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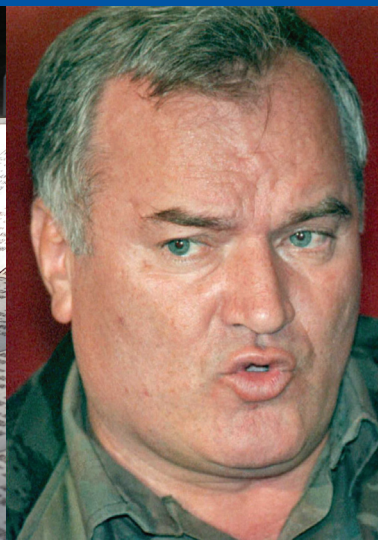
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# That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia

Diane Orentlicher

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Diane F. Orentlicher

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## The Impact of the ICTY in Bosnia

by Diane F. Orentlicher

Open Society Justice Initiative  
International Center for Transitional Justice

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Bosnian Serb wartime leader Radovan Karadzic on trial for war crimes in The Hague, August 28, 2008 | © Valerie Kuypers | AFP | Getty Images

A Bosnian Muslim woman at a 2010 memorial ceremony places a flower near the names of relatives killed in July 1995 | © Elvis Barukcic | AFP | Getty Images

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# Table of Contents

|  |    |
|--|----|
| <b>Acknowledgments</b>                           | 7  |
| <b>Methodology</b>                               | 9  |
| <b>I. Introduction</b>                           | 11 |
| <b>II. Background</b>                            | 23 |
| A. The Creation of the ICTY                      | 23 |
| B. Early Investigations and Indictments          | 24 |
| C. Peace and Justice                             | 26 |
| D. Governance Structure                          | 27 |
| E. The Post Dayton Peace                         | 28 |
| F. Cooperation by Bosnian Authorities            | 30 |
| <b>III. Victims' Justice</b>                     | 31 |
| A. "That Someone Guilty Be Punished"             | 34 |
| B. Prevention: No One Is above the Law           | 36 |
| C. Restoring and Maintaining Peace               | 38 |
| D. Reconciliation                                | 39 |
| E. The Truth                                     | 42 |
| F. "The Hague Has Made It Harder To Deny Abuses" | 42 |



|  |            |
|--|------------|
| G. Affirming Core Values of International Law                      | 44         |
| H. Removing Dangerous People                                       | 45         |
| I. Spurring the Creation of a Domestic War Crimes Tribunal Chamber | 45         |
| J. “Justice Isn’t Just in Legal Terms”                             | 46         |
| <b>IV. Achievements, Failures, and Performance</b>                 | <b>47</b>  |
| A. Ethnic Fault Lines  | 48         |
| B. Sentences   | 51         |
| C. Plea Agreements and Confessions                                 | 57         |
| D. Significant Verdicts, Other Rulings, and Jurisprudence          | 66         |
| E. Length and Complexity of ICTY Proceedings                       | 72         |
| F. Impact on Returns   | 79         |
| G. Bearing Witness   | 85         |
| H. Concluding Observations   | 87         |
| <b>V. Truth and Acknowledgment</b>                                 | <b>89</b>  |
| A. Acknowledging and Condemning Atrocities                         | 91         |
| B. Establishing the Truth  | 99         |
| C. Destruction of Personal Artifacts                               | 100        |
| D. Outreach  | 101        |
| E. Conclusion: Beyond the Tribunal’s Reach                         | 105        |
| <b>VI. Impact on Domestic War Crimes Prosecutions</b>              | <b>107</b> |
| A. The ICTY’s Relationship with Bosnian Courts: Phase I            | 108        |
| B. Creating a National Partner                                     | 113        |
| <b>Notes</b>   | <b>135</b> |

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# Methodology

This report draws upon a wide range of sources, including extensive qualitative interviews conducted in Bosnia and Herzegovina between June 2006 and July 2009. The first set of interviews was undertaken by Eric Witte, a consultant to the Open Society Justice Initiative, in June and July 2006. The remaining interviews were undertaken by Professor Orentlicher during visits to Bosnia from November 29–December 8, 2006; June 8–12, 2007; and July 13–23, 2009. In addition, Professor Orentlicher interviewed various officials and staff of the ICTY in The Hague on November 17, 2006 and March 6–9, 2007 in connection with this study, as well as a companion study of the impact of the ICTY in Serbia. Ines Tadić served as Professor Orentlicher’s interpreter for interviews with non-English speaking sources in November–December 2006; Haris Imamović did so in July 2009.

The interviews in Bosnia were not undertaken as part of a quantitative research project and the sources therefore cannot be described as representative in the sense that a quantitative project would support. However, interviews were conducted with a wide cross-section of individuals from each major ethnic group in Bosnia. Several considerations guided the selection of interviewees. Some sources, such as judges and prosecutors at the State Court of Bosnia and Herzegovina, were selected by virtue of their firsthand knowledge of a subject addressed in Chapter VI: the relationship between the ICTY and the State Court of BiH’s War Crimes Chamber.

A second broad category of interlocutors comprises intellectuals whose specialized knowledge and positions—whether as journalists, academics, leaders of civil society organizations, or otherwise—enable them to observe broad trends in their country and whose insights, collectively, were particularly helpful in synthesizing information from other sources. While interviewees included Bosniaks, Croats, and Serbs, this report generally does not identify their ethnicity, as many emphasized their discomfort with the extreme ethnicization of politics and identity in Bosnia.

Finally, interviews were conducted with victims of wartime atrocities in several locations, including Prijedor, Potočari, Tuzla, Banja Luka, Lašva Valley and Sarajevo. These interviewees came from all three of Bosnia's major ethnic groups, but—reflecting that Bosniaks constituted the vast majority of civilian victims—Bosniak survivors loomed especially large in the research. Interviews were conducted with both leaders of victims' associations and people who are widely described in Bosnia as "ordinary victims." Their stories, resilience, and courage are, however, anything but ordinary.

# I. Introduction

On May 25, 1993, the United Nations Security Council improbably launched a new era of international justice. Amidst a blizzard of resolutions addressing the conflict then raging in the former Yugoslavia, the Council adopted yet another, this time creating the International Criminal Tribunal for the former Yugoslavia (ICTY). If the new court evoked the potent symbolism of Nuremberg, its creation also seemed to symbolize the United Nations' lack of resolve—another in a series of inadequate responses to atrocities routinely described as the worst in Europe since World War II.

Before long, however, what began as an ad hoc measure became a global paradigm: Since the ICTY's creation, international or internationalized courts have been established to respond to sweeping atrocities in Rwanda, Sierra Leone, Cambodia, Kosovo, Bosnia, and Timor Leste, and a permanent International Criminal Court is now operating in The Hague. Perhaps more important, the work of these courts has invigorated prosecutions by national courts, the principal pillars of judicial protection against atrocious crimes and the indispensable partners of international and hybrid courts.

Moreover, the ICTY and its sister tribunal for Rwanda (the International Criminal Tribunal for Rwanda, or ICTR) have generated a rich jurisprudence of international humanitarian law, which now informs the work of national as well as other international courts. These contributions have been widely recognized, and rightly so. But until recently, few efforts were made to understand the impact of the ICTY and other international courts on the societies

most profoundly affected by their work, including their effect on victims and perpetrators. Yet these communities are among the most important audiences for the Tribunal's work—in the case of victims, because the justice the ICTY dispenses is *their* justice, and in respect of perpetrators and the communities that abetted their crimes, for reasons we explore further in this report.

In 2006, the Open Society Justice Initiative began a three-year project to examine local perceptions of the impact of the ICTY in the former Yugoslavia, focusing on Serbia and Bosnia and Herzegovina. In May 2008, the Justice Initiative published the first report resulting from this study, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. The International Center for Transitional Justice (ICTJ) provided myriad contributions to that study, and joins the Justice Initiative in producing this report.

*That Someone Guilty Be Punished* examines local perceptions of the ICTY's impact in Bosnia and Herzegovina (referred to in this report as “Bosnia” or “BiH”), the country that endured the most extensive ravages of “ethnic cleansing” during the 1990's Balkan wars. As such, this report is above all an account of the ICTY's impact on those who survived unspeakable crimes. In addition, it examines the Tribunal's impact on those who committed or silently condoned wartime atrocities in Bosnia, and on Bosnia's domestic capacity to ensure criminal accountability for war crimes.

While this study is based upon extensive research of relevant sources, one of its principal aims is to capture perceptions of the ICTY among Bosnians themselves. Their voices infuse the narrative, and their perceptions and priorities largely inform the structure of this account. This study describes Bosnians' expectations of the ICTY—or as it is known in the region, “the Hague Tribunal” or simply “The Hague”—comparing their hopes to the goals enunciated by the Security Council when it created the Tribunal and by the ICTY itself. In succeeding chapters, we examine Bosnians' perceptions of how well the ICTY has succeeded in meeting their original as well as evolving expectations and, to the extent possible, tie those perceptions to specific aspects of the Tribunal's performance.<sup>1</sup>

One of the key challenges in a study of this kind is to disentangle victims' inevitable dissatisfaction with verdicts that cannot restore what they have lost forever from their disappointment in imperfect legal processes. While recognizing the inherent difficulty of doing so, we have done our best to distinguish between these two. We believe that a better appreciation of both sources of disenchantment can improve future efforts to provide justice to victims of atrocious crimes. With respect to the former, our interviews with Bosnians make abundantly clear that, if nothing else, care must be taken to avoid raising unrealistic expectations of what trials alone can achieve. Indeed, during numerous interviews over two and a half years, the theme of “unrealistic expectations” arose often. With respect to the latter, our study identified several respects in which the quality of justice surely can be improved.

# Victims' Justice

The Security Council recognized several supporting reasons for creating the ICTY, and students of transitional justice have elaborated further justifications while questioning others. Our interviews in Bosnia reminded us that for those who survived wartime atrocities, the Tribunal is important for one reason above all—to provide justice.

It was in Bosnia that the depredations associated with “ethnic cleansing”—an attempt by one ethnic group to purge territory of other ethnic groups by inflicting horrific crimes on their members—reached soaring proportions. While members of all three of Bosnia’s dominant ethnic groups suffered atrocities at the hands of others, Bosniaks—the word commonly used by Bosnian Muslims—bore the brunt of nationalist fury. According to the most authoritative database on the war in Bosnia-Herzegovina, 83.33 percent of the civilians who were killed or are still missing as a result of wartime violence were Bosniak; 10.27 percent Serb; and 5.45 percent Croat.<sup>2</sup>

These are the data of victims who did not survive the harrowing crimes that consumed Bosnia for three and a half years. Today, Bosnia is filled with individuals who did survive but whose lives were shattered. No measure of justice can restore what they have lost, and the survivors we interviewed are acutely aware of this: Trials cannot bring husbands, children, and parents back to life or dispel the lasting trauma of being raped or detained in conditions evocative of Nazi-era concentration camps. But many Bosnian survivors “desperately need justice.”<sup>3</sup> As one of our interlocutors noted, they “weren’t just hit by a bus. Someone did terrible things many times over.”<sup>4</sup> Those who survived unfathomable cruelty “don’t expect perfect justice,” she continued, “but they want some kind of justice.”<sup>5</sup> Law professor Jasna Bakšić Muftić made much the same point, noting: “After all kinds of war crimes and genocide, the people need some sort of satisfaction ... that someone guilty be punished.”<sup>6</sup>

Like many survivors, Mirsad Duratović is perplexed when asked to articulate his reasons for supporting the ICTY despite his disappointments in its performance. Duratović, who was interned in the infamous Omarska camp at the age of 17, counts more than 60 relatives lost to “ethnic cleansing” in Prijedor. “What I have gone through,” he explains, “I think whoever was in my shoes would ... like to see some justice being done.” If the interviewer ever experienced what he had, he continued, “then it would be clear to you ... why you want [justice].”<sup>7</sup>

## Gradations of Justice

For most Bosnian survivors, justice is not experienced as black or white, something the ICTY has either provided or has not. Instead, the Tribunal’s work has provided some measure of justice, often experienced as flawed, sometimes deeply so. Since much of this report explores



the gap between Bosnians' expectations of justice and their perceptions of the ICTY's actual achievements, it is important to emphasize at the outset that the victims we interviewed believe that what they experience as imperfect justice is infinitely preferable to none at all. Like many of our Bosnian interlocutors, journalist Gojko Berić distinguished his concerns about discrete aspects of the ICTY's performance from his core belief in its worth: "My complaints are all about the methods of [the Tribunal's] work, but this is not the essence."<sup>8</sup> Indeed, our Bosnian interviewees were keen to ensure that we did not misinterpret their criticisms of the ICTY as a judgment that its creation was misguided.

That said, there is a large distance between Bosnians' original expectations and their perceptions of what the ICTY has achieved seventeen years on. Many Bosnians had "great, great expectations of international justice"<sup>9</sup> in the Tribunal's early years. Some of their expectations, at least in retrospect, were unrealistic and laid the ground for disappointment. Many hoped that the Tribunal would prosecute virtually all war criminals—a staggering prospect in view of the scale of atrocities committed during the 1990s Balkan wars. That the ICTY began its work by indicting lower-level perpetrators may have reinforced these hopes, while also diverting precious resources from the more important task of prosecuting the masterminds of mass atrocity.<sup>10</sup> With no outreach program in place for the first six years of its existence, moreover, the ICTY had no formal process for managing expectations in Bosnia or for making sense of actions that, however justified, often seemed incomprehensible to victims some 2,000 kilometers away.

This study takes a closer look at other aspects of the ICTY's performance that have either frustrated victims' expectations or gone farthest in meeting them.<sup>11</sup> In the first category, several emerged repeatedly in our interviews:

**Sentencing patterns.** ICTY sentences have on the whole been cause for profound disappointment and at times anger among victims and others in Bosnia. Individuals whom the ICTY has convicted of war crimes<sup>12</sup> have received sentences as light as two, three, five, six, seven and eight years' imprisonment and are typically granted early release. In the eyes of most victims, sentences this short lack any just proportion to the gravity of crimes for which they were imposed. Short sentences, made even shorter by early release, have at times had another painful consequence: Victims who have testified in The Hague soon find themselves enduring the daily indignity of encountering the defendants against whom they testified, now their neighbors. Beyond sentence lengths, moreover, many are highly critical of seeming inconsistencies in ICTY sentencing.

**Guilty pleas.** Many Bosnians expressed particular unease with steep reductions in sentences accorded defendants who have pleaded guilty. While this is partly a function of the fact that plea agreements were not part of Bosnia's legal tradition until recently, this is hardly the whole explanation. Many Bosnians associate plea bargaining with two well-known ICTY cases, each of which produced problematic results. The first defendant to plead guilty before the ICTY, Dražen Erdemović, received a sentence of five years for his role as an executioner

in the Srebrenica genocide. Many Bosnians are unaware of the extent to which Erdemović has assisted the ICTY prosecutor in other cases, and virtually all believe that five years is an indefensibly short sentence for a crime of this order.

The second guilty plea that arose repeatedly during our interviews is that of Biljana Plavšić, a close associate of wartime Bosnian Serb leader Radovan Karadžić who later became president of the Bosnian Serb Republic herself. Although unwilling to agree to cooperate with the prosecutor in future cases,<sup>13</sup> Plavšić received a sentence of only eleven years for crimes against humanity. Following its standard practice, the ICTY granted Plavšić early release in September 2009.

As these examples suggest, guilty pleas in war crimes trials are unlikely to be seen by victim populations as legitimate unless they fulfill two basic conditions: sentences should bear an appropriate relationship to the gravity of crimes committed and defendants should commit to cooperate with the Tribunal in exchange for a reduced sentence. Wherever possible, that cooperation should include providing information about the location of mass graves.

**Length and complexity of proceedings.** Two interrelated concerns emerged with striking regularity in our interviews. As Omarska survivor Muharem Murselović put it, the ICTY's "trials took too long, way too long [a]nd ... these whole proceedings are too complicated."<sup>14</sup> It is not just direct victims who see the Tribunal this way. Members of Bosnia's legal community are just as concerned. Sevima Sali-Terzić, senior legal advisor to Bosnia's Constitutional Court, describes the ICTY in much the same way as Murselović: "The ICTY seems a distant, complicated machinery. It has complicated procedures, its processes last forever."<sup>15</sup>

Inevitably, the four year long trial of former Yugoslav President Slobodan Milošević, which ended before judgment when the defendant died, has come to epitomize this impression of the ICTY. Whatever the reasons for Milošević's death before judgment—some of which were beyond the ICTY's control, others not—many Bosnians believe that the Tribunal's unnecessarily complex procedures deprived them of the justice of a verdict in this case.

**"Tyrants on Trial."** Moreover, the Milošević trial established a precedent that has vexed many victims—the specter of defendants, opting to represent themselves, transforming the courtroom into a political platform. In a report published last year, the Justice Initiative provided an in-depth analysis of how courts, including the ICTY, have met the challenges presented by "tyrants on trial" who represent themselves.<sup>16</sup> In this study however, we provide another perspective: We describe how ICTY judges' failure to control dictators in the dock has tarnished Bosnians' experience of justice.

**Long-lasting impunity: Karadžić and Mladić.** It has often been noted that, while the international community has coalesced around the position that international courts should use their limited resources to prosecute those who bear top responsibility for sweeping atrocities, survivors often place greater store in seeing direct perpetrators—the individuals who raped them or killed their sons—brought to justice. Indeed, these are the people victims may encounter daily at the supermarket or on the street, not the high-level officials who

bear superior responsibility for the suffering they endured. While similar sentiments are not uncommon in Bosnia, most of the Bosnians we interviewed placed overriding importance on prosecuting those whom they see as the principal architects of “ethnic cleansing.” Along with Slobodan Milošević, two men loom largest of all in this regard: Ratko Mladić, the wartime military leader of Bosnian Serbs, and Radovan Karadžić, Bosnian Serbs’ wartime political leader.

Up until our last set of interviews in Bosnia, both suspects remained at large years after they were twice indicted on genocide charges in 1995—the second time for their roles in the Srebrenica slaughter of July 1995. By the time of our last visit in July 2009, Karadžić was awaiting trial in The Hague after his arrest in Serbia one year earlier.

This study explores some of the reasons why Mladić and Karadžić were able to elude apprehension even when up to 50,000 NATO troops patrolled Bosnia in the early years of peace,<sup>17</sup> when their whereabouts were more easily ascertained. Most important, in the immediate aftermath of a vicious three and a half year conflict, NATO force-contributing countries worried that apprehending ICTY suspects would destabilize the fragile peace. In retrospect, it is clear that *failing* to arrest these and other war crimes suspects obstructed Bosnia’s postwar recovery in myriad ways. (Conversely, as we note in Chapter IV, to a limited extent the belated removal of some ICTY suspects through NATO arrest operations may have contributed to displaced persons’ willingness to return to their prewar homes.)

For those who had hoped the ICTY’s work would lay a foundation for reconciliation in the aftermath of ethnic violence, allowing indicted war criminals to remain at large came at a heavy cost, perhaps irreparable. “In the beginning,” Sevima Sali-Terzić reflected when we interviewed her in late 2006, “it was possible to have improvements with justice.” But in view of the international community’s failure to arrest Karadžić and Mladić, she wondered if “it’s too late. Our ethnic relations are terrible.... Too much time was given to those who began the war to be in power after the war ... to pretend that we have working ethnic relations.”<sup>18</sup>

During our first set of interviews for this study, when both Karadžić and Mladić were still at large, we heard repeatedly that this fact risked overwhelming all other achievements of the ICTY. Law professor Jasna Bakšić Muftić summed up what we heard from many in Bosnia: The ICTY has done “so many good things but they’re in the shadow of Karadžić and Mladić.” Because these two suspects had escaped justice for so long, she said, “many ordinary people [in Bosnia] can’t see the good things the ICTY has done.”<sup>19</sup> Many recognize that it is not the Tribunal’s fault that the two were able to elude justice—the Tribunal has no independent authority to arrest suspects and must depend on states and multilateral forces to do this. Even so, we were told, if the ICTY were to close its doors without obtaining custody of its top suspects, this would “reflect on the whole work of the Hague Tribunal. People will forget all other prosecutions.”<sup>20</sup>

The belated arrest of Radovan Karadžić partially redeemed the international community’s failure to secure his arrest sooner but did not erase the costs of his extended impunity.

Journalist Nidžara Ahmetašević recalled the rush of emotions many Bosniaks experienced upon learning of his capture:

People were very happy and at the same time very sad. In the first moment people were on the streets celebrating. In the second moment, when reality hit them, people became really sad because they had to wait so long. There were many who cried that day, because, okay, it was so easy to do that [yet] he was free all that time. So it was very mixed.<sup>21</sup>

Still, if actions speak louder than words, many victims reached a new stage in their ascent from the deepest abyss of loss and grief when Karadžić was captured: they traveled to The Hague to see him in the dock. Ahmetašević characterized their reactions this way: “Okay, he’s there and now you know he will never come out again. Now I feel much better.”<sup>22</sup>

Perhaps inevitably, disappointments continue. On the day Karadžić’s trial was to start, nearly 200 victims travelled over 1,200 miles by bus from Bosnia to The Hague to see Karadžić in the dock, only to find it empty—Karadžić boycotted the beginning of his trial, claiming he needed more time to prepare his defense. Karadžić, a psychiatrist by vocation, had decided to follow in Milošević’s footsteps and represent himself in court. The frustrated victims could not understand why he was not compelled to appear in court when sitting only a few miles away in the UN’s detention facility.<sup>23</sup>

Bosnians will doubtless experience a similar jumble of emotions when Ratko Mladić is finally found and, if captured alive, turned over to the Tribunal. Yet on one point, our Bosniak interlocutors almost universally expressed crystalline clarity: Justice will not be served if the ICTY fails to gain custody over Ratko Mladić, who is widely seen to be even more culpable than Karadžić.

**Further costs of time lost.** The combined effects of protracted periods of impunity and lengthy trials have been burdensome, particularly for victim-witnesses. We heard repeatedly of witness fatigue. Although the subject arose principally in the context of challenges facing Bosnia’s relatively new war crimes chamber,<sup>24</sup> it points to a larger dilemma confronting large numbers of victims seventeen years into the ICTY’s work: While still desperate for justice, many are deeply frustrated by how long it is taking.

Nidžara Ahmetašević, who is in constant contact with victims of wartime atrocities, says she does not “believe anybody who says victims are tired of the whole process—they’re not.” Of course there are exceptions, she acknowledges. Yet every day, her office receives letters “from victims who want to tell their story.” Ahmetašević says there are “thousands” of such people, who are “afraid they will die and take their stories with them.”<sup>25</sup>

**Calling a crime by its proper name: genocide.** If Bosnians cite a formidable list of disappointments in the ICTY’s performance, these should not obscure the profound satisfaction many have derived from its work. For many Bosnians (particularly but not exclusively Bos-

niaks), one achievement stands out above all—the ICTY’s determination in the *Krstić* case that the July 1995 massacre in Srebrenica was a genocide. The ICTY Appeals Chamber affirmed in clarion terms the Trial Chamber’s determination that a genocide occurred in Srebrenica:

The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.<sup>26</sup>

As one Bosnian woman told us (and as many said in similar terms), the ICTY’s “finding that what happened at Srebrenica was genocide is the most important achievement and without the ICTY this would not be possible.”<sup>27</sup> It is “[o]nly based on this decision,” another person told us, that “the ICTY is successful.”<sup>28</sup>

**Gender justice.** As others have noted, some victims in Bosnia continue to grieve for their losses and others, it is often said, are “used and misused” by Bosnian politicians. Yet the ICTY’s judgments have also helped empower many victims, including women who were among the thousands raped in the course of “ethnic cleansing.”

Through their pathbreaking jurisprudence, the ICTY and its sister court, the ICTR, have brought crimes of sexual violence out of the shadows, recognizing that they can constitute war crimes, crimes against humanity, and genocide when other elements of these crimes are established. Reflecting on the significance of these legal milestones, law professor Jasna Bakšić Muftić told us that “ICTY judgments created a new kind of awareness that women had been used as a means of war. They became visible, personalized, and recognized as one kind of victim. This enabled them to become more active” in such matters as exercising their rights to obtain civil benefits.<sup>29</sup>

Yet as several recent studies have highlighted, the ICTY (along with other international tribunals) has not adequately followed through on its own achievements in this area.<sup>30</sup> At times, the prosecutor has failed to include charges relating to sexual violence in indictments where these should have figured prominently, and judges have imposed comparatively high burdens of proof in relation to such charges.<sup>31</sup>

## Bearing Witness

Although the vast majority of those who survived wartime violence in Bosnia will never set foot in The Hague, the ICTY has provided an inestimably important measure of justice for victims who testify in ICTY cases. Doing so is deeply important for reasons that are easily lost amid Bosnians’ long list of legitimate concerns about the ICTY. Their motivation is moral, not instrumental, and it sifts down to a deeply felt need to bear witness for those who did not

survive “ethnic cleansing.” Muharem Murselović, who was detained in the Omarska camp for the crime of being Muslim, has been a willing witness in several ICTY cases. Like many survivors, Murselović testifies out of a deep sense of duty toward those who perished: “I am obliged to witness, to testify on behalf of hundreds of my friends who have been murdered in Prijedor whose guilt was the same as mine. I survived that hell and I never regretted for the fact that I witnessed.”<sup>32</sup>

In his study of ICTY witnesses, Eric Stover found that Murselović’s sentiment is common. A majority of ICTY witnesses interviewed by Stover “stressed the compelling need to tell their story. They had survived unspeakable crimes while others had perished; it was their ‘moral duty’ to ensure that the truth about the death of family members, neighbors, and colleagues was duly recorded and acknowledged.”<sup>33</sup>

## Acknowledgement

Bosnians grieve for the country they lost, where it was commonplace for friendships to transcend ethnic identity and where churches and mosques shared the same public space. The “grotesque intimacy”<sup>34</sup> of the ethnic violence that consumed Bosnia in the 1990s was one of its signal and searing features. This dimension of wartime violence perhaps intensified many Bosnians’ hope that the judicial truth established in The Hague would open the way to acknowledgement of wrongdoing and expressions of remorse. More particularly, many hoped that, by establishing nightmarish facts through the crucible of trial, the ICTY would lead those who committed crimes, and those who averted their eyes when they were in a position to protest, to acknowledge what happened, condemn crimes committed in their name, and express remorse.

As we recount in Chapter V, Bosnia has seen only limited progress toward this goal. Leaders of all three major ethnic groups have treated convicted war criminals from their own ethnic group as war heroes, and most Bosnians experience justice through an ethnic lens. It seemed for a good part of the past decade that outright denial of crimes had given way to “mere” distortion, but even this development came into question in September 2009, when Republika Srpska Prime Minister Milorad Dodik argued that—contrary to the findings of the ICTY and the Bosnian War Crimes Chamber—Bosnian Serb forces were not responsible for shelling incidents in Sarajevo and Tuzla in which scores of civilians had been killed. Dodik claimed that the Bosniak-dominated Bosnian Army staged the incidents to provoke NATO military action against Bosnian Serbs.<sup>35</sup>

Although the ICTY’s judgments have not produced the type of widespread acknowledgment that some hoped they would, many Bosnians believe that the ICTY’s unassailable conclusions are a form of justice in themselves. Commenting on the ICTY judgment in the *Krstić* genocide case, human rights campaigner Mirsad Tokača told us: “After this decision,

there is no negation and refusing of the fact that genocide happened.” In a similar vein, a survivor from a detention camp near Prijedor, Muharem Murselović, has noted that “with th[e] ICTY] documentation, with those verdicts ... the truth about the situation in Prijedor has been established, and this is the largest, the major achievement of the ICTY.”<sup>36</sup>

The less-than-hoped-for impact of the ICTY in the realm of acknowledgment of crimes cannot fairly be attributed solely or even primarily to the Tribunal itself. Nor, however, was this aim helpfully advanced by the Tribunal’s failure to develop an outreach strategy in a timely and effective manner. Failure to undertake outreach at an early stage conceded the field of interpretation to nationalist leaders and the media that are their megaphones. An ICTY outreach program launched in 2004–05, *Bridging the Gap*, demonstrates the potential benefits of a well-devised outreach initiative: under the program, once trial proceedings are completed, ICTY officials and staff have met with local citizens and officials in the area where adjudicated crimes occurred to describe the case from the investigation to appellate stage. Ordinary citizens have been able to learn the facts about the crimes and the work of the ICTY without filtering by local political leaders and ethnic media. The effect of these programs has often been similar to that in Foča, where participants were shocked while listening to the accounts of the sexual crimes committed against Bosniak women from the area. More than a few commented, “You know, we really didn’t know this, it is a horrible crime.”<sup>37</sup> Even with the best outreach efforts, however, it is unrealistic to expect the Tribunal to have singlehandedly overcome persistent resistance among unapologetic politicians and unreformed media institutions.

## Impact on Domestic War Crimes Prosecutions

Among the hoped-for goals cited by the UN Security Council when it established the ICTY, there was no serious suggestion that the Tribunal in The Hague would strengthen the capacity of courts in Bosnia to prosecute war criminals.<sup>38</sup> For a time, in fact, the ICTY was assigned a supervisory function vis-à-vis Bosnian courts, restraining them from exercising war crimes jurisdiction until prosecutors in The Hague determined there was proper cause for doing so. It was unforeseen, therefore, that the ICTY would eventually play a key role, along with the Office of the High Representative (OHR), in launching a war crimes chamber in Bosnia’s then-new state court.<sup>39</sup>

The principal impetus for this change was less visionary than pragmatic: Under pressure to devise a strategy for completing its burgeoning caseload, ICTY judges determined that the Tribunal would focus on prosecuting senior suspects and transfer lower-level indictees to national courts. The Tribunal would not be able to do so, however, unless its judges were satisfied that transferred cases would be fairly tried before impartial courts. Strongly preferring to transfer appropriate cases to the countries where the crimes charged occurred, ICTY officials paid special attention to Bosnian courts. When they did, they concluded that the “shortcom-

ings [of Bosnia's judiciary were] too great for it to constitute a sufficiently solid judicial foundation to try cases referred by the Tribunal."<sup>40</sup>

A solution was found when the ICTY's planning linked up with far-reaching judicial efforts spearheaded by the Office of the High Representative (OHR). By mid-2002, the two institutions formulated a joint plan of action, at the heart of which was a proposal to create a war crimes chamber in Bosnia's State Court, which would operate in accordance with international standards, and a Special Department for War Crimes (SDWC) within the state prosecutor's office. The two institutions would be of a "hybrid" nature—international and national judges and prosecutors would serve together in prosecuting primarily international crimes. While the chamber would be eligible to receive cases transferred from The Hague, its writ would become much larger.

Early in 2005, Bosnia's War Crimes Chamber (BWCC) began operating. This report describes some of the chamber's leading achievements and challenges,<sup>41</sup> including the opposition of Bosnian Serb representatives to further involvement of international judges in the BWCC and international prosecutors in the SDWC beyond the original five-year plan. Despite these challenges, the BWCC and SDWC have generally received high marks for their performance and are now cited as a model form of hybrid court. Reflecting on their achievements in July 2009, Mirsad Tokača said: "They have produced really excellent results in a short period."<sup>42</sup> Many international observers agree. Journalist Nidžara Ahmetašević goes even further, describing the BWCC as one of "the strongest state institution[s] we have" in Bosnia.<sup>43</sup>

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To a considerable degree this study focuses on criticisms of the ICTY's work articulated by our Bosnian interlocutors. It is therefore important to bear in mind that these criticisms come from observers who on balance support the Tribunal and value the manifold contributions it has made.





## II. Background

An overview of Bosnia's relationship to the ICTY is a necessary foundation for the analysis that forms the heart of this report. This chapter provides essential background information, focusing on those aspects of the ICTY's historical and evolving relationship to Bosnia that are relevant to our further analysis. As such, it is necessarily selective.

### A. The Creation of the ICTY

A defining fact of the ICTY's work in Bosnia and its relationship to the country is that the Security Council created the Tribunal when Bosnia was experiencing the full force of nationalist fury. By the time the Council formally created the ICTY in May 1993,<sup>44</sup> Bosnia had endured what were routinely described as "the worst atrocities in Europe since World War II," gruesomely reported in the daily media, for over a year.<sup>45</sup> As Europe and the United States moved toward recognizing the independence of Bosnia in early April 1992, Bosnian Serbs supported by Serbia launched a war whose principal aim was to establish Serb control over parts of Bosnian territory, linking it to Serbia and Montenegro. While Croatian Serbs, backed by Belgrade, had similarly fought to prevent Croatia from seceding ten months earlier, the war in Bosnia would prove even fiercer.<sup>46</sup> From the beginning of the war, Bosnian Serb forces carried out brutal policies of "ethnic cleansing"—the forcible removal of Bosniak and Croat populations

from territories under Serb control, primarily accomplished through deportation and persecution—in order to create conditions for future separation of these areas from the rest of the country.<sup>47</sup> One half of Bosnia’s prewar population was forced to leave their homes by fleeing the country or seeking protection in areas of Bosnia dominated by their own ethnic group.

In this setting, many worried that the Security Council’s action in creating the Tribunal was a fig leaf for its failure to take more assertive steps to stanch the slaughter underway.<sup>48</sup> But the creation of an international war crimes court also enjoyed the enthusiastic support of human rights advocates, who believed that the atrocities underway warranted the founding of a Nuremberg-type tribunal. Their call for a tribunal “was electric within ex-Yugoslavia,” inspiring civil society organizations in Bosnia to begin the treacherous but essential task of documenting war crimes.<sup>49</sup>

The predominantly Muslim government of Bosnia, too, welcomed the Security Council’s historic effort to address atrocities. But it also had ample cause for concern: The resolutions establishing the ICTY had been preceded by a blizzard of Security Council resolutions irresolutely addressing the Bosnian crisis.<sup>50</sup> In this setting, Muslim leaders worried that the Council’s action in creating the ICTY might salve the conscience of countries that were still unprepared to take the action needed to stop the slaughter.<sup>51</sup>

## B. Early Investigations and Indictments

On its side, the fledgling ICTY faced myriad challenges to its work in Bosnia. Judges were not in place until six months after the Tribunal was “created,”<sup>52</sup> and it took much longer—fully 14 months—to identify a candidate for prosecutor who would enjoy the support of a fractious Security Council<sup>53</sup> (and who would remain on the job for more than a few days—the length of time the initial prosecutor stayed).<sup>54</sup> The Tribunal’s investigators had to gather evidence of crimes committed in a zone of ongoing conflict, a challenge for which there was no playbook from the postwar prosecutions in Nuremberg and Tokyo that were the principal precursors of the ICTY.<sup>55</sup> Establishing a financially secure foundation for its work was another huge challenge for the Tribunal, requiring endless attention by its senior officials.<sup>56</sup> Not least important, the Tribunal was (and remains) dependent on states and international forces to carry out arrests of those whom its prosecutor has indicted. While this has presented challenges throughout the ICTY’s work, they were especially daunting in wartime Bosnia.

In this setting, the ICTY’s early indictments were directed against individuals who, while responsible for chilling brutality, played minor roles in the overall architecture of mass destruction. The reasons for this had less to do with prosecutorial strategy than pragmatic pressures and constraints. Richard Goldstone, who was all but technically the first ICTY prosecutor,<sup>57</sup> explains in his memoir why the Office of the Prosecutor (OTP) issued its first indictment against Dragan Nikolić, “a comparatively low-level” suspect.<sup>58</sup> Going into his first budget

meeting at UN headquarters soon after taking up the post of prosecutor, Goldstone had “been informed ahead of time that at least one indictment had to be issued before the ... meeting in order to demonstrate that the system was working and that the tribunal was worthy of financial support.”<sup>59</sup> With the Tribunal starved for cash, the prosecutor indicted Nikolić because “he was the only person against whom we had sufficient evidence to justify an indictment” at that time.<sup>60</sup>

But this alone does not explain the early indictments. Why, after all, did the OTP have sufficient evidence against someone who played a comparatively minor role in the system of atrocities in Bosnia? A significant part of the answer stems from the fact that it is easier for a prosecutor to prove the guilt of direct perpetrators than that of individuals who are the chief architects of systemic atrocities but who did not carry out atrocities themselves and are often physically removed from the scenes of the crimes.<sup>61</sup> At first, Goldstone pursued a pyramid theory of prosecution: Comparatively low-level suspects would provide evidence that establishes the responsibility of their superiors, and the ICTY prosecutors would follow the evidentiary leads upward until they reached the top of the pyramid.<sup>62</sup>

Some responsibility for the patterns reflected in early indictments—which do not add up to a strategic vision—belongs to the Tribunal’s Investigation Division, which was responsible for directing investigations until Prosecutor Carla Del Ponte put the direction of all investigations under the senior trial attorneys, who provided much-needed guidance. The way the OTP was initially structured brought further inefficiencies into a young institution that had to find its footing in the midst of extraordinary challenges. ICTY prosecutors would later acknowledge that some of their early indictments were weak, although they attributed this to yet another source of pressure: judges who were “impatient with the pace of indictments and deteriorating public confidence.”<sup>63</sup>

The same sort of pressures that led the prosecutor to indict Dragan Nikolić also led him to issue his second indictment against another low-level suspect, Dušan Tadić. With the war in Bosnia very much underway during the ICTY’s first two and a half years, the Tribunal was hard-pressed to obtain custody of indicted suspects. Goldstone saw an opportunity when German authorities arrested Tadić—whom Bosnian refugees from Prijedor had identified—in Munich, in February 1994. The ICTY immediately indicted Tadić; two months later Germany transferred to the ICTY the first person to face trial before it.

More than another year would go by before the prosecutor indicted individuals whom Bosnians would not consider “small fish”—Radovan Karadžić and Ratko Mladić. Their indictments marked a significant turning point for the Tribunal, significantly enhancing its credibility and viability. It would take another four years, however, before the ICTY prosecutor—by then Louise Arbour—would indict Yugoslav wartime leader Slobodan Milošević.

## C. Peace and Justice

If the ICTY faced daunting practical challenges in its early years, political challenges were just as formidable. From the outset of the Tribunal's work, diplomats working to bring the conflict in Bosnia to a negotiated end feared that the ICTY might impede their efforts.<sup>64</sup> As we explain in Chapter III, one of the principal justifications the Security Council cited in establishing the ICTY was its conviction that the Tribunal would help restore and maintain peace in a region still at war. But from the outset of his work, Chief Prosecutor Richard Goldstone had to address diplomats' attraction to the idea of offering deals that might include promises of immunity to suspected war criminals in exchange for a peace agreement.<sup>65</sup> After all, for a time the chief negotiator on behalf of Bosnian Serbs was Radovan Karadžić, a man who risked indictment someday—and indeed is now on trial in The Hague—for his leadership role in “ethnic cleansing.”<sup>66</sup>

A massacre that would surpass all others in the war brought this issue to a head. For several days in July 1995, Bosnian Serb forces systematically executed more than 7,000 Muslim males who, with their families, had been living in the eastern Bosnian town of Srebrenica. The final operation,<sup>67</sup> which would later be judged a genocide by both the ICTY and the International Court of Justice, began on July 11, 1995. By July 25, 1995, the ICTY had issued an indictment charging wartime Bosnian Serb leaders Radovan Karadžić and Ratko Mladić with genocide and other crimes. This indictment did not include the July 1995 massacre in Srebrenica—the prosecutor had not yet had time to prepare an indictment for this—but it is widely thought that Goldstone rushed out an indictment already in the works to ensure a swift response to Srebrenica.<sup>68</sup> While much of the world welcomed the long-awaited indictment, then UN Secretary-General Boutros Boutros-Ghali later told Goldstone that, had the prosecutor consulted him first, he would have advised against indicting Karadžić “before peace had been brokered in Bosnia.”<sup>69</sup>

Although long authorized to use military force to protect Srebrenica and other so-called “safe areas” in Bosnia, NATO had been reluctant to do so.<sup>70</sup> But the Srebrenica massacre, soon followed by another in downtown Sarajevo, finally led NATO to use unprecedented fire-power against Bosnian Serb forces in late August 1995.<sup>71</sup> NATO's intervention, along with the crippling effects of international sanctions against Serbia and a decisive Croatian offensive against Serb forces in the Croatian-Serb war, brought Serb leaders to the negotiating table, now under U.S. mediation. After years of inconclusive negotiations under European and then joint European-United Nations auspices, this time the Serbs were ready to reach an agreement to end the war.

Less than four months after the Srebrenica massacres, peace talks led by U.S. negotiator Richard Holbrooke got underway at the Wright Patterson Air Force Base outside Dayton, Ohio. In the lead-up to Dayton, U.S. officials were divided about whether Karadžić and Mladić—now

ICTY indictees—could participate in peace talks, and at Holbrooke’s insistence the United States determined that it would deal with the Bosnian Serbs principally through Milošević, but the U.S. government did not rule out meeting with the indictees in the region and in fact did so in September 1995.<sup>72</sup> Serbian President Slobodan Milošević, who would later face charges himself, represented the Bosnian Serbs in Dayton. If the indictment of Karadžić had any impact on the peace process, it was inadvertently facilitative: The Bosnian government’s then President Alija Izetbegović would not have attended the peace talks if Karadžić had.<sup>73</sup>

But there remained another challenge to the Tribunal, again grounded in a perceived trade-off between justice and peace: There appeared to be a real risk that the Tribunal’s work would be compromised by negotiators willing to offer amnesty as part of a peace package.<sup>74</sup> At the beginning of the Dayton talks, the ICTY sent then U.S. Secretary of State Madeleine Albright a letter asking the United States to include in the peace accords a requirement that indicted war criminals be surrendered to the ICTY.<sup>75</sup> Soon after, Goldstone issued a second set of indictments against Karadžić and Mladić, this time charging them with genocide for their roles in Srebrenica. With these and other high profile indictments again in the headlines,<sup>76</sup> it would have been difficult but not impossible for diplomats to neutralize the indictments in Dayton.

Still, the United States would not go as far as the Bosnian delegation hoped; the latter had wanted the Dayton accords to include detailed obligations to arrest ICTY indictees, with a robust mandate for the NATO-led implementation force, known by its acronym “IFOR,” to do so.<sup>77</sup> There were also divisions between lead negotiator Holbrooke, who thought arresting war criminals would be vital to the peace, and the Pentagon, which wanted the NATO force to focus on what it considered core military missions. A compromise was reached: IFOR would be authorized but not required to arrest ICTY suspects.<sup>78</sup> Moreover, parties to the agreement signed on to cooperate fully with the Tribunal, including by arresting those indicted by the ICTY.<sup>79</sup> As we discuss shortly, whether IFOR would exercise its authority was another matter altogether. First, we briefly describe the governing structure that was finalized at Dayton.

## D. Governance Structure

The peace agreement finalized in Dayton and officially signed in Paris in December 1995, formally called the General Framework Agreement for Peace in Bosnia and Herzegovina but more widely known as the Dayton Peace Agreement (DPA), established two largely autonomous entities. Under the DPA, roughly 49 percent of Bosnia’s territory was assigned to the largely self-governing entity Republika Srpska (RS); approximately 51 percent became the Federation of Bosnia and Herzegovina (“Federation”) entity. The Federation is divided into ten cantons: five with a Bosniak majority, three in which Croats are numerically predominant, and two (Central Bosnia Canton and Herzegovina-Neretva Canton) in which the two ethnic

groups are approximately the same size.<sup>80</sup> In exchange for considerable autonomy in RS, the Serbs accepted in principle what they had for three and a half years fought against—a Bosnian State that included RS.

The Bosnian government found one aspect of the territorial division particularly hard to accept in Dayton: Srebrenica would remain under Serb control. Twelve years later, when the International Court of Justice ruled that the Serb assault on Srebrenica was a genocide, some Bosniak leaders urged that Srebrenica be wrested from RS. In their view, to maintain Serb control over an area they had acquired through genocide was morally indefensible.<sup>81</sup>

This issue was emblematic of a broader moral quandary at the heart of Dayton: Although Serbs were awarded final control over less territory than that which they had acquired in war (roughly 70 percent of Bosnian territory), the Serb entity by its nature seemed to ratify the results of “ethnic cleansing.” To avoid this, Dayton assures all Bosnians the right to return to their original homes. In Chapter IV, we address the question of whether and how arrests of ICTY suspects might have affected implementation of this right.

The DPA also created an international governing structure, the Office of the High Representative (OHR), that would be responsible for implementing the civilian provisions of the peace accords. The OHR, acting under the authority of the Peace Implementation Council, an international body guiding the peace process in Bosnia,<sup>82</sup> now also represents the European Union.<sup>83</sup> Initially envisaged as a transitional structure that could be withdrawn when the previously warring factions reconstructed a national government, the OHR mandate was strengthened in 1997<sup>84</sup> and has been repeatedly extended in the face of strong ethnic division in Bosnia.<sup>85</sup>

## E. The Post Dayton Peace

*The history of post-Dayton Bosnia could have been very different if Karadžić and Mladić had been brought to trial in The Hague.*<sup>86</sup>

Although IFOR was authorized to arrest individuals indicted by the ICTY and provide support for other aspects of the civilian dimensions of the DPA, its commander resolved to avoid any such missions, however compelling the need.<sup>87</sup> Officially, NATO’s policy was that its Bosnia force would arrest those indicted by the ICTY if it came across them while carrying out its duties but would not seek out suspects.<sup>88</sup> Several months into the peace operation, a U.S. defense official told the *New York Times*: “We will take these people into custody if they surrender to us, preferably with their hands up over their heads, or maybe if they’re turned in by someone else.” But, he said, “I can’t imagine it would happen any other way ... [W]e have a much bigger mission in Bosnia.”<sup>89</sup> In practice, IFOR went out of its way to avoid arresting suspects, reportedly waving Karadžić and other suspects through NATO checkpoints.

The policy of avoidance was partly driven by the specter of Somalia, where 18 U.S. soldiers died in late 1993 when they tried to arrest a Somali warlord.<sup>90</sup> But it also reflected NATO countries' concern that arresting indicted war criminals could destabilize the fragile peace.

In the view of Richard Holbrooke and many others, however, arresting Karadžić was one of "the most important ... things necessary to achieve" Dayton's goals in Bosnia.<sup>91</sup> "Karadžić at large was certain to mean Dayton deferred or defeated," Holbrooke wrote.<sup>92</sup> In September 1997, the *New York Times* reported that, "By refusing to arrest Karadžić and deliver him to The Hague, the NATO forces have enabled him to remain the shadow commander and mafia king of the Bosnian Serb republic from his mountain home in Pale."<sup>94</sup> That Karadžić was not arrested until thirteen years after his first indictment enabled him to "rebuild his position" in Bosnia,<sup>94</sup> rallying nationalist Serbs and opposing inter-ethnic cooperation.<sup>95</sup>

The fact that Karadžić was under indictment and, pursuant to Dayton, unable to hold official office nonetheless served to marginalize him as well as Mladić.<sup>96</sup> Yet in myriad ways, as Human Rights Watch observes, "ongoing concerns about continuing ethnic divisions in Bosnia can be traced back, in part, to the early failure to purge the Republika Srpska of leaders implicated in war crimes."<sup>97</sup> As we note later, many Bosnians believe that the time lost while top suspects remained at large brought costs that transcend the toll of justice delayed—although that, too, has been a heavy burden for victims.

It remains to be noted that several years after the DPA entered into force, the Stabilization Force (IFOR's successor, known by its acronym SFOR)<sup>98</sup> began arresting ICTY indictees in July 1997. The newly minted government of British Prime Minister Tony Blair, who assumed office in early May 1997, led the way, under the banner of Foreign Secretary Robin Cook's "ethical foreign policy."<sup>99</sup> Blair had pledged that his government would track down war crimes suspects in Bosnia, and it was British forces who mounted a watershed arrest operation in July 1997 in which one indictee was apprehended and another killed when he resisted arrest.<sup>100</sup> In December 1999, the *New York Times* reported, "the British military has aggressively pursued suspects in western Bosnia. Eleven suspects have been arrested in the British sector; another was killed in a shootout with peacekeepers."<sup>101</sup>

The ICTY itself shamed SFOR into action through an arrest of a Croatian Serb indictee in Eastern Slavonia (Croatia). In June 1997, a joint action by the ICTY and the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) secured the suspect's arrest.<sup>102</sup>

Ultimately, SFOR "brought 39 war-crimes suspects to the [ICTY]" and also "provided security and logistical support to ICTY investigative teams as well as surveillance of and ground patrolling around alleged mass graves"<sup>103</sup> according to the NATO Web site.<sup>104</sup>



## F. Cooperation by Bosnian Authorities

While multinational forces have arrested large numbers of ICTY suspects, others have been arrested or persuaded to surrender by national authorities. The Bosniak-dominated government of BiH was the first to transfer to the Tribunal indictees from the ethnic group that constituted its majority. The government of Bosnia arrested Hazim Delić and Esad Landžo, indicted for crimes committed at the Čelebići prison camp in 1992, in May 1996 and transferred them to the Tribunal the following month.<sup>105</sup> But while Bosniak officials were from the outset cooperative with the ICTY, most of its suspects were in Republika Srpska or, even more often, in Serbia, where for years they were granted citizenship and protection. In the early post-war period, RS authorities openly opposed surrender of Bosnian Serbs to the Tribunal. With Serbs unwilling—and the central Bosnian government unable—to arrest most Serb indictees, and with the NATO forces hesitant for several years to make arrests, the Tribunal suffered a crisis of credibility. Two developments brought a crucial turnaround in the ICTY's fortunes: the July 1997 SFOR action in Prijedor, in which ICTY indictee Simo Drljača was killed while resisting arrest, and the surrenders of ten Bosnian Croats in October 1997, the product of months of intense negotiations between the United States and Croatia.<sup>106</sup>

During the first tenure of RS Prime Minister Milorad Dodik (Jan. 1998–Jan. 2001), RS policy toward the ICTY softened. Dodik allowed the Tribunal to open an office in Banja Luka, asserting that the public mood had shifted to a degree that surrendering Serbs to the Tribunal was no longer seen as the “act of a traitor” but instead as a courageous step.<sup>107</sup> Moreover the terms of Republika Srpska's new cooperation were controversial: In late 2004, ICTY officials criticized Bosnian Serbs for offering financial rewards to war crimes suspects who surrendered.<sup>108</sup>

Republika Srpska for the first time transferred war crimes indictees to the ICTY soon after introducing the new “trading” approach.<sup>109</sup> During 2005 and 2006, RS authorities also forwarded documents to the ICTY's Office of the Prosecutor as well as to the Prosecutor's Office in Bosnia and Herzegovina.<sup>110</sup> In late December 2006, RS appointed a working group on cooperation with the ICTY.<sup>111</sup>

### III. Victims' Justice

*Despite the beauty [of Bosnia and Herzegovina], the pain of the war is still very raw in people's hearts. You see, the enemy who took your father to a concentration camp was your neighbor, the rapist of your wife, daughter or mother was your colleague, and the sniper who killed your child was a relative. That's difficult to overcome; difficult to forget.*<sup>112</sup>

*My mind is very overburdened with sad things... We just trust in God and justice. I am glad there is justice....*<sup>113</sup>

*Justice will never be reached—just a little satisfaction.*<sup>114</sup>

In the lead-up to Serbs' armed attack against Bosnian Muslims in April 1992, Muslim residents' homes in Foča "were being set on fire," an ICTY Trial Chamber would later record.<sup>115</sup> A Tribunal witness identified as FWS-75 was among those who, unable to leave the region, hid "in the woods for fear of being burned in their houses while they were sleeping."<sup>116</sup> Approaching forces shot at the Muslim villagers as they tried to flee, hitting FWS-75 and killing her mother.<sup>117</sup> With other women and girls who survived the assault, FWS-75 was taken captive. The ICTY's trial judgment in the *Kunarac* case describes what happened next:

Women [who were captured by Serb soldiers] were kept in various houses, apartments, gymnasiums or schools. Even prior to their being brought to those detention centres, some witnesses who testified before the Trial Chamber said that they had been physically abused or raped by the soldiers who had captured them. Thus, FWS-50, FWS-48, FWS-75 and FWS-87 stated that they were raped at Buk Bijela, a settlement south of Foča where they had been taken after their capture. FWS-75 was taken away from the group by a man of 40–50 years who proceeded to rape her. She was subsequently raped in this very same room by approximately 10 other men. She fainted after the tenth man.<sup>118</sup>

This was just the beginning of a months-long period of continuous gang rapes during what was legally judged to be the crime against humanity of enslavement and rape, essentially constituting what would now be regarded as sexual slavery had this crime been within the jurisdiction of the ICTY. The trial judgment provides a glimpse of what FWS-75 and other captives endured throughout this period in its account of a two-week period that was hardly unique: After spending a week in the apartment of one of the defendants in the *Kunarac* case, Radomir Kovač, FWS-75 and another captive, twelve-year old A.B., were taken to another apartment where “[t]he two girls stayed ... for about 15 days, during which they were constantly raped by at least ten or fifteen Serb soldiers.”<sup>119</sup> Serb soldiers then took the girls to another apartment, where they stayed “for about 7–10 days, during which time they continued to be raped.”<sup>120</sup> Radomir Kovač ultimately sold 12-year-old A.B. and FWS-87 to two Montenegrin soldiers for 500 Deutschmarks each.<sup>121</sup>

On December 25, 1992, Kovač handed FWS-75 over to another soldier “in the almost certain knowledge that [she] would be raped again.”<sup>122</sup> By then, there were virtually no Bosniaks left in Foča, 51 percent of whose residents were Bosniaks in 1991.<sup>123</sup>

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Bosnia and Herzegovina is filled with individuals who survived harrowing crimes—and with the graves of those who did not.<sup>124</sup> No measure of justice can restore what victims have lost forever, and many of the survivors we interviewed are acutely aware of this. For most survivors, moreover, specific crimes that forever changed their lives are part of a broader canvas of enduring trauma, of deeply felt injustices that cannot be redeemed by criminal prosecutions—the haunting remembrance that it took years before the international community took action to end their suffering; the post-conflict division of their country under terms that Bosniak victims see as the rewarding and ratification of ethnic cleansing; the daily injustice of exile from homes in which generations of their families lived.

But if trials cannot heal victims’ wounds, many “desperately need justice.”<sup>125</sup> Asta Zimbo, who worked with survivors’ groups on behalf of the International Center for Missing Persons,

makes the point this way: “They weren’t just hit by a bus. Someone did terrible things many times over.... People don’t expect perfect justice but they want some kind of justice.”<sup>126</sup> In this chapter we explore the kind of justice Bosnians hoped to receive when the ICTY was established, as well as their evolving expectations of justice from The Hague some seventeen years after the Tribunal was created. For the most part, we defer until later chapters our assessment of the degree to which their expectations have been met and the underlying reasons.<sup>127</sup> To a limited extent, however, our discussion in this chapter reflects not only the goals that Bosnians associate with ICTY success but also their views of how well the ICTY has achieved the goals they consider important. In general, this follows from the way in which many expectations were presented during interviews: Often, our Bosnian interlocutors implicitly conveyed their views of what the ICTY should have achieved by commenting on how well it has achieved those goals. With respect to one of the goals to which many attached great hope—the ICTY’s ability to prevent further atrocities—this chapter provides a somewhat more extended discussion of Bosnians’ perceptions of the ICTY’s record.

While this chapter identifies several distinct justifying aims of the ICTY that emerged in interviews as important to Bosnians, these do not fall neatly into separate categories. For example, as the discussion that follows makes clear, some Bosnians’ conception of reconciliation as a byproduct of prosecution shades into others’ notion of acknowledgment as one of the most important hoped-for consequences of ICTY verdicts. Some of the positions set forth in this chapter could reasonably be cited to illustrate several different positions—that the ICTY serves an expressive function or that it serves a preventive role, for instance. To the extent possible, we have tried to capture and reflect speakers’ conceptions of the ICTY’s contributions and/or unachieved goals in their own terms rather than in terms that are widely used in academic literature.

Although we interviewed victims from all three major ethnic groups in Bosnia, the experiences of Bosniak victims loom especially large in this chapter and the next because—as even many Serbs we interviewed acknowledge<sup>128</sup>—Bosniaks suffered the vast majority of atrocities during the 1990s war and were especially supportive of the Security Council’s action in creating the ICTY.<sup>129</sup> This is not to say that Bosniaks are the only citizens who believe the ICTY’s work to be important. We interviewed individuals of all ethnicities in Bosnia who believe the work of the ICTY to be important (if imperfectly realized), and this chapter reflects their views as well as those of Bosniaks. (And as our discussion in Chapter IV makes clear, we also interviewed individuals across ethnic lines who are highly critical of the Tribunal’s achievements.)

While significant, ethnicity is by no means the only meaningful difference among Bosnian victims. As our analysis makes clear, a victim’s experience of justice is a function of his or her individual personality and personal experiences. Also relevant, as this chapter and others reflect, are differences in victims’ educational level. In general we found that highly educated urban Bosnians are more likely than rural victims to value the symbolic importance of the ICTY’s work—or at any rate, they were more likely to verbalize the importance of the

Tribunal's expressive function in abstract terms, to situate the Tribunal's accomplishments in a larger context than Bosnia, and to understand the reasons behind ICTY practices. While these individuals often refer to other, less educated, Bosnians as "ordinary people" or "direct victims," many if not most of the urban intellectuals interviewed for this study also endured harrowing war crimes.<sup>130</sup>

## A. "That Someone Guilty Be Punished"<sup>131</sup>

*The purpose of a trial is to render justice, and nothing else .... Hence, to the question most commonly asked about the Eichmann trial: What good does it do?, there is but one possible answer: It will do justice.*<sup>132</sup>

Today, it is commonplace outside of Bosnia to ask in relation to international tribunals much the same question that, in Hannah Arendt's words, was "most commonly asked about the Eichmann trial" almost half a century ago: What good does it do?<sup>133</sup> Yet for many survivors of Bosnia's wartime atrocities, the question answers itself.

Sadik Trako, who heads the Association of Victims and Missing Persons in Lašva Valley in central Bosnia, said all that he thought necessary on the point: "For me, the Hague Tribunal is an extremely important institution because it is that court which is going to punish the perpetrators."<sup>134</sup> Like many survivors, Mirsad Duratović, who was 17 when he was detained in the notorious concentration camp in Omarska and who lost more than 60 relatives during the Serb takeover of Prijedor, is perplexed when asked to explain why he supports the ICTY despite myriad disappointments in its performance. "What I have gone through," he explains, "I think whoever was in my shoes would actually like to see some justice being done." If the interviewer ever went through what he did, Duratović continued, "then it would be clear to you ... why you want [justice]."<sup>135</sup>

Although often overlooked in the literature on the ICTY, the UN Security Council recognized the importance of what some of our interlocutors call "justice for its own sake"<sup>136</sup> when it established the Tribunal. In the resolution creating the ICTY, the Council cited its determination not only to deter further atrocities but also "to take effective measures to bring to justice the persons who are responsible for them."<sup>137</sup> In the ICTY's first annual report to the UN General Assembly and Security Council, then ICTY President Antonio Cassese described this aim with elegant simplicity—"to do justice."<sup>138</sup>

More than any other justifying aim of the ICTY, bringing those responsible to justice seems to have special resonance for victims in Bosnia. As law professor Jasna Bakšić Muftić noted, "After all kinds of war crimes and genocide, the people need some sort of satisfaction ... that someone guilty be punished."<sup>139</sup> Reflecting on many victims' continuing support for the ICTY in the face of widespread disappointment in its sentences, Mirsad Tokača, who has met

countless victims while documenting wartime atrocities, captured the essential point: “Simply, they desperately need justice. It’s some kind of satisfaction, moral satisfaction.”<sup>140</sup> Kada Hotić, a leader of Mothers of Srebrenica and Žepa Enclave, described the positive contributions of the ICTY this way: “If the court were not established at all, it would be very difficult to reach any sentence [for the crimes committed during the war]. That’s a little piece of justice.”<sup>141</sup>

Studies by the United Nations Development Programme (UNDP) reflect the importance of justice for Bosnians across ethnic lines. A 2005 UNDP field mission report observed that “Bosnians overwhelmingly identify criminal justice as the most legitimate response to crime, if not the only one. At all levels of society and in every part of the country, putting war criminals on trial is seen as a necessity, with no serious alternative.”<sup>142</sup> (The last part of this observation probably means that most respondents rejected the prospect of amnesty, not that they rejected transitional justice processes complementary to prosecutions; a 2005 UNDP poll also found considerable support for a truth and reconciliation process across ethnic communities.)<sup>143</sup>

Believing that many expected the Tribunal to perform too many roles, Nerma Jelačić insisted that “its primary role needs to be establishing individual responsibility and finding facts, prosecuting defendants and ensuring that they get their due for what they did in the war. That’s huge already.”<sup>144</sup> Establishing individual responsibility is especially important, many of our interlocutors emphasized, in respect of those who played leading roles in wartime atrocities, including but not limited to Bosnian Serb wartime leaders Ratko Mladić and Radovan Karadžić.<sup>145</sup> Journalist Nidžara Ahmetašević, who at seventeen was wounded when Serb snipers shot at her Sarajevo home in May 1992,<sup>146</sup> describes the moral message a verdict against Mladić and Karadžić would send: “The whole world will say, ‘these people committed that and that and we are here to say, it’s not good to do that[;] you cannot do that and go around unpunished.’”<sup>147</sup>

Ahmetašević’s conception of justice is evocative of the ICTY’s notion of retribution, one of the two most important guiding principles (along with deterrence) of the Tribunal’s sentencing.<sup>148</sup> Although its judgments have not always used the term “retribution” in a consistent manner, ICTY chambers have emphasized that the concept “is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”<sup>149</sup>

Hatidža Mehmedović, who lost her husband, two teenage sons, brothers, parents, and scores of other relatives during the Srebrenica genocide, described her disappointments in the ICTY at some length when we interviewed her in July 2009.<sup>150</sup> Yet she concluded our interview this way:

My opinion is that it is good that the Hague Tribunal was established and that the Hague Tribunal exists simply because of the point that if the court was not established, no instance would be able to issue ... verdicts in the case of these crimes.<sup>151</sup>

We found this view to be nearly universal among those we interviewed. Almost all of our Bosnian interlocutors believe, in the words of Sinan Alić, that “it was absolutely necessary to establish the ICTY,”<sup>152</sup> however imperfect its performance. For if the crimes Bosnians endured demanded justice, the “only possibility”<sup>153</sup> for justice during and in the aftermath of the inter-ethnic violence that consumed Bosnia was through “a neutral, impartial institution”<sup>154</sup> like the ICTY.<sup>155</sup>

## B. Prevention: No One Is above the Law

*Simply, it's a message for people that crime will never be accepted... There is a strong message to society that there is not anybody who committed a crime who can stay untouched, unpunished.*<sup>156</sup>

If doing justice was itself a key rationale for creating the ICTY, another—and perhaps the most important for the Security Council—was its conviction that the Tribunal would help “put an end” to the “widespread and flagrant violations of international humanitarian law” then underway in Bosnia and contribute to ensuring that they “are halted.”<sup>157</sup> As noted already, ICTY judgments routinely cite deterrence, along with retribution, as two key aims that should guide judges’ determination of sentences. As then ICTY President Antonio Cassese noted in his first report to the UN General Assembly and Security Council, “[o]ne of the main aims” of the Security Council when it established the Tribunal “was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes.”<sup>158</sup> “In short,” he wrote, “the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.”<sup>159</sup>

The July 1995 slaughter of well over 7,000 Muslims in Srebrenica is haunting testament that the Tribunal’s creation did not put an end to atrocities. Nura Begović, a leader of the organization Women of Srebrenica, holds the ICTY responsible, noting that it was established two years “before this tragedy occurred” in Srebrenica. “This court should have been active even in this period,” she insists, noting that the July 1995 genocide did not come suddenly but was instead the culmination of a siege that had lasted three years.<sup>160</sup> ICTY prosecutors should have pressed charges sooner, she insists. But “they didn’t do it.”<sup>161</sup> Nor did the ICTY prevent Serbia from committing serious violations of humanitarian law in Kosovo—abuses that led NATO forces to intervene in 1999.

