Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, 41–43.

<sup>16</sup> Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia* (Texas A&M University Press, 2004); Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*.

the other hand, the politicization of its decisions by different governments in the region<sup>17</sup>—once it operated on a regular trial schedule—undermined the ICTY’s credibility and legitimacy across different social groups in societies across the Balkans.

In spite of the politicization issues described in Jelena Subotić’s book<sup>18</sup>, the court has had a visible track record, since it held its first trial over 15 years ago, expanding international humanitarian law across the region.<sup>19</sup> In July 2011, Serbian authorities captured and transferred the last war criminal on the ICTY’s 161 person long most wanted list to The Hague, buttressing the court’s legacy and fulfilling its original objectives of trying a long list of indictees from the states of the former Yugoslavia.<sup>20</sup> The creation of the ICTY is often cited as a watershed in the quest to account for international war crimes<sup>21</sup>, fueling a global spill over effect that led not only to numerous regional and hybrid courts across many continents, but also to the formation of the International Criminal Court in 2002.

For a number of reasons this so-called justice cascade<sup>22</sup> also helped develop stronger retributive mechanisms within the region. First, the ICTY’s list of perpetrators only contained a selective and symbolic amount of individuals and committed war crimes. Thus, from the start, it was clear that complementary domestic trials would be necessary to

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<sup>17</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*. In the court’s early years, the prosecution could not work properly, as indicted perpetrators would not be handed to the ICTY by national authorities in various countries, such as Serbia and Croatia.

<sup>18</sup> Ibid.

<sup>19</sup> Teitel, “Global Transitional Justice.”

<sup>20</sup> For a summary of the ICTY’s achievements see website the Tribunal’s website at <http://icty.org/sid/324>, accessed 20 February 2012.

<sup>21</sup> Robert Cryer and Paul Mora, “I. The Coroners and Justice Act 2009 and International Criminal Law: Backing the Future?,” *International and Comparative Law Quarterly* 59, no. 03 (2010): 805; Drumbl, *Atrocity, Punishment, and International Law*, 46.

<sup>22</sup> Lutz and Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America.”



continue the work of the UN ad hoc tribunal in the Balkans. Second, the courtroom in The Hague, situated in the heart of Europe, was at a distance from the actual sites of the crime scenes. While this was necessary at the beginning—due to the ongoing conflict in the region—the geographic gap currently separating victims, witnesses and society from the war criminal trials has diminished the effectiveness of the court to transmit a message to the states in transition, and in particular their societies. Hence justice efforts at the national level have increased—in the cases of Croatia and Serbia, for instance, the basic effectiveness—in terms of case selection, impartiality, appeals, for instance—can still be improved.<sup>23</sup> The record of the WCC in BiH's State Court, created by a 2002 law, is overall promising. Despite numerous challenges (ranging from issues related to case transfers from the ICTY to obstacles in legal procedures, such as witness protection), it has used its internationalized character to promote not only substantive criminal law provisions of BiH, but also European human rights norms, as defined by the European Convention for the Protection of Human Rights and Fundamental Freedoms and applicable case law of the European Court of Human Rights.<sup>24</sup>

Indeed, since the prosecutor's office and the war crimes section of the court reached its full operation ability in 2005, the Court has delivered over 68 final verdicts and several so-called Rule 11bis cases have been processed.<sup>25</sup> The latter refer to transfer cases from the ICTY, in

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<sup>23</sup> See for instance reports published by NGOs and organizations including Documenta Center for Dealing with the Past, OSCE, and the Humanitarian Law Center.

<sup>24</sup> Melika Murtezić, "The War Crimes Chamber in the Court of Bosnia and Herzegovina," in *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, ed. Roberto Bellelli (London: Ashgate Publishing, Ltd., 2010), 349.

<sup>25</sup> OSCE, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010*.

which the domestic judiciary carries on the work of The Hague Tribunal due to the UN's completion strategy for the ICTY. The international community, including the ICTY, the OHR and several countries that seconded judges to the BiH Court in the beginning, were instrumental for the current *modus operandi* of the War Crimes Chamber.

In this context, it is interesting to ponder on how much it costs to provide these services and who paid for them. The BiH State Court is a hybrid court<sup>26</sup> and its current funds for the period of 2004-2011 budgets amount to 57 million euros (77 million US dollars). While the investments at the beginning of the Court's operations in relatively important—partly due to setting up the logistics of a functional prosecution and court system—annual budgets in more recent years from 2009-2011 are on average 3 million US dollars. Comparing these figures to the cost of the ICTY during the same period illustrates how expensive international criminal justice is compared to domestic justice—partly because of the scope of the operations, such staff travel and interpreters, among others (see table 2 below). Over 20 donors support the Court, ranging from large countries and organizations such as the EU and US to small countries such as Luxemburg or Cyprus.<sup>27</sup> Moreover, at the end of 2011, the ICTY had a staff of 869, whereas the State Court in BiH only employs about one third of the ICTY's total amount.<sup>28</sup> Since its first case in 1995, the ICTY has indicted 161 alleged perpetrators and concluded proceedings for 126 accused (35 are still ongoing).<sup>29</sup> In

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<sup>26</sup> For a detailed comparative analysis of BiH's hybrid court and the Cambodian model see for instance Martin-Ortega and Herman, *Hybrid Tribunals & the Rule of Law Notes from Bosnia & Herzegovina & Cambodia*.

<sup>27</sup> The entire list consists of Austria, Belgium, BiH, Canada, Cyprus, Denmark, the EU, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the US.

<sup>28</sup> See ICTY Website, accessed on February 20, 2012.

<sup>29</sup> Ibid.

comparison, BiH's War Crimes Chamber indicted a total of 168 persons already since it began its work in 2005 and rendered 65 judgments of 134 commenced trials.<sup>30</sup> Juxtaposing the total number of indicted persons and the cost of the ICTY's and BiH's State Court budget underlines the cost efficiency of domestic justice.

**Table 2: Annual Budgets of the ICTY and the BiH Court in Million Euros from 2005-2011**

Court Type	Year	2005	2006	2007	2008	2009	2010	2011	Total
BiH Court		--	10.2	7.6	7.7	2.3	4.4	3.4	57.6 *
ICTY		135.9	138.2	138.2	171.2	171.2	150.9	150.9	1056.6

\* Note: For 2005 no data are available for the BiH Court. Due to the ICTY's biennium budgets starting in 2004-05 some of the amounts match. Source: BiH Court & ICTY

This brief summary of the ICTY's work and its influence on the WCC's war crimes prosecution in BiH provide useful background information in order to describe the development agendas of Norway and Sweden and discuss some of their funding strategies. Below, I first present some of Norway's general development activities in BiH. Then, I examine Norwegian financial support of transitional justice processes, before looking at the Swedish aid efforts.

<sup>30</sup> Registry BiH State Court, *Annual Report* (Sarajevo, 2010), 62.

## ***The ‘Norwegian Model’: A Top-Down Approach***

Norway’s involvement in post-conflict aid in BiH has been far-reaching. Since the outbreak of violence in the region, the kingdom provided financial support during different stages of the conflict, including humanitarian emergency funds during the hostilities (in particular to refugees); reconstruction aid shortly after the end of the fighting of warring factions; and development aid (geared towards democratic transition), notably after 2000. In the following, I provide some contextual elements of Norway’s aid strategies to provide background information on the Norwegian case. Then, I elaborate on some transitional justice aspects of the Norwegian government’s intervention in Bosnian politics, illustrating its top-down capacity building efforts.