That atrocious crimes occurred after the ICTY was established does not close the book, as some have suggested,<sup>162</sup> on the question of whether international tribunals can exert a deterrent impact or even whether the ICTY has deterred some crimes that would have been committed but for its operation. The ICTY was still in its institutional infancy when the July 1995 massacre took place in Srebrenica. The prosecutor had by then indicted only fourteen

suspects, all in the eight months before July 1995, and had managed to secure custody of only one.<sup>163</sup> Perhaps even more significantly, the sole defendant in ICTY custody at the time of the Srebrenica massacre had been transferred from Germany, leaving intact the impunity indictees still enjoyed in the Balkans.<sup>164</sup>

The situation had improved, but not nearly enough, by the time abuses in Kosovo intensified in 1998–99. In the ICTY's annual report to the Security Council in 1997, then President Cassese noted that the Tribunal's mandate of "putting an end" to international crimes "has not yet been properly fulfilled because the vast majority of persons indicted by the Tribunal are still at liberty, ignoring their indictments with seeming impunity."<sup>165</sup> Two years later, the Tribunal's annual report, which covered the period in which abuses in Kosovo reached their zenith, noted that 35 of the Tribunal's publicly indicted suspects were still at large;<sup>166</sup> these included Ratko Mladić and Radovan Karadžić, by then twice indicted on genocide and other charges.

Despite the crimes that were not prevented by the mere fact of the ICTY's existence, many of our Bosnian interlocutors believe the Tribunal has prevented some crimes and that its operation over time has served to prevent future crimes. While acknowledging that perpetrators, "thinking they were untouchable," were not deterred simply by the ICTY's creation, Professor Smail Čekić added: "They thought the court would never become what it actually has become."<sup>167</sup> Even Begović (who, as noted earlier, faults the ICTY for failing to prevent the Srebrenica genocide) believes that, as a result of the Tribunal's existence, "some of those criminals were a bit afraid." Despite her frustrations with the ICTY, therefore, she believes "it's good to have the Hague Tribunal in existence."<sup>168</sup> In a similar vein, Keraterm camp survivor Edin Ramulić said that as long as the ICTY was still investigating new cases, unindicted war criminals in Prijedor "were a little bit afraid of the ICTY."<sup>169</sup>

Emsuda Mujagić, who leads a non-governmental organization in Kozarac, places particular hope in the long-awaited trials of two men whom Bosniak victims consider most responsible for their suffering. As the trial of Radovan Karadžić approached, she told us that his trial and "I hope [that of Ratko] Mladić ... means that even in the future, others would be thinking twice before committing such crimes."<sup>170</sup> Dino Djipa believes the ICTY has already had such an effect. In his view, "the most useful" impact of the ICTY is that it has helped make "people ... aware that war crimes are wrong" and, in consequence, "in the event of a future war, everyone would be so careful about not committing war crimes because of the work of the ICTY."<sup>171</sup> ICTY judges, too, hope the Tribunal's achievements will have a deterrent impact beyond its own writ, "the territory of the former Yugoslavia."<sup>172</sup> Addressing the question of general deterrence, ICTY Judge Wolfgang Schomburg told us he is "convinced that in the future" potential perpetrators will be deterred from committing atrocities as a result of the work of contemporary international tribunals. Noting that the leaders who instigate campaigns of atrocity include "highly intelligent people," he believes that "when confronted with ... whether to commit crimes, they will see a real risk of being convicted, being brought to prison."<sup>173</sup>



Branko Todorović, who heads the Helsinki Committee for Human Rights in Republika Srpska, believes that “the best thing the Tribunal in The Hague has done is not related to Bosnia and Herzegovina only or to Kosovo or Rwanda. It has to do with the world as such and the message is clear: ‘Think before you commit a crime. You could certainly be held responsible for what you did.’”<sup>174</sup> Todorović is convinced that, despite the crimes that were not deterred, if the ICTY had not been created “some very bad crimes would have been committed” in the region.<sup>175</sup>

Establishing that the ICTY has helped deter crimes that might have been committed but for its prosecutions is of course inherently difficult, if not impossible. As noted, for that reason we do not separately address how well the Tribunal has succeeded in deterring war crimes. Yet in one respect the ICTY has made an unambiguously important contribution to the broader framework of prevention: As we discuss at some length in Chapter VI, the Tribunal helped launch a war crimes chamber within the Court of Bosnia and Herzegovina. Through its work, Bosnia has developed an increasingly effective capacity to prosecute war crimes itself. Reflecting on this chamber as well as on war crimes prosecutions in Serbia and Croatia, Bosnian lawyer Edina Rešidović observes: “And all of this for sure would not have happened without the influence of the ICTY.”<sup>176</sup>

## C. Restoring and Maintaining Peace

The third and legally necessary justification cited by the Security Council for establishing the ICTY was its conviction that the Tribunal’s establishment and the prosecution of those responsible for atrocities then underway “would contribute to the restoration and maintenance of peace.”<sup>177</sup> Historian Smail Čekić recalled that when the Tribunal was created, many Bosnians’ “expectation was ... that the aggressor states ... will stop or at least reduce their aggression-related activities simply for the fact that they are now aware of such a UN-organized international tribunal.”<sup>178</sup> But perhaps in part because Bosnia remained a cauldron of conflict for another two and a half years after this resolution was adopted, few other Bosnians interviewed for this study even recalled having set much store in the notion that the Tribunal would help end the war.

Damir Arnaut, now a government official in the party of Haris Silajžić, recalled that while the government of Bosnia “was very much in favor of the Tribunal,” its establishment “was not on the top of [its] agenda” in 1993. Its top priority instead was “lifting the siege of Sarajevo.” Some were concerned, in fact, that establishing the Tribunal “was a way to skirt the issue” of ending the siege.<sup>179</sup> Looking back on what transpired in the years after the ICTY was established, Emir Suljagić says that one of the lessons to be learned from the ICTY experience is “let us finish our wars.... Do not start wars and pretend that a tribunal can actually do what a just end to war would actually do.” Suljagić went on to say he believes that “tribunals are

good, generally speaking, but they are only good after you have militarily defeated the ideology behind the crimes that you want to prosecute or judge in those tribunals.”<sup>180</sup>

There may be another reason why Bosniaks in particular do not set store in the “justice for peace” rationale set forth in the Security Council resolution creating the ICTY. Despite the Council’s professed belief that the ICTY would help restore and maintain peace in Bosnia, states acted on much the opposite premise during the early years of the ICTY. Of particular relevance to Bosniaks’ perceptions of the ICTY’s achievements, NATO forces operating in Bosnia in the early postwar years went out of their way to avoid arresting two masterminds of “ethnic cleansing”—Ratko Mladić and Radovan Karadžić—believing that their arrest could be destabilizing.<sup>181</sup> This, as we note in Chapter IV, is widely seen as one of the greatest failures of the international community associated with the ICTY’s work, and one that many believe has significantly diminished its impact.

## D. Reconciliation

The word “reconciliation” is not used in the Security Council resolution establishing the ICTY,<sup>182</sup> nor is it included in the goals of the Tribunal set forth on its own Web site.<sup>183</sup> Even so, many have assumed that the Security Council’s determination that creating the ICTY would contribute to peace includes the notion of reconciliation—a view that has at times been reflected in ICTY judgments<sup>184</sup> and reports.<sup>185</sup> Senior ICTY officials have repeatedly emphasized a notion they consider central to the Tribunal’s mission (though not a concern of judges when performing their work)—that by prosecuting individuals one by one, the Tribunal would avoid the taint of collective responsibility that might fuel future conflicts. Then ICTY President Cassese made the point this way in his first report to the UN General Assembly and Security Council:

Far from being a vehicle for revenge, [the ICTY] is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, “collective responsibility”—a primitive and archaic concept—will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of “collective responsibility” easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.

...Thus the establishment of the Tribunal should undoubtedly be regarded as a measure designed to promote peace by meting out justice in a manner conducive to the

full establishment of healthy and cooperative relations among the various national and ethnic groups in the former Yugoslavia.

Many of our Bosnian interlocutors addressed the Tribunal's impact on reconciliation when asked to assess its performance and achievements against original expectations. As we explain below, we found a wide range of views among them about whether it is appropriate even to expect a criminal court to contribute to reconciliation; what reconciliation means in this context; and what else must happen, including the passage of time, to see the fruits of the ICTY's work in terms of its impact on reconciliation among Bosnia's ethnic communities.

At the time of our last set of interviews in July 2009 in particular, nationalist rhetoric among Bosnian political elites was on the rise and Bosnia was veering toward constitutional crisis.<sup>186</sup> As with other issues of public concern, reactions to verdicts from The Hague divided along ethnic lines. In this setting, some of our interlocutors believe that Bosnia's ethnically fractured polity defies any plausible claim that the ICTY has contributed to reconciliation—or ever could.

Saying that “one of the key ideas about setting up this court was exactly reconciliation,” *Dani* editor Ivan Lovrenović continued: “So far it has proved to be the case that the court has achieved exactly the opposite.”<sup>187</sup> With all three major ethnic groups in Bosnia unable or unwilling “to face [their] own crimes or victims,” each views the ICTY through an ethnic prism, which Lovrenović evokes this way: “It’s good when it prosecutes war crimes from the other ethnic groups and it’s bad when it reaches a verdict from our ethnic group. This is, roughly speaking, where the complete perceptions of The Hague is exhausted.”<sup>188</sup> Lovrenović’s assessment echoed that of another prominent journalist, Gojko Berić. He, too, recalled that one of the Tribunal’s “objectives was to establish reconciliation among people.” But, Berić continued, once Tribunal officials realized how ICTY verdicts were being reflected among Bosnian people, “the Tribunal gave up that very objective silently ... So they retreated before reality.”<sup>189</sup> Others, like Nerma Jelačić, caution that “It was always wrong to expect the Tribunal to have a direct impact in reconciliation. Its work,” she continued, “is only one of many things that have to happen.”<sup>190</sup> Law professor Jasna Bakšić Muftić has a somewhat different emphasis. She believes that “justice is of course necessary to create good inter-ethnic relations and stability in the region”<sup>191</sup> after the type of atrocities that Bosnians endured at the hands of their neighbors, even if the task of social repair has barely begin. While this does not mean that reconciliation follows justice inexorably or easily, it means that without justice it will be impossible to reconstitute the civic bonds between ethnic groups that have been violently torn apart.

Professor Bakšić Muftić recalls Yugoslavia’s postwar experience, when ethnic violence committed during World War II “was minimized and put under the carpet.” Without a serious process of national reckoning, “a double history” developed. Official textbooks omitted discussion of wartime atrocities, which then became part of a “secret history” within families. Those who lost loved ones at the hands of ethnic slaughter endured a “double trauma—that

it happened, and that you couldn't talk about what happened." The secret history that festered beneath the surface of the official history "completely opened up in the last conflict. All the people know what happened in the Second World War and there was sort of a revenge in the 1990s war."<sup>192</sup>

Focusing on the effects of the 1990s conflict itself, civil society leader Srđan Dizdarević made an impassioned case for justice as "the key pillar of reconciliation" in Bosnia. Whatever the reasons for the 1990s conflict, Dizdarević continued, it created "hatred" and "disturbed the traditional, existing relationships" among Bosnia's ethnic groups. In this setting, he said, "justice will bring a part of the solution." Although other mechanisms are also needed to "rebuild trust," he believes, "justice is the starting point, the basic point."<sup>193</sup>

Several individuals articulated a conception of the ICTY's contribution to reconciliation in which its verdicts help reconstitute the basic values that unite a diverse society and make it possible to live together after members of one group have sought to destroy members of another. We interviewed Tarik Jusić one week after Stanislav Galić received a sentence of life in prison for commanding the siege of Sarajevo from September 1992 to August 1994.<sup>194</sup> Reflecting on the significance of the sentence, Jusić told us: "It's very important for me. ... It re-establishes the basic preconditions for society as such. It cannot be that someone bombs you for four years and it's fine. ... It's a re-establishing of basic, underlying values of civilization and society."<sup>195</sup> One of the underlying values Jusić considers important is a commitment to the notion of individualized crimes. Echoing the ICTY's oft-repeated approach, he said: "It's really essential that the guilt is individual," he says. "They [i.e., members of an ethnic group] didn't all commit these crimes."<sup>196</sup>

Although Sevima Sali-Terzić wonders whether the international community has placed more importance on reconciliation than on the fundamental goal of bringing war criminals to justice, she offered a definition of reconciliation that captures a point of deep importance for many Bosnian victims, which we address further in the section that follows. Noting that people have different conceptions of the term, Sali-Terzić said the "best meaning" of reconciliation is "we have to know what happened and we have to reconcile with that."<sup>197</sup> She continued:

People here have different understandings of the same facts and all are blaming others. And the real thing is to know what your people did and to reconcile with that. And then you can live with each other. A lot of Serbs do not accept [that Serbs committed genocide in] Srebrenica. Unless you accept that, you cannot reconcile with the past in order to live with your neighbors. For example, people here [i.e., Bosniaks] do not accept that Serbs were killed in Srebrenica. ... The point is that I understand that somebody allegedly in my name killed people and I say 'I don't like this, and they should be punished.' Only then can there be reconciliation.

Sali-Terzić believes that justice is needed for reconciliation, and continues: “If you just push it under the carpet it will grow and be a real problem.”<sup>198</sup>

## E. The Truth

*People can always say it didn't happen but now there are documents.*<sup>199</sup>

*We still had the hope that establishing this court will help to reveal the truth so that justice will be reached.*<sup>200</sup>

Apart from “justice for its own sake,” the theme that emerged most often as Bosnians described what they consider important about the Tribunal’s work is that it can establish “the truth.” At the broadest level, Bosniaks attach considerable value to the Tribunal’s ability to establish through the rigors of an impartial judicial process the fundamental facts of what was done to them, who was responsible, and the nature of the crimes committed.

While the rest of this section focuses on the broader truth that many count on the ICTY to establish, survivors often place special importance on a more personal truth. Those who have not yet learned the fate of loved ones hope that the work of the ICTY (and, now, of the Bosnian War Crimes Chamber) can help answer questions that consume them: What happened to their sons, husbands, brothers, parents? Where are their relatives’ bodies buried? For some, the ICTY holds the promise of answering a fundamentally different but also haunting question: *Why* did their lifelong neighbors turn against them, hunting them down like animals? And for victims who testify before the ICTY, its trials can offer the “chance to tell their personal history and to have it officially recognized.”<sup>201</sup>

## F. “The Hague Has Made It Harder To Deny Abuses”<sup>202</sup>

The most salient quality of prevailing Serb responses to massive and systemic atrocities committed by Serbs against other ethnic groups has been denial or distortion of the truth about past crimes.<sup>203</sup> They argue that what Serbs did was a “gesture of revenge”<sup>204</sup> for what Muslims had already done to Serbs, and that it takes at least “two sides to fight.”<sup>205</sup>

In the Justice Initiative’s 2008 report on the ICTY’s impact in Serbia, we noted that one of the foremost reasons cited by the Serbians citizens who support the ICTY on principled rather than pragmatic grounds is that they hope the Tribunal’s judgments can help dispel their society’s pervasive denial of the nature and extent of wartime offenses committed by Serbs and

of the role of Serbian institutions in backing atrocities perpetrated in large part by Bosnian and Croatian Serb forces and that, having acknowledged the truth, members of Serbian society will condemn criminal actions by Serbian officials committed in their name.<sup>206</sup> As discussed further in Chapter V, there have been recent indications of limited progress in this regard (alongside several notable instances of enduring denial). Similar considerations loom large for Bosnian Serbs who support the ICTY's work, some of whom have worked tirelessly to educate other Bosnian Serbs about the facts confirmed in ICTY judgments. But for Bosniak victims in particular, the ICTY's role in piercing denial is a matter of justice.

For many, Bosnian Serbs' acceptance of and expressed remorse about the truth is an essential condition of social repair. Edin Ramulić, who survived internment in Keraterm but whose brother did not, says that for him, reconciliation means "above all" that the Serbs who were responsible for these abominations "admit what was committed."<sup>207</sup> Kada Hotić, whose husband and brother were among those murdered in Srebrenica,<sup>208</sup> recalls that "when the Hague Tribunal was established it gave us a big hope, not only to convict criminals...but we expected to have the truth in this country revealed and proved, because we have a big problem here regarding acknowledgement of the truth."<sup>209</sup> But in the absence of such acknowledgment, many Bosniaks believe it matters enormously that the ICTY has at least produced "the evidence and proof that will someday make [Bosnian Serbs] understand they lied to themselves."<sup>210</sup>

While the importance of Serbs' acknowledgement of atrocities committed by Serbs loomed large in our interviews, Bosnian intellectuals also pointed to the importance of Bosniak and Croat acknowledgement of crimes committed by members of their own ethnic groups as an important benchmark of the success of the ICTY's work. As one person pointed out, just as many Serbs have been unwilling to acknowledge the extent and nature of crimes committed by Serbs, many Bosniaks have been unwilling to condemn abuses committed by the Bosnian Army against Serbs and Croats, concerned that "this could be seen as equalizing guilt."<sup>211</sup> Implicitly, then, these individuals measure the Tribunal's accomplishments in part by the degree to which each ethnic group in Bosnia is able to acknowledge and condemn atrocities committed by members of its own group.

A number of our Bosnian interlocutors recognized that there is some measure of tension between the importance they attach to this type of acknowledgment and another principle they associate with the ICTY, which they also consider important. Across ethnic lines our interlocutors in Bosnia expressed support for the proposition that criminal guilt is individual—a point that ICTY officials have been at pains to emphasize from the outset of the Tribunal's work. To suggest that Serbs should acknowledge the guilt of Serb defendants, a number of our interlocutors noted, may reinforce the all-too-prevalent ethnicization of Bosnian discourse about war crimes. Yet many who made this point also stressed the importance they attach to the goal of widespread acknowledgment within each ethnic group that members of their group

committed war crimes, a notion that implies a form of collective responsibility—what Karl Jaspers called “political guilt.”<sup>212</sup>

For example, Dobrila Govedarica noted the importance of transcending the perspective, which still prevails in the former Yugoslavia, of viewing war crimes in ethnic terms. Instead, she said, “individualizing guilt is important” and it is important to “think of war crimes as something that should not be done against anybody.” Even so, she said, while “someone who belongs to an ethnic group should not be stigmatized” because of the guilt of others,

It was not just individuals who were responsible by directly perpetrating crimes—there were witnesses who were silent. They weren’t accomplices but they were silent. Some who opposed crimes committed by members of their ethnic group were punished, but how come they’re *still* silent? ... It was impossible not to see that your neighbor was tortured just because he belonged to an ethnic group. So you shouldn’t stigmatize an entire group but maybe there should be an acceptance of political responsibility. ... These individuals didn’t come from nowhere. There had to be either an overall political/societal climate that supported such acts or there had not been awareness that it was wrong.<sup>213</sup>

## G. Affirming Core Values of International Law

As noted earlier, international lawyers and others have long recognized the ICTY’s rich contributions to international humanitarian law. Many Bosniaks, too, value these contributions. Not surprisingly, this theme was especially likely to arise during our interviews with Bosniak intellectuals.

For example, law professor Jasna Bakšić Muftić said that among the reasons why the ICTY’s work is important, its judgments have “confirmed minimum” standards, set forth in treaties like the 1949 Geneva Conventions on armed conflict and the 1948 Genocide Convention, whose breach may result in prosecution even of senior officials like former Yugoslav president Slobodan Milošević. Among the Tribunal’s signal achievements, she believes, is its explicit recognition of crimes of sexual violence. As we elaborate somewhat in Chapter IV, Professor Bakšić Muftić believes that the attention the ICTY has paid to this issue “has created a new kind of awareness that women had been used” as a means of warfare. In consequence, “they became visible, personalized, recognized as one kind of victim.”<sup>214</sup> This recognition has significance far beyond the regions and the crimes committed in Bosnia; it has helped generate awareness globally that various forms of sexual violence may constitute war crimes, crimes against humanity, and instruments of genocide.

## H. Removing Dangerous People

Although our Bosnian interlocutors did not identify incapacitation and/or removal of dangerous individuals as a goal they hoped the ICTY would achieve, many implied as much. As we discuss in Chapter IV, a common criticism of the ICTY is that it left people who were responsible for harrowing crimes in positions of influence. Conversely, in at least one notable instance, the removal of individuals indicted by the ICTY was seen as a contributing factor behind individuals' willingness to return to homes from which they had been "ethnically cleansed."<sup>215</sup>

Another recent study of Bosnian views found that criticisms of the Tribunal on the ground that it had failed to bring about the removal of war criminals were especially likely to be voiced by those "who had particularly suffered." The author of this study writes that these individuals had expected the ICTY "to severely punish all war criminals with harsh prison sentences and to have a significant impact at the level of their communities; they had expected to be able to go about their daily lives without encountering people whom they claim are guilty of war crimes."<sup>216</sup>

## I. Spurring the Creation of a Domestic War Crimes Chamber

At the time the ICTY was created, no one conceived of it as an institution whose core aims would include strengthening local capacity to prosecute war crimes trials. As we note in Chapter VI, the very creation of the Tribunal "inevitably represented a judgment by the international community that local courts in the Balkans were largely unable to mount credible prosecutions of wartime atrocities," and for years efforts to secure justice focused almost entirely on the ICTY.

Yet developing a strong domestic partner in the project of establishing criminal accountability for wartime atrocities later became a key goal of the ICTY.<sup>217</sup> In partnership with the Office of the High Representative, the ICTY played a major role in planning for a specialized war crimes chamber in the new Court of Bosnia and Herzegovina, launched in 2005. Against this backdrop, even though Bosnians did not initially look to the ICTY to help enhance their domestic capacity to prosecute war crimes, today its contribution in this regard is widely cited as one of the Tribunal's "major achievements."<sup>218</sup>



## J. “Justice Isn’t Just in Legal Terms”<sup>219</sup>

As we turn now to a fuller assessment of how well the ICTY has met victims’ expectations and why, it is important to bear in mind the broader context in which the Tribunal is perceived. While many in Bosnia consider the ICTY’s mission to be profoundly important, criminal justice is hardly the sole concern of Bosnian victims; for many, it is not even the most important.

Many Bosnians who lost loved ones during the war want above all to identify the remains of loved ones and provide a proper burial; to the extent possible, many also want to learn what happened to their relatives during their final weeks, days, and hours.<sup>220</sup> Some, including individuals who believe the work of the ICTY to be of utmost importance, have devoted themselves to reversing the effects of “ethnic cleansing,” encouraging other Muslims to return to their prewar homes and trying to counter laws that discriminate against members of their ethnic group.<sup>221</sup> According to the most recent assessment by the European Commission of Bosnia’s progress toward E.U. membership, “returnees still face discrimination in employment, access to health care, education, pensions and social rights—especially when returning to areas where they are in a minority position. This remains the biggest obstacle to a sustainable return.”<sup>222</sup>

In short, victims and survivors in Bosnia have a raft of needs that are not the province of the ICTY (though many looked to the ICTY itself to address them). While Bosnians’ experience of the ICTY is the subject of this study, our focus on this topic should not be read to imply that this is the sole, or even the most urgently important, issue for Bosnians.<sup>223</sup>

## IV. Achievements, Failures, and Performance

*People do not have a bad opinion of the ICTY here. They have some bad opinions of what they have done.*<sup>224</sup>

*My complaints are all about the methods of work, but this is not the essence.*<sup>225</sup>

*As far as the Hague Tribunal, I'm not happy with its work. But the great thing was to have it established. It was excellent that it was established.*<sup>226</sup>

*[A]ll of us would have expected to see much more.*<sup>227</sup>

When the ICTY was created, many victims in Bosnia had “great, great expectations of international justice.”<sup>228</sup> Seventeen years later, Bosnians’ expectations are only “partially” fulfilled.<sup>229</sup> As civil society activist Dobrila Govedarica noted, Bosnians generally recognize “some positive developments” as a result of the ICTY’s work, “but all of us would have expected to see much more.”<sup>230</sup>

The degree to which Bosnians interviewed for this study believe that the ICTY has achieved its goals ranges widely. At one end of the spectrum are Tribunal supporters like

Vehid Šehić, who believes the ICTY has “absolutely” achieved what he hoped it would within the limits of its judicial role,<sup>231</sup> and Mirsad Tokača, who says he is “80 percent satisfied” with what the ICTY has achieved.<sup>232</sup> At the other end are citizens like Fadil Budnjo, who says that so many years after the ICTY was established, “very little is left of what we could have expected.”<sup>233</sup> Like others who described their disappointed hopes, however, Budnjo added: “All in all, we still believe it was positive to have it established.”<sup>234</sup>

In this chapter, we assess the extent to which Bosnians perceive the ICTY as having achieved many of the goals identified in the previous chapter. We separately address (in Chapter V) the degree to which the ICTY’s judgments have contributed to acknowledgement of wrongdoing by members of each of Bosnia’s ethnic communities. We also separately address the ICTY’s role in contributing to Bosnian capacity to prosecute war crimes.<sup>235</sup>

To the extent possible, we have tried to link reported perceptions of ICTY successes, partial successes, and failures to specific aspects of the Tribunal’s performance. In doing so, we do not mean to imply that the ICTY was invariably at fault in the manner suggested by our Bosnian interlocutors. In some instances, we describe widespread perceptions that the ICTY has erred even when the source of concern may involve actions that lie beyond the control of an international court or that are compelled by international standards of fair process. We nonetheless believe that it is helpful for those involved in making policy determinations bearing on international justice—whether prosecutors, judges, or the diplomatic community—to understand how the actions of a tribunal like the ICTY are perceived by populations most affected by its work. If nothing else, this may usefully shape public outreach efforts of international courts.

## A. Ethnic Fault Lines

As we have suggested elsewhere in this report, many Bosnians continue to embody the multiethnic society for which Bosnia was known before the 1990s conflict, in which bonds of affinity were neither determined by nor defined in terms of ethnicity. In our interviews in Bosnia, particularly in Sarajevo, we would be hard-pressed to surmise many of our interlocutors’ ethnic identity from their observations about the ICTY. Thus any general claims about different perceptions of the ICTY among Bosnia’s ethnic groups would be overgeneralizations if not appropriately qualified.

Yet for many Bosnians, overall perceptions of the ICTY are at least in significant part a function of the ethnic group to which they belong.<sup>236</sup> In a 2006 interview, Bosnian lawyer Dubravka Piotrovski characterized the perceptions of the country’s three major ethnic groups regarding the work of the ICTY this way: “It seems that Bosniaks are more or less satisfied, Croats somewhat, and Serbs not at all.”<sup>237</sup> While others might characterize the degree of each

group's satisfaction somewhat differently, Piotrovski's observation captures in broad brush the fundamentally different overall assessment of each group's members.

With one exception noted below, various surveys of public attitudes toward the ICTY have found that Bosniaks have the most positive attitude toward the Tribunal, Serbs have the most negative views of the ICTY, and Croats are somewhere between these two. Broadly speaking, positive attitudes toward the ICTY have tended to correlate with the degree to which the ICTY has prosecuted perpetrators who committed atrocities against members of the survey respondents' own ethnic communities and to correlate negatively with the degree to which suspects prosecuted by the ICTY come from respondents' ethnic group.<sup>238</sup>

The largest majority of perpetrators indicted by the ICTY (roughly two-thirds) are ethnically Serb, and residents of the predominantly Serb Republika Srpska (RS) have the lowest regard for the Tribunal in Bosnia.<sup>239</sup> A 2002 survey found that 3.6 percent of those surveyed in Republika Srpska trusted the ICTY,<sup>240</sup> while 50.5 percent of those surveyed in the Federation trusted the Tribunal.<sup>241</sup> When results within RS are broken down by ethnicity, the relevance of this factor to the survey results is even more dramatic: 1.8 percent of the RS respondents who identified themselves as Serb said they trusted the ICTY; 42.2 percent of RS respondents who identified themselves as "other" (non-Serb) said they trusted the Tribunal. Within the Federation, there was significantly higher trust in the ICTY among respondents who identified themselves as Muslim (70.2 percent) than those who identified themselves as Croat (14.4 percent).<sup>242</sup>

Surveys undertaken by PRISM Research every several months from April 2001 to May 2004 show a significantly different breakdown when the survey question is "To what degree do you support the work of the ICTY?," but the ethnic division remains clear: Over a period from April 2001 to May 2004, the percentage of Serbs who said they support the Tribunal's work ranged from 17.60 percent to 32.90 percent; the percentage of Bosniaks who said they support its work ranged from 89.10 percent to 92.50 percent; while the percentage of Croats who said they support the Tribunal's work ranged from 47.80 percent to 68.70 percent.<sup>243</sup>

One survey, which the United Nations Development Programme (UNDP) commissioned in 2005, produced a somewhat different picture: While it, too, found that the percentage of respondents who had a positive attitude toward the ICTY was significantly higher in the Federation than in RS, a higher percentage of Croat respondents (31.9 percent) than Bosniak respondents (24 percent) said they thought the ICTY "has done a good job and justified its existence." As usual, Serb respondents came in lowest, with 18.8 percent responding affirmatively.<sup>244</sup> A different pattern of responses emerged when the question asked was whether the ICTY has "not done a good job, but is necessary." On this, 46.4 percent of Bosniak respondents, 22.2 percent of Croat respondents, and 29.8 percent of Serb respondents responded affirmatively.<sup>245</sup> The disparity between Bosniaks' responses to these two questions may suggest that many Bosniaks still see the ICTY as necessary in principle but are growing increasingly disappointed in its performance.

Because our own research did not include a statistical survey of public attitudes, we are not in a position to draw broad conclusions about public attitudes toward the ICTY. But our general impression, which is consistent with the overall thrust of most of the surveys others have undertaken, is that many Bosniaks have a fundamental commitment to the ICTY in principle but are disappointed in many aspects of its performance, often deeply so, and apparently increasingly so.<sup>246</sup> Because the largest portion of ICTY cases has involved crimes committed against Bosniak victims, their views figure prominently in our assessment of the degree to which Bosnians more broadly are satisfied in the justice provided by the Hague Tribunal.

We believe the perspectives of many Serbs to be more difficult to characterize than survey results alone suggest. In our interviews with Serbs who lost relatives at the hands of members of other ethnic groups, we heard of their own keen desire for justice. Dušanka Lalović echoed the words of many of our interviewees when she said she is “absolutely trying to get justice” for crimes committed against her relatives and that “the Hague Tribunal should try our case too.”<sup>247</sup> Yet there is a broader perception among Serbs in Republika Srpska, in Piotrovski’s words, “that the ICTY was organized more or less for them.”<sup>248</sup> We heard this view often in our interviews with Serbs in RS. For example Lalović’s colleague, Josip Davidović, told us: “We ... stand on the position that The Hague [Tribunal] was established to bring Serbs before trial.... We also stand on the opinion that The Hague is a political court.”<sup>249</sup> In a setting in which this position is widely espoused by political leaders and media in Republika Srpska,<sup>250</sup> it is possible that many individual Serbs are somewhat conflicted, on the one hand wanting their suffering, too, to be recognized by the ICTY but on the other hand wanting (and under social pressure) to ensure that they do not contribute to the Tribunal’s legitimization. As we describe in Chapter VI, moreover, even in RS it is commonplace to hear people say that war criminals should be prosecuted and that establishing the ICTY was correct in principle.

After several visits to Bosnia, we find it difficult to characterize prevailing attitudes toward the ICTY among the country’s Croats even in impressionistic terms. We have interviewed Croats like Srećko Mišković, who told us that his “personal opinion” is “we simply don’t trust the Hague Tribunal.”<sup>251</sup> And we have met others, like Josip Drežnjak and Drago Zadro, who, while deeply disappointed in the outcome of a particular case in the ICTY, nonetheless placed their hopes in the Tribunal to render justice.<sup>252</sup> Dino Djipa, whose organization PRISM Research undertakes public opinion polls, provided his own insights about what lies behind Bosnian Croats’ “in between” responses in various surveys about attitudes toward the ICTY. First describing Bosnian Croats as “indifferent,” Djipa speculated that their attitudes to the ICTY are a function of their position within Bosnia more generally and the sense of “political disorientation” many feel.<sup>253</sup>

We return in Chapter V to a fuller discussion of how prevailing views toward the ICTY within each ethnic group, influenced in large measure by political leaders and local media, shape individuals’ perceptions of the Tribunal. This chapter tries to capture perceptions of how well the ICTY has performed in terms of the criteria offered by those interviewed for this study.

## B. Sentences

*We who survived these tortures believe that all of those convicted have gotten insignificant or small punishments.*<sup>254</sup>

For most victims we interviewed in Bosnia, justice is not experienced as indivisible, something a trial either provides or does not. Instead, the ICTY's guilty judgments provide some measure of justice, often experienced as flawed and sometimes deeply so, yet still preferable to no justice at all. Not surprisingly, victims of crimes that were prosecuted before the ICTY and resulted in judgments of acquittal were deeply disappointed in the outcome, though some said the fact that a suspect was made to answer charges against him provided a measure of satisfaction.<sup>255</sup>

Our research in Bosnia suggests that one of the most important factors affecting the quality of justice that victims experience is the sense that there should be a just proportion of the sentence imposed to the gravity of a perpetrator's crime.<sup>256</sup> Thus Sabahudin Garibović, who lost his brother to "ethnic cleansing," believes that "anyone who for ethnic or religious purposes has killed or participated in killing ... should be sentenced to life in prison without a possibility of release."<sup>257</sup>

By this measure, ICTY sentences have on the whole been cause for profound disappointment and often anger. Mirsad Tokača, who as noted earlier describes himself as "80 percent satisfied" with the ICTY's performance, cites "a lot of problems with sentencing" when asked to explain the other 20 percent (as noted below, however, this was not the sole concern he cited). In some instances, Tokača says, sentences for unspeakable crimes have been "reduced to a level that is absurd" in recognition of defendants' remorse and cooperation.<sup>258</sup> *Dani* editor Senad Pećanin, too, finds the ICTY's "punishment criteria" to be "very doubtful," particularly when compared to local sentencing criteria in Bosnia. Pećanin describes the ICTY's approach to sentencing as "really senseless," adding: "Here, you could get more years for killing someone in traffic" than the ICTY imposes for war crimes.<sup>259</sup> (We note, however, that while dissatisfaction with ICTY sentences is widespread, they have often been longer than those pronounced by domestic courts in war crimes cases, although the Court of BiH has imposed several prison sentences of around 30 years.<sup>260</sup>)

In regions that experienced the worst ravages of ethnic cleansing, victims often describe ICTY sentencing practices with a mixture of incredulity and anger. Crimes in Foča, the eastern town that became notorious for "rape camps," resulted in a legally path-breaking judgment in the *Kunarac* case.<sup>261</sup> Yet Fadil Budnjo, who leads an association of survivors from the Foča region, is appalled by the quality of justice dispensed by the ICTY, characterizing the Tribunal's sentences as "basically nothing."<sup>262</sup> The three men convicted in *Kunarac* for mass rapes in Foča received sentences of 12, 20, and 28 years in prison respectively; when the 15-year sentences

imposed on two other perpetrators convicted of crimes in Foča are included in the tally,<sup>263</sup> the average sentence imposed against five of the men who shattered Budnjo's universe is 18 years' imprisonment. (We note that the figures differ only slightly from those reflecting the case law of the Court of BiH. As of February 2009, the war crimes chamber of the Court of Bosnia and Herzegovina had convicted six individuals of crimes against humanity committed in Foča, four of them for sexual crimes; the average sentence was 17.5 years.<sup>264</sup>)

A substantial number of defendants indicted by the ICTY were charged with atrocities committed in the northwest Bosnian municipality of Prijedor, where nondescript warehouses became nightmarish detention centers that evoked Nazi concentration camps.<sup>265</sup> Despite the attention paid to Prijedor crimes, however, Keraterm camp survivor Edin Ramulić observed: "In Prijedor generally speaking people aren't satisfied with Hague sentencing policy"<sup>266</sup>—and small wonder. Individuals found criminally responsible for atrocities in the Omarska and Keraterm camps have received sentences as light as three,<sup>267</sup> five,<sup>268</sup> six,<sup>269</sup> seven,<sup>270</sup> and eight<sup>271</sup> years' imprisonment. (While these sentences have provoked deep disappointment, we note that the ICTY has at times imposed more stringent penalties in connection with crimes committed in Omarska and Keraterm, including 25 years in prison for Zoran Žigić, 20 years for Mlađo Radić, and 15 years for Duško Sikirica.<sup>272</sup>)

Even short sentences typically are not served in full. Under Article 28 of the ICTY's Statute, the president of the Tribunal may grant early release to a convicted person when he or she becomes eligible under the law of the State where s/he is serving her/his sentence.<sup>273</sup> Reflecting the standard practice in Europe, where most ICTY defendants are serving their sentences, it has been "a consistent practice" of the ICTY to grant early release to defendants who have served two-thirds of their sentences,<sup>274</sup> with the ICTY president regularly citing rehabilitation as a relevant consideration.<sup>275</sup> Noting that most of the Prijedor defendants who received short sentences were soon released—all received credit for time served before they were sentenced, and most did not serve their full sentences—Edin Ramulić wonders, "What message do you think that sends here, to the local Serb community?"<sup>276</sup>

While many Bosnians (as well as many international commentators) fault the Tribunal for imposing sentences that are not commensurate with the gravity of the crimes committed, short sentences have a more tangible impact on many survivors: Individuals who committed grotesque crimes against them have been released from prison and are now back in their communities. The experience of Nusreta Sivac, who has testified before the ICTY in several cases, exemplifies this point. Sivac, who served as a judge in Prijedor when the conflict began, was one of 36 women who were detained in the Omarska camp. Every morning for two months, she began the day by counting the bodies of inmates killed during the night, "mostly of torture."<sup>277</sup> But "[t]he worst were the nights for women because the guards would come to the rooms and take us somewhere in the camp and rape. That happened on a regular basis."<sup>278</sup> In 2002, Sivac returned to Prijedor to reclaim her apartment, which had been given to a former Serb colleague.<sup>279</sup> One of her neighbors was Miroslav Kvočka—a defendant against whom

Sivac had testified in The Hague. Sentenced to serve seven years for his crimes, Kvočka was granted early release in March 2005. Until Kvočka sold his apartment in 2008, Sivac encountered him almost daily. Recounting this, Fatima Fazlić said: “And that is only one example, and there are hundreds of those.”<sup>280</sup>

The intensity of victims’ dissatisfaction with ICTY sentences varies, but all whom we interviewed in the municipality of Prijedor were disappointed. Recalling that “Bosnians had big hopes, major expectations from the fact that the Hague Tribunal was established,” Emsuda Mujagić says that “in a certain way, the victims feel to be even more offended and damaged very often by those sentences issued by the court in the Hague in relation to what they have originally expected from the Hague.”<sup>281</sup> Muharem Murselović, a survivor of the Omarska concentration camp who has testified in several ICTY trials, describes the overall attitude of Muslims from Prijedor this way: “We had a very positive attitude towards those trials in The Hague, always very welcome. But we have always been disappointed with the sentences.”<sup>282</sup> Another Omarska survivor, Mirsad Duratović, does not have a “very positive attitude” about the justice dispensed in The Hague. Saying that individuals can be charged “for over 400 years” for committing murder in the United States, he finds sentences for mass murderers imposed by the ICTY painfully short.<sup>283</sup>

It has been said that victims of unspeakable crimes “are always dissatisfied” with sentences imposed by a court. Nidžara Ahmetašević, who was wounded by Serb snipers early in the years-long siege of Sarajevo, tried to demonstrate the point by describing her own response when Stanislav Galić received the maximum ICTY sentence for his role commanding the siege: “I’m from Sarajevo, and I’m *really* disappointed with the life sentence for Galić. You’re always unsatisfied.”<sup>284</sup> (As noted below, however, many who lived through the siege were deeply gratified by the life sentence imposed on Galić.) Hatidža Mehmedović, who lost her husband, brothers, teenage sons, parents, and scores of extended family members during the Srebrenica genocide, evinces a similar self-awareness when she describes survivors’ views of ICTY sentencing: “[W]e are ... not happy with the sentences, with the verdicts, because what would be the verdict that would be convenient for a crime committed here in Srebrenica of which you have seen the consequences?”<sup>285</sup> So, too, does Sead Golić, who told us his brother was shot at close range and buried in a mass grave in Brčko. “No matter how strict or serious or high [a sentence] would be, no verdict would replace my brother or some other victim.”<sup>286</sup> Yet we found that many victims are discriminating in their assessment of ICTY sentences; those who condemned short sentences readily acknowledged their satisfaction when the ICTY imposed sentences that seemed commensurate with the defendant’s crimes. For example, while highly critical of the short sentences that sent some defendants back to Prijedor soon after judgment was pronounced, Edin Ramulić described a very different reaction when another Prijedor defendant, Milimir Stakić, received a more substantial sentence. At trial, Stakić received a sentence of life in prison, and this “was very important for us symbolically,” Ramulić recalled. Although Stakić’s sentence was reduced to 40 years on appeal, Ramulić had



feared it would be reduced to half that amount and was relieved and philosophical about the reduced sentence.<sup>287</sup>

Some of our interviews took place during the week that the ICTY Appeals Chamber raised the sentence of Stanislav Galić, whom a trial chamber had sentenced to 20 years' imprisonment, to life in prison. The sentence was a milestone; this was the first time that a life sentence emerged following exhaustion of the appeals process at the ICTY. Many victims of the siege he had commanded were deeply gratified, and spontaneously expressed this during conversations and more formal interviews.<sup>288</sup> In their view, the sentence provided some measure of redemption for the terror that stalked them for three and a half years.<sup>289</sup>

We observed a similar reaction to another set of sentences handed down while we were in Bosnia: On July 20, 2009, Trial Chamber III sentenced Milan Lukić to life in prison and his cousin, Sredoje Lukić, to 30 years' imprisonment for their roles in horrific crimes committed in Višegrad.<sup>290</sup> Although, as noted below, victims were disappointed that the case against these two did not include rape charges, many Bosnians nonetheless found their sentences to be appropriately severe.<sup>291</sup>

For many, the satisfaction that comes with verdicts of guilt partially offsets their disappointment in the lengths of sentences. Sadik Trako, president of the Association of Victims and Missing Persons in Lašva Valley, recalled that he and others in Lašva Valley "were really pleased" when an ICTY Trial Chamber sentenced Tihomir Blaškić to 45 years in prison. But based on the combined effects of errors by the Trial Chamber and newly acquired evidence, the Appeals Chamber reduced Blaškić's sentence to nine years and immediately granted him early release.<sup>292</sup> Trako recalled, "We were very sad" when this happened. But while he "could not accept" the court's reasons for reducing Blaškić's sentence, Trako said he was "still very glad that the court pronounced him guilty" of war crimes.<sup>293</sup> Law professor Jasna Bakšić Muftić made a similar point in general terms. Describing her reaction to ICTY sentences, Bakšić Muftić told us: "Though sometimes I am disappointed in [defendants'] punishment, I am glad to see their punishment, which is more important [than the sentence they receive]. This brings some sense of justice. In public, on TV, all of us can hear who did what. The whole story has been heard."<sup>294</sup>

Just as Bosniaks widely condemn ICTY sentences of Serb and Croat perpetrators on the ground that they are too lenient, many Serbs say that the sentences the ICTY has imposed on "Bosniaks are so small compared to [the penalty imposed on] Serbs,"<sup>295</sup> and that in general, the Tribunal has been overly harsh in sentencing Serb defendants. Thus while Fadil Budnjo is frustrated by the low sentences imposed on Bosnian Serbs who ethnically cleansed Foča, Serbs there "say that the [same] sentences are too high," according to Josip Davidović.<sup>296</sup>

At times, even the Tribunal's strong supporters have questioned its lenient sentencing of Bosniak defendants. In particular, many cite the case of Naser Orić, a Bosniak commander initially sentenced to two years for war crimes committed against Serb detainees in Srebrenica and later acquitted on appeal,<sup>297</sup> to illustrate what they consider the ICTY's inconsistent

approach. On June 30, 2006, an ICTY Trial Chamber imposed the two-year sentence on Orić,<sup>298</sup> who was released immediately based on credit for time already served in detention. During interviews in Bosnia before Orić's subsequent acquittal on appeal, we heard repeatedly that the ICTY's approach had undercut its standing across ethnic lines. Branko Todorović, a Bosnian Serb who has worked tirelessly to educate Bosnians, including other Serbs, about the ICTY's judgments, found it hard to explain the Tribunal's two-year sentence of Orić: "There is no one here in Republika Srpska who is able to explain to a person here that the verdict in the Naser Orić case was justified. ... [T]he type of verdict he got was almost icing on the cake for those who were claiming the worst things" about the ICTY, Todorović observed.<sup>299</sup>

*Dani* editor Senad Pećanin had a similar reaction. While highly critical of the ICTY for imposing, in his view, inappropriately short sentences on Serb defendants, Pećanin thought the Tribunal's two-year sentence for Orić unreasonably short. "It's really funny, two years," Pećanin said. "He should be either [found] innocent or seriously punished. For most people, that's nothing, that's no solution at all—a guy who was indicted for terrible crimes and then you have two years. What does it mean? ... That decision in my view discredited the authority of the Tribunal."<sup>300</sup>

We heard similar complaints from Bosnian Croats. Fabijan Barać, president of the Association for Tracking of Killed and Missing Croats of Central Bosnia and Herzegovina, said that Croats in central Bosnia "are generally very mad with the Hague Tribunal" and cited the short sentences imposed against the few Muslim defendants tried before the ICTY for crimes against Croats compared to harsher sentences imposed on Bosnian Croat defendants for crimes against Muslim victims.<sup>301</sup> His colleague Srećko Mišković, who identified himself as the administrative secretary of War Veterans of Travnik, described the short sentences imposed against two Muslim defendants for crimes against Bosnian Croats as "shameful."<sup>302</sup>

Our own review of sentencing patterns, taking into account only term sentences finalized by the Appeals Chamber or uncontested by defendants who pleaded guilty as of September 2009, found that sentences imposed by the ICTY against Bosniak defendants who were not acquitted have ranged from two to 18 years, and average 9.5 years' imprisonment. Sentences imposed on Bosnian Serbs have ranged from three years to life, averaging 17.03 years' imprisonment.<sup>303</sup> Bosnian Croats' sentences have ranged from six to 25 years, averaging 14.5 years.<sup>304</sup> We have not undertaken an analysis of what factors have accounted for overall differences in sentence lengths but one study that assessed ICTY sentencing up to 2001 found that there was "no correlation between ethnicity and sentence length."<sup>305</sup> Instead, differences in sentence length were a function of factors such as the nature of the crime charged<sup>306</sup> and the level of responsibility of the convicted defendant.<sup>307</sup>

For many victims, frustration with sentences is compounded by the length of the trial proceedings, a subject we address later in this chapter. Sevima Sali-Terzić, senior legal counsel for the Constitutional Court of Bosnia, described a common perception: "People don't understand why you have people sitting in jail for years and then the sentences are too short."<sup>308</sup>

Enumerating victims' frustrations with the ICTY, Hatidža Mehmedović singled out "the fact that those court proceedings, those trials are taking so long," and then, come judgment day, "we are also not happy with the sentences."<sup>309</sup>

Beyond concerns about inappropriately light sentences for serious crimes, many are highly critical of seeming inconsistency in ICTY sentences. Dobrila Govedarica makes the point this way: "You can't say this person will get 45 years, the other 25 years [for essentially similar crimes]. ... They applied really different sentences depending on Trial Chamber judges." In her view, this is "about the law," and "the law shouldn't be a matter of free judgment of judges. Not absolutely free."<sup>310</sup> Mirsad Tokača makes the same point, noting that on the one hand Momčilo Krajišnik, a Bosnian Serb leader who bore substantial responsibility for the crimes of ethnic cleansing, was sentenced to only 20 years in prison while "some small fish" from "Krajina" was sentenced to 40 years in prison.<sup>311</sup>

In this, as with other concerns noted above, our Bosnian interlocutors' perceptions are in line with those of many legal commentators who have studied ICTY sentencing practices. Commentators who have scrutinized the sentencing practices of the ICTY and its sister tribunal for Rwanda describe them as "erratic,"<sup>312</sup> and find "troubling disparities" among ICTY sentences.<sup>313</sup> (As noted earlier, however, a relatively early study did not find a correlation between a defendant's ethnicity and the sentence imposed.)

The ICTY Appeals Chamber has acknowledged that "[o]ne of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment."<sup>314</sup> But it has eschewed proposals by the prosecutor and others that it adopt "basic sentencing principles" aimed at ensuring sentencing consistency,<sup>315</sup> in large part on the ground that such efforts would run counter to its duty to individualize penalties.<sup>316</sup> Assessing this approach against the "lack of consistency" in the Tribunal's sentencing, legal scholar Mark Drumbl concludes: "In the end, although individualizing the penalty certainly is desirable, the benefits thereof dissipate when there is no coherent framework in which to predictably consider the factors germane to, or the goals of, sentencing."<sup>317</sup>

There has been one striking exception to the ICTY's general reluctance to adhere to a principle of consistency in sentencing practices. When making determinations about early release from prison, the ICTY president has often accorded substantial weight to the fact that early release has routinely been granted to other defendants.<sup>318</sup> In the case of Biljana Plavšić, for example, ICTY President Patrick Robinson apparently thought that the Tribunal's routine practice of early release outweighed the gravity of the crimes for which the defendant was convicted. While acknowledging the "gravity of her crimes," Judge Robinson wrote: "Considering that other convicted persons similarly-situated have been eligible for early release after serving two-thirds of their sentences, this factor supports her eligibility for early release."<sup>319</sup>

As noted, this practice has compounded victims' frustration, particularly when applied to a sentence that was already short. Beyond this, we note our own questions about whether

the ICTY undermines the principles it has emphasized as being primary considerations at the front end of sentencing, of which the two most important have been deterrence and retribution, when rehabilitation and consistency of practice become driving considerations at the back end of its sentencing practices.

## C. Plea Agreements and Confessions

Beyond their general concern about ICTY sentences, many Bosnians expressed particular unease with steep reductions in sentences the Tribunal has sometimes accorded to defendants who pleaded guilty,<sup>320</sup> as well as the reasons provided by ICTY trial chambers when sentencing confessed war criminals. Although these concerns are closely related to the broader concerns addressed in the preceding section, we believe this subject merits separate attention for several reasons.

First, for many victims the fact that an admitted war criminal received a reduced sentence by “bargaining” for a discount is itself distressing.<sup>321</sup> Until about six years ago, criminal procedure codes used in Bosnia’s two entities did not provide for plea agreements,<sup>322</sup> and the very notion of what Zdravko Grebo called a “legal bargain”<sup>323</sup> sits uneasily with many Bosnians’ conceptions of justice (and, reportedly, among some lawyers from civil law systems within the ICTY itself).<sup>324</sup> When one of the parties to a plea agreement is an acknowledged war criminal, the affront seems much worse. Srebrenica survivor Hajra Čatić expressed a sentiment we heard from a number of Bosnians this way: “In the case of some sentences, [the ICTY was] like bargaining as people do in marketplaces—‘admit some, we will forgive the rest.’”<sup>325</sup> A survey of attitudes toward the ICTY among Sarajevans, taken several years ago, found that only six percent of respondents approved of the Tribunal’s use of plea bargaining.<sup>326</sup>

Second, regarding pleas that lead to substantially lower sentences than a war criminal would otherwise receive, the ICTY’s own understanding of its contributions to the Balkan region can at times seem profoundly at odds with the way its sentencing judgments are perceived there. As we make clear below, the ICTY as well as some of its supporters have expressed the hope and at times the conviction that the confession associated with perpetrators’ guilty pleas is itself a milestone on the path to reconciliation.<sup>327</sup> To be sure, this is not the only reason why the ICTY has in recent years encouraged plea bargaining. Under pressure to complete its work, the Tribunal is spared the time and expense of a trial when a defendant pleads guilty.<sup>328</sup> Given the cost and complexity of typical ICTY cases, the resulting savings is considerable. In addition, some defendants who have agreed to cooperate with the prosecutor as part of their plea agreements have provided “vital new evidence, as in the case of ... two Bosnian Serb officers who pleaded guilty to playing a role in the Srebrenica massacre and provided the first high-level account of how and by whom it was planned.”<sup>329</sup> But the reconciliation rationale has often figured prominently in sentencing judgments following guilty pleas.

While some of our Bosnian interlocutors agree with the ICTY's reasoning, many victims find this very claim insensitive to their suffering.

As of September 2009, 20 defendants had pleaded guilty before the ICTY. Because two plea arrangements loomed especially large in our interviews, we address Bosnians' perceptions of those two cases before broadening our discussion.

## 1. Dražen Erdemović

In February 1996, a young Bosnian Croat who had served with Bosnian Serb forces during the 1990s war, Dražen Erdemović, told ABC News and *Le Figaro* that he had participated in the execution of some 1,200 Muslim male civilians in the aftermath of the fall of Srebrenica. By his own account, Erdemović personally killed approximately 70 of the victims at the Branjevo farm near Pilica on July 16, 1995.<sup>330</sup> On March 2, 1996, Erdemović was arrested by Yugoslav authorities; soon after, he was indicted by the ICTY prosecutor. The day after his indictment, Erdemović became the only ICTY suspect transferred by Yugoslav authorities to The Hague during the regime of Slobodan Milošević.<sup>331</sup>

At his initial appearance before the ICTY on May 31, 1996, Erdemović also became the first suspect to enter a guilty plea, in this case pleading guilty to the count of murder as a crime against humanity. Six weeks later, he testified in proceedings against Ratko Mladić and Radovan Karadžić, and would later provide testimony that was important to other prosecutions of senior suspects.<sup>332</sup> At his sentencing hearing in November 1996, Erdemović expressed his profound remorse: "I wish to say that I feel sorry for all the victims, not only for the ones who were killed at that farm, I feel sorry for all the victims in the former Bosnia and Herzegovina regardless of their nationality."<sup>333</sup>

On November 29, 1996, ICTY Trial Chamber I sentenced Erdemović to ten years in prison, taking into account that "the accused surrendered voluntarily to the International Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition and stated his willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the International Tribunal."<sup>334</sup> After ruling that Erdemović's plea had not been fully informed, the Appeals Chamber remanded his case to a different trial chamber.<sup>335</sup> Erdemović entered a new guilty plea, and was sentenced to five years' imprisonment.<sup>336</sup> While recognizing that a key responsibility of the ICTY is to express the international community's outrage at the kind of crimes in which Erdemović participated, Trial Chamber II noted countervailing considerations in this case:

It is in the interests of international criminal justice and the purposes of the International Tribunal to give appropriate weight to the cooperative attitude of the accused. He truthfully confessed his involvement in the massacre at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would most prob-

ably face prosecution as a result. Understanding of the situation of those who surrender to the jurisdiction of the International Tribunal and who confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward. The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. The International Tribunal must demonstrate that those who have the honesty to confess are treated fairly as part of a process underpinned by principles of justice, fair trial and protection of the fundamental rights of the individual.<sup>337</sup>

Despite Erdemović's remorse and cooperation, many in Bosnia found his sentence indefensibly short. Kada Hotić, a leader of Mothers of Srebrenica and Žepa Enclave, had Erdemović in mind when she voiced her concern about the ICTY's plea bargains. Describing a sentence of five years for participating in the murder of over 1,000 people as "ridiculous," Hotić said: "I believe that each crime has its price, regardless of [a defendant's] further cooperation."<sup>338</sup>

When we spoke to several other Srebrenica survivors in Potočari, where thousands of victims of the Srebrenica genocide are buried, they became more agitated about Erdemović's plea arrangement than any other subject we discussed. Saying they found no comfort in the fact that Erdemović had provided evidence against other perpetrators, the women asked, "Why didn't he turn down the orders to kill? If I'm ordered to kill you I would rather ask them to kill me. He should have turned down the order from those who ordered him to kill."<sup>339</sup>

As we have noted, on a number of subjects urban intellectuals had a somewhat different reaction to ICTY practices than that of rural victims. But on this matter, many Bosnian intellectuals reacted to Erdemović's sentence in much the same way as less educated Bosnians. Noting his general discomfort with the ICTY's plea bargaining in cases involving serious war crimes, Professor Zdravko Grebo characterized Erdemović's sentence as "unacceptable."<sup>340</sup> Mirsad Tokača described the ICTY's plea bargain in this case as "ridiculous," "unacceptable," and so short "it's like a blanket forgiving of a crime." "Without appropriate reason," he said, the ICTY reduced Erdemović's sentence to "a level that's absurd."<sup>341</sup>

Yet this reaction to the *Erdemović* case was not universal. Journalist Nidžara Ahmetašević believes that Erdemović's plea "was groundbreaking." Not only was Erdemović the first Srebrenica perpetrator to come forward and confess, "He is still coming to the ICTY as a witness" against other defendants, Ahmetašević noted.<sup>342</sup>

## 2. Biljana Plavšić

On October 2, 2002, Biljana Plavšić, who had served as a member of the Bosnian Serbs' Presidency during the war, pleaded guilty to the crime against humanity of persecution.<sup>343</sup> Although seven defendants had by then entered guilty pleas before the ICTY, this was the first time that such a high-ranking Serb official had done so and, perhaps more important, had expressed remorse.<sup>344</sup> When she entered her plea, Plavšić said:

To achieve any reconciliation or lasting peace in BH, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility—regardless of their ethnic group. This acknowledgement is an essential first step.<sup>345</sup>

Many believed that Plavšić's confession could have a catalytic effect on "the process of reconciliation" in Bosnia, as one observer put it.<sup>346</sup> The Humanitarian Law Center, a leading NGO in Serbia, welcomed the confession, noting that it "opens the way to the reconciliation of individuals and ethnic groups, and to restoring the dignity of the victims."<sup>347</sup> At her sentencing hearing two and one-half months later, an extraordinary line-up of witnesses, ranging from former U.S. Secretary of State Madeleine K. Albright to Nobel laureate Elie Wiesel, hailed the potential significance of her plea as a gesture of acknowledgement that could advance reconciliation.<sup>348</sup> So, too, did the prosecutor. As the Trial Chamber noted, "The Prosecution states that 'it accepts that Mrs. Plavšić's plea of guilty and acceptance of responsibility represents an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation.'"<sup>349</sup>

In Bosnia, reactions to the courtroom proceeding "ranged from pleasant surprise to suspicion that the tribunal somehow compromised its values by making a deal" with Plavšić.<sup>350</sup> While some agreed with expert witnesses who testified that Plavšić's confession could be a watershed, others doubted her sincerity. Srebrenica survivor Munira Subašić thought Plavšić had confessed "so she can get a lighter sentence"<sup>351</sup> (a suspicion later confirmed by Plavšić herself). Another survivor, Sabra Kolenović, noted that Plavšić had stopped short of actually apologizing.<sup>352</sup> Emir Suljagić, who spent much of the war in Srebrenica, did not detect even a "note of apology" in Plavšić's words.<sup>353</sup> Carla Del Ponte, who was the ICTY prosecutor at the time of this hearing, would later write that she, too, was horrified when she heard Plavšić's confession. Del Ponte described the courtroom scene this way:

[Plavšić] got up during her sentencing hearing and read out a statement full of generalistic mea culpas but lacking compelling detail. I listened to her admissions in horror, knowing she was saying nothing.<sup>354</sup>

Two months after the hearing, the court issued its sentencing judgment. Despite her senior leadership role in extremely grave crimes—factors the Trial Chamber recognized as aggravating circumstances<sup>355</sup>—Plavšić was sentenced to only 11 years' imprisonment.<sup>356</sup> (Because she was granted early release, she will end up serving only 2/3 of this sentence).<sup>357</sup> Without explaining how it reached this precise sentence, the Trial Chamber gave substantial weight to the views of witnesses who had testified about the potential value the defendant's guilty plea "could have for the reconciliation process in the region."<sup>358</sup>

One factor that the chamber did not take into account when it determined Plavšić's sentence was her unwillingness to cooperate with the prosecutor by providing testimony in other defendants' cases, as Erdemović has done.<sup>359</sup> (Later, however, she testified under court order in the case of Momčilo Krajišnik.)<sup>360</sup> Noting that the ICTY's Rules of Procedure and Evidence explicitly mention "the substantial cooperation with the Prosecutor by the convicted person"<sup>361</sup> as the only example of a mitigating factor in sentencing, the Trial Chamber said "it does not follow that failure to do so is an aggravating circumstance. Therefore, the accused's unwillingness to give evidence is not a factor to be taken into account in determining sentence."<sup>362</sup>

In Bosnia, many victims were astonished by the sentence, which Mujesira Memisević described as "outrageously low." Memisević, whose husband, children and other relatives were slaughtered, told a reporter, "I am speechless. I cannot talk at all. I am shivering, I am completely shaken."<sup>363</sup> Muharem Murselović, a survivor of Omarska, commented: "Eleven years for all those lives, for all the sufferings is only a drop in the ocean and we, the former camp inmates, cannot be satisfied with that."<sup>364</sup> When we interviewed Nerma Jelačić, then the Bosnia director of the Balkan Investigative Reporting Network, in December 2006, she reflected: "There was no impact of Biljana Plavšić's confession [on victims]. It got lost in the injustice they saw with the sentence given."<sup>365</sup> Commenting on Plavšić's sentence, Sevima Sali-Terzić, legal advisor to the Bosnian Constitutional Court, said: "It doesn't really look like an institution that can bring justice."<sup>366</sup>

While many Bosniaks felt betrayed by Plavšić's sentence, some Bosnian Serb politicians condemned the sentence as too harsh. Milorad Dodik, at the time the former prime minister of Republika Srpska (and since re-elected to the same post), told a reporter: "I am very depressed by this sentence and think that international justice was unjust to Biljana Plavšić."<sup>367</sup>

Despite their disappointment, for some victims Plavšić's "guilty plea and call to other leaders to follow her example" outweighed their disappointment in her sentence.<sup>368</sup> But in the face of Bosnian Serbs' failure to follow her lead in acknowledging responsibility, some who initially placed hope in Plavšić's confession have been disappointed. Interviewed more than three years after Plavšić was sentenced, attorney Edina Rešidović recalled, "We somehow were expecting the others [i.e., other Bosnian Serbs] to realize what was going on but we were wrong. Serbs proclaimed her as a traitor and victims thought it was her way to get out with a short term of imprisonment."<sup>369</sup>



Others interviewed during the same period, like civil society activist Srđan Dizdarević, said they did not believe that the situation in Bosnia was “mature enough” to benefit from Plavšić’s confession, but nonetheless considered her confession “an enormous qualitative step forward.”<sup>370</sup> Another civil society activist, Dobrila Govedarica, likewise saw something positive in Plavšić’s confession even while wishing Bosnian Serb leaders would build upon it. In a late 2006 interview, Govedarica observed: “Plavšić verbally made herself guilty. That was one of the most important things that happened in the ICTY. A high official really confessed and found herself guilty.”<sup>371</sup>

By the time of our most recent visit to Bosnia in July 2009, however, it was harder to sustain a positive assessment of Biljana Plavšić’s guilty plea. In January 2009, Plavšić disavowed her confession during an interview with a Swedish magazine.<sup>372</sup> Claiming she had pleaded guilty to crimes against humanity to avoid facing a lengthy trial on other charges, which included genocide, Plavšić insisted “I have done nothing wrong.”<sup>373</sup>

Later that year, we interviewed Mirsad Tokača, who had testified at Plavšić’s sentencing hearing that her admission of guilt was “an extremely courageous, brave, and important gesture,” about how he now viewed her confession. Referring to his testimony at Plavšić’s sentencing hearing, Tokača said: “Now we see it was also my mistake. I believed she would confess sincerely and others would follow.” But the results instead have been “absolutely disappointing.” As for Plavšić’s more recent remarks, Tokača noted, “She negated everything.” But the mistake, Tokača made clear, was not only his. He thought that the ICTY had made a “big mistake” in failing to require Plavšić to testify in several other cases as a precondition to accepting the plea agreement reached with the prosecutor.<sup>374</sup> Del Ponte agrees: In her memoir, she wrote that she had made a “fundamental error” by “not obliging [Plavšić] to agree on paper to testify against the other accused. I accepted verbal assurances and was deceived.”<sup>375</sup> When we interviewed Emir Suljagić after Plavšić had recanted her testimony, he reflected: “That was the worst plea agreement I’ve ever seen in my entire life.” (He noted, however, that he had thought the agreement “terrible” from the outset.) In cases like that of Plavšić—“we’re talking genocide,” he said—a plea agreement is “not acceptable” unless the defendant agrees to provide testimony against others. Suljagić added: “Another thing that really hurt was the long line of international officials willing to testify in her defense.”<sup>376</sup>

Others have more positive views of the plea even after Biljana Plavšić’s disavowal of her confession. When we interviewed him in July 2009, *Dani* Editor-in-Chief Ivan Lovrenović recalled Plavšić’s guilty plea as “one of those strong moments that would have never happened if the Hague Tribunal were not established.”<sup>377</sup> Two months later, many victims’ concerns about lenient treatment of Plavšić were compounded once more when the ICTY president decided in mid-September 2009 to grant Plavšić early release.<sup>378</sup>

### 3. Other confessions; general reactions

Although Emir Suljagić rued the plea agreement reached with Biljana Plavšić, he had been more hopeful that a series of subsequent guilty pleas could contribute to reconciliation in Bosnia. In the summer and fall of 2003, the ICTY saw a cascade of detailed confessions by Bosnian Serb perpetrators, including several relatively senior commanders involved in the Srebrenica massacre;<sup>379</sup> some provided crucial information not previously available as evidence.<sup>380</sup> Suljagić recalled that he had thought at the time these confessions were made that they would finally pierce Bosnian Serbs' wall of denial: "If you punched that wall, I thought the rest would fall like dominoes. ... I was really hopeful: 'This is it, it's happened now.'"<sup>381</sup>

Suljagić hoped the detailed confessions of those who played commanding roles in the Srebrenica massacre would "open up a space in the media that was not there before for others to admit to wrongdoing; that [the confessions] would make it easier for Serbs who were not complicit in crimes to talk to their non-Serb neighbors." But, he continued, "it was not that simple[;] obviously I was way too naïve."<sup>382</sup> Still, the confessions had a profound personal impact, even if their broader repercussions did not live up to Suljagić's expectations. Soon after one of the Srebrenica defendants pleaded guilty, Suljagić told a reporter: "I was crying in court. When [the defendant] said, 'I plead guilty,' I ran upstairs and locked myself in the toilet and cried my eyes out. It was a genuine relief to hear someone like him saying, 'Yes, we killed seven thousand or eight thousand people.'"<sup>383</sup>

Looking beyond specific cases in which defendants entered into plea agreements, we found a range of views about the practice. Some of our Bosnian interlocutors emphasized that defendants who committed crimes of singular gravity should get a sentence commensurate with the crime, and that this moral minimum must be honored regardless of whether defendants confess and cooperate with the prosecution. Zdravko Grebo expressed a variation on this theme when he said, whatever utility plea agreements may have in ordinary criminal cases, they are "questionable, both from a legal and moral point of view," in war crimes cases. "Can you bargain about war crimes?," he wondered.<sup>384</sup> Sead Golić, whose brother was killed during the conflict, said simply: "We, the families of the victims, are not satisfied. We are not pleased with bargaining between the court and the perpetrators. It doesn't give us any satisfaction."<sup>385</sup>

Others emphasized specific aspects of the ICTY's approach to guilty pleas that they have found especially problematic. Just as Emir Suljagić was pained by the distinguished witnesses who testified in apparent support of Biljana Plavšić,<sup>386</sup> Omarska survivor Mirsad Duratović said that in addition to excessively lenient sentences, what "is very offensive to me" is that defendants who plead guilty in The Hague—people who have committed unspeakable atrocities—"get praised by the court for being very cooperative."<sup>387</sup>

Duratović cited another concern that is of particular importance to many survivors. Darko Mrđa, one of the ICTY defendants who pleaded guilty in the summer of 2003, was among those who bore major responsibility for one of the more notorious wartime mass

executions, the execution in Korićanske Stijene of some 200 non-Serbs transferred from Prijedor in August 1992. Yet according to Duratović, Mrđa did not reveal in court “where the bodies are.”<sup>388</sup> And for victims, “that was the most important thing.”<sup>389</sup> A couple of years after our interview with Duratović, the war crimes chamber of the Court of Bosnia and Herzegovina (see Chapter VI) was able to do what the ICTY had not done—identify the remains of victims of the Korićanske Stijene massacre through the testimony of defendants who pleaded guilty to charges relating to their involvement.<sup>390</sup> Commenting on this achievement, journalist Nidžara Ahmetašević said that what is important about defendants’ admissions of guilt is that “that’s how you will find out about the destiny of some of your relatives. And what is very important,” she continued, is that the defendants’ testimony before the Court of Bosnia has led to the discovery of mass graves.<sup>391</sup>

On occasion this has happened at the ICTY, too. An ICTY prosecutor recalls one moment when a perpetrator’s confession provided the answer to a question that had burned deep in the heart of a Muslim woman whose two sons had been killed:

[I]n September 2003, Dragan Nikolić, the warden of the notorious Sušica prison camp in the Republika Srpska, confessed to his responsibility for atrocities committed against detainees. At his sentencing hearing..., an extraordinary event occurred when a Prosecution witness, the mother of two Bosnian Muslim men who disappeared from the Sušica prison camp during the war, asked Mr. Nikolić if he could provide her with any information about the fate of her lost sons. Mr. Nikolić explained to the witness that 11 years earlier, ... Bosnian Serb forces murdered her two children. It will be difficult to find another example of courtroom testimony that so powerfully and quickly advanced the process of truth-seeking and (hopefully) reconciliation in the former Yugoslavia.<sup>392</sup>

The ICTY Web site highlights this moment, and indicates that Nikolić provided information that might lead to the identification of the graves of the witness’s sons.<sup>393</sup> But as a former staff member of the International Commission on Missing Persons observed, “The Tribunal has not always asked, ‘where did you put the bodies?’”<sup>394</sup>

More generally, some of the Bosnians we interviewed believe, in the words of *Dani* Editor-in-Chief Ivan Lovrenović, that the “tens of confessions saying in an unambiguous way that war crimes have been committed” has been an important achievement. In Lovrenović’s view, such confessions help counter attempts by many to equalize crimes committed during the 1990s war, which have had the effect of “dehumanizing victims’ suffering.” Through the detailed confirmation of specific atrocities that comes with defendants’ guilty pleas, Lovrenović believes, the ICTY is “taking our attention back to the concrete problem which is most important here, which is the misery that victims have been through.”<sup>395</sup>

Many of the victims we interviewed, moreover, indicated that expressions of remorse that appear to be genuine can be important to their healing processes. For example, Sadik

Trako told us that victims in the Lašva Valley region were gratified when Tihomir Blaškić, one of the defendants convicted for those crimes, contacted them upon his release from prison. According to Trako, Blaškić wanted to meet with the victims' organization that Trako leads "to apologize to the families of victims." Although Trako thought it too early for a meeting and told Blaškić as much, he recalled that he was "still glad Blaškić apologized."<sup>396</sup> Blaškić did not benefit from a plea agreement, and it may be the case that victims are more likely to perceive an apology as insincere when a reduced sentence is secured. But our interviews suggest that victims often do find meaningful differences among defendants who express remorse based on their apparent sincerity. And as one commentator has noted, "guilty pleas that seem to be motivated by sincere remorse and a genuine acknowledgement of wrongdoing are much more likely to encourage dialogue and forgiveness than guilty pleas that appear motivated solely by sentencing concessions."<sup>397</sup>

In any event and as noted earlier, the victims we interviewed generally believe that, even in the context of a plea agreement, there must be a just relationship between the sentence imposed and the crime for which guilt is acknowledged—and that this has not been reflected in most sentences imposed following guilty pleas. Moreover the *Plavšić* case points up the importance of ensuring that perpetrators undertake to cooperate with the prosecution in exchange for a reduced sentence. Thus it is noteworthy that, after the *Plavšić* plea, all defendants who pleaded guilty before the ICTY agreed to testify in other proceedings.<sup>398, 399</sup> Particularly when a defendant is willing to confess, victims' needs would be better served if the ICTY routinely sought to ensure full disclosure about the fate of victims. It may also be important for judges, when sentencing defendants who have shown remorse, to be mindful of how words of praise come across to victims who experienced hellish crimes at the hands of the defendant.