When examining Norway’s development agenda in the Balkans, it is important to recall that Norway is not part of the EU. Although policy recommendations and reports from the respective Norwegian institutions, such as the MFA or Norad—which serves as a advisory body to the MFA—make brief mention of EU structures, aid strategies and the EU enlargement road map, explicit collaborative efforts remain in the background of broader aid objectives. Instead, a 2010 evaluation report of Norwegian development aid, for instance, only refers to the EU’s Stabilization and Association Agreement (SAA)<sup>31</sup> goals *after* listing major international development actors, including the World Bank and the UN.<sup>32</sup>

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<sup>31</sup> SAAs are part of the EU Stabilization and Association Process and European Neighborhood Policy. They are based on the EU’s *acquis communautaire*—the accumulated legislation, legal acts, and court decisions—which constitute the body of European Union law. Before a country can become a EU member, several negotiation rounds with the EU

Moreover, development efforts of the Norwegian government in BiH, and the Western Balkans more generally, lack a clear and overarching policy strategy. Norwegian involvement is merely based on policy formulations in the government's annual budget.<sup>33</sup> Such a policy approach is contrary to international donor strategies, which have been streamlined in recent years to follow benchmarking criteria and measurable results.<sup>34</sup> Hence, suffice to say that Norway's lack of a clear strategic vision made the evaluation of high-level relevance and general effectiveness of particular aid programs in assessment reports very difficult or at times even impossible.<sup>35</sup>

Interestingly, however, the lack of an explicit aid strategy has not posed any accountability issues for the Norwegian government. In fact, the Storting, the country's parliament, approves aid allocations annually. The legislative approval therefore guarantees transparency. This process is part of a donor policy plan called the "Norwegian Model." In sum, as Norwegian actors from the public, private and non-profit sector constitute the main recipients of Norwegian development funding, accountability and transparency are assured via internal check-and-balance mechanisms, such as annual institutional reports. Several advantages result from the current set up. First the decision-making process, which is controlled by the MFA, is fast. In fact, all the involved Norwegian actors (such as managers, executive directors, and other experts) can be reached easily based on the MFA's

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and the candidate country have to be accomplished in order to evaluate whether a country's legislation complies with the over 30 chapters of EU legislation.

<sup>32</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume II*, Evaluation (Oslo: Evaluation Department, Norwegian Agency for Development Cooperation, 2010), 6.

<sup>33</sup> According to officials at the Norwegian Embassy in Sarajevo during an interview in May 2011, the country's oil revenue, in particular, figures into its generous aid portfolio.

<sup>34</sup> See for instance 2005 Paris Declaration on aid effectiveness.

<sup>35</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*, iii.

communication channels and its ability to put pressure on these actors to fulfill their goals.<sup>36</sup> According to a Norad evaluation report, this 'door-to-door' delivery chain and the accountability/transparency efforts have provided Norway much visibility in the European political space.<sup>37</sup> Nonetheless, as I discuss later in this chapter, such an organizational structure based on national actors, rather than local cooperation partners, also bears a number of problems.

The majority of Norway's aid in terms of transitional justice funding in BiH goes to supporting the HJPC.<sup>38</sup> It is an autonomous BiH institution established in 2004 by law with the task of ensuring the independence of the judiciary and the proper functioning of judicial services at the state and entity levels of BiH.<sup>39</sup> As discussed earlier, although the HJPC is not specifically an institution responsible for overseeing transitional justice processes and war crimes prosecutions, it is nonetheless part of the check-and-balance system within the justice system and BiH's political institutions. According to Sven Marius Urke, a seconded Norwegian civil servant, who has been serving as an international member of the HJPC since its creation<sup>40</sup>, it is crucial for promoting war crimes prosecutions. To this end the HJPC appoints impartial and independent judges who will also serve on the bench of the WCC.

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<sup>36</sup> This is particularly important, as Norway's development agency, Norad, which was an independent government body managing aid and development programs during the 1990s, became part of the MFA in 2004. It now serves as a knowledge management and technical advisory body for the MFA and its embassies.

<sup>37</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*, 6.

<sup>38</sup> Total judicial and legal sector reform funding for the period of 1996-2008 was about 10 million euros (13.4 million US dollars), excluding secondment salaries to its experts and civil servants working in BiH institutions.

<sup>39</sup> For more details see Law on the High Judicial and Prosecutorial Council of BiH, May 23, 2002. The HJPC is the successor body of the Independent Judicial Commission (IJC), established by the then High Representative Wolfgang Petritsch in 2001.

<sup>40</sup> Before becoming an international member of the HJPC, Mr. Urke was also part of the international team working on the IJC in BiH.

Interestingly, other members of international organizations had similar opinions of the HJPC's work<sup>41</sup> and were stressing the importance of the Council for transitional justice processes not only in BiH, but also across the region, as I explain below.

A major focus of Norway's aid has been on the transfer of knowledge and experience from the Norwegian judicial system model. While Norway's involvement in helping to increase the capacity of this body in recent years has been remarkable, according to Mr. Urke<sup>42</sup>, the structural conditions for its success were defined by the EU and the OHR insisting on a unified legal sector reform in BiH and pushing for the signing of these judicial sector reform agreements.<sup>43</sup>

Interestingly, the work of the Council has fueled a spill over effect. Recently, the impact of the judiciary watchdog has led to cooperative efforts—initiated by the international influence within the Council's organizational structure—with other governments in the region (including Kosovo and Serbia) to reproduce similar models.<sup>44</sup> Based on these achievements, current Norwegian funding for these activities will not be decreased for several the years to come.

Such a transitional justice aid strategy reveals two important insights about Norwegian development politics. First, the Scandinavian state has a preference to commit its funds to

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<sup>41</sup> Interviews with several members of international organizations, including the OSCE, UNDP, and the EU, among others.

<sup>42</sup> Interview with Sven Marius Urke on May 11, 2011.

<sup>43</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume II*, 52.

<sup>44</sup> Interview with Sven Marius Urke on May 11, 2011.

institutions created by the international community.<sup>45</sup> Moreover, Norway's emphasis lies on capacity building rather than infrastructure or institution building, unlike other international actors in the region. While knowledge transfer is at the core of Norwegian aid policies, the comparison below with another important donor in BiH, Norway's neighbor, Sweden, highlights the many similarities and differences in development funding.

### ***Sweden's Role: Promoting the EU Enlargement Agenda***

With an annual aid budget of 32 million euros (43 million US dollars) in 2009, the Swedish kingdom is one of the largest single-country donors in the region. As a comparison, Norway spent about 16 million euros (21.5 million US dollars) of bilateral aid the same year and the EU enlargement budget for BiH with its Instruments for Pre-Accession (IPA) added up to about 73 million euros (98million US dollars) (see table 1 above).<sup>46</sup> It is important to note, however, that the Swedish support comes on top of its share contributed to EU enlargement efforts. While it is difficult to provide exact amounts for grants supporting transitional justice projects in general, the ratio of funding for justice-related projects is roughly one tenth of the entire aid budget for Norway, Sweden and the EU.

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<sup>45</sup> Reasons for such a strategy vary, but are linked to transparency, flexibility and directness of donor funds, as described above. In this context, Norway is also providing development grants in the War Crimes Section of the BiH State Court. It has been particularly engaged in providing Norwegian support staff, such as prosecutors and judges.

<sup>46</sup> IPA is the EU's assistance to countries engaged in the accession process to the EU for the period 2007-2013. It was preceded by other programs including the Special Accession Program for Agriculture & Rural Development (SAPARD) and the program of community aid to the countries of Central and Eastern Europe called Phare, among others.



Sweden's government has a broad justice sector reform aid portfolio that goes beyond war crimes prosecution and transitional justice support. While it co-funded the 2002-created BiH State Court to account for war crimes with seconded Swedish civil servants, acting as judges or prosecutors, Sweden also supports the HJPC. In particular, it currently provides funding for an electronic case management system, which will facilitate judicial cooperation between the different entities and between the neighboring states in the region.<sup>47</sup> Additionally, the Swedish government has recently shown a strong interest in prison sector reform and juvenile justice, along with its French counterparts. This initiative resulted from a thorough justice sector evaluation carried out by the Swedish International Development Agency (Sida) in 2007.