Finally, redoubled efforts to educate the Bosnian public about the nature of plea agreements—what information the defendant provided in exchange for reduced charges, for example—may be an especially important area of the ICTY's outreach efforts. After stating that Biljana Plavšić's confession had had no positive impact, journalist Nerma Jelačić, who later became an ICTY spokesperson, noted: "Maybe [the ICTY's Outreach Programme] should have been doing something with the confessions."<sup>400</sup> Although her comment focused on the confession of *Plavšić*, it could well apply to plea agreements generally.<sup>401</sup>

One of the victims we interviewed, who was highly critical of plea agreements, indicated that if the ICTY Outreach Programme were more forthcoming about the value of plea agreements, it might indeed take some of the sting out of the practice. "It would mean a lot, by all means, yes, if we knew that the defendant's cooperation [with the prosecutor] led to mass graves or the conviction of others who were even more responsible."<sup>402</sup> Even so, he made clear, someone who committed atrocious crimes deserves commensurate punishment.

## D. Significant Verdicts, Other Rulings, and Jurisprudence

### 1. Calling a massacre by its proper name: genocide

While many in Bosnia are disappointed in sentences imposed by the ICTY, some deeply so, the Tribunal's judgments of guilt have at times provided profound gratification. One stands out for its signal importance in this regard: the ICTY's determination, first reached in the case against Radislav Krstić, that "Bosnian Serb forces committed genocide" in Srebrenica.<sup>403</sup> In clarion terms, the ICTY Appeals Chamber affirmed the Trial Chamber's determination that a genocide occurred in Srebrenica:

The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.<sup>404</sup>

In a context of pervasive Serb denial that Serbs committed genocide in Srebrenica, Tarik Jusić believes that the *Krstić* judgment was indeed "very important" in the sense the Appeals Chamber meant. In Jusić's words: "It is important that things are named as they are. If it is a genocide, historically it's important that this is said by an independent body that's 3,000 kilometers from here."<sup>405</sup> Journalist Senad Pećanin also sees this determination as crucial, emphasizing Bosnian society's inability to reach a consensus judgment about responsibility for Srebrenica: "Without the ICTY, who knows? We would have to wait decades to know who was responsible. That's a really important prosecution."<sup>406</sup>

Like many we interviewed, Dobrila Govedarica believes that "clarifying that Srebrenica was a genocide" was the Tribunal's "most important achievement and without the ICTY it wouldn't be possible." She explained the judgment's significance this way: "For history and for the future, you can never question that ... and that's definitely important for victims."<sup>407</sup> Mirsad Tokača made a similar point. Describing *Krstić* as "one of the most important" accomplishments of the ICTY, Tokača said: "Only based on this decision, the ICTY is successful." In his view, the Tribunal's determination of genocide is important not only "theoretically [and] in terms of judicial practice," but also "for Bosnian society. Finally there is no dilemma. ... After this decision, there is no negation and refusing of the fact that genocide happened."<sup>408</sup>

Jasna Bakšić Muftić also believes it was "very important to find that genocide was committed in Srebrenica," and describes what this has meant to the mothers who lost their sons there. Rural and largely uneducated, many of these women became deeply "engaged as mothers" in trying to find justice. In Bakšić Muftić's view, their daily protesting would have deepened their suffering if their goals remained unfulfilled: "You're always waiting for, waiting for,

waiting for; this is the way to madness.” But once the ICTY ruled that some 7–8,000 Muslim men were victims of genocide, “their family members were recognized, named. They got a sense of life; [they were able] to start life again.”<sup>409</sup>

In our own interviews with mothers from Srebrenica, we found widespread appreciation for the ICTY’s judgment of genocide, even as we heard concerns about many other aspects of the Tribunal’s performance. For example, after describing her concerns about the ICTY, Hatidža Mehmedović added: “Despite [these concerns,] we have to be honest and say the Hague [Tribunal] was the one who sentenced and reached the verdict of Krstić for the ... crime of genocide committed here in Srebrenica. This is what matters to us, this is what is the most important to us, to the families, to the victims, that justice is reached.”<sup>410</sup> More than five years after the ICTY Trial Chamber first ruled the massacre at Srebrenica to be a genocide, journalist Nerma Jelačić observed: “It’s still important—this is a huge judgment to this day. [*Krstić* is] probably the only one that gave victims a sense of the most complete thing to justice.”<sup>411</sup>

Yet Emir Suljagić, who along with thousands of other Muslims had sought refuge in Srebrenica before it became the most dangerous place on earth, has a “problem with this whole Srebrenica thing. This whole thing started as genocide in Bosnia and it ended with genocide in Srebrenica and it’s so unfair to those tens of thousands of people” who died before the July 1995 massacre that their extermination is left outside the ICTY’s judgment of genocide in *Krstić*.<sup>412</sup> Even so, Suljagić came to realize how much the judgment meant to him, too, when he read the Appeals Chamber’s 2004 judgment in *Krstić*.<sup>413</sup> “That was the moment I realized, my god, we are in that select group of nations whose existence has been brought into question, literally, physically, and that’s when the importance of this judgment—that’s when I realized it.”<sup>414</sup>

## 2. Absence of genocide convictions in other cases

Suljagić is not alone in hoping that the ICTY will eventually rule that genocide was committed not only in Srebrenica, but throughout Bosnia. Mirsad Tokača, who has developed an extensive database of confirmed victims, believes his data show that “genocide happened in 1992”—i.e., well before July 1995.<sup>415</sup>

To date, however, the ICTY has not rendered any judgments finding that genocide occurred in Bosnia other than in Srebrenica and for a variety of reasons has not convicted anyone other than Radislav Krstić of genocide in relation to Srebrenica. In some instances, individuals indicted on genocide-related charges elsewhere in Bosnia have died before they could be prosecuted to final judgment;<sup>416</sup> in others, including the case against Biljana Plavšić,<sup>417</sup> a plea agreement led to the prosecutor’s agreement to drop genocide-related charges or the defendant was acquitted of genocide-related charges following his trial.<sup>418</sup> One of the small number of ICTY defendants charged with genocide, Radovan Karadžić, eluded capture for some fourteen years and is now on trial but the trial judgment in his case is not expected until

at least 2012; another, Ratko Mladić, remains at large. Particularly in light of the tiny number of remaining cases in which it is even theoretically possible that the ICTY will judge there to have been a genocide outside the context of Srebrenica,<sup>419</sup> many Bosniaks are disappointed in the Tribunal's failure to sustain genocide-related charges in the few cases where genocide was charged and which resulted in a verdict.

One of the most important of these is the case against Momčilo Krajišnik, a senior member of the Bosnian Serb leadership during the war. On September 27, 2006, ICTY Trial Chamber I found the defendant responsible for "the killing, through murder or extermination, of approximately 3,000 Bosnian Muslims and Bosnian Croats" in 30 Bosnian municipalities during the period of the indictment.<sup>420</sup> It also found that "the perpetrators of the killings chose their victims on the basis of their Muslim and Croat identity."<sup>421</sup> Yet, perhaps in part due to the limited timeframe charging genocide solely for the early stages of the conflict, the chamber did not find that the prosecutor had proved beyond a reasonable doubt that "any of these acts were committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such,"<sup>422</sup> a key element of the crime of genocide.<sup>423</sup>

Interviewed several months after the trial judgment was issued, Nerma Jelačić said it was "a huge thing" for victims that Krajišnik "wasn't found guilty of genocide."<sup>424</sup> Commenting on the *Krajišnik* judgment several years later, historian Smail Čekić said, "I am completely disappointed. ... For all of us investigators and victims of genocide, this is like a shock, like a major hit. ... [They] proved the existence of the *actus reus* of the crime of genocide but they failed in proving the intention of the crime."<sup>425</sup> Srebrenica survivor Kada Hotić found it "ridiculous, silly" that Krajišnik was acquitted of the genocide-related charges "when there was so much evidence" against him.<sup>426</sup>

Others were not so much shocked as disappointed. When asked to describe the public reaction when Krajišnik was acquitted of genocide-related charges, Nidžara Ahmetašević said: "People didn't even expect that Krajišnik would be convicted of genocide. People don't ... trust that people will finally recognize that we survived genocide. ... In a way, people expected that decision because they just lost confidence in international justice."<sup>427</sup>

### 3. Non-disclosure of evidence in the *Milošević* case

It goes without saying that ICTY chambers must be satisfied that the prosecutor has proved beyond a reasonable doubt all elements of the crime of genocide—including the mental element of specific intent—before it may convict defendants of this charge, however disappointed victims may find an acquittal. The way that such acquittals are misused by political leaders is a serious problem, which we address in Chapter V, but it is not one that falls to judges to anticipate and address through their evaluation of evidence. Yet one aspect of the ICTY's conduct has caused widespread concern, both within Bosnia and elsewhere: Its Appeals Chamber allowed evidence that might have established Serbia's responsibility for genocide and other

international crimes in Bosnia to remain under seal for reasons that have been widely called into question.

Among the most important documents sought by then Prosecutor Carla Del Ponte in the *Milošević* case were wartime records of the Supreme Defense Council of the then Federal Republic of Yugoslavia (Serbia and Montenegro), which “the prosecution team knew would be crucial to establishing beyond a reasonable doubt the links between Milošević and the rest of the political leadership in Belgrade with the war crimes committed in Croatia, Bosnia and Herzegovina, and Kosovo.”<sup>428</sup> Serbian authorities repeatedly said they would provide the crucial evidence only if it were kept under protective order. The reason, Serbian officials made clear, was that they feared these documents would be the proverbial nail in the coffin of their defense to a genocide case that Bosnia had filed against Serbia in 1993 before the International Court of Justice (ICJ), which after many years was heading toward judgment.<sup>429</sup>

Del Ponte recalls: “The Serbs were ready to provide records in a way that would help us sink Milošević with the millstone of genocide tied around his neck. If we did not seize this break in the political cloud cover, the Office of the Prosecutor might not acquire these documents for months or years.”<sup>430</sup> Yet the Tribunal’s rules allowed for evidence of this sort to be kept secret only to protect legitimate “national security interests,”<sup>431</sup> not to protect a state from a genocide verdict in another court. In a decision for which she has been criticized,<sup>432</sup> the prosecutor resolved this dilemma by agreeing to support in general terms Serbia’s application for protective measures on the understanding that the application and measures would be “reasonable” and that it “shall take into consideration the interest of transparency of the court proceedings.”<sup>433</sup>

Although the Trial and Appeals Chambers’ rulings on this request remain sealed, it has been widely reported that the Trial Chamber agreed not to disclose the crucial evidence on a broad reading of Serbia’s “vital national interest,” a standard not contemplated in the ICTY’s own rules of procedure. When the Appeals Chamber eventually had the opportunity to rule on this issue, it found that the Trial Chamber had erred in applying this standard. Even so, and even though Serbia “made no secret” that the reason it sought the protective order was to shield itself from a genocide ruling in the ICJ case,<sup>434</sup> the Appeals Chamber ruled in two confidential decisions that because Serbia had relied on the Trial Chamber’s ruling when it provided the documents—documents it is legally required to provide in any case—it was entitled to the earlier protection afforded by the Trial Chamber.

The Trial Chamber itself could still see the full documents for purposes of assessing Milošević’s guilt, and so the principal effect of this ruling would be to shield Serbia from liability in the ICJ case. But the ICTY did not have a chance to reach judgment in the *Milošević* case—the defendant’s death brought the trial to a premature end.

As for the ICJ case, on February 26, 2007, the Court ruled that genocide was committed in Srebrenica,<sup>435</sup> that Serbia bore responsibility for failing to prevent that genocide,<sup>436</sup> but that Bosnia had not proved that the conduct of Bosnian Serb forces constituting genocide itself



could be legally attributed to Serbia.<sup>437</sup> Crucially, the ICJ had refused Bosnia's request that it request the full documents from Serbia—and it did not ask the ICTY to consider modifying its protective measures so that it could obtain access to the un-redacted documents from the Tribunal. The ICJ nonetheless “observe[d] that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records”<sup>438</sup>—which of course did not include the very documents at issue.

It is impossible to know whether the undisclosed evidence would have produced a different outcome. What is clear is that Serbia thought it would, and for that reason mounted an all-out effort to ensure that this evidence remained secret.<sup>439</sup> It is also clear that the conduct of the ICTY and ICJ has tarnished both courts in the eyes of many Bosnians. Emir Suljagić wondered, “How could [ICTY] judges accept that hiding of evidence of participation in genocide is a legitimate national interest? How in the world could hiding evidence of genocide be construed as a national interest? What's worse, the ICJ never asked [for the redacted documents]! ... Good god!”<sup>440</sup> Zdravko Grebo described the ICTY's action in “intentionally hid[ing] some documents” and thereby “influenc[ing]” the outcome in the ICJ case as “scandalous.”<sup>441</sup>

Saša Madacki, who directs the Human Rights Centre at the University of Sarajevo, noted that he considers the ICTY to be “essential.” Yet, he added, “sometimes we are not able to understand the decisions of the Tribunal,” particularly those relating to the Supreme Defense Council. “This is something that's not understandable.”<sup>442</sup>

Omarska survivor Muharem Murselović, who has testified in several cases before the ICTY, cites the Tribunal's action in this matter as a source of acute disappointment: “What especially upsets people here in Bosnia and Herzegovina and hurts them,” he told us, “is that some information proving the direct involvement of Serbia has been hidden in agreement with the government of Serbia[.] The Hague Tribunal protected the State of Serbia by hiding documentation of the involvement of Serbia in the conflict in Bosnia. So this creates a certain mistrust, a suspicion of its good intentions.”<sup>443</sup>

For many Bosnians, their “mistrust ... of [the ICTY's] intentions” was compounded by the ICTY's recent action against a former employee, Florence Hartmann. Hartmann, who had served as spokesperson for then Prosecutor Carla Del Ponte from 2000 to 2006, later wrote of the Appeals Chamber's two key rulings in the *Milošević* case authorizing protective measures for the Supreme Defence Council documents provided by Serbia.<sup>444</sup> On September 14, 2009, a Special Chamber of the ICTY found Hartmann guilty of “knowingly and wilfully interfering with the Tribunal's administration of justice”<sup>445</sup> for having disclosed the “contents and purported effect”<sup>446</sup> of two Appeals Chambers decisions in breach of the chamber's orders that they remain confidential, and knowing that the disclosure violated a Tribunal order.<sup>447</sup> Hartmann was fined €7,000.<sup>448</sup>

While a number of our interlocutors found Hartmann's own conduct troubling, either because they thought she should have gone public sooner or because they thought her disclosure to involve conduct unbecoming senior court staff, victims' associations were aggrieved

by her prosecution. Several Bosniak victims sought unsuccessfully to be heard at her trial so that they could tell the Special Panel that its action could “destabilize relations in the region, inflame victims’ frustrations, [and] endanger the founding principles of the work of the [tribunal].”<sup>449</sup> As a result of the ICTY’s action, they wrote, “Trust in the [tribunal] and international justice might be lost.”<sup>450</sup> (At the Tribunal itself, many believe that because Hartmann violated the court’s protection orders, the ICTY had a duty to prosecute that violation, as it has in several other contempt proceedings.)

Hartmann’s prosecution marked a low point in perceptions of the ICTY among many of its strongest supporters. Following her conviction, many Serbs—both Serbian and Bosnian—who have worked to support the ICTY denounced the Tribunal’s action, saying they “now have serious worries about what is happening there.”<sup>451</sup>

#### **4. “Women became visible, personalized, recognized as one kind of victim”**

With rare exception, when wartime atrocities occur on a large scale they include crimes of sexual violence. But while there should be no doubt that they constitute war crimes, genocide and/or crimes against humanity when other elements of these offenses are established, these offenses historically have remained in the shadows of postwar prosecutions.<sup>452</sup> The work of the ICTY and the ICTR changed that, bringing crimes of sexual violence out of the shadows and building a rich jurisprudence recognizing that these crimes are among those meriting the strongest condemnation of the international community.

The attention paid to these violations by the ICTY from the outset was in no small measure due to the courage of rape survivors in Bosnia and the support they forged with women’s human rights advocates around the world. Indeed, major impetus for the ICTY’s creation came from global advocacy efforts aimed at seeking justice for crimes of sexual violence that shocked global conscience.

Speaking to a foreign reporter about a year after the war ended, Jasna Bakšić Muftić recognized the historic nature of victims’ cooperation with ICTY investigators. “This could be the first time in history that women are coming forward right after a war to talk about rape,” she said. “It could be a very important milestone for war crime prosecutors.”<sup>453</sup> Reflecting on the ICTY’s achievements and failures more than a decade later, Bakšić Muftić said that through its judgments, the ICTY had “created a new kind of awareness that women had been used as a means” of warfare. “They became visible, personalized, recognized as one kind of victim.”<sup>454</sup> It is often said that many victims in Bosnia have had a hard time moving forward. But Bakšić Muftić has a different perspective. In her view, the recognition provided by the ICTY’s judgments enabled rape survivors in Bosnia “to become more active” in asserting their rights.

One such woman is Bakira Hasečić, a rape survivor who “is becoming the Bosnian Wieselthaler”<sup>455</sup>—that is, she has been active and effective in identifying evidence against wartime rapists and submitting it to prosecutors.<sup>456</sup> As *Balkan Insight* has reported, the organization

Hasečić leads, the Association of Women Victims of War, “rallies rape victims across Bosnia and Herzegovina and has provided key testimonies in rape and sexual abuse trials linked to the conflict.”<sup>457</sup>

Yet Hasečić’s own case points up the limits of justice that victims of sexual violence have received in The Hague. On July 20, 2009, ICTY Trial Chamber convicted the man who raped her, Milan Lukić, and his cousin Sredoje Lukić for their roles in sadistic atrocities committed in Višegrad during the war. As noted earlier, Milan Lukić became one of a handful of defendants before the ICTY sentenced to life in prison; his cousin received 30 years.<sup>458</sup> But while the mass rapes associated with the cousins have received international attention for over a decade, rape-related charges needlessly were left out of their indictment.

A month before the case went to trial, the ICTY prosecution filed a motion seeking leave to amend the indictment in this case, but the Trial Chamber denied this “on the ground that the Prosecution had not acted with the required diligence in submitting the motion in a timely manner so as to provide adequate notice to the Accused.”<sup>459</sup> Despite the fact that the judgment is replete with testimony of women describing multiple rapes by the defendants—testimony they provided to refute the accused’s alibi defense that he was not in town that day—the Trial Chamber made clear that it could not make “any determination of guilt in relation to these non-indicted crimes.”<sup>460</sup>

The prosecution’s failure to pursue diligently rape charges in *Lukić* was unfortunately not unprecedented. Even as the ICTY and other international courts have highlighted crimes of sexual violence in some cases, others “continue to be plagued by prosecutorial omissions and errors as well as by a tendency on the part of the judges to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases.”<sup>461</sup> Further, in many instances where sex crime charges were warranted, they were absent from indictments, often for strategic reasons related to expediting trials and completing the Tribunal’s work. Thus here, as in other aspects of the ICTY’s work, its contributions have at once been incalculable and have fallen short of what many victims hoped for..

## E. Length and Complexity of ICTY Proceedings

*It’s only that these trials took too long, way too long. And I also think these whole proceedings are too complicated.*<sup>462</sup>

*The ICTY seems a distant, complicated machinery. It has complicated procedures, its processes last forever.*<sup>463</sup>

Along with what many see as lenient sentencing, the length of trial proceedings in the ICTY is cause for widespread frustration in Bosnia and has been criticized internationally.<sup>464</sup> As

former ICTY liaison officer Matias Hellman noted: “Proceedings take so long—three to eight years from arrest until final judgment.”<sup>465</sup> Sometimes years go by after the ICTY gains custody of a defendant before his or her trial even begins;<sup>466</sup> then, the trial typically lasts over a year.<sup>467</sup> Although trials lasting years are rare (so far only five have lasted more than two years), they have made an enduring impression.

In the subsections that follow, we address the impact of trial length on many Bosnians’ experience of justice. But this is not the only concern that lengthy ICTY processes pose. Many Serbs—notably including individuals who support the ICTY—emphasize another problem: The length of time that some defendants have spent awaiting trial, many in detention, is seen as a violation of defendants’ right to a speedy trial.<sup>468</sup> (This is true even though defendants themselves have often sought delays so they can better prepare for trial.)<sup>469</sup>

As the Justice Initiative noted in its report on the ICTY’s impact in Serbia, “[m]any Serbians can readily tick off how long some high-profile defendants had to await trial once the ICTY obtained custody of them,”<sup>470</sup> and the same patterns are grounds for criticism among Serbs in Bosnia.<sup>471</sup> While this alone hardly accounts for Bosnian Serbs’ antipathy toward the ICTY, the practice, which has also raised concerns among international lawyers, provides further grist for Serb nationalists’ efforts to sustain anti-Hague sentiment.<sup>472</sup> Moreover “[e]xcessively long trials” themselves can “carry significant risks of unfairness to the accused,”<sup>473</sup> particularly when he represents himself at trial. To be sure, the ICTY is hardly unique in taking a long time to investigate and prosecute war criminals. As this study highlights, a key area in which internationalized tribunals or domestic courts trying mass atrocities would benefit from improvement is in expediting trial proceedings without short-changing justice.

## 1. The trial without end: Slobodan Milošević

*A lot of victims felt cheated when he died.*<sup>474</sup>

*If they made a huge mistake it was the Milošević case.*<sup>475</sup>

For many, the marathon trial of former Yugoslav President Slobodan Milošević is at once emblematic of a pervasive problem at the ICTY—trials whose length extends beyond tolerable limits—and a cautionary tale. After more than four years, the trial was within weeks of ending<sup>476</sup> when the defendant died in his detention cell in March 2006.<sup>477</sup>

As legal commentators have noted, “[t]he most ardent criticism of [the Milošević] trial was that it was simply allowed to go on for too long.”<sup>478</sup> On this point, there is no daylight between the views of commentators outside Bosnia and of Bosnian citizens. Nidžara Ahmetašević recalled that in the early months of Milošević’s trial, “everybody watched it” on television. “But it lasted so long.” And “by the end, only my father was still watching.”<sup>479</sup> Columnist Gojko Berić reflected the views of many when he said, “the pace of the proceed-

ings ... went before any expectations. This was really too much.”<sup>480</sup> Another journalist, Ivan Lovrenović, cites the *Milošević* trial as the prime example of “extreme inefficiency” on the part of the ICTY. The “whole thing turned into a bureaucratic labyrinth” and, in the end, “we had no appropriate verdict.”<sup>481</sup> Even a lawyer, Sevima Sali-Terzić, had a hard time “understand[ing] why the *Milošević* trial lasted so long.”<sup>482</sup>

There is now a rich literature of lessons learned from the *Milošević* trial, and this study does not revisit ground that has been well plowed by others who have closely analyzed the case. But in view of the special impact the trial has had on the ICTY’s standing in Bosnia, we note here several further themes that arose often in our interviews with Bosnians.

While the need to accommodate the defendant’s precarious health situation was a major factor behind the trial’s length,<sup>483</sup> many in Bosnia fault the Tribunal’s prosecutor and judges. Berić believes the “main responsibility” for “prolonging this process for so long ... should be placed on [former Prosecutor Carla] Del Ponte.” In Berić’s view, Del Ponte tried to prove too much, and in the end lost the chance to prove anything: She “wrote an indictment that is a novel, meaning she made a novel of this indictment. It’s too extensive, unnecessarily.”<sup>484</sup> While we found this view to be widely held among the Bosnian intellectuals we interviewed, there may be a counterpoint when it comes to Bosnians’ expectations: Bosnian victims have rallied in protest against ICTY efforts to apply “lessons learned from the *Milošević* case” by trimming the number of charges or crime scenes to be proved in the trial of Bosnian Serb wartime leader Radovan Karadžić.<sup>485</sup>

Whatever the precise causes of the trial’s length, that *Milošević* died before judgment has left Bosnians vexed by a sense that a streamlined case would have yielded a verdict. “Maybe if the case had been shorter,” Dobrila Govedarica speculates, “*[Milošević]* would have lived to judgment.”<sup>486</sup> Others think the point is clear. Srebrenica survivor Hatidža Mehmetović said the trial of *Milošević* went on “for too long, way too long, so that he was not in a position to even live long enough to be faced with a verdict.” She continued: “This was a huge price for not only victims of ... crimes committed in Srebrenica but for all of Bosnia as such.”<sup>487</sup> Tarik Jusić implicitly links *Milošević*’s death to the unwarranted length of the ICTY’s trials,<sup>488</sup> which he describes as the “weakest” dimension of its work. Like Mehmetović, Jusić believes the costs of *Milošević*’s death without judgment to be huge, describing this as the “most negative” aspect of the ICTY’s record.<sup>489</sup>

Saying “this case should have been completed,” Srebrenica survivor Kada Hotić evokes what she believes was lost by the death of *Milošević*. “Truth be told,” she said, it was not the goal of any victim “to have defendants suffer, but simply to have them serve their sentences so this whole story becomes a part of the truth of everything that happened.”<sup>490</sup> With his death, *Milošević*’s role in Bosnia’s tragedy would not become part of the judicial truth.

By this measure, *Milošević*’s death before judgment was an incalculable loss. The prosecution’s case placed *Milošević* at the epicenter of the violence that engulfed the Balkans in the 1990s, encompassing crimes committed in Kosovo, Bosnia, and Croatia. Of particular

importance for many Bosniak victims, the charges against Milošević included genocide—and not just for Srebrenica. Moreover, because the prosecution’s case aimed to prove that Belgrade institutions provided crucial support to Bosnian Serb forces, a verdict that sustained this claim would establish “that Serbia and Montenegro made an aggression,”<sup>491</sup> as Hatidža Mehmedović put it.<sup>492</sup>

## 2. The collateral damage of self-representation

One issue that both contributed to the length of the *Milošević* trial and was cause for deep concern in itself was the way the Tribunal handled—or many would say, mishandled—the challenges presented by Milošević’s self-representation. Defendants before the ICTY are legally entitled to represent themselves,<sup>493</sup> and Slobodan Milošević famously exploited this right, “transforming the courtroom into his political platform.”<sup>494</sup> As has often been noted, Milošević’s insistence on representing himself “posed a profound challenge to the conduct of [his] trial.”<sup>495</sup>

This subject, too, has received extensive analysis by others, and the Justice Initiative has recently published a report devoted exclusively to the challenges presented by political leaders who represent themselves in war crimes trials.<sup>496</sup> Again, we do not revisit this subject in depth here but briefly try to capture the impact of self-defending suspects’ behavior on Bosnians’ experience of justice and, even more briefly, their perceptions of responsibility for the problems presented in these cases.

For many Bosnians it was excruciating to watch Milošević mock the court, treating judges “without respect.”<sup>497</sup> Virtually everyone we interviewed in Bosnia believes that Milošević’s ability to use his trial as a platform for Serb nationalism “could have been avoided” if ICTY judges had exercised proper control of the courtroom.<sup>498</sup> Along with many attorneys both within and outside Bosnia, Damir Arnaut, a senior advisor to the Bosniak member of the Presidency, believes that the ICTY could have found better ways to handle the challenges presented by Milošević without compromising his rights.<sup>499</sup>

Many worry that the *Milošević* case established a model for others in which high-profile defendants have abused their right to self-representation, stringing out trial proceedings and mocking justice. Describing the ongoing trial of Vojislav Šešelj who, like Milošević, chose to represent himself, Mirsad Tokača noted the unnerving similarity and added: “The Tribunal is now the strongest weapon in Šešelj’s hands.”<sup>500</sup> Savima Sali-Terzić wonders “why Šešelj has all the power to mock the court and the judges just sit there in all their dignity. He offends the victims again. The procedure is terrible. I’m a lawyer and I just don’t understand.”<sup>501</sup>

Saying he planned to challenge everything but whether it was “sunny outside or raining,” Radovan Karadžić—whose case we discuss further below and who, like Milošević, chose to represent himself—told ICTY judges that his trial would be “far greater than any before it.”<sup>502</sup> Seeing a cascade effect from Milošević to Šešelj “and Krajišnik and now Karadžić,” Sre-

brenica survivor Kada Hotić describes cases in which high-profile ICTY defendants have represented themselves as proceedings in which “a defendant simply makes a circus of this court whenever they are willing.”<sup>503</sup> (The “circus” metaphor arose often in our interviews in Bosnia on this topic.) As Radovan Karadžić seemed to tie the ICTY up in a blizzard of motions before his trial even began, Nidžara Ahmetašević noted, Bosnians were “really disappointed because the court is letting him do that. People are losing confidence in the ICTY because of that.”<sup>504</sup>

### 3. Beyond Milošević

Concerns about the length of trial proceedings in specific cases shade into a growing sense that the ICTY is taking far too long to provide justice in the broader sense of its work. Saša Madacki, who directs the Human Rights Centre at the University of Sarajevo, described a widely held view among Bosnians: “Ordinary people will ask you how Nuremberg took one year and this [process] is taking 20 years.” As for his own view, Madacki said: “I am very supportive of the work of the Tribunal, though I strongly believe improvements [should be made in speeding up its] procedures.” Like many who made this point, Madacki added: “I’m not saying there should be a three-day trial and then hang somebody outside of the Tribunal.”<sup>505</sup>

It would be difficult to exaggerate the cumulative effect of the length and complexity of ICTY procedures. It can seem a staggering weight, dragging public confidence downward as it grows heavier with the passage of years. While the length of trial proceedings alone does not account for the lengthiness of the Tribunal’s work, many in Bosnia believe that the Tribunal’s slow pace has blunted its contributions and compounded the challenges associated with delays in arresting indictees.

For example, Sevima Sali-Teržić points out the high costs of delayed justice on political progress and social repair in Bosnia. “In the beginning,” she said, “it was possible to have improvements with justice.” Citing the international community’s failure to arrest Radovan Karadžić, who at the time of our interview with Sali-Teržić in late 2006 was still a fugitive from justice, and Ratko Mladić, she wondered if “it’s too late. Our ethnic relations are terrible.... Too much time was given to those who began the war to be in power after the war ... to pretend that we have working ethnic relations.”<sup>506</sup>

Even at the outset, ICTY supporters had to contend with an overwhelming sense of the ICTY as a heavy bureaucratic machine that was out of step with their country’s urgent need for justice. Branko Todorović evoked this when he contrasted the toxic chokehold of many wartime Bosnian Serb leaders with the lumbering bureaucracy he encountered in The Hague:

I want to tell you that in my opinion they made a first mistake: the majority of people working there are most probably the highest ranking in the judicial profession, but at the same time they are a high-ranking supreme bureaucracy, too. They have bylaws of the court, documents of the court, “we have certain international standards and of

course we are backed up with the United Nations and we'll do our job the best we know based on justice, law." And to them it must have seemed pretty perfect. At the same time here there were people who were running the country in high political circles who were the people who committed the crimes.<sup>507</sup>

The burden of time is also taking a toll on victims. Particularly during our most recent visit to Bosnia in July 2009, we heard repeatedly of witness fatigue. Although the subject arose principally in the context of challenges facing Bosnia's relatively new war crimes chamber,<sup>508</sup> it points up the dilemma many victims feel sixteen years into the ICTY's work: While still desperate for justice, many are deeply frustrated by how long it is taking; growing numbers are weary of participating in trials.

Describing the challenges that Bosnia's war crimes chamber faces, Vehid Šehić noted that some who are in a position to provide eyewitness testimony, though willing to do so ten years ago, are growing reluctant to do so after beginning new lives as refugees abroad or as returnees in Bosnia. Šehić told us that the former often say: "I started a new life here, I don't want to spoil my future with that terrible past." Those who have returned to towns that were "ethnically cleansed" similarly fear that "something bad may happen if they testify." Yet Šehić adds: "It's not that they don't want to see justice satisfied; they do." But they fear that testifying "could spoil their future."<sup>509</sup>

As a journalist who covers war crimes prosecutions, Nidžara Ahmetašević sees the other side of the coin. She says, "I don't believe anybody who says victims are tired of the whole process. They're not, they want to talk." Of course there are exceptions, Ahmetašević acknowledges. Yet every day, her office receives letters "from victims who want to tell their story." Ahmetašević says there are "thousands" of such people, who are "afraid they will die and take their stories with them."<sup>510</sup> (In light of these concerns, it may be worth noting that some recent trials have been better managed.)<sup>511</sup>

#### **4. The extended impunity of Radovan Karadžić and Ratko Mladić**

As noted earlier, for a variety of reasons Radovan Karadžić and Ratko Mladić, the Bosnian Serbs' wartime political and military leaders, respectively, loom especially large in Bosnians' assessment of the ICTY's performance. Here, we focus on the symbolic impact of their extended impunity, describing how their ability to elude capture for over a decade<sup>512</sup> has colored Bosnians' broader perceptions of the ICTY. Then, we consider how Bosnians have reacted to the belated capture of Karadžić in July 2008.

During our first sets of interviews for this study in November–December 2006 and June 2007, when both suspects were still fugitives from justice, we heard repeatedly that their continued at-large status threatened to overshadow whatever the Tribunal had accomplished. As law professor Jasna Bakšić Muftić put it, "The ICTY has done so many good things but



they are in the shadow of Karadžić and Mladić. Many ordinary people can't see the good things the ICTY has done" with these two men still at large.<sup>513</sup> Jasminka Džumhur made much the same point when we interviewed her in June 2007. Noting that it is not the ICTY's fault that Karadžić and Mladić were then still at large, she said that its inability to gain custody of the two men would "reflect on the whole work of the Hague Tribunal. People will forget all other prosecutions" if the ICTY were to close without trying these two.<sup>514</sup> Reflecting on the ICTY's overall record, Mirsad Tokača put the point even more strongly: "They didn't finish a lot of things because of Karadžić and Mladić. Without these two persons it was a total failure.... What was the purpose, why [did] we spend such a lot of money for the Tribunal, if we haven't been able to bring the main people to justice?"<sup>515</sup>

Sevima Sali-Terzić suggested (as many international commentators have) that the fact that the two fugitives "don't live freely, they have to hide" is "one of the biggest positive things" the ICTY has achieved. Despite "all those flaws and problems," she explained, this showed that "somebody knew the crimes and can shame those who committed them."<sup>516</sup> Yet, she continued, the delay in arresting them had significantly impaired the ICTY's potential for contributing to reconciliation, perhaps irreparably: "In the beginning, it was possible to have improvements with justice. But ten years after the failure to arrest Karadžić and Mladić, it's too late. Our ethnic relations are terrible."<sup>517</sup> (Sali-Terzić added that this state of affairs is not solely due to the failure to arrest Karadžić and Mladić, however.) Many of our interlocutors recognized that the ICTY itself is not to blame for the failure of others to arrest these men. Yet the fact that they were able to elude apprehension is widely seen to have "diminishe[d] the effects of the ICTY."<sup>518</sup>

## 5. The arrest of Radovan Karadžić

During our final visit to Bosnia in July 2009, we tried to understand how far the arrest of Radovan Karadžić one year earlier had gone in redeeming this failure. For many, the long overdue arrest produced a jumble of mixed emotions. Nidžara Ahmetašević recalled the rush of emotions many experienced upon learning of his capture:

People were very happy and at the same time very sad. In the first moment people were on the streets celebrating. In the second moment, when reality hit them, people became really sad because they had to wait so long. There were many who cried that day, because, okay, it was so easy to do that [yet] he was free all that time. So it was very mixed.<sup>519</sup>

When asked how she felt when she learned of Karadžić's arrest, Srebrenica survivor Hatidža Mehmedović replied: "We were sad, even then, for the fact that he was rewarded by being able to live as a free person for so long despite the fact that our families were murdered

and killed.” Adding to her sadness, she said, was the realization that “Serbia and Montenegro and a significant portion of Bosnia and Herzegovina knew where he was hiding [all along]. It was simply the politics that decided the moment he would be arrested.”<sup>520</sup> Many victims, too, were offended by media coverage, which focused far more on Karadžić’s life on the run than on the crimes that robbed them of their loved ones.<sup>521</sup> But if actions speak louder than words, many victims reached a new plateau in their ascent from the deepest abyss of loss and grief: they traveled to The Hague to see Karadžić in the dock. Ahmetašević characterized victims’ reactions this way: “Okay, he’s there and now you know he will never come out again; now I feel much better.”<sup>522</sup> For many, the trial of Radovan Karadžić holds forth a promise of accomplishing what they had hoped a judgment in the *Milošević* case would: rounding out the judicial record of genocide in Bosnia.

## 6. The continuing impunity of Ratko Mladić

But however important a judgment in the *Karadžić* case, Bosniaks almost universally say that justice will not be served if the ICTY fails to gain custody over Ratko Mladić, who is widely seen to be even more culpable than Karadžić. Though an eloquent wordsmith, Emir Suljagić says “it’s really hard to verbalize” why he feels it so important to see Mladić—whom he met while serving as a UN translator in Srebrenica—brought before the bar of justice.<sup>523</sup> Suljagić does not expect any court, including the ICTY, to provide “catharsis.” But when Mladić is brought to justice, he says, “I’m going to camp in The Hague for however long it takes. ... [T] his guy just needs to be removed from this society. This guy does not deserve to share this world with us. It’s that simple for me. He doesn’t deserve to share this world with us. That’s it. End of story.”<sup>524</sup>

## F. Impact on Returns

During interviews with ICTY officials in The Hague, several mentioned reports they had received to the effect that the work of the Tribunal had had an impact on many individuals’ willingness to return to homes from which they had been “ethnically cleansed” during the 1990s, particularly in Prijedor. Only through an interpretive leap (one that our ICTY sources did not make themselves) could this be seen as an intended aim of the ICTY.<sup>525</sup> Although the right of return was enshrined in the Dayton Peace Accord,<sup>526</sup> lead responsibility for facilitating the return of refugees and internally displaced persons was entrusted to the UN High Commissioner for Refugees.<sup>527</sup>

But while contributing to the return of persons forcibly displaced from their homes was not an aim of the Tribunal, our sources in The Hague speculated that, if the accounts they had heard were correct, the ICTY’s work might have contributed to such returns in two respects.

First, individuals who had been forced to flee their homes felt “psychologically safer because the world was watching.”<sup>528</sup> Second, some individuals known to have been responsible for horrific crimes were no longer in a position to deter returns.

Several journalists, too, have reported that in some respects ICTY prosecutions—more particularly, the arrests and consequent removal of ICTY suspects—have facilitated the return of individuals forcibly displaced by “ethnic cleansing.” In a 2004 article in the *New York Review of Books*, Tim Judah wrote of the remarkable change he saw in Kozarac, a town in the north-west Bosnian municipality of Prijedor that had been thoroughly “cleansed” of non-Serbs in 1992. By 2004, Judah wrote, “half the original population [had] returned.” Noting that “the rate of return in Kozarac and some nearby towns has been exceptionally high,” Judah offered this explanation:

...Bosniaks tell you that far fewer people would have returned had it not been for the Hague Tribunal. Nineteen of the local killers and organizers of wartime ethnic cleansing have been indicted, arrested, or effectively removed; as a result people have felt it was safe to return home. In eastern Bosnia, where fewer people have been indicted or arrested, the rate of return is far lower. This is just one example of the way the court affects the region.<sup>529</sup>

While we did not undertake a comprehensive study of this subject, the reports we heard prompted us to include questions about the relationship between ICTY prosecutions and returns in our interviews with Bosnians who had returned to their original homes in northwest Prijedor and the northern city of Brčko. Their responses were broadly consistent with several studies that have touched on this issue. We begin by briefly describing key conclusions of the latter.

## 1. Returnees in Prijedor

Out of an estimated prewar population of 4.4 million people, an estimated 2.2 to 2.3 million Bosnians were forcibly displaced during and immediately after the war.<sup>530</sup> Over a million are estimated to have become internally displaced, while the rest became refugees.<sup>531</sup>

Despite Dayton’s commitment to the right of return, political scientist Roberto Belloni recounts in his study of post-conflict Bosnia, international actors were ambivalent about promoting this right in the early years of peace. Concerned about the security of returnees and fearing a potential backlash during the fragile postwar peace, international agencies did not ramp up their efforts in this area until a few years after Dayton took effect, and NATO forces “insisted that they had no mandate to assist returnees to go home and ensure their safety” during the first two years of peace.<sup>532</sup> Yet international agencies did not want to permanently relocate displaced Bosnians either, lest this consolidate the effects of “ethnic cleansing.”<sup>533</sup>

Beyond security concerns, the right of return faced a raft of formidable challenges, not least the “dire housing conditions at the end of the war.”<sup>534</sup>

While Belloni thus recognizes several formidable barriers to the return of “ethnically cleansed” Bosnians to their prewar homes, he identifies the presence of war criminals as a contributing factor. In his words, “Post-war initial reluctance to prosecute indicted war criminals and the lack of gender and ethnic balance of local police forces created additional hurdles for women’s return.”<sup>535</sup>

Eventually, the picture changed and displaced Bosnians began to reclaim their homes in substantial numbers.<sup>536</sup> Against all odds, returns were most striking in the municipality of Prijedor, a place many considered the least likely place for large scale returns.<sup>537</sup> As Isabelle Wesselingh and Arnaud Vaulerin have written, Prijedor had been “purged of virtually its entire non-Serb population during the war, more than forty thousand Muslims and five thousand Croats.”<sup>538</sup> Yet a decade later, Prijedor was cited as “an exemplary success in achieving the ‘return of minorities’ not just in Republika Srpska but in Bosnia-Herzegovina as a whole.”<sup>539</sup> What, then, accounts for the turnaround?

Any responsible answer would have to reflect the myriad factors that converged to draw displaced persons back to Prijedor. One factor that was essential but not sufficient was that by the late 1990s, key international actors devoted substantial “financial, juridical and political” efforts to achieve the goal of return.<sup>540</sup> Another factor that likely contributed to the high number of returns to Prijedor is that large numbers of displaced Bosniaks had relocated to Sanski Most, which was nearby in Federation territory.<sup>541</sup> These displaced persons were more likely to return home than those who had started new lives farther away. Moreover, at the time of large scale returns, the city of Prijedor had a relatively moderate mayor, who created a climate that was supportive of returns.<sup>542</sup>

Among the most important reasons for the flow of Bosniaks back to Prijedor was the dedicated efforts and sheer competence of individuals who were determined not to accept the results of “ethnic cleansing.”<sup>543</sup> Wesselingh and Vaulerin place particular importance on the roles of “two Bosniak leaders, Muharem Murselović and Sead Jakupović, who have made a crucial contribution to the return of such large numbers of refugees.” The writers note that the UNHCR itself had recognized in its 2002 report on Prijedor that “the refugees’ organizational capacity and the courage of their leaders are ‘essential elements’ in promoting their return to difficult zones.”<sup>544</sup>

Yet like Belloni, Wesselingh and Vaulerin recognize one other factor—the arrests of war criminals in Prijedor, which then ICTY Deputy Prosecutor Graham Blewitt characterized as “fairly satisfactory and anyway superior to the level in other zones.”<sup>545</sup> It was in British-patrolled Prijedor that NATO forces made their first arrest of ICTY suspects, and others would soon follow.<sup>546</sup> Wesselingh, Vaulerin, Belloni and others cite British troops’ action in July 1997 against two Serbs sought by the ICTY as especially important to Bosnians who had been displaced by “ethnic cleansing” in Prijedor. On July 10, 1997, British troops arrested Milan

Kovačević, who was under indictment on genocide and other charges, and shot dead another suspect, Simo Drljača, when he resisted arrest. The wartime chief of police in Prijedor, Drljača inspired acute fear among displaced Bosniaks, and with good reason. He had “personally obstruct[ed] the return of refugees and displaced persons” after the war “by giving weapons to the local [Serb] population so that it could threaten anyone who came back.”<sup>547</sup> Belloni describes the impact of this action:

The July 1997 events had a profound impact. Following SFOR’s overdue activism, [war-time Prijedor leader] Milomir Stakić, fearing the possibility that ICTY had issued a secret indictment for his arrest, went ‘on permanent vacation’. Instead of the feared backlash against international peacekeepers, local authorities switched allegiance from the hard line wartime leader Radovan Karadžić to the more moderate leadership of Biljana Plavšić ... These changes gave Bosniak potential returnees a sufficient sense of security seriously to consider returning.<sup>548</sup>

The following spring, some 10,000 Bosniaks returned to Kozarac, and others returned to the city of Prijedor itself.<sup>549</sup> In the view of the International Crisis Group, “The lesson is clear: the removal of suspects indicted for war crimes ... has a ripple effect that can fundamentally alter the disposition of an area towards [Dayton Peace Agreement] implementation.”<sup>550</sup>

Our interviews in Prijedor a dozen years later suggest that the arrest of several key figures, notably Drljača, probably were crucial to displaced persons’ willingness to return to Prijedor. Moreover, the arrests of several other Prijedor suspects helped create a more conducive atmosphere for returns if only because they led other war criminals in Prijedor to lie low, fearing they might be next. Yet we repeatedly heard that the impact of the ICTY in this respect was limited given the large number of war criminals who remained unindicted and in positions of influence in Prijedor. We recount these views in the subsection that follows. First, however, it is helpful to understand the view from Prijedor concerning who was, and who was not, indicted by the ICTY.

## 2. The unindicted

*Of course, Bosnia is full of crimes that no one has been prosecuted for.*<sup>551</sup>

The Trial Judgment in the case of Milomir Stakić, the most senior person from Prijedor to face trial before the ICTY, describes in passing how Radovan Vokić arranged for the transfer on two buses of some 120 Muslim men from Keraterm, a detention camp to which they had been taken from their homes in Prijedor the day before, to the Omarska camp. One of the trial witnesses had compiled a list of “about 60 people he knew personally who were taken away on those buses and killed.”<sup>552</sup> The corpses of some of the victims were found buried in

mass graves of men who were killed by gunshot.<sup>553</sup> One of the victims was the brother of Edin Ramulić, who was also detained in Keraterm.<sup>554</sup>

Despite this finding, the ICTY never indicted Vokić. As we spoke to Edin Ramulić at his small office in downtown Prijedor in December 2006, he gestured toward his window and noted that Vokić worked in a small boutique “only 30 meters from here.”<sup>555</sup> Ramulić asked, “And what do you think it is like for me that I have an opportunity to see him on a daily basis? I truly hope that one day he will face justice.”<sup>556</sup> With the ICTY now winding up its work, Ramulić said, his efforts to find justice now focus on Bosnia’s State Court.

While Ramulić wants to see the man who coordinated his brother’s execution brought to justice, he is at least equally passionate about more senior war criminals who were never indicted by the ICTY nor removed from office through vetting programs.<sup>557</sup> Ramulić notes that the ICTY indicted only three of the eight members of the Crisis Staff of Prijedor, the Bosnian Serb wartime governing structure which helped coordinate the “ethnic cleansing” of Prijedor. Just as the *Stakić* trial judgment recorded evidence of Radovan Vokić’s criminal responsibility, it identified five Prijedor Crisis Staff members who were never indicted by the ICTY.<sup>558</sup> In consequence, these five—men who, in Ramulić’s words, were among those “deciding who would live and who would die” in Prijedor—were “freely walking around town.”<sup>559</sup> More troubling, according to Ramulić, some of them have held positions of influence in Prijedor’s municipal government or in publicly owned companies.<sup>560</sup>

In light of the pervasive presence of unindicted wartime leaders in Prijedor, Ramulić believes it would be hard to credit the ICTY with the willingness of displaced persons to return to Prijedor. But then, upon reflection, he modified his response: “We cannot say the Hague Tribunal did not contribute to the returns at all. In case Simo Drljača wasn’t killed on arrest, people would not dare to come back if he was still head of police department... It helped in his case.” Moreover, like others we interviewed Ramulić observed: “Indirectly, those who committed war crimes [but were not indicted] got a little bit afraid of justice and the Hague Tribunal, but this was the case just in the first years after the war.”

We asked Muharem Murselović, one of the two Bosniaks who played a leading role in organizing returns to Prijedor, what if any role ICTY arrests had played in the returns he helped mobilize.<sup>561</sup> Murselović replied that they had had an influence, but “not too much.” He explained: “We should rather say we got hope and expectations” from the arrests of ICTY indictees that were carried out. Like others in the region, Murselović noted that many individuals who had played more significant roles than the “concentration camp guards” prosecuted by the ICTY remained unindicted and in positions of influence in Prijedor. (Still, Murselović did not return to Prijedor himself until after Drljača was killed.)

Emsuda Mujagić, who found refuge in Zagreb during the war and later returned to Kozarac, responded this way when asked whether ICTY arrests were a factor in her willingness and that of others to return: “It certainly helped some people, it certainly helped.” Yet she, too,

says it was “not the major reason for them to come back because we are aware of the fact that [the ICTY] has not come up with the results as originally envisaged.”<sup>562</sup>

Sabahudin Garibović, one of only a dozen survivors of a convoy that brought some two hundred victims to the site of an infamous mass execution in Koričanski Stijene, returned to Kozarac in 2000 and now assists others who have returned there. Garibović believes that “the fact that some of the war criminals from Prijedor have been prosecuted before the Hague Tribunal was a helping factor in people returning here.” He explains the dynamic this way: “Basically it helped them to feel more free when they first returned [in the late 1990s] because others who were not yet prosecuted were hiding for awhile.” During the period when NATO forces were aggressively arresting ICTY suspects in Prijedor, those who were not yet indicted or feared that they were under secret indictment kept a low profile, and did not harass returnees. But when the ICTY’s completion strategy prevented it from opening new cases, the unindicted war criminals “started walking freely” again “because they probably thought that justice will never get them.”<sup>563</sup>

### 3. Brčko

Another place where significant numbers of displaced persons have returned is the autonomous district of Brčko.<sup>564</sup> Many, including former ICTY liaison officer in Sarajevo Matias Hellman, attribute this primarily to economic conditions in Brčko,<sup>565</sup> which are more favorable than in many other parts of Bosnia.<sup>566</sup> But Ferid Omerhodžić, who was among the first Bosniaks to return to Brčko, believes that ICTY arrests of two key war criminals were a “huge” factor in displaced persons’ willingness to return there.<sup>567</sup> The two defendants, Goran Jelisić and Ranko Češić, are notorious in the region for their brutality.

Omerhodžić himself returned to Brčko in 1996 soon after the Dayton Peace Agreement entered into effect, before either of these men was arrested. But he says most other displaced persons were too afraid to do so at that time. According to Omerhodžić,

It was like a huge, major relief knowing those two major perpetrators who committed the cruelest war crimes have been arrested. This ... gave us a feeling of greater security. Now we felt much safer. ... Ninety percent of Bosniaks had left [Brčko] at the beginning of the war; returns were significant after [these two] were arrested. Right after these two were arrested we felt a major relief. We started thinking differently. We began to feel safer so people began to think about returning.

Omerhodžić himself has actively encouraged his former neighbors to return home, and found that “it was absolutely harder” to persuade them to do so “before these two were arrested.” Even then, “it took lots of energy persuading them” to return since “there were also many others on the streets. But still, it was easier after these [two] arrests.”<sup>568</sup>

Our interviews on the relationship between arrests of ICTY indictees and returns of displaced Bosnians were limited, and our concluding observations must accordingly be modest and preliminary. The studies and interviews summarized in this section suggest that when combined with other favorable factors, the removal of notorious war criminals can contribute to displaced persons' willingness to return home and probably has had this effect, albeit to a limited extent. It seems unlikely, for example, that returns to Prijedor would have been as high as they have been if Simo Drjlača were still police chief there. Arrests of other ICTY indictees seem to have played only a limited part in easing the climate of intimidation in Prijedor, as large numbers of unindicted suspects remained in positions of influence. In a 2005 report, the UNHCR identified this as a key factor preventing many from exercising their right of return:

The presence of suspected war criminals and failure to arrest and prosecute them constitutes an important obstacle to return and affects the sense of security of many returnees. Moreover, it is not only that the local police has often not been able to arrest war criminals, but the continued presence of suspected war criminals in the local administration which hampers trust of the local population and particularly returnees in[] the justice system.<sup>569</sup>

As one of our interlocutors in Sarajevo noted in relation to this issue, "the ICTY of course could not solve all these problems."<sup>570</sup> Other organizations have been responsible for vetting the Bosnian police and judiciary.<sup>571</sup> Finally, our interviews with returnees, who noted the large numbers of unindicted perpetrators at large, may once again point up the need to ensure that victims and other citizens of countries where an international court has become engaged have realistic expectations of what the tribunal can and cannot accomplish.

## G. Bearing Witness

While we heard extensive criticisms of the ICTY during our research interviews in Bosnia, it bears noting that many of the fiercest criticisms came from representatives of victims' associations whose members have repeatedly served as witnesses in ICTY cases and which, organizationally, have helped the ICTY identify potential witnesses. Perhaps as much as any other recurring pattern in our interviews, this paradox seemed to capture many Bosnians' conflicted attitudes toward the Tribunal. Saša Madacki evokes Bosnians' ambivalence this way: "I hate the Tribunal but I need the Tribunal."<sup>572</sup>

Yet to note that many victims remain committed to testifying as witnesses in The Hague is not to say that their experiences as witnesses have been pleasant. As Eric Stover chronicled in his 2005 book about people who have testified at the ICTY, *The Witnesses*, their experiences there have hardly been ideal. Many witnesses who are the subject of protective measures—



their names are not publicly disclosed in judgments; their identity is obscured in court, for example—enjoy little protection when they return home, if home is still in Bosnia.<sup>573</sup> Although a majority of these witnesses have not faced serious problems as a result of their testimony, some have been harassed and even been targets of violence.<sup>574</sup>

During our interviews with members of victims' associations in Republika Srpska, this concern came up regularly. Emsuda Mujagić, who leads an NGO based in Kozarac, said that “protected witnesses ... as a matter of fact have no protection whatsoever.” She says that the combined effect of defendants' short sentences and the lack of meaningful protection for witnesses once they return home, “means a continuation of the torture for the victims today.”<sup>575</sup>

So it is noteworthy that many witnesses who have every reason to say “enough” say they will testify before the ICTY whenever called to do so.<sup>576</sup> Nusreta Sivac has been a witness in The Hague several times. A judge before the war, Sivac has been unable to return to her chosen profession, reportedly as retaliation by local Serb authorities for her testifying in The Hague. Indeed, she has been unable to find employment in the municipality where she lives, and has to commute to a town in the Federation for work. Despite the price Sivac has paid and the fact that “her freedom is under threat,” her associate Emsuda Mujagić notes, Sivac has ultimately remained willing to bear witness when asked because she knows what her testimony “means to justice, which has a higher importance.”<sup>577</sup>

For many witnesses, testifying before the ICTY is important for reasons that can easily get lost in Bosnians' long list of legitimate concerns. Their chief reason is moral, not instrumental, and it sifts down to a deeply felt need to bear witness for those who did not survive “ethnic cleansing.” In his study of ICTY witnesses, Stover writes that a majority of those he interviewed “stressed the compelling need to tell their story. They had survived unspeakable crimes while others had perished; it was their ‘moral duty’ to ensure that the truth about the death of family members, neighbors, and colleagues was duly recorded and acknowledged.”<sup>578</sup>

Time and again, we heard of similar motivations for testifying before the ICTY. Muharem Murselović, the returnee activist in Prijedor, was detained in the infamous Omarska camp for the crime of being Muslim and has been a willing witness in several ICTY cases. Like the witnesses described in Stover's study, Murselović testifies out of a deep sense of duty toward those who perished: “I am obliged to witness, to testify on behalf of hundreds of my friends who have been murdered in Prijedor whose guilt was the same as mine. I survived that hell and I never regretted for the fact that I witnessed.”<sup>579</sup>

Goran Jelisić played a notorious part in the “ethnic cleansing” of Brčko. In its summary of the *Jelisić* case, the ICTY Web site recalls Jelisić's arrival in Brčko during the war: “He introduced himself as the ‘Serb Adolf,’ said that he had come to Brčko to kill Muslims and often informed the Muslim detainees and others of the numbers of Muslims he had killed.” Hundreds of Muslim and Croat men and several women were taken to the Luka camp, formerly a warehouse just outside of Brčko, where they were “under armed guard and systematically killed.” Almost every day during that period, Jelisić “entered the Luka camp's main hangar

where most detainees were kept, selected detainees for interrogation, beat them and then often shot and killed them.”

Džafer Deronjić narrowly escaped being killed in Luka but is tormented by his perfect recall. “I remember everything,” he said, explaining why he was asked to testify in the *Jelisić* case. “I remember each time somebody lost a piece of his body” in Luka. For the past eight years, Deronjić told us, “I do not sleep at all,” and testifying against Jelisić did nothing to calm his nightmares. Yet when we asked if he wanted to testify, Deronjić did not hesitate: “Absolutely yes. It is in the interest of us all who survived the tortures to tell the truth, to tell the world what it was like. ...”<sup>580</sup>

## H. Concluding Observations

As this chapter reflects, many Bosnians are disappointed in the ICTY’s performance, some profoundly so. Yet, at least among the Bosnians we interviewed, the dominant view was that it was important to create “the Hague Tribunal.” Deronjić summed up his assessment of the court in terms that captured succinctly many of our interlocutors’ views: “As far as the Hague Tribunal, I’m not happy with its work. But the great thing was to have it established. It was excellent that it was established.”<sup>581</sup>

Many, like journalist Gojko Berić, shudder to imagine what their country would be like were it not for the ICTY: “If there was no Hague, Milošević would probably still be in power. If nothing else, he would at least be the head of his political party. Many ICTY convicts would still be active in politics and at this moment, summertime, these individuals would probably be having their vacations in some summer resort.”<sup>582</sup> Senad Pećanin, too, imagines a parallel universe without the ICTY. In his, “Probably Radovan Karadžić would be a member of Parliament. Ratko Mladić could be chief of staff of the army. Hundreds of war criminals could be highly ranked in all parts of state institutions. Without the ICTY, there would be no chance to have prosecutions of these most responsible people. If we put a hundred minuses, this one thing is heavier than all handicaps.”<sup>583</sup>



## V. Truth and Acknowledgment

*The official history of our region is being written in The Hague. There are so many different histories being offered here. ... Now, through the Hague process... we can get the complete picture.*<sup>584</sup>

*Even with the ICTY, there are three truths.*<sup>585</sup>

*We have a big problem here regarding acknowledgment of the truth. Because you see it is well known to all that several alleged truths exist—Muslims' truth, Serbs' truth, and Croats' truth.*<sup>586</sup>

As we have noted, “justice for its own sake” emerged during our interviews as the most important justification for the ICTY’s work for most of our Bosnian interlocutors. Yet many Bosnians also hoped the justice secured in The Hague would have a broader impact in the Balkans. And what mattered most to many is that the “truth” about wartime atrocities established in ICTY judgments be publicly accepted as factual truth and condemned without reservation or equivocation.

In a setting where the overwhelming majority of wartime atrocities were committed by Serbs, it is particularly important to members of ethnic groups who bore the brunt of these crimes that Bosnian Serbs accept the “trial truth” established in The Hague and express

remorse for crimes committed in their name. For many, this is seen as a precondition to reconciliation; for others, this type of acknowledgment is seen as a proxy for reconciliation—a key indicator of how far Bosnia has come in the process of social repair.

The issue of acknowledgment by Serbs looms especially large in the aspirations of many (non-Serb) Bosnians for another reason. As we noted in Chapter III and discuss in more detail here, denial has been a distinctive, though hardly uniform, feature of Serb discourse about wartime atrocities committed by Serbs. As Saša Madacki put it, “one part of the country is in constant denial.”<sup>587</sup> Serbs’ unwillingness to acknowledge the complete truth of “ethnic cleansing” has deepened survivors’ personal suffering and perpetuated the social rupture between Bosnia’s ethnic communities. Journalist Gojko Berić evoked the latter when, speculating about what would happen if the ICTY were to convict Radovan Karadžić of genocide but this finding were rejected by Bosnian Serbs, he said: “It’s not justice. In that case, we will have no trust among people.”<sup>588</sup>

Looking to broader issues of political community, persistent forms of denial are antithetical to the notion of a national society that has achieved “common agreement on an interpretation of the past.”<sup>589</sup> Although no one we interviewed believes that dispelling the fog of denial or justification would come solely or even principally through the work of the ICTY, those who emphasized this point hoped that the Tribunal’s findings of individual guilt, achieved through the crucible of criminal process, would radically shrink the margins of plausible denial.<sup>590</sup>

Many of our interlocutors—in particular urban intellectuals—emphasized that in their view, a crucial indicator of the ICTY’s success in fostering acknowledgement is whether leaders and citizens within each of the country’s three major ethnic groups accept that members of their own ethnic group committed atrocities and acknowledge that this was wrong. Some made clear that this is important not only as a gesture of reciprocal acknowledgment and remorse. It is also, they say, how it will be clear that Bosnia has transcended the divisions that make most citizens view matters of consequence, such as responsibility for war crimes, through an ethnic prism. What is important is that Bosnians recover a common commitment to core values—that war crimes are wrong, whoever commits them.

In this chapter we address two principal questions: First, to what extent have Bosnians taken on board the factual conclusions set forth in ICTY judgments and acknowledged that wartime atrocities committed by members of their own ethnic group deserve unqualified condemnation? Second, within the bounds of what is possible and appropriate for a judicial institution, has the ICTY performed as well as it could in ensuring that facts established in its judgments as well as basic information about the nature of its work, are known and understood in Bosnia?

## A. Acknowledging and Condemning Atrocities

### 1. Acknowledgment by Serbs

As recently as September 2009, Republika Srpska (RS) Prime Minister Milorad Dodik questioned Serb responsibility for wartime massacres of civilians in Tuzla and Sarajevo, suggesting that Muslims had staged the events.<sup>591</sup> The ICTY and the Court of Bosnia and Herzegovina had by then determined that Bosnian Serb forces had carried out these attacks.<sup>592</sup> Dodik's comments marked a recent nadir in public discourse, and at the end of this section we place his remarks in a broader context of troubling developments in Bosnia. We first consider whether, at least until the recent deterioration in Bosnia's political landscape, there had been overall movement toward greater acknowledgment of wartime atrocities.

Particularly during interviews in late 2006, we heard from a number of individuals who are in a position to observe trends over time that the prevailing rhetoric among Bosnian Serbs had changed—in particular, that it is relatively rare to hear the extreme brand of outright denial that Dodik expressed<sup>593</sup>—but that most Bosnian Serbs remained unwilling to acknowledge the extent of Serb responsibility for wartime atrocities and express unequivocal remorse. For example, Matias Hellman, then the ICTY's liaison officer in Sarajevo, told us in late 2006 that the prevailing Serb discourse was not to deny that Serbs committed wartime atrocities but to suggest that the ICTY was biased against Serbs in its case selection, asking questions like, “Why haven't you dealt with this crime against Serb victims?”<sup>594</sup> Speaking well before Dodik's recent remarks, civil society activist Mervan Miraščija described the discourse of Bosnian Serb leaders this way:

Serbian politicians like Dodik realize they should talk about war crimes as something that was bad, they will say that people who committed them should be punished. They insist on individualization, but they won't say there were no crimes. They may add, “but Serbs were also victims.” But they realize that it's not profitable to deny. That's a change.<sup>595</sup>

Rather than deny that Serbs committed wide-scale and systematic wartime atrocities, then, Serb leaders invoke the principle of individualization advanced by the ICTY itself, implying that such crimes as were committed were acts of individuals, not ones that engage broader responsibility among Serbs or leaders who acted in their names.

As we note below, the related notion that “war crimes deserve to be punished whoever committed them” was a common theme in our interviews throughout Bosnia, across ethnic lines. The frequency with which this is affirmed may be a testament to the effectiveness of the ICTY's normative power. But the phrase is also often invoked among Bosnian Serbs as a watchword for what many other Bosnians describe as an effort to equalize crimes committed

by members of all three major ethnic groups. Journalist Gojko Berić describes the prevailing Serb discourse this way: “Serbs, as is well known, would like to equalize those war crimes, make them relative by using the thesis that all three sides committed crimes in wartime and they claim that only Serbs are being prosecuted in The Hague—which of course is notorious nonsense.”<sup>596</sup>

Our interviews in the Republika Srpska (RS) town of Foča, where “ethnic cleansing” was brutally effective, captured in microcosm what is said to be the prevailing discourse among Bosnian Serbs. Josip Davidović, who represents an association of families of Serb soldiers killed during the war, expressed what he described as the common view in Foča:

The opinion that rules this town ... is that all war crimes by all sides should be prosecuted, on all three sides. But we believe that the war crimes against Serbs are not prosecuted in the same volume as in the case of war crimes against Bosniaks and Croats. We also stand on the opinion that The Hague is established to bring Serbs to trial.... We also stand on the opinion that The Hague is a political court.<sup>597</sup>

As we noted in Chapter III, Foča has the chilling distinction of being the first town in history to produce a verdict finding that sexual slavery occurred in circumstances amounting to the crime against humanity of enslavement. When asked if he thought the defendants from Foča who had been convicted of war crimes and crimes against humanity deserved to be punished, Davidović said “yes,” and added: “All those who committed war crimes deserve to be tried... Whoever committed crimes should be brought before the face of justice.” Yet like many Bosnian Serbs, he insists that the number of persons the ICTY has prosecuted for crimes committed against Serbs is “so minor compared to trials against Serbs. It’s almost negligible.” As for the sentences imposed on the Foča defendants—the same sentences victims from Foča found painfully short<sup>598</sup>—Davidović told us that “public opinion” among Serbs in Foča is that the sentences “are too high.”<sup>599</sup>

Noting that several of the ICTY’s defendants came from “this town,” Gordan Kalajdžić, an officer of an RS veterans’ group in Foča, continued: “It’s our opinion that the guilt is individual and everyone should be responsible for what he did. So my organization never stood behind those [defendants]. If they have committed war crimes, they should be held responsible.” Going farther than Josip Davidović in acknowledging the broader truth of patterns of abuses during the war, Kalajdžić says, “The truth is the Bosniaks were the major victims. They suffered the most.” Yet he also went farther than Davidović into the dominion of denial, saying that the executions of Muslims in Srebrenica were a “gesture of revenge by one segment of the Serb army for what the Bosnian Army did to Serbs in the first two years of the war.” And, he said, “it takes two to fight.” Like Davidović, Kalajdžić told us, “We Serbs see [the Hague Tribunal] as a political court” that does not treat everyone equally.<sup>600</sup>

We encountered another brand of non-acknowledgement when we interviewed Ljubiša Simović, president of the Association of Displaced and Refugees in Republika Srpska. When asked about the defendants from Foča who had been found guilty of bone-chilling crimes, Simović could only talk about how upsetting their arrests had been. Indeed, he went on at some length about how “traumatic” it was for the defendants’ families when SFOR troops arrested the suspects. Like others, Simović said the ICTY did not treat all sides equally, but instead focused on Serbs. Even so, he said “it was correct to form this court. But the way in which it works,” he added, “is not OK.”<sup>601</sup>

We heard a more determined form of denial from Nedjeljko Mitrović, president of the Republika Srpska Association of Families of Missing Persons in the RS capital of Banja Luka. Like others whom we interviewed in RS, Mitrović affirmed that “whoever committed war crimes deserves to be punished” and even said that “whoever was prosecuted before the ICTY deserves to be.” Yet he referred to the three and one-half year siege of Sarajevo by Bosnian Serbs—for which two Bosnian Serbs have been convicted before the ICTY—as the “so-called siege.”<sup>602</sup> In response to a request for clarification, Mitrović replied that Sarajevo was a “front line” in a two-way war. When reminded that Serbs targeted civilians in Sarajevo throughout the siege, he immediately conceded the point but moved on to what he apparently sees as firmer ground: The ICTY is “one-sided, partial, biased.”<sup>603</sup>

In these and other interviews we heard what might be seen as progress in the sense that our Bosnian Serb interlocutors did not generally deny that Serbs committed specific war crimes (Mitrović’s comments aside) and often said that those who did deserved to be prosecuted. But many of our Bosnian Serb interlocutors went a long way toward neutralizing the point by asserting that: 1) everyone committed war crimes; 2) it is mainly Serbs who are prosecuted by a “political court”; and 3) the few Bosniaks who have been prosecuted have received lenient sentences.

Later we consider several contextual factors accounting for Bosnian Serbs’ failure to acknowledge fully and condemn war crimes committed by Bosnian Serbs. For now, we note the relevance of a dynamic that one of our interlocutors in Foča, Josip Davidović, came close to acknowledging: strong peer pressure. In a tone that suggested he realized how his remarks must have sounded, Davidović said near the end of our interview: “You have to be partial or biased when it is about your people, you have to be partial. This is an unwritten rule, regardless of how much you would like it to be different.”<sup>604</sup>

Davidović might have added that “you have to be partial” especially when speaking to foreign interviewer who may quote your remarks in a public report. During interviews in Prijedor, we were told that local Serbs “unofficially acknowledge” the ethnic cleansing that happened there during the war but, with rare exception, will not do so publicly. One of the few local Serbs who has acknowledged that Serbs in Prijedor committed “ethnic cleansing” wholesale, Milimir Popović, told us “many [Serbs] talk like this but won’t come out and [do so publicly].”<sup>605</sup>



## 2. Srebrenica

Understandably, many Bosniaks (and others) consider Serb leaders' and other Bosnian Serbs' treatment of the genocide in Srebrenica as a key indicator of how far Serbs have traveled on the road to acknowledgement. As we chronicle in this section, recent years have seen significant progress in this regard, yet many Serbs remain unwilling to acknowledge that Bosnian Serb forces committed genocide in Srebrenica and to express remorse for their actions.

Given the staggering scale of the slaughter and the systematically discriminatory fashion in which at least 7,000 executions were organized, it would be impossible to deny the nature of the crime or to blame it on aberrant actors. Yet when Serbian authorities published an analysis of wartime atrocities in September 2002, the resulting document was a study in distancing, distortion, and denial. Issued more than a year after an ICTY Trial Chamber had ruled that the July 1995 massacre in Srebrenica was a genocide,<sup>606</sup> the report stunned Federation authorities and citizens, as well as the international community. *Time* magazine summarized reactions to the report and its key findings this way:

Authorities in the Federation Entity of Bosnia and Herzegovina and the international community have severely condemned a report released by authorities in the Republika Srpska claiming the July 1995 massacre of Bosnian Muslims at Srebrenica never happened. Though it is widely accepted that between 7,000 and 8,000 Bosniak men and boys were massacred by Bosnian Serb forces when they took control of Srebrenica in eastern Bosnia between 11 and 15 July 1995, the report offers a completely different story, blaming deaths on "exhaustion," among other things.

The report—conducted in early September by the Republika Srpska's Government Bureau for Relations with the International Criminal Tribunal for the Former Yugoslavia (ICTY)—claims that no more than 2,000 were killed, and that all were armed soldiers of the Bosnian Army and not civilians. Of those 2,000, the new study says that 1,600 were killed in battle or while attempting escape, and 100 died simply because they were "exhausted." The study also claims that it is possible that fewer than 200 members of the Bosnian Army were killed by members of the Bosnian Serb Army in acts of revenge or because they were not aware of the particulars of the Geneva Convention on prisoners of war.<sup>607</sup>

International organizations working in Bosnia were dismayed. The International Commission on Missing Persons (ICMP) issued a statement noting that the RS report's treatment of missing persons "contains what ICMP believes to be serious inaccuracies" and placing these in a broader context: "Manipulation of the issue of the missing for political purposes, including the manipulation of numbers of missing, has been an ongoing practice within Bosnia and

Herzegovina that only serves to cause further pain and suffering in a society that has already suffered so much.”<sup>608</sup> Then High Representative Paddy Ashdown said the report’s findings were “so far from the truth as to be almost not worth dignifying with a response. It is tendentious, preposterous, and inflammatory.”<sup>609</sup>

The next two years brought a significant turnabout, however. During the 2003 anniversary of the Srebrenica massacre, then RS Prime Minister Dragan Mikerević attended the annual commemoration ceremony in Potočari for the first time.<sup>610</sup> Mikerević also acknowledged that the by-then well established crimes had to be addressed, although he apparently did not use the word genocide: “These reports prove that there was a crime here. One needs to learn from one’s mistakes, and there have been a lot of mistakes in our history.”<sup>611</sup>

A mandate from the Office of the High Representative (OHR) to conduct an investigation to establish the full truth relating to the Srebrenica massacre led to the next milestone. The commission established pursuant to the OHR mandate, which included one international and one Bosniak member, issued its report (later supplemented) on June 11, 2004.<sup>612</sup> For the first time, RS authorities themselves compiled data on almost 7,800 victims of the Srebrenica massacre and identified 32 previously unknown mass grave sites.<sup>613</sup> The report also stated that the perpetrators of the massacre “undertook measures to cover up the crime by moving the bodies” to other sites.<sup>614</sup>

Less than two weeks later, then RS President Dragan Čavić appeared on RS television. In his extraordinary remarks, Čavić—a member of the party of Radovan Karadžić—said that the report “undoubtedly establishes that in nine days of July 1995 atrocities were committed in the area of Srebrenica.” Then, in words that Bosniaks quote to the present day, he continued: “I have to say that these nine days of July of the Srebrenica tragedy represent a black page in the history of the Serb people.”<sup>615</sup> The RS government itself issued an apology after the commission issued its final report.<sup>616</sup> Even so, today Bosniaks often cite these events more to illustrate the resilience of Serb denial than to celebrate a watershed in the road toward acknowledgment. After quoting Čavić’s historic “black page in history” statement, our interlocutors typically proceeded to note that Čavić lost his bid for re-election in 2006.<sup>617</sup>

Another moment of truth came in February 2007, when the International Court of Justice (ICJ) ruled that Bosnian Serbs committed genocide in Srebrenica.<sup>618</sup> The ICJ’s key legal and factual conclusions relied heavily on the ICTY’s judgments, including in particular in the *Krstić* case.<sup>619</sup>

RS Prime Minister Milorad Dodik’s first response to the judgment was to reject its finding of genocide and attribute the Srebrenica killings to rogue elements of the Bosnian Serb army.<sup>620</sup> Accordingly, he said, individuals had to be held accountable, not the institutions or people of RS.<sup>621</sup> Two days after the ICJ rendered its judgment, the government of Republika Srpska issued a statement “express[ing] its deepest regret for the crimes committed against non-Serbs during the recent war in Bosnia and condemn[ing] all persons who took part in these crimes.”<sup>622</sup> The government said it was “essential that a deepest apology be

extended to the victims, their families and friends, regardless of their ethnicity,”<sup>623</sup> but apparently stopped short of acknowledging political responsibility for genocide committed by its own armed forces. Again, the picture was mixed: While the RS government’s response to the judgment went farther in condemning the crimes committed in Srebrenica than would have been imaginable ten years earlier, it also took care to avoid language of unqualified acceptance of responsibility, if only political.

In somewhat similar fashion, in late March 2010 the Serbian Parliament adopted an unprecedented declaration “condemning in strongest terms the crime committed in July 1995 against Bosniak population of Srebrenica” and apologizing to the families of the victims. Notably, however, the declaration avoided any reference to genocide. What was still a landmark acknowledgment of the underlying facts was then further undermined by the parliament’s “expectation that the highest authorities in other states in the territory of the former Yugoslavia will in the same way condemn crimes committed against the Serbs, and apologize and express condolences to the families of the Serb victims.”<sup>624</sup>

To the extent that there has been movement in the direction of Serb acknowledgement of the Srebrenica genocide, a question of special relevance to this study is whether or to what degree the ICTY’s work has been a contributing factor (compared to, for example, the RS Commission report released in 2004). Damir Arnaut, a senior legal advisor to the Bosniak member of the BiH Presidency, is convinced that the ICTY’s finding in *Krstić* that Bosnian Serbs committed genocide in Srebrenica had a significant impact in this regard. Arnaut concedes that there are enduring indicators of denial, such as the opposition of Serb members of parliament to a resolution that would declare July 11 a day of remembrance for the victims of genocide in Srebrenica (the interview in which he expressed this view took place some eight months before the aforementioned declaration by Serbia’s Parliament).<sup>625</sup> But Arnaut believes that *Krstić* changed the dynamic between members of the ethnic groups who are represented in Bosnia’s trifurcated national government. Whereas in 1998–1999 it was common to hear Serbs deny that there was a genocide in Srebrenica, he notes, now “there is no denial that genocide happened.”<sup>626</sup> On the level of daily interactions, Arnaut continued, “it helps that there are judicial findings. ... When you talk about other issues, this elephant isn’t in the room” anymore.<sup>627</sup>

Like Arnaut, journalist Ivan Lovrenović thinks that the *Krstić* judgment had a discernible impact on the way that Serb politicians talked about Srebrenica. He attributes this to the judgment’s reminder that the international community is aware of what happened and will not allow the issue go away. And yet, Lovrenović continued, “that’s when [Serb politicians] intensively started working on discovering victims on their side.” Whereas they had previously been “completely quiet even about their own victims,” after *Krstić* they were trying “to equalize [by saying] that Serbs were victims the same as others.”<sup>628</sup>

### 3. Acknowledgement on the part of other ethnic groups

Measured against an ideal to which many Bosnians aspire,<sup>629</sup> in which leaders and individuals from all of Bosnia's ethnic groups publicly acknowledge crimes committed by members of their own ethnic group and condemn them, no one would—and none of our interlocutors did—claim that Bosnia has achieved this ideal. As noted in Chapter II, Bosniak political leaders have from the beginning of the post-Dayton period been willing to cooperate with the ICTY by ensuring that Bosniak suspects appear in The Hague. Still, like leaders of other ethnic groups, Bosniak political figures have treated defendants who return from The Hague as heroes.

As was often noted during our interviews, when the Bosnian army commander in Srebrenica, Naser Orić, returned to Bosnia after his initial conviction (later overturned on appeal) and minimal sentence for crimes committed against Serb detainees, he was welcomed as a war hero.<sup>630</sup> The Bosniak chairman of the Bosnian Presidency, Sulejman Tihić, publicly welcomed the verdict as a vindication: "Now it can clearly be seen who was defending unarmed civilians and who was committing crimes," Tihić said.<sup>631</sup> Reflecting on Orić's reception as a war hero, Sevima Sali-Terzić said, "People celebrated Orić here, they didn't understand he was guilty of anything." (Again, this interview took place after Orić's conviction at trial but before his exoneration on appeal.) Sali-Terzić continued: "As long as someone found guilty of war crimes is celebrated as a hero something is terribly wrong, with politicians and with the people."<sup>632</sup>

Dobрила Govedarica noted that, apart from intellectuals—including the cosmopolitan media—there is "no understanding" among Bosniaks that "war crimes could also be committed by Bosniak soldiers." If one raises the issue of war crimes for which Bosniaks have been prosecuted before the ICTY, the reaction is often defensive because condemning these crimes "could be seen as equalizing guilt."<sup>633</sup> We certainly encountered this reaction in some interviews: a number of Bosniaks expressed concern that the ICTY's prosecution of Bosniaks was an effort to establish a "national balance" among perpetrators.<sup>634</sup> Noting that a reluctance to confront war crimes by members of one's own ethnic community was common in all three major ethnic groups in Bosnia, Govedarica said "Ninety-nine percent of Bosnians think of war crimes in terms of ethnic groups and from my point of view that's a problem."<sup>635</sup>

If the situation today is far from where it should be, some see overall progress compared to the postwar years. Journalist Senad Pećanin recalled that in 1997, *Dani* investigated war crimes committed by Bosniaks; most but not all of the victims were "innocent Serbs." The story got picked up by the international media—and the journalists were attacked by the Bosniak leadership. Pećanin recalled, "it was a terrible experience for us [we] received a lot of threats" and a bomb was thrown into *Dani's* office. But "things have changed." Now, he says, even leading politicians acknowledge that members of their ethnic group committed crimes. Still, among "ordinary people" within each ethnic group, there is an overriding focus on having "their own suffering acknowledged."<sup>636</sup>

#### 4. Contextual considerations

Our interlocutors offered several explanations for the persistent patterns described above. Jasna Bakšić Muftić offered a social-psychological insight: “Sometimes the Hague Tribunal is like a mirror and if you see an ugly face, you reject it. But you know it’s true. But officially, you say ‘I’m nicer, etc.’”<sup>637</sup> Others see the hand of historical memory, which weighs heavily in the Balkans, at play in many Bosnians’ reluctance to accept the truth about crimes committed by members of their own ethnic group. Reflecting on why many Bosnian Croats are reluctant to accept the guilt of Bosnian Croat defendants whom the ICTY convicted of war crimes, Dobrila Govedarica invoked a broader context: Croats, she recalled, have long been blamed in the Balkans for crimes committed in World War II, when their state was allied with Nazi Germany. “Finally, they get to a point where the Serbs, who took almost all the credit for being on the right side in World War II, are the most guilty ones” in the 1990s war. In addition, there is a deep-rooted perception that those who defend themselves cannot, by definition, commit a crime. In this setting, there are “strong psychological reasons to resist accepting responsibility.”<sup>638</sup>

But while psychological dynamics are important, virtually everyone in Bosnia faults political leaders for perpetuating ethnic perspectives. As Mervan Miraščija put it, “politicians use [the ICTY] for their own aims.”<sup>639</sup> Likewise noting that “politicians maintain ethnic divisionism to retain power,” Savima Sali-Terzić added that the attention Bosniak politicians pay to ICTY indictments “is a tool in pre-elections.”<sup>640</sup>

During the past year-and-a-half, RS leader Milorad Dodik has threatened secession if the Serb entity is not granted greater autonomy,<sup>641</sup> and provoked a political crisis when he issued a decree purporting to nullify state institutions. Acknowledging Serb responsibility for genocide, many point out, is hardly supportive of his political agenda. Conversely, Bosniak leader Haris Siladžić condemns the Serb entity as a creature of genocide<sup>642</sup> and pivoted off the ICJ’s February 2007 genocide judgment to demand that Srebrenica be wrested from Serb control.<sup>643</sup> While many Srebrenica survivors we interviewed agree with his position, Bosnian intellectuals widely believe that Bosniak political leaders have nurtured victims’ suffering to entrench their own political positions, just as Serb leaders have perpetuated an anti-ICTY stance to advance a self-serving political agenda.<sup>644</sup> A point emphasized by many of our interlocutors is that Bosniak leaders have “used and misused victims’ associations.”<sup>645</sup> More generally, speaking of the issue of war crimes, Dobrila Govedarica noted, “political leaders aren’t very responsible when this issue is about.”<sup>646</sup>

Analyzing Bosnia’s complex political landscape is beyond the province of this report, but it is necessary to note that the ICTY’s impact in Bosnia, as elsewhere in the Balkans, is mediated by domestic political figures and the local media. With ethnic relationships in Bosnia tenser than they have been in years,<sup>647</sup> Bosnians like Emir Suljagić wonder, “How do you translate judicial findings of the Tribunal into political facts under these kind of circumstances?”<sup>648</sup>

More generally, Bosnians' perceptions of the ICTY and of its judgments appear to be at least in part a function of the specific ethno-political context in which they are situated.<sup>649</sup>

Beyond recent political trends, a recurring theme pressed by many of our interlocutors is that Bosnians' tendency to view issues, including those relating to war crimes, through an ethnic prism is in large part a legacy of Dayton. Journalist Ivan Lovrenović made the point this way: "The scheme of ethnic conflict going on in wartime was in a way verified politically through the Dayton Peace Agreement. The military dimension has been removed, the war finished. Metaphorically speaking, it moved on to the political field and it's still on today." In this context, he says, the ICTY's work is filtered through an ethnic lens, with each group approving of verdicts convicting "war criminals from the other ethnic group" and faulting the ICTY "when it reaches a verdict from our ethnic group." In this setting, it is unlikely that establishing facts at trial can by itself dispel denial. "Metaphorically, the ears are stuffed with cotton."<sup>650</sup>

Later we consider how well has the ICTY performed in meeting the challenges presented by local actors who mediate the meaning of its judgments and who are key sources of most Bosnians' information about the ICTY. First, however, we take up Bosnians' perceptions of the significance of the ICTY's verdicts in their own right.

## B. Establishing the Truth

While many of our interlocutors in Bosnia are discouraged that "three versions of the truth" persist fourteen years after Dayton, we did not interview anyone who concluded that the ICTY was for that reason a failure. Instead, many believe that disappointments in this regard make the Tribunal's role in establishing facts all the more important.

For victims who suffered unspeakable crimes, the affirmation in ICTY verdicts that their nightmare really happened—that a specific person was responsible and that what he did was criminal—appears to be all the more important in the face of denial by those who abetted the perpetrators through acquiescence or active support. Omarska survivor Muharem Murselović evoked this notion when he told us he is "most satisfied with the realistic reflection of what happened in Prijedor through [the ICTY's] verdicts and sentences."<sup>651</sup> Noting that the Tribunal has "extremely rich documentation" of Prijedor's nightmarish experience, Murselović said: "With that documentation, with those verdicts ... the truth about the situation in Prijedor has been established, and this is the largest, the major achievement of the ICTY."<sup>652</sup> A recent study of victims in the area, however, suggests that even this achievement still pales against the prevailing reality with which they must contend on a daily basis.<sup>653</sup>

Noting that ICTY cases "established a lot of things that people forgot about," journalist Nerma Jelačić observed that "it matters for [victims] so much." Without its work, she says, "you wouldn't be able to counter the political truth." This is not to say that politicians have stopped manipulating the truth. But now "you have the alternative you can counter with."<sup>654</sup> Sinan Alić,

a journalist who directs the non-governmental organization “Foundation Truth, Justice and Reconciliation,” believes that the work of the ICTY is “very important for the whole process of reconciliation because among us we would never be able to come to terms with what happened—are some war criminals? Was Srebrenica a genocide?” Alić recognizes that even with the ICTY, “there is no consensus and it will continue long after I am dead.” Nevertheless, he thinks the situation would be far worse “if there were no ICTY,” and believes it has already “made it harder to deny abuses.”<sup>655</sup>

Zdravko Grebo thinks that “it is an important test of the Hague Tribunal to prevent denial.” But like others, he does not conclude that the widespread treatment of war criminals as “national heroes” by “their ethnic group” means its work has not succeeded. “People can always say it didn’t happen but now there are documents. ... Finally, you cannot say I didn’t know.”<sup>656</sup> As for the question whether the *Krstić* judgment has had the sort of effect Damir Arnaut described on a wider scale, its importance to many Bosnians may be that, even if many still resist its finding of genocide, the deniers have been definitively judged to be wrong. Mirsad Tokača may have had this in mind when he described what he called the *Krstić* judgment’s importance “for Bosnian society”: “Finally there is no dilemma. ... After this decision, there is no negation and refusing of the fact that genocide happened.”<sup>657</sup>

A number of our interlocutors, while acknowledging that the ICTY’s work has not yet persuaded Bosnians to acknowledge fully wartime atrocities, expressed the belief that its historical legacy will be crucial in establishing a commonly accepted history in the future. Emir Suljagić believes the ICTY has thoroughly failed to achieve the main goals he says it set for itself—countering impunity and promoting reconciliation. But when asked if, in light of this, it was a mistake to establish the ICTY, he (like virtually everyone we interviewed) responded adamantly, “No, no!,” and explains that despite these failures the Tribunal has achieved something deeply consequential. Because of its work, there are “adjudicated facts that we can call upon, and that we can point to, that we can try and learn from and build upon which would not have been there had it not been for the Tribunal.” In his view, this alone “has justified its existence.”<sup>658</sup>

## C. Destruction of Personal Artifacts

While the ICTY’s “adjudicated facts” and the evidence that will become part of its archives may rank among its most important contributions, a disclosure in mid-2009 about the prosecutor’s treatment of one source of evidence has been deeply unsettling for many Bosnians.<sup>659</sup> ICTY Prosecutor Serge Brammertz confirmed reports that his office had disposed of some 1,000 personal artifacts found in mass graves in late 2005 and early 2006 because they were “deteriorating, and presented a risk to health,” according to the prosecutor’s spokesperson, Olga Kavran.<sup>660</sup> Except for this general explanation and Kavran’s suggestion that this action

is standard procedure for prosecutors' offices, the ICTY prosecutor has not clarified the circumstances behind this episode or indicated why efforts were not made to allow access to the destroyed artifacts for purposes of DNA testing and the like.

Survivors who have literally lost every tangible trace of their families were devastated, fearing that their only chance at recovering a physical link to their loved ones had been destroyed.<sup>661</sup> Forensics experts expressed concern that the ICTY could have destroyed material that holds the key to determining the fate of those still missing—the personal truth which, as we noted earlier, may be the most important truth for many survivors.<sup>662</sup> Mirsad Tokača, who hopes that his database of wartime atrocities will help build the foundation for a “new culture of memory based on facts, not politics,” describes the prosecutor’s destruction of artifacts as “the biggest scandal of the Tribunal. Really, it’s the killing of memory.”<sup>663</sup>

## D. Outreach

*Most are in agreement—the ICTY didn't get very close to the public in the former Yugoslavia. It wasn't that present for people.*<sup>664</sup>

Clearly, there is an enormous distance between the facts adjudicated in The Hague and the reality that is either known or acknowledged some 2,000 kilometers away in Bosnia. With judgments typically running hundreds of pages long, keeping abreast of the ICTY’s jurisprudence is a challenge even for lawyers who specialize in international humanitarian law. But for victims whose personal experiences form the facts set forth in ICTY verdicts, the Tribunal’s judgments may be completely inaccessible: Those who suffered searing losses include large numbers of rural and uneducated victims. Adjudicated facts aside, basic information about the way the ICTY has operated—whom it has indicted, why defendants who plead guilty receive reduced sentences and the like—has long been either manipulated by political and other leaders or simply misunderstood by others.<sup>665</sup> A recent empirical study in Bosnia found that even in places that had suffered the largest number of wartime casualties—places like Prijedor and Srebrenica—people interviewed “as a whole were poorly informed about the Tribunal.”<sup>666</sup>

And so two important questions are whether the ICTY itself could and should have done more to bridge the gap between The Hague and Bosnia. As we note below, the Tribunal’s efforts to do so began belatedly and, after that, were not sufficient to overcome deeply entrenched misperceptions of both the Tribunal and the facts that it has established.

### 1. Early communication efforts

During the early years of the ICTY, the institution made scant efforts to communicate with those most affected by its work—citizens of Balkan countries. To be sure, travel to wartime



Bosnia was necessarily extremely limited during the first two and one-half years of the ICTY's existence. But the Tribunal's reticence to engage was also largely a function of judicial officers' professional culture: In many countries there are strong norms to the effect that judges should "let the judgment speak for itself."

Yet this approach was problematic when applied by a court operating 2,000 kilometers away from those most keenly interested in its work—not least because the ICTY did not translate its judgments into the local languages of the former Yugoslavia until 1999. And while the "remoteness of the Hague Tribunal from Bosnia and Herzegovina was a *big one*,"<sup>667</sup> nationalist leaders in Bosnia were aggressively filling the void. Branko Todorović, who has played a leading role in educating other Serbs—"and all others in this country, as the level of knowledge was extremely limited among all"—about the ICTY's work, recalled that "the criminal political structures" in Republika Srpska were "in control of all the media" and were "able to have an immense effect on people's opinions" about the ICTY. With the ICTY itself largely absent, "the reflections that were here in Bosnia and Herzegovina were only the ones that could have passed through the manipulations of the media bosses, the politicians here."<sup>668</sup>

By around 1998, the Tribunal's then President Gabrielle Kirk McDonald and then Prosecutor Louise Arbour became keenly aware that the Tribunal was "absolutely misunderstood" in the Balkans. Anton Nikiforov, who joined the prosecutor's staff in 1998, recalled that local officials in the Balkans "were knowingly misrepresenting the Tribunal," yet the court had "no capacity to work in the region [and] no capacity to speak in the regional language."<sup>669</sup> Persuaded that this was undercutting the Tribunal's work, Judge McDonald launched the Tribunal's Outreach Programme, which became operational in October 1999,<sup>670</sup> although the Tribunal had begun developing its outreach program in 1997, just over a year after the war in Bosnia ended and an outreach program became viable.<sup>671</sup>

## 2. Bridging the Gap

As a former ICTY outreach officer noted, however, "It is much more difficult to dismantle already established misperceptions and propaganda than it would have been to start from the outset with updated and accurate information about the Tribunal."<sup>672</sup> The "enduring cost of time lost" was a constant theme in our interviews in Bosnia. So too, however, was "better late than not at all": When we interviewed Nerma Jelačić in late 2006 (before she became a spokeswoman for the ICTY in 2008), she said that the ICTY was "now doing all it can" in terms of outreach but that its "impact would have been much bigger if it were doing in the '90's what it is doing now."<sup>673</sup> Jelačić was particularly impressed by a relatively recent initiative of the ICTY Outreach Programme launched in 2004–05, called Bridging the Gap. As its name implies, this initiative aims to bridge the informational chasm between The Hague and local communities in Bosnia.

Under this program, once trial proceedings are completed (i.e., when there are no appeals proceedings ahead), ICTY officials and staff travel to the town where adjudicated

crimes occurred and meet with local citizens and officials to explain how they investigated the crimes; to describe the outcome of cases, and to respond to questions. Bridging the Gap programs have been organized in Prijedor, Brčko, Konjić, Foča, and Srebrenica.<sup>674</sup>

According to Branko Todorović, who played a major role in organizing these events, some of the local authorities where the events took place were “strictly against this” when first approached about convening such a program in their towns; Todorović had to come up with funds for electricity and bathroom doors in the cultural center in Srebrenica because the local mayor doubted the need for such a program. (Heating was too expensive, however, “so it was held in a very cold room.”) Local authorities in Foča and in Konjić firmly refused to support the program, while the authorities in Brčko District were supportive and cooperative. Yet the turnout was larger than expected in all five programs. “Simply there is an authentic feeling among people to see what the Hague [Tribunal] is doing,” Todorović explains.

After participating in Bridging the Gap events, Bosnians—including Serbs—whose knowledge of the ICTY had long been filtered by local political leaders and ethnic media were, in Todorović’s words, finally “able to see the factual truth, not the political truth,” and they grasped that “the truths are horrible.” One of the examples Todorović cited involved a Bridging the Gap program in Brčko, where representatives of the ICTY described the outcome of a case from that town. Among Brčko’s Muslim community, it had long been rumored that Serbs had burned the bodies of Muslim victims in ovens normally used to cremate animals in a facility known as the *Kafiljerija*. An ICTY police investigator explained that Tribunal investigators had looked into this report, and described how the investigators were able definitely to establish that Serbs had not in fact burned Muslim victims in the *Kafiljerija*, as had long been rumored. Todorović believes that if this expert had not been able persuasively to set this rumor to rest, “it would always cause hate” in Brčko. Instead, “the book on that was closed.”<sup>675</sup>

He described another memorable moment at the Bridging the Gap program in Foča. When people gathered for the program, the air was thick with tension. Then, the ICTY staff presented a videotape about their work on crimes committed in Foča during the war. Todorović describes what happened next:

All present could see on a screen the guy who did the raping in Foča. And all of them could hear and see how the prosecutor was asking him, “Did you rape that little girl? And he said, “Yes, I did.” “And you were very well aware at that moment that she was only 12 years old?” And he said “Yes.” At that time he was probably 45 years old. And then the prosecutor repeated his question, saying “You knew that she was 12 at the most, and what else did you tell her?” He told her, “you know I would do many more terrible things to you but I shall not because I have at home a daughter” who is her age, “so I won’t.” So the prosecutor confirmed, “It’s true you have a daughter at home?” I was in the back rows and there were like 140 people there and [when the technical people changed the tapes] I closed my eyes and you wouldn’t believe it, for a moment

there was such a silence ... that you can hear. It's a horrible silence. And it lasted for [a] long [time].... And for me it was the most important moment of the day. Then we had a lunch break, and you could see the change. Now the people ...are leaving the room, looking down, some were commenting, "You know, we really didn't know this, it is a horrible crime."

Todorović thought that many would not return after the lunch break but they did, and everyone stayed until the end of the program. Todorović said, "I really think that they left a bit different."<sup>676</sup> Describing this same program, Nerma Jelačić said, "people were genuinely shocked."<sup>677</sup>

Todorović shared another perception of the dynamics at play during programs like the one described above. In his view, many of the "ordinary people" who were not involved in committing war crimes had a chance "to make a distance" from those who did. Todorović recognized that the premise of their reaction—that participants believe that what they heard in the ICTY program "has nothing to do with me"—may itself seem to be a form of denial. But he noted that, if you insist that all Serbs are guilty, "you don't give them a chance to change. And if you push a man to the wall, what can he do but say 'yes, yes, I am the same, so what?'"<sup>678</sup> Beyond their potential impact in advancing acknowledgment of crimes and condemning them, these programs, Todorović believes, can help people understand that people from their communities "weren't convicted because they were Bosniak, Serb, or Croat but because they committed crimes."<sup>679</sup>

While the programs described above suggest the potential impact of effective outreach efforts, it would be misleading to suggest that an occasional conference can fundamentally change deeply entrenched attitudes. Describing the seemingly transformative Bridging the Gap programs, Jelačić said, "You can genuinely plant that seed, and then you need to go back and water it."<sup>680</sup> This is not to say the follow up work has to be done by the ICTY, but it has to be done.

Refik Hodžić, who played a central role in designing the Bridging the Gap project, was (once again) the Tribunal's liaison officer in Sarajevo at the time of our July 2009 interviews. When we spoke with Hodžić then, he expressed concern about the project's long-term impact. The day before we spoke, a nationalist group had disrupted the annual commemoration of the Srebrenica massacre, "chanting insults" against the Muslim survivors.<sup>681</sup> Like many with whom we spoke, this came as yet another alarming marker of Bosnia's increasingly heated political climate. And in this setting, it was hard to be optimistic about the ICTY's ability to foster change. With limited resources—the ICTY has only one outreach officer in all of Bosnia—the ICTY is vastly outmatched when it comes to creating a compelling narrative. People living in the communities where Bridging the Gap programs have been convened "are exposed to other rhetoric" on a daily basis.<sup>682</sup>

Srđan Dizdarević believes that the ICTY's Outreach Programme, not only "came too late" but remains "absolutely insufficient."<sup>683</sup> (We note that outreach is not covered in the Tribunal's budget so the program has to rely on voluntary extra-budgetary funding, which has often been difficult to raise.) Noting the formidable obstacles that Bosnian journalists face in trying to cover proceedings in The Hague, *Dani* editor Senad Pećanin believes the ICTY needs to do far more to ensure that its work is properly understood in the region. In his view, "The ICTY couldn't be proud of their achievement in outreach."<sup>684</sup>

On the positive side of the ledger, several of our interlocutors noted that the ICTY's outreach efforts have been strengthened by the fact that the public faces of the Tribunal are increasingly individuals from the Balkans. Bosnian journalist Nerma Jelačić is now an ICTY spokesperson. The prosecutor's principal spokesperson, Olga Kavran, is from Serbia, and the liaison officer based in Sarajevo, Refik Hodžić, is from Bosnia. Even though previous spokespersons were fluent in the local language, the individuals now representing the ICTY inspire greater confidence among Bosnians, Nidžara Ahmetašević says, because they "know the region" and understand how news from The Hague will be understood in the Balkans.<sup>685</sup>

Yet many stress the need for far more comprehensive efforts to educate Bosnians about the Tribunal and the facts that it has helped clarify. Asserting that the ICTY's Outreach Programme is "doing a good job within the limits they have," Saša Madacki believes the challenge is "how to reach those who are out of reach."<sup>686</sup>

## E. Conclusion: Beyond the Tribunal's Reach

The ICTY faces formidable challenges in trying to ensure that its work is understood in Bosnia. But particularly in its early years, the Tribunal ceded the ground to local politicians who were only too eager to distort its work. As we have noted, advances have been made, such as the overhaul of the Tribunal's web site in late 2008 (though this remains inaccessible for many Bosnians).

But to note these concerns is not to suggest that it is solely up to the ICTY to counter distortion by local political figures and media. Recognizing the intrinsic limitations in any court's ability to "educate" the public as well as the specific weaknesses of the ICTY's outreach, a number of Bosnian civil society activists believe that a truth commission should be established. Among other contributions, they believe that such a body could provide younger Bosnians the chance to obtain a complete picture of the recent past, and could both confer and receive acknowledgment of crimes and sufferings.

Two principal initiatives for setting up a national truth commission in BiH have been launched—but thus far have failed. The first was launched in the late nineties and peaked at a "Truth and Reconciliation" conference, held in Sarajevo in 2000, with attendance of representatives of more than one hundred non-governmental organizations from BiH. Proponents

of this initiative submitted a draft law on the truth and reconciliation commission to the Parliamentary Assembly of BiH for consideration. But the draft never entered parliamentary procedure, principally due to lack of political will as well as fear among many victims that the work of the commission could result in amnesty for war crimes. Six years later, in May 2006, a parliamentary parties' working group produced a similar draft law. Victims' groups, human rights organizations, and the media were harshly critical of this effort, however, charging that it lacked transparency and involvement of civil society. The political parties, in turn, shifted the focus of their attention to the October parliamentary elections.<sup>687</sup> Although a more limited effort to look at crimes in Sarajevo alone resulted in the establishment in June 2006 of an official fact-finding commission by the BiH Council of Ministers, this too never got off the ground.<sup>688</sup>

More recently, a new initiative has formed to build a coalition of civil society organizations from throughout the countries of the former Yugoslavia to motivate the public and the national governments to create a Regional Commission on Establishing the Facts on War Crimes and Grave Violations of Human Rights in the Former Yugoslavia, known as RECOM. As of late 2009, there were over 350 organizations from throughout the region who had committed to the process.<sup>689</sup>

The ICTY's own stance towards such efforts has also evolved, perhaps evincing a greater institutional awareness of the enormity of the challenges associated with acknowledgement of past crimes and limitations on its own role. During an earlier period of the ICTY's work, senior court officials opposed a truth commission, in part because they feared that its work could taint evidence that would later come before the Tribunal. Even as late as 2001, then ICTY President Claude Jorda was publicly ambivalent at best about the attempt to have a separate truth-seeking body exist concurrently with the Tribunal's work.<sup>690</sup> Yet by 2006 the ICTY's public stance had shifted, and Tribunal officials have regularly participated in the public forums that led to the RECOM process, in which they have supported the idea.

## VI. Impact on Domestic War Crimes Prosecutions

*The Hague Tribunal opened the door for national courts to start trials of war criminals ... This is one of the major achievements of the ICTY.*<sup>691</sup>

The phrase “transitional justice” captures one of the most tangible and perhaps most enduring ways in which the ICTY has had an impact in Bosnia and Herzegovina (although the phrase is used here in a particular sense)<sup>692</sup>: The Tribunal has played a distinctive role in spurring and shaping a major transition within Bosnia’s domestic system for prosecuting wartime atrocities. Along with the Office of the High Representative as well as other international and domestic actors, the ICTY helped launch a specialized war crimes chamber within the newly established Court of Bosnia and Herzegovina.<sup>693</sup>

For reasons explained in this chapter, the work of the chamber, which has operated since early 2005, represents a major advance in Bosnia’s own efforts to provide a judicial reckoning for wartime atrocities. That an effective war crimes process was established in Bosnia also ranks among the ICTY’s most important legacies. Yet as we also make clear in this chapter, in some respects limitations in the Bosnian chamber’s work point up limits to the ICTY’s impact.

The Tribunal’s role in launching this innovation represents a significant evolution in its broader relationship to justice in the former Yugoslavia. As noted earlier, when it established

the ICTY, the UN Security Council conceived of the Tribunal as a peace-enforcement measure whose principal contributions would be to deter further atrocities and, quite simply, provide justice through the very process of prosecuting those responsible for atrocities the world had failed to prevent. At a time when domestic prosecutions were not seen as credible to the extent they occurred at all, the ICTY at first largely took the place of domestic legal processes of reckoning with 1990s era atrocities. Relatively early in the ICTY's life, the Tribunal began to play a second role. From 1996 through 2004, the Office of the Prosecutor (OTP) of the ICTY played a supervisory role in relation to Bosnian war crimes prosecutions by reviewing proposed war crimes indictments of national prosecutors. Only about midway through the Tribunal's life did key international actors fundamentally reconceive the Tribunal's relationship with domestic courts in the Balkans. In this third phase, the ICTY became a key catalyst for ramping up Bosnia's domestic capacity to prosecute wartime atrocities.

## A. The ICTY's Relationship with Bosnian Courts: Phase I

### 1. Primacy

In its early years, the ICTY operated in marked detachment from local courts. While seeking to answer victims' calls for justice through its own prosecutions, the Tribunal also inevitably represented a judgment by the international community that local courts in the Balkans were largely unable to mount credible prosecutions of wartime atrocities themselves.

As we note below, this judgment was amply justified at the time the ICTY was created and for years after. Legally, however, the Tribunal's statute from the outset made room for local courts to play a role complementary to that of the ICTY. In the technical jargon of international law, the ICTY's relationship with domestic courts in Bosnia and elsewhere is one of "primacy": While the ICTY exercises concurrent jurisdiction with domestic courts in the former Yugoslavia and elsewhere, those courts must defer to the ICTY if it decides to assert its jurisdiction in a case.<sup>694</sup> In principle, however, national courts' displacement in specific cases need not entail their broader disqualification as partners in the project of rendering justice for atrocious crimes. Indeed, in his report to the Security Council proposing what became the ICTY Statute, then UN Secretary-General Boutros Boutros-Ghali affirmed the important role of national courts in the process of accountability: "In establishing [the ICTY]," Boutros-Ghali said, "it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures."<sup>695</sup> The first president of the ICTY, Judge Antonio Cassese, made a similar point in the ICTY's first annual report to the UN Security Council and General Assembly, noting that the ICTY "does not monopolize criminal jurisdiction over certain categories of offences committed in the former Yugoslavia."<sup>696</sup>

But if his words seemed to invite states to exercise jurisdiction, Judge Cassese's message was more likely directed at Western European countries that were capable of prosecuting fugitives from justice rather than courts in the Balkans. Noting "the huge number of potential cases and the fact that *many defendants may find themselves in countries whose authorities are willing and prepared to bring them to justice*," Judge Cassese explained that "it was felt it would be salutary if national courts exercised their jurisdiction under their own legislation or on the strength of the 1949 Geneva Conventions."<sup>697</sup> For good reason, courts in Bosnia-Herzegovina and elsewhere in the former Yugoslavia were not seen as credible partners in the ICTY's project of justice during its early years. When the ICTY was created in May 1993, the war in Bosnia was in full rage—hardly an ideal setting for impartial and secure prosecutions of those responsible for depredations still underway. While Bosnian courts undertook a limited number of war crimes prosecutions even before the conflict ended, these were widely and strongly criticized by independent observers.<sup>698</sup> Indeed, Bosnia's Human Rights Chamber later found "[m]any of the trials"<sup>699</sup> processed by local courts in this period to have been unfair.

Particularly in the immediate aftermath of Dayton, there were powerful disincentives for Bosnian courts to hold credible war crimes trials. Until 2003, such trials were held before cantonal and district courts in the two entities and before the Basic Court in Brčko.<sup>700</sup> Entity courts "would only have jurisdiction over individuals of their own ethnic group—whom they did not want to subject to criminal prosecution,"<sup>701</sup> and there was not yet a state-level court that could transcend the partiality of these courts.

While Bosnian courts were particularly ill-suited to render impartial justice for war-time atrocities, the 1990s conflict had wider implications for Bosnia's judiciary, shattering a system that was already burdened by the legacy of its communist tradition. The Organization for Security and Cooperation in Europe (OSCE) described the Bosnian judiciary in the early years of peace this way:

[The] loss of skilled members of the legal profession and the judiciary, as well as the physical destruction and lack of proper equipment or facilities significantly hampered the ability of the courts to administer justice properly or efficiently. ... Outdated and inadequate procedural laws contributed to the inefficiency of the system. The loss of many pre-war judges resulted in the judiciary and prosecutors' offices, in different parts of the country, being dominated by the majority ethnicity. New, inexperienced judges and prosecutors were appointed on ethnic and political grounds. The prosecution of war crimes, in particular, ineffectual investigations, excessive and systematic delays in the resolution of trials and dubious decisions, compounded by a lack of public faith in the judicial system, brought into serious question the applicability of the rule of law.<sup>702</sup>

Far from seeking to encourage war crimes prosecutions by Bosnian courts in the years immediately following Dayton, then, the international community was instead more concerned about "[t]he possibility of arbitrary arrests and unfair trials" there.<sup>703</sup>



In larger perspective, to the extent that the international community in general, and the ICTY in particular, addressed local authorities on the subject of war crimes prosecutions, their emphasis was overwhelmingly on the importance of national authorities fulfilling their legal obligation to arrest those whom the ICTY had indicted and transfer them to The Hague. In light of donor states' more recent support for a hand-off from the ICTY to local courts, it is easy to forget that, during the Tribunal's early years, international efforts to assure justice for Bosnia's victims focused overwhelmingly on "the international rather than the national justice system."<sup>704</sup>

## 2. Supervisory

In 1996, the relationship between the ICTY and Bosnia saw an important change, transforming the ICTY's role vis-à-vis Bosnian courts from one of primacy in a broader context of concurrent jurisdiction to one of supervision and restraint. This relationship was to last for eight years.

The ICTY's supervisory role evolved as a solution to an early challenge to the fragile peace secured at Dayton: In late January 1996, Federation authorities arrested two senior Republika Srpska army officers—one of whom, General Đorđe Đukić, was a close aide to Ratko Mladić—after they took a wrong turn into Federation territory,<sup>705</sup> accusing the two men of responsibility for war crimes. Although the Federation was legally entitled to arrest individuals suspected of war crimes, its action in this instance was seen to "violate[] the free-movement provisions of Dayton."<sup>706</sup> The specter of arbitrary arrests had potentially broad repercussions at the time of these arrests. As the OSCE recalled in a 2005 report, "[p]roviding for freedom of movement [within Bosnia], especially to refugees and displaced persons, was crucial to the success of holding free and fair municipal elections in September 1996, especially as candidates and voters were being encouraged to stand and vote in their pre-conflict constituencies."<sup>707</sup>

The episode provoked what the *New York Times* described as "the most serious" dispute "to arise between the Bosnian Serbs and the Bosnian government since the signing of the Balkan peace agreement" one month earlier.<sup>708</sup> A British NATO officer stationed in Bosnia described the arrests as "provocative and inflammatory."<sup>709</sup> In this setting, the Bosnian government asked the ICTY to question the detained Serbs to determine whether they should be indicted.<sup>710</sup> Then ICTY Prosecutor Richard Goldstone sought the Serbs' provisional arrest and transfer to The Hague for questioning and possible indictment.<sup>711</sup>

To avoid a repetition of this incident—in the words of Dayton peace negotiator Richard Holbrooke, "to ensure that we would never again have to struggle with the consequences of a surprise arrest" in Bosnia<sup>712</sup>—the leaders of Bosnia, Serbia, and Croatia agreed during the first post-Dayton Compliance Summit in Rome in mid-February 1996 that local authorities would not arrest anyone on war crimes charges without first obtaining approval from the ICTY prosecutor.<sup>713</sup> The ICTY's Web site summarizes the process born of the Rome Agreement and its achievements this way:

### *Rules of the Road*

In the aftermath of the war in Bosnia and Herzegovina (BiH), returning displaced persons and refugees voiced fears about arbitrary arrests on suspicion of war crimes. To protect against this, the [Office of the Prosecutor (OTP)] agreed to operate a “Rules of the Road” scheme under which local prosecutors were obliged to submit case files to The Hague for review. No person could be arrested on suspicion of war crimes in BiH unless the Tribunal’s prosecution had beforehand received and assessed a case file to contain credible charges.

The Rules of the Road procedure, established under the Rome Agreement of 18 February 1996, regulated the arrest and indictment of alleged perpetrators of war crimes by national authorities. As part of the Tribunal’s contribution to the re-establishment of peace and security in the region, the ICTY prosecutor agreed to provide an independent review of all local war crimes cases. If a person was already indicted by the OTP, he could be arrested by the national police. If the national police wished to make an arrest where there was no prior indictment, they had to send their evidence to the OTP. Under the Rome Agreement, decisions of the OTP became binding on local prosecutors.

Applying international standards, OTP staff reviewed 1,419 files involving 4,985 suspects, and advised local prosecutors whether or not they had enough evidence to proceed. Approval was granted for the prosecution of 848 persons.<sup>714</sup>

To the extent that its principal aim was to “assist in ensuring the free movement of people throughout” Bosnia by heading off insufficiently supported indictments,<sup>715</sup> the Rules of the Road process succeeded. In the words of a Bosniak official, the program “helped *enormously* in making the country more functional and making freedom of movement a reality” in postwar Bosnia.<sup>716</sup>

The ratio of cases approved by the ICTY to those submitted indicates that the ICTY prevented thousands of poorly-substantiated war crimes charges from being instituted.<sup>717</sup> Of the reviews it completed, the OTP found sufficient evidence to indict on war crimes charges roughly one-sixth of the suspects submitted for its review.<sup>718</sup> In the view of two former ICTY officials, moreover, the process may have had a positive, albeit limited, benefit for local prosecutors: “Given the large number of cases reviewed, local prosecutors no doubt did begin to get a better sense of the relevant international standards.”<sup>719</sup>

But these contributions may have come at a cost. Strapped for resources,<sup>720</sup> “the ICTY was notoriously slow in reviewing cases”<sup>721</sup> submitted by Bosnian authorities, according to law professor William Burke-White.

Some have suggested that the Rules of the Road process had a deeper impact on the Bosnian judiciary, sapping its morale and inhibiting initiative. In a 2005 interview, a senior Bosnian court official told a researcher that some Bosnian prosecutors experienced a “loss of

face” in having to seek international approval to proceed, a process they found “shameful.”<sup>722</sup> The sense of shame inherent in this process was, according to a study by the human rights centers of Berkeley University and the University of Sarajevo, compounded by the ICTY’s poor communication with some of the jurists who submitted files for approval. Based on interviews with “thirty-two Bosnian judges and prosecutors with primary or appellate jurisdiction for national war crimes trials” in 1999, this study reported that:

ICTY officials failed to keep their Bosnian colleagues informed of the status of the [Rules of the Road] investigations, even in response to direct inquiries. ... A judge reported that after having submitted twenty-five case and waiting eight months, the ICTY had not responded. Other judges and prosecutors stated that they too had submitted files several years before and had received no communication ... These professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials.<sup>723</sup>

Several observers share the jurists’ judgment that the Rules of the Road process inadvertently contributed to Bosnian courts’ protracted inability to play a major role in war crimes prosecutions. The overall impact of the Rules of the Road process, in two writers’ words, was to “shut down all efforts by Bosnian government authorities to utilize justice to remove war criminals from powerful post-war positions.”<sup>724</sup> Believing that the process of seeking ICTY approval had a demoralizing effect on Bosnian prosecutors, Burke-White draws a link to Bosnian courts’ desultory performance in respect of cases cleared for prosecution by the ICTY. Of the 846 cases in this category,<sup>725</sup> Burke-White notes, “only fifty-four (11%) had reached trial stage in domestic courts by January 2005.”<sup>726</sup>

But it would be unfair to lay primary or even major blame for the Bosnian judiciary’s failures at the ICTY’s doorstep.<sup>727</sup> As noted earlier, by all accounts the Bosnian judicial system suffered serious, systemic problems as it emerged from the wreckage of armed conflict as well as from a deeper legacy of communist rule<sup>728</sup> and these were hardly limited to war crimes prosecutions. A November 2000 report by the International Crisis Group squarely laid blame for the abysmal record of follow-up by courts in Republika Srpska on the nationalist structures in which they were embedded: “A number of war crimes cases have already been referred by The Hague to local courts and more can be expected,” the ICG wrote, “but these cases have simply shown up the inability of the Bosnian justice system, as presently constituted, to handle war crimes cases.”<sup>729</sup>

Years after the Rules of the Road program ended, moreover, courts in Republika Srpska have been slower than courts in the Federation in bringing war crimes suspects to justice.<sup>730</sup> While the district prosecutor’s office in Banja Luka has been proactive in prosecuting war crimes cases,<sup>731</sup> it is typically described as an exception to the general rule.

Responding to a question about the Berkeley/University of Sarajevo study during a July 2009 interview, Damir Arnault, a senior advisor to the Bosniak member of the Bosnian Presidency, suggested that its “anti-imperialistic instinct” was well meaning but misplaced. “Some of these [judges] are incompetent. These courts were trying to do war crimes cases and they just couldn’t do it.”<sup>732</sup> Interviewed the same week, a representative of the Bosnian Serb government, Jovan Spaić, did not say anything that would call Arnault’s assessment into question. Instead, he offered various explanations for why investigating judges in Republika Srpska did not aggressively pursue war crimes cases during or in the years after the 1990s conflict, none of which even hinted at the harmful effects of the Rules of the Road process. In Spaić’s view, “It would be hard to expect ... judges to operate so soon after the war when everything was so unstable, people were moving; it would have been hard to make witnesses come.”<sup>733</sup>

The perceptions of Bosnian jurists who participated in the Berkeley/University of Sarajevo study should, moreover, be placed in context. At the time that study was conducted, Bosnian judges felt “beleaguered” as a result of well-founded criticism from a wide range of international actors as well as “pressure from those within, particularly politicians and criminal elements who act with impunity.”<sup>734</sup> (Indeed, a former judge, Vehid Šehić, told us that he resigned from his position as a judge in the District Court of Tuzla in 1994 because the judiciary was at that time in the thrall of a “political climate” inimical to war crimes prosecutions.)<sup>735</sup>

The real question, then, is not whether the ICTY can fairly be blamed for the troubling record of Bosnian courts in prosecuting war crimes during the first half of the Tribunal’s life. Instead, it is whether a different approach by relevant international actors—and here, the ICTY would not be the logical lead actor<sup>736</sup>—could have been more effective in helping prepare the Bosnian judiciary to mount credible war crimes prosecutions sooner. We come back to this question at the end of this chapter.

## B. Creating a National Partner<sup>737</sup>

After years of stagnation, Bosnia’s courts became the focus of ramped up international reform efforts in the early 2000s. The reform that followed was far-reaching, and included comprehensive vetting of the country’s judges and prosecutors as well as the replacement of an inquisitorial with an adversarial criminal procedure.<sup>738</sup> The ICTY’s prosecution office played an important role in this vetting process.<sup>739</sup>

By 2002-03 the reforms also included key steps toward the establishment of a domestic war crimes chamber within a new Court of Bosnia and Herzegovina.<sup>740</sup> This facet of broader judicial reform efforts received significant impetus from the ICTY, which was coming under pressure to plan for an eventual hand-off process. With this, the ICTY’s relationship with Bosnian courts underwent a major transformation.