In this context, the Sida analysis followed a model of the so-called *justice chain*, including five sections—police, prosecution, courts, legal aid, and carrying out of criminal sanctions. Although the assessment demonstrated the need of reform in all areas, Sweden's development strategies have since focused on particularly weak links of the chain:

Support of the justice sector will be based on an analysis of the judicial chain and any weak links identified, and paying attention to possible synergy effects. This support can cover issues relating to the administrative courts, enforcement and penal care. Support can also be given to supplementary measures lying outside the remit of the justice sector strategy based on a

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<sup>47</sup> See also interview with Swedish International Development Agency (Sida) official of the Swedish Embassy in Sarajevo in May 2011.

rights perspective, for example, support to juveniles who come into contact with judicial authorities.<sup>48</sup>

Sweden has also supported projects with BiH's state level institutions, such as the Ministry of Justice.

One explanation why Swedish development support for post-conflict justice is broader and includes also cooperation with government institutions in Bosnia is that Sida has a long tradition of formulating project proposals and multi-year strategy planning.<sup>49</sup> Moreover, Sweden, as a member of the EU, has tailored its aid strategy to EU guidelines for enlargement processes in the region. Sweden's agenda also foresees a steadily decreasing aid budget, as it prepares to merge certain activities with EU partners and projects.<sup>50</sup> The close ties between the EU institutions and the Swedish government are clearly outlined in the Swedish 2011-14 development report. It states that the main strategy for reform cooperation in BiH should be based on: *"Democratic, equitable and sustainable development as well as improved conditions for EU integration."*<sup>51</sup> Sweden's government is thus closely following EU policies that have been consolidated by the SAA signed in 2008 and EU financial support to BiH via its IPA funds. Notwithstanding the EU's overarching

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<sup>48</sup> Sida, *Strategy for Development Cooperation with Bosnia and Herzegovina: January 2011 – December 2014* (Stockholm: Government Offices of Sweden, Ministry of Foreign Affairs, 2010), 4.

<sup>49</sup> Although Norwegian's MFA also processes project ideas, they have been relatively punctual, based on a short-term vision without any benchmarking or evaluation possibility. Indeed, Norway's first internal (and relatively comprehensive) assessment of the MFA and Norad's development assistance dates from 2010 only.

<sup>50</sup> Sida, *Strategy for Development Cooperation with Bosnia and Herzegovina: January 2011 – December 2014*, 7. According to various interviews with Norwegian diplomatic officials in Sarajevo in May 2011, Norway's aid budget for BiH is likely to increase in the years to come.

<sup>51</sup> Ibid., 3. Quote italicized in original text.

development agenda for the Western Balkans, Sweden is still able to conduct a relatively independent donor strategy.

When comparing the cases of Norway and Sweden, it is noticeable that both donors have a preference for providing support to state-run institutions, be it through institution-building projects or capacity building. In spite of this admittedly cursory history of international criminal law in the former Yugoslavia and Norway and Sweden's donor support to BiH's judiciary to fight war crimes, several observations vis-à-vis donor strategies can be made here. As I will show later, domestic politics in Bosnia between the entities—and the different ethnic groups—still remain politically charged and are very difficult to cope with. Hence building state-institutions by using the leverage of the OHR and introducing accountability efforts by creating a state-level court have been positive measures to establish a counter-balance within BiH's political institutions. As direct involvement, such as the number of international judges on the Court's bench has been phasing out in recent years, donors have shifted to more subtle support, such as capacity building projects through workshops and professional exchange programs.<sup>52</sup>

Yet, the fragile political climate in BiH has also kept donors from interacting more seriously with a broader spectrum of actors on the ground, which I will address in the second part of this article.<sup>53</sup> Instead the support strategies described above illustrate the inclination of countries like Norway and Sweden to concentrate their aid efforts on projects that have

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<sup>52</sup> Interview with international judge at the BiH State Court in September 2009.

<sup>53</sup> The author is aware that several projects with entity and local administrative institutions are in place, but they are comparatively smaller to the important funding of main judicial actors.

been directly related with the international humanitarian law spill over effect generated by the work of the ICTY. International watchdogs, such as the OSCE have pointed out this phenomenon: although BiH's judiciary has made progress in prosecution war crimes in recent years, problems persist, including a large backlog of cases and cooperation between judiciaries on different levels and among countries.<sup>54</sup> Consequently, assessing the existing shortcomings, officials of Norway and Sweden underlined the requirement to provide development support that incrementally builds on these needs. An important amount of funding therefore currently goes to an information technology project consisting of a database management system in order to provide access to existing cases across the judiciary system in BiH.<sup>55</sup> The trend of disbursing bilateral aid for retributive justice projects implemented by state institutions is partly due to donors' interests of measuring the outcome of their distributed funds. Below I briefly describe the logic behind evaluating international funding in trial mechanisms.

### ***Tracking War-Crimes-Trial Progress: Gauging Aid Output***

The findings and recommendations of several of the international donor evaluation reports on the BiH State Court and analyses of the justice sector reform in BiH are generally based on statistical data.<sup>56</sup> These assessments precisely count the number of processed cases by the court, while other related results are also measured using quantitative research

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<sup>54</sup> International judge, *supra* n 52.

<sup>55</sup> Interviews with officials of the Norwegian and Swedish Embassies in Sarajevo in May 2011.

<sup>56</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*.

methods. According to an OSCE report, which compares the outcomes and the work performance of the judiciary's war crimes section in recent years, have progressively improved war crimes prosecutions in BiH.<sup>57</sup> One of the figures at the end of the report, for instance, indicates that the number of accused brought to trial from January 2005 until September 2010 rose from 16 in 2005 to 28 in 2010.<sup>58</sup> Collecting and in particular evaluating statistical data on trial outcomes has become part of donors' activities in order to measure the output of their development assistance. Alternative attempts to foster sociopolitical change in postwar BiH, however, are more difficult to account for.

As the outcome of restorative justice practices are more difficult to capture statistically, NGOs—inspired by these output-assessment trends—have also developed and adapted quantitative evaluation tools in order to measure more reconciliatory-oriented activities, which I briefly mention below. Conceptually, several authors have grappled with the question of how to assess the impact of transitional justice measures, using a variety of case studies.<sup>59</sup> And indeed, according to them, the problem of how restorative and reconciliatory activities in transitional justice processes can be quantified is a tough nut to crack. Geoff Dancy, for instance, stresses the limitations of statistical analyses:

The summary statistics defend against the claim that transitional justice mechanisms have uniquely destabilizing impacts within transitional contexts [...]. Unfortunately, such an impact assessment, and even those that are much more technically

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<sup>57</sup> International judge, *supra* n 52.

<sup>58</sup> OSCE, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010*, 98.

<sup>59</sup> Hugo Van der Merwe, Victoria Baxter, and Audrey R. Chapman, eds., *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009).

sophisticated, can do very little by way of *evaluation*<sup>[60]</sup>, or determining the ‘worth’ of transitional justice interventions. Looking at these numbers, lost are crucial considerations, like whether formerly victimized citizens of Timor-Leste or Rwanda or Peru understand ‘justice’ to have been achieved or whether they can feel ‘reconciled’ with their neighbors.<sup>61</sup>

To this end, some scholars, despite extensive fieldwork and emic case studies, suggest further longitudinal studies to gauge reconciliatory change, which remains difficult if not impossible to measure.<sup>62</sup> While it is complicated to determine the healing value of a memorial or other restorative justice processes within society, NGO activists have attempted to address the evaluative requirements and implemented projects that aim at fulfilling donor requests to show measurable results.

Non-profit organizations, such as the Research and Documentation Center in Sarajevo—which was created in 2004 with the aim of collecting data on human losses during the 1992-1995 war in BiH—have started to create database projects in order to document war crimes and human rights violations across the region. These archives help to break down myth and politicization of past conflicts on the one hand;<sup>63</sup> and provide donors with tangible results after a project, hence establishing a measurable benchmark on the other hand.<sup>64</sup> The regional fact-finding initiative RECOM has operated along similar lines, attempting to

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<sup>60</sup> Italicized in original text.

<sup>61</sup> Geoff Dancy, “Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice,” *International Journal of Transitional Justice* 4, no. 3 (2010): 376.

<sup>62</sup> Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004).

<sup>63</sup> Nidžara Ahmetašević, “Bosnia’s Book of the Dead,” *Justice Report*, June 21, 2007, <http://www.balkaninsight.com/en/main/analysis/5606>.

<sup>64</sup> In addition to the *Bosnian Book of the Dead*, the Research and Documentation Center has also created a software program integrating Google Maps in order to trace war crimes, human rights violations during the 1992-1995 conflicts in BiH.

depoliticize the work of a regional truth-seeking body and turning its advocacy work—raising the voice of victims in the former Yugoslavia—into an objective and scientifically measurable project. However, international donors have yet to embrace this trend and adjust their funding patterns accordingly.<sup>65</sup> In the next section, I draw on the RECOM case in order to discuss the difficulties of civil society engagement in this context.

The above overview of Norwegian and Swedish donor efforts distinctly underlines the strong trend of how grant funding for post-conflict accountability has been geared towards retributive justice. Unfortunately, the support of a larger transitional justice strategy has hence been relatively ignored. In the following I outline the problems associated with the BiH war crimes strategy and the lack of a broader transitional justice strategy in BiH. Additionally, I explore other related challenges that donors in BiH face, which help us understand their current development agenda. The donors' state-centric approach also hinders alternative transitional justice initiatives launched by civil society.

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<sup>65</sup> Interview data collected in May 2011 with EU officials and other representatives of several donor countries have indicated that NGO research proposals still fall short of fulfilling funding requirements of government or EU guidelines, resulting in the refusal or ineligibility of NGO applications.

## Donor Challenges and Influence on Broader Transitional Justice

### Initiatives

The road to democratic transition in BiH since the international peace Dayton agreement in 1995 has been incessantly rocky. Nevertheless, quarreling political elites of different ethnic origins,<sup>66</sup> frequently had to cede to the pressure and power of the OHR to enforce and implement incremental reforms over the years. Yet, the fall 2010 elections—which have resulted in an ongoing coalition-building imbroglio of BiH’s political parties—left the country’s political institutions months without a ruling government.<sup>67</sup> The reform of the justice sector, which is still ongoing, pertinently highlights the intricate problems BiH society is facing in its long and seemingly never-ending post-conflict period.

As mentioned above, the decision to restructure BiH’s judiciary eventually led to the establishment of the HJPC in order to monitor reforms in the justice system. One of the important programs the Council was in charge of from 2002 to 2004—immediately after its creation—consisted of vetting, a procedure of screening individuals who hold public office to ensure minimum standards of integrity in public service and which is widely recognized as an important in security sector reform measures in post-conflict societies. During this period, replacements for nearly 1000 judges and prosecutors were sought, and their posts

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<sup>66</sup> Including Bosnian Croats, Bosnian Muslims and Bosnian Serbs.

<sup>67</sup> International Crisis Group, “Bosnia: State Institutions Under Attack” (International Crisis Group Europe Briefing, 2011).



filled by an open competition.<sup>68</sup> This process, however, was highly politicized with political leaders criticizing the work of the HJPC and trying to influence appointments.<sup>69</sup>

Almost a decade after this initial vetting, the HJPC still watches over appointment procedures; yet, recent developments show that the discussions and activities evolving around BiH's judiciary remain very politicized. In February 2011, the then-president of the Federation of BiH (FBiH)<sup>70</sup>, Borjana Krišto, ignored the constitutional competencies of the HJPC by adopting a decision on appointments of judges at the FBiH Constitutional Court. She and her vice presidents signed the decision on appointments of two judges without the prior approval of the HJPC, which proposes candidates in order to ensure the independence and impartiality of judges and prosecutors. Ms. Krišto eventually withdrew her decision.<sup>71</sup>

In sum, since its creation the HJPC has become an important body among BiH's political institutions and the continuous financial and political support of foreign donors has guaranteed a proper *modus operandi*. Notwithstanding, the above example illustrates that local leaders still attempt to decrease the HJPC's influence and manipulate appointment processes. In the eyes of several BiH politicians it remains an intrusion in local politics. The dilemma for donors therefore consists gauging how to best strengthen the BiH's institutional framework and engaging local actors, while at the same time reducing the impression of interventionist politics of the OHR and the EU.

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<sup>68</sup> OECD, *The OECD Handbook on Security Sector Reform (SSR) Supporting Security and Justice* (Paris: Organization of Cooperation and Economic Development, 2007), 109.

<sup>69</sup> Lara Nettelfield, *Courting Democracy: The Hague Tribunal's Impact in Bosnia-Herzegovina* (Cambridge, NY: Cambridge University Press, 2010), Chapter 8.

<sup>70</sup> FBiH is one two BiH entities, with the other one being Republika Srpska.

<sup>71</sup> Dragan Bradvica, "Krišto Popustila Odustajanje Kandidata Ili Pritisci OHR-a?," *Dnevni List* (Sarajevo, February 25, 2011). See also website of the EU Police Mission in BiH (EULEX) at <http://www.eupm.org/>, accessed April 13, 2011.

The case of the HJPC's politicized activities nicely illustrates the quandary international donors face when it comes to choosing specific projects to which they intend to allocate aid to in post-conflict settings. Despite donor funding that focuses mainly on grants supporting state institutions, in particular the judiciary—generally seen as an independent actor among government institutions—the fragile political landscape within BiH only aggravates populist political discourses of top-down donor activities and interventionist politics led by the international community. Predictably major donors remain cautious when it comes to investing in civil society initiatives<sup>72</sup>, because the politics and the level of politicization between local governments and different social groups and movements—including victims and their families, veterans, and others—remains very high.<sup>73</sup> In addition to the politicking that occurs on diverse levels in BiH, the cooperation between different donors is also a source of potential problems due to a lack of coordination.

### ***Limited Donor Coordination***

The analysis of information from over a dozen semi-structured interviews with donor officials from different countries and international organizations during fieldwork conducted in May 2011 demonstrates the repeated concern of donors with regards to project

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<sup>72</sup> During some of my fieldwork in May 2011, several official representatives from different government and international organizations underlined this dilemma and the hesitations to fund civil society initiatives.

<sup>73</sup> Denisa Kostovicova, "Civil Society in the Western Balkans: Vehicle for or Obstacle to Transitional Justice," in *Conflict and Memory: Rethinking Past and Future in (South East) Europe*, ed. Wolfgang Petritsch and Vedran Dzihic, Southeast European Integration Perspectives 3 (Baden-Baden (Germany): Nomos, 2010).

coordination and collaboration. Indeed, although different actors began to harmonize transitional justice aid activities in recent years, the organizational structure of the concerted efforts remains highly informal based on a very loose network.<sup>74</sup> One reason why these collaborative efforts have yet to properly take shape is the complexity of the network members, including states and international organizations.

For instance, Norway's development officials are representatives of their state, as are their Swedish counterparts. Although not a EU member, Norway's general development objectives comply with Sweden's policy agenda and EU objectives. The EU, however, has a more intricate position within the BiH institutional framework. As pointed out in a footnote at the beginning of this article until recently the current head of the OHR used to be also the EU Special Representative for BiH. The decision to merge both positions was fueled by the idea that the OHR would eventually wind down its activities, once the political leadership in BiH has implemented a certain number of reforms. The last oversight power will then remain with the Europeans, embedded within the EU enlargement process in the Western Balkans.