## 1. Impetus for change

Although the ICTY had from the outset been pressed to produce results,<sup>741</sup> this intensified several years into its work, when the United Nations expected to see more in the way of tangible results. In a 1999 study commissioned by the UN General Assembly, a group of experts noted that “[m]ajor concerns” had been voiced by a range of actors about “the slowness of the pace of proceedings” before the ICTY and its sister court, the International Criminal Tribunal for Rwanda (ICTR), as well as about the associated costs. The experts asked, “more pointedly ... why, after almost seven years and expenditures totaling \$400 million, only 15 ICTY and ICTR trials have been completed.”<sup>742</sup> While the experts’ recommendations focused on ways the two tribunals could streamline procedures, their report served to catalyze planning of a different sort in The Hague: It provided “a little nudge” to the ICTY judges to begin “thinking ahead towards formulating a completion or exit strategy.”<sup>743</sup> Anticipating that the Security Council would soon press them to wind up the ICTY’s work, the Tribunal’s judges seized the initiative to shape the Hague Tribunal’s completion strategy.

Transferring cases not yet tried in The Hague to domestic courts—a subject addressed only briefly in the experts’ study<sup>744</sup>—became a key component of the completion strategy that emerged from the ICTY and which was later adopted by the UN Security Council.<sup>745</sup> More particularly, transferring cases of comparatively low-level suspects<sup>746</sup> would free up human resources in The Hague and thereby enable the Tribunal to focus on high-level suspects—the centerpiece of what became the ICTY’s completion strategy.<sup>747</sup>

There were, to be sure, other reasons for transferring some of its caseload to local courts. In an address to the Security Council on November 27, 2000, then ICTY President Claude Jorda introduced the idea of “relocating” some ICTY cases to domestic courts by noting the potential implications of recent political changes in the former Yugoslavia:<sup>748</sup>

The political upheavals recently witnessed in the Balkans have gradually changed the perception of the International Tribunal held by the States from the region. However, must these upheavals not also lead us to change our own view as to the ability of these States to try some of the war criminals in their territory? From this perspective, must we not, for example, further promote the new national reconciliation processes the Balkan States are setting up, such as the truth and reconciliation commissions?<sup>749</sup>

Even so, ICTY officials appeared to be motivated more by the Tribunal’s need to complete its core work than by their secondary desire to foster greater participation by local courts in the project of accountability for wartime atrocities. This came across in Judge Jorda’s November 2000 address to the UN Security Council as well as in his subsequent remarks to the Council. Describing recent discussions among judges of the ICTY and ICTR and then UN Legal Advisor Hans Correll, Judge Jorda made the case for transferring some cases to Balkan courts:

In examining the results and prospects of their mission after eight years' activity, [the judges] first discussed whether ... the International Tribunal should not focus more on prosecuting those crimes constituting the most serious breaches of international public law and order, that is mostly, the crimes committed by the high-ranking military and political officials. After all, it is those crimes which principally jeopardise international peace and security. ...

The cases of lesser importance for the Tribunal could, under certain conditions, be "relocated", that is, tried by the courts of the States created out of the former Yugoslavia. This solution would have the merit of considerably lightening the International Tribunal's workload, thereby allowing it to complete its mission at an even earlier juncture. Moreover, it would make the trial of the cases referred before the national courts more transparent to the local population and so make a more effective contribution to reconciling the peoples of the Balkans.<sup>750</sup>

## **2. Joint planning for the future War Crimes Chamber**

The ICTY would not, however, be in a position to transfer cases to the former Yugoslavia unless the judges were satisfied that transferred cases would be fairly tried. As then ICTY President Claude Jorda explained to the Security Council, the "[m]ost important" condition for transferring cases to national courts was their ability "fully to conform to internationally recognised standards of human rights and due process in the trials of referred persons."<sup>751</sup> Strongly preferring to transfer cases involving crimes committed in Bosnia—the overwhelming majority of its docket—to Bosnian courts,<sup>752</sup> senior ICTY officials nonetheless believed that its judiciary "display[ed] shortcomings too great for it to constitute a sufficiently solid judicial foundation to try case referred by the Tribunal."<sup>753</sup> Thus they intensified their efforts to ensure that the Bosnian judiciary would be capable of receiving transferred cases.<sup>754</sup>

A solution was found when the Tribunal's efforts linked up with a broader judicial reform drive already underway. The Office of the High Representative (OHR) had recently initiated a comprehensive judicial reform effort in Bosnia.<sup>755</sup> While the ICTY's goal was to "identify a trustworthy domestic court" to which it could transfer war crimes cases,<sup>756</sup> the OHR was engaged in broader efforts aimed at streamlining and modernizing Bosnia's judiciary; assuring judicial and prosecutorial independence, integrity, and competence; and ensuring an appropriate ethnic balance among judges.<sup>757</sup> While the ICTY naturally focused on war crimes prosecutions, the key preoccupation of the OHR was the development of judicial institutions that could tackle organized crime—a pervasive and daunting challenge in Bosnia even today.<sup>758</sup>

In due course, the two institutions' interests converged and a consensus plan emerged.<sup>759</sup> Crucially for the ICTY, the broader reforms instituted by the OHR included the establishment of a new Court of Bosnia and Herzegovina (BiH), as well as imposition by the High Repre-

sentative of a new national criminal code (CC) that would define crimes over which the court would have jurisdiction, and a new code of criminal procedure (CPC).<sup>760</sup>

By mid-2002 the ICTY and OHR formulated a joint plan of action,<sup>761</sup> at the heart of which was a proposal to establish a specialized war crimes chamber within the new Court of BiH that could receive certain cases transferred from the ICTY and which would play a filtering role for war crimes cases instituted before local courts in Bosnia.<sup>762</sup> In effect, then, the specialized chamber for war crimes was grafted onto a new court already in formation, now given a further mandate.

For the ICTY, connecting its completion strategy to a judicial innovation in Bosnia was a challenge as well as a solution. Creating the legal framework for transferring cases to Bosnia would have been complex under any circumstances, but the task was further complicated by the far-reaching nature of judicial reform then underway in Bosnia.<sup>763</sup> The reform task, as one writer noted, involved “the construction rather than the reconstruction of a state-level criminal justice system.”<sup>764</sup>

Almost a year after the ICTY and OHR formulated a joint plan of action, the Peace Implementation Council (PIC) finally mandated the High Representative to implement the proposal to establish a war crimes chamber within the new Court of BiH.<sup>765</sup> Then, planning speeded up.<sup>766</sup> The ICTY, by then under the leadership of a new president, Judge Theodor Meron, and the OHR created several joint working groups to address a range of issues relating to the legal framework for transferring indicted cases to Bosnia’s State Court.<sup>767</sup> These working groups became the principal forum in which the ICTY helped shape the design of the war crimes chamber and, importantly, the legal framework that would govern the transfer of indictments from The Hague to Sarajevo. While the ICTY negotiators worked above all to ensure that the chamber would meet international standards, the OHR’s core aim was to build “a sustainable justice sector at the state level which could trigger reform in the entities, as well as having the capacity to deal with cases transferred from the Tribunal.”<sup>768</sup>

The joint discussions soon led to consensus about the basic structure of the Bosnian War Crimes Chamber (BWCC).<sup>769</sup> The chamber would be part of Bosnia’s domestic court system, applying domestic law, but with international participation.<sup>770</sup> The Special Department for War Crimes, staffed by national and international prosecutors, would be created in the Prosecutor’s Office of BiH.<sup>771</sup> Crucial to the chamber’s design, international judges and prosecutors would be phased out after five years.<sup>772</sup>

Soon after this plan was formulated, the Security Council intensified pressure on the ICTY to meet the deadlines for completing the work it had proposed to the Council; in so doing the Council supported the role of the BWCC. In August 2003, the Council adopted Resolution 1503, which “reaffirm[ed] in the strongest terms” a previous statement by the Council’s president endorsing

the ICTY's strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 ... by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.<sup>773</sup>

Noting that "an essential prerequisite to achieving" these goals "is the expeditious establishment ... and early functioning of a special chamber within the State Court of Bosnia ... and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber,"<sup>774</sup> the resolution called on donors to support the OHR's effort to create the special chamber.<sup>775</sup>

Legislation establishing the BWCC as well as the Special Department for War Crimes (SDWC) in the Prosecutor's Office of BiH had already been imposed by the High Representative in January 2003; these laws entered into effect two months later.<sup>776</sup> A Law on the Transfer of Cases, which addressed many of the ICTY's preconditions for transferring indictments and resulted from a joint ICTY-OHR Working Group, was introduced before the national parliament in June 2004 and was adopted by the end of the year.<sup>777</sup>

On its side, the ICTY judges amended Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence to establish a procedure for transferring indictments to another court. Under this rule, a three-judge Referral Bench of the ICTY determines whether to transfer to an appropriate domestic court an indictment that has already been confirmed but in respect of which trial has not yet commenced before the ICTY. Reflecting the imperatives that gave rise to the new procedure, amended Rule 11 *bis* provides that judges on the Referral Bench must, "in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused."<sup>778</sup> On the matter of which countries could receive transferred cases, Rule 11 *bis* provides that the Referral Bench must be "satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out" before it can approve a referral.<sup>779</sup> As a further safeguard once cases are transferred, the bench can order that protection orders previously imposed in respect of witnesses or victims remain in force as indictments are transferred to a domestic court.<sup>780</sup>

The War Crimes Chamber was finally launched on March 9, 2005, two years after the Court of BiH itself began operating.<sup>781</sup> Even before the chamber became operational, the ICTY prosecutor had begun transferring information to the state prosecutor during the second half of 2004. She also informed the BiH Presidency by letter dated August 27, 2004 that the OTP was no longer in a position to review war crimes cases and that the prosecutor of BiH should take over authority for such cases effective October 1, 2004.<sup>782</sup> Thus the "supervise and restrain" phase of the ICTY's relationship to Bosnian courts ended before the contemporary era was fully launched.



While the ICTY and OHR were satisfied that the Bosnian War Crimes Chamber and the Special Department for War Crimes were capable of handling cases transferred pursuant to Rule 11 *bis*, the prospect of domestic prosecutions of persons indicted in The Hague aroused concern among some victims, who still trusted the ICTY more than they trusted Bosnian courts.<sup>783</sup> They were hardly reassured when the first person transferred pursuant to 11 *bis*, Radovan Stanković, escaped from prison in May 2007 following his conviction before the BWCC for wartime atrocities, including multiple rapes, enslavement, and torture of civilians in the town of Foča—which was also the site of his escape.<sup>784</sup> Although this was not the fault of the BWCC, which generally received high marks for its conduct of the *Stanković* case, the episode reinforced victims' concerns about whether Bosnia was ready to take over cases initiated in The Hague.

Since then, confidence in the BWCC has grown, though substantial challenges remain. Just as victims cite a litany of what they consider to be failings of the ICTY, they recite a raft of disappointments in the BWCC's work.<sup>785</sup> Yet despite these, a 2008 survey of public attitudes toward the Court of BiH and the Prosecutor's Office (POBiH) found that "[m]ost representatives of war victims' associations ... were generally satisfied with the work of the Court and Office of the Prosecutor of BiH,"<sup>786</sup> while a majority of citizens "believe that the Court and the Prosecutor's Office of BiH are the most important institutions for prosecution ... of war crimes."<sup>787</sup> At the same time, however, the same study highlights enduring public concerns as well as misperceptions about the Court of BiH.<sup>788</sup>

Reflecting on the BWCC and SDWC in July 2009, Mirsad Tokača, who directs the non-governmental Research and Documentation Center in Sarajevo, summed up their achievements this way: "They have produced really excellent results in a short period."<sup>789</sup> While the ICTJ, the OSCE Mission to BiH,<sup>790</sup> and others have identified a number of concerns relating to the BWCC, it has generally received high marks for its overall performance and is now seen as a model form of hybrid court.<sup>791</sup> And despite the fact that the ICTY acted to create the BWCC only when pushed to do so by the imperatives of its completion strategy, many now rank its contribution in this regard as among the Tribunal's greatest accomplishments.<sup>792</sup>

### **3. War crimes prosecutions before Bosnian courts: The ICTY's imprint**

In view of the BWCC's emergence as a core element of the ICTY completion strategy, it is not surprising that cases originating in The Hague formed an important part of its initial docket. But cases before the BWCC originating in The Hague are not limited to those transferred pursuant to Rule 11 *bis*. In fact, although the ICTY's need to transfer indictments of relatively low-level suspects provided crucial impetus to the establishment of the BWCC, only six cases involving ten suspects have been transferred to Bosnia under the Rule 11 *bis* rubric.<sup>793</sup>

a. *Rule 11 bis cases*

While Rule 11 *bis* cases transferred to Bosnia have been few in number, they have had a broad impact on the country's new system for prosecuting war crimes. As noted earlier, Rule 11 *bis* provides that the ICTY Referral Bench may transfer indictments to a domestic court only if it is satisfied that the accused will receive a fair trial, though this is hardly the only reason the war crimes chamber would be bound to meet international standards. Pursuant to the Dayton Agreement, Bosnia is bound to apply the European Convention on Human Rights, and the country's Constitutional Court has ensured that it does so.<sup>794</sup>

More significantly, Rule 11 *bis* provides for further assurances once a confirmed indictment has been transferred. The ICTY prosecutor can designate observers to monitor domestic cases that originated in an ICTY indictment on his or her behalf,<sup>795</sup> and the Tribunal can recall a transferred case if local proceedings fall short of international standards.<sup>796</sup> The prosecutor requested the Organization for Security and Co-operation in Europe (OSCE) to perform an ongoing trial monitoring role on its behalf in BWCC cases arising out of Rule 11 *bis* transfers and it agreed to do so.<sup>797</sup> Although the OSCE's writ on behalf of the ICTY prosecutor extends to these cases only, its Judicial and Legal Reform Unit in Sarajevo monitors all of the chamber's cases and the mission would almost certainly have monitored 11 *bis* cases on its own initiative to the greatest extent possible within its regular monitoring capacities even without being asked to do so by the ICTY prosecutor. Even so, a formalized relationship with the ICTY enabled the OSCE Bosnia mission to establish a specialized section to focus on the 11 *bis* cases as its main priority.<sup>798</sup>

Its capacity to monitor these cases comprehensively has had a knock on effect: The OSCE's detailed critiques of the national court proceedings addressed systemic concerns early on, preparing the fledgling chamber to perform at a higher level as it has taken on other cases. For example, the OSCE's monitoring reports in the initial Rule 11 *bis* cases flagged problems relating to the manner in which ICTY detention orders were reviewed by the Court of BiH. By the time the third indictment was transferred, the court's practice changed.<sup>799</sup> Other issues flagged by the OSCE in its 11 *bis* monitoring reports—relating for example to protection of witnesses, pretrial custody, and the rights of witnesses to request compensation from the accused through the criminal proceedings—have either been addressed by the court and prosecutor or have at least raised awareness about the need to resolve them comprehensively.<sup>800</sup> The OSCE unit notes that its reporting has not been the sole reason for these improvements; it has often “worked in synergy with the efforts of numerous actors.”<sup>801</sup> Yet its 11 *bis* monitoring role doubtless contributed to positive change.

This is not to suggest that the procedures put in place by the ICTY and OHR to govern 11 *bis* cases have invariably enhanced trial proceedings before the BWCC. In its initial report on the first 11 *bis* trial before the BWCC, the OSCE's Bosnia Mission identified a number of gaps and ambiguities in the Law on the Transfer of Cases,<sup>802</sup> which was enacted to provide a

legal framework for Rule 11 *bis* transfers<sup>803</sup> Resolving these issues has inevitably complicated the processing of early cases before the chamber. In similar fashion, some of the requirements built into the transfer process, which were designed to protect the integrity of ICTY indictments,<sup>804</sup> ensure the safety of witnesses who provided evidence to the ICTY prosecutor and preserve the value of other ICTY-generated evidence, have given rise to legal challenges and cumbersome processes that necessarily result in delays.<sup>805</sup>

Yet any fundamentally new court like the BWCC would face novel legal challenges, regardless of whether it was bound to honor special rules concerning the transfer of cases from an international court. (Indeed, the ICTY itself had to resolve a raft of legal challenges in its early trials.) In the view of BWCC officials, far more difficult challenges have come from Republika Srpska leaders who oppose an institution whose very existence represents an enhancement of central authority and which could credibly prosecute war crimes.<sup>806</sup>

If ICTY requirements for the transfer of cases have at times complicated early BWCC trials, the Tribunal has also been a helpful resource in resolving many of the BWCC's early challenges. According to staff in the OSCE Mission to Bosnia, ICTY jurisprudence has provided valuable guidance to the BWCC in its resolution of thorny legal issues, including some that may have arisen in part out of the BWCC's desire to comply with standards emanating from The Hague.

The OSCE Bosnia mission cites an example relating to a problem that arose early in the chamber's life: The BWCC was widely criticized for going too far in its efforts to protect victim-witnesses in two early cases involving allegations of systematic rape, excluding the public from almost the entire trial proceedings in the cases of Radovan Stanković and Nedo Samardžić.<sup>807</sup> Since then, the chamber has been more judicious in its use of closed sessions. While widespread criticism of the closed trials was doubtless a key factor, the OSCE Mission to Bosnia believes that the standards for witness protection developed by the ICTY, along with public trial standards developed in the case law of the European Court of Human Rights, have provided importance guidance to the BWCC as it has adjusted its approach to witness protection.<sup>808</sup>

#### ***b. Transfer of evidence***

Another byproduct of Rule 11 *bis* was that the transfer of evidence that accompanied transferred indictments provided the fledgling SDWC a helpful boost in its early years, enabling it to go to trial without having to undertake the same level of extensive investigation already done by the ICTY. In fact, the SDWC's first prosecution of an 11 *bis* case was "based only on Hague evidence," according to the first chief prosecutor of BiH, Marinko Jurčević.<sup>809</sup>

Yet the process of transferring evidence was hardly seamless. Two suspects were transferred to the state court in Bosnia before the evidence supporting their indictments arrived there<sup>810</sup> Branko Perić, then president of Bosnia's High Judicial and Prosecutorial Council (HJPC), dryly recalled the dilemma facing state court prosecutors: "We have an indicted guy

but the documentation is still in their archives. It was senseless [for the SDWC] to charge him”<sup>811</sup> until supporting evidence arrived from The Hague. According to officials in the SDWC, however, this happened “only once or twice.”<sup>812</sup>

Until amended to correct the problem, the Law on the Transfer of Cases imposed another challenge: ICTY documents had to be transferred to Bosnia in hard copy. In the “relatively small case of [Radovan] Stanković,” former ICTY Prosecutor Carla Del Ponte recalled, her staff had to print, authenticate and transfer some 14,000 pages of documents.<sup>813</sup> Processing these documents placed enormous burdens on the receiving end too.<sup>814</sup> This burden was alleviated in July 2006, when the BiH Parliament amended the Law on the Transfer of Cases to allow ICTY documents to be transferred electronically.<sup>815</sup>

Other problems were harder to fix. Because OTP investigations were undertaken with the expectation that cases would be tried in The Hague, ICTY investigators and prosecutors did not prepare files in the local languages of the former Yugoslavia. One of the national prosecutors who worked on an *11 bis* case, then SDWC chief David Schwendiman, recalled that he “had terrible trouble because most of the information was in English.”<sup>816</sup> After all, he noted, “No one gave any consideration to the fact that [the Bosnian State Court’s] language is Bosnian.”<sup>817</sup>

During interviews in June-July 2006, some former and current members of the SDWC staff described other “teething problems” in their relationship with the ICTY. One of the Bosnian prosecutors told us that, while the ICTY had never failed to fulfill her requests for information, key items were sometimes delivered “in a sea of documents,” many not admissible or useful.<sup>818</sup> In a subsequent interview, SDWC officials recalled that during the early operation of the department, the ICTY prosecutors “didn’t know what we needed, so they gave us everything.”<sup>819</sup> Other staff members described early problems with database formats and technical access to documents. Although the ICTY provided the SDWC access to its evidence disclosure suite—an invaluable resource to the department’s work—the SDWC had not yet received an ICTY index that would facilitate searches for handwritten documents in the database when we interviewed SDWC staff in the summer of 2006.<sup>820</sup> Despite these and other challenges, those interviewed in 2006 gave the ICTY generally high marks for the support it provided even during the “teething” period, saying Tribunal prosecutors had done the best possible in light of the challenges they described.<sup>821</sup>

Interviewed three years later, when the SDWC had largely completed first instance trials of *11 bis* cases,<sup>822</sup> local prosecutors had high praise for the contributions made by Hague prosecutors. Reflecting on his office’s relationship with the ICTY, Chief Prosecutor of the State Court Milorad Barašin told us: “It’s indisputable that the Hague Tribunal gave us major support in setting up this institution and getting cases going.”<sup>823</sup> Barašin characterized cooperation with the Hague Tribunal as “great,” adding:

And really, whatever we asked in accordance with [the law] we have received. Above all, I have to compliment them on their efficiency. Always they have been available, espe-

cially the prosecutorial office of the Hague Tribunal. If we ask for something today, it's possible to get it the next day.<sup>824</sup>

While the comparatively small number of Rule 11 *bis* transfers played an outsized role in shaping the BWCC and its early docket, the chamber's caseload is far more extensive than that generated by such referrals—and so, too, is the ICTY's role. A second category of cases prosecuted by the SDWC grew out of investigations instituted by the ICTY prosecutor that did not lead to indictments by the time the Tribunal had to conclude its investigations. Known as "Category II" cases in recognition of the fact that "Rule 11 *bis* cases were the first priority" in the ICTY's completion strategy, what was transferred to the Bosnian State Court was more accurately described as "collections of materials associated with particular crimes"<sup>825</sup> than a trial-ready case file.

ICTY prosecutors transferred fourteen Category II cases involving approximately 40 suspects for transfer to Sarajevo<sup>826</sup> in the hope that their investigatory work would not "simply be left on the proverbial wayside."<sup>827</sup> In an effort to narrow the gap between the raw evidence in Category II files and a criminal case, an OTP Transition Team prepared "a summary of the 'case,' outlining the principal factual and legal issues as well as an accompanying analysis."<sup>828</sup>

A third category of the SDWC's prosecutions has a different connection with the ICTY. These are cases "already cleared in accordance with the Rules of the Road procedure in The Hague"<sup>829</sup> and not referred for prosecution by a cantonal or district court. As noted earlier, the ICTY prosecutor transferred her office's Rules of the Road files to Bosnian authorities beginning in October 2004. At this time, the SDWC began receiving electronic copies of the 877 files that had been given an "A" marking,<sup>830</sup> signifying that the ICTY OTP believed that there was sufficient evidence in the file submitted by Bosnian prosecutors to support war crimes charges. For these cases, the SDWC undertook a review during the first half of 2005 to determine which cases it would retain for prosecution itself—a total of 202 files<sup>831</sup>—and which, instead, it would refer for investigation by cantonal and district prosecutors pursuant to the process outlined below.<sup>832</sup>

If, as noted earlier, the Rules of the Road process played a key role in stabilizing post-war Bosnia, it is less clear how helpful the ICTY review process was for Bosnian prosecutors who received stale files years after they were submitted to the Hague Tribunal for its review. (This is not surprising, as the OTP review was intended to assess sufficiency, and not completeness, of the evidence in the files.) According to then SDWC head David Schwendiman, "The ICTY Rules of the Road files have not proven to be reliable except as starting points for [essentially new] domestic investigations. They do not translate immediately into prosecutable cases, partly because they are old, but mostly because they were and are incomplete"<sup>833</sup>—even when deemed by the ICTY to contain sufficient evidence to support an indictment.<sup>834</sup>

The fourth and final category of cases prosecuted by the SDWC comprises cases initiated in Bosnia that did not flow through the Rules of the Road process. When interviewed in

December 2006, Vaso Marinković, then head of the SDWC, was unable even to estimate how many cases fell into this category, noting that new cases “are coming in on a daily basis.”<sup>835</sup> Like the case files returned by the OTP in late 2004, these cases might be prosecuted before the Court of BiH or before a court in one of the entities or in Brčko.<sup>836</sup> How to decide whether cases should be prosecuted before the BWCC or instead referred for trial elsewhere has presented vexing challenges, which we address later.

### 3. Transfer of expertise and jurisprudence

#### *a. Coordination, collaboration, and training*

Alongside its transfer of case files, the ICTY has provided ongoing support in the form of expert guidance to prosecutors, judges, and defense counsel in Bosnia. To facilitate collaboration between ICTY and local prosecutors, the OTP established a Transition Team within the office, whose function is to coordinate with local prosecutors in the former Yugoslavia on both *11 bis* and Category II transfers.<sup>837</sup> According to officials in the SDWC, lawyers in their office “work really closely” and “constantly” with prosecutors at the ICTY. “When we get a case” from the ICTY, one said, “we send our people up there. It’s a terrific relationship.”<sup>838</sup>

In addition, judges from the BWCC have traveled to The Hague, while prosecutors from Bosnia have participated in various symposia with their counterparts in the OTP aimed at sharing professional experiences.<sup>839</sup> Moreover, ICTY judges and prosecutors, as well as defense counsel who have practiced before the Tribunal, have given lectures as part of Bosnian programs aimed at training local defense counsel.<sup>840</sup>

While the ICTY’s contributions in bolstering domestic capacity have been “immensely important”<sup>841</sup> to the BWCC and related offices, they should not be overstated. As two former ICTY prosecutors acknowledge, “[m]uch less has been done” by the ICTY “in terms of transferring ... know-how, that is assistance on how to prosecute and adjudicate war crimes cases,” than in transferring evidence. Emir Suljagić, a former journalist who covered the ICTY, goes further. In his view, “There was no strategy behind the completion strategy” in terms of “transferring know-how, unless you call seminars transferring know-how.”<sup>842</sup> In an interview in late 2006, the liaison officer of the ICTY acknowledged these limitations, noting that the participation of ICTY personnel in training seminars and the like is not part of a “structured ... program,” in part because the Tribunal did not have funding to provide training on a programmatic basis.<sup>843</sup>

Several recent initiatives that form part of the Tribunal’s high-profile strategy to demonstrate its “legacy” commitment may partially address Suljagić’s concerns. In July 2009, prosecutors from Bosnia, Serbia, and Croatia began a six-month internship at the ICTY to work in an intensive way with the OTP. During this period, according to the ICTY’s Web site, the Balkan prosecutors would “have an opportunity to learn about methodologies of search-

ing and reviewing large volumes of material as applied by OTP criminal analysts and be the contact points for colleagues in their respective national prosecution services working on war crimes investigations and cases.”<sup>844</sup> At least one Bosnian defense lawyer has also had a fellowship at the ICTY.<sup>845</sup>

A second effort is a joint project among the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the UN Interregional Crime and Justice Research Institute (UNICRI), and the ICTY which was launched in May 2008. After a year-long consultation process with local actors and international organizations that have been engaged in judicial capacity building within the region, the project identified outstanding judicial needs and evaluated the effectiveness of past efforts.<sup>846</sup> In addition, in May 2009 the ICTY published a comprehensive guide to what it calls its “developed practices” that captures practical operational procedures in areas such as investigations, judgment drafting, management of the Detention Unit and legal aid policies.<sup>847</sup>

It bears repeating that, while this chapter focuses on the ICTY’s contributions, numerous other organizations have played a major role in preparing Bosnian lawyers for war crimes prosecutions. While ICTY personnel have often participated in programs organized by others, their engagement constitutes a comparatively small part of a larger picture.<sup>848</sup>

#### *b. From The Hague to Sarajevo*

Expertise has also migrated from The Hague to Sarajevo in another form: Many of the international personnel who have staffed the Court of BiH in its early years have had previous experience in The Hague.<sup>849</sup> These officials and staff have been able to bring to their jobs in Bosnia a wealth of expertise.

Three of the international judges serving on the BWCC as of July 2009 previously worked as prosecutors at the ICTY,<sup>850</sup> while Judge Almiro Rodrigues, who was an ICTY judge from 1997 to 2001, served as one of the international judges on the BWCC from April 2005 to April 2009. Judge Meddžida Kreso, president of the state court, believes that the presence of international judges on the court “gave us a lot of good results in the sense of applying international standards.”<sup>851</sup> Former HJPC President Branko Perić believes that the contributions of judges with previous ICTY experience were especially important, noting that Bosnian judges on the state court told him “how helpful Judge Rodrigues was for them” as they first confronted the myriad challenges associated with trying complex war crimes cases.<sup>852</sup>

Perić contrasted the former ICTY judge’s contributions with those of other international judges who lacked a previous background in war crimes cases and who were in much “the same position as domestic judges” when it came to inexperience in this area. Thus, he concluded, the BWCC and the SDWC would be improved if more judges and prosecutors with previous ICTY experience could be involved, “perhaps in the form of counselors and monitoring teams for judges and prosecutors” in Bosnia.<sup>853</sup> Perić was not alone in noting that interna-

tional judges and prosecutors are not necessarily “real experts” in international humanitarian law.<sup>854</sup> Similar concerns have routinely arisen in respect of other hybrid tribunals, highlighting the importance of reviewing recruitment practices to enhance the possibility of appointing highly qualified jurists.<sup>855</sup>

### *c. Guidance in case law*

But while the presence of judges with prior ICTY experience has doubtless facilitated the BWCC’s knowledgeable application of international humanitarian law in the cases before it, the Hague Tribunal’s contribution in this regard is not limited to cases in which a former ICTY judge or prosecutor participated.<sup>856</sup> As the fledgling Bosnian War Crimes Chamber first confronted complex issues of international humanitarian law, it found guidance for many of these issues in the jurisprudence of the ICTY.<sup>857</sup>

As discussed earlier, among the ICTY’s most widely-noted achievements is its contribution, along with that of the ICTR, in developing case law recognizing that crimes of sexual violence are war crimes, crimes against humanity, and/or acts of genocide when other elements of these crimes are present. For example, in a breakthrough judgment in 2001, the ICTY convicted two defendants of the crime against humanity of enslavement for treating two women as sexual slaves—the first time this charge had been found applicable to gender-based violence.<sup>858</sup>

Less obvious is how these legal milestones have affected the thousands of victims of wartime violence across the globe. Through its case law, the BWCC has filled in a small part of the picture: In its first judgment in an *11 bis* case, the BWCC convicted the defendant of crimes against humanity, resting in part on its finding that he committed the crime against humanity of enslavement, for crimes of sexual violence.<sup>859</sup> In this and other judgments the court in Sarajevo has stood on the shoulders of the ICTY, ensuring that crimes of sexual violence receive the legal opprobrium they deserve.<sup>860</sup> Reflecting on this development early in the BWCC’s work, University of Sarajevo Professor Jasna Bakšić Muftić told us that, while it was difficult at that point to predict whether rape would be prosecuted more often as an international crime in Bosnia, “what is important is that it is now part of our jurisprudence. ... This is really important.”<sup>861</sup>

Yet just as the ICTY has been faulted for its failure to bring charges of sexual violence in particularly egregious cases where the evidence warrants, the Court of BiH has been criticized for under-prosecuting crimes of sexual violence.<sup>862</sup> According to Amnesty International, moreover, “The majority of cases related to war crimes of sexual violence in which the WCC has delivered a final judgment were either cases which had been directly transferred to the BiH judiciary from the ICTY under Rule 11 *bis* or cases which relied on the investigative work which had already been done by the ICTY.”<sup>863</sup> Even so, a substantial number of cases brought before the BWCC have involved convictions for charges of sexual violence.<sup>864</sup>



#### *d. Applying lessons learned from ICTY missteps*

At times, staff who brought prior ICTY experience to Bosnia have helped improve upon the state court's approach by applying to their work in Bosnia lessons learned the hard way in The Hague. The experience of Lucia Dighiero exemplifies the point. In December 2004, Dighiero, who had worked in the ICTY's Victims and Witnesses Section (VWS) since 2002, became the first director of the Witness and Victim Support Section (WSS) of the Court of BiH. As an ICTY victim support officer observed, Dighiero was able to "take the bits that were helpful" from her experience in the ICTY's VWS and "transfer[] her ... skills to the locally recruited staff," while adapting expertise developed in The Hague to a different context.<sup>865</sup> Dighiero recalled that, as the unit in Sarajevo was being established, "they had a concept but no practical experience" in working with vulnerable witnesses.<sup>866</sup> Dighiero was able to bring to bear a broad range of practical experience in setting up the new office, which she applied in hiring and training staff and,<sup>867</sup> most important, in establishing protocols for assisting witnesses.

In Dighiero's view, the ICTY's "main influence" on the office she helped launch, "was the idea of this VWS."<sup>868</sup> While the VWS provided an important model and a key source of expertise, the ICTY's approach also provided a cautionary tale. For Dighiero, it was all important that the fledgling BWCC avoid "this bureaucracy with the ICTY," where staff in the VWS could not directly address judges about witnesses' psychological state but instead had to communicate through the UN hierarchical structure of intermediate officials. "At the ICTY," she recalled, "it was very formal." At the BWCC, she could communicate directly with judges about witnesses' practical needs in the courtroom—things as mundane as a witness's need to take a 15-minute break—and "they listen to us ... they accept that we're part of the process."<sup>869</sup>

Dighiero also made sure that her office could establish contact with witnesses earlier than was possible in the ICTY. The VWS generally did not get involved with witnesses until they received a summons. "Often," Dighiero recalled, "issues were coming up that could have been solved" if the section had been able to establish contact sooner.<sup>870</sup> At the Court of BiH, her office is able to establish contact sooner: in the case of prosecution witnesses, typically two to three months before they testify.<sup>871</sup>

#### **4. Completing the "completion strategy"**

Like many victims of wartime atrocities, Josip Drežnjak and Drago Zadro had hoped to find justice in The Hague—but now realize that the only justice they may find will come from domestic courts. And like many victims, the men have found that justice in Bosnia might be found, if at all, in courts that were not addressed in the ICTY's completion strategy.

Both men lost several relatives in a notorious 1993 massacre in Grabovica in which 33 Croat civilians were slaughtered by Bosniak soldiers. The victims included Drežnjak's mother, father, and sister-in-law; Zadro lost his mother, father, brother, sister-in-law, and a four-year-old niece, and has raised the slain toddler's two brothers, who managed to escape the slaughter.

The ICTY prosecuted just one person for the Grabovica massacre, charging a senior Bosniak military official, Sefer Halilović, with command responsibility for the Grabovica massacre and for the murder of 25 inhabitants of the nearby village of Uzdol in September 1993. On November 16, 2005, an ICTY Trial Chamber acquitted Halilović. Although it confirmed the fundamental facts of the Grabovica massacre, the chamber found that the prosecution failed to prove beyond a reasonable doubt that the defendant actually commanded the operation that claimed so many civilian lives.<sup>872</sup>

Survivors of the massacre were devastated. When Halilović went to The Hague, Drežnjak recalled, “we expected that he would be sentenced, that the verdict would be reached, that justice would be met.”<sup>873</sup> Intimately familiar with the facts of the massacre, Zadro was “one hundred percent sure that he would be convicted. ... I counted on it one hundred percent.”<sup>874</sup> But they “lost almost every hope” after Halilović was acquitted, Drežnjak told us. Now, Halilović serves in the national parliament, and victims who believe he was responsible for their relative’s deaths “see this guy on TV, in the media, every day.”

While Halilović’s acquittal frustrated their hope of finding redress in The Hague, Drežnjak and Zadro continue to believe, fourteen years after the Grabovica massacre, that justice is necessary. “After all that one has been through,” Drežnjak explained, “it’s very often the case that you cannot even sleep well. But then you have to find someone to tell about it all. ... We just want to see justice.”<sup>875</sup>

Zadro says he has found “at least something, some small comfort,”<sup>876</sup> in convictions imposed by Bosnian courts, but their limitations are also painful. In October 2003 (before the BWCC became operational), Enes Šakrak, a soldier who pleaded guilty to killing Zadro’s mother and four-year-old niece because “his conscience could not stand it any longer,”<sup>877</sup> became the first person sentenced for the Grabovica massacre; Šakrak was sentenced to 10 years’ imprisonment.<sup>878</sup> Soon after, the cantonal court imposed a nine-year sentence on Mustafa Hota, who pleaded guilty to killing a 79-year-old man and his wife during the same military operation.<sup>879</sup> According to Drežnjak and Zadro, three other soldiers implicated by Šakrak were convicted in Bosnian courts of participating in the murder of Zadro’s relatives but “they haven’t served their sentences yet” because “there’s no room in prison” for them.<sup>880</sup> Recounting this, Drežnjak asked, “Can you imagine how we feel? They wait for us to go crazy.”<sup>881</sup>

Like anyone who has endured tragic loss, each of these men’s suffering is unique. But the challenges they describe are systemic, affecting victims across Bosnia who are still seeking justice for wartime atrocities. Just as the ICTY could prosecute a small fraction of wartime atrocities, the Court of BiH can handle a fraction of the war crimes cases that now fall to Bosnian courts to complete. Yet only the state court has been adequately prepared to meet this challenge, creating what many perceive as “double standards for justice” in Bosnia.<sup>882</sup> Civil society activist Dobrila Govedarica believes that the ICTY’s role in the creation of the BWCC is one of its most important achievements but notes that it is “limited to the state court. We now have the problem of how to apply it to lower courts.”<sup>883</sup>

This is not to minimize the ICTY's role in creating the BWCC and ensuring its effective operation.<sup>884</sup> Yet the Bosnia experience highlights an important lesson for other contexts in which international courts may play a role in addressing mass atrocities. Specialized courts may play a necessary and essential role in prosecuting certain cases but their capacity will always be limited. Accordingly, planning for prosecutions should always take account of the role that regular courts ultimately should play in complementing their work.

Just as important, the ICTY's experience highlights an important lesson that the SDWC failed to take on board in its crucial start-up years: Specialized war crimes bodies like the ICTY, the BWCC, and the SDWC will surely be faulted if they devote their finite resources to prosecuting comparatively low-level suspects. Just as the ICTY was faulted for taking on comparatively low-level cases in its earlier years—a misstep eventually addressed in part through the vehicle of *11 bis* transfers—the SDWC's early indictments have drawn wide criticism.<sup>885</sup>

The pith of this criticism is that the SDWC has failed to develop a coherent approach to determining the cases it will prosecute<sup>886</sup> and those it will refer to district or cantonal courts for prosecution.<sup>887</sup> The Collegium of Prosecutors of BiH took a first cut at this question in guidelines adopted in late 2004. Under those guidelines, the Court of BiH would try “highly sensitive” cases, while “sensitive cases may, contingent upon the discretion of the Chief Prosecutor, be remitted for trial to the cantonal and district courts.”<sup>888</sup> It quickly became clear, however, that the criteria of “highly sensitive” and “sensitive” provided scant practical guidance.

Two years after these criteria were adopted, Branko Perić, then president of the HJPC, stated bluntly, “The prosecutor's office doesn't have a strategy.”<sup>889</sup> According to Perić, the state prosecutor had “taken over more than 100 war crimes cases from cantonal courts, ... and then they were overloaded with cases they can't solve” given the SDWC's finite capacity.<sup>890</sup> In his view—one that is widely shared—many of the cases taken over by the state court included comparatively low-level suspects, which should be left for prosecution by cantonal and district courts.<sup>891</sup>

Delays in developing clear and principled criteria for selecting cases has left victims to wonder why their own cases did not merit prosecution at the state level while other victims' cases did.<sup>892</sup> In a country starkly divided along ethnic lines, the seeming lack of neutral principles for selection has needlessly provided further grist for Bosnian Serbs' recurring charge that case selection is fueled by ethnic bias.<sup>893</sup> (Reflecting the fact that Serb forces committed the largest proportion of war crimes, the SDWC has indicted more Serbs than Bosniaks or Croats.)

Closely related to the importance of finalizing appropriate criteria for the selection of cases and ensuring that these are understood by the Bosnian public, the SDWC needs to make a realistic assessment of the number of cases it will be able to prosecute, prioritize its caseload accordingly, and manage public expectations about what it can realistically achieve. Otherwise, it risks repeating a major misstep by the ICTY—devoting substantial resources to prosecuting comparatively low-level cases in its early years and then having to readjust its caseload in the face of finite time.<sup>894</sup>

In recent years, state authorities have taken further steps to address this issue.<sup>895</sup> In February 2009 the SDWC adopted draft guidelines for selecting cases for prosecution before the BWCC that flesh out the barebones criteria set forth in earlier policy statements while nonetheless avoiding rigid standards.<sup>896</sup> As a foundation for implementing its selection guidelines, the SDWC has also been working to establish a comprehensive database of all wartime atrocities and potential defendants, as well as a database of all war crimes cases that have been instituted before any Bosnian court.<sup>897</sup>

Now, fifteen years after the armed conflict in Bosnia came to an end, the need to finalize and implement the SDWC's selection strategy is more urgent than ever. As one of our Bosnian interlocutors noted, when it comes to cases before the BWCC "time is not an ally," because many witnesses have already died while others are growing reluctant to testify.<sup>898</sup> "It's not that they don't want to see justice satisfied," he explained, "they do." But "this situation is taking way too long," and many fear that appearing as a witness in cases before the state court can disrupt the new lives they have begun to build.<sup>899</sup>

## 5. Lessons for the future

### *a. Planning a role for domestic courts from the outset*

In view of the achievements of Bosnia's War Crimes Chamber and Special Department for War Crimes in the Prosecutor's Office of BiH, the question must be asked: Could the international community have done more sooner—in particular, before pressure mounted on the ICTY to hand off lower-level cases to domestic courts—to prepare Bosnian courts to prosecute war crimes cases fairly? We raise this question not to criticize the ICTY in hindsight, but rather in the hope of guiding future policy decisions concerning the relationship of international and domestic courts.

A number of our Bosnian interlocutors believe, in the words of Mirsad Tokača, that "a local partner" for the ICTY "should have been developed much sooner."<sup>900</sup> Tokača faults the Peace Implementation Council, the High Representative, and other international actors who "ignored this for a long time," saying "everything will be realized by the ICTY."<sup>901</sup> In a December 2006 interview, Nerma Jelačić, then a journalist covering the BWCC for the Balkan Investigative Reporting Network (BIRN), told us that she too believed the chamber could have been established earlier, though perhaps with a more heavily international nature, and asked, "What if you had created it in 2000? Imagine where you would be in 2006." Where you would be, Jelačić continued, is "farther along in ending impunity."<sup>902</sup>

In Jelačić's view, the costs of delay are substantial. Among other tolls, "the passage of time has allowed some beliefs to become more concrete;" now, it is "harder to change attitudes."<sup>903</sup> Nidžara Ahmetašević, the editor of BIRN Bosnia and Herzegovina, agrees that planning for the war crimes chamber could have taken place sooner. Had this happened, she

believes, Bosnia could have gone farther, sooner in “fac[ing] the past”—which she is convinced is “the only way for us ... to look to the future.”<sup>904</sup>

Others insist that the BWCC could not have been established sooner. When asked whether he agreed with one assessment, described below, which identified 1998 as a year of lost opportunity to begin the process of bolstering domestic capacity to prosecute war crimes, the chief prosecutor of BiH emphatically disagreed, saying “it was not possible at all” in view of the prevailing security situation and political will at the time. “Even today everybody is trying to destroy this court,” he noted. “If it had been established sooner, it would never be operational.”<sup>905</sup> In similar fashion, civil society leader Tarik Jusić considers suggestions that the BWCC could have been established sooner to be “absurd,” and notes: “That it actually works and there are no bombs are amazing. Ten years ago this would have been unimaginable.”<sup>906</sup>

Judge Meddžida Kreso, president of the Court of BiH, insists that it was “impossible to transfer cases sooner” but offers a different reason, citing the absence until several years ago of the legal framework and institutions needed to support the BWCC.<sup>907</sup> Branko Perić, former president of the HJPC, made much the same point, saying he did not believe “domestic courts were capable of handling war crimes cases before January 1, 2005.”<sup>908</sup>

Edin Ramulić, a survivor of the infamous Omarska camp in Prijedor who helped found the victims’ association Izvor, agrees that “it was impossible to create the state court sooner, before these [judicial] reforms occurred.”<sup>909</sup> But he recognizes that this point begs the question whether comprehensive judicial reform could have occurred sooner. In his view, the international community “would have initiated [judicial] reforms sooner” if the ICTY had “not been there as an excuse.”<sup>910</sup> With the ICTY operating in The Hague, however, and with other international actors involved in postwar Bosnia facing a long list of urgent and demanding priorities—among them, securing the return of refugees and addressing housing needs—judicial reform “wasn’t on the list”<sup>911</sup> and “a few very important years were simply lost.”<sup>912</sup> But while Ramulić believes that the very existence of the ICTY delayed judicial reform by creating the “illusion that the Tribunal would solve the problem on its own of all the war criminals,” he adds that the BWCC “would not have been established” at all if the Hague Tribunal had never existed.<sup>913</sup>

Damir Arnault, a senior advisor to the Bosniak member of the Presidency, has a somewhat different take on the question but ends up close to Ramulić’s view. He notes that even in 2004, it was impossible to create the Court of BiH “through the will of political elites” in Bosnia. Instead, laws establishing the Court and Prosecutor’s Office of BiH, respectively, were imposed by the High Representative that year. Because this action did not rest upon on the support of Bosnian leaders, Arnault reasoned, “It’s not clear why the High Representative couldn’t have done this sooner.” Indeed, he continued, in some respects the High Representative’s action was “riskier in 2004” than when NATO forces were in Bosnia “in force in the 1990s.”<sup>914</sup> “The question,” Arnault concluded, “is whether you could convince governments to give money for the project sooner.” After all, the ICTY “was just beginning to do its work”

in the late 1990s, as it finally began to secure custody of indicted suspects. In this setting, governments might have seen efforts to build a domestic war crimes court as a “ploy to get around the ICTY” just when it was finally becoming truly effective.<sup>915</sup>

In a somewhat similar vein, Fidelma Donlon, a former head of the OHR’s Criminal Institutions and Prosecutorial Reform Unit and former deputy registrar of the Court of BiH, believes that key donors’ already substantial financial contribution to the ICTY may have contributed to the international community’s tardiness in preparing domestic courts to handle war crimes cases: donors thought their existing contributions were sufficient.<sup>916</sup> Additionally, she writes, “many diplomats misconstrued the Rules of the Road agreement” in ways that led them to “believe that there were procedures in place to address problems with national trials, when in fact there were not.”<sup>917</sup> “With the benefit of hindsight,” Donlon concludes, the Peace Implementation Council’s 1998 meeting, in which it addressed the need for judicial reform but failed to address war crimes prosecutions in particular, was a lost opportunity to “comprehensively audit the work of the national authorities in relation to war crimes cases and develop a strategy to combat impunity.”<sup>918</sup>

It is of course impossible to know whether the international community could have made greater headway in preparing Bosnian courts to handle war crimes prosecutions had it made concerted efforts sooner. What seems relatively apparent, however, is that “there was no clear strategy” about judicial reform for years, and “a lot of time was wasted.”<sup>919</sup> At the very least, the experience in Bosnia highlights the risk that the operation of an international court, however necessary, may induce an unwarranted complacency when it comes to domestic courts.

More broadly, the Bosnia experience highlights the crucial importance of recognizing early on that any international court can try only a small fraction of those responsible for mass atrocities and national courts must be adequately prepared to play a major role in providing justice. If the need for effective local partners became clear only when the ICTY was pushed to contemplate winding up its work, in the future this point should be clear from the moment that an international court becomes involved in prosecuting mass atrocities.

During an interview in March 2007, ICTY Judge Wolfgang Schomburg drew the same conclusion. Noting that “the ICTY is only one wheel in the entire machinery” of transitional justice, he said that “one of the most important lessons to be learned ... in the future, when establishing an international tribunal, is that you must take care to ensure that a functioning judiciary worth its name be established at the same time in the area, i.e. capacity building from the outset.”<sup>920</sup>

#### ***b. The role of international actors***

While the best approach for bolstering domestic courts’ capacity to undertake complex war crimes cases depends on the particular circumstances of each context, the model forged in

Bosnia represents an advance that may be worth considering in other contexts. As a hybrid court organized under domestic law, the chamber was thoughtfully designed to enhance local capacity in ways that would endure after international participants were phased out. In particular, the BWCC is the first hybrid court that was designed from the outset to become a fully national court after a period of progressively diminishing international participation.<sup>921</sup>

As noted earlier, the participation of international actors, particularly those with previous experience at the ICTY, is widely thought to have helped prepare their domestic counterparts to apply international humanitarian law as well as international standards of fair process. But in a country still deeply riven along ethnic lines and whose judiciary has long been subject to political pressures, international judges, prosecutors, and other staff have served another role that is equally important: They have helped assure that the BWCC is impartial and insulated from political pressures. Although journalist Nidžara Ahmetašević doubts whether international judges in the Court of BiH are overall more competent than the Bosnian judges, she believes that their presence is crucial in preventing political interference and assuring impartiality.<sup>922</sup> And as Chief Prosecutor of BiH Milorad Barašin observed: “It’s extremely important to have international judges for perceptions of neutrality [on the part of] common people.”<sup>923</sup>

There is another dimension, Barašin added. Describing the dynamic within the SDWC, Barašin—who is ethnically Serb—told us that a Bosniak colleague “would prefer to say everything he knows to an international colleague than to me.”<sup>924</sup> Thus in societies emerging from ethnic violence, international staff may inject a crucial dynamic not only in the public eye but also within judicial institutions.

At a time when it had been envisaged that Bosnia’s war crimes institutions could operate without international judges and staff, the need for their participation remained strong in light of myriad factors, including what one study termed “the current political climate in the country.”<sup>925</sup> Thus, on Dec. 14, 2009, the High Representative for BiH extended the mandate of international judges and prosecutors working on war crimes cases for a further three years.<sup>926</sup> The decision followed the failure of the Bosnian Parliament to amend the relevant legislation in a way that would allow for continued participation of internationals in the work of the SDWC and in the BWCC. Bosnian Serb members of the Bosnian Parliamentary Assembly opposed unanimously their continued presence and blocked adoption of the law.<sup>927</sup> Indeed, RS Prime Minister Milorad Dodik has repeatedly claimed that the ongoing involvement of international judges and prosecutors threatens the legitimacy of Bosnia and Herzegovina as a sovereign state, while his opponents dismiss the rhetoric as an attempt to head off corruption allegations that have been leveled against him.<sup>928</sup>

Although the BWCC has faced and continues to confront a raft of difficult challenges, it has emerged as a model for transitional justice efforts elsewhere.<sup>929</sup> Within Bosnia, the chamber is one of “the strongest state institution[s] we have,” in the view of journalist Nidžara Ahmetašević—and one that is playing an important role in Bosnians’ ongoing process of reck-

oning with the dark pages of its recent past.<sup>930</sup> Although the challenges ahead require serious attention, the BWCC already stands as one of the most significant of the ICTY's legacies in Bosnia.





# Notes

## 1. Introduction

1. See Chapter III in particular. We also examine contributions by the ICTY that were not initially anticipated but which, in time, emerged as important. Most important in this regard is our discussion of the Tribunal's role in spurring the establishment of a national crimes chamber in Bosnia.

2. Research and Documentation Center (Sarajevo), *Ljudski gubici u Bosni i Hercegovni 91-95* (*Human Losses in Bosnia and Herzegovina 1991-95*), graph 36, [www.idc.org.ba/](http://www.idc.org.ba/). The charts are available at [http://www.idc.org.ba/index.php?option=com\\_content&view=section&id=35&Itemid=126&lang=bs](http://www.idc.org.ba/index.php?option=com_content&view=section&id=35&Itemid=126&lang=bs), by clicking on "Bosna i Hercegovina." There is no English version on the RDC website.

3. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

4. Interview with Asta Zimbo, former director, Civil Society Initiatives Program, International Commission on Missing Persons, Sarajevo, Dec. 6, 2006.

5. Id.

6. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

7. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006.

8. Interview with Gojko Berić, journalist and columnist for *Oslobođenje*, Sarajevo, July 17, 2009.

9. Interview with Fadil Budnjo, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009.
10. We explore some of the reasons for this early approach in Chapter II.
11. All chapters look at this issue to some extent, but Chapter IV does so in the most detail.
12. Throughout this report we use the word “war crimes” as shorthand for the three types of international crimes that can be prosecuted by the ICTY—serious violations of the laws of armed conflict, which are commonly called “war crimes;” crimes against humanity; and genocide—rather than in a legally precise sense.
13. Plavšić nonetheless provided testimony under court order in one case. See Chapter IV.C.2.
14. Interview with Muharem Murselović, member of Republika Srpska National Assembly, President of the RS Parliamentarians Club for the Party for BiH (Haris Silajdzic Party), Banja Luka, July 15, 2009.
15. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.
16. Patricia M. Wald, *Tyrants on Trial: Keeping Order in the Courtroom* (Open Society Justice Initiative, 2009), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/tyrants\\_20090911/tyrants\\_20090911.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/tyrants_20090911/tyrants_20090911.pdf).
17. This is the highest figure, from 1996, when the International Force (IFOR) in Bosnia had 60,000 troops, of which “50,000 troops [were] provided by NATO nations and approximately 10,000 from non-NATO contributors.” Larry K. Wentz (ed.), *Lessons From Bosnia: The IFOR Experience*, National Defense University/Command and Control Research Program, 1998, [www.dodccrp.org/files/Wentz\\_Bosnia.pdf](http://www.dodccrp.org/files/Wentz_Bosnia.pdf), p. 477. The Stabilization Force (SFOR), the legal successor to IFOR, “was activated on 20 December 1996,” Wentz, p. 480. In January 1997, there were “approximately 32,000 troops deployed in B[iH] with contributions from all the NATO nations and from the 18 non-NATO countries”. S/1997/81, 27 January 1997 (Monthly report to the UN SC on SFOR operations, para. 2), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/023/06/PDF/N9702306.pdf?OpenElement>.
18. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006. Karadžić was arrested in July 2008, almost one and a half years after we interviewed Sali-Terzić.
19. Id.
20. Interview with Jasminka Džumhur, national legal officer, Office of the UN High Commissioner for Human Rights, Sarajevo, June 11, 2007.
21. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.
22. Id.
23. Ian Traynor, “Radovan Karadzic fails to appear for war crimes trial,” *The Guardian*, Oct. 26, 2009; David Charter, “Fury as Karadzic refuses to turn up for war crimes trial,” *The Times*, Oct. 27, 2009. When the judges threatened to impose counsel if Karadžić continued his boycott, his trial was ultimately delayed until March 1, 2010 in order to give imposed counsel time to defend Karadžić if he continued to obstruct the proceedings. Upon the brief resumption of his trial in March 2010, Karadžić claimed that the war was “just and holy” and that the massacres at Srebrenica were a

fiction. Marlise Simons, “Karadzic Trial Resumes Without Defendant,” *New York Times*, Oct. 27, 2009. Mariette le Roux, “Lawyer imposed on Karadzic, trial delayed to March, AFP, Nov. 5, 2009; “Karadzic: Sarajevo and Srebrenica crimes are myths,” *BBC News*, March 2, 2010. The judges then postponed the trial again under a decision made by the Appeals Chamber on additional postponement. Lauren Comiteau, “Karadzic Trial Delayed After Opening Defense Statement,” *VOA News*, March 2, 2010.

24. Some victims, who have for years willingly testified whenever asked to do so at the ICTY, are growing reluctant to do so in Bosnian courts. See Chapter VI.

25. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

26. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 37 (Apr. 19, 2004).

27. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006. Conversely, as we note in Chapter IV.D.2, the Tribunal’s failure to conclude that genocide occurred elsewhere in Bosnia is cause for disappointment among many victims.

28. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

29. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

30. See Chapter IV in this report for a brief discussion of this issue.

31. On July 2, 2008, the Open Society Justice Initiative submitted a Request for Leave to File an Amicus Curiae Brief in *The Prosecutor v. Milan Lukić and Sredoje Lukić* (ICTY Case No. IT-98-32/1-PT). The Justice Initiative requested this leave “in support of the motion filed by the Office of the Prosecutor seeking leave to amend the second amended indictment against Milan Lukić and Sredoje Lukić to include charges concerning mass rapes, enslavement, and torture for sexual atrocities committed in Višegrad, Bosnia-Herzegovina.” The prosecutor’s request to amend to include sexual violence was denied.

32. Interview with Muharem Murselović, member of Republika Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.

33. Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, p. 126 (Univ. of Pennsylvania Press, 2005).

34. British journalist Ed Vulliamy introduced this phrase in his description of the Bosnian conflict. See Ed Vulliamy, “Middle Managers of Genocide”, *The Nation*, June 10, 1996, also available at <http://www.barnsdle.demon.co.uk/bosnia/Vulliamy.html>; and Ed Vulliamy, “‘Neutrality’ and the Absence of Reckoning: A Journalist’s Account,” *Journal of International Affairs*, vol. 52, no. 2, Spring 1999, at 605.

35. Srećko Latal, “Bosnian Serb Leader Shocks Victims’ Families,” *Balkan Insight*, Sep. 15, 2009, [www.balkaninsight.com/en/main/news/22220/](http://www.balkaninsight.com/en/main/news/22220/) (retrieved Feb. 4, 2010). Dodik’s claims came in the midst of a political crisis marked by efforts of Republika Srpska leaders to further increase the competencies of the Bosnian Serb entity at the expense of the central government.

36. The quotes by Tokača and Murselović are excerpted from Chapter V, “Truth and Acknowledgment” of this study.

37. See *infra*, Chapter V: “Truth and Acknowledgment,” Sec. D (Outreach).

38. As we note in Chapter VI, then UN Secretary-General Boutros Boutros-Ghali recognized the role of national courts in prosecuting the atrocities then under way. But under the prevailing circumstances, Bosnian courts were hardly seen as credible vehicles for justice.

39. See David Tolbert and Aleksandar Kontić, Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009 (Dec. 15, 2008).

40. Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, annexed to Letter dated 17 June 2002 from the Secretary-General addressed to the Security Council, UN Doc. S/2002/678, para. 49.

41. See especially Chapter VI.

42. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, July 24, 2009.

43. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporters Network in BiH, July 13, 2009.

## 2. Background

44. The resolution creating the Tribunal, S.C. Res. 827 (May 25, 1993) was preceded by a resolution adopted three months earlier in which the Security Council decided that the ICTY “shall be established” and directed the Secretary-General to submit a proposal for constituting the court. S.C. Res. 808 (Feb. 22, 1993).

45. The international media played an important role in exposing the atrocities underway in Bosnia. A breakthrough series appeared in *Newsday* starting on August 2, 1992. *Newsday* journalist Roy Gutman reported on “concentration camps in which more than a thousand civilians have been executed or starved and thousands more are being held until they die.” Roy Gutman, “Bosnia’s Camps of Death,” *Newsday*, Aug. 2, 1992. Gutman, soon joined by other journalists, continued to report on the Bosnian atrocities in real time.

46. A major difference between Bosnia and Croatia is that Serbs were a relatively small minority in Croatia (roughly 12 percent of its prewar population) but a much larger minority in Bosnia, almost one-third of its prewar population.

47. In the initial phase of the war, Bosniaks and Croats joined forces against a common enemy, but the alliance collapsed in autumn 1992 and for the next three years Bosnia was engulfed in conflict, with all three major groups fighting each other.

48. Writing that the Security Council created the ICTY for both “[g]ood and bad reasons,” Aryeh Neier explains what he meant by the latter: Creating the Tribunal “was a substitute for effective action to halt Serb depredations in Bosnia-Herzegovina.” Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice*, p. 112 (Times Books, 1998) [hereafter *War Crimes*]. Similarly, journalist Pierre Hazan writes that Western leaders’ motivation in creating the ICTY “is more to reassure the public than to formulate concrete responses in the domain of preventive diplomacy.” Pierre Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia*, p. 41 (Texas A&M Univ. Press 2004) [hereafter *Justice in a Time of War*].

49. Aryeh Neier, *War Crimes*, p. 124.

50. The gap between the number of Security Council resolutions addressing the Bosnia conflict and effective responses prompted a commander of UN peace operations in Bosnia to say, "I don't read the Security Council resolutions anymore because they don't help me. There is a fantastic gap between the resolutions of the Security Council, the will to execute those resolutions and the means available to commanders." Roger Cohen, "Dispute Grows over U.N.'s Troops in Bosnia," *New York Times*, Jan. 20, 1994.

51. The summary of major news stories appearing in the *New York Times* on the day that it reported the ICTY's creation captures the inauspicious context for its work. The two top news summaries read:

NEWS SUMMARY

Published: Wednesday, May 26, 1993

International A3-13 WEST SEES GAINS, SERBS ASSERT

From Yugoslavia, the plan to contain the fighting in Bosnia and Herzegovina that the United States, Russia, Britain, France and Spain agreed on last weekend looks like a recognition by the outside world that the Bosnian Serbs have won their war against the Muslims. A1

CROATS PONDER A MOVE ON SERBS

With the West backing away from a showdown with the Serbs over Bosnia, the question in Croatia is whether President Franjo Tudjman will bide his time or renew attacks on Serbian-held territory in Croatia. A12 U.N. sets up tribunal to hear war crimes charges.

*New York Times*, May 26, 1993, at <http://query.nytimes.com/search/sitesearch?query=May+26%2C+1993+%2B+Serbs&submit.x=20&submit.y=11>.

52. By then, expectations were so low that the *New York Times* reported the ICTY's opening via a wire service report with a disparaging lead: "The first war crimes tribunal since World War II opened today amid doubt that it had enough documented proof or power to punish those guilty of atrocities in former Yugoslavia." "War-Crimes Tribunal Opens Inquiry on Yugoslav Fighting," AP, in *New York Times*, Nov. 18, 1993.

53. Aryeh Neier recounts briefly the Security Council deliberations over a prosecutor in *War Crimes*, p. 132.

54. Venezuela's Attorney General Ramon Escovar-Salom was appointed prosecutor but soon withdrew so that he could accept another appointment in Venezuela. See Paul Lewis, "South African Is to Prosecute Balkan War Crimes; A yearlong search, complicated by Slavic alliances," *New York Times*, July 9, 1994. The ICTY Web site indicates that Escovar-Salom never actually took up his position. See ICTY Web site at <http://www.icty.org/sid/287>.

55. In his memoir, former ICTY Prosecutor Richard Goldstone recalls his first visit as prosecutor to Sarajevo, which was "unforgettable because of the problems and danger associated" with visiting a city "under vicious siege." Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, p. 94 (Yale Univ. Press, 2000).

56. When the ICTY began operating, the United Nations was in the midst of an unprecedented financial crisis caused in significant part by U.S. arrears in making its contribution to the UN budget, and in any case was wholly unfamiliar with the complex needs of an international criminal court.