The EU and the OHR are nonetheless not the only regional and international actors. In fact, the UNDP and the OSCE are also part of the political landscape in BiH. As seen above, UNDP's role in the politics of transition has done little to promote local involvement and despite converging road maps of each of the actors, policy interests differ. According to EU officials, the monthly meetings among donors are characterized by an informal but

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<sup>74</sup> Interviews with several donor officials during fieldwork in May 2011.

informative style.<sup>75</sup> Since these meetings are on a voluntary basis, they also depend on professional ties between the different actors and their respective agendas that they need to tackle at the time a meeting is scheduled. Moreover, these meetings are for international donors only, excluding local actors, such as representatives of different ministries or the government. While such a policy is understandable in the eyes of the donors who seemingly struggle when attempting to coordinate aid projects, it also discredits the overarching objective highlighted in recent reports across the donor community, which is to strengthen local involvement. This situation is even more delicate when it comes to implementing a post-conflict roadmap that goes beyond war crimes trials, and aims at integrating a broader transitional justice strategy, as I discuss below.

### ***War Crimes Strategy versus Transitional Justice Strategy***

In 2007, the BiH government established a working group in order to draft a national strategy for dealing with war crimes and related issues, which was adopted by the Council of Ministers the following year. The rationale behind drafting this strategy included several concerns. First, it aimed to address the lack of a systematic approach to account for the large number of war crimes cases, in order to prevent impunity and facilitate the timely prosecution of the largest number of known perpetrators. Second, no centralized statistical data on the number of prosecuted war crimes cases was available in the country. Such data

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<sup>75</sup> Interview with EU officials in May 2011.

could serve as an indicator of the judiciary's efficiency and assist in gauging future material and human investment in order to process cases. There was also a lack of harmonizing court practices, partly due to the application of several criminal codes in BiH. Despite the introduction of a new criminal code in 2003, the management of war crimes cases remained deficient and the transfer of war crimes cases between different courts lacked coordination.<sup>76</sup>

The political effort of outlining the conditions of war crimes prosecution in the country has, without a doubt, provided donors with a clear idea of a reform agenda in this particular area of the justice sector. The idea of mapping ongoing trials, outstanding war crimes cases and terminated proceedings were thus a catalyst for creating an electronic case management system, which is even more modern than the database used at the ICTY.<sup>77</sup> Fixing objectives to be met within a reasonable timeline—such as a roadmap to finish prosecuting the bulk of most complex war crimes cases within seven years of adopting the strategy<sup>78</sup>—has also been very helpful for donors to adopt precise project proposals for funding specific programs or meeting the needs of the local justice system. Thus, technical support, such as the information technology investments, and capacity building to train judicial staff has since been clearly stated in donor policy strategy papers.<sup>79</sup>

Contrary to the explicit national war crimes strategy in BiH, there is no overarching transitional justice strategy outlining reconciliatory measures, a political dialogue, and fact-

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<sup>76</sup> Council of Ministers, "National War Crimes Strategy", December 2008, 3–4.

<sup>77</sup> Interviews with officials of the HJPC in May 2011.

<sup>78</sup> The strategy suggests finishing prosecuting all the war crimes cases within 15 years of its adoption.

<sup>79</sup> See for instance the Swedish strategy for development cooperation in BiH 2011-2014.

finding and documentation initiatives to deal with the conflict during 1992-1995 in BiH. However, under the auspices of UNDP, lawmakers, experts and civil society organizations have convened consultation meetings since spring 2010—in January 2010, the BiH Council of Ministers adopted a decision to form and implement a transitional justice working group<sup>80</sup>—in order to discuss topics, such as reparations, truth commissions and institutional reform.<sup>81</sup> Norway’s development agency did not contribute to these efforts.<sup>82</sup> While Sweden provided assistance to an earlier UNDP project from 2007-2009, called “Bosnia and Herzegovina: Supporting National Capacities in Transitional Justice for Bosnia and Herzegovina,” according to UNDP officials, the role of Sweden and other bilateral donors in the talks about a transitional justice strategy in BiH are minor and informal.<sup>83</sup>

Despite the awareness of integrating NGO actors into transitional justice processes in BiH, in order to respond to concerns within society<sup>84</sup>, the participation of civil society organizations—particularly BiH victims associations—is also limited and problematic. The political crisis after the tumultuous general elections in fall 2010 only exacerbated cooperation efforts among the different participating groups.<sup>85</sup> In fact, UNDP-led initiatives to include local level efforts remain limited to state institutions. Although UNDP officials were not opposed to civil society actors in transitional justice processes, UNDP does not

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<sup>80</sup> See Decision on the Establishment of the Expert Working Group for Development of the Transitional Justice Strategy in BiH and the Action Plan for its Implementation on 21 January 2010.

<sup>81</sup> Interview with UNDP officials in May 2011.

<sup>82</sup> See website of the Norwegian Embassy with a summary of its 2010 project support, at [http://www.norveska.ba/Embassy/Embassy\\_Fund/An-overview-over-the-projects-supported-by-the-Norwegian-Ministry-of-Foreign-Affairs-in-2010/](http://www.norveska.ba/Embassy/Embassy_Fund/An-overview-over-the-projects-supported-by-the-Norwegian-Ministry-of-Foreign-Affairs-in-2010/), accessed January 3, 2012.

<sup>83</sup> Interview with UNDP officials on 16 May 2011.

<sup>84</sup> Zoran Pajić and Dragan Popović, *Facing the Past and Access to Justice from a Public Perspective* (United Nations Development Programme in BiH, 2010), 26.

<sup>85</sup> Ibid.

provide any official political support.<sup>86</sup> The regional fact-finding initiative RECOM mentioned earlier serves as a good case in point. While RECOM is seeking support from governments across the former Yugoslavia to establish a transnational body to document and disclose human rights violations and war crimes during the 1991-2001 conflicts in the region<sup>87</sup>, UNDP neither sponsors RECOM financially nor stands politically behind it.<sup>88</sup> As the objective of a transitional justice strategy for BiH consists of creating a general framework which the BiH national war crimes strategy is part of, it is understandable that such a broad road map is more difficult to elaborate. The lack of a clear vision might also explain why donors have been reluctant to latch onto specific project funding in this area.

### ***Difficulties Strengthening Civil Society***

Donor efforts to go beyond war crimes strategies to include a broader transitional justice vision have not only been limited due the lack of putting the issue on the agenda for future donor policies, but also because of the modest interaction of Swedish and Norwegian development teams with local civil society actors. Indeed, the ‘Norwegian Model,’ as described above, circumvents direct contact with local NGOs by allocating aid funds directly to major Norwegian NGOs.<sup>89</sup> While local capacity can be built through the intermediary

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<sup>86</sup> UNDP officials, *supra* n 83.

<sup>87</sup> See website of RECOM coalition for more detail at <http://www.zarekom.org/>, accessed May 18, 2011.

<sup>88</sup> UNDP officials, *supra* n 83.

<sup>89</sup> As a comparison, the World Bank rarely disburses funds directly to Civil Society Organizations (CSOs) either. Instead it applies a strictly state-centric donor approach. Hence, a CSO receives project funds by working as a paid consultant or contractor to the borrower (government).

function of international actors, this strategy relies on a top-down approach that ignores local problems and needs. Yet, donors prefer this strategy as it allows for more flexibility when disbursing funding.<sup>90</sup>

Interestingly, the reason for the weak interaction between local stakeholders and international donors is strongly described in a Sida 2008 evaluation report:

There is a strong feeling amongst stakeholders that norms need to be changed across the whole of society in order to achieve social improvement. “People” are perceived as being timid and lethargic. ... Stakeholders do not in general consider BiH to have a strong civil society.<sup>91</sup>

Although the donors’ political discourse emphasizes the need to strengthen civil society organizations;<sup>92</sup> in practice, donors rely on their own, domestic organizations to implement development strategies.<sup>93</sup> And while civil society is encouraged, according senior officials,<sup>94</sup> collaborative relations with the donors are only maintained between government entities and international organizations.

Already several years after the first wave of international donor activity had ebbed, several scholars criticized the interventionist approach followed by the different international actors on the ground after the ceasefire agreement in Dayton, Ohio in 1995. Some of the

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<sup>90</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*, 12.

<sup>91</sup> Steve Powell et al., *Outcome Mapping Evaluation of Six Civil Society Projects in Bosnia and Herzegovina*, Summary Report, Sida Evaluation 2008:17 (Sida Department of Europe, 2008), 22.