57. See note 11, *supra*.

58. Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, p. 105 (2000).
59. Id.
60. Id., pp. 105–06.
61. Much of the evidence supporting the indictment of Nikolić came from a source who had fled the region and who had been a guard at a camp where Nikolić murdered, tortured, and illegally detained Muslim prisoners. The *New York Times* had published a series of articles based on this man's account in August 1994. See Roger Cohen, "Tribunal Charges Serbian Camp Commander with War Crimes," *New York Times*, Nov. 8, 1994. Although indicted in November 1994, Nikolić eluded arrest until April 20, 2000. See ICTY Web site at [http://www.icty.org/x/cases/dragan\\_nikolic/cis/en/cis\\_nikolic\\_dragan.pdf](http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf).
62. See Monika Nalepa, "Why Do They Return? Evaluating the Impact of ICTY Justice on Reconciliation," p. 30 (Jan. 26, 2007). Michelle Nicholasen, "What about Milosevic?," Frontline Online (no date available) at <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/milosevic.html>.
63. Charles Trueheart, "War Crimes Tribunal Gathers Momentum; 4 Trials Underway for Atrocities in Bosnia, but top Figures Remain at Large," *Washington Post*, Mar. 3, 1998.
64. See Gary J. Bass, "Settling with the Enemy; The Dicey Politics of Negotiating Peace in the Balkans with Accused War Criminals," *Washington Post*, Oct. 29, 1995 (describing opposition by Europeans to the idea of the ICTY since it was first proposed on the ground "that pursuing this sort of justice would interfere with peace-making further down the road"); Carla Anne Robbins, "Balkan Judgments; World Again Confronts Moral Issues Involved in War-Crimes Trials; Some Feel U.N. Delays Peace in Former Yugoslavia by Pursuing Atrocities," *Wall Street Journal*, July 13, 1993.
65. See Jonathan S. Landay, "Opening the docket: trials of a war tribunal," *Christian Science Monitor*, Nov. 16, 1994.
66. The Bosnian Serbs' military chief, Ratko Mladić, was also routinely engaged by European diplomats. See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, p. 25 (July 2009). <http://soc.kuleuven.be/ieeb/CPRS/cahiers/Vol83.pdf>, at 42–43 and 60–61. Later, the ICTY prosecutor—by then, Louise Arbour—would face a similar challenge. Her concern that Slobodan Milošević would escape prosecution if she did not act quickly was among the primary reasons for filing the first Milošević indictment only two months after the beginning of the massive campaign of ethnic cleansing undertaken by the Serbian and Yugoslav forces in Kosovo in 1999. See Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Justice Initiative, 2008), at 35 and 112.
67. As we discuss further in Chapter IV, while Srebrenica is known for the massacre of well over 7,000 males in July 1995, the siege began years earlier.
68. See Pierre Hazan, *Justice in a Time of War*, p. 66.
69. Richard J. Goldstone, *For Humanity*, p. 103.
70. Security Council Resolution 836, adopted on June 4, 1993, authorized the UN Protection Force (UNPROFOR) in Bosnia and UN Member States to use force to protect so-called "safe areas" that were under siege. These included Sarajevo, Bihać, Tuzla, Srebrenica, Žepa, and Goražde.
71. Gary Bass writes that the late August 1995 shelling of a marketplace in Sarajevo was, coming soon after the Srebrenica assault, the last straw that prompted NATO's response. See Gary Bass, *Stay the Hand of Vengeance*, p. 231.

72. See id., pp. 232–38.
73. Goldstone, *For Humanity*, p. 103.
74. Gary Bass describes the Tribunal prosecutor’s and president’s concerns that amnesties would be offered at Dayton in *Stay the Hand of Vengeance*, pp. 242–43.
75. See Stephen Engelberg, “Panel Seeks U.S. Pledge on Bosnia War Criminals,” *New York Times*, Nov. 3, 1995.
76. Goldstone denies that he deliberately issued the second indictments during the peace talks but concedes that he speeded up their preparation “[w]hen it was announced that the Dayton talks were to take place.” Goldstone, *For Humanity*, p. 108. Just before he issued the Srebrenica indictments, Goldstone also issued his first set of indictments against Serbian officers in relation to the worst massacre in Croatia, which took place in Vukovar in November 1991. See e.g. *Prosecutor v. Mrkšić et al.*, [Initial] Indictment, IT-95-13/1-I, “Vukovar Hospital,” 26 Oct. 1995; *Prosecutor v. Hadžić*, [Initial] Indictment, IT-04-75-I, 21 May 2004. See also Roger Cohen, “Tribunal Indicts 3 Serbia Officers; Hague Inquiry Moves Closer to Belgrade’s Leadership,” *New York Times*, Nov. 10, 1995.
77. See Gary J. Bass, *Stay the Hand of Vengeance*, p. 241.
78. See Richard Holbrooke, *To End a War*, p. 222.
79. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex IA, Art. X. UN Member States were already required to cooperate pursuant to the resolution establishing the ICTY. See S.C. Res. 827, 4.
80. The negotiating parties were unable to reach agreement on the location of the Inter-Entity Boundary Line in the northern town of Brčko, and instead provided for arbitration to resolve this matter. The outcome of the arbitration was to establish an autonomous District of Brčko, under the control of neither entity. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 2, Art. V.
81. See Haris Siladzjic interviewed by Christiane Amanpour, “Bosnian leader: ‘Ethnic cleansing’ continues 15 years after war,” CNN, at <http://amanpour.blogs.cnn.com/2010/03/02/bosnian-leader-ethnic-cleansing-continues-15-years-after-war/>.
82. The PIC was established at an implementation conference held in London on Dec. 8–9, 1995, subsequent to the completion of the negotiations of the Dayton Peace Agreement the preceding month. It comprises a group of 55 countries and international organizations. See the OHR Web site, <http://www.ohr.int/ohr-info/gen-info/#6>.
83. The OHR Web site describes the office this way:  

[The] Office of the High Representative (OHR) is an *ad hoc* international institution responsible for overseeing implementation of civilian aspects of the accord ending the war in Bosnia and Herzegovina. The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement, that was negotiated in Dayton, Ohio, and signed in Paris on December 14, 1995. The High Representative, who is also EU Special Representative (EUSR) in Bosnia and Herzegovina, is working with the people and institutions of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina evolves into a peaceful and viable democracy on course for integration into Euro-Atlantic institutions. [http://www.ohr.int/ohr-info/gen-info/default.asp?content\\_id=38519](http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519).



84. In 1997, the Peace Implementation Council granted the OHR special powers, commonly referred to as the Bonn powers, including the capacity to dismiss local officials at any level or to impose laws.

85. See also Chapter VI.

86. Richard J. Goldstone, *For Humanity*, p. 116.

87. In his memoir, Dayton negotiator Richard Holbrooke describes a first test of IFOR soon after its deployment. As the date for Sarajevo's unification under Federation control approached, nationalist Serbs ordered Serbs living in Sarajevo to vacate their homes rather than remain in a multiethnic city—and to burn their homes on their way out. Assisted and intimidated by nationalist Serbs, those living in the predominantly Serb Sarajevo suburbs of Grbavica and Ilidža torched their homes. Holbrooke writes: "This tragedy could have been easily prevented if IFOR had taken action. But although unchallenged and feared, NATO/IFOR did almost nothing... This was the worst moment of the first two years after Dayton. Not only was it a disaster on its own terms, but it ended the sense of hope and momentum that had begun in late November." Richard Holbrooke, *To End a War*, pp. 336–37.

88. See NATO, *Press Release: IFOR Assistance to the International Tribunal* (February 14, 1996), available at <http://www.nato.int/docu/pr/1996/p96-026e.htm>.

89. Philip Shenon, "G.I.'s in Bosnia Shun Hunt for War-Crime Suspects," *New York Times*, Mar. 2, 1996 (quoting unnamed "Defense Department official involved in Bosnian Policy").

90. See *id.*

91. Richard Holbrooke, *To End a War*, p. 338.

92. *Id.*

93. Elizabeth Rubin, "The Enemy of Our Enemy," *New York Times Magazine*, Sept. 14, 1997.

94. *Id.* See also John Pomfret, "Persevering Power Pair; Despite Vows to Rid Bosnia of Them, Mladić, Karadžić Still Lead Serbs," *Washington Post*, Feb. 12, 1996.

95. Radovan Karadžić has been arguing since his arrest and transfer to The Hague that in mid-1996 he had reached an agreement with representatives of the United States that, should he withdraw from public life, he would be immune from prosecution at the ICTY. Richard Holbrooke, the focus of Karadžić's allegation, has denied the claim. According to Holbrooke, "no one in the U.S. government ever promised anything, nor made a deal of any sort with Karadzic," Marlise Simons, "Study Backs Bosnian Serb's Claim of Immunity," *New York Times*, Mar. 21, 2009, [http://www.nytimes.com/2009/03/22/world/europe/22hague.html?\\_r=4&ndhp](http://www.nytimes.com/2009/03/22/world/europe/22hague.html?_r=4&ndhp). The ICTY has recently determined that any alleged undertaking between Karadžić and Holbrooke would not affect the Tribunal's jurisdiction. See *Prosecutor v. Radovan Karadžić*, Case No.: IT-95-5/18-PT, Decision on the Accused's Holbrooke Agreement Motion (July 8, 2009), <http://www.icty.org/x/cases/karadzic/tdec/en/090708.pdf>.

96. Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, p. 27 (2009).

97. *Id.*, p. 56.

98. SFOR operated for eight years beginning in December 1996.

99. "Robin Cook's speech on the government's ethical foreign policy," *Guardian*, May 12, 1997, <http://www.guardian.co.uk/world/1997/may/12/indonesia.ethicalforeignpolicy>.

100. We discuss the impact of this operation in Chapter IV.

101. Philip Shenon, "War Crimes Suspects Seen as Living Openly in Bosnia," *New York Times*, Dec. 13, 1999. In contrast, as the *Times* reported, NATO forces in the French zone, where many of the most notorious suspects were believed to be living, had not arrested any. See Chapter IV.F. for discussion of the impact of arrests on returnees.

102. On April 3, 1996, an ICTY judge signed a Warrant of Arrest Order for Surrender, directing UNTAES to arrest and surrender Slavko Dokmanović, wartime mayor of Vukovar, to the ICTY. Dokmanović had been living in Serbia since July 1996. An investigator for the ICTY Office of the Prosecutor met with Dokmanović in Serbia on June 24, 1997 to hear his allegations about war crimes committed against Serbs in the area of Vukovar; Dokmanović was not yet aware of the ICTY indictment against him. On the same occasion, Dokmanović inquired about the possibility of compensation for his property in Croatia. The investigator suggested that Dokmanović meet with Jacques Klein, then transitional administrator of the UNTAES region. Dokmanović crossed the border on June 27, 1997, believing that he was heading to the meeting with Klein. Instead, UNTAES soldiers handcuffed Dokmanović at the Erdut UNTAES base and boarded him on an UNTAES flight bound for The Hague. See *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, Oct. 22, 1997, 3–11.

103. NATO, *Peace Support Operations in Bosnia and Herzegovina* (March 2009), at <http://www.nato.int/issues/sfor/index.html#aim>.

104. SFOR's mission ended in early December 2004. Since then, a European Force (EUFOR) has been deployed in Bosnia.

105. Case Information Sheet, "Čelebići camp" (IT-96-21), [www.icty.org/x/cases/mucic/cis/en/cis\\_mucic\\_al\\_en.pdf](http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf); see also Chris Hedges, "Balkan War Crimes: Bosnia Is First to Turn In Its Own," *New York Times*, May 3, 2006.

106. The surrender of the ten took place in Croatia, as a major step in Croatia's effort to improve its standing with the United States. Chris Hedges, "10 Bosnian Croats Surrender to War Crimes Tribunal," *New York Times*, Oct. 7, 1997.

107. Charles Trueheart, "War Crimes Tribunal Gathers Momentum; 4 Trials Underway for Atrocities in Bosnia, but Top Figures Remain at Large," *Washington Post*, Mar. 3, 1998.

108. The RS authorities announced in December 2004 that families of suspects who surrendered would receive a payment of 25,000 Euros (equivalent of \$33,263 at the time), plus a pension of 690 Euros (\$918) a month. Each family would also receive four airplane tickets to fly to The Hague to visit their relative in prison. Florence Hartmann, the spokeswoman for the OTP, accused the RS government of "treating war criminals as V.I.P.'s." Nicholas Wood, "Bosnian Serbs Chided over Pay in War Crime," *New York Times*, Dec. 14, 2004.

109. On January 15, 2005, Bosnian Serb authorities transferred Savo Todović to the Tribunal. Gojko Janković surrendered to Bosnian Serb authorities on March 13. Both accused were charged in relation to crimes against Bosniaks in Foča. Sredoje Lukić, charged with crimes against Bosniaks in Visegrad in 1992, surrendered on Sep. 14. Todović had been in hiding in Serbia, while Janković and Lukić had been living in Russia. Human Rights Watch, *World Report 2006* (Bosnia and Herzegovina), [www.hrw.org/legacy/english/docs/2006/01/18/bosher12238.htm](http://www.hrw.org/legacy/english/docs/2006/01/18/bosher12238.htm).

110. Letter dated 30 November 2005 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of

the Security Council, S/2005/781, Dec. 14, 2005, Annex I (Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004)), 35; see also Thirteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [submitted to the General Assembly and the Security Council], A/61/271-S/2006/666, 21 August 2006, 82.

111. “Bosnian Serbs Set up Hague Cooperation Task Force,” BBC Monitoring Int’l Reports, Dec. 27, 2006 (text of report by Bosnia-Herzegovina Federation News Agency FENA). Serbian authorities’ cooperation with the ICTY changed significantly following the fall of Slobodan Milošević. See Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (May 2008); In his latest report, Prosecutor Serge Brammertz noted that the cooperation by Serbia had improved, yet Mladić and Hadžić still remain at large. Sixteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [submitted to the General Assembly and the Security Council], A/64/205-S/2009/394, 31 July 2009, 61-63. at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2009\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2009_en.pdf).

### III. Victims’ Justice

112. Zainab Salbi, “Never Again: Remembering the Balkans,” The Huffington Post, Aug. 18, 2009, at [http://www.huffingtonpost.com/zainab-salbi/never-again-remembering-the\\_b\\_262244.html](http://www.huffingtonpost.com/zainab-salbi/never-again-remembering-the_b_262244.html).

113. Interview with Sadik Trako, president, Association of Victims and Missing Persons in Lašva Valley, Vitez, Dec. 6, 2006.

114. Interview with Fatima Fazlić, president of Izvor (Association of Prijedor Women), Prijedor, July 23, 2009.

115. *Prosecutor v. Kunarac, Kovač and Voković*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Judgment 20 (Feb. 22, 2001), at <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> (hereafter *Kunarac Trial Judgment*).

116. Id.

117. Id., 24.

118. Id., 28.

119. Id., 754. On one occasion while she was held captive in Kovač’s apartment, FWS-75 was “raped together with FWS-87 by Kovač while ‘Swan Lake’ was playing in the background.” Id., 757.

120. Id., 754.

121. Id., 778–780. At the time of Kovač’s trial eight years later, the Trial Chamber noted, “the child had never been seen or heard of again.” *Judgment of Trial Chamber II in the Kunarac, Kovač, and Vuković Case*, ICTY Press Release JL/P.I.S./566-e, Feb. 22, 2001, at [http://www.icty.org/x/cases/kunarac/tjug/en/010222\\_Kunarac\\_Kovac\\_Vukovic\\_summary\\_en.pdf](http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf).

122. *Kunarac Trial Judgment*, 759; see also id., 42.

123. See *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 and 40/1-S, Sentencing Judgment, 32 (Feb. 27, 2003).

124. The Research and Documentation Center of Sarajevo has documented approximately 100,000 individuals who either were confirmed killed or disappeared as a result of the 1990s violence, of whom 40.82 percent were civilians (some of the military victims were prisoners of war). See Research and Documentation Center (Sarajevo), *Ljudski gubici u Bosni i Hercegovini 1991–95* (*Human Losses in Bosnia and Herzegovina 1991–95*), graph 6, [www.idc.org.ba/](http://www.idc.org.ba/). As of July 2009, 3,790 victims were buried in the cemetery in Potočari after being exterminated in the Srebrenica genocide. Large areas of the graveyard remained open for those whose remains which had yet to be identified. A memorial at the graveyard recorded 8,372 victims whose deaths had been confirmed as of the end of 2009.

125. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

126. Interview with Asta Zimbo, former director, Civil Society Initiatives Program, International Commission on Missing Persons, Sarajevo, Dec. 6, 2006.

127. See also Lara Nettlefield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge University Press, forthcoming 2010).

128. For example, Gordan Kalajdžić said, “The truth is, Bosniaks were the major victims [in the war]. They suffered the most.” Yet Kalajdžić went on to claim that the “rate” of suffering was “higher for Serbs.” Interview with Gordan Kalajdžić, president of Foča chapter of the Association of Republika Srpska Veterans, Foča, July 20, 2009.

129. Of the civilians whose death or disappearance during the war has been confirmed by the Research and Documentation Center in Sarajevo, 83.33 percent were Bosniak; 10.27 percent were Serbs; 5.45 percent were Croat; and almost one percent had another ethnicity. Research and Documentation Center (Sarajevo), *Ljudski gubici u Bosni i Hercegovini 1991–95* (*Human Losses in Bosnia and Herzegovina 1991–95*), graph 36, [www.idc.org.ba/](http://www.idc.org.ba/).

130. One survey limited to respondents in Sarajevo found that “more than seven of every 10 respondents reported themselves to be victims of war crimes and crimes against humanity; [about n]ine of 10 respondents reported the victimization of a family member or close friend.” Sanja Kutnjak Ivković and John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)justice*, 40 L. and Soc’y R. 369, 383 (2006). Another study based on qualitative interviews of 171 Bosnians found that victims who had survived internment, lost close relatives, been internally displaced, been injured in a landmine explosion and/or been subjected to sexual violence tended to have the highest expectations of the ICTY at the outset, resulting in deeper disappointments later. Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. Int’l Crim. J. 463, 467 (2009).

131. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

132. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Epilogue, pp. 253–254 (Penguin Books, 1994 ed.).

133. See, for example, Ralph Zacklin, “The Failings of Ad Hoc International Tribunals,” 2 *Journal of International Criminal Justice* 541 (2004); Helena Cobban, “Think Again: International Courts,” *Foreign Policy*, May 8, 2006.

134. Interview with Sadik Trako, president, Association of Victims and Missing Persons in Lašva Valley, Vitez, Dec. 6, 2006.

135. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006. Among those whom Duratović lost were his father and 15-year-old brother.

136. For example, saying he does “not believe in the theory of justice being a precondition for reconciliation,” Zdravko Grebo said that instead, “justice is important for its own sake.” Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006.

137. UN Doc. S/RES/827, preamble (May 25, 1993).

138. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007, 11 (Aug. 29, 1994).

139. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

140. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

141. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.

142. Stefan Priesner, Lynne O’Donoghue, Alma Dedić, United Nations Development Programme, BiH, “Transitional Justice in Bosnia and Herzegovina: Findings of a Public Survey,” p. 5, paper presented at the conference “Pathways to Reconciliation and Global Human Rights,” Sarajevo, Aug. 16–19, 2005. When asked what should happen to people who “caused unjustifiable harm to others during the war,” two-thirds of respondents to a poll commissioned by UNDP said they “believed that all individuals who committed war crimes should be held accountable.” Moreover there was “no significant differences between the entities and the three constituent people.” Id.

143. Id., p. 7 (showing that 55 percent of those polled thought that a truth and reconciliation commission is needed and should be established).

144. Interview with Nerma Jelačić, then director of Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006. Jelačić was fifteen years old when her hometown of Višegrad was “cleansed” by Serbs.

145. This point is noteworthy in itself. It has often been said that, while the international community believes that international courts should focus their finite resources on those suspected of bearing primary responsibility for mass atrocities, victims have a greater need to see the direct perpetrators punished. While this is important for many victims in Bosnia, our interlocutors were more likely to emphasize the importance of prosecuting senior suspects.

146. See European Stability Initiative, “Return to Europe: Portrait of Nidžara Ahmetašević,” at [http://www.esiweb.org/index.php?lang=en&id=280&portrait\\_ID=4](http://www.esiweb.org/index.php?lang=en&id=280&portrait_ID=4).

147. Interview with Nidžara Ahmetašević, editor, BIRN in BiH, Sarajevo, July 13, 2009. Ahmetašević also emphasized the value of having war crimes prosecutions before Bosnia’s relatively new war crimes chamber, which we discuss in Chapter VI. In her view, “it’s just crucial” to have justice “on a local level.” She added, however: “I’m not saying that Karadžić and Mladić should be tried here; we don’t have the capacity here” to try those two men, and then addressed the symbolic importance of their prosecution by an international court.

148. The ICTY Appeals Chamber summarized the practice of the Tribunal itself and the ICTR in a 2009 judgment, recalling: “It is well established that, at the Tribunal and at the ICTR, retribution and deterrence are the main objectives of sentencing.” *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeal Judgment, 775 (Mar. 17, 2009). See also *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 900 (July 31, 2003); *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Appeal Judgment 185 (Mar. 24, 2000).

149. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeals Judgment, 775 (Mar. 17, 2009); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, 185 (Mar. 24, 2000); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 900 (July 31, 2003). While victims speak of the need for punishment that is adequate in light of the gravity of the offenses committed, the ICTY has also recognized the notion of retribution as incorporating a “principle of restraint” in sentencing. See, for example, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeals Judgment, 804 (Mar. 17, 2009); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 1075 (Dec. 17, 2004); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, 185 (Mar. 24, 2000).

150. We describe her criticisms in Chapter IV.

151. Interview with Hatidža Mehmedović, president, Association of Srebrenica Mothers, Potočari, July 21, 2009.

152. Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

153. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006. Former judge Vehid Šehić and others insist, for reasons we explore in some depth in Chapter VI, that no prosecutions would have taken place if the ICTY had not been established: “I only know for a fact that in case the Hague Tribunal was never established war criminals would have never been tried or prosecuted.” Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009. Civil society activist Mervan Maraščija made much the same point: “If there were no ICTY,” he told us, “I don’t know how the whole process would start. We definitely didn’t have any possibility to process war crimes” in local courts. Interview with Mervan Maraščija, law program coordinator, Open Society Fund Bosnia and Herzegovina, Nov. 29, 2006.

154. Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006.

155. As we note in later chapters, however, many Bosnians have expressed growing frustration with the ICTY alongside growing confidence in the national war crimes chamber that has operated since 2005. Even so, none of our interlocutors believes that Bosnian courts could have provided justice during the war or in the immediate postwar years.

156. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

157. S.C. Res. 827, preamble; UN Doc. S/RES/827 (May 25, 1993).

158. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007, 13 (Aug. 29, 1994).

159. *Id.*

160. The ICTY prosecutor issued the Tribunal's first indictment in November 1994, eight months before the Srebrenica genocide. The two men who were charged with genocide in relation to Srebrenica, Ratko Mladić and Radovan Karadžić, were first indicted on July 25, 1995. But the initial indictment did not include the Srebrenica massacre, which had just occurred. See Initial Indictment of Radovan Karadžić and Ratko Mladić at <http://www.icty.org/x/cases/mladic/ind/en/kar-ii950724e.pdf>. Four months after the Srebrenica massacre, the ICTY prosecutor issued a second indictment against the two suspects charging genocide in relation to that massacre. See Second Indictment of Radovan Karadžić and Ratko Mladić at <http://www.icty.org/x/cases/mladic/ind/en/kar-ii951116e.pdf>.

161. Interview with Nura Begović, member of the Presidency, Women of Srebrenica, Tuzla, July 21, 2009. Begović lost sixteen relatives, including her brother, during the Srebrenica massacre. See Aida Alić, "Peace of Mind Still Eludes Srebrenica Families," BIRN Justice Report, July 9, 2009, at <http://www.bim.ba/en/174/10/20973/>.

162. See, for example, Patrice C. McMahon and David P. Forsyth, "The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics," 30 *Human Rights Quarterly* 412, 417 (2008) ("the short-term impact of the ICTY on the disintegrating Yugoslav state was obvious and disappointing: it neither stopped nor deterred violence").

163. As noted earlier, the ICTY does not itself have the power to arrest suspects and thus relies upon states and multilateral forces to do so.

164. The ICTY requested Germany to defer its prosecution of Dušan Tadić, who became the first defendant to stand trial at the ICTY. Tadić was transferred to The Hague on April 24, 1995—less than three months before the Srebrenica genocide.

165. Fourth Annual Report of the [ICTY], UN Doc. A/52/375; S/1997/729, 4–5 (Sept. 18, 1997).

166. Sixth Annual Report of the [ICTY], UN Doc. A/54/187; S/1999/846, 5 (Aug. 25, 1999).

167. Interview with Smail Čekić, professor of history at University of Sarajevo, and director of Sarajevo University Institute for Research of Crimes against Humanity and International Law, Sarajevo, July 16, 2009.

168. Interview with Nura Begović, member of Presidency, Women of Srebrenica, Tuzla, July 21, 2009.

169. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2006.

170. Interview with Emsuda Mujagić, president, Srcem do Mira, Kozarac, July 23, 2009. The name of the organization roughly means "Through the heart to peace."

171. Interview with Dino Djipa, research director, PRISM Research, Sarajevo, July 13, 2009. In a similar vein, others told us that they support the ICTY because of its "big message ... to small dictators that sooner or later they will be brought to justice." Interview with Mirsad Tokača, director, Research and Documentation Center Sarajevo, Sarajevo, July 24, 2009.

172. Statute of the ICTY, Art. 1.

173. Interview with ICTY Judge Wolfgang Schomburg, The Hague, March 5, 2007. There arguably exists a tension between the deterrence rationale cited by ICTY at the sentencing stage and a rehabilitation rationale which becomes more salient at the stage of early release determinations. For discussion about rehabilitation as a factor determining ICTY presidents' decisions on pardon and commutation of sentences see *infra*, Ch. IV, Sec. B (Sentences).



174. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Sarajevo, July 14, 2009. Many of our interlocutors in Bosnia expressed variations on this theme. Tarik Jusić believes that the message of the ICTY “is that you can’t go around and kill people just because you want to. There are basic civilizational norms you have to obey even in war and if you don’t you’ll have to pay the consequences.” When asked if he thought this message had been received, he replied “I guess that’s why they’re hiding.” Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

175. Interview with Branko Todorović, executive director, Helsinki Committee for Human Rights in Republika Srpska, Sarajevo, July 14, 2009.

176. Interview with Edina Rešidović, Sarajevo, Nov. 30, 2006.

177. S.C. Res. 827, preamble, UN Doc. S/RES/827 (May 25, 1993). In accordance with the law of the UN Charter, establishing the ICTY as a peace enforcement measure under Chapter VII of the Charter represented a judgment by the UN Security Council that this step would help restore and/or maintain international peace. This premise is reflected ICTY’s Web site, which states: “The mandate of the Tribunal is to contribute to a lasting peace in this region.” ICTY Web site at <http://www.icty.org/sections/Outreach>.

178. Interview with Smail Čekić, professor of history at University of Sarajevo, and director of Sarajevo University Institute for Research of Crimes against Humanity and International Law, Sarajevo, July 16, 2009.

179. Interview with Damir Arnaut advisor for legal- constitutional affairs, Cabinet of Dr. Haris Silajdžić, the Bosniac Member of the BiH Presidency, Sarajevo, July 16, 2009.

180. Interview with Emir Suljagić, author, advisor for public relations, Cabinet of Mayor of Sarajevo, Sarajevo, July 14, 2009.

181. See Chapter II.

182. In contrast, the Security Council resolution establishing a similar tribunal for Rwanda explicitly invokes the notion of *reconciliation*, expressing the conviction “that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would ... contribute to the process of national reconciliation and to the restoration and maintenance of peace.” SC Res. 955, preamble; UN Doc. S/RES/955 (Nov. 8, 1994).

183. Judge Fausto Pocar insisted that, whatever goals the Security Council might have had in mind when it established the ICTY, the court itself cannot pursue “political” goals such as fostering reconciliation. Instead, its task is to “deal with cases as any other court would do,” ensuring that principles of due process are applied. Interview with Judge Fausto Pocar, The Hague, Mar. 5, 2007.

184. See, for example, *The Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 58 (Nov. 29, 1996); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, 288 (Dec. 10, 1998). As noted in Chapter IV, at times ICTY trial chambers have cited *reconciliation* as a consideration in sentencing defendants who confess to their crimes.

185. See, for example, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007, 15–16 (Aug. 29, 1994).

186. See generally Craig Whitlock, “Old Troubles Threaten Again in Bosnia,” *Washington Post*, Aug. 23, 2009; Nicholas Kulish, “While Europe Sleeps, Bosnia Seeths,” *New York Times*, Sept. 6,



2009; Patrice C. McMahon and Jon Western, "The Death of Dayton: How to Stop Bosnia from Falling Apart," *Foreign Affairs*, pp. 69-83 (Sept.-Oct. 2009); Douglas Davidson, "Recapitulating Yugoslavia: Culture, Politics, and State-Building in Bosnia and Herzegovina," p. 2, German Marshall Fund (July 31, 2009).

187. Interview with Ivan Lovrenović, editor in chief, *Dani*, Sarajevo, July 17, 2009.

188. Id. Former journalist Emir Suljagić is even more explicit in blaming local "political elites" for the fact that the ICTY failed to bring about reconciliation. "None of them are interested in reconciliation," he insists. "None of them want it." Interview with Emir Suljagić, author, Sarajevo, July 14, 2009.

189. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

190. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

191. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

192. Id.

193. Interview with Srđan Dizdarević, president, Helsinki Committee for Human Rights in Bosnia and Herzegovina, Sarajevo, Dec. 1, 2006. A substantial number of our Bosnian interlocutors made similar points. For example *Dani* editor Senad Pećanin is convinced that "there is no way to think about reconciliation without justice. Justice is the minimum requirement for any attempts of reconciliation, building ethnic trust between people." Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006. Similarly, Mirsad Tokača believes that "there is no social reconstruction without justice." Interview with Mirsad Tokača, director, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

194. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Judgment (Nov. 30, 2006).

195. Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

196. Id.

197. Interview with Sevima Sali-Terzić, senior legal advisor, Constitutional Court of Bosnia and Herzegovina (from late 2008 Head of Appellate Department), Sarajevo, Nov. 30, 2006.

198. Id. Yet as we note in Chapter IV.E., Sali-Terzić despairs about whether, however necessary, justice has come too late for Bosnia.

199. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006.

200. Interview with Sead Golić, Association of Forcibly Taken Away and Missing from Brčko, Brčko, July 22, 2009.

201. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

202. Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006.

203. See, for example, Rachel Kerr, *The Road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the Politics of War Crimes in Bosnia*, 14 Eur. Security 319, 325 (Sept. 2005). This is true both for Serbian Serbs and Bosnian Serbs.

204. Interview with Đoren Kalajdžić, executive secretary of Association of Republika Srpska Veterans, Foča, July 20, 2009.
205. Interview with Nedjeljko Mitrović, president of Republika Srpska Association of Families of Missing Persons, Banja Luka, July 23, 2009; Interview with Gordan Kalajdžić, president of Foča chapter of the Association of Republika Srpska Veterans, Foča, July 20, 2009.
206. See Diane Orentlicher, *Shrinking the Space for Denial: The ICTY's Impact in Serbia*, pp. 18, 40 (Open Society Justice Initiative, May 2008).
207. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2009.
208. See Udo Ludwig and Ansgar Mertin, "A Toast to the Dead"; Srebrenica Widows Sue UN, Dutch Government," Spiegel Online International, July 4, 2006, at <http://www.spiegel.de/international/spiegel/0,1518,425024,00.html>.
209. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.
210. Interview with Emsuda Mujagić, Srcem do Mira, Kozarac, July 23, 2009.
211. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.
212. See Karl Jaspers, *The Question of German Guilt*, pp. 25; 55–57 (Fordham Univ. Press, 2001 ed.) (trans. E.B. Ashton).
213. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.
214. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.
215. We discuss this in Chapter IV.F.
216. Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. Int'l Crim. J. 463, 467 (2009). Here, as in other areas noted in this report, more effective outreach efforts might have at least reduced unrealistic expectations of what the ICTY could accomplish and directed attention to the institutions that were responsible for vetting police and other public officials. One aspect of the ICTY's early years might, moreover, have contributed to the expectations of those who thought the Tribunal would prosecute virtually everyone who committed wartime atrocities: As we describe in Chapter II, the Tribunal's early indictments focused on low-level perpetrators.
217. See Chapter VI.
218. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.
219. Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.
220. The principal organization that has worked to achieve this in Bosnia is the International Commission on Missing Persons (ICMP). A member of its staff who has worked with many victims told us that her perception is that the families of victims who were killed want "truth" as their "number one" priority—"they want to know what happened and who did it"; and "justice" as their "number two" priority. "Both are very important," she added. Asta Zimbo, director, Civil Society Initiatives Program, International Commission on Missing Persons, Dec. 6, 2006.

221. An example of such an individual is Muharem Murselović, an Omarska survivor who has testified in several ICTY cases and has worked tirelessly to encourage Muslims to return to his hometown of Prijedor. See Chapter IV.G.

222. Commission of the European Communities, *Bosnia and Herzegovina, 2009 Progress Report* (Oct. 14, 2009), at 20, [www.delbih.ec.europa.eu/docs/ProgressReport20092.pdf](http://www.delbih.ec.europa.eu/docs/ProgressReport20092.pdf).

223. As the a UN report explains, the right to know what happened, the right to justice, and the right to reparation and guarantees of non-recurrence are fundamental principles which need to be provided to victims in order to combat impunity. See e.g., Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Impunity, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, Feb. 8, 2005. The rights and principles encompass a broad range of needs that victims require.

#### IV. Achievements, Failures, and Performance

224. Interview with Nidžara Ahmetašević, editor, BIRN, Sarajevo, July 13, 2009.

225. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

226. Interview with Džafer Deronjić, Association of the Families of Missing, Forcibly Detained and Murdered Bosniaks of Bosnia and Herzegovina, Brčko, July 22, 2009.

227. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.

228. Interview with Fadil Budnjo, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009.

229. Interviews with Sead Golić, Association of the Families of Missing, Forcibly Detained and Murdered Bosniaks of Bosnia and Herzegovina, Brčko, July 22, 2009; Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

230. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006. At the time of this interview, two men whom Bosnians most associate with wartime atrocities, Radovan Karadžić and Ratko Mladić, were still at large more than eleven years after they were first indicted.

231. Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009. Šehić noted that “very few” of the ICTY’s verdicts “fulfilled justice 100 percent simply because of the point that a court is limited by the procedures and facts it can use to reach a final decision.” Id.

232. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

233. Interview with Fadil Budnjo, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009. As noted earlier, the range captured here may be partly a function of the nature of our interlocutors’ experiences during the war. See Chapter III, note 130 (noting that a study based on qualitative interviews of Bosnians found that victims who had survived internment, lost close relatives, been internally displaced, been injured in a landmine explosion and/or been subjected to sexual violence tended to have the highest expectations of the ICTY at the outset, resulting in deeper disappointments later): Janine Natalya Clark, *The Limits of Retributive Justice; Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. Int’l Crim. J. 463, 467 (2009).

234. Interview with Fadil Budnjo, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009.
235. Chapter VI explores the relationship between the ICTY and Bosnia's War Crimes Chamber.
236. A 2008 survey of public attitudes in the Balkans on a range of issues summarized its findings on the ICTY this way: "Attitudes on the ICTY differed distinctively across ethnic lines." Gallup Balkan Monitor, 2008 Analytical Report, p. 48.
237. Interview with Dubravka Piotrovski, then program coordinator, American Bar Association Central European and Euroasian Law Initiative, Sarajevo, Nov. 29, 2006.
238. It is not clear which factor is most important, and the answer may vary among ethnic groups. Mirko Klarin believes that in general, the ethnic identity of perpetrators is more important than that of victims in shaping attitudes toward the ICTY. See Mirko Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia," 7 J. Int'l Crim. Just. 89, 92 (2009).
239. Although Republika Srpska was awarded to Bosnian Serbs during the Dayton Peace negotiations, it is not ethnically homogenous. According to a UNHCR estimate for 1997 quoted in a September 2000 decision of the Constitutional Court of BiH, Serbs constituted 96.79 percent of the population of Republika Srpska. *Constituent Peoples' Decision of the BiH Constitutional Court*, Sep. 14, 2000, para. 86, [http://www.ohr.int/ohr-dept/legal/const/default.asp?content\\_id=5853](http://www.ohr.int/ohr-dept/legal/const/default.asp?content_id=5853). The ethnic breakdown changed, however, in the last decade, in large part as a result of the return of refugees and displaced persons. No census has been conducted in Bosnia and Herzegovina since the end of the war, but official data concerning persons recently born and deceased in Republika Srpska suggest that Serbs constitute between 85 and 90 percent of the population there. Of 10,198 children born in Republika Srpska in 2008, 8,914 were ethnically Serb, 743 Bosniak, and 47 Croat. Republika Srpska Institute of Statistics, *Demographic Statistics: Statistical Bulletin*, No. 12 (Banja Luka, 2009), p. 48, <http://www.rzs.rs.ba/Publikacije/Demografija/DemBilten12.zip>. During the same year, 13,501 persons died, of whom 11,351 were Serbs, 997 Bosniaks, and 264 Croats. *Id.*, p. 54.
240. International Institute for Democracy and Electoral Assistance, South East Europe Public Agenda Survey, January-February 2002, Republika Srpska, p. 24, [http://archive.idea.int/balkans/results/Srpska/Srpska\\_rtf.rtf](http://archive.idea.int/balkans/results/Srpska/Srpska_rtf.rtf).
241. International Institute for Democracy and Electoral Assistance, South East Europe Public Agenda Survey, January-February 2002, Bosnia and Herzegovina, <http://archive.idea.int/balkans/results/Bosnia/ReportBOS.rtf>, p. 26.
242. *Id.*
243. These data were provided by Dino Djipa, who undertook the cited surveys for the UN Development Programme. Curiously, there did not appear to be an inverse relationship between surges in, say, Serbs' support and that of other groups. The highest percentage of Serb respondents supporting the ICTY's work, 32.90 percent, was registered in the September 2003 survey; that same month saw the highest percentage of Bosniak respondents reporting that they support the Tribunal's work (93.60 percent) and the second largest percentage of Croat respondents reporting that they support its work (67.20 percent) during the period for which Djipa provided survey results. These results seem broadly consistent with those undertaken by Strategic Marketing Research, a Belgrade-based company, in 2007. In response to its survey question about whether they support the ICTY, 28 percent of residents of Republika Srpska responded yes, while 76 percent of residents of the Federation responded positively. The results were quoted in "Najviše građana RS za

izručenje” (“Most RS Citizens Favor Surrender [of Radovan Karadžić and Ratko Mladić]”), July 23, 2007, Web site B92 (Belgrade), [www.b92.net/info/vesti/index.php?yyyy=2007&mm=07&ddd=23&nav\\_category=167&nav\\_id=256395](http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=07&ddd=23&nav_category=167&nav_id=256395). An earlier survey taken in two Bosnian cities and one Croatian city in 2000 and 2001 found that “Bosniaks had the most positive attitudes toward the tribunal, while the Serbs in Prijedor and the Croats in Mostar showed the greatest resentment toward the ICTY.” Written comments by respondents showed, further, that “Croats and Serbs were deeply convinced that the ICTY was biased against them,” while Bosniaks frequently commented “that the ICTY sentences were too soft.” Mikloš Biro et al., “Attitudes toward justice and social reconstruction on Bosnia and Herzegovina and Croatia,” in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 183,193 (Eric Stover and Harvey M. Weinstein, eds., Cambridge Univ. Press, 2004).

244. These results are described in Stefan Priesner, Lynne O’Donoghue, Alma Dedić, UNDP BiH, “Transitional Justice in Bosnia and Herzegovina: Findings of a Public Survey,” p. 6, Paper presented at the conference “Pathways to Reconciliation and Global Human Rights,” Sarajevo, Aug. 16–19, 2005.

245. Id.

246. See Merima Husejnović, “Hague Tribunal’s Prestige Fades as Closure Looms,” *Balkan Insight*, Sept. 17, 2009.

247. Interview with Dušanka Lalović, secretary, Association of Families of Fallen Soldiers, Foča, July 20, 2009. Lalović told us that 56 Serbs were killed in Jošenica, near Foča, including several of her relatives, on December 19, 1992. According to Lalović, the case “was sent back by the Hague to be prosecuted locally,” before a municipal court in Trebinje. Id.

248. Interview with Dubravka Piotrovski, then program coordinator, American Bar Association Central European and Euroasian Law Initiative, Sarajevo, Nov. 29, 2006.

249. Interview with Josip Davidović, president, Association of Families of Fallen Soldiers and Missing and Detained Persons, Foča, July 20, 2009.

250. See Chapter V.

251. Interview with Srećko Mišković, administrative secretary, War Veterans of Travnik, Lašva Valley, Dec. 7, 2006.

252. Their experience is described in Chapter VI.

253. Interview with Dino Djipa, research director, PRISM Research, Sarajevo, July 13, 2009. In Djipa’s words, Croats’ political position in Bosnia’s constitutional structure is the “weakest” among the three dominant ethnic groups. They “see themselves as the biggest losers,” and are “sensitive to that injustice. They didn’t get what they fought for yet their generals are arrested.” He contrasted Bosnian Croats’ attitude toward the ICTY to that of Croats in Croatia, which he characterized this way: Having to send a few generals to The Hague is “the price they have to pay” for their independence. We note, however, that polls in Croatia do not necessarily support this view: In March 2005, the leading polling company in Croatia (*Puls*) found that “39 percent of respondents ‘completely disagree’ that it is in Croatia’s interest to extradite Gotovina to the tribunal at The Hague; 15 percent, the poll indicated, ‘mostly disagree.’” Nicholas Wood, “In Croatia, stalemate on fugitive EU and UN tribunal want general’s arrest,” *International Herald Tribune*, Apr. 5, 2005. According to a Croatian blogger, in the same poll 56 percent of the respondents answered “No” to the question “Should Ante

Gotovina be handed over to Hague?,” and 26 percent answered “Yes,” “E-Day Postponed”, March 16, 2005, [http://draxisblogging.blogspot.com/2005\\_03\\_01\\_archive.html](http://draxisblogging.blogspot.com/2005_03_01_archive.html).

254. Interview with Džafer Deronjić, witness in the *Goran Jelisić* case, Brčko, July 22, 2009.

255. For example, Josip Drežnjak said he had derived some satisfaction from the fact that, even though the ICTY had not found the specific defendant guilty as charged, it had found beyond a reasonable doubt that crimes violating international law had been committed. Interview with Josip Drežnjak, president, Association of Missing Croat Persons from Grabovica, Mostar, July 18, 2009. Fatima Fazlić, who lost her husband during the war, said she would derive satisfaction “[just] in the fact that some of the suspects have been arrested even if the court decides there is not sufficient evidence and he is released. ... Even that is satisfaction.” Interview with Fatima Fazlić, president, Izvor (Association of Prijedor Women), Prijedor, July 23, 2009. In a similar vein, Marin Brkić, who is seeking justice for members of his family killed during the war, says that if those responsible spent even one day in prison, “that would mean so much to me[;] I would then say ... that justice has been served.” Marin Brkić, Association of Missing, Forcibly Taken Away and Fallen Croats of Brčko District, Brčko, July 22, 2009.

256. This conception tracks closely with common conceptions of retributivist-based theories of punishment. See, for example, Mark A. Drumble, *Atrocity, Punishment, and International Law*, p. 15 (Cambridge Univ. Press, 2007).

257. Interview with Sabahudin Garibović, Association of Former Camp Detainees, Kozarac, July 23, 2009.

258. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

259. Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006.

260. Gojko Janković—34 years; accused in the *Kravica genocide* case (Milenko Trifunović—33 years, Brano Džinić—32 years, Aleksandar Radovanović—32 years, Petar Mitrović—28 years, Slobodan Jakovljević—28 years, Branislav Medan—28 years); Duško Knežević—31 years; Milorad Trbić—30 years; Niset Ramić—30 years; Mirko (Mile) Pekez—29 years; Jadranko Palija—28 yrs.

261. The *Kunarac* case, mentioned in the introduction to Chapter III, was the first judgment in history to find that crimes of sexual violence constitute the crime against humanity of enslavement. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int’l L. 288, 333 (2003).

262. Interview with Fadil Budnjo, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009.

263. The defendants who received 15-year sentences each are Milorad Krnojelac and Dragan Zelenović. See ICTY Web site at [http://www.icty.org/x/cases/krnjelac/cis/en/cis\\_krnjelac\\_en.pdf](http://www.icty.org/x/cases/krnjelac/cis/en/cis_krnjelac_en.pdf) and [http://www.icty.org/x/cases/zelenovic/cis/en/cis\\_zelenovic\\_en.pdf](http://www.icty.org/x/cases/zelenovic/cis/en/cis_zelenovic_en.pdf).

264. The War Crimes Chamber pronounced the following sentences: Gojko Janković—34 years’ imprisonment (for crimes including murder, torture, rape, and sexual slavery); Neđo Samardžić—24 years (rape, sexual slavery); Radovan Stanković—20 years (torture, rape); Savo Todović—12 and a half years, and Mitar Rašević—7 years (persecution); and, Miodrag Nikačević—8 years (rape).

265. See Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, p. 79 (2000).

266. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2006.

267. In November 2001, Dragan Kolundžija was sentenced to three years' imprisonment after pleading guilty to the crime against humanity of persecution, and was granted early release three weeks later. See [http://www.icty.org/x/cases/sikirica/cis/en/cis\\_sikirica\\_al\\_en.pdf](http://www.icty.org/x/cases/sikirica/cis/en/cis_sikirica_al_en.pdf).

268. In November 2001, Damir Došen and Dragoljub Prcać were each sentenced to five years' imprisonment for the crime against humanity of persecution and, in Prcać's case, for the war crimes of murder and torture. Došen was granted early release on February 28, 2003; Prcać was released after serving his full sentence in March 2005. See [http://www.icty.org/x/cases/sikirica/cis/en/cis\\_sikirica\\_al\\_en.pdf](http://www.icty.org/x/cases/sikirica/cis/en/cis_sikirica_al_en.pdf) (Damir Došen) and [http://www.icty.org/x/cases/kvocka/cis/en/cis\\_kvocka\\_al\\_en.pdf](http://www.icty.org/x/cases/kvocka/cis/en/cis_kvocka_al_en.pdf) (Dragoljub Prcać).

269. In November 2001, Molojica Kos was sentenced to six years' imprisonment for the crime against humanity of persecution and for the war crimes of murder and torture. He was granted early release in July 2002. See [http://www.icty.org/x/cases/kvocka/cis/en/cis\\_kvocka\\_al\\_en.pdf](http://www.icty.org/x/cases/kvocka/cis/en/cis_kvocka_al_en.pdf).

270. In November 2001, Miroslav Kvočka was sentenced to seven years' imprisonment following his conviction of persecution as a crime against humanity and murder and torture as war crimes, and was granted early release in March 2005. See [http://www.icty.org/x/cases/kvocka/cis/en/cis\\_kvocka\\_al\\_en.pdf](http://www.icty.org/x/cases/kvocka/cis/en/cis_kvocka_al_en.pdf).

271. In October 2003, Predrag Banović was sentenced to eight years' imprisonment after pleading guilty to the crime against humanity of persecution, and was granted early release in September 2008. See [http://www.icty.org/x/cases/banovic/cis/en/cis\\_banovic\\_en.pdf](http://www.icty.org/x/cases/banovic/cis/en/cis_banovic_en.pdf).

272. See [http://www.icty.org/x/cases/kvocka/cis/en/cis\\_kvocka\\_al\\_en.pdf](http://www.icty.org/x/cases/kvocka/cis/en/cis_kvocka_al_en.pdf) and [http://www.icty.org/x/cases/sikirica/cis/en/cis\\_sikirica\\_al\\_en.pdf](http://www.icty.org/x/cases/sikirica/cis/en/cis_sikirica_al_en.pdf). As of this writing, the Court of BiH has dealt with one case concerning the crimes in Omarska and Keraterm. The four defendants in this case received prison sentences of seven, nine, 21, and 31 years in prison, respectively. See "Mejakić et al: Personal Responsibility for Crimes in Prijedor Detention Camps," *BIRN Justice Report*, July 20, 2009, <http://www.bim.ba/en/176/10/21183/>.

273. Article 28 provides in full:

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

274. *Prosecutor v. Miroslav Tadić*, Case No. IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 4 (June 24, 2004). Under Rule 123 of the ICTY's Rules of Procedure and Evidence, the state where a defendant is serving his or her sentence shall notify the Tribunal of his or her eligibility for pardon or commutation of sentence under its own law. Typically, the states that have agreed to receive defendants for purposes of serving sentences imposed by the ICTY allow early release when a convict has served two-thirds of his sentence. It falls to the ICTY president to determine, in light of factors set forth in Rule 125 and after consulting with ICTY officials specified in Rule 124, whether to grant pardon or commutation.

275. See, for example, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, 8–9, Case No. IT-00-39 and 40/I-ES (Sept. 14, 2009). Other examples include Damir Došen (president's decision of Feb. 28, 2003), Milan Simić (Oct. 27, 2003),



Simo Zarić (Jan. 21, 2004), Stevan Todorović (June 22, 2005), Drago Josipović (Jan. 30, 2006), Predrag Banović (Sep. 3, 2008), and Vladimir Šantić (Feb. 16, 2009).

Rehabilitation is one of several grounds that the president is to take account of when determining the appropriateness of commuting a convict's sentence pursuant to Rule 125 of the ICTY's Rules of Procedure and Evidence. Others include the gravity of the crimes for which the prisoner was convicted; the treatment of similarly-situated prisoners, and any substantial cooperation of the prisoner with the prosecutor.

276. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2006.

277. "The Story of Nusreta Sivac," United Nations Office of the High Commissioner for Human Rights, at <http://www.ohchr.org/EN/NewsEvents/Pages/StoryOfNusretaSivac.aspx>.

278. Id.

279. See Felix Blake, "Nusreta survived the rape camp, but her torture is unending," Bosnian Institute, Nov. 23, 2002, at [http://www.bosnia.org.uk/news/news\\_cfm?newsid=1670](http://www.bosnia.org.uk/news/news_cfm?newsid=1670).

280. Interview with Fatima Fazlić, president, Izvor Association, Prijedor, July 23, 2009.

281. Interview with Emsuda Mujagić, Srcem do Mira, Kozarac, July 23, 2009.

282. Interview with Muharem Murselović, member of Republička Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.

283. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006.

284. Interview with Nidžara Ahmetašević, editor, BIRN in BiH, Sarajevo, July 13, 2009.

285. Interview with Hatidža Mehmedović, president, Association of Srebrenica Mothers, Potočari, July 21, 2009. Radislav Krstić received a sentence of 35 years in prison for aiding and abetting the Srebrenica genocide. See [http://www.icty.org/x/cases/krstic/cis/en/cis\\_krstic.pdf](http://www.icty.org/x/cases/krstic/cis/en/cis_krstic.pdf). At the other end of the extreme, Dražan Erdemović received only five years for participating in the Srebrenica slayings, having pleaded guilty, expressed remorse and cooperated with the ICTY prosecutors. See [http://www.icty.org/x/cases/erdemovic/cis/en/cis\\_erdemovic\\_en.pdf](http://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf).

286. Sead Golić, Association of the Families of Missing, Forcibly Detained and Murdered Bosniaks of Bosnia and Herzegovina, Brčko, July 22, 2009.

287. According to Ramulić, there had been rumors that Stakić's sentence would be reduced to 20 years by the Appeals Chamber of the ICTY. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2006.

288. For example, Mervan Miraščija, law program coordinator, Open Society Fund BiH, Sarajevo, Nov. 2006.

289. Not surprisingly, Sarajevo respondents in a survey taken after the ICTY Trial Chamber sentenced Galić to 20 years in prison "overwhelmingly indicated that they regarded [this sentence] as too lenient." Sanja Kutnjak Ivković and John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)justice*, 40 L. and Soc'y R. 369, 397 (2006).

290. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Trial Judgment (July 20, 2009).

291. For example Sead Golić, who was otherwise highly critical of ICTY sentences, singled out these sentences as an exception to his discontent. Interview with Sead Golić, Association of the



Families of Missing, Forcibly Detained and Murdered Bosniaks of Bosnia and Herzegovina, Brčko, July 22, 2009.

292. *Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appeal Judgment (July 29, 2004).

293. Interview with Sadik Trako, president of Association of Victims and Missing Persons in Lašva Valley, Vitez, Dec. 6, 2006.

294. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

295. Interview with Ljubiša Simović, president, Association of Displaced and Refugees in Republika Srpska, Foča, July 20, 2009.

296. Interview with Josip Davidović, president, Association of Families of Fallen Soldiers and Missing and Detained Persons, Foča, July 20, 2009.

297. *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Appeal Judgment (July 3, 2008). As the Justice Initiative noted in its 2008 report on the impact of the ICTY in Serbia, the *Orić* case has caused considerable consternation in Serbia. See Diane F. Orentlicher, *Shrinking the Space for Denial: The ICTY's Impact in Serbia*, p. 82 (Open Society Justice Initiative, 2008).

298. *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Trial Judgment (June 30, 2006).

299. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006.

300. Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006.

301. Interview with Fabijan Barać, president, Association for Tracking of Killed and Missing Croats of Central Bosnia and Herzegovina, Lašva Valley, Dec. 7, 2006. Barać appeared to have in mind the sentences imposed on Enver Hadžihasanović and Amir Kubura for crimes committed principally against Bosnian Croats, and also against Bosnian Serbs, in central Bosnia. He mentioned Kubura's sentence of two and one-half years in prison, which an ICTY Trial Chamber had imposed earlier in the year; Kubura's sentence was subsequently reduced to two years. Hadžihasanović had been sentenced to five years in prison; his sentence was later reduced on appeal to three and one-half years in prison. Barać contrasted the two and one-half year sentence imposed on Kubura with the 25-year sentence imposed on Bosnian Croat commander Dario Kordić for crimes committed against Muslims in central Bosnia.

302. Interview with Srećko Mišković, administrative secretary, War Veterans of Travnik, Lašva Valley, Dec. 7, 2006. Mišković was apparently referring to the sentences imposed on Enver Hadžihasanović and Amir Kubura earlier that year. See previous footnote.

303. This figure is derived in part by treating a sentence of life imprisonment as 60 years' imprisonment.

304. These figures are based on analysis by Kimi Takakuwa Johnson, a law student at American University.

305. James Meernik and Kimi Lynn King, *The effectiveness of international law and the ICTY—preliminary results of an empirical study*, 1 Int'l Crim. L. Rev. 343, 366 (2001) [hereafter *Effectiveness of the ICTY*].

306. The study found that in general crimes against humanity convictions were sentenced more harshly than war crimes convictions, see *id.*, p. 364; at the time of this study, no one had yet

been convicted of genocide. The ICTY Appeals Chamber itself has declined to rank crimes against humanity as a more serious crime than war crimes. See *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A and IT-94-1-Abis, Judgment in Sentencing Appeals (Jan 26, 2000), 69; see also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment (July 21, 2000), 247.

307. The study authors wrote that “[t]he ‘Level of Responsibility’ exercised by the guilty has a profound impact on sentencing by our statistical analysis.” Meernik and King, *Effectiveness of the ICTY*, supra, p. 365.

308. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

309. Interview with Hatidža Mehmedović, Association of Srebrenica Mothers, Potočari, July 21, 2009.

310. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.

311. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006. Tokača apparently was referring to Milomir Stakić, who was sentenced to 40 years in prison for crimes committed in Prijedor, which is located in the northwest area of Bosnian known as the Bosanska Krajina. Because both of these defendants are ethnic Serbs, there does not appear to be grounds for alleging that this sentencing disparity reflects ethnic bias.

312. Mark A. Drumbl, *Atrocity, Punishment, and International Law* 59 (Cambridge Univ. Press 2007).

313. Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 Geo. L.J. 1685, 1691 (2009); Judith Armatta, “The Need for Sentencing Standards,” Coalition for International Justice, Feb. 28, 2003. See generally Olaoluwa Olusanya, *Sentencing War Crimes and Crimes against Humanity under the International Criminal Tribunal for the Former Yugoslavia* (Europa Law Publishing 2005).

314. *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Appeal Judgment, 756 (Feb. 20, 2001). See also *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeal Judgment, 96 (July 5, 2001).

315. *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Appeal Judgment, 715 (Feb. 20, 2001); see also Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 Geo. L.J. 1685, 1697-98 (2009).

316. See *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Appeal Judgment, 717 (Feb. 20, 2001) (noting that Trial Chambers exercise considerable discretion in sentencing, the Appeals Chamber explained: “This is largely because of the overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 680 (July 29, 2004) (“The Appeals Chamber has emphasised in previous judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines. The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator.”)

317. Mark A. Drumbl, *Atrocity, Punishment, and International Law* 59 (Cambridge Univ. Press 2007). See also *id.* at 66–68.

318. Pursuant to Rule 125 of the ICTY’s Rules of Procedure and Evidence, the ICTY president is to take into account several factors when determining whether to approve commutation of a con-

vict's sentence, including "the gravity of the crime or crimes for which the prisoner was convicted [and] the treatment of similarly-situated prisoners."

319. Decision of the President on the Application for Pardon or commutation of Sentence of Mrs. Biljana Plavšić, Case No. IT-00-39 and 40/I-ES, Sept. 14, 2009, 10. Judge Robinson did not provide any citation to decisions relating to "similarly-situated" defendants. As noted earlier, Plavšić is among the more senior Bosnian Serbs ever convicted by the ICTY.

320. See also Mark B. Harmon and Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. Int'l Crim. Just. 683, 707 n.101 (2007) (noting that "criticisms of ICTY sentences have been particularly sharp in respect of sentences imposed in cases of plea agreements").

321. Plea agreements are reached through negotiations between a defendant and the ICTY prosecutor, who can agree to drop certain charges or recommend a sentence lower than what she would otherwise seek in exchange for the defendant's guilty plea. See Mark B. Harmon and Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. Int'l Crim. Just. 683, 705-06 (2007). Trial Chambers are not required to accept the plea agreement, however. See ICTY Web site at <http://www.icty.org/sections/TheCases/GuiltyPleas>.

322. Criminal Procedure Code [of Federation of BiH], *Official Gazette of Federation of BiH*, Nos. 43/98 and 23/99; Criminal Procedure Code [of Republika Srpska], *Official Gazette of SFRY*, Nos. 26/86, 74/87, 57/89 and

3/90, and *Official Gazette of Republika Srpska*, Nos. 4/93, 26/93, 14/94, 6/97 and 61/01.

323. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, July 13, 2009.

324. See Marlise Simons, "Plea Deals Being Used to Clear Balkan War Tribunal's Docket," *New York Times*, Nov. 18, 2003.

325. Interview with Hajra Čatić, president, Women of Srebrenica, Tuzla, July 21, 2009.

326. Sanja Kutnjak Ivković and John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)justice*, 40 L. and Soc'y R. 369, 396 (2006). The ICTY itself avoids using the phrase "plea bargaining" and instead prefers "plea agreement." See Marlise Simons, "In a Startling Plea, a Serbian Policeman Confesses to Atrocities," *New York Times*, July 27, 2003.

327. In addition to examples from ICTY sentencing judgments cited below, see Mark B. Harmon and Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. Int'l Crim. Just. 683, 707 n.101 (2007).

328. See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Pa. L. Rev. 1, 90 (2002); Mark B. Harmon and Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. Int'l Crim. Just. 683, 703 (2007).

329. Marlise Simons, "Plea Deals Being Used to Clear Balkan War Tribunal's Docket," *New York Times*, Nov. 18, 2003.

330. Until then, ICTY investigators were not even aware of this massacre site. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 Harv. Int'l L.J. 323, 336 (2009).

331. See Jane Perlez, "Serb Leader Expected to Turn Over Key War Crimes Suspects," *New York Times*, Mar. 13, 1996.

332. See Monika Nalepa, “Why Do They Return? Evaluating the Impact of ICTY Justice on Reconciliation,” pp. 17–18 n.20 (Jan. 26, 2007).

333. See Excerpt of Guilty Plea Statement of Dražen Erdemović at <http://www.icty.org/sid/212>. Alongside his remorse, Erdemović made a statement that would later provide a basis for resentencing: “Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: ‘If you’re sorry for them, stand up, line up with them and we will kill you too.’ I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.” *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 10 (Nov. 29, 1996).

334. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 55 (Nov. 29, 1996).

335. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgment (Oct. 7, 1997).

336. This time, Erdemović pleaded guilty to a war crimes charge; the ICTY prosecutor withdrew the crime against humanity charge. See *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 8 (Mar. 5, 1998).

337. *Id.*, 21.

338. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.

339. Interview with Hatidža Mehmedović, Mejra Đogaz, and Hanifa Đogaz, Association of Srebrenica Mothers, Potočari, July 21, 2009. When he pleaded guilty, Erdemović said that in one instance, when he was able to resist orders to execute Muslim men without being killed himself, he did in fact refuse those orders. See *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 81 (Nov. 29, 1996).

340. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, July 13, 2009.

341. Interview with Mirsad Tokača, director, Research and Documentation Center, Sarajevo, Dec. 6, 2006.

342. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

343. Plavšić had surrendered to the ICTY after learning that there was a sealed indictment against her. See Carla Del Ponte in collaboration with Chuck Sudetic, *Madam Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity*, p. 161 (Other Press, 2009).

344. See Marlise Simons, “Ex-Bosnia Leader Enters Guilty Plea to The Hague,” *New York Times*, Oct. 3, 2002.

345. *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39and40/1-S, Sentencing Judgment, 74 (Feb. 27, 2003), quoting Plavšić Written Statement (hereafter *Plavšić Sentencing Judgment*).

346. Marlise Simons, “Ex-Bosnia Serb Leader Enters Guilty Plea to The Hague,” *New York Times*, Oct. 3, 2002 (quoting Judith Armatta of the Coalition for International Justice).

347. Humanitarian Law Center, “Acknowledgment, Taking of Responsibility, Remorse—The Way to Reconciliation,” Oct. 3, 2002.

348. See Marlise Simons, “Crossing Paths: Albright Testifies in War Crimes Case,” *New York Times*, Dec. 18, 2002. Weisel testified that “whereas others similarly accused deny the truth about their crimes and thereby assist those who want to falsify history, Mrs. Plavšić, who once moved in the highest circles of power, has made an example by freely and wholly admitting her role in the crime.” Plavšić Sentencing Judgment, 69 (summarizing testimony of Elie Wiesel). Wiesel urged, however, that the value of Plavšić’s confession be weighed against the “pain and suffering of all the victims,” and urged that she receive a stern sentence. “Wiesel Urges Stern Hague Term,” AP, reprinted in *New York Times*, Dec. 17, 2002. In advance of his testimony, Wiesel said that he would not testify in support of mitigation, but instead “to say that it is important for a person of her importance to have the courage to admit her guilt.” Stephanie van den Berg, “Nobel laureate Wiesel to testify against ex-Bosnian Serb leader,” AFP, Dec. 13, 2002.

349. Plavšić Sentencing Judgment, 67, quoting Prosecution Sentencing Brief. See also *id.*, 67.

350. “Southeastern Europe Praise for Bosnian Serb Leader’s Admission of Guilt,” RFE/RL News-Line, Oct. 3, 2002.

351. Abigail Levene, “‘Iron Lady’ in dock for ethnic cleansing,” Reuters, Dec. 18, 2002.

352. *Id.*

353. Marlise Simons, “Crossing Paths: Albright Testifies in War Crimes Case,” *New York Times*, Dec. 18, 2002.

354. Carla Del Ponte in collaboration with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity*, p. 161 (Other Press, 2009).

355. See Plavšić Sentencing Judgment, 57-60.

356. *Id.*, 132. Moreover in accepting her plea to the charge of crimes against humanity, the Trial Chamber had already accepted the plea agreement between Plavšić and the prosecutor pursuant to which charges of genocide were dropped. See *id.*, 5.

357. See Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, Case No. IT-00-39 and 40/1-ES (Sept. 14, 2009); Mike Corder, “Former Bosnian Serb President Plavšić to Be Freed,” AP, Sept. 15, 2009.

358. Plavšić Sentencing Judgment, 76 (describing the testimony of Alex Boraine).

359. See *id.*, 63 n.114.

360. See Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, Case No. IT-00-39 and 40/1-ES, 12 (Sept. 14, 2009).

361. See *id.*, 20, quoting ICTY RPE, Rule 101(B)(ii).

362. *Id.*, 63-64.

363. Daria Sito-Sučić, “Muslim victims outraged, say Plavšić sentence low,” Reuters, Feb. 27, 2003.

364. *Id.*

365. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

366. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

367. Daria Sito-Sučić, “Muslim victims outraged, say Plavšić sentence low,” Reuters, Feb. 27, 2003. The views of Bosniaks noted above appear to be common among Bosniak victims. Nidžara Ahmetašević, who speaks with victims often, told us that “most victims were disappointed with how many years she got.” Interview with Nidžara Ahmetašević, editor, BIRN in BiH, Sarajevo, July 13, 2009.

368. Daria Sito-Sučić, “Muslim victims outraged, say Plavšić sentence low,” Reuters, Feb. 27, 2003 (quoting Nusreta Sivac, a survivor of Omarska).

369. Interview with Edina Rešidović, attorney; Member of ICTY Defence Attorney Chamber, Sarajevo, Nov. 30, 2006.

370. Interview with Srđan Dizdarević, president, BiH Helsinki Committee, Sarajevo, Dec. 1, 2006. Dizdarević also noted that many devalued Plavšić’s confession because they thought the sentence inadequate.

371. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006. Law professor Jasna Bakšić Muftić made a similar point, describing Plavšić as “the first one who really said everything[;] she really accepted responsibility.” Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

372. The original text of the interview can be found at <http://www.vitidningen.se/templates/ArticlePage.aspx?id=10784>. (in Swedish).

373. Margaretha Nordgren, “Mötet med Biljana Plavšić” (“Meeting with Biljana Plavšić”), *Vi* (Stockholm), Jan. 25, 2009, at [www.vi-tidningen.se/templates/ArticlePage.aspx?id=10784](http://www.vi-tidningen.se/templates/ArticlePage.aspx?id=10784). In the interview, Plavšić states that her defense lawyer advised her to plead guilty to some charges to reduce the length of the trial. See also Simon Jennings, “Plavšić Reportedly Withdraws Guilty Plea,” *IWPR Tribunal Update* No. 586, Jan. 30, 2009, at [www.iwpr.net/?p=triands=fando=349739&apc\\_state=henitri2009](http://www.iwpr.net/?p=triands=fando=349739&apc_state=henitri2009). In fact, as early as March 2005 Plavšić suggested that her confession was not genuine. She told an independent TV station in Republika Srpska that she admitted guilt because she was unable to bring in appropriate witnesses who would testify on her behalf, and added: “When I got to see how all that goes in the Hague Tribunal, I told myself I should do something for myself. At least I could spare myself the trouble of sitting there and listening to false witnesses.” Quoted in “Zatvorski dani B. Plavšić” (“B. Plavšić’s Prison Days”), Web site B92 (Belgrade), Mar. 12, 2005, [www.b92.net:8080/info/vesti/index.php?yyyy=2005&mm=03&ddd=12&nav\\_category=64&nav\\_id=164146](http://www.b92.net:8080/info/vesti/index.php?yyyy=2005&mm=03&ddd=12&nav_category=64&nav_id=164146).

374. Interview with Mirsad Tokača, director, Research and Documentation Center, Sarajevo, July 24, 2009.

375. Carla Del Ponte in collaboration with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity*, p. 161 (Other Press, 2009).

376. Interview with Emir Suljagić, author, Sarajevo, July 14, 2009.

377. Interview with Ivan Lovrenović, editor-in-chief, *Dani*, Sarajevo, July 17, 2009. Lovrenović did not address the concerns just noted because his observations were offered in response to a question concerning positive aspects of the ICTY’s work.

378. See “BiH associations criticise Plavšić’s early release,” *SETimes*, Sept. 16, 2009, at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/newsbriefs/2009/09/16/nb-10](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/newsbriefs/2009/09/16/nb-10).

379. See Judith Armatta, “Srebrenica Guilty Pleas Have Many Repercussions,” Coalition for International Justice, May 21, 2003; Marlise Simons, “In a Startling Plea, a Serbian Policeman Confesses to Atrocities,” *New York Times*, July 27, 2003; Arthur Max, “Yugoslav Tribunal Is Court Making History,” AP, Aug. 3, 2003; Marlise Simons, “Serb at Hague Pleads Guilty to Brutalities,” *New York Times*, Sept. 5, 2003; Marlise Simons, “Officers Say Bosnian Massacre Was Deliberate,” *New York Times*, Oct. 12, 2003.

380. See Marlise Simons, “Plea Deals Being Used to Clear Balkan War Tribunal’s Docket,” *New York Times*, Nov. 18, 2003.

381. Interview with Emir Suljagić, author, Sarajevo, July 14, 2009.

382. Id. Suljagić recalled that in the period that followed these confessions, the Serbian government geared up to counter evidence of its own involvement in the Srebrenica massacre as the International Court of Justice moved toward resolution of a case filed a decade earlier by Bosnia and Herzegovina, alleging that the State of Yugoslavia had violated the Genocide Convention. We discuss that development in Section D.3.

383. Tim Judah, “The Fog of Justice,” 51 *N.Y. Rev. Books*, Jan. 15, 2004.

384. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, July 13, 2009.

385. Interview with Sead Golić, Association of the Families of Missing, Forcibly Detained and Murdered Bosniaks of Bosnia and Herzegovina, Brčko, July 22, 2009.

386. Some witnesses, while in no position to second-guess the sincerity of Plavšić’s confession, were careful to note that her acknowledgement of past wrongs was just a step, one among many, that could foster reconciliation in the region. For example, Alex Boraine, then-president of the International Center for Transitional Justice, told the Tribunal he believed that Plavšić’s statement had the potential to “prompt other leaders responsible for similar crimes to acknowledge their culpability [and] to recognise the jurisdiction of this Court,” and it “could—could—help catalyse or initiate a process of honest truth-telling and acknowledgement throughout former Yugoslavia.” Drawing upon comparative experience, Boraine emphasized that truth-telling and acknowledgement of past wrongs were “one—only one—of the aspects which have been extremely helpful in creating a climate where people can begin to co-exist.” Case of Biljana Plavšić (IT-00-39 and 40/1), Trial transcript, Dec. 17, 2002, at 605–606, [www.icty.org/x/cases/plavsic/trans/en/021217IT.htm](http://www.icty.org/x/cases/plavsic/trans/en/021217IT.htm).

387. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006. Duratović cited the example of Darko Mrđa, one of the defendants who entered a guilty plea in the summer of 2003. The ICTY Web site includes this paragraph in its summary of the Mrđa sentencing judgment:

As to the mitigating circumstances, the Chamber took into consideration Darko Mrđa’s cooperation with the Prosecution. The Chamber also held that Darko Mrđa’s guilty plea helped to establish the truth surrounding the crimes committed at Korićanske Stijene and could contribute to promoting reconciliation between the peoples of Bosnia and Herzegovina. It was noted incidentally that his plea made it possible to obviate the expense of a lengthy trial and the need for a large number of victims and witnesses to come and testify at the Tribunal. Therefore, his guilty plea was considered to be a mitigating factor. In addition, the Chamber found Darko Mrđa’s expression of remorse to be sincere and took this into account in mitigation. The Chamber found that Darko Mrđa’s personal circumstances



should be considered in mitigation, but that little weight should be attached to them in this regard.

ICTY Web site at [http://www.icty.org/x/cases/mrda/cis/en/cis\\_mrdja\\_en.pdf](http://www.icty.org/x/cases/mrda/cis/en/cis_mrdja_en.pdf).

388. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006. Sadik Trako made much the same point about the ICTY's failure to ensure that another ICTY defendant who pleaded guilty, Miroslav Bralo, provided accurate information about the locations of victims' corpses. According to Trako, although Bralo had provided information about their location, authorities did not discover bodies at that location. Describing local residents who were still searching for relatives' bodies, Trako said: "They're angry because the tribunal didn't get the correct information [from Bralo]. I see it as if he's playing with The Hague." Interview with Sadik Trako, president of Association of Victims and Missing Persons in Lašva Valley, Vitez, Dec. 6, 2006.

389. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006.

390. See "Exhumation at Korčanske Stijene Begins," BIRN's Justice Report, July 21, 2009; "Bosnian authorities recover remains of war crime victims," Deutsche Presse-Agentur, Aug. 5, 2009.

391. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

392. Dan Saxon, "Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia," 4 J. Hum. Rts. 559, 560 (2005) (citations omitted).

393. See ICTY Web site at <http://www.icty.org/sid/324>.

394. Interview with Asta Zimbo, then director, Civil Society Initiatives Program, International Commission on Missing Persons, Dec. 6, 2006.

395. Interview with Ivan Lovrenović, editor-in-chief, *Dani*, Sarajevo, July 17, 2009. Lovrenović did not address the concerns just noted, perhaps because his observations were offered in response to a question concerning positive aspects of the ICTY's work.

396. Interview with Sadik Trako, president of Association of Victims and Missing Persons in Lašva Valley, Vitez, Dec. 6, 2006. Another person told us he does "not think that justice will be served" until the man who was most responsible for his brother's death "comes before the people and apologizes" once he finishes serving the 21-year sentence he received after pleading guilty in Bosnia's War Crimes Chamber. Interview with Sabahudin Garibović, Association of Former Camp Detainees, Kozarac, July 23, 2009.

397. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Pa. L. Rev. 1, 150 (2002).

398. The following indictees have pleaded guilty since the trial of Biljana Plavšić and provided substantial cooperation to the prosecutor: Momir Nikolić (2003), Dragan Obrenović (2003), Darko Mrđa (2003), Miroslav Deronjić (2003), Miodrag Jokić (2003), Dragan Nikolić (2003), Ranko Češić (2003), Milan Babić (2004), and Ivica Rajić (2005). Predrag Banović (2003) and Dragan Zelenović (2007) expressed commitment in the respective plea agreements to cooperate with the prosecutor, and the Tribunal judged such commitment to constitute a mitigating circumstance. Only in the case of Miroslav Bralo (2005), the Tribunal judged co-operation as merely "moderate" and weighed it accordingly.

399. This trend may be partly attributable to an amendment to the ICTY's Rules of Procedure and Evidence, which "legitimized" these types of plea arrangements. Rule 62ter was adopted in December



2001 and was based on U.S. federal criminal procedure. See Vladimir Tochilovsky, *The Jurisprudence of International Courts and the European Court of Human Rights*, (Martinus Nijhoff, 2008), p. 265. In general, the rule change created a framework to make the plea agreement, including judicial involvement, more explicit and in the process became a more valuable tool to the prosecution.

400. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006. It is worth noting that in December 2008 the ICTY launched its new web site, which contains a substantial outreach section on guilty pleas and confessions, with transcripts and video extracts from the proceedings. See <http://www.icty.org/sid/203>. It has proved to be a popular addition; according to an ICTY official, this page was the twelfth-most viewed of the entire site during 2009.

401. A study based on qualitative interviews with Bosnians indicates that knowledge relating to plea bargains is quite low: few of the 171 Bosnians interviewed in this study knew which ICTY defendants had pleaded guilty, “and even fewer had read the statements in which these defendants acknowledge their culpability and typically express remorse.” Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. Int’l Crim. J. 463, 475 (2009). According to Fatima Fazlić, when the ICTY sentences defendants who have pleaded guilty, the local media reports on the sentences but not on the details of the confessions themselves “because they still see [confessions] as a betrayal of Serb interests.” Interview with Fatima Fazlić, president of Izvor Association, Prijedor, July 23, 2009.

402. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006.

403. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 37 (Apr. 19, 2004). In August 2001 Krstić was found guilty of genocide and sentenced to 46 years’ imprisonment. See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Judgment (Aug. 2, 2001). The Appeals Chamber found that Krstić was guilty of aiding and abetting genocide rather than of genocide itself, and reduced his sentence to 35 years in prison. See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment (Apr. 19, 2004).

404. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 37 (Apr. 19, 2004).

405. Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

406. Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006.

407. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006.

408. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

409. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006. Bakšić Muftić also places this judgment in a wider context: The *Krstić* judgment confirmed that “at the end of the 20th Century in Europe” it is possible for genocide to occur. After that, we could believe there could be a genocide anywhere. It’s always a potential danger.” Id.

410. Interview with Hatidža Mehmedović, Association of Srebrenica Mothers, Potočari, July 21, 2009. Although Hajra Čatić was critical of the ICTY for failing to indict UN peacekeepers who failed to stop the slaughter in Srebrenica, she said: “We can’t say they did nothing good. Krstić was convicted of genocide.” Interview with Hajra Čatić, president, Women of Srebrenica, Tuzla, July 21, 2009.

411. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.
412. Interview with Emir Suljagić, author, Sarajevo, July 14, 2009. As he noted in our interview, Suljagić had recently made this point in a televised interview on the fourteenth anniversary of the July 1995 massacre. He summarized the point he had made in the interview as “remembering Srebrenica but forgetting Bosnia.”
413. Suljagić recalled that when he first learned that Radislav Krstić had been judged guilty of genocide by the Trial Chamber, he told a journalist who contacted him for comment, “I really don’t care what you do to this guy.” *Id.* It was not until he read the Appeals Chamber’s judgment that the full import of the ruling hit him.
414. *Id.*
415. Interview with Mirsad Tokača, director, Research and Documentation Center, Sarajevo, July 24, 2009. Even so, Tokača considers the *Krstić* judgment to be “a big success.” *Id.*
416. As noted below one of the few defendants who faced the charge of genocide, Slobodan Milošević, died as his marathon trial neared a conclusion. Others who faced the charge of genocide or complicity in genocide but whose death terminated proceedings against them include Simo Drljača, who was killed while resisting arrest in 1997; Milan Kovačević, who died in detention soon after trial proceedings began; and Momir Talić, whose trial began in January 2002 but who was granted provisional release for health reasons in September 2002 and died in May 2003.
417. In addition, genocide charges against Momir Nikolić were withdrawn as part of a plea agreement; the charge of complicity to commit genocide was withdrawn as part of a plea agreement with Dragan Obrenović.
418. Others who have been tried on charges of genocide and/or complicity to commit genocide who were acquitted of these charges include Milomir Stakić, Goran Jelisić, Vidoje Blagojević, Duško Sikirica, and Radoslav Brđanin.
419. While Mladić and Karadžić face genocide charges that encompass municipalities beyond Srebrenica as well as Srebrenica, other not-yet-resolved genocide charges pertain solely to Srebrenica. Five of seven defendants currently being tried jointly for their roles in the Srebrenica genocide have been charged with genocide, conspiracy to commit genocide, or aiding and abetting genocide. *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88. Zdravko Tolimir, who has been charged with genocide and conspiracy to commit genocide in Srebrenica, is awaiting trial in The Hague.
420. *Prosecutor v. Momčilo Krajišnik*, Case IT-00-39-T, Trial Judgment, 1143, 717 and 792; Sept. 27, 2006.
421. *Id.*, 793.
422. *Id.*, 867.
423. Krajišnik was sentenced to 27 years in prison. On appeal, his sentence was reduced to 20 years.
424. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.
425. Interview with Smail Čekić, professor of history, University of Sarajevo, and director of Sarajevo University Institute for Research of Crimes against Humanity and International Law, Sarajevo, July 16, 2009.

426. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.
427. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.
428. Carla Del Ponte in collaboration with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, p. 199 (Other Press, 2009).
429. See id., pp. 199; 202.
430. Id., p. 200.
431. ICTY RPE, Rule 54 *bis*.
432. See, for example, Ruth Wedgwood, "The Strange Case of Florence Hartmann," The American Interest Online (July–August 2009), at <http://www.the-american-interest.com/article.cfm?piece=636>.
433. Carla Del Ponte, *Madame Prosecutor*, p. 200.
434. Marlise Simons, "Genocide Court Ruled for Serbia without Seeing Full War Archive," *New York Times*, Apr. 9, 2007.
435. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 297 (Feb. 26, 2007), at <http://www.icj-cij.org/docket/files/91/13685.pdf>.
436. Id., 438.
437. Id., 415.
438. Id., 206.
439. One of the dissenting judges in the ICJ case thought it "reasonable" to expect "that those documents would have shed light on ... central questions" pertaining to Serbia's legal responsibility for genocide. Id., Dissenting Opinion of Vice President Al-Khasawneh, 35.
440. Interview with Emir Suljagić, author, Sarajevo, July 14, 2009.
441. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, July 13, 2009.
442. Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009.
443. Muharem Murselović, member of Republika Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.
444. See Edward Cody, "From War Crimes to Contempt Case; U.N. Yugoslav Tribunal's Prosecution of Ex-Spokeswoman Draws Criticism," *Washington Post*, June 21, 2009; "International Court Fines Journalist for Secrecy Violation; No Jail Time in Contempt Finding," *Washington Post*, Sept. 15, 2009.
445. In the *Case against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, 89, Sept. 14, 2009.
446. Id., 47.
447. Id., 62.
448. Id., 90.

449. As reported in Simon Jennings, “Victims’ Request to Speak in Hartmann Trial Dismissed,” IWPR Tribunal Update No. 600, May 8, 2009.

450. *Id.*

451. Merima Husejnović, “Hague Tribunal’s Prestige Fades as Closure Looms,” *Balkan Insight*, Sept. 17, 2009.

452. Although “countless women and girls were ... singled out for rape, sexual slavery and other forms of sexual violence and persecution” during World War II, and substantial evidence of these offenses was presented during the Nuremberg trial of major Nazi war criminals, these crimes were largely buried in the Nuremberg judgment. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int’l L. 288, 300 (2003). Crimes of sexual violence received more attention in postwar prosecutions in Asia. See *id.*, pp. 302–03.

453. “Investigators compile mass rape allegations,” AP, published in *USA Today*, Feb. 14, 1996. During the war, Bakšić Muftić was a leader in local efforts for “raped women to be accepted by the community” and for rape to be recognized as a war crime. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

454. *Id.*

455. Interview with Nidžara Ahmetašević, editor, Balkan Investigative and Reporting Network, Sarajevo, July 13, 2009.

456. See Nidžara Ahmetašević, Nerma Jelačić and Selma Boračić, “Investigation: Višegrad rape victims say their cries go unheard,” *Balkan Insight*, Nov. 29, 2008.

457. *Id.*

458. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Trial Judgment (July 20, 2009).

459. *Id.*, 36.

460. *Id.*, 37. This testimony was nonetheless allowed in order to rebut an alibi defense.

461. Susana SáCouto and Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 Am. U. J. Gender, Soc. Pol’y and L. 337, 348 (2009).

462. Interview with Muharem Murselović, member of Republika Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.

463. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

464. See Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can be Justice Delivered*, 50 Harv. Int’l L.J. 323, 323-324 (2009) [hereafter *Justice Delayed*].

465. Interview with Matias Hellman, then outreach program coordinator, ICTY, Sarajevo, Nov. 29, 2006.

466. As of September 23, 2009, the average length of time between the time of an ICTY indictee’s arrest/surrender and the start of his or her trial has been 20.5 months (based on research by Kimi Takakuwa Johnson, law student at American University).

467. The average length of trials completed as of September 23, 2009 is 455.09 days (based on research by Kimi Takakuwa Johnson, law student at American University). This calculation includes cases in which a defendant decided to plead guilty after his trial had begun.

468. See Whiting, *Justice Delayed*, supra, at 333.

469. Moreover, as Judge Wolfgang Schomburg noted when we asked about this criticism, delays have sometimes been partly caused by states' failure to provide evidence as requested by the ICTY on a timely basis. Interview with Judge Wolfgang Schomburg, The Hague, Mar. 5, 2007. Judge Schomburg nonetheless readily agreed that this is a real concern—in his words, an “entirely correct criticism.”

470. Diane F. Orentlicher, *Shrinking the Space for Denial: The ICTY's Impact in Serbia*, p. 85 (Open Society Justice Initiative, 2008).

471. For example Nedjelko Mitrović, president of the Republika Srpska Association of Families of Missing Persons, cited the case of Vojislav Šešelj, whose trial began four and a half years after he surrendered to the ICTY. Exaggerating the already long term of Šešelj's pretrial detention, he said: “The Hague Tribunal holds Šešelj for 5, 6, 7 years without any proceeding. What is this?” Interview with Nedjelko Mitrović, president of the Republika Srpska Association of Families of Missing Persons, Banja Luka, July 23, 2009.

472. Branko Todorović, who is devoted to educating other Serbs in Republika Srpska about the ICTY and its judicial findings of fact, noted: “I don't think the Tribunal should have allowed for any procedural mistakes at the beginning, like keeping Krajišnik in custody too long.” Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006. Increasingly, the ICTY has addressed this concern by authorizing the provisional release of defendants pending the start of their trial.

473. Patricia M. Wald, *Tyrants on Trial: Keeping Order in the Courtroom*, p. 14 (Open Society Justice Initiative, 2009) hereafter [*Tyrants on Trial*].

474. Interview with Damir Arnaut, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajdžić, Sarajevo, July 16, 2009.

475. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006.

476. At the time of Milošević's death, the prosecution had completed presenting its case and forty hours remained for the defendant to present his case. Carla Del Ponte in collaboration with Chuck Sudetic, *Madam Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, p. 332 (Other Press, 2009).

477. See Molly Moore and Daniel Williams, “Milošević Found Dead in Prison; Genocide Trial Is Left Without a Final Judgment,” *Washington Post*, Mar. 12, 2006; Marlise Simons, “Milošević's Trial Ends but Inquiries Continue,” *New York Times*, Mar. 15, 2006.

478. Gideon Boas and Timothy L.H. McCormack, *Learning the Lessons of the Milošević Trial*, 9 Y.B. Int'l Humanitarian L. 65, 68–69 (2006).

479. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

480. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

481. Interview with Ivan Lovrenović, editor-in-chief, *Dani*, Sarajevo, July 17, 2009. Lovrenović observed that “everybody’s opinion” is that one of the major failures of the ICTY is its “extreme inefficiency, its slow pace.” Id.

482. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

483. See Patricia M. Wald, *Tyrants on Trial*, p. 13; Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milošević Trial*, pp. 60–61 (Dec. 2006) [hereafter *Weighing the Evidence*].

484. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009. Like Berić, Mirsad Tokača faults the prosecutor for framing an indictment that was “too wide” and lacked sufficient focus. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006. Many commentators outside of Bosnia who have undertaken in-depth assessments of the *Milošević* case agree that the lengthy indictment was at least one of the key factors behind “the long and arduous trial.” Patricia M. Wald, *Tyrants on Trial*, p. 14. (While this quote is the words of the report’s author, Patricia Wald, the context is her characterization of views expressed by Gideon Boas, a senior legal officer at the ICTY who was responsible for managing the *Milošević* trial for Chambers.) Former ICTY Judge Patricia Wald notes that “[t]here is a strong argument made by prosecutors that it is less the length or scope of the indictment that makes for needlessly long trials than the management of time by the prosecutor, the defense, and the court. If the court sets reasonable time allotments and sticks to them, the trial will stay on a timely course.” Id., p. 18. As for the scope of the indictment itself, experts who have closely analyzed the *Milošević* case have suggested a range of ways to streamline the trial proceedings without significantly reducing the overall scope of criminality addressed at trial, including better pre-trial management and greater efforts to avoid needless duplication. See, e.g., Human Rights Watch, *Weighing the Evidence*, p. 53.

485. See, for example, “Protesters burn photos of UN judges in Sarajevo,” AP, Sept. 16, 2009.

486. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006.

487. Interview with Hatidža Mehmedović, Mejra Đogaz, Izvdin Đogaz, Hanifa Đogaz, Association of Srebrenica Mothers, Potočari, July 21, 2009.

488. Jusić noted that the ICTY “allowed that [Milošević] was not sentenced.” Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

489. Id. Jusić reckons that Milošević’s death without judgment “undermined” the ICTY’s legacy “by thirty percent.” Id.

490. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.

491. Interview with Hatidža Mehmedović, Association of Srebrenica Mothers, Potočari, July 21, 2009.

492. Id.

493. Article 21 of the ICTY’s Statute provides that the accused “shall be entitled ... to defend himself in person or through legal assistance of his own choosing.”

494. Ian Fisher and Marlise Simons, “Defiant, Milošević Begins His Defense by Assailing NATO; Calls U.N. Charges ‘Lies,’” *New York Times*, Feb. 15, 2002.

495. Gideon Boas and Timothy L.H. McCormack, *Learning the Lessons of the Milošević Trial*, 9 Y.B. Int'l Humanitarian L. 65, 82 (2006).
496. Patricia M. Wald, *Tyrants on Trial*, supra.
497. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009. Some are pained, more generally, by what they see as judges' over-indulgence of defendants who cynically manipulate court procedures aimed at assuring fair process. Fadil Budno, who leads an NGO representing survivors from the Foča region, concluded our interview by noting: "Sometimes I see the Hague Tribunal on television and my hair goes up seeing how much they care about human rights for killers," who did not show any regard for the rights of others when "they had power in their hands, killing people, chopping bodies." Interview with Fadil Budno, president, Association of Families of Killed and Missing from Foča and Kalinovik, Ilidža, July 24, 2009.
498. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.
499. Interview with Damir Arnaut, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajdžić, Sarajevo, July 16, 2009.
500. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.
501. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.
502. Rachel Irwin, "Karadžić to Dispute Everything but the Weather," IWPR's ICTY Tribunal Update No. 595, Apr. 3, 2009.
503. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.
504. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.
505. Interview with Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009. Gojko Berić made a similar point. Citing the apparent inefficiencies of ICTY proceedings, he added: "Of course I do not support the trials in totalitarian regimes." Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.
506. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006. Karadžić was arrested in July 2008, almost one and a half years after we interviewed Sali-Terzić.
507. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Sarajevo, July 14, 2009.
508. Some victims, who have for years willingly testified whenever asked to do so at the ICTY, are growing reluctant to do so in Bosnian courts. See Chapter VI.
509. Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009.
510. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.
511. See e.g., David Tolbert and Fergal Gaynor, "International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies," 28 Law in Context, (forthcoming, 2010).

512. As noted earlier, Karadžić eluded capture for more than thirteen years, and was finally arrested in Belgrade in July 2008. See Marc Champion, “Karadžić Is Arrested After Years on the Run; Bosnian Serb Figure Accused of Genocide; An EU Hurdle Falls,” *Wall Street Journal*, July 22, 2008; Neil Macdonald and Stefan Wagstyl, “Bosnian Serb leader captured,” *Financial Times*, July 22, 2008. Mladić, who is known to have been sheltered by Serbian military elements at least until 2002, is believed to be protected by Belgrade still. See Craig Whitlock, “Serbian Officials Say Mladić Is ‘Within Reach’,” *Washington Post*, July 30, 2009.

513. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

514. Interview with Jasminka Džumhur, national legal officer, Office of the UN High Commissioner for Human Rights, Sarajevo, June 11, 2007.

515. Interview with Mirsad Tokača, president, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

516. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

517. *Id.*

518. Interview with Srđan Dizdarević, president, BiH Helsinki Committee, Sarajevo, Dec. 1, 2006.

519. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

520. Interview with Hatidža Mehmedović, Association of Srebrenica Mothers, Potočari, July 21, 2009.

521. See Dan Bilefsky, “Serb Leader’s Capture Brings Little Solace at Site of Killings in Bosnia,” *New York Times*, July 25, 2008. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Sarajevo, July 14, 2009. The Balkan Investigative Reporting Network (BIRN) and Konrad Adenauer Stiftung published a critique of regional reporting on the Karadžić arrest, *History Overshadowed by Trivia: Regional Media Coverage of Radovan Karadžić Arrest* (2009).

522. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.

523. Suljagić describes this encounter in his memoir, *Postcards from the Grave*, pp. 156–57 (2005).

524. Interview with Emir Suljagić, Sarajevo, July 14, 2009.

525. An example of this type of interpretive leap can be found in a paper by Monika Nalepa, “Why do they Return? Evaluating the Impact of ICTY Justice on Reconciliation,” Jan. 26, 2007. The author uses “the return of minority refugees to the places where they were confronted with human rights violations as a proxy for reconciliation,” which she understands to be a goal of the ICTY’s work.

526. Annex 7 of the General Framework Agreement is devoted to this subject. Article 1 of Annex 7 provides:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be



restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

Dayton Peace Agreement, Annex 7, 1, at <http://www.state.gov/www/regions/eur/bosnia/dayann7.html>.

527. See *id.*, 5.

528. Confidential interview with ICTY judge.

529. Tim Judah, “The Fog of Justice,” 51 *N.Y. Rev. Books*, Jan. 15, 2004.

530. See UNHCR, “Update on Conditions for Return to Bosnia and Herzegovina,” Jan. 2005 (an estimated 2.2 million people were forcibly displaced during the war); Roberto Belloni, *State Building and International Intervention in Bosnia*, p. 125 (2008) [hereafter *State Building*] (approximately 2.3 million people left their homes during and in the immediate aftermath of the conflict).

531. Roberto Belloni, *State Building*, p. 126.

532. *Id.*, p. 133.

533. *Id.*, p. 134.

534. *Id.*, p. 130.

535. *Id.*, pp. 129-130.

536. By the end of 2008, the UNHCR reported that there had been 467,297 total minority returns to place of origin in Bosnia since the Dayton accords entered into effect. UNHCR in BiH, Statistics Package, Dec. 31, 2008, at [http://www.unhcr.ba/updatedeco8/SP\\_12\\_2008.pdf](http://www.unhcr.ba/updatedeco8/SP_12_2008.pdf). Such data likely overstate the number of actual numbers of persons who have made their original homes their principal residence. According to the Helsinki Committee for Human Rights in BiH, the UNHCR’s data are based on formal returns of property and do not reflect such facts as whether the original owner actually returned to his/her home or instead immediately resold it. See Helsinki Committee for Human Rights in BiH, *Report on the Status of Human Rights in Bosnia and Herzegovina (Analysis for the period January-December 2005)*, p. 2, at <http://www.bh-hchr.org/Reports/reportHR2005.htm>.

537. Belloni writes that “[h]ard line politics, international isolation and lack of reconstruction funding all made Prijedor a very difficult and unlikely case for successful minority return” and “international return schemes neglected this municipality.” *Id.*, p. 137.

538. Isabelle Wesselingh and Arnau Vaulerin, *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*, p. 90 (SAQI in association with the Bosnian Institute, 2005).

539. *Id.*, p. 91. Writing in 2005, Wesselingh and Vaulerin reported that over 12,000 Bosnian Croats and Muslims had returned to Prijedor since the war’s end. *Id.*, p. 92.

540. *Id.*, p. 92. Among the reasons for this, Belloni cites the desire of European countries to repatriate the large numbers of Bosnians who had become refugees during the war. See Roberto Belloni, *State Building*, p. 131. According to staff of the UN High Commissioner for Human Rights in Bosnia, there may have been a disproportionately large number of refugees in Western Europe from Prijedor, because the worst atrocities in Prijedor occurred early in the war, when European countries were more welcoming of Bosnian refugees. Thus when these countries’ welcome wore out, there were a large number of exiles from Prijedor who had to return to Bosnia and had not

relocated within the country. Interview with Viktorija Ružičić and Jasminka Džumhur, Office of the UN High Commissioner for Human Rights, Sarajevo, June 11, 2007.

541. Welcomed by the city's mayor, a former Bosnian army general, thousands of repatriated refugees from Prijedor went to Sanski Most, a few miles from their homes in Prijedor. Roberto Belloni, *State Building*, p. 134.

542. Wesselingh and Vaulerin, *Raw Memory*, p. 94. Belloni writes that, more generally in Bosnia, "[i]mproved implementation of property legislation, better coordination among international agencies, and the fact that the brutality of the war is slowly fading in the collective memory have all contributed to a breakthrough." Belloni, *State Building*, p. 140. He attaches particular importance to the first factor, noting: "The key to making the return process an irreversible reality was securing individual property rights." Id.

543. Describing why she and others returned to Kozarac, Emsuda Mujagić told us that the fact that they had returned "is the worst defeat" for those who had organized "ethnic cleansing." Emsuda Mujagić, *Srcem do Mira*, Kozarac, July 23, 2009.

544. Wesselingh and Vaulerin, *Raw Memory*, p. 94.

545. Id., p. 93.

546. See Steven Erlanger, "NATO Action Reflects Shift in Tactics," *New York Times*, July 11, 1997.

547. Wesselingh and Vaulerin, *Raw Memory*, citing Human Rights Watch reporting.

548. Roberto Belloni, *State Building*, p. 137.

549. Id., p. 138.

550. *Minority Return or Mass Relocation?*, ICG Bosnia Project-Report No. 33, p. 39 (May 14, 1998).

551. Interview with Matias Hellman, then ICTY liaison officer, Sarajevo, Nov. 29, 2006.

552. *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 211 (July 31, 2003).

553. Id., 212.

554. Interview with Edin Ramulić, Izvor Association, Prijedor, Dec. 8, 2006.

555. Id.

556. Id. When we spoke with Ramulić again in July 2009, he told us that the daily encounters no longer occurred as "the boutique he owned was burned down last year." But according to Ramulić, Vokić lives in the same building as a former Omarska detainee who has testified in The Hague. Interview with Edin Ramulić, Izvor Association, Prijedor, July 23, 2009.

557. For a discussion of the vetting processes, see David Tolbert and Aleksandar Kontić, "The ICTY and the Transfer of Cases/Materials to National Judicial Authorities: Lessons in Complementarity," in *The ICC and Complementarity: From Theory to Practice*, eds. Carsten Stahn and Mohamed El Zeidy (Cambridge University Press, forthcoming.)

558. See Stakić Trial Judgment, 89.

559. Interview with Edin Ramulić, Izvor Association, Prijedor, July 23, 2009.

560. These individuals include Slavko Budimir, mentioned in the Stakić Trial Judgment at 87 and 90 and who, according to Ramulić, now serves as the director of the Post Office; Dragan Savanović, mentioned in the Stakić judgment in 79, 87 and 90 and who, according to Ramulić, now serves as director of Central Heating; Rade Javorić, mentioned in 87 of the Stakić trial judgment, now director of the Social Welfare Center according to Ramulić.

561. Murselović recalled that at the time he and others began to organize returns in 1998, “no single Bosniak remained to live in Kozarac” and only about 700 Bosniak and Croats out of some 60,000 before the war remained in the city of Prijedor. Interview with Muharem Murselović, member of Republička Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.

562. Interview with Emsuda Mujagić, Srcem do Mira, Kozarac, July 23, 2009.

563. Interview with Sabahudin Garibović, Association of Former Camp Detainees, Kozarac, July 23, 2009.

564. By the end of 2008, the UNHCR counted 22,095 minority returns to the Brčko District. UNHCR in BiH, Statistics Package, Dec. 31, 2008, at [http://www.unhcr.ba/updatedeco8/SP\\_12\\_2008.pdf](http://www.unhcr.ba/updatedeco8/SP_12_2008.pdf).

565. Interview with Matias Hellman, then ICTY liaison officer, Sarajevo, Nov. 29, 2006.

566. See *Bosnia’s Brčko: Getting In, Getting On and Getting Out*, p. 16 ICG Balkans Report No. 144 (June 2, 2003).

567. Jelisić was arrested in January 1998 by the Stabilization Force (SFOR) and was sentenced to 40 years’ imprisonment. Česić was arrested by Serbian authorities in 2002, and received a sentence of 18 years’ imprisonment after pleading guilty to all charges.

568. Interview with Ferhid Omerhodžić, Association of Families of Fallen and Missing from Brčko, Brčko, July 22, 2009. Omerhodžić’s efforts to promote the return of displaced persons to Brčko are undertaken in his personal capacity.

569. UNHCR, Update on Conditions for Return to Bosnia and Herzegovina, p. 4 (Jan. 2005).

570. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

571. The International Police Task Force (IPTF) was responsible for vetting police, and completed its work in 2002. As a result of the process, four percent of the 24,000 active policemen were fired. See Alexander Mayer-Rieckh, “Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia and Herzegovina,” in *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council and International Center for Transitional Justice, 2007), at 191. Despite this, some individuals who survived the vetting have subsequently been indicted by Bosnian State authorities on war crimes charges. See “UN-vetted police officers arrested on criminal charges,” BBC Monitoring European, Sept. 10, 2009. The Bosnian judiciary has also been vetted. Between 2002 and 2004, the High Judicial and Prosecutorial Council carried out the process of appointment of judges and prosecutors. About 30 percent of the incumbents who applied for their positions were not reappointed. *Id.*, at 201.

572. Interview with Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009.

573. Stover writes, “The majority of protected witnesses I interviewed said the measures taken in The Hague to guard their anonymity as witnesses failed, leaving them open for recriminations on their returning home from the tribunal.” Eric Stover, *The Witnesses; War Crimes and the Promise of Justice in The Hague*, p. 98 (Univ. of Pennsylvania Press, 2005) [hereafter *The Witnesses*]. Defendants who are supposed to keep the identities of “protected witnesses” secret often tell their family and friends who testified against them. See *id.*, p. 99. One person we interviewed in Bosnia said she

knew of a witness who, by virtue of the ICTY's travel arrangements, flew home on the same plane as relatives of the defendant against whom she had just testified as a "protected witness." Interview with Jasminka Džumhur, national legal officer, Office of the High Commissioner for Human Rights, Sarajevo, June 11, 2007.

574. See UNHCR, Update on Conditions for Return to Bosnia and Herzegovina, p. 2 (Jan. 2005); Eric Stover, *The Witnesses*, pp. 100–01. *The Witnesses* recounts a troubling episode in which an ICTY witness who faced serious threats after testifying was told that "the ICTY had nothing to do with this." *Id.*, pp. 102–03. But Stover also told us about a situation in which he had alerted the ICTY to harassment a witness was facing after returning home, and the ICTY relocated the individual. Interview with Eric Stover, Washington, D.C., Sept. 3, 2009.

575. Interview with Emsuda Mujagić, Srcem do Mira, Kozarac, July 23, 2009.

576. As noted earlier, however, with the passage of time many witnesses are growing reluctant to keep testifying; "witness fatigue" is a growing phenomenon.

577. Interview with Emsuda Mujagić, Srcem do Mira, Kozarac, July 23, 2009.

578. Eric Stover, *The Witnesses*, p. 126.

579. Interview with Muharem Murselović, member of Republička Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH, Banja Luka, July 15, 2009.

580. Interview with Džafer Deronjić, witness in *Jelisić* case, Brčko, July 22, 2009.

581. *Id.*

582. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

583. Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006.

## V. Truth and Acknowledgment

584. Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

585. Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006.

586. Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009.

587. Interview with Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009.

588. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

589. Interview with Tarik Jusić, executive director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

590. Or as Michael Ignatieff has described the goal, to "narrow the range of permissible lies" in relation to the ICTY as far back as 1996. See Michael Ignatieff "Articles of Faith," *Index on Censorship* 25 (No 5) 1996, 113.

591. See Daria Sito-Sučić, "Bosnian Serb leader faces charges over massacre denial," Reuters, Sept. 24, 2009; "Envoy slams Bosnian Serb leader for massacre denial," Sept. 16, 2009, Agence France-Presse. This brand of denial is disturbingly similar to the narrative that Bosnian wartime leader Radovan Karadžić has put forth in his own defense during his ICTY trial on genocide and

other charges. See Marlise Simons, “Indicted Ex-Leader of Bosnian Serbs Calls Atrocities ‘Myths’,” *New York Times*, Mar. 3, 2010.

592. A Bosnian Serb had recently been convicted in the Bosnian State Court for the Tuzla massacre. Daria Sito-Sučić, “Bosnian Serb leader faces charges over massacre denial,” Reuters, Sept. 24, 2009. The events in Sarajevo challenged by Dodik had been adjudicated in ICTY trials of Stanislav Galić and Dragomir Milošević.

593. Nor is it common to hear of the sort of violent reprisals that occurred in 1999, when an independent RS newspaper published details of two episodes of wartime atrocities alleged to have been committed by Serb forces. Soon after the account was published, the newspaper’s editor lost both legs in a car bomb attack. See Rachel Kerr, *The Road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the Politics of War Crimes in Bosnia*, 14 Eur. Security 319, 325 (Sept. 2005). The investigation into the case is still open, but the version of the event described above has been widely accepted by the general public and local media in BiH.

594. Interview with Matias Hellman, ICTY liaison officer, Sarajevo, Nov. 29, 2006.

595. Interview with Mervan Miraščija, law program coordinator, Open Society Fund Bosnia and Herzegovina (OSF BiH), Nov. 29, 2006.

596. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.

597. Interview with Josip Davidović, president, Association of Families of Fallen Soldiers and Missing and Detained Persons, Foča, July 20, 2009.

598. See Chapter IV.B (quoting views of Fadil Budnjo).

599. Interview with Josip Davidović, president, Association of Families of Fallen Soldiers and Missing and Detained Persons, Foča, July 20, 2009.

600. Interview with Đoren Kalajdžić, executive secretary of Association of RS Veterans, Foča, July 20, 2009.

601. Interview with Ljubiša Simović, president of Association of Displaced and Refugees in Republika Srpska, Foča, July 20, 2009.

602. The two are Stanislav Galić and Dragomir Milošević.

603. Interview with Nedeljko Mitrović, president, RS Association of Families of Missing Persons, Banja Luka, July 23, 2009.

604. Interview with Josip Davidović, President, Association of Families of Fallen Soldiers and Missing and Detained Persons, Foča, July 20, 2009.

605. Interview with Milimir Popović, Prijedor, Dec. 8, 2006.

606. The trial judgment in the *Krstić* case, which we discuss earlier (see Chapter IV.D.1 and below) was issued on August 2, 2001.

607. “Imaginary Massacres?,” *Time Magazine*, Anes Alić and Dragan Stanimirović, Sept. 11, 2002, at <http://www.time.com/time/world/article/0,8599,349957,00.html>.

608. See id., quoting ICMP statement.

609. Id. Six months later, Bosnia’s Human Rights Chamber issued a decision in a case filed by 49 immediate relatives of individuals who disappeared during the Srebrenica massacre. The chamber called on RS authorities to, among other measures, conduct an investigation and publish its results

by September 2003. While RS authorities apparently did not respond to this decision, their response to the OHR mandate, described in the text, came the following year.

610. See Beth Kampschor, “RS Prime Minister Attends Srebrenica Anniversary Ceremony,” SETimes.com, July 14, 2003.

611. Id.

612. The first interim report was issued on April 14, 2004. An addendum was completed in October 2004. In April 2004, the High Representative Paddy Ashdown discharged two Bosnian Serb officials for obstructing the work of the commission. See “Bosnian Serbs admit Srebrenica massacre,” AFP, June 11, 2004.

613. See “Bosnian Serbs admit to Srebrenica,” BBC News, June 11, 2004, at <http://news.bbc.co.uk/2/hi/europe/3799937.stm>. Of these, 28 were “secondary,” meaning that they contained bodies originally buried somewhere else. Eleven of the sites had not previously been disclosed. See Nicholas Wood, “Bosnian Serbs Admit Responsibility for the Massacre of 7,000,” *New York Times*, June 12, 2004.

614. Samir Krilić, “Bosnian Serbs Admit to Massacre,” AP, in *Washington Post*, June 12, 2004.

615. “Bosnia Herzegovina: President Dragan Čavić Acknowledges Atrocities against Muslims in Srebrenica in 1995,” Reuters, at <http://www.itnsource.com/shotlist//RTV/2004/06/22/406220052/?s=srebrenica>. In the lead-up to the report, Čavić had indicated that his government would, in the words of the *New York Times*, “begin to redress its hard-line stance” on wartime atrocities by Serbs. Čavić said: “After years of prevarication, we will have to finally face up to ourselves and to the dark side of our past. We must have courage to do that.” Id.

616. Associated Press, Nov. 11, 2004.

617. For example, this point was made during interviews with Emir Suljagić, Gojko Berić, and Ivan Lovrenović.

618. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 297 (Feb. 26, 2007). The Court also found that Serbia had breached its legal obligations to prevent and punish genocide. See id., 438 (responsibility for failure to prevent genocide) and 449-450 (responsibility for failure to punish as well as to prevent genocide). The ICJ found, however, that the Srebrenica genocide itself could not be legally attributed to Serbia. See id., 415. It also found that Serbia’s legal responsibility for complicity in genocide had not been established. Id., 424.

619. The ruling came in a case brought by Bosnia against Serbia and Montenegro, and thus RS authorities were not respondents. But the ICJ assessed Bosnian Serbs’ wartime actions as part of its assessment of Belgrade’s legal responsibility for the crimes perpetrated in Bosnia. RS leadership had unsuccessfully tried to have the case discontinued. Between June 1999 and October 2000, in a series of letters sent to the Court, the then Chairman of the Presidency of BiH, Zivko Radisić—himself a Bosnian Serb—and a Co-Agent he unilaterally appointed (Svetozar Miletić, another Serb), argued that the case should be terminated. The National Assembly of Republika Srpska declared during that period that continuation of the case would be “destructive of a vital interest” of Republika Srpska. During the same period, the Bosniak and Croat members of the tri-partite Bosnian Presidency informed the Court that the case should continue. Finally, on Oct. 10, 2000, the Court concluded that there had been no discontinuance of the case by BiH. Case concerning Application

of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Feb. 26, 2007, 18–24.

620. See Peter Lippman, “International Court of Justice Finds Serbia Innocent of Genocide, But Not Entirely Clean,” *Washington Report on Middle East Affairs*, May–June 2007, pp. 30–31, at [http://www.wrmea.com/archives/May-June\\_2007/0705030.html](http://www.wrmea.com/archives/May-June_2007/0705030.html).

621. See Dragana Jovanović, “International Court Clears Serbia of Genocide,” ABC News Online, Feb. 26, 2007, at <http://abcnews.go.com/International/Story?id=2906051andpage=1>.

622. Quoted in Merdijana Sadović, “Bosnian Serbs Now Anxious about ICJ Ruling,” IWPR’s Tribunal Update No. 491, Mar. 4, 2007.

623. Id.

624. Rachel Irwin, “Bosnian Serbs Block Srebrenica Massacre Resolution,” April 11, 2010, <http://www.iwpr.net/report-news/bosnian-serbs-block-srebrenica-massacre-resolution>. By way of contrast, a few days after the Serbian declaration the Croatian Ivo Josipovic apologized for the effects of Croatian policy during the conflict without a similar qualification: Sabina Arslanagic “Josipovic Delivers Unprecedented Apology to Bosnia,” April 14, 2010, *Balkan Insight*. <http://www.balkaninsight.com/en/main/news/27333/>.

625. See “Bosnian Serb MPs against remembrance day for Srebrenica victims,” HINA Croatian News Agency, July 8, 2009. In January 2009 the European Parliament adopted a resolution calling on EU and Western Balkan countries to mark July 11 as a day of remembrance for Srebrenica. See “Bosnia: Srebrenica Burial in Question,” *Balkan Insight*, July 6, 2009.

626. As noted above, however, Bosnian Serb leader Milorad Dodik was at pains to deny that the word genocide applied to Srebrenica following the ICJ judgment. Denial of legal characterizations may be easier to sustain than denial of underlying facts, however. While Arnaut’s assertion therefore may not be true across the board, he has seen a striking difference in his interactions with Serb officials in government.

627. Interview with Damir Arnaut, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajdžić, Sarajevo, July 16, 2009.

628. Interview with Ivan Lovrenović, editor-in-chief, *Dani*, July 17, 2009.

629. As noted earlier, however, many also recognize peril in insisting too strongly on describing remorse through an ethnic prism.

630. Orić was given credit for the three years he had already served in detention, and was therefore released immediately upon being sentenced to serve two years in prison. Because he was therefore released immediately after his trial verdict was rendered, some inaccurately thought he had been exonerated. Later, his conviction was overturned by the ICTY Appeals Chamber. See *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Appeal Judgment (July 3, 2008).

631. “Bosnian Muslim leader hails Hague verdict on Orić,” BBC Worldwide Monitoring, June 30, 2006 (from FoNet News Agency, Belgrade).

632. Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

633. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.

634. Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006. Duratović made it clear that he believed all war crimes deserve punishment and that widespread atrocities by Serbs did not justify a single violation by Bosniaks. He was nonetheless concerned that the ICTY's approach did not reflect differences of degree and nature between crimes committed by Bosniaks and Serbs.

635. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.

636. Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. Int'l Crim. J. 463, 478 (2009).

637. Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006.

638. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006.

639. Interview with Mervan Miraščija, law program coordinator, Open Society Fund BiH, Nov. 29, 2006.

640. Interview with Sevima Sali-Terzić, legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006.

641. See "Fragile Bosnia: The break-up danger; Growing fears that fractious political leaders are jeopardizing Bosnia's future," *The Economist*, Nov. 8, 2008; Dan Bilefsky, "Tensions Rise in Fragile Bosnia as Country's Serbs Threaten to Seek Independence," *New York Times*, Feb. 27, 2009.

642. See "Fragile Bosnia: The break-up danger; Growing fears that fractious political leaders are jeopardizing Bosnia's future," *The Economist*, Nov. 8, 2008.

643. When the ICJ judgment was rendered, Silajčić told ABC News: "Bosnia-Herzegovina must ... purge itself of the remnants of the genocide that permeates throughout Bosnian society. We will achieve this by altering what has been founded on the genocide's outcome — the interior structure of Bosnia and its constitution." Dragana Jovanović, "International Court Clears Serbia of Genocide," ABC News Online, Feb. 26, 2007, at <http://abcnews.go.com/International/Story?id=290605&randpage=1>.

644. As noted earlier, many Bosnians point out that leaders of victims' associations are themselves political actors—often very savvy ones—whose perspectives may be different than those of "ordinary victims."

645. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006. Although this quote is Govedarica's, we heard this point repeatedly during each of our visits to Bosnia.

646. *Id.*

647. See Nicholas Kulish, "Biden Warns Bosnians against 'Ancient Animosities'," *New York Times*, May 20, 2009.

648. Interview with Emir Suljagić, author, Sarajevo, July 14, 2009.

649. An intriguing study found that Serbs in the Croatian city of Vukovar were more likely to have positive attitudes toward the ICTY, and more ready to admit that war crimes were committed by members of their own ethnic group, than Serbs in the RS town of Prijedor. The study authors speculate that the differences may have some relation to the different status of Serbs in the two towns: "The Vukovar Serbs lost their primacy and have chosen to remain in Croatia; they must



admit to the existence of war criminals on their side if they wish to remain as accepted citizens of the state.” In contrast, Serbs in Prijedor “are still trying to attain recognition for their status and need to distance themselves from the horrors that occurred in their name.” Mikloš Biro et al., “Attitudes toward justice and social reconstruction in Bosnia and Herzegovina and Croatia,” in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, 183, 193-95 (Eric Stover and Harvey M. Weinstein, eds., Cambridge Univ. Press 2004). While we do not have an opinion on the authors’ theory, situational factors surely play a large role in the way the ICTY’s work is interpreted.

650. Interview with Ivan Lovrenović, editor-in-chief, *Dani*, Sarajevo, July 17, 2009.

651. Interview with Muharem Murselović, member of Republika Srpska National Assembly, president of the RS Parliamentarians Club for the Party for BiH (Haris Silajdzic Party), Banja Luka, July 15, 2009.

652. Id.

653. The situational factors suggested in note 650 above seem to hold true even in 2009: a recent study found that the prevailing reality of Serb dominance and public denial in the area overshadowed all other experiences of even those victims whose cases had been directly judged by ICTY. Refik Hodžić “Living the Legacy of Mass Atrocities: Victims’ Perspectives on War Crimes Trials,” *Journal of International Criminal Justice* (2010), 1.

654. Interview with Nerma Jelačić, then director of Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

655. Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006.

656. Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006.

657. Interview with Mirsad Tokača, director, Research and Documentation Center Sarajevo, Sarajevo, Dec. 6, 2006.

658. Interview with Emir Suljagić, advisor to the mayor, Sarajevo, July 14, 2009. While Nerma Jelačić believes that the Tribunal has already had “a huge effect in terms of establishing the historical record of what happened, for example conditions in the Omarska camp” and that this “is important for victims [and] for society,” she also believes that this is important “for future generations when we have normal history books.” Interview with Nerma Jelačić, then director of Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

659. See “ICTY Destroyed Some Srebrenica Material,” BIRN, May 5, 2009.

660. Kristin Deasy and Dženana Halimović, “After Hague destroys Srebrenica evidence, survivors feel pain of lost memories,” RFE/RL (Prague), Sept. 3, 2009.

661. See id.

662. See id.

663. Interview with Mirsad Tokača, director, Research and Documentation Center, Sarajevo, July 24, 2009.

664. Interview with Asta Zimbo, then director of Civil Society Initiatives Program, ICMP, Sarajevo, Dec. 6, 2006.

665. In Chapter IV.C we discuss many Bosnians' frustrations with sentences imposed following a plea agreement and note that to some extent victims' frustrations may be compounded by the fact that they do not know what forms of cooperation the ICTY prosecutor secured through the negotiations.

666. Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. Int'l Crim. J. 463, 467 (2009).

667. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006. Describing his early visits to The Hague, Todorović captured the prevailing attitude this way: "Why do we need to show those people in the Balkans what we are doing, to prove ourselves? What we are doing is right." After undertaking our judicial work, "we will have the verdicts. What the reflections of those verdicts will be is not our interest. We don't want to be biased." Id.

668. Id.

669. Interview with Anton Nikiforov, special advisor for political affairs to then Prosecutor Carla Del Ponte, The Hague, Mar. 5, 2007.

670. See Lal C. Vohrah and Jon Cina, "The Outreach Programme," Ch. 40 in Richard May, ed., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, p. 554 (Kluwer, 2000).

671. Interview with David Tolbert, former deputy prosecutor, former registrar, and former chef de cabinet to President McDonald, New York, April 27, 2010.

672. FIDH, *Victims' Rights before the ICC*, Ch. III: Outreach, p. 8 (quoting Olga Kavran).

673. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

674. See <http://www.icty.org/sections/Outreach/BridgingtheGap>. Other programs in which ICTY officials meet with Bosnians took place sooner. Branko Todorović described a meeting he helped organize between ICTY officials and local lawyers in Banja Luka, followed by similar encounters over several years. In his view, these helped transform what began as a hostile relationship to more of a partnership. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006.

675. Id. We heard similar accounts of this episode from Sead Golić, whom we interviewed in Brčko in July 2009, and former ICTY Deputy Prosecutor David Tolbert, who participated in this program, in April 2008.

676. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006.

677. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

678. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006.

679. Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Sarajevo, July 14, 2009.

680. Interview with Nerma Jelačić, then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006.

681. “Controversial group in Srebrenica incident,” RTV B92 News, July 13, 2009.
682. Interview with Refik Hodžić, ICTY liaison officer, Sarajevo, July 13, 2009.
683. Interview with Srđan Dizdarević, president, BiH Helsinki Committee, Sarajevo, Dec. 1, 2006.
684. Interview with Senad Pećanin, editor, *Dani*, Sarajevo, Dec. 6, 2006.
685. Interview with Nidžara Ahmetašević, editor, Balkan Investigative Reporting Network in BiH, Sarajevo, July 13, 2009.
686. Interview with Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009.
687. United Nations Development Programme, *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary* (Sarajevo, 2008), at 27–28; Humanitarian Law Center (Belgrade), Documenta (Zagreb), and Research and Documentation Center (Sarajevo), *Transitional Justice in Post-Yugoslav Countries: Report for 2006*, at 22–234. For
688. Decision to Form a State Commission for Establishing Truth on the Fates of Serbs, Croats, Bosniaks, Jews, and Others in Sarajevo in the Period between 1992 and 1995, June 25, 2006. See Bogdan Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, 37; Nidžara Ahmetašević and Mirna Mekic, “Multiple Versions of the Truth,” *Balkan Insight*, April 26, 2006.
689. Website for the Coalition: <http://korekom.org/>. The list of organizations that are members of the Coalition is available at <http://www.korekom.org/webpage/52>. See also BalkanInsight.Com on “Why RECOM Matters” at <http://www.balkaninsight.com/en/main/info/24057>.
690. President Jorda addressed the issue at length in a speech in Sarajevo in May 2001 in which he warned about overlap between the mandate of a Bosnian Truth Commission and the ICTY. ICTY Press Release, 17 May 2001, JL/P.I.S./591-e.

## VI. Impact on Domestic War Crimes Prosecutions

691. Interview with Gojko Berić, journalist and columnist of *Oslobođenje*, Sarajevo, July 17, 2009.
692. When the phrase “transitional justice” first gained wide currency, it was used to describe efforts of “countries undergoing the radical shift from repression to democracy” to “purge the remnants of [their] vilified recent past” through processes emblematic of the rule of law and thereby “demonstrate a separation between the old and the new governments.” Neil J. Kritz, “The Dilemmas of Transitional Justice,” I *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* xxi (United States Institute of Peace, 1995). The central preoccupation of transitional justice discourse was the extraordinary nature and constitutive role of justice in periods of political transition. See Ruti G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L.J. 2009, 2011 (1996–97); Ruti G. Teitel, *Transitional Justice* 3 (Oxford University Press, 2000). Increasingly, the term has been used in ways that emphasize the mechanisms associated with earlier conceptions of transitional justice—prosecutions of human rights violators, truth commissions, and vetting processes—more than the context in which these processes are used. See, for example, *Report of the Secretary-General on transitional justice in conflict and post-conflict countries*, UN Doc. S/2004/616, 8 (2004) (defining transitional justice as “compris[ing] the full range of processes

and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"). ICTJ uses the phrase transitional justice to mean "a response to systematic or widespread violations of human rights[,] which seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades." ICTJ Web site, at <http://ictj.org/en/tj/#1>.

693. Although widely known as the War Crimes Chamber, the chamber is officially called Section I for War Crimes of the Court of Bosnia and Herzegovina.

694. This relationship is established in Article 9 of the ICTY Statute.

695. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 64, UN Doc. S/255704 (May 3, 1993).

696. Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/49/342; S/1994/1007, 20 (Aug. 29, 1994).

697. *Id.*, 87 (emphasis added). The 1949 Geneva Conventions to which Judge Cassese referred provide for universal jurisdiction over grave breaches of those conventions—war crimes that fall within the subject matter jurisdiction of the ICTY when committed in the territory of the former Yugoslavia since 1991. Two months after this report's publication date, the ICTY prosecutor filed a deferral request in relation to a Bosnian Serb suspect, Dušan Tadić, against whom German prosecutors had already begun a criminal proceeding. As noted in Chapter II, Tadić became the ICTY's first defendant.

698. Organization for Security and Cooperation in Europe, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, p. 4 (March 2005) (hereafter OSCE, *Progress and Obstacles*); see also Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, p. 6 (Oct. 13, 2004) (Hereafter HRW, *Justice at Risk*).

699. Fidelma Donlon, "Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina," in *Deconstructing the Reconstruction: Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina*, 255–284, at p. 262 (Dina Francesca Haynes, ed., 2008) (hereafter Donlon, *Rule of Law*).

700. *Id.*, p. 264.

701. William W. Burke-White, *The Domestic Influence of International Criminal Trials: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina*, 46 Colum. J. Transnat'l L. 279, 315 (2008). By 2002, some 80% of Bosnia's judges and prosecutors had been appointed during the 1990s conflict. See Donlon, *Rule of Law*, at 264.

702. OSCE, *Progress and Obstacles*, p. 4. See also 22nd Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, 53 (May 14, 2002), at [http://www.ohr.int/print/?content\\_id=8069](http://www.ohr.int/print/?content_id=8069) (noting: "War crimes prosecutions have suffered due to the inadequacy of the domestic system. ... [I]n several cases, police have refused to act against high-profile criminals because they know that the offenders will be quickly released and will never be effectively prosecuted. The judicial system of BiH has not merely suffered the ravages

and disruption of war and immediate post-war, but also emerged from a communist culture in which there was no separation of powers and no tradition of judicial independence. Furthermore, judges and prosecutors continue to lack the capacity to deal with complex cases....”).

703. Id., p. 5.

704. Donlon, *Rule of Law*, supra, p. 267.

705. See Chris Hedges, “Muslim Detention of Bosnian Serbs Threatens Truce,” *New York Times*, Feb. 7, 1996. The Bosnian government arrested several other Bosnian Serbs during the same period, but the arrest of these two men proved especially controversial.

706. Richard Holbrooke, *To End A War*, p. 332 (Random House, 1998).

707. Organization for Security and Cooperation in Europe, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, p. 5 (March 2005).

708. Id. See also Stacey Sullivan, “Bosnian Serb Leaders Halt Contacts with Government; Arrest of 8 Military Men Threatens Fragile Peace,” *Washington Post*, Feb. 7, 1996.

709. Chris Hedges, “Muslim Detention of Bosnian Serbs Threatens Truce,” *New York Times*, Feb. 7, 1996.

710. See Jack Kelley, “Bosnia arrests 2 top Serbs, seeks charges,” *USA Today*, Feb. 6, 1996.

711. See ICTY Press Release, “Tribunal’s Prosecutor requests Bosnia to provisionally arrest General Đukić and Colonel Krsmanović,” CC/PIO/031-E, at <http://www.icty.org/sid/7419>. Contemporaneous press reporting suggested that Goldstone’s intervention helped dispel the crisis provoked by the arrests. See, for example, Stacey Sullivan, “Bosnian Serb Leaders Halt Contacts with Government; Arrest of 8 Military Men Threatens Fragile Peace,” *Washington Post*, Feb. 7, 1996 (reporting that the commander of NATO forces in Bosnia, Adm. Leighton W. Smith, Jr., had “released a statement saying he was reassured that the Bosnian government would abide by the decision of the war crimes tribunal”). So, too, does a more recent account: see Donlon, *Rule of Law*, supra, p. 263. Richard Holbrooke, the lead negotiator at Dayton, had a different view of the ICTY’s involvement, which was illustrative of the international community’s general approach during the Tribunal’s early years, often downgrading the pursuit of justice in the belief that this could destabilize a fragile peace. In his memoir of the Dayton peace negotiations and their early implementation, Holbrooke asserted that, since the two Serbian officers had been apprehended in a manner that violated the Dayton accord, “we would normally have insisted that the Muslims release them immediately.” Holbrooke continued: “But Justice Goldstone complicated matters considerably; from the International War Crimes Tribunal in The Hague, he issued a warrant for the two men—even though they had not been indicted.” Richard Holbrooke, *To End a War*, p. 332 (Random House, 1998). Although General Đukić was soon indicted by the ICTY, he was provisionally released due to ill health in late April 1996 and the proceedings against him were terminated following his death in May 1996. See ICTY Press Release, “Đukić case terminated by the death of the accused,” CC/PIO/082-E, June 3, 1996, at <http://www.icty.org/sid/7346>. The ICTY released the other potential suspect, Col. Krsmanović, without charge in late March 1996. See ICTY Press Release, “Colonel Krsmanović remanded back to Bosnia and Herzegovina,” CC/PIO/058, Apr. 3, 1996, at <http://www.un.org/icty/pressreal/p058-e.htm>.

712. Holbrooke, supra, at 334. Like other commitments set forth in the Rome Agreement, the Rules of the Road undertaking was understood primarily as an “*action to strengthen and advance the peace process*.” *Agreed Measures, preamble* (Feb. 18, 1996), at <http://www.nato.int/IFOR/rome/rome2.htm>.

713. The Rome Agreement signed by the three Balkan presidents provided in part:

Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.

Agreed Measures, 5 (Feb. 18, 1996), at <http://www.nato.int/IFOR/rome/rome2.htm>.

714. ICTY Web site, at <http://www.icty.org/sid/96>. Other sources, including some cited below, use slightly different figures than those provided on the Tribunal's Web site.

715. David Tolbert and Aleksandar Kontić, *The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC*, in Carsten Stahn and Goren Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, p. 142 (2008) (hereinafter Tolbert and Kontić, *Transitional Justice*).