<sup>92</sup> See also United Nations Development Programme, *Country Programme Document for Bosnia and Herzegovina (2005-2009)* (Sarajevo, 2004).

<sup>93</sup> For a larger discussion on the politics of foreign aid cf. Carol Lancaster, *Foreign Aid: Diplomacy, Development, Domestic Politics* (University of Chicago Press, 2007).

<sup>94</sup> Interviews with donor country representatives in Sarajevo in May 2011.



research in the early 2000s deplores in particular the lack of long-term strategies and the disempowering impact of these measures on actors on the ground.<sup>95</sup> Analyzing the recommendations of recent donor strategy assessment reports, I was surprised to observe that even years after the insightful studies, transitional justice donors are still grappling with how to best integrate civil society actors into their strategies.

Recent Norwegian and Swedish guidelines for future grant planning with respect to transitional justice mechanisms—focusing on civil society participation and strengthening of local actors within society—serve as a case in point. The reports suggest that funding recipients be diversified, in other words local stakeholders should be progressively integrated with the possibility of directly receiving allocated funds. Additionally, they recommend strengthening the relationship between donors and NGOs. All these measures, however, should pursue the donor’s principal goal of building and sustaining local involvement.<sup>96</sup> Without question, such an objective is easier said than done. In particular, since a recent embezzlement scandal with the Research and Documentation Center in Sarajevo alienated European and Norwegian donors.<sup>97</sup> Yet, fund abuse is an exception and not the rule. Rather the lack of engagement of international donors with grassroots actors jeopardizes important civil society initiatives as the example below illustrates.

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<sup>95</sup> Florian Bieber, “Aid Dependency in Bosnian Politics and Civil Society: Failures and Successes of Post-war Peacebuilding in Bosnia-Herzegovina,” *Croatian International Relations Review* 8, no. 26–27 (2002): 25–30; Roberto Belloni, “Civil Society and Peacebuilding in Bosnia and Herzegovina,” *Journal of Peace Research* 38, no. 2 (2001): 163–180.

<sup>96</sup> Norad, *Evaluation of Norwegian Development Cooperation with the Western Balkans Volume I*, chap. 3 and 4; Powell et al., *Outcome Mapping Evaluation of Six Civil Society Projects in Bosnia and Herzegovina*, 22–24.

<sup>97</sup> Interviews with EU and Norwegian officials in May 2011.

### ***Unheard Voices: The Example of the RECOM Signature Campaign***

As described above, the RECOM project is a transnational NGO initiative fueled by the need to complement retributive justice efforts and with the goal to help societies across the region to deal with the conflicts in the 1990s in the former Yugoslavia. I draw on this particular case in order to demonstrate how limited funding undermines the visibility and reach of grass-roots initiatives, particularly in BiH. The purpose of the following is thus not to provide a comprehensive account of the emergence and scope of the movement, but rather to briefly describe the signature campaign phase of the project in order to highlight the impact and difficulties of the coalition partners in BiH during their effort to promote this fact-finding initiative.

Despite its regional character, RECOM is mainly funded by donors and supporters who are directly in contact with—or financially support—the Serbian non-profit organization, the Humanitarian Law Center, headed by the controversial Serbian human rights activist Nataša Kandić. They include George Soros' Open Society Institute (OSI), the United States Institute for Peace (USIP), the Dutch Embassy in Belgrade, the Robert Bosch Stiftung, and the European Instrument for Democracy & Human Rights (EIDHR), among others. Neither the Swedish nor the Norwegian Embassies provide any financial aid to the project. Moreover, the current funds from participating donors did not match the projected budget for certain phases of the initiative.

In fact, an updated budget proposal for the RECOM initiative dating from February 2011—for the period winter 2008 to summer 2011<sup>98</sup>—outlines the different steps of the project and their respective expenses. Each of the above donors matches or contributes to the budgetary requirements. Different activities range from logistical support—such as accommodation for members of the coalition during consultation meetings across the region—to salary expenses for consultants who share their expertise and provide their advice to the steering committee and working groups of the initiative. At the time of the publication of the revised budget, for instance, RECOM lacked nearly 40 000 euros (58 000 US dollars) in order to pay for a regional transitional justice forum in Sarajevo at the end of the consultation and signature campaign of the project. More importantly, however, the movement lacked almost one million euros (1.3 million US dollars) for its signature campaign. While activists were still able to cope with the lack of funding, the budgetary shortfall jeopardized the continuation of the project and led to solemn consequences.

To understand the extent and the seriousness of the issue, it is helpful to provide some sociopolitical background of the movement and highlight different obstacles. After a preparatory phase to define the scope of the fact-finding initiative and extensive consultation meetings in order to introduce and disseminate the idea across the former Yugoslavia, founders planned to launch a public signature campaign in each of the participating countries. The goal was to collect one million of signatures in order to lobby different governments and legislative bodies in these states to secure the official support of

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<sup>98</sup> For a detailed budget see Excel spreadsheet with the 2008-2011 funding resources presented by type of expenses and donor source on the official RECOM website at <http://www.zarekom.org/documents/Budget-Coalition-for-REKOM.en.html>, accessed May 17, 2011.

the political leadership and elites. Yet, without the needed funding, the RECOM coalition members had to improvise, organizing the entire signature campaign with an army of youth volunteers from a youth-based NGO network in the region, called the Youth Initiative for Human Rights. Originally founded in Serbia, this organization has now offices and independent branches in BiH, Croatia, Kosovo and Montenegro.<sup>99</sup>

Although young ambitious leaders and organizers were able to mobilize a noteworthy amount of signatories for their cause, the initial objective of one million signatures was not accomplished.<sup>100</sup> According to several of the youth leaders, lack of volunteers, hasty training, and limited resources for a broad outreach strategy were mentioned as the main difficulties organizers had to cope with during the campaign.<sup>101</sup> Interestingly, when the signature campaign was in full swing during my May-June 2011 fieldwork, none of the officials at the Embassies or international organizations seemed to be aware of it. Rather than the lack of interest of the international donors, however, it is the disconnect of these actors with local civil society as well as the limited funding of the signature campaign that resulted in chaotic and disorganized public relations efforts to collect signatures for RECOM's case.

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<sup>99</sup> See website at <http://www.yihr.org/en/>, accessed May 11, 2011.

<sup>100</sup> According to different officials of the RECOM campaign the number of collected signatures during this period was around 350.000, but the campaign continues to collect additional signatures online.

<sup>101</sup> Series of interviews with youth leaders across the region in May 2011.

## Conclusion

In this chapter, I analyzed different international donor activities to account for war crimes and human rights violations after mass atrocity in BiH. To this end, I compared Norwegian and Swedish donor support in BiH since the early 2000s. Drawing on extensive fieldwork, including interviews with donor officials, activists and experts, I mapped various aid programs in BiH's post-conflict society. I explored in particular the cost of justice and the politics of transitional accountability efforts, examining the extent to which donors integrate civil society and local actors in their funding projects, illustrated by the RECOM case. Despite several report recommendations stating otherwise, both, Norway and Sweden, have kept a top-down approach—disbursing grants to their respective domestic non-profit organizations. Contrary to Norway, however, Sweden's policy strategy foresees a stronger streamlining with the EU enlargement agenda. Several problems result from their strategies. First the lack of a broader transnational justice strategy in BiH, which could complement the 2008 national war crimes strategy—with the goal of improving the efficiency of BiH's judiciary—limits donor investments mainly to state institutions. Strengthening ties with NGOs and local actors therefore remains very restrained. Second, donor coordination among different international actors needs to be improved as their collaboration continues to be irregular and informal. Furthermore, local actors and institutions are not only aid recipients, but also play an active role in shaping these processes. While political elites oppose certain structural and institutional reforms—criticizing international donors on their interventionist agenda—human rights NGOs and victims associations have struggled to

secure funding from international state actors to initiate regional restorative justice processes.

To conclude, despite a trend shift in international donor reporting—highlighting the need to improve local initiatives of funding projects and transitional justice efforts—the main obstacle development aid actors are confronted with pertains to the question of measuring outcome. While reforms in war crimes prosecutions have been such that progress can be traced by, for instance, the number of processed cases or the number of judicial professionals sitting on the bench to try alleged perpetrators, reform projects within civil society appear to be more difficult to track. It is time for both sides—the civil society sector and international donors—to enhance collaborative efforts by mapping reliable guidelines to ensure the transparency of funding flows, the adequate assessment of results, and the creation of stronger relations between state institutions and society in BiH. The potential for such a dialogue exists, and the moment for encouraging the necessary political steps to bridge this gap is now.

## Chapter 8

### Conclusion

In my dissertation I examined the politics of post-conflict justice in the former Yugoslavia. I discussed the protagonistic role of human rights activists in challenging existing transitional justice models that emphasize international and domestic war crimes trials over restorative justice mechanisms, especially truth commissions. Grounding political sociology in a political science perspective, my study aimed at strengthening the sociopolitical research agenda of post-conflict justice. In other words, I examined the importance of political objectives of different actors in transition contexts. In particular, I looked at the relationship between the state (or its representatives) and society, characterized by civil society organizations. This study went therefore beyond statist, normative and legalist scholarship on accountability after mass atrocity and built on an emerging literature in the social sciences that focuses on the impact of global human rights on the national and local level. It explored various factors to explain human rights advocates' recent unsuccessful efforts to initiate a transnational fact-finding body—the Coalition for RECOM Initiative—weighing it against the successes and challenges of the ICTY as well as the difficulties of national judiciaries to prosecute war crimes and gross human rights violations across the region.

To this end, chapter 2 provided a methodological approach for scholarship on global efforts to account for mass atrocities, state violence and grave human rights violations that complements variable-oriented and causality-driven methodology in transitional justice studies. I believe that it helps scholars and practitioners illuminating developments in transnational contexts, such as post-conflict justice processes, to which various actors and in particular human rights activists are exposed and in which they play an increasingly important role. Through my research design I worked to define the role of civil society actors and how they interact in different spaces. Moreover, the structure of my research was well suited to describe where and when these interactive processes take place. Thanks to participant observation and narrative interviews, two anthropological and sociological analytical tools, I was able to observe different transnational networks, study their practices and goals, and examine the relationship between different actors and how their activities affect each of the groups and different transitional justice processes more broadly. Yet, my alternative and complementary methodology did not aim at turning legal scholars, social scientists and practitioners into anthropologists, ethnographers or sociologists. To the contrary, my goal is to generate new ideas for the growing field of transitional justice in order to explore and pursue an alternative epistemology grounded in political science that provides a different perspective and offers unique theoretical insights to some of the fundamental questions that still require our full scholarly attention today.

In chapter 3 I presented a background analysis of the ideological and institutional underpinnings of the ICTY's early years. While I illustrated the importance of emerging



concepts and ideas, I also underlined how key figures influenced the course of the ICTY's evolution through their agency. For this, I outlined the initial struggles of international experts and politicians to pass a UN Security Council resolution and create the UN ad hoc tribunal. Subsequently I underlined the difficulties even after the preliminary obstacles were overcome. In fact, applying international norms and rules on a domestic level turned out to be contested by various actors, such as international policymakers, legal experts and domestic political actors. To highlight these problems empirically, I used the case of Croatian politics. It suffices to say that these struggles within national judiciaries and bureaucracies, however, are not an exception limited to the former Yugoslavia. Rather they are part of a trend showing that transitional justice processes are confronted with opposition when transversing from the international to the national level. As a consequence, my research findings are very helpful to examine other cases as well, as I will show below.

In the following chapters, I turned to NGO actors to sketch their understanding of international humanitarian law, their early involvement in transitional justice processes, as well as their motivations to implement alternative and complementary mechanisms to deal with the past. Chapter 4 therefore described accountability practices of different NGOs across the former Balkan region to illustrate how these activists have helped to promote the human rights discourse of fighting impunity and war crimes. Additionally, it demonstrated that NGOs also contributed to strengthening bottom-up approaches. As a result, the interpretation of international humanitarian law by early ICTY cases gained a new victim-

centered dimension. By redefining who should be the center of attention, human rights activists took the first steps towards democratizing human rights. They stressed the importance of the local space and increased the victims' voices in societies across the region. In this context, I first discussed the difficulties witnesses/victims have to face in war crimes trials as well as the challenges of NGOs providing support in this setting. Second, I introduced a conceptual framework that explained the changing meaning of a grand narrative of human rights to a localized understanding of its meaning. Last, I pointed to a broader shift in transitional justice strategies in which restorative justice mechanisms have found their place within the general discourse of the ICTY's retributive justice strategy.

Chapter 5 explored the politics involved in the campaign to establish the fact-finding body, the Coalition for RECOM Initiative, across the former Yugoslavia. It focused on internal and external difficulties of NGOs to expand their sphere of influence and continue to transform the human rights discourse. During the campaign process human rights activists took on an important intermediary role, communicating and interacting between spaces created by varying narratives of truth and justice. My aim was to analyze these different, intersecting spaces and the role of civil society within these spaces to help understand recent efforts to establish this transnational fact-finding mechanism. In this chapter I looked primarily at the ongoing internal and external struggle of human rights activists to establish an extra-legal space to deal with the past across the former Yugoslavia. Furthermore, I analyzed the conflicting impact of different victims groups' narratives that accompanied the institutionalization process. Finally, I examined the emerging issues in the RECOM

movement's regional approach to create support for its cause by discussing and employing framing concepts from social movement theory.

Building on the sociopolitical struggles described in chapter 5, in chapter 6 I traced the development of NGO activists' efforts to increase "invented" space, in which to foster deliberative spaces of justice for civil society. In order to do so, I looked at how legal concepts influenced the institutionalization of fact-finding measures—a trend, which I refer to as the legalization of truth spaces. Moreover, I concentrated on the challenges of the legalistic influence on truth seeking and investigated the ongoing political barriers to institutionalizing alternative transitional justice instruments. 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. As a consequence, I discussed the process of NGOs attempting to draft a very detailed legal document that serves as the truth commission's mandate. My goal in this chapter was to show that activists' strategy of legal-oriented depoliticization of restorative justice processes, despite their repetitive efforts, remain still highly political, as activists continue to struggle to establish an officially institutionalized truth space. Additionally, I explored the conflict between state-centric transitional justice initiatives and bottom-up efforts across the region which were also the research focus of my previous chapter.

Chapter 7 analyzed different international donor activities to account for war crimes and human rights violations after mass atrocity in BiH. I mapped various aid programs in BiH's

post-conflict society, comparing mainly Swedish and Norwegian aid strategies. I explored in particular the cost of justice and the politics of transitional accountability efforts, examining the extent to which donors integrate civil society and local actors in their funding projects, illustrated by the RECOM case. Several problems result from their strategies. First the lack of a broader transnational justice strategy in BiH presents a major obstacle. In fact, an overarching transitional justice policy approach in BiH could complement the 2008 national war crimes strategy, whose goal is to improve the efficiency of BiH's judiciary. Instead, the lack of a transitional justice strategy limits donor investments mainly to state institutions. Strengthening ties with NGOs and local actors therefore remains very restrained. Despite a trend shift in international donor reporting—highlighting the need to improve local engagement of funding projects and transitional justice efforts—the main obstacle development aid actors are confronted with pertains to the question of measuring outcome. While reforms in war crimes prosecutions have been such that progress can be traced by, for instance, the number of processed cases or the number of judicial professionals sitting on the bench to try alleged perpetrators, reform projects within civil society appear to be more difficult to track. Furthermore, local actors and institutions are not only aid recipients, but also play an active role in shaping these processes. While political elites oppose certain structural and institutional reforms—criticizing international donors on their interventionist agenda—human rights NGOs and victims associations have struggled to secure funding from international state actors to initiate regional restorative justice processes.