716. Interview with Damir Arnault, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajžić, Sarajevo, July 16, 2009.

717. As two former OTP attorneys recalled, the office's review role under the Rules of the Road agreement "was a limited one," aimed solely at determining whether the evidence submitted by local authorities "was sufficient under international standards to justify the arrest or indictment of a suspect or continued detention of a prisoner." *Id.*

718. When the OTP reviewed a file submitted by Bosnian prosecutors, it assigned one of seven possible designations. A marking of "A" indicated that the file contained sufficient evidence to establish reasonable grounds for suspicion that a person committed a war crime, while a marking of "B" indicated the opposite. See *id.* A "C" marking reflected the OTP's inability to make a judgment based on the evidence in the file. See *id.*, pp. 142-43. For a brief description of other notations, see *id.*, p. 143 n.32.

719. *Id.*, p. 145. The *Transitional Justice Guidebook for Bosnia and Herzegovina*, produced by the United Nations Development Programme, credits the Rules of the Road program with "raising the professional level of BiH's judicial institutions." Executive Summary, p. 17. (Only the Executive Summary is available in English.)

720. The Rome Agreement placed a time-consuming and unfunded responsibility on the OTP beyond the core mandate set forth in its statute. Tolbert and Kontić later recalled the immediate impact of the Agreement on the OTP:

[T]here were no resources or funding provided for the project in the ICTY's budget, and the extra-budgetary funds had to be raised to support the project. Moreover, given that the OTP's staff were fully focused on investigations, trials, and appeals, additional external legal specialists were required to be identified and recruited to handle the demands of the project. There was also a heavy demand for translation resources to support the effort of these specialists, except to the extent lawyers with the requisite language skills could be identified.

*Id.*, p. 143.

721. William W. Burke-White, *The Domestic Influence of International Criminal Trials: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and*

*Herzegovina*, 46 Colum. J. Transnat'l L. 279, 313 (2008). Citing an OSCE report, Burke-White writes that "more than 2,300 cases sent to the ICTY were never reviewed and lost in administrative limbo." *Id.* This appears to be an inference, as the OSCE report notes without comment that the ICTY Rules of the Road unit received criminal files against 5,789 people since the program began, and by the time it ended "reviewed and [made determinations] against a total of 3,489 persons." OSCE, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina; Progress and Obstacles*, p. 6 (Mar. 2005). In a December 2006 interview, then War Crimes Prosecutor for BiH Vaso Marinković told the Justice Initiative that "The Hague" had transferred more than 300 cases that it had not reviewed before the Rules of the Road program ended. Interview with Vaso Marinković, head of SDWC, Sarajevo, Dec. 4, 2006. Burke-White suggests that the ICTY not only lacked the resources and substantial incentive to clear cases for prosecution by Bosnian courts, but in fact had a disincentive to do so lest domestic prosecutions "should interfere with a case presently before or potentially to be brought by the international court." Burke-White, *supra*, p. 317. Others suggest that the numbers of unreviewed cases cited above are incorrect. David Tolbert and Aleksandar Kontic write: "W. W. Burke-White ... claims that more than 2300 cases sent to the ICTY were never reviewed and were lost in administrative limbo .... In fact, this is not accurate. First, the ICTY Prosecutor transferred all of the un-reviewed Rules of the Road files to the POBiH in October 2004 .... Moreover, Burke-White incorrectly cites the relevant OSCE report ... by apparently confusing the number of cases and number of persons who were the subject of those Rules of the Road cases sent to the OTP. In fact, during its existence the Rules of the Road Unit received 1,235 case files regarding 4985 suspects. A total of 5,868 Standard Markings were issued for 3,360 suspects (some cases involved more than one suspect and certain suspects were allegedly involved in multiple crimes). Apparently, he subtracted the number of suspects from the number of standard markings and thus determined that some 2,300 remained unexamined. Instead, the salient number is that approximately 1,235 case files were provided to the OTP, of which 1072 were reviewed, leaving approximately 163 case files not reviewed; this is a far cry from 2,300. Moreover, as noted above, these were all handed over to the POBiH, not sent into some kind of limbo."

722. Interview by William W. Burke-White with Biljana Potparić-Lipa, then president of the State Court of Bosnia and Herzegovina, Sarajevo, Aug. 9, 2005, quoted in Burke-White, *supra*, p. 314.

723. Human Rights Center, International Human Rights Clinic, University of California, Berkeley, and Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, p. 36, at [http://www.law.berkeley.edu/files/IHRLC/Justice\\_Accountability\\_and\\_Social\\_Reconstruction.pdf](http://www.law.berkeley.edu/files/IHRLC/Justice_Accountability_and_Social_Reconstruction.pdf). The study noted that one Bosnian Serb judge expressed satisfaction with the ICTY's treatment of him, asserting: "Everything I did was accepted by the Tribunal with no objections." *Id.*, p. 37. It is difficult to know how to interpret this, however, as only two cases approved for prosecution by the ICTY under the Rules of the Road process had reached the trial stage in RS courts, according to a report published in March 2005. OSCE, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina; Progress and Obstacles*, p. 6 (March 2005).

724. Paul R. Williams and Patricia Taft, *War Crimes Research Symposium: The Role of Justice in Building Peace: The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?*, 35 Case W. Res. J. Int'l L. 219, 253-4 (2003). In larger perspective, Williams and Taft believe that, put into place at a time when the ICTY itself had indicted only a handful of suspects, the Rules of the Road process "severely limited the role of justice" for atrocities committed in Bosnia. *Id.* at



253. See also William W. Burke-White, *supra*, at 26 (quoting a former OSCE monitor, Dan Beckwith, saying “the rules of the road program buried a lot of cases and inhibited prosecutions”).

725. As noted earlier, the ICTY’s Web site places 848 individuals in this category. The head of the Special Department for War Crimes in the Court of Bosnia and Herzegovina told us that he received 877 files marked “A” from the ICTY when the OTP transferred the Rules of the Road program to the Bosnian State Court at the end of 2004. Interview with David Schwendiman, then deputy chief prosecutor of State Court of BiH and head of the Special Department for War Crimes, Sarajevo, July 14, 2009.

726. Burke-White, *supra*, p. 314.

727. In a November 2001 statement, then High Representative Wolfgang Petritsch softly hinted at a problematic ICTY role, even while making clear that primary responsibility for problematic prosecutions lay with the Bosnian judiciary itself:

The fact that the ICTY under the ‘Rules of the Road’ procedure does not specify where cases which are returned by the ICTY to BiH should be heard has often led to the politicisation of trials, undue pressure on the Judiciary or accusations that an outcome is not just. War crimes trials heard in lower level Entity courts have also been the subject of public skepticism.

OHR Press Release, “High Representative develops strategy for ‘Rules of the Road’ court proceedings,” Nov. 8, 2001, at [http://www.ohr.int/print/?content\\_id=6292](http://www.ohr.int/print/?content_id=6292). An OSCE report explains that the High Representative’s “statement acknowledge[d] the fact that some war crimes are not investigated and tried in the court with appropriate territorial jurisdiction.” OSCE, *Progress and Obstacles*, *supra*, p. 15. The report notes that Bosnian law has always followed the principle that cases should be tried before the court having territorial jurisdiction in the place the crimes were committed. But in the aftermath of the 1990s conflict, cases were often instituted elsewhere, in large part because witnesses displaced by ethnic cleansing reported crimes elsewhere. The ICTY’s Rules of the Road unit typically returned approved cases to those courts, which proceeded without regard to Bosnia’s general rules allocating jurisdiction internally. See *id.* This critique of the ICTY may rest on a misunderstanding of its limited mandate. As one observer notes, “many diplomats misconstrued the Rules of the Road agreement as a mechanism to ensure fair trials in national courts rather than one to prevent arbitrary arrests.” Donlon, *Rule of Law*, p. 266.

728. See sources cited in Human Rights Center, International Human Rights Clinic, University of California, Berkeley, and Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, pp. 7-8 (May 2000), at [http://www.law.berkeley.edu/files/IHRLC/Justice\\_Accountability\\_and\\_Social\\_Reconstruction.pdf](http://www.law.berkeley.edu/files/IHRLC/Justice_Accountability_and_Social_Reconstruction.pdf). Writing in 2002, ICG highlighted the depth of these problems even seven years after the fighting ended:

The law does not yet rule in Bosnia and Herzegovina. What prevail instead are nationally defined politics, inconsistency in the application of law, corrupt and incompetent courts, a fragmented judicial space, half-baked or half-implemented reforms, and sheer negligence. Bosnia is, in short, a land where respect for and confidence in the law and its defenders is weak.

*Courting Disaster: The Misrule of Law in Bosnia and Herzegovina*, ICG Europe Report No. 127, p. 1 (Mar. 25, 2002), at [http://www.crisisgroup.org/library/documents/report\\_archive/A400592\\_25032002.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400592_25032002.pdf).



729. International Crisis Group, *War Criminals in Bosnia's Republika Srpska: Who Are the People in Your Neighborhood?*, p. iii (Nov. 2, 2000), at [http://www.crisisgroup.org/library/documents/report\\_archive/A400001\\_02112000.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400001_02112000.pdf).

730. In a 2008 report, Human Rights Watch reported: “To date, in Republika Srpska, prosecutors have brought a total of 18 indictments for crimes committed during the war, and district courts have rendered 7 verdicts, with 3 cases still currently underway. In the Federation, cantonal courts have decided a total of 144 verdicts, with 25 cases still in process.” Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity and Genocide in Bosnia and Herzegovina's Cantonal and District Courts* (July 2008) (citations omitted) at <http://www.hrw.org/en/node/62137/section/2>.

731. See Jelena Mrkić Bjelović, “Banja Luka: Legacy of the Past,” BIRN Justice Report, Dec. 27, 2007, at <http://www.bim.ba/en/95/10/7151>.

732. Interview with Damir Arnault, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajdžić, Sarajevo, July 16, 2009. Tarik Jusić, executive director of Mediacentar Sarajevo, had a similar reaction to the claim that the ICTY had inadvertently undermined national courts, noting that they were “inefficient, corrupt and they submitted to political pressure.” Interview with Tarik Jusić, Sarajevo, Dec. 6, 2006.

733. Interview with Jovan Spaić, then director of the Republika Srpska Center for War Crimes Investigations, Banja Luka, July 15, 2009. In addition, Spaić noted that the courts in Republika Sprska, like those elsewhere in Bosnia, had not yet undergone the comprehensive judicial reform process that started much later. *Id.*

734. Human Rights Center, International Human Rights Clinic, University of California, Berkeley, and Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, p. 39 (May 2000), at [http://www.law.berkeley.edu/files/IHRLC/Justice\\_Accountability\\_and\\_Social\\_Reconstruction.pdf](http://www.law.berkeley.edu/files/IHRLC/Justice_Accountability_and_Social_Reconstruction.pdf).

735. Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009.

736. A raft of international organizations has been deeply involved in various aspects of governance in Bosnia, including judicial reform. These have included, in addition to the Office of the High Representative, the Judicial System Assessment Program of the UN Mission in Bosnia and Herzegovina; the UN Development Programme; the International Judicial Commission and the OSCE. Many non-governmental organizations have also played substantial roles in these processes.

737. The term “Bosnian War Crimes Chamber” is a common phrase used to refer to Section 1 of the Court of Bosnia and Herzegovina (BiH) that handles war crimes exclusively. The Prosecutor’s Office and the Court are separate organs of the state of BiH—they are not part of a single chamber. The prosecutor operates in the judicial system as a participant in trials, but is not actually part of the judiciary.

738. The vetting process is described in Caspar Fithen, *The Legacy of Four Vetting Programs: An Empirical Review*, pp. 5–10 (International Center for Transitional Justice, 2009).

739. The ICTY’s prosecution office played an important role in this vetting process. See Tolbert and Kontic, “The ICTY and the Transfer of Cases,” pp. 3–4. Although the UN Mission in Bosnia carried out the vetting procedure in-country, the majority of documents relevant to the vetting process were housed or archived at the ICTY in the Office of the Prosecutor (OTP). Many of these documents were not otherwise available and without access to them, the vetting procedure would

have been much more difficult. See G. L. Naarden, 'Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials,' (2003) 97 *AJIL* 342.

740. The Court of BiH has three sections, dealing with distinct types of criminal offenses. As noted earlier, Section 1 of the Court (colloquially referred to as "War Crimes Chamber") adjudicates war crimes.

741. Going into his first budget meeting at UN Headquarters soon after taking up the post of ICTY prosecutor in 1994, Richard Goldstone recalls that he had "been informed ahead of time that at least one indictment had to be issued before the ... meeting in order to demonstrate that the system was working and that the tribunal was worthy of financial support." Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, p. 105 (2000).

742. Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (hereafter *Report of the Expert Group*), UN Doc. S/2000/597, annex I, pp. 19–20, 35.

743. Michael Bohlander, *Last Exit Bosnia—Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 *Crim. L. Forum* 59, 61 (2003).

744. *Report of the Expert Group*, supra, p. 40, 101.

745. See, e.g., Statement of the President of the Security Council, UN Doc. S/PRST/2002/21 (July 23, 2002); SC Res. 1503 (2003); and SC Res. 1534 (2004).

746. In 2002 ICTY officials involved in shaping the Tribunal's completion strategy explained that indictees transferred to national courts would be "those who, though in a sufficiently high-level position of authority to be indicted by the Prosecutor of the [ICTY], may be tried by national courts provided certain conditions have been satisfied." Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678, 32 (June 2002) (citation omitted).

747. In relation to any new indictments issued by the prosecutor in the brief time then remaining, the Security Council called on the Tribunal "to ensure that any such indictments concentrate on the most senior leaders suspected of being responsible for crimes within [its] jurisdiction." SC Res. 1534, 5 (2004). While these considerations were of paramount importance to the Security Council and governments that supported the ICTY, Tribunal prosecutors came to support the idea of strengthening domestic capacity to prosecute war crimes for another reason. In the course of preparing cases, they gathered vast amounts of evidence implicating individuals they would not be able to charge themselves. In this setting, prosecutors came to see the value of having a strong domestic partner that could develop this evidence into prosecutions. Interview with former ICTY prosecutor, Washington, D.C., August 12, 2009.

748. Judge Jorda did not specify the nature of those changes, but they doubtless included the collapse of the Milošević regime in Serbia in October 2000, which eventually led to the former Serbian leader's transfer to the ICTY in late June 2001. While developments in Bosnia were less dramatic, Jorda may also have had in mind the elections for a range of public positions on November 11, 2000. But while many welcomed the largely peaceful nature of the polling, observers were disappointed in voters' selections, which for the most part favored nationalist candidates. As election results filtered in, the *New York Times* reported: "What is clear is that international officials are disappointed and the country is not set for major change." Carlotta Gall, "Bosnian Election Returns Point to Little

Change, Analysts Say,” *New York Times*, Nov. 20, 2000. Despite this, the fall of Milošević from power may have made it easier for Bosnian Serb leaders to moderate their own stance toward the ICTY. Around the time of the collapse of the Milošević regime, the leader of Republika Srpska, Milorad Dodik, was taking steps that seemed encouraging to outsiders, including then ICTY Prosecutor Carla Del Ponte. In a press statement dated October 6, 2000, Del Ponte described her visit to the RS capital Banja Luka:

In Banja Luka I was very pleased to receive the assurance of Prime Minister Dodik that his government is prepared to open investigations and to bring to justice the killers who were responsible for the thousands of murders involving the Muslim victims of Srebrenica in 1995. This is a very positive development, which would see The Hague Tribunal prosecuting the higher level perpetrators and the Republika Srpska would prosecute lower level perpetrators. I am willing to co-operate with the Republika Srpska if Mr. Dodik is serious in relation to this new initiative.

Statement by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, made on 6 October 2000, PR/P.I.S./532-e, at <http://www.icty.org/sid/7816>.

749. Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council, set forth in ICTY Press Release of Nov. 27, 2001, JD/P.I.S./641-e, at <http://www.icty.org/sid/7927>.

750. Id. See also Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council, July 23 2002, ICTY Press Release JDH/P.I.S./690-e (July 26, 2002), at <http://www.icty.org/sid/8080> (giving “certain cases of lesser significance to the national courts ... is the only way we will be able to ... close the investigations around 2004 and finish the first instance trials around 2008”).

751. Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678, 32 (June 2002).

752. Interview with David Tolbert, then deputy prosecutor, ICTY, The Hague, Mar. 5, 2007. See also Letter dated 17 June 2002 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2002/678 (June 19, 2002) (after noting that the ICTY’s proposed completion strategy would entail transferring cases of mid-level suspects to local courts, the Secretary-General’s transmittal letter continued: “In view of the location where the crimes concerned are alleged to have been committed, all of these cases would be referred for prosecution and trial to the national courts of Bosnia and Hercegovina”).

753. Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678, 49 (June 2002). See also Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2004/420, 29 (May 24, 2004).

754. These efforts are described in the ICTY’s Ninth Annual Report to the UN General Assembly and Security Council. See UN Doc. A/57/379-S/2002/985, 18-21 (Sept. 4, 2002). One option considered by the ICTY judges but ultimately rejected was to create an international court in Bosnia. But the costs of such an effort would defeat the goal of curbing expenses associated with the ICTY’s

own work. See Seventh annual report of the [ICTY], UN Doc. A/55/273-S/2000/777, 338 (Aug. 7, 2000), at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2000\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2000_en.pdf).

755. See 22nd Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, 54–55 (May 14, 2002); OSCE, *Progress and Obstacles*, p. 9. The PIC endorsed the High Representative’s judicial reform strategy in July 2002. See Donlon, *Rule of Law*, p. 275.

756. Consultants’ Report to the OHR: The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina, p. 5 (May 2002).

757. See OSCE, *Progress and Obstacles*, p. 9; Burke-White, *supra*, p. 6. Previous, unsuccessful, efforts at reform are described in International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina*, Balkans Report No. 127 (Mar. 25, 2002) [hereafter ICG, *Courting Disaster*].

758. See Sebastian van de Vliet, “Addressing Corruption and Organized Crime in the Context of Re-establishing the Rule of Law,” in *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* 203, at 229–230 (Dina Francesca Haynes, ed. 2008); Donlon, *Rule of Law*, pp. 275–76.

759. By one account, when asked to consider various other options for local war crimes trials, the OHR “suggested focusing on the yet to be established Court of BiH.” Donlon, *Rule of Law*, p. 272. In another, soon after the law establishing the Court of Bosnia was adopted and as related judicial reforms were taking shape, then ICTY Prosecutor Carla Del Ponte presented to the OHR and two other international bodies in Bosnia a proposal for “remission of some cases to a Special Court in Bosnia and Herzegovina.” *Consultants’ Report to the OHR: The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina*, p. 6 (May 2002). In this account, the three international bodies welcomed her proposal and “agreed that the Court of Bosnia and Herzegovina appear[ed] to be the most appropriate institution for the prosecution of war crimes cases” transferred from The Hague. *Id.* According to an ICTY outreach official, negotiations between the ICTY and OHR were preceded by then ICTY Prosecutor Carla Del Ponte’s presentation of a non-paper by Deputy Prosecutor Graham Blewitt. Interview with Refik Hodžić, ICTY liaison officer for BiH, Sarajevo, July 13, 2009.

760. The High Representative imposed the Law on the State Court of BiH on November 12, 2000, following the failure of the Bosnian parliament to adopt the law. See Donlon, *Rule of Law*, pp. 268–69. Upon challenge by RS parliamentarians, the Constitutional Court of Bosnia upheld his power to do so in September 2001. See ICG, *Courting Disaster*, *supra*, at 25. It would take more time for the State Court to become fully functional. See Donlon, *Rule of Law*, p. 274. The High Representative enacted both the Criminal Code of BiH and Criminal Procedure Code on January 24, 2003; both entered into force on March 1, 2003. See OSCE, *Progress and Obstacles*, p. 9.

761. See Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678, p. 6 (June 2002); Michael Bohlander, *Last Exit Bosnia—Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 *Crim. L. Forum* 59, 66 (2003).

762. A range of options had been explored in some depth by a group of four legal consultants engaged by the OHR in early 2002 to examine issues relating to future war crimes prosecutions in Bosnia, and to make recommendations. See 22nd Report by the High Representative for Implemen-

tation of the Peace Agreement to the Secretary-General of the United Nations, 28 (May 14, 2002), at [http://www.ohr.int/print/?content\\_id=8069](http://www.ohr.int/print/?content_id=8069). Their analysis and recommendations are discussed in depth in Bohlander, *supra*, at 66–85. Then ICTY President Claude Jorda presented the broad outlines of this proposal to the UN Security Council on July 23, 2002. See Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council, July 23 2002, ICTY Press Release JDH/P.I.S./690-e (July 26, 2002), at <http://www.icty.org/sid/8080>. Following his remarks, the Security Council “endorse[d] the report’s broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as likely to be in practice the best way of allowing the ICTY to achieve its current objective of completing all trial activities at first instance by 2008.” SC Press Release 7461, at <http://www.un.org/News/Press/docs/2002/sc7461.doc.htm>. In his memoir, former High Representative Paddy Ashdown recalled that on November 19, 2002, then ICTY Prosecutor Carla Del Ponte “visited Sarajevo and we took the historic decision (private for the moment) that we would take on the task of establishing a domestic war crimes chamber in Bosnia. This \$25 million project would give Bosnia a mini-Hague court and make it the first country in the Balkans to be able to try its own war criminals in its own specialized court, on its own territory.” Paddy Ashdown, *Swords and Plowshares: Bringing Peace to the 21st Century*, p. 256.

763. The OHR’s reforms “essentially moved the country away from its traditional civil law model to one closer to the adversarial system.” Tolbert and Kontić, *Transitional Justice*, *supra*, p. 147. By equal measure, accommodating the ICTY’s criteria for a trustworthy local partner placed further demands on a judiciary that was already facing the daunting challenges presented by the OHR’s radical judicial restructuring plan. Although generally complimentary of the ICTY’s contributions to the war crimes section of the Court of BiH, Branko Perić, then president of Bosnia’s High Judicial and Prosecutorial Council (HJPC), noted that the chamber faced some challenges because “the Hague [Tribunal] was trying to solve its own problem instead of Bosnia and Herzegovina trying to solve its problems.” Interview with Branko Perić, then president, HJPC, Sarajevo, Dec. 4, 2006.

764. Donlon, *Rule of Law*, *supra*, p. 277.

765. Interview with Mechtild Lauth, then senior legal counsel, The Registry, War Crimes and Organized Crime, Court of BiH, Sarajevo, June 12, 2007; OSCE, *Progress and Obstacles*, p. 10; see also Tolbert and Kontić, *Transitional Justice*, *supra*, at 146. Although the PIC had endorsed the OHR’s comprehensive judicial reform plan in July 2002, the war crimes chamber was not yet included in this plan. See Donlon, *Rule of Law*, p. 274.

766. Interview with Mechtild Lauth, Sarajevo, June 12, 2007. According to then State Prosecutor Marinko Jurčević, the key law for transferring cases from the ICTY to Bosnia’s War Crimes Chamber “was not passed overnight but prior to that the working groups worked day and night” to lay the groundwork for this law. Interview with Marinko Jurčević, Sarajevo, Dec. 4, 2006.

767. See Tolbert and Kontić, *Transitional Justice*, *supra*, pp. 146–47. According to various individuals involved in this process, the OHR “did much of the work” in this process.

768. Donlon, *Rule of Law*, *supra*, p. 277. ICTY staff involved in the planning process were also keen to ensure that the joint effort led to sustainable judicial capacity-building.

769. As noted earlier, the chamber is officially known as Section I of the Court of BiH.

770. See *id.*

771. See *id.*, p. 280. Other elements came into focus later. For example, following a major donors' conference in 2004, a decision was made to create a special registrar's office to administer the BWCC's international funds.

772. *Id.*, pp. 280–81. As noted below, the role of international prosecutors and judges was extended in December 2009 for an additional three years. See *infra*, Ch. V, Sec. 5 (Lessons for the Future).

773. SC Res. 1503, UN Doc. S/RES/1503, preambular 7 (Aug. 28, 2003).

774. *Id.*, preambular 11.

775. *Id.*, 5. See also SC Res. 1534, UN Doc. S/RES/1534, 4, 9 and 10 (Mar. 24, 2004).

776. See Donlon, *Rule of Law*, p. 278; Interview with Mechtild Lauth, then senior legal counsel, the Registry, War Crimes and Organized Crime, Court of BiH, Sarajevo, June 12, 2007. The SDWC was actually created in 2004. David Schwendiman, "Background and Introduction," p. 1 (July 2009) (on file with author). "Background and Introduction" is an informal document which the SDWC distributes to counterparts from other countries, and other individuals and organizations with whom the department interacts, as a way of providing considered answers to various questions regarding the work of the SDWC.

777. Interview with Mechtild Lauth, *supra*. According to Lauth, although the High Representative had the legal power to impose the law, he preferred that it be adopted by the national Parliament. *Id.*

778. ICTY Rules of Procedure and Evidence, Rule 11bis (C), as amended Sept. 30, 2002; July 28, 2004; and Feb. 11, 2005 (internal citation omitted).

779. *Id.*, Rule 11bis (B), as amended Sept. 30, 2002; July 28, 2004; Feb. 11, 2005.

780. ICTY Rules of Procedure and Evidence, Rule 11bis (D) (ii), as amended Feb. 11, 2005. Issues relating to protection of victims and witnesses are addressed in greater depth in a Memorandum of Understanding between the Office of the Prosecutor of the ICTY and the SDWC of the Prosecutor's Office of BiH, Sept. 2, 2005.

781. The War Crimes Chamber is one of three sections of the Criminal Division of the State Court of Bosnia and Herzegovina. The second section addresses organized crime, while the third section deals with general crime.

782. See OSCE, *Progress and Obstacles*, p. 5; Address of the Prosecutor, Carla Del Ponte, "Office of the Prosecutor of the ICTY and War Crimes Chamber of BH Court—Way Forward and Challenges," BIRN Conference, Sarajevo, Nov. 10, 2005, at <http://www.un.org/icty/pressreal/2005/speech/cdp-bh-BIRN-wcc-ronovo5.htm>. The OHR had already taken the position that "sensitive Rules of the Road cases would . . . be dealt with by the [BWCC]" in addition to indicted cases transferred by the ICTY. See Donlon, *Rule of Law*, p. 277. Although the program ended in 2004, the Croat and Bosniak members of the Bosnian presidency charged that Serbia had breached the Rome Agreement when its War Crimes Prosecutor issued indictments against members of Bosnia's wartime presidency several years later. See "Sarajevo: Serbia broke Rome Agreement," RTV B92 News, Mar. 20, 2009.

783. Interviews with Nerma Jelačić, then director of BIRN in BiH, Sarajevo, Dec. 1, 2006; Srdjan Dizdarević, president of the Helsinki Committee for Human Rights in BiH, Sarajevo, Dec. 1, 2006. Only 32 percent of Bosnian citizens who participated in a 2002 survey said that they trusted local courts. This figure was almost identical for citizens residing in the Federation (32.0%) and in

Republika Srpska (31.9%). See South East Europe Public Agenda Survey, January–February 2002, Bosnia and Herzegovina (Federation), p. 19; South East Europe Public Agenda Survey, Republic of Srpska, January–February 2002, p. 17. In contrast, among those residing in the Federation, where a majority of victims of wartime atrocities reside, 50.5 percent reported that they trusted the ICTY. South East Europe Public Agenda Survey, January–February 2002, Bosnia and Herzegovina (Federation), p. 26. For Republika Srpska, the percentage of respondents who said they trusted the ICTY was only 3.6. South East Europe Public Agenda Survey, Republic of Srpska, January–February 2002, p. 24.

784. See “Bosnian Serb war criminal fakes toothache to escape,” Reuters, May 25, 2007, at <http://www.reuters.com/article/latestCrisis/idUSL25390302>. Three years after his escape, Stanković remains at large.

785. The most common concern voiced by Bosniak victims is that sentences imposed by the BWCC are too short in relation to the crimes committed, whereas Serbs are likely to say that Serb perpetrators receive harsher sentences. In addition, just as Bosnian citizens are troubled by apparent inconsistencies among sentences imposed by the ICTY, “it is very difficult [for them] to make sense of disparities in sentences” imposed by the BWCC. Interview with Dubravka Piotrovski, then ABA CEELI, Sarajevo, Nov. 29, 2006. Some fault the BWCC for devoting too much time prosecuting lower level perpetrators, e.g., interview with Emir Suljagić, author, Sarajevo, July 14, 2009.

786. “Public Perceptions of the work of the Court and Prosecutor’s Office of BiH,” Prism Research for the Registry of the Court of BiH and The Registry of the Prosecutor’s Office of BiH, p. 10, July 2008. Although this survey was not limited to perceptions of the BWCC and the SDWC, many of its questions pertained specifically to war crimes prosecutions before the State Court. The study found, moreover, that the most common association of BiH citizens with the words “Office of the Prosecutor of BiH” was “(war) crimes and criminals.” *Id.*, p. 14.

787. *Id.* As we note below, the Court of BiH has been challenged by Republika Srpska President Milorad Dodik.

788. See Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina in 2009 (ICLS Report), available at <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>.

789. Interview with Mirsad Tokača, director, Research and Documentation Center, Sarajevo, July 24, 2009.

790. Interview with the Human Rights Department (OSCE Mission to Bosnia and Herzegovina), Sarajevo, June 8, 2007.

791. See generally ICTJ, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008); Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia’s War Crimes Chamber* (Feb. 2007). Concerns highlighted by both ICTJ and HRW in their respective reports include the BWCC’s over-use of closed sessions in some early trials, the need for the prosecutor to develop a strategy for selecting cases, and the need for more effective outreach by the court. As discussed above, a July 2008 survey suggests that the chamber has received more positive reviews among experts who closely follow its work than the Court of BiH has generally received from the Bosnian public. But international experts have raised a range of concerns about



the Court. See, e.g., Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009 (15 Dec. 2008) (ICLS Report), available at <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>.

792. Dobrila Govedarica describes the ICTY's role in the establishment of the BWCC as its "second most important achievement," its most important being its ruling that genocide was perpetrated in Srebrenica. Interview with Dobrila Govedarica, executive director of the Open Society Fund BiH, Sarajevo, Nov. 30, 2006. ICTY Liaison Office Refik Hožić, who at one point worked with the BWCC, describes the chamber as the "greatest legacy of the Tribunal outside its cases." Interview with Refik Hodžić, ICTY liaison officer for BiH, Sarajevo, July 13, 2009.

793. David Schwendiman, "Background and Introduction," p. 14 (July 2009) (on file with author). While this number is small, the ICTY transferred the largest number of Rule 11 *bis* cases to Bosnia. According to the ICTY's Web site, "A total of eight cases involving 13 persons indicted by the ICTY have been referred to courts in the former Yugoslavia, mostly to Bosnia and Herzegovina." ICTY Web site at <http://www.icty.org/sections/Outreach/TransferofCases>. The ICTY does not contemplate any further 11 *bis* transfers. See *id.* The ICTY prosecutor unsuccessfully sought authority to refer a number of other cases to Bosnia and Herzegovina.

794. The Constitution of Bosnia and Herzegovina, included in an annex to the Dayton Peace Agreement, provides that "the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law." General Framework Agreement for Peace in Bosnia and Herzegovina, Annex IV, Article II (2), available at <http://www1.umn.edu/humanrts/icty/dayton/daytonannex4.html>. The same Annex also confers on the Constitutional Court of BiH jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the Convention. *Id.*, Art. VI (3)(c). In addition, a Commission for Human Rights exists within the Constitutional Court with a mandate to consider alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and the Protocols thereto. The Commission is the successor institution to the Human Rights Chamber, a judicial body established under Annex VI of the Dayton Peace Agreement. See Web site of the Human Rights Commission, at [www.hrc.ba/commission/eng/default.htm](http://www.hrc.ba/commission/eng/default.htm).

795. Rule 11 *bis* provides for the prosecutor to send observers to monitor domestic trials arising from transferred indictments. ICTY Rules of Procedure and Evidence, Rule 11 *bis* (D)(iv), as amended on Sept. 30, 2002.

796. *Id.*, (F)–(G). It is unclear how viable a threat this is in practice. Under pressure to complete the cases already in or heading toward trial, it is difficult to imagine the ICTY actually recalling a case it has transferred to Bosnia. Nonetheless, when we interviewed him in late 2006, then HJPC President Branko Perić said that "judges and prosecutors are well aware of The Hague's ability to take back cases and they are very motivated to show that they are just as capable of trying cases as the ICTY." Interview with Branko Perić, then president of the HJPC, Sarajevo, Dec. 4, 2006.

797. See Decision No. 673, Cooperation Between the Organization for Security and Cooperation in Europe and the International Criminal Tribunal for the Former Yugoslavia, PC.DEC/673, May 19, 2005, [www.osce.org/documents/pc/2005/05/14531\\_en.pdf](http://www.osce.org/documents/pc/2005/05/14531_en.pdf).



798. E-mail communication with Pipina Katsaris, legal advisor-head of the Rule 11 bis Monitoring Project and Capacity Building and Legacy Implementation Project, Human Rights Department, OSCE Mission to BiH, Sept. 30, 2009. All public reports of the OSCE Mission to BiH on the transferred cases are available on the websites of both the OSCE Mission ([www.oscebih.org/human\\_rights/monitoring.asp?d=1](http://www.oscebih.org/human_rights/monitoring.asp?d=1)) and the ICTY ([www.icty.org/sid/8934](http://www.icty.org/sid/8934)).

799. Id.

800. Id.

801. Id.

802. Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH ("Law on the Transfer of Cases"), Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06, 76/06 (Unofficial, Consolidated Version), at [http://www.sudbih.gov.ba/files/docs/zakoni/en/BH\\_LAW\\_ON\\_TRANSFER\\_OF\\_CASES\\_-\\_Consolidated\\_text.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf).

803. See OSCE, Mission to Bosnia and Herzegovina, First Report, Case of Defendant Radovan Stanković Transferred to the State Court pursuant to Rule 11bis, March 2006. See also OSCE Mission to Bosnia and Herzegovina, First Report, Case of Defendant Gojko Janković Transferred to the State Court pursuant to Rule 11bis, April 2006.

804. The Law on the Transfer of Cases requires the Bosnian prosecutor to "initiate criminal prosecution according to the facts and charges laid out in the [confirmed] indictment of the ICTY," after adapting the transferred indictment to ensure its compliance with Bosnian criminal procedure law. Law on the Transfer of Cases, Art. 2(1). While the state prosecutor cannot drop any charges confirmed by the ICTY, he can in principle add charges. While the state prosecutor attempted to do so early on in the case of Gojko Janković, the SDWC soon decided to refrain from doing so. The head of the SDWC explained that there simply is not enough time to conduct further investigations within the period allotted for adapting charges. Although additional charges could in principle be added later, the value of doing so would have to be weighed against the impact on the office's finite resources. Interview with David Schwendiman, then deputy chief prosecutor of BiH and head of SDWC, Sarajevo, July 14, 2009.

805. For example, defendants in trials before the BWCC have opposed the state prosecutor's attempts to apply provisions of the Law on the Transfer of Cases concerning the use of evidence from ICTY proceedings and the establishment of facts already judged to have been proven in legally binding ICTY cases.

806. Interview with Judge Meddžida Kreso, president of State Court of BiH, Sarajevo, Dec. 4, 2006. RS Prime Minister Dodik has charged that state-level judicial institutions are being "used against Serbs" and has labeled them "political institutions." See Velma Sarić and Maria Hetman, "Bosnia: Future of International Judges and Prosecutors in Doubt," *IWPR Tribunal Update*, No. 613, Aug. 28, 2009, [www.iwpr.net/EN-tri-f-355447](http://www.iwpr.net/EN-tri-f-355447).

807. See International Center for Transitional Justice, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, p. 19 (2008); Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber*, pp. 30–35 (Feb. 2007); OSCE, Mission to Bosnia and Herzegovina, Second OSCE Report, Case of Radovan Stanković Transferred to the State Court pursuant to Rule 11 bis, May 2006. Local as well as international NGOs criticized the lack of

transparency of the Chamber in these cases. See “Anger at Secrecy Surrounding Foča Rape Cases,” BIRN’s Justice Report, Mar. 8, 2006, at <http://www.bim.ba/en/1/10/770/>.

808. Interview with OSCE Mission to Bosnia and Herzegovina, Sarajevo, June 8, 2007. In this instance, the ICTY was among those publicly criticizing the BWCC’s practice of excluding the public from most of the trial proceedings. See “Anger at Secrecy Surrounding Foča Rape Cases,” BIRN’s Justice Report, Mar. 8, 2006, at <http://www.bim.ba/en/1/10/770/> (quoting ICTY Spokesperson Alexandra Milenov).

809. Interview with Marinko Jurčević, then chief prosecutor, State Court of BiH, Sarajevo, Dec. 4, 2006. Still, most of the cases transferred under Rule 11 *bis* required further preparation by the SDWC. Then SDWC head David Schwendiman told us that it was simply wrong to think that 11 *bis* cases were for the most part “trial ready.” In some cases, he said, “nothing had been done for awhile” on cases transferred to the SDWC, although prosecutors in The Hague had “done everything they could to get everything to us.” Interview with David Schwendiman, then deputy chief prosecutor, State Court of BiH and Head of SDWC, Sarajevo, July 14, 2009.

810. Email communication with Pipina Katsaris, legal advisor-head of the Rule 11 *bis* Monitoring Project and Capacity Building and Legacy Implementation Project, Human Rights Department, OSCE Mission to BiH. According to officials in the SDWC, this happened “only once or twice.” Interview with Toby Cadman and David Schwendiman, SDWC, Sarajevo, June 12, 2007.

811. Interview with Branko Perić, then president of HJPC, Sarajevo, Dec. 4, 2006.

812. Interview with Toby Cadman and David Schwendiman, SDWC, Sarajevo, June 12, 2007.

813. Address of the Prosecutor, Carla Del Ponte, “Office of the Prosecutor of the ICTY and War Crimes Chamber of BH Court—Way Forward and Challenges,” BIRN Conference, Sarajevo, Nov. 10, 2005, at <http://www.un.org/icty/pressreal/2005/speech/cdp-bh-BIRN-wcc-10nov05.htm>. The case to which Del Ponte referred was the first one transferred to Bosnia pursuant to Rule 11 *bis*.

814. Interviews with SDWC staff, Sarajevo, June and July 2006.

815. Amendment to the Law on the Transfer of Cases, Official Gazette of BiH, No. 53/06.

816. Interview with David Schwendiman, then head of SDWC, Sarajevo, July 14, 2009.

817. *Id.* In part for this reason, international prosecutors took the lead in four out of six 11 *bis* cases transferred to Bosnia. See ICTJ, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, pp. 11-12 (2008); Interview with Toby Cadman and David Schwendiman, SDWC, Sarajevo, June 12, 2007. One of the two national prosecutors who took the lead in an 11 *bis* prosecution speaks English. Interview with David Schwendiman, then head of SDWC, Sarajevo, July 14, 2009.

818. Interview with Prosecutor Džemila Begović, July 2006.

819. Interview with Toby Cadman and David Schwendiman, SDWC, Sarajevo, June 12, 2007. But, they added, ICTY prosecutors were extremely cooperative in working with their counterparts in Sarajevo to help them “get a better sense of how to proceed and what they needed.” *Id.*

820. In a similar vein, another SDWC staff member told us that the ICTY Registry failed to provide exhibit lists along with trial records and bemoaned the ICTY Referral Bench’s short notice of pending 11*bis* decisions. Interview with SDWC staff member, July 2006.

821. Multiple interviews with former and current SDWC staff, June and July 2006.

822. As of July 2009, all but one of the Rule 11bis first instance trials conducted before the BWCC had been completed. David Schwendiman, “Background and Introduction,” pp. 14–15 (July 2009) (on file with author).

823. Interview with Milorad Barašin, chief prosecutor, State Court of BiH, Sarajevo, July 14, 2009.

824. Id. Barašin went on to say that the ICTY provided assistance “even in cases concerning lower level perpetrators.”

825. Tolbert and Kontić, *Transitional Justice*, supra, p. 157.

826. David Schwendiman, “Background and Introduction,” p. 15 (July 2009) (on file with author).

827. Tolbert and Kontić, *Transitional Justice*, supra, p. 157. Of these, two cases had been prosecuted to a first instance verdict by July 2009. David Schwendiman, “Background and Introduction,” p. 16 (July 2009) (on file with author).

828. Tolbert and Kontić, *Transitional Justice*, supra, p. 158. Material in Category II cases sometimes has included material derived from Rules of the Road files. See id.

829. Interview with Vaso Marinković, then head of SDWC, BiH Prosecutor’s Office, Dec. 4, 2006.

830. David Schwendiman, “Background and Introduction,” p. 19 (July 2009) (on file with author). As noted earlier, the ICTY Web site uses the figure of 848 to describe files that received an “A” marking under the Rules of the Road program. The ICTY OTP sent the SDWC electronic copies of files that had been given other markings somewhat later. See id. The SDWC decided to review only those files that had received an “A” marking and not attempt to use other files submitted to the ICTY as a basis for further investigations. Interview with David Schwendiman, then head of SDWC, Sarajevo, July 14, 2009.

831. See David Schwendiman, “Background and Introduction,” pp. 19–20 (July 2009) (on file with author).

832. It was anticipated that the SDWC would review the sufficiency of evidence of cases that did not receive an “A” marking, see OSCE, *Progress and Obstacles*, p. 18, but instead, the office decided to review only files marked “A.”

833. See David Schwendiman, “Background and Introduction,” p. 20 (July 2009) (on file with author).

834. According to Human Rights Watch, prosecutors in Republika Srpska claim that the referral process that followed the state court’s review of Rules of the Road cases led to an improvement in the quality of indictments and case preparation in RS. See Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts* (July 2008) (citations omitted), at <http://www.hrw.org/en/node/62137/section/3>.

835. Interview with Vaso Marinković, then head of SDWC, Sarajevo, Dec. 4, 2006. As of August 8, 2009, indictments had been issued in 84 cases before the BWCC, some involving multiple defendants. See [http://www.sudbih.gov.ba/?opcija=sve\\_optuzniceandodjel=randjezik=e](http://www.sudbih.gov.ba/?opcija=sve_optuzniceandodjel=randjezik=e).

836. As of July 2009, the “best estimate” of the SDWC was that some 4,990 war crimes-related files involving 9,878 suspects, including cases returned to local prosecutors following review under the Rules of the Road program, were “in the hands of prosecutors throughout” Bosnia. But these figures can be misleading, the department cautions, as “they do not take into account the amount

of redundancy in the files.” David Schwendiman, “Background and Introduction,” pp. 20–21 (July 2009).

837. See ICTY Web site at <http://www.icty.org/sid/96>.

838. Interview with Toby Cadman and David Schwendiman, SDWC, Sarajevo, June 12, 2007.

839. In April 2009, for example, ICTY Prosecutor Serge Brammertz participated in a two-day symposium in Brussels with prosecutors from Bosnia and other countries that were formerly Yugoslav republics. See Simon Jennings, “Brammertz Urges Balkan Politicians to Support Local Courts,” ICTY -Tribunal Update No. 595, IWPR, Apr. 3, 2009. This was hardly the first meeting between ICTY prosecutors and regional prosecutors. ICTY prosecutors have met regularly with all the prosecutors in the Balkans through several programs, including the “Palić process” spearheaded by the OSCE as well as parallel processes sponsored by the US Department of Justice. These have led to regional cooperation on many fronts.

840. *Id.*

841. Interview with Nerma Jelačić, then director of BIRN in BiH, Sarajevo, Dec. 1, 2006.

842. Interview with Emir Suljagić, Sarajevo, July 14, 2009.

843. Interview with Matias Hellman, then liaison officer of ICTY, Sarajevo, Nov. 29, 2006.

844. Press Release, OTP/OK/PR1324e (July 1, 2009), “Office of the Prosecutor of the ICTY Welcomes Liaison Prosecutors from Bosnia and Herzegovina, Croatia and Serbia to the Tribunal,” at <http://www.icty.org/sid/10176>. This program is funded by the European Commission.

845. Interview with Jasmina Pjanić, director, Criminal Defense Support Section of State Court of BiH, Sarajevo, July 14, 2009.

846. The final report of the project, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*. [http://www.osce.org/documents/html/pdfthtml/39685\\_en.pdf](http://www.osce.org/documents/html/pdfthtml/39685_en.pdf). html, was published in September 2009.

847. *ICTY Manual on Developed Practices*, ICTY and UNICRI, June 2009, [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf)

848. Among other organizations, the American Bar Association Central and Eastern Europe Initiative (CEELI) has organized a wide range of war crimes training programs for Bosnian lawyers, including defense counsel. Interview with Dubravka Piotrovski, ABA CEELI, Sarajevo, Nov. 29, 2006.

849. This has included management expertise. Michael Th. Johnson, the first registrar of the BiH State Court, had been a prosecutor at the ICTY before taking up this role in Sarajevo.

850. The three former ICTY prosecutors serving on the chamber are Judges Marie Tuma, Philip Weiner, and David Re.

851. Interview with Judge Meddžida Kreso, president, State Court of BiH, Sarajevo, Dec. 4, 2006.

852. Interview with Branko Perić, then president of HJPC, Sarajevo, Dec. 4, 2006.

853. *Id.*

854. Interview with Sevima Sali-Terzić, senior legal counsel for the Constitutional Court of Bosnia, Sarajevo, Nov. 30, 2006. Although the quoted words are those of Sali-Terzić, the same point was made by a number of our Bosnian interlocutors. One characterized certain international judges

as “horrible,” while noting that others are “really good” and asserting that it is “really important to have them” in the BWCC.

855. See discussion on these and related points in David Tolbert and Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina in 2009* (Dec. 15, 2008).

856. A rough assessment of whether judges with prior ICTY experience were more likely to cite ICTY case law than other judges found a weaker connection than one might expect. Of the twelve panels in which Judge Rodrigues participated during his four-year tenure, ICTY case law was cited in eight. Of the eleven panels in which Judge Davorin Jukić, a Bosnian judge, has participated, ICTY case law has been cited in ten. International judges appear generally more likely to cite ICTY cases than local judges, but with the exception of Judge Rodrigues, international judges with previous ICTY experience do not appear to be especially likely to cite ICTY jurisprudence.

857. See ICTJ, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, p. 25 (2008).

858. *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T, Trial Judgment, Feb. 22, 2001. Although the crime against humanity of enslavement was defined in the Nuremberg Charter in terms that would encompass sexual enslavement, the International Military Tribunal did not explicitly recognize any crimes of sexual violence in its judgment. The Kunarac judgment was the first by an international court to recognize that, when other elements of the crime of enslavement are established, sexual slavery constitutes the crime against humanity of enslavement.

859. *Prosecutor v. Radovan Stanković*, Case No. X-KR-05/70, First Instance Verdict, Nov. 14, 2006, at [http://www.sudbih.gov.ba/files/docs/presude/2006/Radovan\\_Stankovic\\_-\\_Verdict\\_-\\_ENG.pdf](http://www.sudbih.gov.ba/files/docs/presude/2006/Radovan_Stankovic_-_Verdict_-_ENG.pdf).

860. Some of the other convictions on charges of sexual violence include:

- Neđo Samardžić, sentenced to 24 years’ imprisonment;
- Dragan Damjanović, sentenced to 20 years;
- Boban Šimšić, sentenced to 14 years;
- Nenad Tanasković, sentenced to 8 years;
- Gojko Janković, sentenced to 34 years;
- Veiz Bjelić, sentenced to 5 years;
- Jadranko Palića, sentenced to 28 years;
- Željko Leleć, sentenced to 16 years;
- Zrinko Pinčić, sentenced to 9 years;
- Ante Kovać, sentenced to 13 years;
- Momir Savić, sentenced to 18 years;
- Predrag Kujundžić, sentenced to 22 years.

861. Interview with Jasna Bakšić Muftić, professor of Human Rights, University of Sarajevo, Sarajevo, Nov. 30, 2006.

862. Amnesty International writes: “As of July 2009 the WCC had completed 33 cases with final verdicts, 12 of which included charges related to war crimes of sexual violence. There have been 57 war crimes cases pending. Fifteen of those cases included charges related to war crimes of sexual violence.” Amnesty International, *Whose Justice? The Women of Bosnia and Herzegovina Are Still Waiting*, § 4.1.1 (Sept. 2009).

863. *Id.*, § 4.1.3 (internal citation omitted).

864. See note 861, above.

865. Interview with Wendy Lobwein, deputy chief, Victims and Witnesses Section, ICTY, The Hague, Mar. 7, 2007.

866. Interview with Lucia Dighiero, Witness Support Unit, State Court of BiH, Sarajevo, June 12, 2007.

867. Among the lessons Dighiero learned from her experience in The Hague was that “big problems” come from having a “big unit.” Accordingly, one of her goals was to “build a small team,” as she knew from experience that there would inevitably be cycles of “down time” between busy periods. *Id.*

868. *Id.*

869. *Id.* Other improvements cited by Dighiero were facilitated by the proximity of victims.

870. The ICTY has, however, established a field office in Bosnia in 2001 so that it could establish contact with witnesses before and maintain contact after their testimony in The Hague. Interview with Wendy Lobwein, Deputy Chief, Victims and Witnesses Section, ICTY, The Hague, Mar. 7, 2007.

871. *Id.* Dighiero told us that 80 percent of the defense counsel contacted by her office provides a list of the witnesses they intend to call. *Id.*

872. *Prosecutor v. Halilović*, Case No. IT-01-48-T, Trial Judgment, Nov. 16, 2005. The acquittal was upheld on appeal. *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeal Judgment, Oct. 16, 2007.

873. Interview with Josip Drežnjak, president of the Association of Missing Croats from Grabovica, Mostar, July 18, 2009.

874. Interview with Drago Zadro, Mostar, July 18, 2009.

875. Interview with Josip Drežnjak, president of the Association of Missing Croats from Grabovica, Mostar, July 18, 2009.

876. Interview with Drago Zadro, Mostar, July 18, 2009.

877. *Id.*

878. Several accounts report that Šakrak received a ten-year sentence, see, for example, “Bosnian Muslim sentenced to 10 years for war crimes,” AFP, Nov. 4, 2003; OSCE, *Progress and Obstacles*, pp. 8 and 53, but Zadro told us that Šakrak received a 13-year sentence. In addition, although the same accounts report that Šakrak was sentenced by the Sarajevo court, Zadro told us that Šakrak was sentenced in Mostar’s central court and that his sentence was confirmed by a court in Sarajevo. Interview with Drago Zadro, Mostar, July 18, 2009.

879. See “Bosnian Muslim sentenced to 10 years for war crimes,” AFP, Nov. 4, 2003; OSCE, *Progress and Obstacles*, pp. 8 and 53.

880. Interview with Josip Drežnjak, president of the Association of Missing Croats from Grabovica, Mostar, July 18, 2009. We do not know the details of the cases against these three soldiers, but when we asked the head of the SDWC about these victims’ account, he told us it is common for persons convicted of war crimes at the first instance to remain free, at least until a second instance verdict is rendered, because Bosnian prisons are filled to capacity. Interview with David Schwendiman, Sarajevo, July [24], 2009. See also Merima Husejnović, “Awaiting State Prison, Bosnia’s Entity

Jails Overflow,” BIRN’s Justice Report, July 28, 2009, at <http://www.bim.ba/en/177/10/21363/>. But the men whose relatives were murdered told us that the three soldiers’ convictions were affirmed by the second instance court, and yet the convicted men were nonetheless at large due to overcrowded prison conditions.

881. Interview with Josip Drežnjak, president of the Association of Missing Croats from Grabovica, Mostar, July 18, 2009.

882. Interview with Branko Perić, then president of HJPC, Sarajevo, Dec. 4, 2006.

883. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006.

884. Govedarica believes that the ICTY’s contribution to domestic capacity is limited not because of any failure by the ICTY but rather due to failings in “our internal system.” Id.

885. Although the question of how to prioritize among broad categories of cases arose during negotiations between the OHR and ICTY concerning the BWCC, the negotiators ultimately decided that there should be no prioritization as between Rule 11 *bis* and other cases. See Donlon, *Rule of Law*, p. 277.

886. See Nidžara Ahmetašević and Mirna Mekić, “The future of war crimes trials,” Nov. 13, 2006, at <http://www.bim.ba/en/36/10/1622/?tpl=58>. The fact that a major impetus for the BWCC’s creation was to receive cases from the ICTY may have contributed to the incoherence of prosecutions before the chamber. See ICTJ, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, p. 10 (2008) (noting that early cases before the BWCC “did not necessarily reflect a coherent strategy; instead they were in part the result of the transfer from the ICTY of several Rule 11 *bis* cases pertaining to Eastern Bosnia”).

887. When the BWCC was established, planners created a framework but not a strategy for allocating responsibility for war crimes cases among various courts. Subject to the operation of relevant transitional provisions, Bosnia’s Criminal Procedure Code establishes a system within Bosnia that replicates the ICTY’s relationship of primacy over/concurrent jurisdiction with national courts: When district or cantonal courts receive reports of war crimes after March 1, 2003, they must submit those reports to the state court prosecutor, see BiH CPC, Art. 215(3); OSCE, *Progress and Obstacles*, p. 17. The state court must then determine which court should prosecute the case. If entity courts had already issued an indictment for war crimes (or other crimes falling under the jurisdiction of the state court) by March 1, 2003, those courts were to complete the indicted cases without referring them to the State Court of BiH. See Criminal Procedure Code (CPC), art. 449(1). Cases falling within the competence of the state court that were pending before entity courts or prosecutor’s office but which had not yet reached indictment were to be “finalized by these courts” unless the state court decides “to take such a case.” Id., art. 449 (2).

888. OSCE, *Progress and Obstacles*, p. 17, describing *Book of Rules on the Review of the War Crimes Cases*, adopted by the Collegium of Prosecutors on Dec. 28, 2004, and id., p. 18, describing *Orienta-tion Criteria for Sensitive Rules of the Road Cases*, adopted by the Collegium of Prosecutors on Oct. 12, 2004.

889. Interview with Branko Perić, then president of the High Judicial and Prosecutorial Council (HJPC), Sarajevo, Dec. 4, 2006. The office of the HJPC was established pursuant to a law imposed by the OHR on May 23, 2002. Official Gazettes—BiH 15/02; FBiH 29/02; RS 40/02; Brčko 11/02. The council serves as “the autonomous organ ... with the task of ensuring the maintenance of an



independent, impartial and professional judiciary, and to ensure the provision of a professional and efficient court system and prosecutorial service.” Id., art. 4.

890. Id. Perić went on to say that he was not sure of the exact number of cases that the state prosecutor had taken on but affirmed the basic point that the SDWC was “overloaded.”

891. Id. When asked about these concerns in a 2006 interview, then Chief Prosecutor of BiH Marinko Jurčević expressed frustration, saying that “the international community isn’t offering us enough of their capacities ... so we’ve tried to organize in the best way with our limited capacity.” Interview, Sarajevo, Dec. 4, 2006. For adoption of the “yellow book” and other related developments, see ICLS Report, *supra*.

892. Beyond the symbolic distinction between the state court and others in Bosnia, only the former can clearly impose the comparatively high sentences authorized by the CPC.

893. See Maja Milavić, “Court faces ‘political’ smears,” BIRN’s Justice Report, Sept. 8, 2006, at <http://www.bim.ba/en/26/10/948/?tpl=58>.

894. Indeed, to former Judge Vehid Šehić it is “obvious” that once a national war crimes strategy is adopted, the state court “will have to reallocate cases ... to cantonal and district courts.” Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009.

895. Pursuant to the National War Crimes Strategy adopted in December 2008, the determination of which cases would be prosecuted before the state court would be guided in particular by the gravity of the crimes and the status of the accused, while taking account of factors that include “a “[c] orrelation between the case and other cases and possible perpetrators”; the [i]nterests of victims and witnesses” and the “[c]onsequences of the crime for the local community.” “Criteria for the Review of War Crimes Cases,” National War Crimes Prosecution Strategy, Annex A, p. 3. The first page of these guidelines invoke the criterion of “complexity,” but the more detailed guidelines set forth on pages 2-3 focus on the criteria noted in the text. See also Humanitarian Law Center and Documenta, *Transitional Justice in Post-Yugoslav Countries: 2007 Report*, p. 10 (hereafter HLC/Documenta, 2007 TJ Report).

896. SDWC, DRAFT Prosecution Guidelines, Practice Direction No. 5: Prioritization (Feb. 9, 2009).

897. Interview with David Schwendiman, then head of SDWC, Sarajevo, July 14, 2009. As of July 2009, the SDWC had “identified approximately 1400 situations and events that need to be ... investigated and where sufficient evidence exists to prosecute those responsible for them.” David Schwendiman, “Background and Introduction,” p. 41 (July 2009) (on file with author). In July 2009, the president of the state court published a highly critical essay charging that deadlines relating to this and other elements of the national strategy had been routinely disregarded. See Meddžida Kreso, “Strategy Not Yet Implemented,” BIRN’s Justice Report, July 3, 2009, at <http://bim.ba/en/173/10/20794/?tpl=58>. See also Denis Džidić, “War Crimes Strategy Faces Credibility Crisis,” BIRN’s Justice Report, Aug. 4, 2009, at <http://www.bim.ba/en/178/10/21472/?tpl=58>. The then head of the SDWC has challenged claims that entity prosecutors are frustrating completion of the database, writing “No data or information are being concealed.” Letter from David Schwendiman, then head of SDWC, to Nidžara Ahmetašević, p. 2, July 6, 2009 (on file with author). The department has, moreover, been making greater efforts to explain its selection of cases to the public, which then SDWC head David Schwendiman dates to November 2007. Interview with David Schwendiman, then head of SDWC, Sarajevo, July 14, 2009. But the SDWC’s resources are neces-



sarily devoted mainly to prosecuting crimes, and the BWCC has devoted scant resources to public outreach efforts.

898. Id. Interview with Vehid Šehić, president, Citizens Forum of Tuzla, Tuzla, July 15, 2009.

899. Id. While many of our Bosnian interlocutors fault the SDWC for failing to adopt and implement a coherent strategy of case selection, former journalist Emir Suljagić faults the ICTY. In his view, ICTY prosecutors were in an ideal position after investigating crimes in Bosnia for fifteen years to identify “50 open and shut cases” that could form the core caseload of the SDWC. Interview with Emir Suljagić, Sarajevo, July 14, 2009.

900. Interview with Mirsad Tokača, director of Research and Documentation Center of Bosnia and Herzegovina, Sarajevo, Dec. 6, 2006.

901. Id.

902. Interview with Nerma Jelačić, then editor of BIRN in BiH, Sarajevo, December 1, 2006. Jelačić now serves as a spokesperson for the ICTY in The Hague, but spoke to us in her capacity as a knowledgeable journalist.

903. Id.

904. Interview with Nidžara Ahmetašević, editor, BIRN Bosnia and Herzegovina, Sarajevo, July 13, 2009.

905. Interview with Milorad Barašin, chief prosecutor, State Court of BiH, Sarajevo, July 14, 2009.

906. Interview with Tarik Jusić, program director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006.

907. Interview with Judge Meddžida Kreso, president of the State Court of BiH, Sarajevo, Dec. 4, 2006.

908. Interview with Branko Perić, then president of the HJPC, Sarajevo, Dec. 4, 2006.

909. Interview with Edin Ramulić, Izvor, Prijedor, July 23, 2009.

910. Id.

911. Id.

912. Interview with Edin Ramulić, Izvor, Prijedor, Dec. 8, 2006.

913. Id.

914. Interview with Damir Arnault, advisor for legal and constitutional affairs, Cabinet of Dr. Haris Silajdžić, Sarajevo, July 16, 2009.

915. Id.

916. Many donors, Donlon writes, considered their “substantial investment in the Tribunal ... to fulfil their obligation to bring the perpetrators of the wartime atrocities to justice.” Donlon, *Rule of Law*, p. 267. See also p. 270 (“Arguably, the vast financial and human resources required by the ICTY diverted the discussion and funding away from building a domestic war crimes trials capacity in Bosnia, and only when the international community’s attention turned toward winding down the ICTY, did the need for a domestic process become more urgent.”)

917. Id., p. 266.

918. Id., pp. 267–68.

919. Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006. Govedarica observes that the OHR's approach to judicial reform "changed every two years." *Id.*

920. Interview with Judge Wolfgang Schomburg, The Hague, Mar. 5, 2007.

921. In contrast, while a somewhat analogous special chamber was established under Cambodian law to prosecute surviving leaders of the Khmer Rouge, international judges and co-prosecutors are to remain part of its structure as long as it operates. Unlike the BWCC, however, the Extraordinary Chambers in the Courts of Cambodia are temporary.

922. Interview with Nidžara Ahmetašević, editor, BIRN Bosnia and Herzegovina, Sarajevo, July 13, 2009.

923. Interview with Milorad Barašin, chief prosecutor, State Court of BiH, Sarajevo, July 14, 2009.

924. *Id.*

925. ICLS Report, p. 46, para. 145.

926. "OHR Extends International Judges' Mandate," Dec. 16, 2009, *Balkan Insight*, <http://www.balkaninsight.com/en/main/news/24402/>.

927. See the history of the BWCC developed expansively in ICLS report, *supra*.

928. "Decision Close on Bosnia's International Judges and Prosecutors," BIRN 16 September 2009, <http://www.bim.ba/en/184/10/22245/>.

929. See, for example, Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone*, pp. 53–54 (July 16, 2009).

930. Interview with Nidžara Ahmetašević, editor, BIRN Bosnia and Herzegovina, Sarajevo, July 13, 2009. As an example of the latter, Ahmetašević noted a "strong judgment for genocide" issued by the BWCC against eleven defendants, and said: "It's a huge thing. It's a historical thing." *Id.*



## Open Society Justice Initiative

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Almaty, Amsterdam, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, and Washington, D.C.

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## International Center for Transitional Justice

The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies.

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# Open Society Institute

The Open Society Institute works to build vibrant and tolerant democracies whose governments are accountable to their citizens. To achieve its mission, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. On a local level, OSI implements a range of initiatives to advance justice, education, public health, and independent media. At the same time, OSI builds alliances across borders and continents on issues such as corruption and freedom of information. OSI places a high priority on protecting and improving the lives of people in marginalized communities.

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When the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May, 1993, expectations were low. War was still raging in the Balkans, and the creation of the Tribunal was perceived as an attempt by Security Council members to save face after failing to stanch the violence then wracking the region.

Few could have foreseen the deep and lasting effects of the ICTY on Bosnia and Herzegovina, the Balkans, and international law. What began as an ad hoc response to the war's atrocities set a precedent that marked the beginning of the post-Nuremberg era of international justice: since the ICTY's founding, the international community has established courts to address atrocities committed in Rwanda, Sierra Leone, Cambodia, Kosovo, and Timor Leste, as well as a permanent International Criminal Court with more than 100 states parties. The ICTY has also directly contributed to national war crimes prosecutions, both in Bosnia and Herzegovina, and throughout the region. Moreover, the ICTY has created a rich jurisprudence of international humanitarian law that now informs the work of other national and international courts.

In *That Someone Guilty Be Punished*, Diane F. Orentlicher, professor of law at American University, looks at the effects and effectiveness of the ICTY, including lessons to improve future efforts to provide justice for survivors of atrocious crimes. Perhaps most importantly, Orentlicher examines the impact of the Tribunal through the words and experiences of those in whose name it was established: the victims and survivors. Their expectations, hopes and disappointments are chronicled alongside the Tribunal's achievements and limitations. Based on hundreds of hours of interviews—and featuring the voices and perceptions of dozens of Bosnian interlocutors—*That Someone Guilty Be Punished* provides a comprehensive and complex portrait of the ICTY and its impact in Bosnia.



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