## **Further Research and Comparative Case Studies**

As I explained above, my dissertation 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. However, far from being a finite process that started in the past and has already found closure, the current situation offers several opportunities for new research projects in the future. As a case in point, in spite of the RECOM project's unsuccessful struggle to institutionalize a fact-finding body, the project has not been buried entirely by its founders. While RECOM's momentum slowed down recently (mainly due to funding issues), the project founders continue to lobby governments and societies across the states of the former Yugoslavia to support the initiative. Changes in the present political environment in the Balkans, such as improved collaboration among the former conflict protagonists, would present a drastic sociopolitical shift. Such a shift could thus generate new insights about post-conflict justice processes and would call for further analysis. Additional issues that could be addressed range from the question of how to adequately integrate transitional justice mechanisms in the EU's enlargement process of the Western Balkan states to the continuous politicization problems of the past in each of the countries across the region.

My research also applies to transitional contexts in which conflict has not entirely ebbed away, such as in Colombia, South America. In fact, after 1948 the term "La Violencia" was coined to describe the violent conflict that struck the country, when the populist political

leader Jorge Gaitán was assassinated and US-backed military attacks led to the reorganization of Communist militants into the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) in the 1950s and 1960s. Since, the country has been plagued by an asymmetric low-intensity conflict in which paramilitary groups, narcotraffickers and government forces fight to gain control over large areas of Colombian state territory and its populations. It suffices to say that transitional justice initiatives in this country continue to be a long and elusive process. A young French scholar, Delphine Lecombe, for instance, analyzed the complex conditions and various actors in the conflict and described the problematic Colombian transitional justice campaign in this non-transitional context.<sup>1</sup> In fact, the current work of the ICTJ in Colombia also illustrates this dilemma. The “Justice and Peace Law” that the Colombian legislature passed in 2006 is yet another example which underlines how demobilization, truth-seeking and peace processes are intertwined and difficult to put in place in an instable and fragile sociopolitical and economic environment. Some of these conditions are similar to the situation in the former Yugoslavia, such as that of BiH. Therefore a comparative study that analyzes the transitional justice developments in both cases, the former Yugoslavia and Colombia, could offer helpful insights about actor strategies and best practices in order to create context-specific transitional justice strategies that apply in this particular case to non-transitional settings.

Yet another example that my research can be applied to is the wave of transitions in Northern Africa and the Middle East after the Arab spring movements. In fact, during these

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<sup>1</sup> Delphine Lecombe, “Mobilisation Autor D’un Modèle De Sortie De Conflit,” *Raison Politiques*, no. 1 (2008): 59–75.

tectonic political shifts, authoritarian political leaders often used violence against their own population, including for instance Bahrain, Egypt, and Libya, among others. The questions that have arisen in each of the cases is how best to account for human rights violations and deal with injustices. While trials are one mechanism, various local actors also suggest putting in place truth commissions to cope not only with abuses committed during the immediate transition processes, but also with human rights violations committed during the reign of autocratic rulers. A report by Chatham House, a British think tank established in 1920, highlights the difficulties that transitional governments face when seeking appropriate tools to confront human rights violations during the Arab spring.<sup>2</sup> However, as I suggested in my own research, it is particularly crucial in the case of the revolutionary uprisings across the Middle East that we study local processes and that we also include civil society actors in our analyses. While it is important to discuss the appropriate tools to account for past atrocities, it is equally important that we understand the politics behind it, which requires a detailed analysis of the involved actors. A political sociology of transitional justice processes therefore offers a promising analytical framework for a broader and more nuanced understanding of these dynamics.

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<sup>2</sup> Hemi Mistry, *Transitional Justice and the Arab Spring*, Meeting Summary: International Law and Middle East Program (London: Chatham House, February 1, 2012).

# Appendix

## 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.*

- International and local judges and prosecutors
- Other Staff and representatives

#### *High Judicial and Prosecutorial Council, Sarajevo, BiH.*

- Sven Marius Urke, International Member of the Council
- Kenan Alisah, Staff of the HJPC Secretariat
- Other Staff and representatives

#### *Belgrade District Court, Serbia.*

- Sinisa Vazić, President of the War Crimes Chamber
- Ivana Ramić, Media Spokesperson of the Court
- Bruno Vekarić, Deputy War Crimes Prosecutor
- Other Staff and representatives

#### *Center for Peace Studies, Zagreb, Croatia.*

- Gordan Bosanac
- Other Staff and representatives

#### *Croatian Disabled Homeland War Veterans Association*

- Renato Selj, President
- Other Staff and representatives

#### *Delegation of the European Union to BiH.*

- Several leading country experts
- Other local staff



*Delegation of the European Union to Croatia.*

- Several leading country experts
- Other local staff

*Documenta Center for Dealing with the Past, Zagreb, Croatia.*

- Vesna Teršelič, Director
- Eugen Jakovčić, Media Spokesperson
- Darija Marić, Regional Coordinator
- Other Staff and representatives

*Muslim-Croat Federation's Veterans Association, Sarajevo, BiH.*

- Senad Hubijer, President
- Other Staff and representatives

*Research and Documentation Center, Sarajevo, BiH.*

- Mrsad Tokača, Director
- Lejla Mamut, Regional Coordinator
- Other Staff and representatives

*Humanitarian Law Center, Belgrade, Serbia.*

- Nataša Kandić, Director
- Sandra Orlović, Deputy Executive Director
- Matthew Holliday, Outreach and Development Director
- Dragan Popović, Program Director
- Lazar Stojanović, RECOM Media Spokesperson
- Other Staff and representatives

*International Center for Transitional Justice, New York, United States.*

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

*International Crisis Group, Sarajevo, BiH.*

- Several Balkans experts
- Other local staff

*International Criminal Tribunal for the former Yugoslavia, The Hague, Netherlands.*

- Current and former judges and prosecutors
- Other staff and representatives

*International Criminal Tribunal for the former Yugoslavia, Outreach, Zagreb, Croatia.*

- Several leading country experts
- Other local staff

*Office of the High Representative, Sarajevo, BiH.*

- Several leading country experts
- Other local staff

*Organization for Security and Cooperation in Europe, Mission in Sarajevo, BiH.*

- Several leading country experts
- Other local staff

*Coalition for RECOM Initiative*

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

*United Nations Development Program, Sarajevo, BiH.*

- Several leading country experts
- Other local staff

*University of Zagreb, Croatia.*

- Tvrtko Jakovina, Assistant Professor of History, Faculty of Social Sciences
- Viktor Koska, Term Professor, Department of Political Science

*University of Rijeka, Croatia.*

- Vjeran Pavlaković, Assistant Professor, Department of Cultural Studies
- Other faculty

*Youth Initiative Croatia*

- Mario Mažić
- Other local staff

*Youth Initiative Serbia*

- Maja Mičić, Director
- Other local staff

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## Curriculum Vitae

Arnaud Kurze was born in Mainz, Germany, to a French mother and an Austrian father. He is a US permanent resident and currently lives in Brooklyn, NY. In spring 2012 he was awarded the Provost Dissertation Completion Fellowship at George Mason University. In the past he was the Publication & Web Editor at the Center for Global Studies (CGS) at Mason and Coordinator of CGS' "Human Rights and, Justice & Democracy Project," funded by the Open Society Institute. He received his Doctorate in Political Science at George Mason University in 2012. He also holds a Master's degree in Governance studies from University of Hagen, Germany (2006) and a Bachelor's in International Relations from Sciences Po, France (2003). He has published in several academic journals and is author of several reports on foreign affairs for the government and international organizations. He regularly contributes analyses and op-ed articles online for think tanks and other institutions. In the past, he has taught undergraduate and graduate classes on globalization and identity politics; geopolitics; transatlantic relations; international relations; and the Balkans. His research interests are Southeast European politics, transitional justice, and critical security studies. He will be teaching Geopolitics at the École Supérieure de Commerce in Dijon, France in fall 2012.